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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-888

Filed: 3 November 2020

Mecklenburg County, Nos. 18 CRS 215623, 215626

STATE OF NORTH CAROLINA

v.

WILLIAM TURNER BROOM, II

Appeal by defendant from judgments entered 15 April 2019 by Judge Gregory R. Hayes in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 March 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General John H. Schaeffer, for the State.*

*James R. Parish for defendant-appellant.*

ZACHARY, Judge.

Defendant William Turner Broom, II, appeals from judgments entered upon two drug-related offenses. On appeal, Defendant argues that “the trial court denied . . . Defendant a fair trial in failing to require the State to reveal the confidential informant” who assisted the State in its investigation. Although courts must be vigilant not to “abandon[ ] our constitutional moorings,” *Thornton v. United States*,

541 U.S. 615, 628, 158 L. Ed. 2d 905, 918 (2004) (Scalia, J., concurring) (citation omitted), nondisclosure of the informant's identity was proper in the case at bar. Defendant received a fair trial, free from error.

### **Background**

On 10 May 2018, Officer Christopher Newman, a member of the Charlotte-Mecklenburg Police Department and narcotics task force, was investigating a report that Defendant would be traveling with a large quantity of cocaine. Assisting with the investigation was a confidential informant associated with the York County (South Carolina) Multijurisdictional Drug Enforcement Unit, who ordered the cocaine from Morris Silver. The confidential informant reported that Silver would obtain the drugs at Defendant's barbershop, and that Defendant and Silver would then sell the drugs. On the date in question, Defendant and Silver met at Defendant's barbershop, and the two departed in Defendant's vehicle to conduct "some kind of transaction." The law enforcement plan was for Officer Newman to initiate a traffic stop of Defendant's vehicle while Defendant and Silver were en route to the location where the transaction was to take place.

Officer Newman stopped Defendant for speeding in a construction zone. Upon "smell[ing] a faint odor of marijuana," Officer Newman ordered Defendant and Silver to step out of the vehicle, and his drug-sniffing dog alerted to the presence of drugs. Officers discovered "marijuana shake laying on the floor," a white bag that appeared

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to contain a kilogram of cocaine “sticking out from the passenger seat,” and two cell phones. Defendant was arrested and taken to a police station. There, he waived his *Miranda* rights and was interviewed by Agent Matthew Taylor of the Drug Enforcement Agency. A Mecklenburg County grand jury indicted Defendant for trafficking in cocaine by possession of 400 grams or more, and trafficking in cocaine by transportation of 400 grams or more.

On 8 April 2019, a hearing on Defendant’s motion to disclose the confidential informant’s identity was held before the Honorable Gregory R. Hayes in Mecklenburg County Superior Court. Agent Taylor testified as follows: law enforcement personnel directed the confidential informant to order the kilogram of cocaine that Defendant was transporting. However, the informant was not present in Charlotte or “at any location involved in the investigation” on 10 May 2018. Prior to the arrest, the informant had indicated that Defendant and Silver would retrieve the cocaine from Defendant’s barbershop and then make the sale. The officers’ surveillance of Defendant confirmed the informant’s predictive statement—they observed Silver and Defendant leaving Defendant’s barbershop in Defendant’s vehicle before initiating the traffic stop.

Following his arrest, Defendant admitted to having cocaine and a firearm at his residence. A subsequent search of his home revealed not only cocaine and a

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firearm, but also items “used to manufacture and . . . distribute narcotics.” The trial court denied Defendant’s motion.

A jury trial commenced the following day. The jury found Defendant guilty of the charges of trafficking in cocaine by possession of 400 grams or more and trafficking in cocaine by transportation of 400 grams or more. The trial court sentenced Defendant to 175-222 months in the custody of the North Carolina Division of Adult Correction, and imposed a \$250,000 fine. In addition to his prison sentence, the mandatory fine, and pretrial jail fees, the trial court imposed a \$600 laboratory fee and \$352.50 in other court costs to be entered as a civil judgment. Defendant gave oral notice of appeal in open court.

