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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1242

Filed: 21 August 2018

Mecklenburg County, Nos. 15CRS205783-85, 15CRS205787-88

STATE OF NORTH CAROLINA

v.

JAMIER STEVON HEARD, Defendant.

Appeal by Defendant from judgments entered 2-3 March 2017 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 May 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Michael T. Wood, for the State.

The Law Office of Sterling Rozear, PLLC, by Sterling Rozear, for defendant-appellant.

HUNTER, JR., Robert N. Judge.

Jamier Stevon Heard ("Defendant") appeals following jury verdicts convicting him of: (1) trafficking in cocaine by transportation; (2) trafficking in cocaine by possession; (3) possession of cocaine with the intent to sell or deliver; (4) possession of a firearm by a felon; (5) possession of marijuana; and (6) carrying a concealed

weapon. Following the verdicts, the trial court sentenced Defendant to the following consecutive terms: (1) 35 to 51 months imprisonment for a trafficking conviction; (2) 35 to 51 months imprisonment for possession with intent to sell or deliver, possession of marijuana, and the other trafficking conviction; and (3) 17 to 30 months imprisonment for possession of a firearm by a felon. On appeal, Defendant contends the trial court erred by denying his request to disclose the identity of a confidential informant ("CI") and this error violated his constitutional right to due process. We affirm the trial court's order denying Defendant's motion and find no error in the judgments.

I. Factual and Procedural Background

On 23 February 2015, a Mecklenburg County Grand Jury indicted Defendant for the following charges: (1) trafficking in cocaine by transportation; (2) trafficking in cocaine by possession; (3) possession of cocaine with intent to sell or deliver a controlled substance; (4) possession of a firearm by a felon; (5) felonious possession of a stolen firearm; (6) possession of a Schedule VI controlled substance; and (7) carrying a concealed weapon. On 17 April 2015, the State filed a Motion for Protective Order and a Motion for Discovery, requesting a protective order to withhold the identity of CIs. On 4 September 2015, Defendant filed a Motion for Immediate Production of the Identities of All CIs.

On 3 November 2016, the trial court held a hearing on Defendant's motion. Defense counsel stated the parties did not disagree as to any of the underlying facts. Thus, he did not offer any evidence and presented the following narrative in his argument to the court.

Officers investigated Defendant based on information received from a CI. The CI described Defendant's car and gave officers its license plate number. The officers then gave the CI some money and placed the CI near Defendant.[1] Defendant did not know whether the CI attempted to make a transaction. Officers surveilled Defendant and saw people meet with him. Defendant drove away, and officers followed him. Once Defendant stopped in the driveway of a home and got out of his car, officers made "voluntary contact" with him. Officers smelled an odor of marijuana coming from the passenger side window of Defendant's car and searched his car. In his car, they found cocaine and marijuana in the center console and a firearm under the driver's seat. Officers charged Defendant with "possession, transport, felony possession of a firearm, carrying a concealed gun, and possession of marijuana."[2]

Defense counsel argued the following: (1) the decision to disclose the CI's identity came down to "whether this confidential informant was a mere tipster or whether this confidential informant was . . . a participant in the activity[;]" (2) if the

[1] At the hearing, defense counsel did not present additional facts, such as where Defendant and the CI were.

[2] Defense counsel did not include the possession with intent to sell or deliver charge in his argument at the hearing.

CI "did attempt to make a transaction and failed," then it "certainly would be important information to the defense[;]" and (3) nondisclosure would violate Defendant's constitutional right to due process of law. Defense counsel asserted lack of knowledge as Defendant's only defense.

The State also did not present any evidence at the hearing and only offered argument. The State contended the CI was a tipster, the identity of the CI was not material to Defendant's case, and disclosure was not required.

On 4 November 2016, the trial court entered an order denying Defendant's motion. In the order, the trial court found Defendant offered no evidence and Defendant failed to present sufficient evidence to warrant disclosure.

On 28 February 2017, the court called Defendant's case for trial. The evidence at trial tended to show the following, which is an expansion of the brief narrative offered by counsel at the November 2016 hearing.

On 12 February 2015, officers conducted surveillance on Defendant based on a tip they received from the CI. Defendant parked at 1804 Merriman Avenue ("the house"). The house was alleged to be a location where narcotics were sold.[3] Four vehicles pulled up to the house, "one at a time," and approached Defendant's window for "a very brief time" or less than a minute. This behavior was consistent with drug activity. All four drivers and Defendant left around the same time.

[3] Detective Sidney Lackey testified the house is connected to Defendant's family.

Defendant left the area and pulled into the driveway of a different home, with two officers, Shawn Franklin and V.K. Simpson, directly behind him. Defendant got out of his car, and Officer Franklin called out to Defendant to "speak to him for just a moment." Officer Franklin explained they "[were] investigating a drug complaint[.]" Officer Simpson "indicated" to Officer Franklin that he smelled a strong odor of marijuana from the car. Officer Franklin then walked up to the car and noticed the odor himself. He also saw "small pieces of green vegetable matter," which he believed to be marijuana.

