2014 WL 4686159 (Fla.Cir.Ct.) (Trial Order)
Circuit Court of Florida.
Eleventh Judicial Circuit
Miami-dade County

State of FLORIDA, Plaintiff,
v.
Jorge PUPO, Defendant.

No. F14-4724.
September 19, 2014.

Order Denying Motion to Compel Disclosure of Informant Witness Information Pursuant to Florida Rules of Criminal Procedure 3.220(b)(1)(A)(i)(8) and (b)(1)(M)

Miguel M. de la O, Judge.

SECTION 15

***1 THIS CAUSE** came before the Court on Defendant, Jorge Pupo's ("Pupo"), Motion to Compel Disclosure of Informant Witness Information ("Motion"). The Court has reviewed the Motion, the State of Florida's ("State") Response, heard argument of counsel, and is fully advised in the premises.

I. BACKGROUND.

Neither party requested an evidentiary hearing, nor provided the Court with any factual summaries or stipulations. Both parties take the position that the Court can rule without regard to the underlying facts. The Court was skeptical at first. However, given the argument which Pupo advances, the Court agrees that the precise details of the crimes charged are not determinative of the issue before this Court.

Suffice to say that Pupo is charged with one count of trafficking in cocaine and one count of possession of a controlled substance. It is undisputed (for purposes of the Motion) that law enforcement used a confidential source (their term) or confidential informant (the State's term) or informant witness (Pupo's term) to arrange the purchase of narcotics. The Court will refer to the person as a Confidential Informant ("CI") for the simple reason that the person is, in fact, an informant as that term is commonly understood in the criminal justice system, and the identity of the person is, in fact, confidential at this time. Indeed, the very point of the Motion is to strip the CI of the cloak of confidentiality. It is further undisputed that the State has not listed the CI as a witness pursuant to Florida Rules of Criminal Procedure 3.220(b)(1)(A).

Pupo asks this Court, pursuant to Rule 3.220(b)(1)(A)(i)(8) and (b)(1)(M) (collectively referred to as the "Informant Witness Rules"), to reveal the identity, address, and other information, of the informant. Pupo intentionally did not ask this Court to reveal the identity of the CI pursuant to the standards enunciated in *Roviaro v. United States*, 353 U.S. 53 (1957) and its progeny, nor Florida Rule of Criminal Procedure 3.220(g)(2). Rather, Pupo argues that every defendant is entitled – merely upon filing a notice of intent to participate in discovery – to learn the identity of any CI by virtue of the Informant Witness Rules.

Therefore, the narrow issue before this Court is whether the Informant Witness Rules compel the disclosure of the identity of a CI in every case *ab initio*, regardless of the specific involvement of the CI in the acts charged and even if the State does not intend to call the CI as a witness.

II. THE NEWLY ENACTED INFORMANT WITNESS RULES.

The Informant Witness Rules were adopted by the Florida Supreme Court on May 29, 2014 and became effective on July 1, 2014. *See In Re: Amendments to Florida Rule of Criminal Procedure 3.220*, 140 So. 3d 538 (Fla. 2014). The amendments added two sections to Rule 3.220:

> (A) (i) Category A. These witnesses shall include … (8) informant witnesses, whether in custody, who offer testimony concerning the statements of a defendant about the issues for which the defendant is being tried.

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***2** (M) whether the state has any material or information that has been provided by an informant witness, including:

(i) the substance of any statement allegedly made by the defendant about which the informant witness may testify;

(ii) a summary of the criminal history record of the informant witness;

(iii) the time and place under which the defendant's alleged statement was made;

(iv) whether the informant witness has received, or expects to receive, anything in exchange for his or her testimony;

(v) the informant witness' prior history of cooperation, in return for any benefit, as known to the prosecutor.

Florida Rule of Criminal Procedure 3.220(b)(1) (as amended July 1, 2014).

The Informant Witness Rules did not address or modify Florida Rule of Criminal Procedure 3.220(g):

> (2) *Informants.* Disclosure of a confidential informant shall not be required unless the confidential informant is to be produced at a hearing or trial or a failure to disclose the informant's identity will infringe the constitutional rights of the defendant.

III. THE NEWLY ENACTED INFORMANT WITNESS RULES DO NOT ENTITLE PUPO TO LEARN THE IDENTITY OF THE CI.

"Public policy favors nondisclosure of the identity of a confidential informant." *State v. Acosta*, 439 So. 2d 1024, 1026 (Fla. 3d DCA 1983). The State has a "privilege of nondisclosure." *Treverrow v. State*, 194 So. 2d 250, 252 (Fla. 1967). [1] The defendant bears the burden of proving entitlement to disclosure. *Id.*

The question squarely before this Court is whether the Florida Supreme Court intended to modify this long-standing policy when it adopted the Informant Witness Rules. "Our purpose in construing a statutory provision is to give effect to legislative intent. Legislative intent is the polestar that guides a court's statutory construction analysis." *Bautista v. State*, 863 So. 2d 1180, 1185 (Fla. 2003). "[S]tatutory analysis begins with the plain meaning of the actual language of the statute, as we discern legislative intent primarily from the text of the statute." *Diamond Aircraft Indus., Inc. v. Horowitch*, 107 So. 3d 362, 367 (Fla. 2013).

"To discern legislative intent, courts must consider the statute as a whole, including the evil to be corrected, the language, title, and history of its enactment, and the state of law already in existence on the statute." *State v. Anderson*, 764 So. 2d 848, 849 (Fla. 3d DCA 2000). [2]

The plain language of the Informant Witness Rules requires the State to provide the name and address of witness informants only if they "offer testimony concerning the statements of a defendant …" Fla. R. Crim. P. 3.220(b)(1)(A)(i)(8). Therefore, the Informant Witness Rules brought no change at all to the confidential informant rules because Rule 3.220(g)(2) already required the State to disclose the identity of any confidential informant that would be testifying at a hearing or trial. The Florida Supreme Court did not repeal, modify, or even refer to Rule 3.220(g)(2) when it enacted the Informant Witness Rules.

***3** Florida Rule of Criminal Procedure 3.220(c)(2), the controlling rule, provides that disclosure of a confidential informant can be compelled for discovery purposes only if that informant "is to be produced at a hearing or trial." There is nothing in the spirit or letter of rule 3.220(c)(2) which requires the state to decide irrevocably, upon the commencement of a prosecution, whether it will call a confidential informant as a witness.

State v. Manderville, 512 So. 2d 326, 327-28 (Fla. 3d DCA 1987).

Even if the Informant Witness Rules were ambiguous as to whether the identities of confidential informants must be disclosed *ab initio*, the Court would nevertheless deny the Motion. In the event of an ambiguity, courts can apply various canons of statutory construction to determine the proper interpretation to give the Informant Witness Rules. As will be explained, the applicable rules of statutory construction inexorably point to the singular conclusion that the Motion must be denied.

A. ALL WORDS IN A STATUTE MUST BE GIVEN MEANING.

"A court's function is to interpret statutes as they are written and give effect to each word in the statute." *Florida Dept. of Revenue v. Florida Mun. Power Agency*, 789 So. 2d 320, 324 (Fla. 2001). It is a fundamental principle of statutory construction that all words and sections of a statute must be given meaning. *See Sch. Bd. of Palm Beach County v. Survivors Charter Sch., Inc.*, 3 So. 3d 1220, 1233 (Fla. 2009) ("Basic to our examination of statutes, … is the elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage.").

When faced with two possible interpretations, one which renders parts of a statute superfluous, and the other which gives meaning to all parts of the statute, courts should apply the latter interpretation

> It is the general rule, in construing statutes, that construction is favored which gives effect to every clause and every part of the statute, thus producing a consistent and harmonious whole. A construction which would leave without effect any part of the language used should be rejected, if an interpretation can be found which will give it effect.

