2017 IL App (2d) 150682-U
No. 2-15-0682
Order filed October 5, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JESUS A. MENDEZ, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 13-CF-3736 Honorable George D. Strickland, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Burke and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied defendant's motion to compel the State to disclose the identity of a confidential informant, as defendant merely speculated that the disclosure would have supported his *Franks* motion or his theory of defense at trial.

¶ 2 Following a bench trial in the circuit court of Lake County, defendant, Jesus A. Mendez, was found guilty of possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(2)(A) (West 2012)) and possession of cannabis with intent to deliver (720 ILCS 550/5(e) (West 2012)). He was sentenced to concurrent 16-year prison terms. Defendant's convictions were based on evidence seized during the execution of a search warrant that was

based on information received from a confidential informant (CI). Defendant argues on appeal that the trial court erred by denying his motion for disclosure of the identity of the CI. We affirm.

¶ 3 The search warrant authorized the search of defendant's person and of an apartment located on Continental Drive in Waukegan. The warrant was issued on the basis of a sworn complaint signed on December 26, 2013, by Elias Agalianos, a detective with the Waukegan police department, and by the CI, who was referred to as "J. Doe." In the complaint, J. Doe averred that he or she was inside the Continental Drive apartment within the preceding 72 hours and had observed defendant to be in possession of a large plastic bag containing a green leafy substance. J. Doe also observed a scale and several small plastic bags. Based on his or her familiarity with the appearance, texture, and packaging of cannabis, J. Doe believed that the green leafy substance was cannabis.

¶ 4 Prior to trial, defendant moved to reveal J. Doe's identity. According to defendant, the information received from J. Doe made him or her "a [t]ransactional and an [o]ccurrence witness." An evidentiary hearing was held on the motion. At the hearing, Agalianos testified that the warrant was issued on December 26, 2013, and was executed that afternoon. Defendant and another individual, Dimas Arellano, had just stepped out of the apartment before the warrant was executed. The officers conducting the search detained defendant and Arellano and then gained entry to the apartment with a key obtained from defendant. Items found in the apartment included: (1) two food-saver bags full of a green plant material that later tested positive for marijuana; (2) a clear plastic bag of a white powder that later tested positive for cocaine; (3) a revolver and some ammunition; (4) a scale and some baggies; (5) medication prescribed to defendant; and (6) a state identification card in defendant's name with an address different from

that of the Continental Drive apartment. Defendant told the officers that certain items of clothing found in the apartment belonged to him.

¶ 5 Anastasia Diaz testified that she had leased the Continental Drive apartment but no longer lived there at the time of her testimony. When the warrant was executed, Anastasia's brother, Eric Diaz, was living at the apartment with Anastasia. At that time, Anastasia was dating defendant, who was living with his aunt. Anastasia was at work when the warrant was executed. She had left her keys in the apartment and asked defendant to get them for her. The entrance to the apartment was unlocked, and she was able to use her cell phone to open the building's security door for defendant. Anastasia denied that she had seen cocaine, marijuana, scales, guns, or ammunition in the apartment on or around December 26, 2013. Anastasia admitted, however, that she had made statements to the police indicating that defendant had sold drugs from the apartment. She explained that the police had threatened to prosecute her if she did not implicate defendant.

¶ 6 Defendant testified that he served a sentence in the Department of Corrections for a prior felony and that he was released in October 2013. Shortly thereafter, he began dating Anastasia Diaz, but he did not live with her. On December 26, 2013, defendant received a telephone call from Eric Diaz. Eric indicated that he wanted to show defendant some drugs at the Continental Drive apartment. Defendant went to the apartment with Arellano. Defendant had an additional reason for going to the apartment: to look for Anastasia's keys and for his own. Defendant did not see any cannabis or controlled substances in the apartment. He found his keys, but not Anastasia's. When he left the apartment, he was approached by police officers who told him that they had a search warrant.

¶ 7 The trial court characterized the issue raised by the motion as whether the CI was "transactional." In denying the motion, the court defined the relevant transaction with reference to the time and place of the search. The court essentially reasoned that, because the CI was not present at that time and place, he or she was not transactional.

¶ 8 In addition to the motion for disclosure of the CI's identity, defendant moved pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), to quash the search warrant and to suppress evidence. *Franks* permits a challenge to a search warrant issued on the basis of an affidavit that includes false statements made knowingly, intentionally, or with reckless disregard for the truth. Defendant's motion alleged that the Continental Drive apartment belonged to Anastasia Diaz, that Eric Diaz resided at the apartment, and that Eric was the CI. Defendant was dating Anastasia, but did not live at the apartment. Defendant submitted an affidavit in support of the motion. He averred that Eric had planted the drugs and gun that were discovered during the search and had falsely stated that defendant lived at the apartment. Defendant further averred that the police knew that defendant lived elsewhere. The trial court denied the motion.

