NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. RONALD WOOD, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3202 EDA 2011

Appeal from the Judgment of Sentence entered on November 10, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0013310-2010.

BEFORE: OLSON, WECHT and COLVILLE,* JJ.

MEMORANDUM BY OLSON, J.: Filed: February 25, 2013

Appellant, Ronald Wood, appeals from the judgment of sentence entered on November 10, 2011. We affirm.

The trial court has provided us with a comprehensive and well-written summary of the underlying, relevant facts:

> [At approximately 3:00 p.m., on the sunny afternoon of] July 30, 2010, [City of Philadelphia] Police Officer [Diertra] Cuffie directed a confidential informant (hereinafter "CI") toward [Appellant] and co-defendant Julius Glover on the 2500 block of [North] Napa Street. Prior to releasing the CI, Officer Cuffie searched the CI for contraband with negative results. Officer Cuffie then provided the CI with [$20.00] in pre-recorded buy money. Officer Cuffie released the CI from her unmarked vehicle on [North] Napa Street near 25th Street. The officer positioned her car in such a manner that she maintained continuous sight of the CI.

*Retired Senior Judge assigned to the Superior Court.

> The CI walked toward [Appellant] and Glover, who were standing outside of 2521 [North] Napa Street. The CI engaged in a brief conversation with Glover. Glover then engaged in a brief conversation with [Appellant]. [Appellant] and Glover walked across the street to an abandoned lot. [Appellant] picked up an orange and yellow potato chip bag from a grassy area within the abandoned lot. [Appellant] poured several small items from the potato chip bag into his hand. [Appellant] handed the small items to Glover and then returned the potato chip bag to the abandoned lot. [Appellant] and Glover both walked back across the street to the CI. Glover handed [] the CI the small items that [Appellant] retrieved from the potato chip bag[] and – in exchange – the CI handed Glover the [$20.00] in pre-recorded buy money.
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> The CI returned directly to Officer Cuffie and provided her with four red-tinted packets of marijuana. Moments later, [Appellant] and Glover were arrested in front of 2521 [North] Napa Street. [Appellant] had [$10.00] in United States currency on his person. Glover had [$222.00] in United States currency as well as the [$20.00] in pre-recorded buy money on his person. Police officers went to the lot and recovered a yellow and orange potato chip bag, which contained seven red-tinted packets of marijuana. The four red-tinted packets from the CI were identical to the seven red-tinted packets inside the potato chip bag.
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> [Officer Cuffie testified that, "from the time [she] conducted the search of the CI at [] headquarters through the whole incident to when the CI came back to [her] and gave [her] the packets of marijuana," the CI never left Officer Cuffie's sight and the CI followed the officer's instructions "exactly."]

Trial Court Opinion, 6/29/12, at 1-2 (internal citations and footnote omitted).

On May 26, 2011, Appellant filed a boilerplate motion for pre-trial discovery, in which Appellant sought the disclosure of the CI's identity. ***See*** "Supplemental Omnibus Motion," 5/26/11, at 2. Thereafter, the trial court

convened a hearing to address pre-trial discovery issues. During the pre-trial discovery hearing, Appellant argued that he was entitled to have the CI's identity revealed because the CI possessed information that was material to the preparation of his defense. First, Appellant claimed, he was entitled to question the CI because Officer Cuffie possibly made an unspecified "mistaken observation" during the operation. With respect to this point, Appellant argued that Officer Cuffie made her observations from an inferior vantage point than the CI and, thus, Appellant claimed that he had "the right to have a witness present who was there in a better position to see what was going on." N.T. Pre-Trial Discovery Hearing, 7/19/11, at 63. Appellant also argued that Officer Cuffie's memory was faulty, as Officer Cuffie could not remember such details as "which way the street runs, what side of the street houses are on" and whether the participants stood "on the porch" or "in front of the porch." ***Id.*** at 63-64. Finally, Appellant argued that he was entitled to cross-examine the CI as to the specific serial numbers that were imprinted on the pre-recorded buy-money. ***Id.*** at 64.

