

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) Crim. No. 04-103-SLR
)
JACKIE JOHNSON,)
)
 Defendant.)

MEMORANDUM ORDER

At Wilmington this 21st day of June, 2005, having considered defendant's motion to compel disclosure of the identity of the informant and the papers submitted in connection therewith;

IT IS ORDERED that said motion (D.I. 13) is denied for the reasons that follow:

1. On December 31, 2003, defendant was arrested by Delaware State Police officers ("DSPOs") in Newark, Delaware.¹ (D.I. 13) Defendant contends that the arrest was based on information provided by a confidential informant ("CI") to DSPOs

¹He is charged with possession with intent to distribute more than 50 grams of cocaine base in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A). (D.I. 1) More than 250 grams of crack cocaine were found in the front seat of defendant's car at the time of his arrest. (D.I. 18)

on December 30, 2003.² (Id.) The CI and defendant allegedly had telephone conversations wherein the drug transaction and delivery were arranged.

2. Defendant believes he knows the identity of the CI and seeks confirmation of such by plaintiff.³ Defendant contends that the CI's identity is crucial to determine whether the CI actually supplied the information that served as the basis for probable cause for the stop.

3. Plaintiff submits that evidence produced at the suppression hearing will establish that, sometime on or before plaintiff's December 31, 2003 arrest, DSPOs arrested an individual ("CI") for drug trafficking charges. (D.I. 18) The CI identified defendant as his/her supplier and agreed to cooperate with law enforcement. In so doing, DSPOs directed the

²On April 6, 2005, defendant moved to suppress evidence. (D.I. 9) A suppression hearing was scheduled for June 9, 2005 (D.I. 12) and rescheduled to address the motion at bar. (D.I. 15, 17) By his motion to suppress, defendant challenged the stop, and search and seizure of his vehicle on December 31, 2003 as lacking reasonable suspicion and/or probable cause in violation of his 4th Amendment rights. (D.I. 9)

³To the best of the court's understanding, defendant is arguing that his arrest was based on information supplied to DSPOs on December 30 and 31, 2003 by a CI who, allegedly, engaged in phone conversations with defendant to arrange for the delivery of cocaine. (D.I. 13) Defendant recently learned that the individual he believes is the CI was arrested on December 31, 2003. (D.I. 19, Ex. A) As a result, defendant claims the information contained in police reports must be false because the CI could not have supplied the information before his arrest. Defendant submits that, if the information were false, there was no probable cause to warrant his arrest.

CI to contact defendant by telephone to order a certain amount of crack cocaine. For a little over a day, defendant and the CI allegedly negotiated the transaction over the telephone and agreed on a place to consummate the deal. These conversations were contemporaneously monitored and listened to by DSPOs.

4. When defendant arrived at the agreed upon exchange location, DSPOs tried to stop his car. In an attempt to elude arrest, defendant allegedly rammed his car into a police vehicle. As a result, defendant was arrested and the crack cocaine was found on the front car seat.

5. Plaintiff contends that disclosure of the CI's identity is unnecessary because defendant has failed to demonstrate that such information would assist in his efforts to suppress evidence. The focus of the inquiry, according to plaintiff, is whether there was reasonable suspicion that defendant was involved in criminal activity to warrant the stop of his car. Plaintiff argues that reasonable suspicion is present because officers listened to defendant negotiate a drug transaction with the CI. Since the officers were silent witnesses, there is no need to disclose the CI. Moreover, plaintiff does not intend to call the CI as a witness at defendant's trial because this testimony would not demonstrate defendant's guilt or innocence. The CI's testimony would only establish that phone calls related to the drug transaction were placed and received. This

information can be established through the testimony of those participating DSPOs.

6. In United States v. Roviato, 353 U.S. 53 (1957), the United States Supreme Court established guidelines to determine whether disclosure of a confidential informant's identity is warranted. The Court recognized "the government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." Id. at 59. However, the privilege is not without limitations. "Where the disclosure of an informer's identity, or of 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; accord United States v. Brown, 3 F.3d 673, 679 (3d Cir. 1993). Although there is no precise rule as to when disclosure is required, once a defendant sets forth a specific need for disclosure, the court should balance "the public interest in protecting the flow of information against the individual's right to prepare his defense." Id. at 62. The result of this balancing will depend upon the particular circumstances of the case, "taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony and other relevant factors." Id.

7. The Supreme Court, in McCray v. Illinois, 386 U.S. 300,

311 (1967), turned to whether an informant's identity should be disclosed for purposes of a preliminary proceeding where the issue is one of probable cause and not guilt or innocence. In McCray, the Court rejected the defendant's attempt to establish a mandatory disclosure rule. Instead, the Court upheld the trial court's ruling against disclosure of the informant's identity as a proper exercise of discretion. Id. at 314. Further, the Court noted that defendant's need to learn the identity of a CI is less compelling in a pretrial suppression hearing than at trial. Id. at 312.

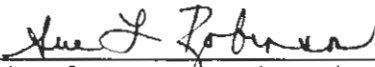
8. The United States Court of Appeals for the Third Circuit has found that, when applying the Roviaro standards, "one of three types of cases" may emerge. United States v. Jiles, 658 F.2d 194, 197 (3d Cir. 1981). First, there is the "extreme situation such as that in Roviaro itself, in which the informant has played an active and crucial role in the events underlying the defendant's potential criminal liability. In these cases, disclosure and production of the informant will in all likelihood be required to ensure a fair trial." Id. The second group is where the confidential informant was not an active participant or eye witness but rather a mere tipster. Generally, courts have found these facts do not warrant disclosure. See United States v. Moreno, 588 F.2d 490, 494 (5th Cir. 1978). The third category "falls between these two extremes and it is in this group that

the balancing becomes most difficult." Id. at 197.

9. Regardless of which Jiles category is implicated, the first step in assessing disclosure is to "ascertain what need, if any, the defendant has alleged for disclosure." The "burden is on the defendant" to demonstrate the need for disclosure. Id. at 197. Speculation that the disclosure will be helpful to the defendant's defense will not defeat the government's interest in protecting the identity of the CI. United States v. Bazzano, 712 F.2d 826, 839 (3d Cir. 1983). Trial courts are afforded substantial deference to decide on a case-by-case basis whether disclosure is warranted. United States v. Brown, 3 F.3d at 679.

10. Consistent with the case-by-case analysis mandated by Roviaro, the court finds that the CI's information is not crucial to the issue of guilt or innocence. Instead, the identification of the CI is related only to whether there was reasonable suspicion to stop the vehicle. In that regard, the officers involved in the arrest can testify at the suppression hearing as to the circumstances warranting the stop. Although the CI's active participation in the drug transaction that forms the underlying charges against defendant implicates the first Roviaro situation, the contemporaneous presence of DSPOs and their listening to those conversations means the CI does not exclusively possess information. To that end, the court is satisfied at this time that the identity of the CI need not be

disclosed. This conclusion, however, is subject to change should the facts adduced at the time of the suppression hearing so warrant.⁴



United States District Judge

⁴Defendant's contention that the arrest of the individual he claims is the CI on a date after his own arrest suggests that all of the information contained in the police reports is false can be explored at the suppression hearing.