Affirmed and Majority and Dissenting Opinions filed April 5, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-00375-CR

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GERMAN RIVAS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 339th District Court
Harris County, Texas
Trial Court Cause No. 778,612

M A J O R I T Y O P I N I O N

After finding appellant guilty of possession with intent to deliver cocaine, at least 400 grams, the court sentenced appellant to thirty-five years in prison and imposed a $1,000 fine. TEX. HEALTH & SAFETY CODE ANN. § 481.112 (Vernon Supp. 2000). Because we find no reversible error, we affirm the trial court's judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

At approximately 4:00 p.m. on March 23, 1998, a confidential informant told Drug Enforcement Administration ("DEA") agent Michael Dubet that a drug transaction was

scheduled to occur at a service station at Little York and Hirsch Road. At approximately 5:15 p.m., several law enforcement agents set up surveillance at the station. Thirty to forty minutes later, appellant and a passenger, Bernardo Marulanda, arrived at the station in a gold 1997 Toyota Camry. Appellant exited the car and talked to some individuals standing near a bank of pay phones. During the next forty to sixty minutes, Dubet received a phone call from the informant telling him that in the gold Camry were approximately five kilograms of cocaine. During this time Dubet also received an unexpected phone call from appellant. Dubet testified that he told appellant that he "did not want to do the cocaine transaction until the next morning." At approximately 6:50 p.m., appellant drove away from the station with Marulanda. While at the station, appellant did not open the Camry's trunk.

At approximately 7:30 p.m., the Camry arrived at an apartment complex on Buffalo Speedway. Dubet had followed the Camry and parked about fifty feet away. Dubet saw appellant exit the Camry, open the trunk with a key attached to a key chain, and remove a distinctively colored gift bag. Appellant then took the bag to an apartment, unlocked the door with another key on the same key chain, and entered the apartment. Ten minutes later, appellant left the apartment, locked the door, and drove away in the Camry. Dubet then ordered police to stop appellant. A Houston police officer pulled over appellant and Marulanda about a half mile from the apartment complex and returned them to the apartment. Dubet then began efforts to obtain a search warrant.

At 8:55 p.m., two women and three children arrived at the apartment. Three law enforcement agents went to the apartment and received written permission from one of the women to search the apartment for illegal drugs or money. An agent found the distinctively colored gift bag in the apartment in a basket of dirty laundry. In the package were five bricks of what later proved to be cocaine.

When questioned, appellant denied knowledge of the contents of the package and placed responsibility on Marulanda. At that time Marulanda also denied knowledge of the cocaine.

At trial, however, Marulanda testified that the distinctively colored gift bag was his and that he knew it contained cocaine.

Before trial, appellant moved to require the State to reveal the informant's identity. Appellant's motion stated that the informant participated in the offense, was present at the time of the offense, was a material witness to the transaction, and was a material witness as to whether appellant committed the charged act knowingly. The court's docket sheet indicates that the judge held an *in camera* hearing in July 1998, and denied the motion.

The case proceeded to trial before a different judge. At trial, agent Dubet testified that he had received a phone call from the informant while the agent had appellant under surveillance. Appellant sought a second hearing before the new judge. Specifically, appellant sought to question Dubet on the identity of the informant and on the informant's role in the transaction. The court denied the motion. Appellant then asked the court to review the record of the previous *in camera* hearing to determine whether the judge who presided at the earlier hearing had considered the informant's phone calls to the agent. The trial court denied the request, stating the prior judge had heard the matter and had ruled the State need not identify the informant.

II. ISSUES PRESENTED ON APPEAL

Appellant raises four points of error in connection with the non-disclosure of the identity of the confidential informant. Specifically, appellant complains: (1) the trial court erred in failing to allow appellant the opportunity to show the confidential informant may have given testimony necessary to a fair determination of guilt or innocence; (2) the trial court erred in failing to hold a second *in camera* hearing when the testimony demonstrated that the confidential informant may have given testimony necessary to a fair determination of guilt; (3) the trial court erred in failing to compel the State to disclose the identity of the confidential informant; and (4) appellant's right to have compulsory process and to present evidence on his behalf under the Sixth Amendment was violated when the trial court failed to allow appellant

the opportunity to show the confidential informant may have given testimony necessary to a fair determination of guilt or innocence.

