

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
vs.	:	
	:	NO. 04-680
TYRONE SMITH	:	

ORDER AND MEMORANDUM

ORDER

AND NOW, this 10th day of March, 2005, upon consideration of Defendant's Motion to Produce the Name and Address of the Confidential Informant (Document No. 32, filed January 12, 2005), and Government's Consolidated Response to Defendant's Pretrial Motions (Document No. 36, filed March 4, 2005), for the reasons set forth in the attached Memorandum, **IT IS ORDERED** that Defendant's Motion to Produce the Name and Address of the Confidential Informant is, on the present state of the record, **DENIED**. The entry of this Order is without prejudice to defendant's right to seek reconsideration if warranted by changed circumstances.

MEMORANDUM

Before the Court is Defendant's Motion to Produce the Name and Address of the Confidential Informant. Defendant asserts that the Government has used a confidential informant in this case and that because this confidential informant possesses exculpatory information, the Court should order that the Government disclose the name and address of this informant to the defendant. In the alternative, defendant requests that the Government produce the confidential informant for a pre-trial interview outside of defendant's presence with

instructions not to reveal the informant's identity to defendant at any time. In response, the Government argues that defendant has not met his burden to demonstrate that disclosure is required and, furthermore, that disclosure could endanger the informant.

Defendant does not specifically describe the exculpatory information that he seeks from the confidential informant or point to any circumstances in the case that warrant disclosure of the informant's identity. Moreover, the Court finds that disclosure could threaten the confidential informant. For those reasons, the Court denies defendant's motion on the present state of the record.

I. BACKGROUND

On October 20, 2004, a grand jury in this District returned an Indictment charging defendant, Tyrone Smith, with the following crimes: Count One – possession with intent to distribute approximately 1,547 grams of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B); Count Two – possession with intent to distribute approximately 1,547 grams of cocaine within 1,000 feet of a school in violation of 21 U.S.C. §§ 841(a)(1) and 860(a); Count Three – possession with intent to distribute approximately 582 grams of cocaine base (“crack”) in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A); Count Four – possession with intent to distribute approximately 582 grams of crack within 1,000 feet of a school in violation of 21 U.S.C. §§ 841(a)(1) and 860(a); Count Five – possession of a loaded Star 9mm semiautomatic pistol in furtherance of a drug trafficking crime in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 924(c)(1).

The Government's evidence consists of items seized on September 10, 2004, when

Pennsylvania State Police officers and agents of the Drug Enforcement Agency (“DEA”) executed a state search warrant at a rowhouse located at 3335 Goodman Street in Philadelphia, Pennsylvania. Law enforcement agents had observed defendant entering or exiting 3335 Goodman Street several times between August 16 and September 9, 2004, often while carrying luggage or packages into or out of the house.

Among the items seized from the house were approximately 1,547 grams of cocaine, approximately 583 grams of crack, thirty used kilogram wrappers containing suspected cocaine residue, thousands of empty crack vials, two automated currency counters, one Star 9mm semi-automatic handgun with two magazines and six rounds of ammunition, photographs of defendant, two digital scales, three bottles and one plastic baggie of the cutting agent inositol, and over \$200,000 in United States currency.

At the time of the search on September 10, 2004, defendant had already been arrested as a result of an investigation by the Pennsylvania State Police and the DEA. The Government states that it used confidential informants in an investigation that ultimately led to defendant but does not intend to call any confidential informant as a witness at defendant’s trial. Moreover, the Government stated in its submissions that it was not aware of any exculpatory information known to any confidential informant, Government’s Consolidated Response to Defendant’s Pretrial Motions at 10, and that it has already provided defendant with all exculpatory evidence. Id. at 5.