During the hearing, the trial court heard testimony from Officer Cuffie. Officer Cuffie testified that she personally witnessed or participated in all of the events detailed above. Moreover, as Officer Cuffie testified: the CI currently lives in the neighborhood where Appellant was arrested; prior to Appellant's arrest, the CI was "in use" as a confidential informant around the neighborhood; at the time of the evidentiary hearing, the CI was not in use as a confidential informant, but the CI was considered a viable confidential

informant for future investigations; threats have been made against the CI; and, if the CI's identity were to be revealed, future police investigations could be adversely affected and the safety of the CI and the CI's family could be compromised. ***Id.*** at 17-20.

Appellant neither testified during the pre-trial discovery hearing nor presented any evidence to support his assertion that Officer Cuffie committed some sort of unspecified "mistaken observation" or that the events did not occur precisely as Officer Cuffie testified. Indeed, when Appellant finally explained the basis for his motion, Appellant did not even deny that the "small items" he was observed passing to his cohort were, in fact, marijuana. ***See id.*** at 5 and 62-66.

At the conclusion of the hearing, the trial court denied Appellant's motion to reveal the identity of the CI. As the trial court explained, its ruling was based upon the following findings of fact:

> [T]he disclosure of the CI would not be material to [Appellant's] defense. . . . [In this case, Appellant] was arrested nearly moments [] after the transaction occurred. . . . And [the motion is also] denied because of all the observations that were personally made by Officer Cuffie.
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> . . .
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> [Moreover,] the CI [] currently lives in the neighborhood [where the arrest occurred and, although the CI] is not currently in use by this officer, [the CI] is someone who could be used in future investigations and in the officer's opinion would likely suffer harm if the identity was revealed, not only to the CI himself or herself but also the CI's family. This concern is heightened because the CI does live in the

> neighborhood. The CI has also had prior threats against him or herself.

Id. at 71-72.

Appellant proceeded to a bench trial, after which the trial court found Appellant guilty of possession with the intent to deliver a controlled substance, possession of a controlled substance, and criminal conspiracy.[1] For these convictions, the trial court sentenced Appellant to an aggregate term of two years of reporting probation. N.T. Sentencing, 11/10/11, at 11. Appellant filed a timely notice of appeal and now raises the following claim to this Court:[2]

> Did not the [trial] court abuse its discretion and violate [Appellant's] constitutional rights to due process by denying [Appellant's] pre-trial motion to reveal the identity of the Commonwealth's informant where the Commonwealth's case was based upon the observations of a single police officer, the informant was an eyewitness, the defense at trial was fabrication or mistake, and the Commonwealth failed to demonstrate a compelling reason for nondisclosure?

Appellant's Brief at 3.

"Our standard of review of claims that a trial court erred in its disposition of a request for disclosure of an informant's identity is confined to

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[1] 35 P.S. § 780-113(a)(30) and (16) and 18 Pa.C.S.A. § 903(a), respectively.

[2] The trial court ordered Appellant to file a concise statement of errors complained of on appeal, pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). Appellant complied and preserved the one claim he currently raises before this Court.

[whether the trial court committed an] abuse of discretion [or error of law]." ***Commonwealth v. Withrow***, 932 A.2d 138, 140 (Pa. Super. 2007). Moreover, to the extent that the current appeal requires us to interpret a Rule of Criminal Procedure, we note that "[t]he interpretation of the Rules of Criminal Procedure present[] a question of law and[,] therefore, . . . our standard of review is *de novo* and our scope of review is plenary." ***Commonwealth v. Dowling***, 959 A.2d 910, 913 (Pa. 2008).

Pennsylvania Rule of Criminal Procedure 573 provides a trial court with "the discretion to require the Commonwealth to reveal the names and addresses of all eyewitnesses, including confidential informants, where a defendant makes a showing of material need and reasonableness." ***Commonwealth v. Marsh***, 997 A.2d 318, 321 (Pa. 2010) (plurality). In relevant part, Rule 573 declares:

> **(B) Disclosure by the Commonwealth**
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> . . .
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> *(2) Discretionary With the Court.*
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> (a) In all court cases, except as otherwise provided in [Pa.R.Crim.P.] 230 (Disclosure of Testimony Before Investigating Grand Jury), if the defendant files a motion for pretrial discovery, the court may order the Commonwealth to allow the defendant's attorney to inspect and copy or photograph any of the following requested items, upon a showing that they are material to the preparation of the defense, and that the request is reasonable:
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> (i) the names and addresses of eyewitnesses[.]

