

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	No. CR-381-2019
	:	
vs.	:	
	:	Omnibus Pretrial Motion
DAVID DANIELS, JR.	:	
Defendant	:	

OPINION AND ORDER

By way of background, Defendant is charged with delivery of a controlled substance, possession with intent to deliver, possession of a controlled substance and criminal use of a communication facility. Defendant filed an omnibus pretrial motion which consisted of a motion for disclosure of the identity of the confidential informant and a petition for writ of habeas corpus.

In his motion for disclosure of the identity of the confidential informant, Defendant asserts that because the confidential informant was the sole person present for the alleged delivery, the name of the confidential informant in this case is discoverable because she is an eyewitness to the alleged events. During the hearing, Defendant also argued that it is a possibility that the Public Defender's office, which represents Defendant, may also possibly represent the confidential informant which would constitute a conflict and negatively affect counsel's ability to fairly represent their clients if the identity remains unknown.

On November 15, 2018, Detective Caschera was conducting a controlled buy which allegedly involved Defendant. Detective Caschera met a confidential informant at a predetermined location and subsequently searched her to negate the presence of any drugs, contraband or currency; none were found. The confidential informant had allegedly called Defendant, at the cellular number (570) 494-7127, to arrange the sale or purchase of \$100.00

worth of cocaine. Defendant allegedly agreed to the sale and directed the confidential informant to 716 Grace St., Apartment 2. The confidential informant was provided with \$100.00 in pre-recorded police funds. Detective Caschera then transported the confidential informant in his undercover vehicle to the location given. Upon arrival, the confidential informant entered the front door of the address given and then exited and returned to the undercover police vehicle. Detective Caschera immediately confiscated the suspected cocaine and transported the confidential informant back to the predetermined location. The confidential informant was searched once again to negate the presence of any drugs, contraband or currency and none were found. Detective Caschera conducted an audio debrief with the confidential informant regarding this investigation shortly thereafter.

The Commonwealth asserts that they possess a “qualified privilege to withhold the identity of a confidential source.” *Commonwealth v. Marsh*, 606 Pa. 254, 260, 997 A.2d 318, 321 (Pa. 2010)(citing *Commonwealth v. Bing*, 551 Pa. 659, 713 A.2d 56, 58 (Pa. 1998); *Commonwealth v. Roebuck*, 545 Pa. 471, 681 A.2d 1279, 1283 n.6 (Pa. 1996)). In order to overcome this privilege, a defendant must establish, pursuant to Rule 573(B)(2)(a)(i), that the information sought is “material to the preparation of the defense and that the request is reasonable.” *Marsh*, 997 A.2d at 321(citing *Roebuck*, 681 A.2d at 1283). The Commonwealth also asserts that it is the burden of Defendant to prove that the confidential informant possesses evidence that could help Defendant and cannot be provided by anyone else. *Roebuck*, supra. at 1285. The Commonwealth further asserts that if the identity of the confidential informant is exposed, the less likely it is that a confidential informant will work with the Commonwealth in the future due to fear of her own safety.

“Only after the defendant has proven that the identity of the confidential informant is material to the defense that the trial court is required to exercise its discretion to determine whether the information should be revealed based on balancing factors, which are initially weighed in favor of the Commonwealth.” *Marsh*, supra at 321-322 (citing *Bing*, 713 A.2d at 58; *Commonwealth v. Herron*, 475 Pa. 461, 380 A.2d 1228 (Pa. 1977)).

The factors the court must consider are as follows:

A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. 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. In these situations[,] the trial court may require disclosure, and, if the Government withholds the information, dismiss the action.

[N]o fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting 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.

Commonwealth v. Carter, 427 Pa. 53, 233 A.2d 284, 287 (Pa. 1967) (quoting *Roviaro v. United States*, 353 U.S. 53, 60-62, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957)).

