NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. ROBERT LEE KEARNEY, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 3272 EDA 2011

Appeal from the Judgment of Sentence entered November 17, 2011
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0010180-2010.

BEFORE: OLSON, WECHT and COLVILLE,* JJ.

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

Appellant, Robert Lee Kearney, appeals from the judgment of sentence entered on November 17, 2011. We affirm.

The trial court has ably explained the facts underlying Appellant's convictions:

> [On June 15, 2010, at approximately 5:30 p.m., City of Philadelphia Police Officer Diertra Cuffie was conducting] a narcotics field investigation at [the] corner of 32nd and Westmont Streets in Philadelphia. . . . Officer Cuffie was working with a confidential informant ("CI") and her partner, Officer [Don] Cain. . . .
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> [Prior to arriving on location, t]he officers searched the CI and determined that the CI did not have any contraband [or] currency in [his or her] possession. Officer Cuffie [then] gave the CI money and directed the CI to attempt to purchase narcotics from [Appellant]. Officer Cuffie had seen [Appellant] in the area of the investigation on four or

*Retired Senior Judge assigned to the Superior Court.

five prior occasions during the "couple [of] months" preceding June 15, 2010. Officer Cuffie watched the CI approach [Appellant] and speak to him. Officer Cuffie observed [Appellant] walk to a door of a property in the immediate area, then return to the CI and hand[] the CI small items. The CI returned to Officer Cuffie and gave the officer four packets of [marijuana]. . . .

[As Officer Cuffie testified, she] watched the drug transaction between the CI and [Appellant from] "four or [f]ive car lengths away" in "bright light" with nothing obstructing [her] view. . . . [Moreover, t]here is no indication that the CI was ever out of Officer Cuffie's view on June 15, 2010. . . .

Officer Cuffie testified that she, [Officer Cain], and the CI returned to [the intersection of] 32nd and Westmont [Streets] the following day, *i.e.*, June 16, 2010. On that day[,] the CI purchased [marijuana] again[. H]owever, [Appellant] was not present on June 16, 2010. [Rather, t]he CI purchased drugs from a man named ["Randall"]. . . .

Officer Cuffie, back[-]up officers, and the CI returned to [the intersection of] 32nd and Westmont [Streets] on July 21, 2010. Officer Cuffie directed the CI to purchase drugs from Randall[,] who was sitting on [] steps [along] Westmont Street. As the CI approached Randall, Officer Cuffie saw [Appellant] stop the CI and speak to the CI. Officer Cuffie saw [Appellant] direct the CI to sit on the steps beside Randall. [As Officer Cuffie testified, she then witnessed the following: "Randall had a brief conversation with the CI . . . , [after which] the CI handed the pre[-]recorded buy money to [] Randall, and then [] Randall got up and went across the street . . . into [an] alleyway, and then came back and handed the CI [] small objects"]. The CI returned to Officer Cuffie and handed her two bags of [marijuana]. . . .

[Officer Cuffie then instructed her fellow officers to arrest Appellant and Randall. When Officer Cuffie approached Appellant to effectuate the arrest, Appellant] attempted to punch Officer Cuffie in the head and then struggled and scuffled with other officers [who were] attempting to place

> him under arrest. The officers recovered the pre-recorded buy money from Randall and several bags of [marijuana] from the alley[way. The packaging and drugs recovered from the alleyway] matched [those that were] sold to the CI.

Trial Court Opinion, 5/23/12, at 4-6 (internal citations omitted).

On January 5, 2011, Appellant filed a "Motion to Compel Production of Eyewitness Informant," in which Appellant sought the disclosure of the CI's identity. Appellant's "Motion to Compel Production of Eyewitness Informant," 1/5/11, at 1 (hereinafter "Motion to Compel"). According to this motion, Appellant anticipated raising a "misidentification" defense at trial and, Appellant believed, the CI might possess information that could aid in this defense. ***Id.*** at 1-2.

The trial court scheduled a pre-trial discovery hearing on Appellant's motion and, during this hearing, Officer Cuffie testified that she personally witnessed or participated in all of the events detailed above. Moreover, as the trial court explained:

> During direct examination by the assistant district attorney ("ADA"), Officer Cuffie was asked if she knew [whether her partner,] Officer Cain[, witnessed] the [June 15, 2010] drug transaction [between the CI and Appellant. Appellant's] counsel . . . objected on the basis that Officer Cuffie could only provide "speculation" as to what another person saw. Officer Cuffie was permitted to answer the ADA's question and stated, "I believe Officer Cain saw exactly what I saw." This answer confirmed [Appellant's] counsel's suspicion that Officer Cuffie could not state with certainty what her partner observed.
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> . . .

> Officer Cain also testified at the [pre-trial discovery] hearing. Officer Cain testified that he was working with Officer Cuffie on June 15, 2010, but that he did not see [Appellant] on that day. Neither the ADA[] nor [Appellant's] counsel[] asked Officer Cain if he saw the CI enter into a transaction on June 15, 2010. Thus, it is unclear whether Officer Cain was observing the transaction, or looking out in other directions to ensure the safety of the CI and police as Officer Cuffie watched the transaction. Officer Cain testified that he did see [Appellant] on July 21, 2010.