Pa.R.Crim.P. 573(B)(2)(a)(i).

In interpreting this rule, our Supreme Court has explained:

> The Commonwealth enjoys a qualified privilege to withhold the identity of a confidential source. In order to overcome this qualified privilege and obtain disclosure of a confidential informant's identity, a defendant must first establish, pursuant to Rule 573(B)(2)(a)(i), that the information sought is material to the preparation of the defense and that the request is reasonable. Only after the defendant shows that the identity of the confidential informant is material to the defense is the trial court required to exercise its discretion to determine whether the information should be revealed by balancing relevant factors, which are initially weighted toward the Commonwealth.

Marsh, 997 A.2d at 321-322 (internal citations omitted) (plurality); ***see also Commonwealth v. Bing***, 713 A.2d 56, 58 (Pa. 1998) (same).[3]

As our Supreme Court has held, in order for the defendant to meet his threshold burden of establishing "that the information sought is material to

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[3] We note that ***Marsh*** was decided by an evenly divided, six-Justice Supreme Court panel. The Opinion Announcing the Judgment of the Court ("OAJC") in ***Marsh*** – which was authored by Justice McCaffery and joined by Justice Eakin and Justice Baer – concluded that both the Superior Court and the trial court erred in ordering the Commonwealth to disclose the identity of the confidential informant. According to the ***Marsh*** OAJC, the defendant was not entitled to have the confidential informant's identity revealed because the defendant failed to meet "his threshold burden of establishing [that the informant's identity was] material[to his defense]" and, also, because the "balancing" of relevant factors weighed against disclosure. ***Marsh***, 997 A.2d at 321. Justice Saylor – joined by Chief Justice Castille and Justice Todd – concurred in the result only. Within the concurring opinion, however, the concurring Justices "agree[d] with the [OAJC] that a defendant is required to establish materiality and reasonableness before a trial court may exercise its discretionary prerogative to require disclosure of the identity of a confidential informant, and that [the defendant] failed to make the requisite showing here." ***Marsh***, 997 A.2d at 325 (Saylor, J. concurring).

the preparation of [his] defense," the defendant must make an on-the-record "show[ing that there] is a reasonable possibility that the anonymous informer could give evidence that would exonerate him." ***Commonwealth v. Roebuck***, 681 A.2d 1279, 1283 (Pa. 1996) (internal quotations and citations omitted); ***see also Commonwealth v. Withrow***, 932 A.2d 138, 141 (Pa. Super. 2007) (same). Thus, for the defendant to satisfy his initial burden of establishing "materiality," "more is necessary than a mere assertion by the defendant that such disclosure might be helpful in establishing a particular defense." ***Commonwealth v. Herron***, 380 A.2d 1228, 1230 (Pa. 1977).

In the case at bar, Appellant failed to make **any** showing that there was a "reasonable possibility that the anonymous informer could give evidence that would exonerate him." ***Roebuck***, 681 A.2d at 1283. Therefore, since Appellant did not meet his threshold burden of establishing "that the information sought [wa]s material to the preparation of [his] defense," Appellant's claim on appeal necessarily fails.

At the outset, in this case, Appellant filed a boilerplate pre-trial discovery motion, seeking to have the CI's identity disclosed. ***See*** "Supplemental Omnibus Motion," 5/26/11, at 2. The written motion provided no basis for the request and neither disclosed Appellant's anticipated defenses nor specified the particular evidence that, Appellant believed, the CI might possess.