Officer Franklin searched the car. Inside, he found a large sum of money and a glass jar containing what appeared to be marijuana. He also found a bag, which contained "at least two clear baggies[.]" The individual baggies "appeared" to contain both powder and crack cocaine. Upon finding those items, he arrested Defendant.

Officer Franklin then continued searching the car and found "what appeared to be a large caliber handgun." Defendant sat in the back of the patrol car, while Officer Franklin "placed all the evidence on the front of [his] patrol car . . . ." A woman walked out of the house where officers arrested Defendant and spoke with him. To Officer Franklin, it appeared the woman and Defendant knew each other.

Defendant moved to dismiss the case for insufficient evidence. The trial court denied Defendant's motion. Defendant did not present any evidence.

The jury found Defendant guilty of: (1) trafficking in cocaine by transportation; (2) trafficking in cocaine by possession; (3) possession of cocaine with the intent to sell or deliver; (4) possession of a firearm by a felon; (5) possession of marijuana; and (6) carrying a concealed weapon.[4] The trial court sentenced Defendant to the following consecutive terms: (1) 35 to 51 months imprisonment for a trafficking conviction; (2) 35 to 51 months imprisonment for possession with intent to sell or deliver, possession of marijuana, and the other trafficking conviction; and (3) 17 to 30 months imprisonment for possession of a firearm by a felon. Defendant gave timely oral notice of appeal.

II. Jurisdiction

Defendant properly preserved his arguments for appeal by raising them before the trial court and obtaining an order on his motion. N.C. R. App. P. 10 (a)(1) (2017). *See State v. Mack*, 214 N.C. App. 169, 171, 718 S.E.2d 637, 638 (2011) (citation omitted) (holding defendant preserved appellate argument on his motion to disclose the identity of the State's CI by raising the issue below and obtaining a ruling). Additionally, Defendant specifically raised the constitutional argument at the hearing on his pretrial motion. *State v. Lloyd*, 354 N.C 76, 86-87, 552 S.E.2d 596, 607 (2001) (citation omitted) ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal.").

[4] The State voluntarily dismissed the felonious possession of a stolen firearm charge before trial.

III. Standard of Review

We apply two different standards of review to Defendant's arguments. The standard of review for alleged violations of constitutional rights is *de novo*. *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted); *see also Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) (citations omitted) ("[D]e novo review is ordinarily appropriate in cases where constitutional rights are implicated.").

"A trial court's order regarding matters of discovery are generally reviewed under an abuse of discretion standard." *State v. Hall*, 187 N.C. App. 308, 324, 653 S.E.2d 200, 211 (2007) (quotation marks and citation omitted). "An abuse of discretion occurs when a trial judge's ruling is manifestly unsupported by reason." *State v. Summers*, 177 N.C. App. 691, 697, 629 S.E.2d 902, 907 (2006) (quotation marks and citation omitted).

IV. Analysis

Defendant contends the trial court erred in denying his motion for disclosure and this error violated his constitutional right to due process. Whether reviewing disclosure of a CI as a regular discovery matter or as a constitutional violation, our courts have, for the most part, applied the same test, rooted in the United States Supreme Court's decision *Roviaro v. United States*, 353 U.S. 53, 1 L. Ed. 2d 639

(1957).[5] *Compare State v. Williams*, 319 N.C. 73, 83-84, 352 S.E.2d 428, 435 (1987) (applying *Roviaro* to an appellate constitutional argument); *State v. McEachern*, 114 N.C. App. 218, 220-23, 441 S.E.2d 574, 575-77 (1994) (same); *State v. Hodges*, 51 N.C. App. 229, 230-32, 275 S.E.2d 533, 534-35 (1981) (same), *with Mack*, 214 N.C. App. at 171-75, 718 S.E.2d at 638-40 (applying *Roviaro* where defendant's appellate argument was not based on constitutional rights); *State v. Withers*, 179 N.C. App. 249, 264-66, 633 S.E.2d 863, 872-74 (2006) (same); *State v. Grainger*, 60 N.C. App. 188, 190-91 298 S.E.2d 203, 204-05 (1982) (same). Additionally, for constitutional arguments, our Court held "a defendant who makes no defense on the merits, and who does not contend that the informant participated in or witnessed the alleged crime, has no constitutional right to discover the name of the informant." *State v. Gaither*, 148 N.C. App. 534, 541, 559 S.E.2d 212, 217 (2002) (citing *State v. Ketchie*, 286 N.C. 387, 392, 211 S.E.2d 207, 211 (1975)).

