

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,           :  
  :  
                  Plaintiff,            :  
  :  
                  v.                     :  
  :  
  :  
James Tunnell,                        :  
  :  
  :  
                  Defendant.           :  
  :  
  :

Criminal Action No. 08-149-JJF

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David C. Weiss, Esquire, Acting United States Attorney, and  
Robert F. Kravetz, Esquire, Assistant United States Attorney, of  
the OFFICE OF THE UNITED STATES ATTORNEY, Wilmington, Delaware.

Attorney for Plaintiff.

Peter A. Levin, Esquire of PETER A. LEVIN, ESQUIRE, Philadelphia,  
Pennsylvania.

Attorney for Defendant.

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**MEMORANDUM OPINION**

March 25, 2009  
Wilmington, Delaware

  
Farnan, District Judge.

Pending before the Court are two motions filed by Defendant, James Tunnell, a Motion To Suppress Physical Evidence And Statements (D.I. 25) and a Motion To Disclose Information Regarding Confidential Informants and Supporting Authorities (D.I. 26). For the reasons discussed, the Court will deny both Motions.

#### **I. BACKGROUND**

The Government alleges that on August 18, 2008 an individual described by the Government as a reliable confidential informant purchased crack cocaine from Defendant James Tunnell. (D.I. 28 at 3.) Briefly, the informant told the FBI that Mr. Tunnell sold crack cocaine on a daily basis from his residence in Wilmington, Delaware and further provided the FBI with telephone numbers that could be used to communicate with Mr. Tunnell. (D.I. 28 at 3.) The FBI then gave the informant \$1000 in government funds to purchase cocaine from Mr. Tunnell, a process that the FBI monitored. (Id.) Based on evidence collected during this "controlled purchase," on August 27, 2008, FBI Supervisory Special Agent Scott Duffey obtained a warrant to search Mr. Tunnell's residence. (Id.) The warrant was executed on the same date. (D.I. 25 at 1.)

Based on the August 18, 2008 sale of crack cocaine to the informant, on October 7, 2008, Mr. Tunnell, was indicted for

knowingly distributing five (5) grams or more of a mixture and substance containing a detectable amount of cocaine base. (D.I. 11.) Based on the August 27, 2008 search and discovery of additional crack cocaine at Mr. Tunnell's residence, the indictment was subsequently amended to include one count of knowingly possessing with intent to distribute five (5) grams or more of a mixture and substance containing a detectable amount of cocaine base. Both counts of the Superseding Indictment alleged violations of 21 U.S.C. §§ 841(a)(1) and 844(b)(1)(B). (D.I. 18 (Superseding Indictment).) On December 17, 2008, Mr. Tunnell filed the instant Motions. Shortly thereafter, on January 8, 2009, the Government moved to dismiss the count of the Superseding Indictment pertaining to the sale of cocaine to the informant, leaving only the count pertaining to the discovery of cocaine during the August 27, 2008 search of Mr. Tunnell's residence. (D.I. 27.) The Court granted the Motion To Dismiss on January 14, 2008. (D.I. 29.) On February 11, 2009, briefing on the pending Motions was completed.

By his Motion To Suppress, Mr. Tunnell contends that the search of his residence was unlawful because an affidavit in support of the relevant search warrant contains "knowing, intentional, or reckless false statements and/or omissions concerning substantial reasons to doubt the credibility of the confidential information" that the government relied upon in

obtaining the relevant search warrant. (D.I. 25 at 2.) Mr. Tunnell further contends that the "affidavit is lacking in specific factual details to support the showing of probable cause . . . ." (Id.) In these circumstances, Mr. Tunnell requests a Franks hearing to question the affiant and thus challenge the content of the affidavit. (See D.I. 32 at 7.) Finally, Mr. Tunnell asserts that his statement was taken without being given appropriate warnings. (D.I. 25 at 6.)

With respect to his Motion To Disclose Information Regarding Confidential Informants, Mr. Tunnell contends that he is entitled to know the identities of the confidential informant that allegedly observed Mr. Tunnell selling crack cocaine from his residence and who was later involved in a controlled purchase of crack cocaine from Mr. Tunnell on August 18, 2008. (D.I. 26 at 2; D.I. 28 at 4.) Mr. Tunnell believes that the informant will be a "lead prosecution witness" in this case and that he "(1) does not exist or fabricated the information provided; (2) did not provide law enforcement with the information they have said was provided or falsely provided that information; and (3) that the informant fabricated that information or that his existence was in fact created by officers in order to provide additional support for a search warrant that should not have been issued." (D.I. 26 at 3.)

