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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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STATE OF WEST VIRGINIA,
ex rel., STATE OF WEST VIRGINIA,

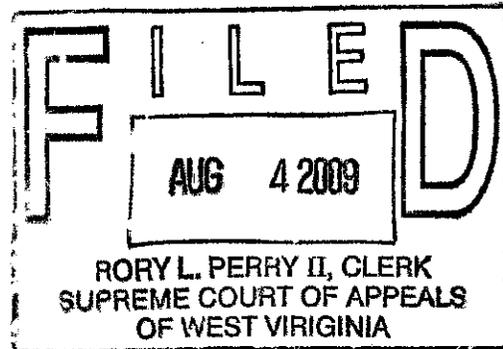
Petitioner,

v.

// Case No.: 35035

HONORABLE JACK ALSOP,
Circuit Judge 14th Judicial Circuit,
JERRY RICK MEADOWS,
MARY MEADOWS,
JOZET GILLION and
GERALD FAULKNER,

Respondents.



GERALD FAULKNER'S RESPONSE TO PETITION FOR WRIT OF PROHIBITION

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

**State of West Virginia ex rel. State of West
Virginia, Petitioner**

vs.

No. 35035

**Honorable Jack Alsop, Judge of the Circuit
Court of Webster County; Jerry Rick Meadows,
Mary Meadows, Jozet Gillion, and Gerald
Faulkner, Respondents**

**GERALD FAULKNER'S RESPONSE TO THE PETITION FOR WRIT OF
PROHIBITION**

Comes now the Respondent, Gerald Faulkner, by and through his attorney, Daniel R. Grindo, and does make the following response to the Petition for Writ of Prohibition.

I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

Respondent agrees with the State's Representation of the procedural history of this case and incorporates the same by reference.

II. STATEMENT OF THE FACTS

Without making any comment regarding the State's assertions about its practices in other cases, the Respondent agrees that the Court did Order the State to disclose the identity of its confidential informants in the initial disclosure over the objection of the State. This is the ruling that is at issue before this Court.

III. THE ISSUE PRESENTED

Whether the Circuit Court properly directed the State to disclose the identity of any confidential informants in the initial disclosure.

IV. AUTHORITIES RELIED UPON

- a. *Rovario v. United States*, 353 U.S. 53, at 60 (1957)

- b. State v. Green, 1992, 415 S.E.2d 449, 187 W.Va. 43 8
- c. State v. Haverty, 267 S.E.2d 727 (1980)
- d. State v. Mansfield, 1985, 332 S.E.2d 862, 175 W.Va. 397
- e. State v. Tamez, 169 W.Va. 382, 290 S.E.2d 14 (1982)
- f. State v. Walls, 170 W.Va. 419, 294 S.E.2d 272 (1982)
- g. State ex rel. Peacher v. Sencindiver, 160 W.Va. 314, 233 S.E.2d 425 (1977)
- h. State ex rel. Shepard v. Holland, 219 W.Va. 310, 633 S.E.2d 255, (2006)
- i. W.Va.R.Crim.P. 16(d)(1)
- j. W.Va.R. Trial Ct. 32.01
- k. W.Va.R. Trial Ct. 32.03

V. DISCUSSION

In criminal proceedings, discovery is provided for in under the West Virginia Rules of Criminal Procedure and the West Virginia Trial Court Rules. Rule 32.01 of the West Virginia Trial Court Rules states in part, “[i]t is the intent of this rule to encourage complete and open discovery consistent with applicable statutes, case law, and rules of court at the earliest practicable time. Nothing in this rule should be construed as a limitation on the court's authority to order additional discovery.” Rule 32.03 of the West Virginia Trial Court Rules compels the State to provide the defendant's attorney with a list of the names and addresses of all State witnesses, together with any record of prior convictions of any such witnesses. Rule 16 of the West Virginia Rules of Criminal Procedure provides in relevant part,

“(F) State Witnesses. Upon request of the defendant, the state shall furnish to the defendant a written list of names and addresses of all state witnesses whom the attorney for the state intends to call in the presentation of the case in chief, together with any record of prior convictions of any such witnesses which is within the knowledge of the state. When a request for discovery of the names and addresses of witnesses has been made by a defendant, the state may be allowed to perpetuate the testimony of such witnesses in accordance with the provisions of Rule 15.

(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), (D) and (E) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda or other

internal official documents made by the attorney for the state or other state officials in connection with the investigation or prosecution of the case, or of statements made by state witnesses or prospective state witnesses except as provided in Rule 26.2.”

Clearly, the rules governing discovery in criminal cases demand the disclosure of the identity of witnesses for the State of West Virginia upon request by a Defendant. In the instant case, the Respondent Gerald Faulkner did make that request. The issue presented by the Prosecuting Attorney centers around the disclosure of the identity of confidential informants utilized in investigating criminal matters. In the instant case, a confidential informant allegedly purchased controlled substances from the Respondents. From a review of the disclosures already made by the State, as well as the phrasing of the indictment, the State will have to rely upon the trial testimony of the confidential informant to prove the charges against the Respondent. The indictment alleges that the Respondents delivered the alleged controlled substances to the confidential informant.

