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Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4702-16T4

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

EDISON FERNANDEZ,

Defendant-Respondent.

Argued March 15, 2018 – Decided April 23, 2018

Before Judges Simonelli, Haas and Rothstadt.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Indictment No.
16-10-1699.

David M. Liston, Assistant Prosecutor, argued
the cause for appellant (Andrew C. Carey,
Middlesex County Prosecutor, attorney; David
M. Liston, of counsel and on the brief).

Brynn Giannullo argued the cause for
respondent (The Giannullo Law Firm, attorneys;
Brynn Giannullo, on the brief).

PER CURIAM

We granted the State leave to appeal from the Law Division's
May 25, 2017 order requiring the prosecutor to confirm or deny

whether the two individuals who were present in a car with defendant Edison Fernandez at the time of his arrest for possession of controlled dangerous substances (CDS), were confidential informants (CIs). The order was issued in response to defendant's motion to suppress physical evidence seized during a warrantless search, and a motion to reveal the identity of the CI so that defendant could pursue an entrapment defense and determine whether either of the two individuals were "an active participant in the crime." At the time defendant made the motions, he knew the identity of the two individuals and had been provided with their contact information and dates of birth. For the reasons that follow, we reverse.

The facts leading to defendant's arrest are gleaned from the motion record and summarized as follows. On July 15, 2016, a detective received a tip from a CI that defendant would be arriving within two hours at a residential building in Perth Amboy with a large quantity of narcotics. The CI also provided a physical description of defendant. The detective set up surveillance at the location with several other officers.

Approximately two hours later, the police observed a car pull into the parking lot with three occupants inside. The vehicle had a male driver, a female passenger, and an individual matching the CI's description of defendant in the back seat. Defendant exited

the vehicle with a bag in his hand that police determined contained CDS. The officers placed defendant under arrest and conducted a search incident to the arrest. The two additional occupants in the vehicle were also searched for contraband, but they were released after no CDS were found in their possession.

After the trial court conducted a hearing on defendant's motions, it denied defendant's motion to suppress in its entirety, and denied in part the motion to reveal the identity of the CI. The court required the State to inform defendant if one or both of the vehicle's other occupants was the CI, and directed that if the State did not provide that information, the court would dismiss the indictment. Although it found defendant's entrapment claim, to be a tenuous, "hard sell," the court ordered disclosure of the information because defendant was entitled to know why someone in the car might have "set [him] up[,]" and he was entitled to an opportunity to "attack the credence of the" two individuals at trial.

On appeal, the State argues that the trial court abused its discretion by ordering the disclosure. It contends that the "active participant" exception to the CI privilege does not apply because there is no evidence to support that either occupant "was an active participant in the alleged crime" of defendant possessing CDS, and no proof that the two occupants were more than witnesses

to the crime. Defendant argues that the motion did not request that the State disclose any information about the two individuals, as he already had addresses and dates of birth, only whether either was a CI.

We conclude that requiring the disclosure of whether either of the two car occupants was a CI was a mistaken exercise of the trial court's discretion. We reverse.

The identity of a CI is privileged information that the State need not disclose except under limited circumstances. See N.J.S.A. 2A:84A-28; N.J.R.E. 516; State v. Sessoms, 413 N.J. Super. 338, 343 (App. Div. 2010). The privilege "protect[s] the safety of the informant and . . . encourage[s] the process of informing." Sessoms, 413 N.J. Super. at 343. It is intended "to protect the public interest in a continuous flow of information to law enforcement officials." Grodjesk v. Faghani, 104 N.J. 89, 97 (1986). However, it is not absolute. State v. Florez, 134 N.J. 570, 578 (1994). The State may be required to disclose a CI's identity if "the judge finds that (a) the identity of the person furnishing the information has already been otherwise disclosed or (b) disclosure of his identity is essential to assure a fair determination of the issues." N.J.R.E. 516.

Where the defense claims disclosure is essential to a fair determination of the issues, a court must balance "the public

interest in protecting the flow of information against the individual's right to prepare his defense[,] . . . taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." State v. Milligan, 71 N.J. 373, 384 (1976) (quoting Roviaro v. United States, 353 U.S. 53, 62 (1957)). The goal is to protect both the State's interest in encouraging the reporting of confidential information and a criminal defendant's right to fairness. State v. Burnett, 42 N.J. 377, 385-86 (1964).

