

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	
)	No. 09-20500-A/P
OTAH HUNT,)	
)	
Defendant.)	
)	

ORDER DENYING DEFENDANT'S MOTION FOR DISCLOSURE OF IDENTITY OF
CONFIDENTIAL INFORMANT

Before the court by order of reference is defendant Otah Hunt's Motion for Disclosure of Identity of Confidential Informant. (D.E. 33.) On January 20, 2011, a hearing was conducted on the motion, at which time the court heard testimony from Shelby County Sheriff's Department Detective Christopher Grimes. For the reasons below, the motion is DENIED.

I. BACKGROUND

On July 20, 2010, Hunt filed a motion to suppress evidence obtained by officers as a result of the officers' stop of a vehicle that Hunt was driving on February 1, 2008. The government filed a response to the motion to suppress on August 9, 2010. In its response, the government asserts that immediately prior to the vehicle stop, Hunt sold heroin to a confidential informant ("CI")

and that this transaction provided the officers with a basis to stop Hunt's vehicle. Specifically, on February 1, 2008, Detective Christopher Grimes received information from a CI that an individual known as "Wesley" was selling heroin from a vehicle in the area of Airways Boulevard and Dunn Avenue in Memphis, Tennessee. The CI described Wesley as a black male, approximately 5'9" in height, weighing at least 210 pounds, and approximately sixty years old. Further, the CI informed Detective Grimes that Wesley drove a grey-colored Lincoln Town Car with Tennessee license plate number 799-LPY. Detective Grimes was informed that the CI could make an undercover drug buy from Wesley. Detective Grimes met with the CI later that same day at the CI's residence. After searching the CI and confirming that the CI did not have any contraband or money, Detective Grimes gave the CI \$225.00 in government funds to use in the drug transaction. While standing next to Detective Grimes, the CI called Wesley and arranged a time and place to buy heroin from him.¹

Detective Grimes conducted surveillance of the transaction from the driveway of a residence located approximately two houses over and thirty feet from the CI's residence - the agreed upon location of the drug transaction. Detective Grimes testified that

¹The phone call was not recorded and Detective Grimes did not hear the voice on the other end of the call. However, Detective Grimes heard the CI say that the CI had \$225.00 and wanted to buy some heroin.

he had a "clear sightline" and observed a black male matching the description of Wesley arrive at the residence in a grey Lincoln Town Car with Tennessee license plate 799-LPY. Detective Grimes observed Wesley get out of his vehicle and approach the CI in the walkway in front of the residence. Detective Grimes then observed what appeared to be a hand-to-hand drug transaction between Hunt and the CI. Although Detective Grimes testified that he did not actually see drugs or money being exchanged because Wesley had his back to him, Detective Grimes observed hand movements that were consistent with a drug transaction:

Q. And how exactly did that happen? What exactly did you see, or can you actually demonstrate what you saw?

A. Yes. As was stated, [Wesley's] a big guy. So, I could see his shoulder movement, going down with his hand, going down and getting something, coming out, and then the reach, hand to hand with the (demonstrates) informant.

Q. Okay. And, again, you said you've been doing narcotics for a long time.

A. Yes, sir.

. . . .

Q. And based on your training and experience, you believe this to be a hand-to-hand transaction, right?

A. Correct.

(Tr. at 47-48.) Wesley then returned to his vehicle and drove away from the scene. Immediately after Wesley left, Detective Grimes met with the CI on the walkway, and the CI showed him a plastic bag

containing the heroin purchased from Wesley.² The CI stated that Wesley had a "few more packs of heroin on him." Detective Grimes directed other officers who were assisting with the investigation to conduct a stop of Wesley's vehicle. Shortly thereafter, the officers stopped the vehicle and seized a firearm and heroin. The officers later identified Wesley as Otah Hunt.³ The government subsequently brought charges against Hunt based on the firearm and drugs found in his vehicle, but did not charge him for the heroin sold to the CI.

In the present motion, Hunt argues that the identity of the CI should be revealed so that Hunt can conduct a complete background check of the CI and gain access to his informant file. Hunt claims that although the government has recently revealed that the CI is now deceased, he needs to know the identity of the CI so that he can challenge the CI's credibility at the suppression hearing.⁴

II. ANALYSIS

As an initial matter, the Supreme Court has stated that,

²Detective Grimes later conducted a field test, and the substance tested positive for heroin.