In Rovario v. United States, the United States Supreme Court held that the scope of the government’s privilege to withhold from disclosure the identity of a confidential informant is limited by the privilege’s underlying purpose and the fundamental requirements of fairness. Rovario v. United States, 353 U.S. 53, at 60 (1957). Under the fundamental fairness limitation, the privilege must give way when the disclosure of the informant’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. . . .” Id. at 60-61. Declining to impose an absolute rule requiring disclosure, the Court stated:

The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.
Id. at 62.

In Rovario, the Court ultimately held that it was reversible error not to reveal the informant's identity where the informant was the sole participant, other than the accused, in the transaction and, therefore, "was the only witness in a position to amplify or contradict the testimony of government witnesses." Id. at 64.

This Court has previously held that disclosure of the identities of confidential informants may be privileged. This Court has held that "[a] common law privilege is accorded the government against the disclosure of the identity of an informant who has furnished information concerning violations of law to officers charged with the enforcement of the law. However, disclosure may be required where the defendant's case could be jeopardized by nondisclosure." Syl. pt. 1, State v. Haverty, 267 S.E.2d 727 (1980).

It has long been held that the issue of whether to disclose the identity of confidential informants rests within sound discretion of trial court and is only subject to challenge on an abuse of discretion analysis. See State v. Green, 1992, 415 S.E.2d 449, 187 W.Va. 43; State v. Mansfield, 1985, 332 S.E.2d 862, 175 W.Va. 397; State v. Tamez, 169 W.Va. 382, 290 S.E.2d 14 (1982).

In Syllabus Point 3 of State v. Tamez, 169 W.Va. 382, 290 S.E.2d 14 (1982), this Court outlined the procedure to be followed when a defendant seeks disclosure of the identity of a confidential informant. The Court held in Tamez,

“When the State in a criminal action refuses to disclose to the defendant the identity of an informant, the trial court upon motion shall conduct an in camera inspection of written statements submitted by the State as to why discovery by the defendant of the identity of the informant should be restricted or not permitted. A record shall be made of both the in court proceedings and the statements inspected in camera upon the disclosure issue. Upon the entry of an order granting to the State nondisclosure to the defendant of the identity of the informant, the entire record of the in camera inspection shall be sealed, preserved in the records of the court, and made available to this Court in the event of an appeal. In ruling upon the issue of disclosure of the identity of an informant, the trial court shall balance the need of the State for nondisclosure in the promotion of law enforcement with the consequences of nondisclosure upon the defendant's ability to receive a fair trial. The resolution of the disclosure issue shall rest within the sound discretion of the trial court, and only an abuse of discretion will result in reversal. W.Va.R.Crim.P. 16(d)(1).”

Syllabus Point 3, State v. Tamez, 169 W.Va. 382, 290 S.E.2d 14 (1982)

The Tamez case can be differentiated from the instant case in that Tamez involved a circumstance where the confidential informant was not directly involved in the transfer of narcotics but only introduced law enforcement officer to the accused and thus was not the material witness to the alleged transfer. In the instant case, the confidential informant is alleged to have been the actual purchaser of drugs from the Respondent. In State v. Walls, this Court held, “[t]he general rule is that where the informant has only peripheral knowledge of the crime, his identity need not be disclosed. Where the informant directly participates in the crime, or is a material witness to it, disclosure may be required, particularly where, in a drug related crime, he is the only witness to the transaction other than the defendant and the buyer.” Syl. pt. 5, State v. Walls, 170 W.Va. 419, 294 S.E.2d 272 (1982).

The balancing test set forth in Tamez, and the exception to the privilege against disclosure set forth in Walls clearly illustrate that the Trial Court is correct in ordering the disclosure of the identity of the confidential informant. As the confidential informant utilized in this case is the alleged actual purchaser of drugs from the Respondent, the disclosure of the informant's identity is critical to the Respondent's defense. The confidential informant in this case is not a 'peripheral' party to the charges against the Respondent. Nondisclosure would deny the Respondent the ability to receive a fair trial in that she would be unable to explore possible defenses to the charges against her. The disclosure of the informant's identity would be important in the proper preparation of a defense to the charges. Disclosure will allow the Respondent to discover the existence of exculpatory evidence or provide support to a defense of entrapment. Additionally, disclosure would allow Counsel to interview such witness or other possible witnesses who have knowledge of the informant; prepare rebuttal evidence, explore evidence as contemplated under Rule 404(b) of the West Virginia Rules of Evidence; possible defenses relating to electronic surveillance or recording; credibility issues; and as to the basic foundation upon which the State seeks to admit evidence against the Respondent.