Trial Court Opinion, 5/23/12, at 5 and 6 (internal citations and emphasis omitted).

Appellant did not testify at the pre-trial discovery hearing. Moreover, Appellant presented no evidence suggesting that Officer Cuffie was mistaken in testifying that, on June 15, 2010, Appellant sold marijuana to the CI. ***See*** N.T. Pre-Trial Discovery Hearing, 6/20/11, at 7-40.

The trial court denied Appellant's Motion to Compel and, following a bench trial, Appellant was found guilty of aggravated assault, resisting arrest, possession of a controlled substance with the intent to deliver ("PWID"), and possession of a controlled substance.[1] On May 21, 2012, Appellant was sentenced to an aggregate term of two to eight years in prison for these convictions.[2] This appeal followed.

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[1] 18 Pa.C.S.A. §§ 2702(a)(3) and 5104 and 35 P.S. § 780-113(a)(30) and (16), respectively.

[2] Appellant's judgment of sentence was originally entered on November 17, 2011. At this time, the trial court sentenced Appellant to a term of two to eight years in prison for PWID with a concurrent, two to eight year term of imprisonment for aggravated assault. Yet, while the current appeal was
(Footnote Continued Next Page)

Appellant raises one claim to this Court:

> Did not the trial court err by failing to order the disclosure of the identity of a confidential informant, where there was contradictory evidence presented by the Commonwealth's two police witnesses as to whether [A]ppellant was present on the date at issue and where the confidential informant was the only other witness known to be present and further, where there was no relevant or specific evidence of danger to the informant presented by the Commonwealth?

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 [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 presents 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).

(Footnote Continued) ––––––––––––––––––––

pending, the trial court realized that its original sentence was illegal, as the statutory maximum for Appellant's PWID conviction was five years in prison. As a result, on May 21, 2012, the trial court utilized its inherent power to correct a patently illegal sentence and amended Appellant's sentence to require that Appellant serve two to eight years in prison for aggravated assault, with a concurrent, one to five year term of imprisonment for PWID. ***See Commonwealth v. Holmes***, 933 A.2d 57, 66 (Pa. 2007) (holding that trial courts possess the inherent power to correct "obvious and patent errors" in their original orders, even absent "traditional jurisdiction" over their cases).

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**
>
> . . .
>
> *(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:
>
> (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 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

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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).

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).

Within Appellant's brief to this Court, Appellant claims that he met his initial burden of establishing "materiality." With respect to this point, Appellant's entire argument is as follows:

> In the case *sub judice*, [A]ppellant's initial burden was met by the Commonwealth itself, when it presented contradictory testimony from its own police witnesses. One officer said [A]ppellant was there and the other said he was not seen there. This establishes materiality, as there is ample support for the claim that [A]ppellant was engaged in no sale or other criminal activity. Who else but the CI could break that logjam?

Appellant's Brief at 11 (internal emphasis omitted). Appellant's argument is factually incorrect. Therefore, Appellant's claim on appeal necessarily fails.

As summarized above, during the pre-trial discovery hearing, Officer Cuffie testified that – on June 15, 2010 – she observed Appellant sell marijuana to the CI. Officer Cuffie's partner, Officer Cain, also testified during the hearing and declared that, on that date, he was "working with Officer Cuffie[] and the CI" but that he "didn't see [Appellant]." N.T. Pre-Trial Discovery Hearing, 6/20/11, at 26-29.

Appellant now claims that Officer Cain's testimony was inconsistent with Officer Cuffie's testimony and that, because Officer Cain's testimony "support[s] the claim that [A]ppellant was engaged in no sale or other criminal activity," Appellant satisfied his threshold burden of establishing

"materiality." Appellant's Brief at 11. This claim is simply incorrect. Indeed, as the trial court properly explained, Officer Cain's testimony neither was inconsistent with Officer Cuffie's testimony nor supported the proposition that Appellant "was engaged in no sale or other criminal activity":

> Officer Cain testified that he was working with Officer Cuffie on June 15, 2010, but that he did not see [Appellant] on that day. [However, n]either the ADA[] nor [Appellant's] counsel[] asked Officer Cain if he saw the CI enter into a transaction on June 15, 2010. Thus, it is unclear whether Officer Cain was observing the transaction, or looking out in other directions to ensure the safety of the CI and police as Officer Cuffie watched the transaction.

Trial Court Opinion, 5/23/12, at 6 (internal citations omitted).

Stated another way, the mere fact that Officer Cain did not see Appellant on June 15, 2010 does not support the inference that Appellant was not present on June 15, 2010. As Appellant's entire claim is grounded upon an unfounded and unsupported inference, Appellant's claim on appeal necessarily fails.[4]

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[4] We note that, since Appellant failed to satisfy his threshold burden of establishing that "the identity of the confidential informant [was] material to the defense," the trial court 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"). Therefore, the second part of Appellant's claim – where Appellant contends that the trial court erred in finding that "disclosure of the informant's identity would jeopardize the informant" – is moot. ***See*** Appellant's Brief at 11.

Judgment of sentence affirmed.