[Cite as *State v. McKoy*, 2010-Ohio-522.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93363

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

ARTHUR MCKOY

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-519426

BEFORE: Kilbane, P.J., Jones, J., and Cooney, J.

RELEASED: February 18, 2010

JOURNALIZED:

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MARY EILEEN KILBANE, P.J.:

{¶ 1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1. The state of Ohio ("the State") appeals the trial court's granting of Arthur McKoy's ("McKoy's") motion to require the prosecution to reveal the name or identity of its confidential informant ("informant" or "CI"). After careful consideration of the law and facts, we affirm.

{¶ 2} On January 9, 2009, the Cuyahoga County Grand Jury indicted McKoy on one count of permitting drug abuse, a fifth degree felony, in violation of R.C. 2925.13(B), for allegedly witnessing a drug transaction at McKoy's barbershop in East Cleveland, Ohio, between one of his codefendants and an unidentified individual who the State claims is a CI.

{¶ 3} On March 24, 2009, McKoy's counsel filed a motion to reveal the name and identity of all informants and to reveal the "deal" or other considerations the CI received in exchange for his testimony ("motion to reveal the identity of the CI").

{¶ 4} On May 20, 2009, the State filed a supplemental response to McKoy's request for discovery and filed a Crim.R. 16(B)(1)(e) certification to protect the identity of its confidential informant.[1]

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[1]Crim.R. 16(B)(1)(e) states in pertinent part: "Upon motion of the defendant, the court shall order the prosecuting attorney to furnish to the defendant a written list of the names and addresses of all witnesses whom the prosecuting attorney

{¶ 5} On May 21, 2009, the State filed a "motion in opposition" to McKoy's motion to reveal the identity of the CI. On that same date, the trial court granted McKoy's motion to reveal the identity of the CI and ordered the State to provide notice to McKoy's counsel on or before May 26, 2009, of the name of the informant and all other relevant information required under Crim.R. 16.

{¶ 6} On May 22, 2009, the State filed a "supplemental motion in opposition" to McKoy's motion to reveal the identity of the CI.

{¶ 7} On May 26, 2009, the State filed a "State's Response to Court Order to Reveal Identity" of the CI.

{¶ 8} On May 27, 2009, the trial court filed a journal entry disputing the State's response and denying the State's supplemental motion as moot, stating in part:

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intends to call at trial, together with any record of prior felony convictions of any such witness, which record is within the knowledge of the prosecuting attorney. Names and addresses of witnesses shall not be subject to disclosure if the prosecuting attorney certifies to the court that to do so may subject the witness or others to physical or substantial economic harm or coercion."

> **"The court notes that the state did not raise any issues of concern about the witness; nor were such concerns raised during the numerous pretrial discussions of the issue. The only additional information provided to the court and defense counsel regarding disclosure was the request of the state for additional time in which to comply with this order, and the state indicated it would file a motion for an extension of time. No such extension of time was filed by the State or received by the court. Therefore, as the order was previously issued based on the State's disclosure and discovery response that it intends to use the CI as a witness at trial, and without any prior mention to the court or defense counsel of concern for witness safety until the order to produce was journalized and the State ordered to produce the information, the court stands by its prior ruling."**

{¶ 9} On May 27, 2009, this court granted leave for the State to appeal the trial court's interlocutory ruling pursuant to R.C. 2953.21. This appeal followed, asserting one assignment of error, which states:

> **"The trial court erred in ordering the State to reveal the identity of the CRI."**

Standard of Review

{¶ 10} We will not reverse a trial court's decision regarding the disclosure of the identity of a confidential informant absent an abuse of discretion. *State v. Bays*, 87 Ohio St.3d 15, 1999-Ohio-216, 716 N.E.2d 1126. See, also, *State v. Glenn*, Cuyahoga App. No. 85005, 2005-Ohio-2009, citing *State v. Brown* (1992), 64 Ohio St.3d 649, 597 N.E.2d 510; *State v. Richard* (Dec. 7, 2000), Cuyahoga App. No. 76796. An abuse of discretion is defined as a decision that is unreasonable, arbitrary or unconscionable, rather than a

mere error in judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

Analysis

{¶ 11} Crim.R. 16(B)(1)(e) provides a mechanism by which the prosecuting attorney may protect the identity of witnesses by certifying to the court that disclosure of their names and addresses prior to trial may subject them or others to physical harm, substantial economic harm, or coercion. The certification is in essence a request for a protective order to prevent disclosure of the witness list or part of it. See Baldwin (2009), Ohio Prac. Crim.L. §49:13.

