

Opinion issued July 27, 2021.



In The
Court of Appeals
For The
First District of Texas

NO. 01-19-00833-CR

No. 01-19-00834-CR

KENTRELL DESHAY THURMAN, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 212th District Court
Galveston County, Texas
Trial Court Case No. 18-CR-1286**

MEMORANDUM OPINION

A jury convicted Kentrell Deshay Thurman of unlawful possession of a firearm and possession of a controlled substance, namely cocaine weighing between 4 and 200 grams. TEX. PENAL CODE § 46.04(a); TEX. HEALTH & SAFETY CODE

§ 481.115(d). He pleaded true to an enhancement, and the jury recommended sentences of 5 and 24 years' imprisonment, respectively. The trial court sentenced him to serve the sentences concurrently.

Thurman raises two issues on appeal. First, Thurman contends that the trial court abused its discretion in denying his request for disclosure of the identity of a confidential informant. Second, he argues that the trial court erred by denying his request for documentation related to his interactions with a confidential informant, or, alternatively, that he received ineffective assistance of counsel because he did not receive the information. We affirm.

Background

Thurman was charged with possession with intent to deliver between 4 and 200 grams of cocaine and unlawful possession of a firearm. He pleaded not guilty to both charges. The testimony at trial revealed that in the early morning hours of November 2, 2017, Detective K. Miller with the Galveston County Sheriff's Office Special Crimes Unit observed a black sedan parked in a driveway at a residence. The detective and other officers from her unit planned to execute a search warrant at the house later that morning. Detective Miller testified that she observed Thurman in the driver's seat. She also identified him in court. He was not the target of the investigation she was conducting. Detective Miller parked nearby and observed

Thurman driving away from the residence. She radioed a description of the vehicle and the direction it was traveling.

Detective Hill heard Detective Miller's description and found the vehicle. He followed it while he contacted Officer D. Galindo, a patrol officer, to stop the car. Officer Galindo observed a speeding car matching the description and turned on his patrol car's emergency lights and siren. The car slowed down but did not stop. Instead, it turned onto another street. During this time, the driver appeared to be reaching across the passenger side of the car. The car stopped in the driveway of a vacant lot next to a house.

Officer Galindo got out of his patrol car after turning on its overhead lights so he could see clearly. The driver of the car got out, looked at Officer Galindo, and then ran away through a field. The driver left his car door open and the car's engine running. Officer Galindo reported a description of the driver to other officers. The driver was not arrested on that day. Officer Galindo identified Thurman in court as the person who ran away from the car.

Soon after Thurman fled the scene, a woman, identified as Candy Poe, and man arrived at the house next door. Officer Galindo informed them that a suspect had fled toward the backyard and asked them to stay in the front until other officers secured the area. Poe insisted on going into her residence. Officer Galindo later

found mail with Poe's name on it in the abandoned car and realized she had a connection to Thurman.

A search of the area near the abandoned car revealed a plastic bag containing a white substance on the ground about five feet from the driver's door. The substance later tested to be 86.12 grams of cocaine with a value of about \$8,000. Near the cocaine, officers found a black, semi-automatic .380 caliber handgun with one bullet inside. None of the items had been on the ground for a long period of time, because they were clean, with no dew, dirt, or debris.

There was a wallet in the front seat of the car, and a driver's license on the floorboard. The driver's license belonged to Thurman. Officer Galindo recovered a magazine for the handgun, containing seven rounds of bullets. The magazine was on the driver's seat. The car also contained clothes, bedding, designer women's purses, personal mail for Thurman, personal mail for Poe, and a five-gallon water jug filled with small denominations of cash totaling \$849.95. A rental car receipt, insurance card, credit cards, and a jewelry store receipt were found in the car. Each had Thurman's name on it. Officers also recovered a cell phone belonging to Thurman in the glove compartment. A search of the phone revealed text messages sent to someone named "Candy."