Under this standard, disclosure may be warranted where the CI participates in the crime or "plays an instrumental role in its occurrence." Milligan, 71 N.J. at 386. Further, "even when an informer's involvement falls short of active participation in a criminal offense," a defendant can overcome the privilege against disclosure by showing "that the testimony of the informer is essential to preparing his defense" Id. at 390. Disclosure may be necessary where the informant "might have been a material witness" and "was the only witness in the position to support or refute the testimony of the governmental witness." Florez, 134 N.J. at 580 (citing Roviaro, 353 U.S. at 63-65).

A CI's mere presence at the time defendant commits a crime does not require disclosure of the CI's role as an informant. The CI's presence "does not take him out of the protection of the

statute. Such presence is only one fact to be taken into consideration with all of the facts in determining whether 'disclosure of his identity is essential to assure a fair determination of the issues.'" State v. Booker, 86 N.J. Super. 175, 179 (App. Div. 1965); see also Milligan, 71 N.J. at 388.

"[F]rivolous demands for information on unsubstantiated allegations of need" will not be enough to justify disclosure because "[s]omething more than speculation should be required of a defendant before the court overrules an informer's privilege of nondisclosure." Milligan, 71 N.J. at 393. "[A]bsent a strong showing of need, courts generally deny disclosure where the informer plays only a marginal role, such as providing information or 'tips' to the police or participating in the preliminary stage of a criminal investigation." Id. at 387; see State v. Infante, 116 N.J. Super. 252, 259 (App. Div. 1971) (holding that disclosure was not warranted when the informant made a bet on the phone with defendant as police listened because that "was not . . . the criminal activity for which the defendant was convicted . . .").

In our review of an order compelling disclosure of a CI's identity, we apply an abuse of discretion standard, Sessoms, 413 N.J. Super. at 342, and decide "whether the trial court abused its

discretion after weighing the competing considerations of the balancing test." Milligan, 71 N.J. at 384. We will defer to the trial court's ruling unless the trial court committed a "clear error of judgment." Sessoms, 413 N.J. Super. at 342.

Applying these guiding principles, we conclude that a clear error in judgment occurred in this case. Defendant did not meet his burden to establish that disclosure is proper because he already knows the identity of the CI from information provided by the State in discovery, or that disclosure is necessary to obtain the CI's testimony, which is essential to preparing his defense. First, the CI's identity has not been disclosed. Rather, defendant suspects that one of the car's occupants is a CI based on information that the CI told the police, and the fact that the individuals drove defendant to the parking lot. Despite the circumstantial evidence and defendant's suspicions, there has never been any disclosure that either occupant was a CI.

Second, neither occupant was an active participant in defendant possessing CDS, so that exception does not apply. The fact that one of them drove defendant to the location where he was arrested does not establish the driver was an active participant, and neither individual possessed any CDS when defendant was arrested. See State v. Brown, 170 N.J. 138, 144, 148-49 (2001) (concluding that the CI's identity should not be revealed where

the informant carried out two controlled drug buys under police surveillance).

Finally, defendant made no "strong showing of need" for the CI's identity that overcomes the presumption of confidentiality. Indeed, defendant raised a possible entrapment defense that alleged the role of the CI in setting up defendant to get caught with a large quantity of drugs by police. However, defendant offers no facts giving rise to the defense, or any details as to how or why he was entrapped.¹


Contrary to the trial court's conclusion, the fact that defendant might want to know who "set him up," or be able to attack the credibility of the State's witnesses, did not give rise to any justification for disclosing a CI's identity, even indirectly by either including or excluding the occupants of the car as possible CIs. Defendant was free to use whatever information he already obtained about each witness to investigate their knowledge and cross-examine them at trial about any issue argued in support of disclosure, such as their involvement in the incident and whether

¹ "Entrapment exists when the criminal design originates with the police officials, and they implant in the mind of an innocent person the disposition to commit the offense and they induce its commission in order that they may prosecute. It occurs only when the criminal conduct was the product of the creative activity of law enforcement officials." State v. Dolce, 41 N.J. 422, 430-31 (1964) (citations omitted).

they played any role in setting up defendant to be arrested. That inquiry does not require the State to confirm or deny that either of them was the CI.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION