2013 WL 8020209 (Fla.Cir.Ct.) (Trial Order)
Circuit Court of Florida.
Eleventh Judicial Circuit
Miami-dade County

STATE OF FLORIDA, Plaintiff,
v.
Julio GARCIA, Nathan King, and Norberto Figueroa, Defendants.

No. F12-7405.
December 20, 2013.

Order

Miguel M. De La O, Judge.

***1 THIS CAUSE** is before the Court on Defendants, Julio Garcia ("Garcia") and Norberto Figueroa's ("Figueroa"), multiple Motions to Compel Discovery regarding the Confidential Informant ("CI") in this case (collectively referred to in the singular as the "Motion"). The Court has reviewed the Motion, the State of Florida's ("State") Response, the Defendants' Reply, and heard argument of counsel.

"The State, without question, enjoys a limited privilege to withhold the identity of its confidential informants." *State v. Diaz*, 678 So. 2d 1341, 1344 (Fla. 3d DCA 1996) (citing *State v. Hassberger*, 350 So. 2d 1, 2 (Fla. 1977)). The United State Supreme Court set forth the public policy behind this privilege in *Roviaro v. United States*, 353 U.S. 53 (1957), holding:

The purpose of the privilege [of nondisclosure of a confidential informant] is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

Id. at 57.

The privilege is limited. It will not bar disclosure of a confidential informant's identity "[w]here the disclosure of an informer's identity, or the contents of his communication, [1] is relevant and helpful to the defense of an accused, or [2] is essential to a fair determination of a cause." *Roviaro*, 353 U.S. at 60-61. The burden is on the defendant seeking disclosure of the confidential informant to establish the existence of one or both exceptions. *See State v. Diaz*, 678 So. 2d 1341, 1344 (Fla. 3d DCA 1996).

Garcia and Figueroa have not set forth any viable defense to the charges filed against them. On this basis alone, they have failed to satisfy the first *Roviaro* exception. *See Diaz*, 678 So. 2d at 1345 ("failure to set forth a valid defense ... is sufficient alone to defeat his ability to seek disclosure of the tipster under the first *Roviaro* exception").

The second *Roviaro* "exception does not require a defendant to proffer any valid defense to the charges or demonstrate that the confidential informant has exculpatory evidence for the defense." *Id.* However, this exception "is not met when the informant merely was present during the illegal drug transaction with which the defendant was charged or merely acted as a tipster, furnishing a lead to law enforcement." *State v. Rivas*, 25 So. 3d 647, 650-51 (Fla. 4th DCA 2010); *see Miller v. State*, 729 So. 2d 417, 420 (Fla. 4th DCA 1999) ("The fact that the confidential informant was present during the drug transaction does not automatically compel his disclosure.").

On the other hand, “disclosure of a confidential informant is absolutely required where the defendant is charged with selling or delivering illegal drugs to the subject informant.” *State v. Zamora*, 534 So. 2d 864, 869 (Fla. 3d DCA 1988) (citing *Roviaro)*.

The Court in *Roviaro* specifically noted that the informant assisted law enforcement in setting up the drug transaction and played a prominent role in it; the informant might be able to provide testimony to support a defense of entrapment; the informant was the only witness who might be able to testify as to the defendant's knowledge or lack of knowledge of the contents of the package; the Government relied upon the defendant's conversation with the informant, which took place in the informant's car, as evidence inculpating the defendant without providing the defendant with the ability to confront that evidence; and the informant was the sole participant other than the defendant.

***2** *State v. Simmons*, 944 So. 2d 1122, 1128 (Fla. 3d DCA 2006).

Such is the case here. The Defendants contend, and the State does not dispute, that the CI was an active participant in the alleged drug transaction. Indeed, the State did not object to the Court compelling the disclosure of the CI. The parties dispute, however, the contours of the disclosure which the Court should order.

First, the Defendants want more information identifying the CI than just his name. In particular, the Defendants seek the CI's date of birth, social security number, and home address.

When the credibility of a witness is in issue, the very starting point in “exposing falsehood and bring out the truth” through cross examination must necessarily be to ask the witness who he is and where he lives. The witness's name and address open countless avenues of in-court examination and out-of-court investigation.

Smith v. Illinois, 390 U.S. 129, 131 (1968).

The State's complaint that Defendants seek to engage in a mere fishing expedition is not dispositive. The Constitution entitles defendants to undertake such an expedition, within bounds, when their liberty is at stake.

Cross-examination of a witness is a matter of right. Its permissible purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood; that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment; and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased. Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what fact a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. In this respect a summary denial of the right of cross-examination is distinguishable from the erroneous admission of harmless testimony. The present case, after the witness for the prosecution had testified to uncorroborated conversations of the defendant of a damaging character, was a proper one for searching cross-examination. The question, ‘Where do you live?’ was not only an appropriate preliminary to the cross-examination of the witness, but on its face, without any such declaration of purpose as was made by counsel here, was an essential step in identifying the witness with his environment, to which cross-examination may always be directed.