¶ 9 At defendant's bench trial, the evidence showed that police executed a warrant to search the Continental Drive apartment and defendant's person. Defendant and Arellano were seen entering the apartment building and were detained when they exited the building. The police gained entry to the apartment with a key found on defendant's person. Bags containing cannabis and cocaine were found in the apartment. Defendant's fingerprints were found on some of the bags. The police also found a scale; a gun; a napkin that was apparently being used as a ledger to record drug transactions; items of men's clothing; medication prescribed to defendant; and a state identification card issued to defendant. Defendant was carrying a large amount of cash.

¶ 10 Defendant called Anastasia Diaz, Eric Diaz, and Arellano as witnesses, but they refused to testify, invoking the privilege against self-incrimination. Defendant was permitted to introduce into evidence a transcript of Anastasia's testimony at the hearing on the motion to disclose the CI's identity.

¶ 11 As noted, the trial court found defendant guilty of possession of a controlled substance with intent to deliver and possession of cannabis with intent to deliver. The trial court denied defendant's motion for a new trial and imposed sentence as described earlier. Following the denial of his motion to reconsider his sentence, defendant filed a timely notice of appeal.

¶ 12 At issue is whether the trial court erred in denying defendant's motion for disclosure of the identity of the CI. Illinois Supreme Court Rule 412(j)(ii) (eff. Mar. 1, 2001) provides, "Disclosure of an informant's identity shall not be required where his identity is a prosecution secret and a failure to disclose will not infringe the constitutional rights of the accused." As we noted in *People v. Clark*, 2013 IL App (2d) 120034, ¶ 21, this rule "codifies the common-law 'informer's privilege' recognized by the Supreme Court in *Roviaro* [*v. United States*, 353 U.S. 53 (1957)]." In *Clark*, we further observed:

> "In *Roviaro*, the Court explained that the privilege advances the public's interest in effective law enforcement by preserving the anonymity of informers, thus encouraging them to communicate their knowledge of the commission of crimes to law enforcement officials. [Citation.] However, the scope of the privilege is limited by fundamental fairness: 'Where the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.' [Citation.] The Court continued:

> 'We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.' [Citation.]" *Id.*

¶ 13 The extent of the informant's involvement in the charged offense is a key consideration. As stated in *People v. Bufford*, 277 Ill. App. 3d 862, 865-66 (1995):

> "[A] court will look to whether the informant was a mere tipster, a witness, or was actively engaged in the criminal activity charged. [Citation.] The theory is that the greater the informant's involvement is, the more relevant the informant's testimony will be, and the greater interest the defendant has in gaining the informant's disclosure. As a general guide, this makes perfect sense. To properly address the constitutional rights of a defendant to prepare a defense, however, it is necessary to look beyond this initial query, and to inquire into how the informant's potential testimony bears upon the defendant's theory of the case."

¶ 14 Defendant argues that the denial of the motion to disclose the CI's identity was error because the trial court "did not balance the public interest in protecting informants against the right of an accused to prepare a defense." According to defendant, the trial court's ruling impaired the defense because it "limited the defendant's ability to challenge the search warrant in a *Franks* motion" and also because it "prejudiced the defendant in developing his defense at trial."

¶ 15 A criminal defendant seeking disclosure of the identity of a CI "bears the burden of showing that disclosure is needed for him to prepare his defense." *Clark*, 2013 IL App (2d) 120034, ¶ 33. In order to satisfy this burden, the defendant must demonstrate that the defense theory requiring disclosure of the CI's identity "is founded on evidence, not speculation." *Id.* When the defendant fails to meet this burden, otherwise relevant considerations become matters of purely academic interest. Significantly, whether disclosure will jeopardize the CI's safety is an important concern *when the defendant has shown a need for disclosure*. *Id.* ¶ 51 (Birkett, J., specially concurring) (citing *People v. Rose*, 342 Ill. App. 3d 203, 206-07 (2003)). Disclosure does not become necessary merely because it can be accomplished without jeopardy to the CI's safety. *Id.*

¶ 16 Defendant failed to show that disclosure of the CI's identity was needed to prepare a trial defense for which there was an evidentiary basis. Defendant ostensibly hoped to establish that Eric Diaz planted the drugs found during the search of the Continental Drive apartment. Evidence that Eric was the CI might tend to bolster any evidence that Eric planted the drugs as part of a plan to frame defendant. But the record contains no real evidence that Eric did plant the the drugs. Notably, although defendant testified at the hearing on his disclosure motion, none of his testimony suggested that he had any knowledge that the drugs belonged to Eric. We acknowledge that, if Eric was the CI, defendant's testimony regarding the telephone call he received from Eric might create an inference that Eric was attempting to lure defendant to the police so that he could be searched. But whether he did so as part of a scheme to frame defendant or simply to assist in the execution of the search warrant is a matter of pure speculation. Standing alone, evidence that Eric was the CI (if he was, indeed, the CI) would be of little or no value to the defense.