The Trial Court's order compelling the State to disclose the identity of its confidential informant should also be sustained as a practical matter. As the Court ordered discovery requests to be filed within twenty days and responses thereto within twenty days after such request (including disclosure of the identity of the confidential informant), the Court was simply ordering the State to identify the confidential informant as it is already required to identify witnesses under the discovery rules set forth in the Rules of Criminal Procedure and the Trial Court Rules. The State seeks its relief largely on the basis of its argument that such disclosure should not be required during plea negotiations. That argument fails to take into consideration the need for the defendant to be able to afford his or herself of the discovery rules to analyze her case prepare a defense to the charges. The Respondent, having been indicted and having trial scheduled within three months of arraignment cannot effectively assess the strengths and weaknesses of the case in that time frame without being provided the identity of those witnesses to be called against her. Once indicted, the Respondent is subject to trial upon the charges against her and basic fair trial concepts should compel disclosure of such a critical witness. To permit the State to simply refuse to disclose the identity of this witness without filing a motion with the Trial Court in that regard would force the Respondent to negotiate blindly without a real vision of the strength or weakness of the case against him.

Further, Respondent would argue that the impact to the State's ability to obtain pleas favorable to the State is not one of the considerations set forth in Rovario. Respondent would argue that to withhold information central to the preparation of a defense for the purpose of extracting a more favorable plea for the State is exactly the

type of behavior that the Rules of Criminal Procedure and the accompanying case law seek to prevent.

Additionally, under the guidance of Tamez, the Petition should be denied as the State of West Virginia has failed to seek redress of this issue with the Circuit Court. Tamez clearly states that the disclosure issue shall be addressed by the Trial Court, upon Motion to the Court. Syl. Pt. 3, State v. Tamez, *supra*. The logic of Tamez is clear: absent a determination by the Trial Court directing nondisclosure of the identity of a confidential informant, the State should be held to follow the discovery requirements of the West Virginia Rules of Criminal Procedure and the West Virginia Trial Court Rules. If the State is adamant about withholding the identity of the informant, then the State must file a Motion to invoke the privilege and obviate the requirements of disclosure under the Rules of Criminal Procedure and the Trial Court Rules. Had the State brought a Motion to that effect, the Trial Court could have considered the factors set forth in Tamez and rendered a decision on the same. The State, however, has sought no such relief. If the State seeks to maintain the confidentiality of its informant, the process has been established, but the State has not availed itself of that procedure. It is, after all, the State's desire to maintain the confidentiality, thus, it should be the State's burden to seek such relief through the Trial Court.

In a criminal matter such as this, the State has a duty, upon request, to provide discovery including the identity of the witnesses intended to be utilized during its case in chief. Absent a motion to the Trial Court seeking to maintain such confidentiality, and a ruling in its favor, the State is under a nondiscretionary duty to provide such discovery. There exists no other legal authority which grants to the State the right to refuse to

disclose the identity of witnesses upon proper request as has been done in this case without approval of the Court as outlined in Tamez.

Further, the State's Petition for Writ of Prohibition should be denied as the relief sought is improper in this instance. As stated Tamez, ". . . [t]he resolution of the disclosure issue shall rest within the sound discretion of the trial court, and only an abuse of discretion will result in reversal." State v. Tamez, supra. This Court has held, "[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W.Va.Code 53-1-1." State ex rel. Shepard v. Holland, 219 W.Va. 310, 633 S.E.2d 255, (2006).citing Syl. Pt. 2, State ex rel. Peacher v. Sencindiver, 160 W.Va. 314, 233 S.E.2d 425 (1977).

V. CONCLUSION

For all of the reasons set forth hereinabove, the Court was well within its jurisdiction and within its legitimate powers to direct the State to disclose the identity of the confidential informant. The witnesses are clearly paramount to the charges in this matter and directly impact the Respondent's ability to prepare a defense. Additionally, even if the confidential informants were only tertiary to the charges, the State has not set forth in any pleading in the Circuit Court or in this Court, any legitimate basis to withhold the names of the confidential informants.

VI. RELIEF REQUESTED

WHEREFORE, the Respondent, Gerald Faulkner, respectfully requests this Court to Deny the Petition for Writ of Prohibition and shall further pray for such other relief as this Court may deem appropriate.

GERALD FAULKNER

By Counsel



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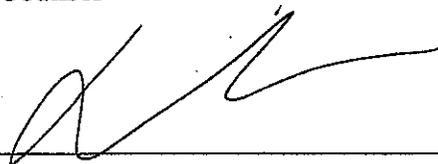
CERTIFICATE OF SERVICE

I hereby certify that I have, on this the 3rd day of August, 2009, provided a true copy of the foregoing **GERALD FAULKNER'S RESPONSE TO THE PETITION FOR WRIT OF PROHIBITION** to the following individuals, by regular mail:

- Hon. Jack Alsop, Judge of the Circuit Court of Webster County, West Virginia, 2 Court Square, Webster Springs, WV 26288
- Dwayne C. Vandevender, Esq., Prosecuting Attorney, 137 South Main St., Webster Springs, WV 26288
- William C. Martin, Esq., P.O. Box 72, Sutton, WV 26601
- Howard J. Blyler, Esq., P.O. Box 217, Cowen, WV 26206
- DENNIS J. WILLETT, 45 West Main Street, Buckhannon, West Virginia 26201

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