Goode v. State, 39 So. 461, 463 (Fla. 1905) (citations omitted). *See Kasischke v. State*, 991 So. 2d 803, 808 (Fla. 2008) (courts cannot construe the plain language of a statute in manner that renders sections superfluous.).

This Court must presume that the Florida Supreme Court had a good reason for leaving Rule 3.220(g) intact when it enacted the Informant Witness Rules. *See Martinez v. State*, 981 So. 2d 449, 452 (Fla. 2008) ("It is a basic rule of statutory construction that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless."). Adopting Pupo's interpretation would render Rule 3.220(g)(2) useless.

B. SPECIFIC PROVISIONS CONTROL OVER GENERAL PROVISIONS.

"[S]tatutes which relate to the same or closely related subjects should be read *in pari materia*." *State v. Fuchs*, 769 So. 2d 1006, 1009-10 (Fla. 2000). Rule 3.220 sets forth the broad parameters of discovery allowed in a Florida criminal proceeding. Subsection (b)(1)(A) sets forth the prosecutor's general obligation to disclose witnesses, subsection (b)(1)(A)(i)(8) sets forth the general rule when the witness is an informant, and Rule 3.220(g)(2) sets forth a very specific rule when the witness is a confidential informant.

***4** Because the Informant Witness Rules are of general application to informant witnesses who will be offering testimony, Rule 3.220(g)(2) – which specifically refers to confidential informants who the State does not intend to call as witnesses – must be deemed controlling.
It is a well settled rule of statutory construction, however, that a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms. In this situation "the statute relating to the particular part of the general subject will operate as an exception to or qualification of the general terms of the more comprehensive statute to the extent only of the repugnancy, if any."

Adams v. Culver, 111 So. 2d 665, 667 (Fla. 1959) (citations omitted). Because the two sets of rules address different situations, there is no repugnancy between them.

This is so even were the general act is enacted after the specific act. *See Am. Bakeries Co. v. Haines City*, 180 So. 524, 528 (Fla. 1938) ("The maxim of "*leges posteriores priores contrarias abrogant*" is not applicable to cases where the precedent act is special or particular and the subsequent act is general; the rule being that a later general act does not work any repeal of a former particular statute.... unless the two acts are so repugnant and irreconcilable as to indicate a legislative intent that the one should repeal or modify the other.").

C. THE FLORIDA SUPREME COURT DOES NOT OVERRULE ITSELF *SUB SILENTO.*

Pupo asks this Court to grant the Motion on the grounds that the newly enacted Informant Witness Rules require the State to disclose the identity of confidential informants *ab initio.* To do so, this Court would have to find that the Florida Supreme Court accidentally overlooked Rule 3.220(g)(2) and 50 plus years of precedent when it enacted the Informant Witness Rules. Even if this Court suspected this were the case (which it most certainly does not), Florida law is clear that it should resist such a finding unless there is no other reasonable alternative. Indeed, this Court is obligated to presume the opposite; it must presume the Florida Supreme Court is well-aware of its rules and precedent governing the disclosure of confidential informants.

The Florida Supreme Court has made it abundantly clear that when it intends to overrule precedent it will do so expressly. *See Arsali v. Chase Home Fin. LLC*, 121 So. 3d 511, 516 (Fla. 2013) ("First, in *Arlt* we did not intentionally overrule our previous decision in *Brown sub silentio*, because this Court does not engage in such practices."); *Puryear v. State*, 810 So. 2d 901, 905 (Fla. 2002) ("We take this opportunity to expressly state that this Court does not intentionally overrule itself *sub silentio.*"). *See also Am. Bakeries Co. v. Haines City*, 180 So. 524, 529 (Fla. 1938) ("statutes may be impliedly as well as expressly repealed, yet the enactment of a statute does not operate to repeal by implication prior statutes, unless such is clearly the legislative intent.").