II. DISCUSSION

In Roviaro v. United States, the Supreme Court set forth standards for determining when a defendant's request for disclosure of a government confidential informant's identity should be

granted; “[w]here 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 [Government's] privilege [to safeguard the informant's identity] must give way.” 353 U.S. 53, 60-61 (1957). The Court emphasized, however, that protecting an informant's identity serves important law enforcement objectives, including the public interest in encouraging persons to supply the government with information concerning crimes. *Id.* at 59. A defendant bears the burden of demonstrating the need for disclosure of a confidential informant’s identity. United States v. Rios, Crim. No. 96-0540-06, 1997 U.S. Dist. LEXIS 8843, at *3 (E.D. Pa. June 20, 1997). A defendant’s speculation that disclosure of an informant’s identity will assist in his defense does not defeat the government’s interest in protecting its informant. *Id.* (“Mere speculation as to the usefulness of the informant’s testimony to the defendant is insufficient to justify disclosure of his identity”) (citing United States v. Bazzano, 712 F.2d 826, 839 (3d Cir. 1983)); see also United States v. Skelton, Crim. No. 2003/04, 2003 U.S. Dist. LEXIS 24713, at *2 (D.V.I. Mar. 24, 2003) (declining to compel disclosure of identity of confidential informant where defendant failed to specify exculpatory information allegedly possessed by confidential informant).

There is no fixed rule for determining whether to require disclosure, Roviaro, 353 U.S. at 62, and trial courts accordingly retain “substantial leeway” to decide on a case-by-case basis whether disclosure is warranted. Brown, 3 F.3d at 679. Whether to compel the Government to produce a confidential informant for a pre-trial interview is also within the trial court's discretion. E.g., United States v. Heatley, 994 F. Supp. 483, 489 (S.D.N.Y. 1998). In deciding these questions courts must consider carefully an assertion that a confidential informant may be

endangered by the disclosure of his identity. United States v. Almodovar, 1996 U.S. Dist. LEXIS 18219, at *22-23 (D. Del. 1996).

In support of his motion, defendant states:

“Failure to provide the name and address of the confidential informant would violate the discovery rules, and Defendant’s Due Process rights under the United States Constitution, as the testimony sought by him is exculpatory in nature, and as such, extreme prejudice to his fair trial rights under the Sixth Amendment would occur.”

This statement lacks the specificity required of defendants who seek the identities of informants involved in their cases; defendants who allege that confidential informants possess exculpatory information but fail to elaborate on this alleged information and its importance do not meet their burden. See Rios, 1997 U.S. Dist. LEXIS 8843, at *3 (finding argument that “the disclosure of the Government’s informer or informers in this matter would most definitely be relevant and helpful to the preparation of his defense, as well as being essential to a fair trial” not sufficiently specific to warrant disclosure of confidential informant’s identity); Skelton, 2003 U.S. Dist. LEXIS 24713, at *2. Because defendant’s motion does not specify how the confidential informant’s testimony would be exculpatory to defendant or how disclosure of the informant’s identity would be relevant and helpful to his defense, the Court concludes that this statement is “mere speculation” and is insufficient to justify disclosure of the confidential informant’s identity. Rios, 1997 U.S. Dist. LEXIS 8843, at *3; Almodovar, 1996 U.S. Dist. LEXIS 18219, at *24.

Further, the Court finds merit in the Government’s argument that the confidential informant could be endangered should his identity be disclosed. Where the Government claims that a confidential informant may be endangered through disclosure of his identity, such an

assertion of danger “will not be disregarded lightly.” Almodovar, 1996 U.S. Dist. LEXIS 18219, at *25 (finding that discovery of weapons at defendant’s property demonstrated possible danger to confidential informant). In this case, a Star 9mm handgun along with two magazines and six rounds of ammunition were recovered from a search of the 3335 Goodman Street property. The Court concludes that the discovery of the weapon and ammunition substantiates the Government’s claim that the confidential informant might be endangered if his identity is disclosed. Id.

III. CONCLUSION

On the present state of the record, the Court concludes that defendant has failed to specify the exculpatory information he seeks from the confidential informant and fails to identify particular circumstances of this case that would render disclosure of the confidential informant’s identity essential to a fair trial. The Court also concludes that there is a possibility that disclosure of the confidential informant’s identity could endanger the informant. For those reasons, Defendant’s Motion to Produce the Name and Address of the Confidential Informant is denied on the present state of the record. The entry of this Order is without prejudice to defendant’s right to seek reconsideration if warranted by changed circumstances.

BY THE COURT:

JAN E. DUBOIS, J.