

In The
Court of Appeals
Ninth District of Texas at Beaumont

NO. 09-16-00063-CR

LEWIS EDWARD TAYLOR, Appellant

V.

THE STATE OF TEXAS, Appellee

**On Appeal from the 359th District Court
Montgomery County, Texas
Trial Cause No. 15-04-04276-CR**

MEMORANDUM OPINION

Appellant Lewis Edward Taylor was charged with possession with intent to deliver or manufacture a controlled substance, namely methamphetamine, and after the trial court denied Taylor’s motion to disclose the identity of the informant, Taylor pleaded guilty to the indicted offense and pleaded “true” to four enhancement paragraphs. The trial court assessed punishment at thirty years of confinement. In his sole appellate issue, Taylor argues that the trial court erred by denying his motion

to disclose the informant's identity without holding an *in camera* hearing. We affirm the trial court's judgment.

The confidential informant issue raised by Taylor stems from an investigating officer's affidavit used to support the search warrant. The affidavit does not appear in the record; however, Taylor quoted from the affidavit in the appellate record and his brief. According to Taylor's quotations, the affidavit stated as follows, in pertinent part:

On 9-10-14, I K-9 Officer J. Foxworth, was contacted by a credible informant with whom I have worked . . . and obtained validated information in the past on numerous occasions concerning the sale and possession of narcotics in reference to a subject selling narcotics, specifically crack cocaine, out of room 221 at Motel 6 in Conroe[,] Texas. The informant stated that in the early morning hours on 9-10-14 he observed approximately 28 grams of crack cocaine inside of room 221 as well as marijuana. The informant stated that the suspect in this case is Lewis Taylor, AKA Gucci, and he was accompanied by another subject According to the informant he observed Taylor going between rooms 221 and 220 a few times in a manner that appeared he was using both rooms and had access to each. I proceeded to Motel 6 to see who rented the rooms and upon checking on them I learned that [L.T.], a relative of Lewis Taylor, had rented room 221[.] I am aware that this is common with drug dealers When I checked room 220 I learned that it had been rented by [C.X.]. Upon researching [C.X.]'s history I learned that he had [a] drug history, specifically marijuana related, which is most likely where the marijuana that the informant saw inside the room came from since Lewis Taylor is a well-known crack cocaine dealer only. [C.X.] is also from Conroe, making it highly likely that he and Lewis do indeed know each other[;] however, the informant has not seen them together, as he merely observed Lewis Taylor going in and out of his room.

In his motion to disclose the informant’s identity, Taylor argued that revealing the confidential informant’s identity was required “to test the [S]tate’s reliance on him as both a credible witness to obtain the search warrant and to preserve his right to confrontation and cross[-]examination of the witnesses against him in a trial.” Taylor asserted that the affidavit states that the confidential informant “does not say how he knows [Taylor], if he is related to him, or if he too is involved in the criminal conduct[.]” According to Taylor’s motion, the confidential informant “was allegedly a key player in the [S]tate’s case in chief to obtain the warrant[.]” and was allegedly in the room where drugs were found. Citing *Bodin v. State*, 807 S.W.2d 313 (Tex. Crim. App. 1991), Taylor argued that revealing the informant’s identity was imperative to preserve his right to confrontation and cross-examination.

The trial court held a hearing on Taylor’s motion. At the hearing, Taylor’s counsel argued that Texas “has effectively done away with confidential informants after the Michael Morton [Act]¹ came about because it’s a sweeping change in the disclosure process We’re asking that this person’s name be disclosed. . . . [H]e stated that he was there. He’s actually a material witness in the case.” Taylor’s

¹Article 39.14 of the Texas Code of Criminal Procedure, as amended in 2014, is commonly known as the Michael Morton Act. *See* Tex. Code Crim. Proc. Ann. art. 39.14 (West Supp. 2016); *In re State ex rel. Munk*, 448 S.W.3d 687, 691 (Tex. App.—Eastland 2014, no pet.).

counsel argued that Taylor is entitled to disclosure of the informant's identity under the Michael Morton Act.

In response, the prosecutor argued that *Bodin* is the seminal case on the issue. The prosecutor stated that under *Bodin*, the defendant must show that disclosure of the informant's identity is necessary for a fair determination of guilt or innocence, and mere conjecture about possible relevance of the informant's potential testimony is insufficient. Defense counsel argued that *Bodin* is more than twenty-five years old, and the Michael Morton Act brought about sweeping changes in the law, making the prosecutor's arguments about *Bodin* irrelevant. The prosecutor stated that the Michael Morton Act specifically excludes items that are otherwise privileged, such as the identity of a confidential informant. Taylor's counsel did not object to the trial court's failure to conduct an *in camera* hearing with the confidential informant before ruling on the motion. *See* Tex. R. Evid. 508(2)(C). The trial court denied the motion to disclose the informant's identity, and Taylor pleaded guilty during the same hearing.