Appellant finally provided a basis for his motion during argument at the pre-trial discovery motion hearing. As explained above, Appellant claimed that he was entitled to have the CI's identity disclosed because: 1) the CI had a better vantage point than Officer Cuffie and, thus, Appellant had "the right to have a witness present who was there in a better position to see what was going on;" 2) Officer Cuffie could not remember details of the event, such as "which way the street runs, what side of the street houses are on" and whether the participants stood "on the porch" or "in front of the porch;" and, 3) the CI could be cross-examined as to the specific serial numbers that were imprinted on the pre-recorded buy-money. N.T. Pre-Trial Discovery Hearing, 7/19/11, at 63-64.[4] At no point during the pre-trial discovery proceedings did Appellant argue, claim, or present evidence supporting the proposition that he was somehow innocent of the charges or that the CI possessed evidence that could potentially exonerate Appellant. Certainly, Appellant did not even deny – in either argument or testimony –

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[4] Within Appellant's brief to this Court, Appellant raises a plethora of additional grounds that, Appellant claims, support his motion to disclose the identity of the CI. Indeed, within Appellant's brief, Appellant claims – for the first time on appeal – that he "did not hand marijuana to [his cohort]," that the CI "could have testified that [Appellant] did not" hand marijuana to his cohort, and that Officer Cuffie's testimony regarding the marijuana sale was "inaccurate." Appellant's Brief at 7, 11, and 13. As these grounds were never raised before the trial court, they are waived. Pa.R.A.P. 302(a) ("[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal").

that the "small items" he was observed passing to his cohort were, in fact, marijuana.

Under these circumstances, the trial court was correct to conclude that Appellant failed to satisfy his threshold burden of establishing "that the information sought [was] material to the preparation of [Appellant's] defense." ***Bing***, 713 A.2d at 58. Indeed, with respect to the three bases for Appellant's motion, none even rises to the level of **asserting** that there was "a reasonable possibility that the anonymous informer could give evidence that would exonerate him." ***Roebuck***, 681 A.2d at 1283.

First, Appellant claims that Officer Cuffie might have made an unspecified "mistaken observation" and that, because the CI had a better vantage point than Officer Cuffie, Appellant had "the right to have a witness present who was there in a better position to see what was going on." N.T. Pre-Trial Discovery Hearing, 7/19/11, at 63. Obviously, since Appellant does not specify the "mistaken observation" or even deny that he passed marijuana to his cohort, Appellant's first claim falls far short of asserting that the CI "could give evidence that would exonerate [Appellant]." ***Roebuck***, 681 A.2d at 1283. Rather, Appellant's first claim constitutes "a mere assertion . . . that [] disclosure [of the CI] might be helpful in establishing a particular defense." ***Herron***, 380 A.2d at 1230. As our Supreme Court has held, this is not enough to satisfy the threshold burden of establishing that the informant's identity was material to the defense.

Second, Appellant claims that Officer Cuffie could not remember all details of the event – such as "which way the street runs, what side of the street houses are on" and whether the participants stood "on the porch" or "in front of the porch" – and that Appellant must be entitled to question the CI to determine the specifics of the event. N.T. Pre-Trial Discovery Hearing, 7/19/11, at 63-64. Again, since Appellant did not even claim that that he was innocent or that the CI's testimony had the potential of "exonerating" him, Appellant's second claim also necessarily fails. ***Roebuck***, 681 A.2d at 1283.

Finally, Appellant claims that he should have been permitted to cross-examine the CI as to the specific serial numbers that were imprinted on the pre-recorded buy-money – in order to substantiate Officer Cuffie's testimony that the police recovered the buy-money from Appellant's cohort. N.T. Pre-Trial Discovery Hearing, 7/19/11, at 64. This claim fails for multiple reasons, including that Appellant provided no explanation as to how it was "reasonabl[y] possibl[e]" the CI would remember the serial numbers on the buy-money.

Here, since Appellant failed to "show [that there was] a reasonable possibility that the anonymous informer could give evidence that would exonerate him," Appellant failed to satisfy his threshold burden of establishing that "the identity of the confidential informant [was] material to the defense." ***Roebuck***, 681 A.2d at 1283. Pursuant to Pennsylvania Rule of Criminal Procedure 573(B)(2)(a)(i), the trial court simply had no

discretion to order the disclosure of the informant's identity. ***Marsh***, 997 A.2d at 321-322 (plurality) ("[o]nly after the defendant shows that the identity of the confidential informant is material to the defense is the trial court required to exercise its discretion to determine whether the information should be revealed by balancing relevant factors, which are initially weighted toward the Commonwealth"). Appellant's claim on appeal thus fails.

Judgment of sentence affirmed.