***3** *Alford v. United States*, 282 U.S. 687, 691-93 (1931) (citations omitted).

The Court must, however, counterbalance the Defendant's right to confront with the safety of the CI.

The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." The right of confrontation, which is secured for defendants in state as well as federal criminal proceedings, "means more than being allowed to confront the witness physically." Indeed, " '[t]he main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination*." ' Of particular relevance here, "[w]e have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.

Delaware v. Van Arsdall, 475 U.S. 673, 678-79 (1986) (citations omitted).

In short, if there is one fixed rule set forth in *Roviaro* it is that "no 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.

Roviaro, 353 U.S. at 62.

In considering the total circumstances of this case, as *Roviaro* requires, the Court must take notice that since it first compelled the State to disclose the CI to the Defendants, the material significance of the CI has changed because Nathan King ("King"), a co-Defendant, has plead guilty and agreed to testify against the Defendants.

The Court recognizes the State's argument that King's testimony decreases its reliance on the CI, but does not view King's testimony as decisive. That is, King is a witness that the Defense can (and will) challenge, just as it can challenge any other witness the State produces. It may, in fact, be relatively easier for the Defense to question King's testimony than the CI's because the benefits which King stands to obtain from his agreement with the State are arguably more valuable than the compensation given the CI. This is all to say that King's re-positioning as a State witness alters the calculation this Court must make, but does not diminish the value of the CI to the point where the Court could deny disclosure of the CI without violating the principles enunciated in *Roviaro*. King is one more arrow in the State's quiver, the CI is another.

***4** With these principles in mind, the Court thus proceeds to evaluate the Defendants' request for disclosure of information concerning the CI.

A. HOME ADDRESS AND DATE OF BIRTH.

Without question, this is the information which the State most strenuously and understandably objects to disclosing to the Defense. But this is the easiest decision - at this point, anyway - for this Court to make because the State has not yet met its burden, and cannot do so absent an evidentiary hearing.

The Florida Supreme Court has adopted the personal safety exception articulated in *United States v. Palmero*, 410 F.2d 468 (7th Cir. 1969). [1]

We approve of the "personal safety" exception to the otherwise ordinary duty of the State to allow the defendant full access to its witnesses on cross-examination, and of the procedure outlined in *Palermo*. We stress, however, that this exception is an exceedingly narrow one, and that all doubts must be resolved in favor of the accused's sixth and fourteenth amendment right to confront the witnesses against him. The use of a "John Doe" witness is clearly prohibited, and the correct name of the witness must be supplied.

State v. Hassberger, 350 So. 2d 1, 5 (Fla. 1977). The court reversed Hassberger's conviction because "the trial judge did not require the confidential informant to appear before him and testify to specific threats which were made against his safety as a result of his testimony in this case. Nothing appears in the record by which a reviewing court can determine whether the threat to the witness' safety was sufficient to overcome the defendant's interest in the disclosure of the address of the witness." *Id.* The Third DCA has held that the threat to the witness must be actual.

[P]rior to effectively invoking this "personal safety" exception, the prosecution must demonstrate an actual, not implied, threat to the witness or his family and must disclose to the trial judge in camera the information sought to be withheld from the defendant who must be allowed to show any special need for the information requested. Then the trial judge must determine whether the facts must be disclosed in order not to deny effective cross-examination to the defendant and this determination is reviewable on appeal.

Blanco v. State, 353 So. 2d 602, 604 (Fla. 3d DCA 1977). The importance of the State making a sufficient showing was underscored by the Fifth DCA in *Holmes v. State*:

We believe the foregoing justifies the trial court's decision to withhold the victim's address under the circumstances of this case. We are disturbed, however, by the state's apparent attitude on appeal that appellant's complaint about the withholding of this information is a mere "technicality." It is not a technicality. The decision to withhold from an accused the current address and place of employment of a witness intrudes on the constitutional rights of the accused. The trial court should assure the record reflects a proper basis for making such a decision based upon founded concerns for the safety of the witness.

557 So. 2d 933, 938 (Fla. 5th DCA 1990).

***5** The Court will allow the State an opportunity to make a showing that the personal safety exception is applicable to the CI's home address and date of birth in this case. If the State cannot make a sufficient showing, the Court will order the information disclosed to the Defendants.

B. SOCIAL SECURITY NUMBER.

The Defendants seek the social security number ("SSN") of the CI in order to conduct a thorough background investigation into his history. The Court will not order the disclosure of the SSN at this time, if ever, for a number of reasons. First, and foremost, the CI has a right of privacy as to his SSN.

The expectation of privacy that individuals have in their social security numbers has been acknowledged by the federal government, the State of Florida, and numerous other states. The United States Congress recognized the sensitive and confidential nature of social security numbers more than twenty-five years ago when it enacted the Privacy Act. In 2002, the Florida Legislature enacted section 119.0721 which makes social security numbers confidential and exempt from public disclosure under the public records law. As part of its findings in support of the law, the legislature noted the "sensitive personal nature" of social security numbers and their potential for misuse as "the link to an individual's personal, financial, medical, or familial records."

Thomas v. Smith, 882 So. 2d 1037, 1045 (Fla. 2d DCA 2004) (citations omitted).

Even if this Court could order the CI to disclose his SSN, the Defendants need to show what efforts they undertook to investigate the CI's background, in what ways their investigation came up short, and how the disclosure of the CI's SSN will make the critical, material difference in their investigation. In light of the State's obligation to turn over *Brady* material concerning the CI, the proffer of King's testimony, and the lack of any record establishing that the failure of the Defendants to obtain the CI's SSN is impeding their ability to effectively investigate (and by extension cross-examine) the CI, the Court will not order the State or the CI to disclose the CI's SSN at this time.

C. CASES IN WHICH CI HAS PREVIOUSLY TESTIFIED.

The State has provided the Defendants with payment slips which reveal compensation the CI has received for his work on behalf of law enforcement agencies. The Defendants have attempted, in most cases successfully, to correlate these payment slips with court cases. There remain nine police case numbers in which the CI was paid, but which the Defense is unable to match to any state or federal court case. [2] For a number of reasons, the State objects to providing any assistance to the Defense in identifying these cases.

The Court begins from the principle that the State should be required to produce no less information for the CI than a party is required to produce in a civil case about their expert. *See* Fla. R. Civ. P. 1.280(b)(5)(A)(iii) ("3. The identity of other cases, within a reasonable time period, in which the expert has testified by deposition or at trial"). Also, the Court notes that in the case cited by the State, the trial court barred disclosure of the CI's name in part because the defense had access to his prior testimony. *See United States v. Machado-Erazo*, 2013 WL 3244823, *9 (D.D.C., June 28, 2013) ("Because the Defendants had access to Juan Diaz's expert report, a summary of his qualifications, and his prior testimony [in other cases involving similar subject matter], they had access to almost the entire universe of possible ammunition for cross-examination."). That is what the Defendants seek here. This request is fair and reasonable, especially in light of the State's objection to producing any personal information that would allow the Defendants to more fully investigate the CI's background. Therefore, the Court concludes that the Defendants are entitled to learn the case number for any state and federal case in which the CI has testified at trial or deposition.

***6** The thornier question is how the Defense can obtain it, or whether anyone has to provide it to them. Thus far, the Defendants have identified three ways to obtain this information: Assist Other Agency ("AOA") reports, the CI's DEA Handling Agent, or the CI himself. The Defendants first ask that the State produce AOA reports for these nine police case numbers. The State objects, noting that the Defendants can petition the police agency for copies of these reports directly. The issue of the CI's DEA Handling Agent is related closely to this topic. The issue of the Handling Agent's name arose because the State protested it had no knowledge of the federal cases in which the CI has testified. The person most likely to have this information is the CI or the Handling Agent. The Defendants seek to obtain the information before they depose the CI so that they do not have to take multiple depositions of the CI.

The Court gave the State the choice of disclosing the court case numbers to the Defense or disclosing the person who can provide that information *(i.e.*, the CI's DEA Handling Agent). The State labels this a "Hobson's Choice." State Response, ¶ 24. Perhaps it is. Or, perhaps, it is the Court's only remedy for piercing the artificial compartmentalization of information which hinders the flow of information to which the Defendants are entitled. One person's Hobson's Choice is another's shell game. State and federal law enforcement agents are routinely cross-designated to aid each other in enforcing federal, state and local laws. It is difficult for this Court to accept that requiring the State to obtain the federal case numbers in which the CI may have testified (which do not exceed nine in number) is too onerous a task. Indeed, it appears the State was able to ascertain with ease that the CI "has no priors, based on discussions with his law enforcement handler." State's Response, ¶ 15. Perhaps all that is needed is one more friendly call to the Handling Agent and this issue can be peacefully put to rest.

The Court will temporarily relieve the State of its "Hobson's Choice." The Defendants must first seek the AOAs directly from the police agency. If their request is denied, or if the AOAs do not provide Defendants the information they need about the remaining cases in which the CI may have testified, then the Court will require the State to produce the case numbers for those

cases. In that event, the State shall first attempt (by whatever means it chooses) to obtain the missing state and federal case numbers and provide those to the Defense prior to the CI's deposition. If the State certifies to the Court that it is unable to do so, the Defendants shall take the CI's deposition and inquire of the CI as to his knowledge and recollection of those cases and whether he did in fact testify in them. If the CI confirms he testified in any of those cases, but is unable to aid the Defense in successfully identifying the case(s), then the Court will revisit whether the State must disclose the CI's DEA Handling Agent.

DONE and ORDERED in Miami-Dade County, Florida this 20th day of December, 2013.

<<signature>>

Miguel M. de la O

Circuit Judge

Footnotes

1 The exception is also codified in Florida Rule of Criminal Procedure 3.220(e).

2 The Defendants draw the apparently reasonable inference, which the State does not dispute, that if the CI was paid then the underlying investigation concluded and a subject was arrested.

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