"We review a trial court's denial of a motion to disclose a confidential informant under an abuse of discretion standard." *Ford v. State*, 179 S.W.3d 203, 210 (Tex. App.—Houston [14th Dist.] 2005, pet. ref'd) (citing *Taylor v. State*, 604 S.W.2d 175,179 (Tex. Crim. App. [Panel Op.] 1980)). Therefore, we will not disturb

the trial court's decision unless it falls outside the zone of reasonable disagreement. *Id.* (citing *Jones v. State*, 944 S.W.2d 642, 651 (Tex. Crim. App. 1996)).

To preserve an alleged error for appeal, the complaining party must make his complaint known to the trial court by a timely request, objection, or motion that states the grounds for the ruling the complaining party sought with sufficient specificity to make the trial court aware of the complaint. Tex. R. App. P. 33.1(a). In addition, the issue raised on appeal must comport with the objection raised before the trial court. *See Thomas v. State*, 723 S.W.2d 696, 700 (Tex. Crim. App. 1986). Because Taylor did not object to the trial court's failure to hold an *in camera* hearing, and the issue he raises on appeal does not comport with the one raised before the trial court, he has failed to preserve the alleged error for appellate review. *See* Tex. R. App. P. 33.1(a); *Thomas*, 723 S.W.2d at 700.

Even if Taylor had preserved error, he would not prevail in this appeal. Rule 508(a) of the Texas Rules of Evidence provides that a state has a privilege to refuse to disclose a person's identity if the person (1) has furnished information to a law enforcement officer who is investigating a possible violation of the law, and (2) the information provided "relates to or assists in the investigation." Tex. R. Evid. 508(a). Rule 508(c)(2)(A) provides an exception to the privilege, as follows: "In a criminal case, this privilege does not apply if the court finds a reasonable probability exists

that the informer can give testimony necessary to a fair determination of guilt or innocence.” Tex. R. Evid. 508(c)(2)(A). In his appellate brief, Taylor cites *Bodin* to support his argument that the exception provided in Rule 508(c)(2) applies to his case, and he no longer argues that the Michael Morton Act requires disclosure of the informant’s identity.

In *Bodin*, the Court of Criminal Appeals held that “[t]he informer’s potential testimony must significantly aid the defendant[,] and mere conjecture or supposition about possible relevancy is insufficient.” *Bodin*, 807 S.W.2d at 318. The *Bodin* court further explained that because a defendant may not know the nature of an informer’s testimony, he “should only be required to make a plausible showing of how the informer’s information may be important.” *Id.* Mere conjecture or speculation will not suffice. *Id.*

In this case, the investigating officer’s affidavit states that he was contacted by a confidential informant, with whom he had dealt on numerous occasions, and that the informant told him that crack cocaine was being sold from room 221 at Motel 6. The investigating officer avers that the informant identified Taylor and that the informant saw Taylor going between rooms 220 and 221 in a manner that suggested Taylor had access to both rooms. According to the investigating officer’s affidavit, the informant “merely observed Lewis Taylor going in and out” of both

rooms. The portions of the affidavit cited by Taylor do not mention methamphetamine, which is the controlled substance Taylor was charged with possessing with the intent to distribute or manufacture. Nothing in the affidavit indicates that the confidential informant was in the room when the narcotics were found or otherwise had knowledge of Taylor's guilt or innocence.

We conclude that Taylor did not demonstrate a reasonable probability that the informant could give testimony necessary to a fair determination of Taylor's guilt or innocence. *See* Tex. R. Evid. 508(c)(2)(A); *Bodin*, 807 S.W.2d at 318. Taylor merely offered conjecture or speculation about the possible nature of the informant's testimony, which is insufficient. *See Bodin*, 807 S.W.2d. at 318. Because Taylor did not make the required showing, the trial court did not abuse its discretion by not conducting an *in camera* hearing before denying Taylor's motion. *See id.*; *see also* Tex. R. Evid. 508(2)(C); *Ford*, 179 S.W.3d at 210. We therefore overrule Taylor's sole issue and affirm the trial court's judgment.

AFFIRMED.

STEVE McKEITHEN
Chief Justice

Submitted on March 8, 2017
Opinion Delivered April 19, 2017
Do Not Publish

Before McKeithen, C.J., Kreger and Johnson, JJ.