The Government has filed a response to Mr. Tunnell's Motion To Suppress contending that, to the extent the Motion seeks a Franks hearing, Mr. Tunnell has not made any preliminary showing that the affiant knowingly or recklessly made false statements in the affidavit of probable cause. (D.I. 28 at 10.) In this regard, the Government contends that Mr. Tunnell relies strictly on his "belief" that the informant does not exist and/or provided false information. (Id. at 11.) To the extent Defendant's suppression motion is based on lack of probable cause, the Government contends that the affidavit establishes probable cause because it sets out in detail the controlled purchase of crack cocaine that the confidential informant made from Mr. Tunnell on August 18, 2008. (D.I. 28 at 13.) With regard to Mr. Tunnell's contention that his statement was taken without the appropriate warnings, the Government notes that Mr. Tunnell has set forth no facts or evidence providing any basis or support for this claim.

In response to Mr. Tunnell's Motion To Disclose Information Regarding Confidential Informants, the Government contends that Mr. Tunnell has not demonstrated that disclosure of the informant's identity is warranted. The Government contends, first, that because it has dismissed the count pertaining to the sale of crack cocaine to the informant, it will not need to call the confidential informant as a witness. (D.I. 28 at 7.) With respect to the count pertaining to the seizure of cocaine during

the August 27, 2008 search of Mr. Tunnell's residence, the Government argues that the confidential informant will not testify at trial because he was not present for the search and seizure. (Id.) Where an informant provides information solely for the purpose of establishing probable cause for a search, but does not participate in the search, the Government contends that knowledge of the informant's identity will not serve to establish guilt or innocence and thus should not be disclosed.

## II. CONCLUSIONS OF LAW

1. The Fourth Amendment to the United States Constitution protects "the right of the people to be secure against unreasonable searches and seizures. . . ." U.S. Const, amend IV.

2. In deciding whether to issue a search warrant, "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . [concluding]' that probable cause existed." Illinois v. Gates, 462 U.S. 213, 238-239 (U.S. 1983) (citations omitted).

3. In Franks v. Delaware, 438 U.S. 154 (1978), the U.S.

Supreme Court concluded that a defendant has the right to challenge the truthfulness of factual statements made in an affidavit of probable cause filed in support of a warrant. In order to obtain a Franks hearing, a defendant must make a "substantial preliminary showing" that the affidavit contained a false statement that was made knowingly or with reckless disregard for the truth, which is material to the finding of probable cause.

3. "In order to make this preliminary showing, the defendant cannot rest on mere conclusory allegations or a 'mere desire to cross-examine,' but rather must present an offer of proof contradicting the affidavit, including materials such as sworn affidavits or otherwise reliable statements from witnesses." United States v. Yusuf, 461 F.3d 374, 383 (3d Cir. 2006) (citations omitted).

5. Reviewing Mr. Tunnell's contentions in support of his Motion To Suppress, the Court concludes that Mr. Tunnell has not made the "substantial preliminary showing" necessary to support a Franks hearing. Indeed, Mr. Tunnell has not presented allegations that amount to an offer of proof contradicting the affidavit. Instead, Mr. Tunnell relies almost exclusively on his "belief" that the confidential informant does not exist and/or supplied fabricated information. Furthermore, "[i]t is well-established that a substantial showing of the informant's

untruthfulness is not sufficient to warrant a Franks hearing. The Supreme Court made clear throughout Franks that a substantial preliminary showing of intentional or reckless falsity on the part of the affiant must be made in order for the defendant to have a right to an evidentiary hearing on the affiant's veracity." United States v. Brown, 3 F.3d 673, 677 (3d Cir. Pa. 1993). Thus, to the extent Mr. Tunnell's motion relies on alleged falsehoods on the part of the informant, the motion is unsupported. The Court does find one attempt by Mr. Tunnell to identify a falsehood on the part of the affiant. Specifically, Mr. Tunnell contends that the affidavit in support of the search warrant explains that members of the surveillance team observed the August 18, 2008 transaction. (D.I. 32 at 9.) However, the Confidential Human Source Report, which also describes the transaction, states that the Mr. Tunnell showed the informant drugs inside Mr. Tunnell's residence, but sold him the drugs at "the bottom of the steps." (Id.) The Court finds that the differences or refinements between these statements do not establish a basis for a finding of "recklessly or deliberately false statements" in the affidavit, as Mr. Tunnell contends. (Id.) Accordingly, to the extent Mr. Tunnell's Motion To Suppress seeks a Franks hearing, the Court will deny the Motion.