Defendant first argues that his reasons given for acquiring the disclosure of the confidential informant’s identity are material to forming his defense. Defendant’s counsel stated that the Public Defender’s office represents several female confidential informants which they argue poses a dilemma. Defendant’s counsel has indicated that they are aware that the confidential informant in question is a female, which potentially imposes a burden on them in effectively doing their job. The dilemma being that if the Public Defender’s office represents the confidential informant in question and that confidential informant has pending charges, not

knowing this particular confidential informant's identity until they testify will put defense counsel in an uncomfortable position because they are unsure if they would be able to cross-examine the confidential informant without jeopardizing the individual posing as the confidential informant to self-incrimination.

In weighing the required factors and reviewing Defendant's first argument, the Court examines a few points. The Public Defender's office is constantly burdened with hundreds of cases and clients at a time. It is not unlikely that the Public Defender's office represents individuals who are also posing as a confidential informant, usually to assist with their own pending charges. Defendant raises a good point that if the confidential informant is represented by the Public Defender's office and the time comes for them to testify, upon cross-examination, Defendant's counsel would be put in a situation where they would have one of two options: have the confidential informant potentially incriminate herself in regards to her pending charges or not ask the questions needed during cross-examination resulting in the defendant not receiving a fair trial. If a potential conflict of interest was the only basis for Defendant's request, the Court might be inclined to have the Commonwealth reveal the identity of the confidential informant to the Court in camera at which point the court could examine the file of the confidential informant's charges to determine whether he or she was represented by an attorney from the Public Defender's office. If so, the Court could appoint a conflict attorney to alleviate this issue.

Defendant additionally argues, however, that the identity of the confidential informant and the information that the confidential informant possesses cannot be obtained by any other individual because the confidential informant was the sole individual present during the alleged transaction. Defendant asserts that even though it was stated by Detective Caschera at the

preliminary hearing that this particular confidential informant had had “dealings with Mr. Daniels, Sr., and Mr. Daniels, Jr., on previous occasions” (*Prelim. Hearing Transcript, March 5, 2019*, at 9), Defendant has indicated to his counsel that he has no insight as to who the confidential informant may be and it is nearly impossible to retrieve any information from Mr. Daniels, Sr., because according to defense counsel, he is “borderline mentally disabled.”

The Court finds this argument to be a compelling one. The alleged facts of the case indicate that the confidential informant went into the address, allegedly given by Defendant, retrieved the cocaine and then returned to the undercover police vehicle. At least at this time, there is no evidence or testimony to indicate that anyone other than the confidential informant witnessed the alleged drug transaction with Defendant or if Defendant was even the actual seller inside the residence. In other words, the Commonwealth’s only evidence linking Defendant to this crime is the information provided by the confidential informant. Becoming aware of this confidential informant’s identity would definitely assist in allowing Defendant to attempt to recall his version of the alleged transaction. In discovering the confidential informant’s identity, Defendant would possess the ability to form a proper defense which makes the disclosure a reasonable request.

Defendant asserts in his petition for writ of habeas corpus that: (A) testimony presented at the preliminary hearing was solely hearsay from Detective Caschera; (B) the Commonwealth did not indicate whether the confidential informant would be available at the time of trial; (C) the Commonwealth did not provide the name of the confidential informant at the preliminary hearing; (D) the detective did not observe the transaction nor the alleged phone call to Defendant setting up the transaction; and (E) no evidence presented could verify that Defendant was the person from whom the confidential informant purchased cocaine on November 15,

2018. Defendant requests that the charges be dismissed due to a lack of a showing of prima facie at the preliminary hearing.

A petition for habeas corpus is the proper way for a defendant to challenge the sufficiency of the Commonwealth's evidence pretrial. *Commonwealth v. Wyatt*, 203 A.3d 1115, 117 (Pa. Super. 2019). In order to show that a prima facie case exists, the Commonwealth must produce evidence of every material element of the charged offense as well as the defendant's complicity. *Id.*; Pa.R.Crim.P. 542(D).