The jury found Thurman guilty of the lesser-included charge of possession of between 4 and 200 grams of cocaine. The jury also found him guilty of unlawful

possession of a weapon. Thurman pleaded true to an enhancement. The jury assessed punishment at 5 years' imprisonment for possessing a weapon and 24 years' imprisonment for possessing cocaine. The court imposed the sentences to be served concurrently.

Disclosure of Identity of Confidential Informant

In his first issue, Thurman contends that the trial court abused its discretion by denying his motion to disclose the identity of a confidential informant without holding an in-camera review. The State responds that the trial court did not abuse its discretion because Thurman did not meet his burden of showing that an informant's testimony was necessary to a fair determination of guilt or innocence. We agree.

A. Applicable Facts

The trial court heard testimony on pretrial motions. During that time, Detective Miller testified that she was conducting surveillance for an unrelated narcotics investigation when she saw Thurman. While watching a residence at 3:30 a.m., she noticed a car in a driveway with its driver's side door open. Lights were on inside the car, and she could see a man sitting in the driver's seat. She identified Thurman in court as the man in the car. Detective Miller testified that she recognized Thurman from previous investigations and that she had spent numerous hours following him. She had also seen several photographs of Thurman from a law enforcement database. Detective Miller did not expect to see Thurman in the

driveway that morning. When Thurman reversed out of the driveway, she provided his location and description to other officers via radio. She stayed near the original residence as Thurman drove away.

Detective Miller testified that during her prior investigation of Thurman, he had been involved in at least two “controlled buys.” A confidential informant was involved in these transactions. Detective Miller testified that her identification of Thurman was not based on information provided by an informant. While she had conducted previous investigations of Thurman, she happened to see Thurman in the car in the driveway that morning.

After Detective Miller’s testimony, Thurman’s attorney requested disclosure of documents related to the controlled buys from Thurman. The State objected, stating that the information could disclose the identity of informants and that it was not necessary to the identification issue for the charged offenses. The State was not prosecuting drug transactions at the time and did not intend to mention them. While the court did not conduct an in-camera hearing, the court allowed both sides to question Detective Miller about the records. Detective Miller testified that the records were operations plans, detailing controlled buys the department had conducted with Thurman, but she testified that the plans were not the reason she was familiar with Thurman. She was familiar with Thurman based on her own surveillance of him.

Detective S. Hill also testified at the pretrial hearing. He heard Detective Miller on the radio and then saw the car that she mentioned. He began following the car and contacted another officer to stop it. Detective Hill was familiar with Thurman because he had stopped him in a traffic stop before, as well as from narcotics investigations. Detective Hill's involvement was limited to asking another officer to stop the car and later writing a search warrant for the car.

Officer Galindo testified that after receiving Detective Hill's request, he attempted to stop Thurman's car because he was speeding. He did not know who was driving the car when he attempted to stop it. The driver got out of the car in a well-lit area. Officer Galindo and the driver looked at each other before the driver ran away. Officer Galindo identified Thurman as the individual driving the car.

Officer Galindo discovered a clear plastic baggie in the grass near the vehicle. He suspected it contained cocaine. He found a handgun with one bullet in it near the cocaine. Both appeared to have been dropped on the ground recently. Officer Galindo also saw a magazine for the handgun in the front seat of the car.

During this time, a woman, identified as Candy Poe, arrived at the house next door with another man. Officer Galindo asked Poe to stay outside her home until the backyard could be cleared by officers. Poe insisted on going into her house. Officer Galindo found mail and several checks and receipts made out to Poe in the back of the vehicle. He then realized that Poe had a connection to Thurman.

After the testimony, the court did not conduct an in-camera hearing to review documents containing information that could identify confidential informants. The trial court denied Thurman's motion requesting disclosure of the identity of confidential informants.