{¶ 12} The disclosure of an informant's identity requires a balancing of competing interests, i.e., the accused's right to confront his or her accusers and the State's right to preserve an informant's anonymity. *Richard*, supra. (Internal citations omitted.) In *Glenn*, supra, this court analyzed those competing interests as follows:

> **"The factors to be considered when determining whether the identity of a CI should be disclosed [under Crim.R. 16(B)(1)(e)] are: (1) whether the CI's testimony is vital to establishing an essential element of the offense charged, or (2) whether the CI's testimony is helpful or beneficial to the accused in preparing a defense. If the CI's degree of participation is such that the CI is essentially a State's witness, the balance tilts in favor of disclosure. However, where disclosure is not helpful to the defense, the prosecution need not reveal the CI's identity. The defendant bears the burden of establishing the need for**

learning the CI's identity." Id. at ¶10. (Internal citations omitted.)

{¶ 13} With this framework in mind, we proceed to analyze the allegations present in this case as they relate to the disclosure of the informant's identity.

A. Whether the CI's Testimony is Vital to Establishing an Element of the Offense Charged.

{¶ 14} Here, the record reveals that McKoy's counsel met the burden of establishing a need for the CI's identity through its March 24, 2009 motion, which identified the specific allegations behind the events leading to McKoy's indictment. McKoy was alleged to have been present during a drug purchase in his barbershop and was allegedly quoted by the CI to have asked the informant: "Are you sure you know what you are doing?" Outside of this informant, whom the State has repeatedly refused to identify, the only other witness to the alleged transaction is a codefendant who cannot be compelled to testify under the Fifth Amendment. Because no other witness is able to testify to the allegations and no other evidence exists outside of the allegations made by the informant, his or her identity is essential to establishing the elements of the offense McKoy has been charged with committing.

{¶ 15} The statute proscribing permitting drug abuse is found at

R.C. 2925.13(B) and states,

> **"No person who is the owner, lessee, or occupant, or who has custody, control, or supervision, of premises or real estate, including vacant land, shall knowingly permit the premises or real estate, including vacant land, to be used for the commission of a felony drug abuse offense by another person."**

{¶ 16} Based upon the above statute, it is essential that the State prove that McKoy "knowingly" permitted his barbershop to be used "to commit a felony drug abuse offense" as required by R.C. 2925.13(B). When analyzing this case under the factors cited in *Glenn*, it is clear that the informant's testimony is essential to establishing not only an element of the charged offense, but, in fact, the veracity of the entire encounter. Without the testimony of this witness, the elements of the State's case potentially cannot be proven. Further, since the CI is essentially the State's only witness present during the alleged encounter, the balance of competing interests weighs heavily in favor of disclosure under *Glenn*, supra.

B. Whether the CI's Testimony is Helpful or Beneficial to the Accused in Preparing a Defense.

{¶ 17} In this case, the only witness to the alleged transaction is an unidentified State's witness. No video or audiotape or other surveillance of

the alleged drug purchase exists. Outside of the unverified assertions that McKoy was present, which come from an unidentified individual, no known evidence exists to support the State's position. Significantly, the State waited 57 days — or until the eve of trial — to respond to McKoy's March 24, 2009 motion, by filing its Crim.R. 16(B)(1)(e) certification on May 20, 2009, the final pretrial date in this matter. The record is devoid of any mention by the State regarding its concerns relative to any fears of physical harm or coercion to any of the State's witnesses during any of the six pretrial hearings and conferences held in this matter. Certainly, as the only witness with any evidence against McKoy, the testimony of this witness is essential to McKoy in preparing a defense.

C. Whether the State's Privilege to Withhold the Identity of its Informant gives Way to McKoy's Sixth Amendment Right to Confront his Accusers.