Addressing issue (A) from Defendant, the Court agrees that the testimony provided was hearsay. However, hearsay as evidence has been determined to be sufficient to establish any element of a crime during a preliminary hearing. *Commonwealth v. Ricker*, 120 A.3d 349, 354 (Pa. Super. 2015). Although there have been prior speculations and disagreements regarding when hearsay is admissible, it was found that hearsay evidence alone can establish a prima facie case. *Id.* at 357. Additionally, the hearsay evidence provided by the Commonwealth was sufficient to establish a prima facie case that a crime had been committed and that Defendant committed it.

In accordance with the first issue, issue (D) from Defendant is tied into the hearsay argument. Detective Caschera, at the preliminary hearing, testified to the information that was communicated to him by the confidential informant during a controlled buy set up by the police. As previously stated, his testimony is in fact hearsay, but it is allowed under the circumstances during a preliminary hearing. *Id.*

Addressing issue (B) from Defendant, the Court does not find this argument persuasive. While hearsay is admissible to establish a prima facie case at a preliminary hearing, it is generally inadmissible at trial. *Alwine v. Sugar Creek Rest, Inc.*, 883 A.2d 605, 609 (Pa. Super.

2005). Hearsay is “a statement, other than a statement made by the declarant while testifying under oath, which is offered for the truth of the matter asserted.” *Id.* Hypothetically, in the midst of a trial, while the detective could still testify as to what he witnessed regarding the alleged offense that occurred, nothing he said regarding what the confidential informant informed him of would be admissible at that point because it would be hearsay. Accordingly, the Commonwealth needs the confidential informant to testify. During the hearing for this matter, the Commonwealth represented that confidential informant was available and would testify at trial.

Addressing issue (C) from Defendant, the Court sufficiently addressed this issue when it discussed Defendant’s motion for disclosure of the identity of a confidential informant.

Finally, addressing issue (E) from Defendant, the Court must reflect back to what the purpose of a preliminary hearing is. Defendant allegedly selling cocaine to the confidential informant was not witnessed by anyone other than the confidential informant. However, there was a transaction for the purchase of cocaine, the alleged controlled substance was given to the detective, and the transaction was set up through a phone; therefore, multiple criminal offenses have been committed by someone. Additionally, while at this time there is minimal testimony and evidence to prove that Defendant was the other individual involved in the transaction of cocaine, the testimony provided by the detective is sufficient enough to link Defendant to the crime at this point. Additionally, the address where the confidential informant purchased the cocaine and was directed to go to was confirmed to be occupied by Defendant’s father according to the detective’s testimony at the preliminary hearing. *Prelim. Hearing Transcript, March 5, 2019, at 5.* The Court must note that Detective Caschera testified that while he was not present for the alleged transaction by Defendant, he did drive the confidential informant to

the address allegedly provided by Defendant via a phone call and witnessed the confidential informant enter and exit the apartment.

The Court has reviewed and examined all arguments presented for both motions filed by Defendant. On the first motion, the Court, after weighing the factors and reviewing the testimony and evidence presented, shall rule in favor of Defendant for his motion to disclose the identity of a confidential informant. The Court concludes that Defendant presented multiple reasonable arguments for why the disclosure is necessary. On the second motion, while the Court understands the arguments and concerns raised by Defendant, the Court finds that those arguments presented hold no merit and will deny Defendant's petition for writ of habeas corpus.

ORDER

AND NOW, this 9th day of August, 2019, following a hearing and argument, Defendant's motion to compel the disclosure of the confidential informant is **GRANTED**. Defendant's petition for habeas corpus is **DENIED**.

By The Court,

Marc F. Lovecchio, Judge

cc: Lindsay Sweeley, Intern for Judge Lovecchio (via email)
Nicole Spring, Esquire (PD)
Joseph Ruby, Esquire (ADA)
Gary Weber, Esquire (Lycoming Reporter)