Before concluding that the Florida Supreme Court overlooked Rule 3.220(g)(2), this Court must first examine whether the Informant Witness Rules can be read in conjunction with Rule 3.220(g)(2).

> The courts presume that statutes are passed with knowledge of prior existing statutes and that the legislature does not intend to keep contradictory enactments on the books or to effect so important a measure as the repeal of a law without expressing an intention to do so. Where possible, it is the duty of the courts to adopt that construction of a statutory provision which harmonizes and reconciles it with other provisions of the

> same act. *State ex rel. School Board v. Dept. of Education*, 317 So. 2d 68 (Fla. 1975); *State v. Putnam County Development Authority*, 249 So. 2d 6 (Fla. 1971); *Woodley Lane, Inc. v. Nolen*, 147 So. 2d 569 (Fla. 2d DCA 1962).

***5** *Woodgate Dev. Corp. v. Hamilton Inv. Trust*, 351 So. 2d 14, 16 (Fla. 1977).

Because all of Rule 3.220's provisions regarding informants can be harmonized, and because the Florida Supreme Court did not expressly indicate it intended to reverse over 50 years of precedent regarding confidential informants when it enacted the Informant Witness Rules, the Motion must be denied.

D. LEGISLATIVE HISTORY DEMONSTRATES THE COURT DISTINGUISHED BETWEEN INFORMANT WITNESSES AND CONFIDENTIAL INFORMANTS.

Though not as determinative as the accepted rules of statutory construction, this Court can also look to the legislative history surrounding the enactment of the Informant Witness Rules to determine their meaning. *See Koile v. State*, 934 So. 2d 1226, 1231 (Fla. 2006) ("if the statutory intent is unclear from the plain language of the statute, then we apply rules of statutory construction and explore legislative history to determine legislative intent").

In its decision adopting the Informant Witness Rules, the Florida Supreme Court noted that informant witnesses are not currently addressed under Rule 3.220.

> We agree with the Commission that rule 3.220 should be amended to include more detailed disclosure requirements with respect to informant witnesses, because informant witnesses are not currently specifically treated under the rule and they constitute the basis for many wrongful convictions. *See Final Report*, at 66.

In re Amend. To Rule of Crim. Proc. 3.220, 140 So. 3d 538, 539 (Fla. 2014). This language can only be interpreted to mean that the Florida Supreme Court distinguished between confidential informants and informant witnesses because this Court must presume that the Florida Supreme Court was well-aware of Rule 3.220(g)(2). *See City of Hollywood v. Lombardi*, 770 So. 2d 1196, 1202 (Fla. 2000) ("the legislature is presumed to know the judicial constructions of a law when enacting a new version of that law") (citations omitted).

IV. CONCLUSION.

The Motion brings to mind a line from Simon & Garfunkel's timeless classic, *The Boxer:* "still a man hears what he wants to hear and disregards the rest." Pupo would have this Court read only the provisions of the Informant Witness Rules which benefit his discovery request and disregard the rest of Rule 3.220. To reach such a result would require this Court to assume the Florida Supreme Court is unaware of its own rules and chose to upend over 50 years of precedent without even so much as a subtle acknowledgement of its intent. The (far) more reasonable reading of the Informant Witness Rules is that when a confidential informant will be testifying, the State must provide all the information set forth in the Informant Witness Rules. The Motion is denied.

DONE and ORDERED in Miami-Dade County, Florida this 19th day of September, 2014.

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Miguel M. de la O

Circuit Judge

Footnotes

1 The Florida Supreme Court first recognized the State's privilege of non-disclosure in *Chacon v. State*, 102 So. 2d 578, 582 (Fla. 1957).

2 "Our courts have long recognized that the rules of construction applicable to statutes also apply to the construction of rules." *Brown v. State*, 715 So. 2d 241, 243 (Fla. 1998) (interpreting Florida Rule of Criminal Procedure 3.191) (citations omitted).

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