{¶ 18} We recognize that in many cases the State has a privilege to withhold from disclosure the identities of those who give information to the police about crimes. *State v. Beck* (1963), 175 Ohio St. 73, 76-77, 191 N.E.2d 825, reversed on other grounds (1964), 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142. However, the privilege must give way where disclosure of the informant's identity would be helpful to the accused in making a defense to a criminal charge. Id. at paragraph two of the syllabus; see, also, *Roviaro v.*

United States (1957), 353 U.S. 53, 60-61, 77 S.Ct. 623, 1 L.Ed.2d 639.

{¶ 19} The State argues that it is shielded from revealing the identity of its CI under the authority of *State v. Lynn* (Dec. 7, 1995), Cuyahoga App. No. 68850, which held, inter alia, that "the name and address of the witness 'shall not be subject to disclosure if the prosecution attorney certifies to the court that to do so may subject the witness or others to physical or substantial economic harm or coercion.'" *Lynn* at 3, citing *State v. Quintero* (Mar. 1, 1990), Cuyahoga App. No. 56598 and quoting Crim.R. 16(B)(1)(e). This case is distinguishable from *Lynn* for several reasons.

{¶ 20} The *Lynn* court based its decision on facts that differ greatly from the instant case. In *Lynn*, a confidential informant sold two ounces of cocaine to an individual as part of a transaction that Lynn arranged. Id. at 1-2. Unlike the present case, where only the informant, McKoy, and his codefendant were allegedly present, the police officers in *Lynn* were outside of the hotel room where the drug transaction took place and arrested the participants to the transaction when they exited the room. Id. In concluding that Lynn was not deprived of her right to confront her accuser and was not denied a fair trial, the *Lynn* court also reasoned that "there was no evidence that would suggest revealing the identity of the informant would have assisted Lynn's defense."

{¶ 21} Here, the opposite facts are true. The only evidence put forth by

the State is the evidence provided by its CI that a drug transaction took place in McKoy's presence at his barbershop on Saturday, February 16, 2008. The police did not participate in the alleged transaction in this case, as they did in *Lynn*, and no corroborating evidence exists to support the allegation outside of the testimony of the informant.

{¶ 22} Further distinguishing *Lynn* from the present case is the fact that the trial court in *Lynn* held a pretrial evidentiary hearing to determine whether the informant was at risk of suffering physical harm, and afforded defense counsel an opportunity to interview the CI and review the CI's statement prior to trial. Id. at 4. In the instant case, the State waited until the eve of trial to file its Crim.R. 16(B)(1)(e) certification. Based upon the timing of the State's certification and its immediate appeal of the trial court's ruling, McKoy has not had the opportunity to interview the CI in this case.

{¶ 23} Revealing the informant's identity is essential not only to assisting in McKoy's defense, but also to establishing the "knowingly" element of the proscribed crime as stated in R.C. 2925.13(B). The evidence provided by the CI, in this case, unlike that suggested by the court in *Lynn*, could assist McKoy in his defense and is essential to establishing an element of the crime McKoy is alleged to have committed. *Lynn* is therefore entirely distinguishable from the present case.

{¶ 24} As in *Glenn*, supra, the CI in this case is essentially the State's

only witness, thus tilting the balance in favor of disclosure. Further tilting that balance in favor of disclosure are the facts that this witness provides the only evidence of the alleged crime. The informant's identity and the information he or she would provide is essential to McKoy's defense.

{¶ 25} We cannot say that the trial court abused its discretion in requiring the State to disclose the identity of the State's CI. Under the circumstances, the trial court was in the best position to weigh the evidence and determine whether the State's Crim.R. 16 certification withheld the scrutiny of the balancing test cited in *Glenn*; see, also, *State v. Williams* (1983), 4 Ohio St.3d 74, 446 N.E.2d 779. Requiring the State to disclose the identity of the CI in this matter does not constitute an abuse of discretion.

Judgment affirmed. This matter is remanded to the trial court for further proceedings.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, PRESIDING JUDGE

LARRY A. JONES, J., and
COLLEEN CONWAY COONEY, J., CONCUR