

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL ACTION
 :
 : NO. 05-440-16
 :
 TYREK MCGETH :

SURRICK, J.

JANUARY 9, 2008

MEMORANDUM & ORDER

Presently before the Court is Defendant Tyrek McGeth's Motion to Reveal Identity of Informant (**Doc. No. 418**). A **hearing on this Motion was held on August 15, 2007**. For the following reasons, Defendant's Motion will be **granted**.

I. BACKGROUND

On February 21, 2007, the grand jury returned a 194-Count Fifth Superseding Indictment ("Indictment") charging Defendant Tyrek McGeth, and **twenty-one co-defendants** with offenses related to their participation in a wide-ranging drug conspiracy. The Indictment charged the defendants with conspiracy to distribute narcotics in violation of 21 U.S.C. § 846; engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848(a), (b); being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1); possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c); distribution and possession with intent to distribute narcotics in violation of 21 U.S.C. § 841(a)(1); and other related offenses.¹

On April 5, 2004, the Philadelphia Police Department initiated a narcotics investigation

¹ Not all defendants were charged in all counts in the Indictment.

in the area of 7200 Greenway Avenue in Philadelphia. (Doc. No. 431-2.) The operation was conducted by an Officer Monaghan. (*Id.*) Under the direction of Officer Monaghan, a confidential informant was provided with “buy” money and sent to buy drugs from Defendant. (Suppression Hr’g Tr. 22-23, Aug. 15, 2007.) The police then observed Defendant interacting with the confidential informant. (*Id.*) When the confidential informant returned to the officers he was in possession of a small plastic bag containing two chunks of an off-white substance that was later determined to be crack cocaine. (*Id.*; Doc. No. 431-2). Defendant was not arrested on that date. (Doc. No. 475 at 7, n.4.) He was permitted to remain free in the interest of allowing the police investigation of the larger drug conspiracy alleged in the Fifth Superseding Indictment to continue. (*Id.*) Count 23 of the Fifth Superseding Indictment charges Defendant with “knowingly and intentionally distribut[ing] approximately 3.76 grams of a mixture and substance containing a detectible amount of cocaine base (‘crack’)” on April 5, 2004. (Doc. No. 295 at 51.)

At the hearing held on August 15, 2007, counsel for Defendant advised the Court that Defendant will testify at trial that he did not engage in the sale of narcotics on April 5, 2004. (Hr’g Tr. 20, 24.) Defendant argued that knowledge of the identity of the confidential informant was essential to his defense, as the informant was the only other direct participant in this alleged drug transaction. (*Id.* at 20-21.) The Government responded that it had produced to the Defendant all available discovery, short of the identity of the confidential informant, that it did not intend to produce the identity of the confidential informant, and that the confidential informant would not testify at trial. (*Id.* at 22; *see also* Doc. No. 431-2.)

II. LEGAL ANALYSIS

Courts, citing the informer's privilege, traditionally protect the identity of a confidential informant who provides information to law enforcement. *See Roviario v. United States*, 353 U.S. 53, 59 (1957). "The purpose of the privilege 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.* The privilege does not belong to the informant however, but "is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." *Id.*

The informer's privilege can be limited in certain circumstances. "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." *Id.* at 60-61. In *United States v. Jiles*, the Third Circuit "specifically articulated those circumstances in *Roviario* which required the informant's identity to be released: (1) the possible testimony was highly relevant; (2) it might have disclosed an entrapment; (3) it might have thrown doubt upon the defendant's identity; and (4) the informer was the sole participant other than the accused, in the transaction charged." 658 F.2d 194, 198-99 (3d Cir. 1981) (citing *McCray v. Illinois*, 386 U.S. 300, 310-11 (1967); *Roviario*, 353 U.S. at 63-65); *see also United States v. Brenneman*, 455 F.2d 809, 811 (3d Cir. 1972) ("In order to tip the scales in favor of disclosure, there must be some indication that access to the informer may be 'helpful to the defense of an accused' or 'essential to a fair determination of a cause.'" (citing *Roviario*, 353 U.S.