III. STANDARD OF REVIEW

When a party complains that the trial court erred by not requiring the State to disclose an informant's identity, the reviewing court must consider all of the circumstances of the case in determining whether the trial court erred. *Edwards v. State*, 813 S.W.2d 572, 580 (Tex. App.—Dallas 1991, pet. ref'd). We review the trial court's decision for an abuse of discretion. *See Cannon v. State*, 807 S.W.2d 631, 633 (Tex. App.—Houston [14th Dist.] no pet.).

IV. ANALYSIS

The State has the privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in a criminal investigation. TEX. R. EVID. 508(a). The State's interest in not disclosing an informant's identity relates to: (1) the informant's future usefulness to authorities as a confidential source; and (2) the informant's safety. *U.S. v. Orozco*, 982 F.2d 152, 155-56 (5th Cir. 1993). However, this non-disclosure privilege is not absolute. If it appears from the evidence in the case, or from other showing by a party, that an informant may be able to give testimony necessary to a fair determination of a material issue on guilt or innocence in a criminal case, and the State invokes the privilege, the judge must give the State an opportunity to show *in camera* facts relevant to determining whether the informant can, in fact, supply that testimony. TEX. R. EVID. 508(c)(2). Evidence submitted to the court at this hearing must be sealed to protect the identity of the confidential informant. *See id*. In addition, this evidence must be preserved so that, in the event of an appeal, an appellate court may review the record for error. *Id*. This means that to be afforded meaningful appellate review, the appellant must request transcription and preparation of the hearing and record. TEX. R. APP. P. 35.3(b)(2)*; see Dear v. Russo*, 973 S.W.2d 445, 448-49 (Tex. App.—Dallas 1998, no pet.) (discussing incompleteness of record and stating "it was the appellant's burden to provide a sufficient record showing error that requires reversal.").

The docket entry suggests that a court reporter was present at the hearing; however, the record before us does not show that appellant requested the preparation of the transcript of the hearing. The evidence presented at the *in camera* hearing is not part of the record. Nevertheless, appellant argues that the evidence that the informant telephoned agent Dubet while Dubet had appellant under surveillance was not available when appellant filed his pretrial motion. Thus, appellant contends, the judge who presided at the trial should have allowed appellant to question Dubet in connection with the informant's role in the transaction or at least should have reviewed the evidence from the pretrial *in camera* hearing.

Texas Rule of Evidence 508, entitled "Identity of Informer," does not provide for an evidentiary hearing with defense counsel questioning the State's witness regarding the informant's identity. The rule mentions only an *in camera* hearing. *See Heard v. State*, 995 S.W.2d 317, 320-21 (Tex. App.—Corpus Christi 1993, pet. ref'd) (stating that trial court erred in conducting hearing in open court under Rule 508). In fact, under the terms of the rule, parties and counsel are not permitted to be present for the *in camera* showing. TEX. R. EVID. 508(c)(2). As for the argument that newly discovered evidence (the telephone calls) triggered the need for a second *in camera* hearing, we are limited in our ability to make that determination because we have no record of the evidence the judge considered at the *in camera* hearing. In his pretrial motion, however, appellant argued that the informant participated in or witnessed the transaction. There is nothing in the record to indicate the two phone calls in question were actually "new evidence" or that the court did not have that evidence in making its determination. Given the grounds stated in appellant's written motion, we presume that the trial court considered the full extent of the informant's involvement in the transaction before finding that there was no reasonable probability that the informant could give testimony necessary to a fair determination of a material issue on guilt or innocence. The record before us does not lead us to a different conclusion. This court has previously affirmed a trial court's denial of disclosure where the trial court considered a request *in camera* and the appellate record did not contain the evidence reviewed by the trial court. *See Hoyos v. State*,

951 S.W.2d 503, 513 (Tex. App.—Houston [14th Dist.] 1997), *aff'd*, 982 S.W.2d 419 (Tex. 1998) (relying on former appellate rule 50(d), which was not carried forward in the 1997 revision of the appellate rules). We find appellant has failed to demonstrate that the trial court abused its discretion.

As for appellant's argument that the trial court's action violated appellant's Sixth Amendment rights by denying him the opportunity to show the informant may have given needed testimony, the record before us does not support the complaint. The trial court conducted the requisite *in camera* hearing and determined that there was no reasonable probability the informant's testimony was necessary to a fair determination of any material issue in this case.

We overrule appellant's four points of error and affirm the judgment of the trial court.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Majority and Dissenting Opinions filed April 5, 2001.

Panel consists of Justices Yates, Wittig, and Frost.

Do Not Publish — TEX. R. APP. P. 47.3(b).