³After Hunt was arrested, Detective Grimes wrote a report documenting the CI's undercover drug transaction. Detective Grimes wrote that the transaction occurred at the corner of Kenner and Labelle. However, Detective Grimes testified that the transaction actually occurred at a residence and not at the corner of Kenner and Labelle, and that this inaccurate information was purposely included in his report to protect the identity of the CI.

⁴There is no indication that Hunt had anything to do with the CI's death.

although the Due Process Clause may require the government to disclose the identity of a CI at trial under certain circumstances, "it has never been held to require the disclosure of an informant's identity at a suppression hearing." United States v. Slaughter, 274 F. App'x 460, 466-67 (6th Cir. 2008) (quoting United States v. Raddatz, 447 U.S. 667, 679 (1980)); see also United States v. Douglas, No. 5:08CR84, 2008 WL 1809393, at *3 (N.D. Ohio Apr. 21, 2008) (stating that "the Government has never been required [to] disclose the informant's identity at a suppression hearing"). As the Supreme Court explained in Raddatz,

This Court on other occasions has noted that the interests at stake in a suppression hearing are of a lesser magnitude than those in the criminal trial itself. At a suppression hearing, the court may rely on hearsay and other evidence, even though that evidence would not be admissible at trial. Furthermore, although the Due Process clause has been held to require the Government to disclose the identity of an informant at trial, provided the identity is shown to be relevant and helpful to the defense, it has never been held to require the disclosure of an informant's identity at a suppression hearing. We conclude that the process due at a suppression hearing may be less demanding and elaborate than the protections accorded the defendant at trial itself.

Raddatz, 447 U.S. at 679 (internal citations omitted).

Even assuming, *arguendo*, that a defendant may seek disclosure of an informant's identity for purposes of a suppression hearing, the court finds that under Roviaro v. United States, 353 U.S. 53 (1957), disclosure of the CI's identity in this case is not warranted. In general, the government is not required to disclose the names of its witnesses before trial. United States v. Baylis,

No 3:08-CR-147, 2009 WL 454332, at *1 (E.D. Tenn. Feb. 10, 2009) (citing United States v. Perkins, 994 F.2d 1184, 1190 (6th Cir. 1993); United States v. McCullah, 745 F.2d 350, 353 (6th Cir. 1984); United States v. Dark, 597 F.2d 1097, 1099 (6th Cir. 1979)). As for government informants, the Supreme Court has recognized a qualified privilege that protects their identities:

What is usually referred to as the informer's privilege 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. 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 that anonymity, encourages them to perform that obligation.

Roviaro, 353 U.S. at 59. This privilege is not absolute; whether disclosure is appropriate in a given case is determined by balancing "the public interest in protecting the flow of information against the individual's right to prepare his defense." Id. at 62. "[T]he informer's privilege must yield when the informant's identity is 'relevant and helpful to the defense of an accused' or 'essential to a fair determination of a cause.'" Baylis, 2009 WL 454332, at *1 (quoting Roviaro, 353 U.S. at 60-61). Factors to be considered in this determination include, among others, the charges against the defendant, the potential defenses, and the possible significance of the informer's testimony. Id. (citing Roviaro, 353 U.S. at 59); United States v. Jordan, No.

3:06-CR-102, 2007 WL 1849985, at *31 (E.D. Tenn. June 25, 2007) (same).

The burden is on the defendant to show how disclosure of the informant would substantively assist his or her defense. United States v. Moore, 954 F.2d 379, 381 (6th Cir. 1992). A defendant must do more than speculate that revealing the identity would be helpful to the defense. Jordan, 2007 WL 1849985, at *31 (citing United States v. Trejo-Zambrano, 582 F.2d 460, 466 (9th Cir. 1978); United States v. Moore, 954 F.2d 379, 381 (6th Cir. 1992)); see also United States v. Sharp, 778 F.2d 1182, 1186 (6th Cir. 1985). "A court may require disclosure if it finds that the informant's provision of relevant testimony, which is material to the defense, is 'reasonably probable.'" United States v. Thompson-Bey, No. 3:09-CR-64, 2010 WL 276122, at *2 (E.D. Tenn. Jan. 15, 2010) (quoting United States v. McManus, 560 F.2d 747, 751 (6th Cir. 1978)). Once the defendant makes this initial showing, if the evidence reveals that "it is reasonably probable that the informer can give relevant testimony, the burden should be on the Government to overcome this inference with evidence that the informer cannot supply information material to the defense." Id. (quoting United States v. Eddings, 478 F.2d 67, 71 (6th Cir. 1973)).