B. Standard of Review and Applicable Law

We review the trial court's ruling on a motion to disclose the identity of a confidential informant under an abuse of discretion standard. *Blake v. State*, 125 S.W.3d 717, 728 (Tex. App.—Houston [1st Dist.] 2003, no pet.). Under this standard, we affirm the judgment unless the trial court's decision was so clearly wrong as to lie outside that zone within which reasonable persons might disagree. *Id.*

Generally, the State has the privilege to withhold the identity of any person who provides information relating to, or assisting in, the investigation of a possible crime. TEX. R. EVID. 508(a). If it appears from the evidence in the case, or from some other showing by a party, that an informant may be able to give testimony necessary to a fair determination of a material issue on guilt or innocence, and the State invokes the privilege, the trial court must give the State an opportunity to show in-camera facts relevant to determining whether the informant can, in fact, supply that testimony. TEX. R. EVID. 508(c)(2)(C). The Court of Criminal Appeals has held that a party requesting disclosure under Rule 508 has the threshold burden to demonstrate

that the informant's identity must be disclosed. *Bodin v. State*, 807 S.W.2d 313, 318 (Tex. Crim. App. 1991). Before a court orders the identity of the informant to be revealed, the informant's potential testimony must be shown to significantly aid the defendant—mere conjecture about possible relevance is insufficient to meet the threshold burden. *Id.* A party seeking disclosure must make a plausible showing of how the informant's information may be important. *See Southwell v. State*, 80 S.W.3d 647, 650 (Tex. App.—Houston [1st Dist.] 2002, no pet.). Only after a defendant makes a plausible showing is the trial court required to hold an in-camera hearing to determine whether disclosure is necessary. *Olivarez v. State*, 171 S.W.3d 283, 292 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

When it is shown that the informant was an eyewitness to an alleged offense, then the informant can give testimony necessary to a fair determination of the issues of guilt or innocence. *Anderson v. State*, 817 S.W.2d 69, 72 (Tex. Crim. App. 1991). But, if the informant's information was used only to establish probable cause for a search warrant, or if the informant merely provided information that led law enforcement to investigate a potential offense and the informant was neither a participant in the offense for which the accused was charged nor present when a search warrant was executed or an arrest was made, then the identity of the informant need not be disclosed, because the testimony is not essential to a fair determination

of guilt or innocence. *Ford v. State*, 179 S.W.3d 203, 210 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd).

C. Analysis

On appeal, Thurman argues that the trial court should have held an in-camera hearing and compelled the State to disclose the names of confidential informants because previous undercover investigation assisted law enforcement in identifying Thurman. He argues that this information was necessary to a fair determination of guilt or innocence.

As an intermediate Texas appellate court, we are bound to follow the precedent of the Texas Court of Criminal Appeals. As a result, we hold that the trial court did not abuse its discretion in denying Thurman's motion to disclose the informant's identity because Thurman failed to meet the threshold burden to demonstrate that the informant's identity would significantly aid him. *Bodin*, 807 S.W.2d at 318. The pretrial testimony does not reflect that a confidential informant assisted law enforcement in identifying Thurman. Detective Miller, who first encountered Thurman at the site of an unrelated narcotics investigation, testified that she knew Thurman because she had spent numerous hours surveilling him. Detective Hill testified that he was familiar with Thurman from previous narcotics investigations and because he had previously conducted a traffic stop involving Thurman. Officer Galindo testified that on the night in question, he attempted to stop

Thurman's car for speeding, but instead Thurman got out of the car and fled on foot. The area was well-lit, and Officer Galindo saw Thurman before he ran away. In each instance, the officers were able to identify Thurman based on their own personal knowledge, not based on information from a confidential informant.