In *Roviaro*, the federal district court denied defendant's motion for a bill of particulars, requesting the identification of a CI. 353 U.S. at 55, 1 L. Ed. 2d at 642. The Court of Appeals affirmed the district court's denial. *Id.* at 56, 1. Ed. 2d at 642.

[5] We note there is a statute governing disclosure of CIs. N.C. Gen. Stat. § 15A-978 (2017). However, the statute only applies to situations "in which a defendant contends (1) that testimony relied upon to establish probable cause for the issuance of a search warrant was not truthful, and (2) that, as a result, the evidence seized pursuant to the search warrant should not be admitted at trial." *Gaither*, 148 N.C. App. at 540, 559 S.E.2d at 216 (emphasis omitted) (explaining when N.C. Gen. Stat. § 15A-978 applies).

The Supreme Court summarized the issue before it as whether the district court erred when:

> it allowed the Government to refuse to disclose the identity of an undercover employee who had taken a material part in bringing about the possession of certain drugs by the accused, had been present with the accused at the occurrence of the alleged crime, and might be a material witness as to whether the accused knowingly transported the drugs as charged.

Id. at 55, 1 L. Ed. 2d at 642.

The Supreme Court first discussed the Government's privilege to withhold the "identity of persons who furnish information of violations of law to officers charged with enforcement of that law." *Id.* at 59, 1 L. Ed. 2d at 644 (citations omitted). The purpose of this privilege is to protect the public's interest in effective law enforcement and to encourage citizens to communicate knowledge of crimes to law enforcement by preserving anonymity. *Id.* at 59-60, 1 L. Ed. 2d at 644.

However, the privilege is limited by "the fundamental requirements of fairness." *Id.* at 60, 1 L. Ed. 2d at 645. Thus, "[w]here the disclosure of an informer's identity . . . 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 61-62, 1 L. Ed. 2d at 645. To determine whether a CI's identity should be disclosed, the Supreme Court called "for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense" and said the balance would "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." *Id.* at 62, 1 L. Ed. 2d at 646.

Addressing the *Roviaro* rule, our State Supreme Court held "before the courts should even begin the balancing of competing interests which *Roviaro* envisions, a defendant who requests that the identity of a confidential informant be revealed must make a sufficient showing that the particular circumstances of his case mandate such disclosure." *State v. Watson*, 303 N.C. 533, 537, 279 S.E.2d 580, 582 (1981) (citations omitted).

The "[t]wo factors weighing in favor of disclosure are[:] (1) the informer was an actual participant in the crime compared to a mere informant, . . . and (2) the state's evidence and defendant's evidence contradict on material facts that the informant could clarify[.]" *State v. Newkirk*, 73 N.C. App. 83, 86, 325 S.E.2d 518, 520 (1985) (internal citations omitted). "Several factors vitiating against disclosure are whether the defendant admits culpability, offers no defense on the merits, or the evidence independent of the informer's testimony establishes the accused's guilt." *Id.* at 86, 325 S.E.2d at 320-21 (citation omitted).[6]

[6] While we understand without the CI's identity it may be difficult for Defendant to meet his burden, Defendant could present other witness testimony to show a contradiction between his evidence and the State's evidence. Such a contradiction would weigh in favor of disclosure.

Thus, we must first weigh the factors in favor of and against disclosure to determine whether Defendant made a "sufficient showing" before we apply the *Roviaro* balancing test.

1. Factors Weighing in Favor of Disclosure

At the outset, we must determine whether the CI was a "participant" in the crime or merely a "tipster." *See State v. Orr*, 28 N.C. App. 317, 319, 220 S.E.2d 848, 850 (1976). A "participant" is someone "who takes an active part in the commission of the offense." *Id*. at 319, 220 S.E.2d at 850. Simply being present for the transaction, even after introducing the parties, does not require the conclusion the CI was a participant. *See Mack*, 214 N.C. App. at 173, 718 S.E.2d at 639 (citation omitted). A "tipster" is someone "who supplies law enforcement officers with leads and information[.]" *Orr*, 28 N.C. App. at 319, 220 S.E.2d at 850.

Defendant contends the facts of this case are similar to *Roviaro*, in which the United States Supreme Court concluded the CI was a participant. 353 U.S. at 64-65, 1 L. Ed. 2d. at 647. In that case, the CI conducted a drug deal with Roviaro while a police officer rode in the trunk of the car. *Id*. at 57, 1 L. Ed. 2d at 643. This allowed the police officer to be present, to overhear the transaction, and to come out of the trunk at the right moment to find Roviaro with the drugs in his hand. *Id*. at 56-57, 1 L. Ed. 2d at 643. The CI was the "sole participant" other than Roviaro in the transaction charged. *Id*. at 64, 1 L. E. 2d at 647.