**Discussion**

Defendant contends that the trial court erred by denying his pretrial motion to disclose the identification of the State’s confidential informant. Defendant maintains that the trial court’s error deprived him of his constitutional right to a fair trial, because “[t]he informant was the only witness who might have testified to [D]efendant’s possible lack of knowledge of the contents of what he was transporting.” We disagree.

I.

The seminal case regarding the government’s privilege to withhold disclosure of the identity of its confidential informants is *Roviaro v. United States*, 353 U.S. 53,

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1 L. Ed. 2d 639 (1957). The purpose of the privilege is to safeguard the government's sources and to shield persons who contribute information that may be used to facilitate the prosecution of criminal acts. *See State v. Ketchie*, 286 N.C. 387, 390, 211 S.E.2d 207, 209 (1975). Although "the State has the right to withhold the identity of persons who furnish information to law enforcement officers," *State v. Leazer*, 337 N.C. 454, 459, 446 S.E.2d 54, 57 (1994), fundamental fairness requires that "[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," *State v. Newkirk*, 73 N.C. App. 83, 86, 325 S.E.2d 518, 520 (citation omitted), *disc. review denied*, 313 N.C. 608, 332 S.E.2d 81 (1985); *cf. State v. Gaither*, 148 N.C. App. 534, 540, 559 S.E.2d 212, 216 (2002) (reviewing the defendant's appeal under the analysis set forth in *Roviaro* where the "case involve[d] a tip from a confidential informant that [wa]s relied upon by the police as the basis for stopping and detaining a defendant").

The trial court must balance the interests supporting the privilege with the accused's right to prepare his defense. *See State v. Watson*, 303 N.C. 533, 536-37, 279 S.E.2d 580, 582 (1981). "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.” *Id.* at 537, 279 S.E.2d at 582 (citation omitted).

Thus, the informer’s privilege is qualified, not absolute. *See id.* Nonetheless, the defendant must make a sufficient showing that disclosure is necessary. *See State v. Johnson*, 81 N.C. App. 454, 457, 344 S.E.2d 318, 320, *disc. review denied*, 317 N.C. 339, 346 S.E.2d 151 (1986). A naked assertion of one’s right to confront the informant will not suffice: “When the defendant fails to make a sufficient showing of need to justify disclosure of the informant’s identity he acquires no greater rights to compel disclosure of details about the informant than he initially had.” *Id.* (citation omitted). However, if the defendant makes “a plausible showing of the materiality of the informer’s testimony,” the trial court must then “balance the public’s interest with [the] defendant’s right to present his case.” *State v. Valladares*, 165 N.C. App. 598, 606, 599 S.E.2d 79, 85 (citation and internal quotation marks omitted), *disc. review denied*, 359 N.C. 196, 608 S.E.2d 66 (2004).

Though the courts must explore “the particular circumstances of each case” when determining whether to apply the privilege, *Watson*, 303 N.C. at 537, 279 S.E.2d at 582 (citation omitted),

[t]wo factors weighing in favor of disclosure are [whether] (1) the informer was an actual participant in the crime compared to a mere informant, and (2) the [S]tate’s evidence and [the] defendant’s evidence contradict on material facts that the informant could clarify[.] 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.

*Newkirk*, 73 N.C. App. at 86, 325 S.E.2d at 520-21 (citations and internal quotation marks omitted).

Accordingly, we initially examine whether Defendant has shown that the particular circumstances of his case mandate the disclosure of the identity of the confidential informant.

## II.

We first consider the factors weighing *in favor* of disclosure of the confidential informant's identity. Defendant argues that the facts of his case "clearly indicate the informant was a participant in the incident[.]" A " 'participant' is one who takes [an] active part in the commission of the offense." *State v. Orr*, 28 N.C. App. 317, 319, 220 S.E.2d 848, 850 (1976). "By virtue of his participation, the informer is a witness to material and relevant events." *Id.* at 320, 220 S.E.2d at 850 (internal quotation marks omitted). Conversely, when the informant is a mere "tipster"—an individual whose only role is to provide law enforcement with "leads and information"—disclosure is not required. *Id.* at 319, 220 S.E.2d at 850.

Here, the confidential informant was not present at the drug transaction, nor "at any location involved in the investigation" on the day of Defendant's arrest. Thus, it is clear that the confidential informant was not a participant.

