

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,  
PENNSYLVANIA**

<b>COMMONWEALTH OF PENNSYLVANIA</b>	:	
	:	<b>CR-257-2019</b>
	:	
<b>vs.</b>	:	
	:	<b>CRIMINAL DIVISION</b>
<b>TYREK K. RUSH,</b>	:	
<b>Defendant</b>	:	

**OPINION AND ORDER**

AND NOW, this 4<sup>th</sup> day of **June, 2021**, a bench trial was scheduled for this date regarding drug related charges brought against the Defendant. During direct examination of Detective Tyson Havens, one of the Commonwealth’s witnesses, Detective Havens identified an individual by the name of Samantha Turner as the Confidential Informant (hereinafter “CI”) involved in the alleged purchase of drugs from the Defendant. On cross-examination, Detective Havens testified that the CI was not present to testify and that her whereabouts were unknown. After the Commonwealth rested, Defendant made an oral motion to continue the trial in order to allow the defense an opportunity to locate the CI and potentially subpoena her to testify on the Defendant’s behalf. Defense Counsel explained that the CI’s identity was unknown to him until Detective Havens stated her name during his testimony and was unaware the Commonwealth did not intend to call the CI as a witness. The Commonwealth opposed the motion and argued that the Defendant had almost three years to ask the Commonwealth to identify the CI but failed to do so.

When the Commonwealth does not call an eyewitness to the stand, it is required to “apprise the defense of the witness's name and whereabouts at trial, unless the defense is

able or should have been able to procure the witness unaided.” *Com. v. Allen*, 429 A.2d 1113, 1116 (Pa. Super. 1981), *Com. v. Gray*, 271 A.2d 486, 490 (Pa. 1970), *cert. denied*, 402 U.S. 967 (1971). If, however, the defense is able or should be able to identify and procure a witness independently, then the Commonwealth has no obligation to inform him of the witness’s whereabouts. *Allen*, 429 A.2d at 1116. “[T]he purpose of the requirement that the Commonwealth apprise the defense of the eyewitness's name and whereabouts, is to allow the defense to secure the witness at trial.” *Id.* Of course, as it relates to confidential informants, the defense must demonstrate that the necessity of the disclosure of a confidential informant’s identity outweighs the public interest in protecting such a person’s identity. *Com. v. Jackson*, 598 A.2d 568, 580 (Pa. Super. 1991).

In *Allen*, a case relating to robbery charges, the Commonwealth did not disclose to the defense the whereabouts of a victim-eyewitness and did not intend to call the witness at the time of trial. *Allen*, 429 A.2d at 1116. Although the Commonwealth failed to inform the Defendants that it would not call the eyewitness to the stand and failed to inform them of the eyewitness’s whereabouts, the Court nevertheless affirmed the trial court’s denial of the defendants’ motion for a demurrer when “the defendants never requested the Commonwealth to inform them of [the eyewitness’s] whereabouts; when the defendants learned that [the eyewitness] would not be called as a witness, they never requested a continuance to secure [the eyewitness] at trial; and they never stated that they wished to call [the eyewitness] as a witness.” *Id.* The Court held that the purpose of requiring the Commonwealth to disclose a witness’s identity and whereabouts is to allow a Defendant the opportunity to call him as a witness at trial and, where “the record does not show that the

defendants wished to secure [the eyewitness] at trial, the lower court did not err by denying the motion for a demurrer.” *Id.* at 1117.

Here, the Commonwealth has waived the issue of whether disclosing the identity of the CI is against public policy when its witness identified her by name during direct examination. The Defendant’s entire argument rests on the assertion that it he did not commit the crime with which he is charged and therefore, there is no reason to believe that the Defendant would already know the identity of the CI. The Defendant argues that since he would not have otherwise known about the CI’s identity, the Commonwealth should have informed him of such as well as her whereabouts, or the lack of the CI’s whereabouts if unknown, if it was not intending to call her as a witness. As explained in *Allen*, even when the Defendant is not apprised of the identity and location of an eyewitness, the defense must show in some way that he may want to call the witness to the stand, such as requesting a continuance. Unlike the Defendants in *Allen*, the Defendant here did just that.

For these reasons, Defendant’s continuance request is granted for the purpose of locating and exploring the option of subpoenaing the CI as a witness for the defense. Defense Counsel is cautioned that in the future, it is expected that he be proactive in identifying and locating witnesses, instead of assuming the Commonwealth will have them available at the time of trial.

This trial is continued to **July 22, 2021 from 1:30 p.m. to 5:00 p.m. in Courtroom No. 3 of the Lycoming County Courthouse**. No additional continuances will be granted. The trial will resume with the Defendant’s case-in-chief. The Court notes that, since this trial was scheduled for an entire day, defense counsel was given an opportunity to present any fact witnesses that were present on June 1, 2021 and chose not to do so. Therefore, no continuances will be granted due to a defense witness not being available to testify during the Defendant’s case-in-chief on July 22, 2021.

By the Court,

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Ryan M. Tira, Judge

RMT/ads

CC: DA (MS)

Peter Campana, Esq.

April McDonald, CST

Gary Weber, Esq.

Alexandra Sholley – Judge Tira’s Office