Turning to our case, the CI's presence near Defendant is insufficient evidence to conclude the CI "participated" in the crimes for which the State charged Defendant. *See State v. Gilchrist,* 71 N.C. App. 180, 182-83, 321 S.E.2d 445, 447-48 (1984). At the hearing, Defendant presented no evidence of the CI's active participation. *See State v. Allen*, 25 N.C. App. 623, 625, 214 S.E.2d 257, 259 (1975) (citation omitted) (stating the burden was on defendant to make a sufficient showing). We conclude the CI's role aligns with the definition of a "tipster" rather than a "participant." Accordingly, this factor does not weigh in favor of disclosure.

Next, we consider whether the State's and Defendant's evidence contradict on any material facts the CI could clarify. Defendant contends the CI's testimony *could* shed light on what Defendant knew and possibly aid in his defense. At the hearing, the State and Defendant agreed on the material facts. Defendant neither offered any evidence in support of his defense nor did he dispute any of the State's evidence at the hearing. Defendant also did not present evidence at trial. Because Defendant did not offer any evidence, there are no contradictions between the State's and Defendant's evidence. This factor does not weigh in favor of disclosure.

2. Factors Weighing in Favor of Nondisclosure

As to the first factor, if the accused admits guilt or does not deny guilt, nondisclosure will be upheld. *See State v. Cameron*, 283 N.C. 191, 193, 195 S.E.2d 481, 483 (1973) (citation omitted). Here, Defendant did not admit guilt or fail to deny

guilt; therefore, he did not make an admission of culpability. *Mack*, 214 N.C. App. at 173, 718 S.E.2d at 639. This factor does not weigh in favor of nondisclosure.

For the second factor, Defendant contends the CI's testimony would be helpful to his defense because the CI could testify as to whether Defendant knew drugs were in the car. At trial, Defendant asserted lack of knowledge as his only defense. Defendant did not offer any evidence to support this defense theory. Defendant also did not testify as to what he did or did not know regarding the drugs in the car. Additionally, there were at least two other witnesses Defendant could have called to testify. However, Defendant did not call those witnesses who may have been able to testify as to what he knew. *See Mack*, 214 N.C. App. at 174, 718 S.E.2d at 639-40 (concluding the second factor weighed in favor of nondisclosure when the helpfulness of the CI's testimony was speculative because defendant did not testify at trial, offered no evidence in support of his defense theory, and failed to present any testimony from other witnesses). Since Defendant provided no evidence, called no witnesses, and did not testify, Defendant's argument is speculative as to what the CI may have known or not known. Therefore, we conclude this factor weighs in favor of nondisclosure.

The third factor is whether there exists evidence independent of the CI's testimony which establishes Defendant's guilt. *Id.* at 174, 718 S.E.2d at 640 (citation omitted). Here, there are two testimonies, Officer Franklin's and Officer Simpson's,

as evidence independent of the CI's testimony which establish Defendant's guilt. Although the officers located Defendant based on information they received from the CI, they conducted their search based on their own observations. There is also testimony from three other officers who conducted surveillance on the day in question, as well as expert testimony confirming the drugs to be marijuana and cocaine. *See Mack*, 214 N.C. App. at 174, 718 S.E.2d at 640 (concluding the testimony of the undercover officer and of the analyst who confirmed the drugs was sufficient evidence independent of the CI's testimony establishing defendant's guilt). Accordingly, we conclude the testimony from these witnesses is evidence independent of the CI's testimony establishing Defendant's guilt and this factor weighs in favor of nondisclosure.

3. Weighing the Factors

We conclude the factors weigh in favor of nondisclosure. Because Defendant did not make a "sufficient showing," we need not balance, pursuant to *Roviaro*, the public's interest against Defendant's right to disclosure. *See Gaither*, 148 N.C. App. at 541, 559 S.E.2d at 216 (citation omitted). Likewise, Defendant did not meet his burden of showing he had a constitutional right to disclosure. *Id.* at 541, 559 S.E.2d at 217 (citation omitted). Accordingly, we hold the trial court neither abused its

discretion nor committed constitutional error by denying Defendant's motion for disclosure of the identity of the CI.[7]

V. Conclusion

For the foregoing reasons, we affirm the trial court's order denying Defendant's motion for disclosure of the CI's identity and find no error in the judgments.

NO ERROR.

Judges ELMORE and ZACHARY concur.

Report per Rule 30(e).

[7] At the hearing, Defendant, the State, and the trial court omitted the possession with the intent to sell charge. In its order, the court found "[t]he Defendant is charged with two counts of trafficking in cocaine, possession of a firearm by a felon, possession of a stolen firearm, misdemeanor possession of marijuana and misdemeanor carrying a concealed gun." **[R. 39]** We agree with Defendant this portion of the finding is in error. Thus, we strike this portion of the finding. However, the error in this finding does not alter our holding.