The trial court was not required to hold an in-camera hearing to determine whether disclosure of an informant's identity was necessary because Thurman did not make a plausible showing of how that information may be important. *See Southwell*, 80 S.W.3d at 650; *see also Olivarez*, 171 S.W.3d at 292. The fact that Thurman had previous involvement with law enforcement, including with informants, was not relevant to the issue of identification for the underlying charges. An informant did not participate in the charged offenses. *Ford*, 179 S.W.3d at 210; *see Garcia v. State*, No. 01-18-00974-CR, 2020 WL 4118019, at *3 (Tex. App.—Houston [1st Dist.] July 21, 2020, no pet.) (mem. op., not designated for publication) (holding trial court did not abuse its discretion by denying motion to disclose when informant set up narcotics transaction but did not witness or participate in offense). The facts demonstrate that informants were not eyewitnesses to the offense, did not participate in the offense, and were not present at the scene. Put simply, this case is not about confidential informants or controlled drug transactions. The court did not abuse its discretion in denying Thurman's motion for disclosure because an

informant's testimony was not essential to a fair determination of guilt or innocence. We overrule Thurman's first issue.

Duty to Disclose Under Michael Morton Act

In his second issue, Thurman argues that the trial court erred by not ordering the disclosure “of the details of the two other controlled buys targeting Appellant, and any other information in possession of the State as a result of their recent undercover investigation of Appellant at or near the time of the offense that may be used against the defendant in guilt innocence or punishment.” In essence, Thurman argues that article 39.14 of the Code of Criminal Procedure required that the State disclose information about the other drug investigations because they were material to the underlying case, and that the trial court erred by failing to order the State to do so. Alternatively, he contends that he received ineffective assistance of counsel because he did not have access to the documents. We disagree.

A. Standard of Review and Applicable Law

The Michael Morton Act—Code of Criminal Procedure article 39.14—governs discovery in criminal cases. It provides, in relevant part:

- (a) [A]s soon as practicable after receiving a timely request from the defendant the state shall produce and permit the inspection and the electronic duplication, copying, and photographing, by or on behalf of the defendant, of any offense reports, any designated documents, papers, written or recorded statements of the defendant or a witness, including witness statements of law enforcement officers but not including the work product of counsel for the state in the case and their investigators and their

notes or report, or any designated books, accounts, letters, photographs, or objects or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the state or any person under contract with the state. . . .

. . . .

- (h) Notwithstanding any other provision of this article, the state shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.

. . . .

- (k) If at any time before, during, or after trial the state discovers any additional document, item, or information required to be disclosed under Subsection (h), the state shall promptly disclose the existence of the document, item, or information to the defendant or the court.

TEX. CODE CRIM. PROC. art. 39.14. Evidence is “material” for purposes of Article 39.14(a) if it has “some logical connection to a consequential fact.” *Watkins v. State*, 619 S.W.3d 265, 269 (Tex. Crim. App. 2021). Whether evidence is “material” is determined by evaluating its relation to a particular subject matter. *Id.*

B. Analysis

Thurman argues that the State was required to disclose information related to previous undercover investigations because article 39.14(a) permits discovery of anything “that constitute[s] or contain[s] evidence material to any matter involved in the action,” and information related to the other investigations was relevant for

deciding whether to plead guilty. TEX. CODE CRIM. PROC. art. 39.14(a). He contends that the trial court erred by not requiring the State to disclose the information. The State, however, argues that the information at issue in this case—documentation related to controlled buys not at issue in the underlying offenses—does not constitute the type of information that article 39.14 was designed to require a prosecutor to make available to the defense. We agree with the State.

1. State’s Disclosure Obligations

The information about other possible investigations was not material “to any matter involved in the action.” TEX. CODE CRIM. PROC. art. 39.14(a). The Court of Criminal Appeals has held that “material” in the context of Article 39.14 is synonymous with “relevant” evidence. *Watkins*, 619 S.W.3d at 289. To be material to “any matter involved in the action,” evidence need not be related to the ultimate issues of either guilt or punishment, but the evidence must have a “logical connection to a fact of consequence.” *Id.* Information related to controlled drug transactions involving Thurman did not have a logical connection to a consequential fact. *Id.* at 280. The State was not prosecuting an offense related to controlled drug transactions, nor did the State introduce evidence of them. The question before the jury was whether Thurman possessed a gun or drugs on or about November 2, 2017. Any other undercover investigation or controlled drug transactions were not “involved in the action.” TEX. CODE CRIM. PROC. art. 39.14(a). They did not have a logical

connection to a consequential fact. *See Watkins*, 619 S.W.3d at 279–80. The trial court did not err in failing to require the State to disclose this information.