¶ 17 We also fail to see how disclosure of the CI's identity would have helped defendant secure a *Franks* hearing. *Franks* held:

> "[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." *Franks*, 438 U.S. at 155-56.

The relevant question, therefore, is whether, had defendant known the CI's identity, he could have made a substantial preliminary showing that the CI made false statements in the sworn complaint for the search warrant. Defendant's argument is based on the theory that Eric Diaz was the CI and that he planted the drugs to frame defendant. Leaving aside the previously-discussed lack of evidence to support defendant's theory,[1] even if Eric Diaz planted the drugs

[1] We acknowledge that defendant submitted his own affidavit in support of the motion for a *Franks* hearing. That affidavit baldly asserts that Eric Diaz planted the drugs. In light of *People v. Born*, 113 Ill. App. 3d 449 (1983), it is doubtful whether such an affidavit would be sufficient. In *Born*, the defendant relied in part on an affidavit from his minor son indicating that only he and his parents were present in a residence when a CI claimed to have seen contraband in the residence. We concluded that this affidavit did not amount to a substantial preliminary

that were discovered in the apartment, it does not follow that he any made false statements in the complaint for the search warrant. It still might very well be true, as stated in the complaint, that Eric Diaz observed defendant in possession of cannabis in the apartment within 72 hours before the complaint was signed.

¶ 18 Defendant argues that, in denying his motion to disclose, the trial court improperly gave decisive weight to its conclusion that, because the CI was not present when the search took place, he or she was not "transactional." Defendant cites *Bufford* as authority that the trial court may order disclosure of the identity of a CI who was not present when a warrant was executed. But even if the trial court's reasoning was flawed, it reached the correct result. As discussed, defendant did not meet his burden of showing that preserving the CI's anonymity would impair the defense, so the trial court would have erred had it ordered disclosure.

¶ 19 Furthermore, *Bufford* does not alter our conclusion that defendant failed to meet this burden. In *Bufford*, the informant was stopped by police and found to be in possession of cocaine. The informant indicated that, earlier in the day, he had been to the home of someone named "Marvel." *Bufford*, 277 Ill. App. 3d at 864. Marvel wanted the informant to deliver the cocaine for him, as he had done on numerous prior occasions. Based on that information, the police obtained a warrant to search a residence and Marvel. The defendant was on the premises when the warrant was executed and he was charged with possession of a brick of cocaine found there. The defendant maintained, however, that the cocaine belonged to his brother, Norvel. In

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showing of the falsity of the CI's statements in an affidavit for a search warrant. It is hard to see how defendant's own conclusory affidavit in this case could be considered to be of any more value than the affidavit in *Born*.

holding that the informant's identity should have been disclosed, the *Bufford* court reasoned as follows:

> "The informant, here, was more than a mere tipster. This informant, according to his own sworn statement relied upon by the police, witnessed and participated in events directly leading to the defendant's arrest for possession and intent to deliver a controlled substance. The informant was in the home [where the cocaine was later found], received cocaine from presumably the same brick defendant was charged with possessing and intending to deliver, was en route to delivering cocaine cut from that brick, and had received cocaine from that location on previous occasions.
>
> The State argues that the offense with which defendant was charged stands alone and does not rely on the informant's testimony. The State by focusing on its case, however, misses the point. The crux of the issue is not how the informant's potential testimony affects the prosecution's case, but how it affects the defendant's case.
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> *** The informant, here, had intimate knowledge of the cocaine found in the home and had the ability to identify the person or persons with whom he has seen handle the cocaine in question, the person or persons for whom he was delivering the cocaine when he was stopped, the person or persons for whom he had delivered cocaine in the past, and ultimately the person or persons who possessed the cocaine in question. His testimony, therefore, was critical to defendant, who was defending against the charge of constructive possession." *Id.* at 866.

Thus, in *Bufford*, there was a tangible basis for thinking that the informant could help the defendant develop a defense that the brick of cocaine belonged to someone other than the defendant. Here, in contrast, the theory that the drugs belonged to the CI is, as stated before,

based on nothing more than speculation. Defendant contends that, as in *Bufford*, the CI here was a witness to the events leading to defendant's arrest. In *Bufford*, however, those events were germane to a defense theory that was based on more than speculation. Accordingly, defendant's reliance on *Bufford* is misplaced.

¶ 20 Lastly, we note that, because defendant did not meet his burden of showing that disclosure of the CI's identity was needed for preparation of the defense, the State was not required to show that disclosure would jeopardize the CI's safety.

¶ 21 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 22 Affirmed.