6. After reviewing the parties' briefing, the Court concludes that the Magistrate Judge had a substantial basis to

conclude that there was probable cause to issue a warrant to search Mr. Tunnell's residence. In particular, as the Government argues, the affidavit in support of the warrant sets out the details of the transaction observed by the FBI agents, including that FBI agents, among other things, monitored a phone conversation between Mr. Tunnell and the informant, provided the informant with government funds to purchase the cocaine, monitored every stage of the transaction, and field-tested the product purchased by the informant for the presence of crack cocaine and cocaine. (See D.I. 28 at 13.) Thus, the Court concludes that these facts provided a clear nexus between Mr. Tunnell's drug activity and his residence, which was the focus of the search warrant. See, e.g., United States v. Burton, 288 F.3d 91, 104 (3d Cir. 2002) ("[W]e generally accept the common sense proposition that drug dealers often keep evidence of their transactions at home . . . ."). Accordingly, to the extent Mr. Tunnell's Motion To Suppress is based on an absence of probable cause to support the search warrant, the Court will deny the Motion.

7. With respect to Mr. Tunnell's contention that his statement was taken without being given the appropriate warnings, the Court agrees with the Government that Mr. Tunnell has failed to raise a colorable claim for relief. Indeed, on this issue, Mr. Tunnell's motion includes no facts regarding a Miranda claim.

Additionally, the Government argues that during discovery it provided Mr. Tunnell with a Waiver of Rights Form that Mr. Tunnell signed prior to giving statements to law enforcement officers. (See D.I. 28 at 16.) Accordingly, to the extent Mr. Tunnell's motion seeks to suppress his statements based on an a failure to advise Mr. Tunnell of his rights under Miranda, the Court will deny the Motion.

10. With respect to Mr. Tunnell's Motion To Disclose Information Regarding Confidential Informants, the Court concludes that Mr. Tunnell has not demonstrated that disclosure of the informant's identities is necessary in this case. In United States v. Roviario, 353 U.S. 53 (1957), the Supreme Court recognized that the Government retains the privilege to withhold from disclosure the identity of confidential informants; however, that privilege is not absolute. "Where the disclosure of the 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." (Id. at 60-61.) Where the confidential informant is akin to a tipster, disclosure is generally not warranted.<sup>1</sup>

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<sup>1</sup> Regardless of whether the informant is merely a tipster or individual who falls within the third category of people to whom Roviario is applicable (e.g. those people who fall between tipsters and the "the extreme situation" . . . in which the informant[s] ha[ve] played an active and crucial role in the events underlying the defendant's potential criminal liability"), the Court concludes that Mr. Tunnell has not demonstrated that

United States v. Jiles, 658 F.2d 194, 197 (3d Cir. 1981). Here, the Government, by dismissing the count of the Superseding Indictment pertaining to the direct sale of crack cocaine to the informant, has relegated the role of the informant to something akin to a mere tipster. In fact, the Government has confirmed that because the informant did not participate in the August 2008 search of Mr. Tunnell's residence, he will not be called as a witness at trial. (D.I. 28 at 7.) The informant's only role in this case was to assist in providing probable cause for the search warrant. The results of the subsequent search independently form the basis for the only remaining charge. Accordingly, the Court will deny Mr. Tunnell's Motion To Disclose Information Regarding Confidential Informants And Supporting Authorities.

### **III. CONCLUSION**

For the reasons discussed, the Court will deny Mr. Tunnell's Motion To Suppress Physical Evidence And Statements and Motion To Disclose Information Regarding Confidential Informants and Supporting Authorities.

An appropriate Order will be entered.

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the identity of the informant is essential to his defense.  
Jiles, 658 F.2d at 197.