The evidence also was not the type of privileged information that requires automatic disclosure by the State. The Code of Criminal Procedure only requires the State to disclose privileged information if it is exculpatory or impeaching. TEX. CODE CRIM. PROC. art. 39.14(h). Information about the controlled drug transactions was neither exculpatory nor impeaching.

We hold that article 39.14 does not obligate the State in this circumstance to disclose information related to these particular investigations because they were not material to any matter involved in the offenses, were not impeaching, and were not exculpatory.

2. Disclosure Before Plea Decisions

To the extent Thurman argues that he was entitled to the information related to other drug investigations involving him before deciding how to plead, this is not the sort of information that the State is required to provide. The Court of Criminal Appeals has held that “the voluntariness of a defendant’s guilty plea is not contingent upon his awareness of the full dimension of the prosecution’s case.” *Ex parte Palmberg*, 491 S.W.3d 804, 809 (Tex. Crim. App. 2016). “Naturally, the more information the defendant acquires before [pleading guilty] about the prosecution’s case, the better informed his decision to plead guilty will be, providing him the

opportunity to make a ‘wise’ plea.” *Id.* (quoting *United States v. Ruiz*, 536 U.S. 622, 629 (2002)). Thurman seems to argue that his decision whether to plead would be impacted by the strength of the information the State had about him in other investigations or whether the State planned to indict him for other offenses. We are bound by the precedent of the Court of Criminal Appeals which has stated that as long as a defendant has “sufficient awareness of his circumstances—including an awareness that some facts simply remain unknown to him or are undetermined as of the time of his plea—his potentially unwise plea is still a voluntary one.” *Ex parte Palmberg*, 491 S.W.3d at 809. Nothing in the record indicates that Thurman was not sufficiently aware of the circumstances when making his decision to plead not guilty to the underlying offenses. In fact, Thurman himself would be acutely aware of the threat of future prosecution based on his own previous behavior and the risk that law enforcement could be investigating him for that conduct.

3. Ineffective Assistance of Counsel

Finally, to the extent Thurman argues that his counsel was ineffective in some way related to the State’s failure to disclose the controlled transaction information, we cannot say that counsel was ineffective based on the trial record. *Williams v. State*, 526 S.W.3d 581, 583 (Tex. App.—Houston [1st Dist.] 2017, pet. ref’d) (trial record is rarely sufficient to demonstrate ineffective assistance). Ordinarily, trial counsel should be afforded an opportunity to explain her actions “before being

condemned as unprofessional and incompetent.” *Bone v. State*, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002). If trial counsel has not been afforded the opportunity to explain the reasons for her conduct, we will not find her performance to be deficient unless the challenged conduct was “so outrageous that no competent attorney would have engaged in it.” *Nava v. State*, 415 S.W.3d 289, 308 (Tex. Crim. App. 2013) (quoting *Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012)). Contrary to Brown’s assertion, the record reflects that counsel made diligent efforts to obtain information related to the controlled drug transactions, and her requests were denied by the trial court. On this record, we cannot say that counsel was ineffective when Thurman did not have access to the State’s investigative reports related to other drug transactions during these proceedings.

We overrule Thurman’s’s second issue.

Conclusion

We affirm the judgment of the trial court.

Peter Kelly
Justice

Panel consists of Justices Kelly, Landau, and Hightower.

Do not publish. TEX. R. APP. P. 47.2(b).