Further, the Sixth Circuit has stated that "[a]llthough there is no fixed rule, disclosure has usually been required when . . . the informer was an active participant in the events underlying the

defendant's potential criminal liability. On the other hand, disclosure has usually been denied when the informer was not a participant, but was a mere tipster or introducer." Sharp, 778 F.2d at 1186 n.2 (internal citations omitted); see also Thompson-Bey, 2010 WL 276122, at *4 (stating that an informant's role as an active participant, as opposed to a mere tipster, is a relevant factor to the Roviaro analysis); United States v. Bennett, No. 3:07-CR-81, 2008 WL 701644, at *5 (E.D. Tenn. Mar. 13, 2008) (same).

In the present case, the court finds that the CI's role was more akin to a tipster or introducer as opposed to an active participant. The CI, through the undercover drug transaction with Hunt, merely gave the officers information that provided them with a basis to stop Hunt's vehicle. The CI was not present during the vehicle stop and did not participate in the seizure of the firearm and drugs during the stop. Hunt's charges in the indictment are based solely on the firearm and drugs found during the vehicle stop.

However, even if the court were to conclude that the CI was an active participant in the underlying criminal activity, that determination would not necessarily result in disclosure of the CI's identity. See Thompson-Bey, 2010 WL 276122, at *3 (finding that informant was an active participant in drug transaction that formed a basis for the charged conspiracy but denying defendant's

motion to reveal the identity of the informant after balancing Roviaro factors). The CI's participation alone is insufficient if Hunt cannot specifically link the CI's testimony to his defense. Id. (citing United States v. Bryant, Nos. 90-1831, 90-1836, 1991 WL 256555, at *5-6 (6th Cir. Dec. 2, 1991)). In Bryant, the defendant sufficiently demonstrated that the informant was an active participant in the charged drug transactions. However, the district court denied his motion to disclose the identity of the informant because Bryant merely wanted to interview the informant to learn whether the informant could help his defense. The Court of Appeals affirmed the trial court's decision, holding that

[a]lthough the informant's role as an active participant, as opposed to a mere tipster, is a factor relevant to Roviaro balancing, under the circumstances of this case it adds no real weight to the balance, since defendant has not demonstrated how that is significant to his defense, from an evidentiary point of view. To say that role should tip the balance under the circumstances of this case would be to assign to it the preclusive effect of a *per se* rule. This we are unwilling to do, in view of the previous case law of this circuit.

Bryant, 1991 WL 256555, at *6.

Likewise, Hunt has not demonstrated how the CI's identity would be significant to his defense. To the extent Hunt contends that the information might assist him in challenging the CI's credibility about what happened during the drug transaction that provided the basis for the vehicle stop, that type of speculation does not satisfy the defendant's burden under Roviaro. Moreover, this was not a case where the officers relied on uncorroborated

information from an informant. See Roviario, 353 U.S. at 64 (observing that the fact that the government's informant and the defendant were the sole participants in the transaction weighed in favor of disclosure). To the contrary, the entire drug transaction was conducted under the supervision of Detective Grimes. The information provided by the CI was corroborated by Detective Grimes's own observations. The CI gave Detective Grimes a detailed description of Hunt (who the CI knew only as "Wesley"), including the vehicle he drove and the license plate number, and this information turned out to be accurate. The CI spoke to Hunt on the phone, and Detective Grimes heard the CI set up the purchase of heroin, which later took place as the CI said it would. The CI engaged in the drug transaction with Hunt while under close surveillance by Detective Grimes, and the CI provided Detective Grimes with the drugs, which field tested positive for heroin.

Finally, as the CI is no longer available to testify, the court fails to see how disclosing the CI's identity could possibly be necessary to Hunt's suppression motion.⁵

III. CONCLUSION

For the reasons above, Hunt's Motion for Disclosure of Identity of Confidential Informant is DENIED.

⁵The fact that the CI is now deceased does not lessen the need to protect the CI's identity, as disclosure might lead to retaliation against members of the CI's family. United States v. Dexta, 136 F. App'x 895, 904-05 (6th Cir. 2005).

IT IS SO ORDERED.

s/ Tu M. Pham
TU M. PHAM
United States Magistrate Judge

February 28, 2011
Date