However, “[t]he privilege of nondisclosure . . . ordinarily applies where the informant is neither a participant in the offense, *nor helps arrange its commission*[.]” *State v. Mack*, 214 N.C. App. 169, 171, 718 S.E.2d 637, 638 (2011) (emphasis added) (citation omitted). Although not a participant during the controlled buy itself, the confidential informant ordered the drugs that Defendant was attempting to deliver when he was stopped by Officer Newman. In that the confidential informant helped to arrange the drug transaction, this factor weighs in favor of disclosure of the informant’s identity.

Another factor concerns whether “the [S]tate’s evidence and [D]efendant’s evidence contradict on material facts that the informant could clarify[.]” *Newkirk*, 73 N.C. App. at 86, 325 S.E.2d at 520. Here, “there has been no forecast as to how the identity of the confidential informant could provide useful information for [Defendant] in order to clarify any contradiction between the State’s evidence and [Defendant’s] denial.” *State v. Dark*, 204 N.C. App. 591, 593, 694 S.E.2d 502, 504, *disc. review denied*, 364 N.C 327, 700 S.E.2d 928 (2010). Moreover, Defendant did not put forth any evidence at trial, and therefore, there was no contradiction between the State’s and Defendant’s evidence. This factor does not weigh in favor of disclosure.

### III.

Regarding the factors weighing *against* disclosure of the confidential informant’s identity, we begin by noting that while Defendant did not explicitly admit



culpability, he did make several statements to Agent Taylor suggesting that he knowingly transported cocaine, including a statement that this was “the first time he’s ever had something like that on [his] person.” Additionally, and as previously noted, because Defendant called no witnesses and did not testify, his assertion on appeal that the confidential informant’s testimony might have affected the outcome of the trial amounts to nothing more than conjecture. Although it is evident that the confidential informant “only dealt with . . . Silver and not [Defendant],” the significance of that fact to Defendant’s argument is not clear. Moreover, Defendant does not explain how the confidential informant would know whether Defendant was aware of “the contents of what he was transporting.” Thus, these factors weigh against disclosure of the informant’s identity.

Finally, we consider whether there is “evidence independent of the informer’s testimony [that] establishes the accused’s guilt.” *Newkirk*, 73 N.C. App. at 86, 325 S.E.2d at 520-21. Here, the jury (1) heard testimony that Defendant consented to a search of his home, during which law enforcement officers found cocaine, a gun with live rounds, marijuana, and paraphernalia such as “baggies, scales, [and] vacuum sealers”; (2) watched a video recording in which Defendant strongly suggested his culpability, including stating that this was “the first time he’s ever had something like that on [his] person”; (3) heard testimony from Agent Taylor that Defendant, who waived his *Miranda* rights, never stated that the cocaine was not his, that it belonged

to Silver, or that he was unaware of how the cocaine got into his car; and (4) heard testimony from an expert in the field of forensic chemistry confirming that the white substance seized from Defendant's car was cocaine. There being evidence independent of the informant's testimony establishing Defendant's guilt, this factor also weighs against disclosure of the informant's identity.

IV.

After reviewing the record and arguments of the parties, the only factor weighing in favor of disclosure was the confidential informant's role in setting up the drug transaction. However, the mere arrangement of a transaction does not warrant disclosure of the informant's identity in the presence of other evidence establishing Defendant's guilt, and where none of the other factors weigh in favor of disclosure. *See Dark*, 204 N.C. App. at 593-94, 694 S.E.2d at 504. Accordingly, "[D]efendant failed to make a sufficient showing that the particular circumstances of his case mandate disclosure of the [confidential informant's] identity[.]" *Mack*, 214 N.C. App. at 175, 718 S.E.2d at 640 (citation and internal quotation marks omitted). This obviates the need to "balance the competing interests which *Roviaro* envisions." *Id.* (citation and internal quotation marks omitted).

**Conclusion**

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For the aforementioned reasons, the trial court did not err by denying Defendant's motion to compel disclosure of the informant's identity. Defendant received a fair trial, free from error.

NO ERROR.

Judges INMAN and YOUNG concur.

Report per Rule 30(e).