at 60-61)). Mere speculation by the defendant that the informant's identity or information from the informant will help in the defense is not sufficient. See *United States v. Bazzano*, 712 F.2d 826, 839 (3d Cir. 1983) (“[M]ere speculation as to the usefulness of the informant’s testimony to the defendant is insufficient to justify disclosure of his identity.” (quoting *United States v. Estrella*, 567 F.2d 1151, 1153 (1st Cir. 1977))); see also *Brenneman*, 455 F.2d at 811 (rejecting “[a]ppellant’s speculation” as sufficient reason to order disclosure of a confidential informant’s identity).

Initially, “[t]he burden is on the defendant to show the need for disclosure” of a confidential informant’s identity. *Jiles*, 658 F.2d at 197. If the defendant successfully demonstrates this need, the court must undertake “a balancing of the [defendant’s] interest in disclosure against the Government’s interest in maintaining the confidentiality of its informant.” *Id.* at 198 (citing *Rovario*, 353 U.S. at 62). “If the result of this balance is that disclosure of the informer’s identity will be essential to a fair determination of a cause, the Government’s privilege must give way.” *Id.* at 198 (citing *Rovario*, 353 U.S. at 60). In discussing the test for disclosure of a confidential informant, the *Jiles* Court identified three potential scenarios that courts might encounter. *Jiles*, 658 F.2d at 196. The first is “an extreme situation . . . in which the informant played an active and crucial role in the events underlying the defendant’s potential criminal liability.” *Id.* at 196-97. In such situations, the court concluded, “disclosure and production of the informant will in all likelihood be required to ensure a fair trial.” *Id.* at 197.

In the instant case, it is undisputed that the confidential informant played a central role in the events that underlie the Defendant’s potential liability under Count 23 of the Indictment. The Government represents that on April 5, 2004, Officer Monaghan observed some interaction

between Defendant and the confidential informant. They contend that this interaction was a drug transaction. However, the confidential informant was the only direct participant in this alleged drug transaction. He is the only individual who can testify to what actually transpired. The Government has advised that the informant will not testify at trial, and that only Officer Monaghan will offer testimony regarding the alleged transaction underlying Count 23. Defendant maintains that he did not engage in any narcotics transaction on April 5, 2004, and will so testify. Defendant's cross examination of Officer Monaghan is hardly a substitute for the opportunity to examine the only other participant in this alleged drug transaction. The confidential informant is the only witness who could shed light on Defendant's participation in or lack of participation in this transaction. He is the only witness in a position to amplify or contradict the Government's witness.

The Government has offered no explanation as to why the continued preservation of the informant's identity is essential at this time. We presume that the Government is concerned that disclosure of the identity of an informant could potentially place the informant at risk. However, the Government has not made this argument. Moreover, it has not advanced the argument that the disclosure of the informant's identity would substantially undermine any other count in the indictment against any of the other defendants. Based upon the Government's representations, on April 5, 2004, the surveillance officers apparently had probable cause to arrest and search the Defendant pursuant to their observation of his interaction with the informant. Certainly the arrest and search of Defendant could have led to the discovery of the "buy" money and, perhaps, drugs. The officers elected not to pursue this course and instead permitted the Defendant to walk away. This was an entirely permissible choice. But this choice, coupled with the refusal to provide the

identity of the confidential informant, undermines Defendant's ability to get a fair determination of the issues raised in Count 23 of the Fifth Superseding Indictment.

After balancing the interests of both the Defendant and the Government, we are compelled to conclude that disclosure of the informant's identity is appropriate in this case.

III. CONCLUSION

For these reasons, Defendant's Motion to Reveal Identity of Informant will be granted.

An appropriate Order follows.

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ORDER

AND NOW, this 9th day of January, 2008, upon consideration of Defendant Tyrek McGeth's Motion to Reveal Identity of Informant (Doc. No. 418), and after a hearing on August 15, 2007, it is ORDERED that the Motion is GRANTED.

IT IS SO ORDERED.

THE COURT:

BY



R. Barclay Surrick, Judge _____