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Criminal Law: Witnesses - Disclosure of a Confidential Informant's Identity - United States v. Rugendorf, 316 F. 2d 589 (7th Cir. 1963)

DePaul College of Law

CASE NOTES

CRIMINAL LAW: WITNESSES–DISCLOSURE OF A CONFIDENTIAL INFORMANT'S IDENTITY

On the basis of information supplied by a third party to the Federal Bureau of Investigation a search warrant was issued, the subsequent search revealing eighty-one pieces of stolen furs in the defendant's basement. The defendant was thereupon convicted of having received fur garments which were stolen and transported in interstate commerce. On appeal, the defendant contended that the trial court had erred in refusing to require the Government to reveal the source of the information contained in the affidavit, pursuant to which the search warrant was issued. The United States Court of Appeals for the Seventh Circuit, affirmed the trial court's decision, and expressly recognized the governmental privilege of non-disclosure commonly termed the "informer's privilege."

The scope of this note is confined to a discussion of the following issue: Is the identity of the confidential informant relevant to the defense of the accused where said informant's communications are used to establish probable cause for the issuance of a search warrant or the conducting of a search without a warrant?[1] *United States v. Rugendorf*, 316 F.2d 589 (7th Cir. 1963).[2]

In the early case of *In re Quarles and Butler*[3] the Supreme Court of the United States pronounced that it was the duty and right of every citizen to communicate to officers of the law any available information concerning the commission of a crime, and that such information, given by a private citizen, is a privileged and confidential communication, disclosure of which cannot be compelled without the assent of Government.

[1] People v. Durr, 28 Ill. 2d 308, 192 N.E. 2d 379 (1963). The court refused to require disclosure of the informant's identity, even though the informant's information was solely relied upon by the police in conducting a search of the defendant's automobile without a search warrant. I will discuss this case in light of Illinois law after a discussion of the federal doctrine of non-disclosure of the confidential informant's identity.

[2] On March 31, 1964, this case was affirmed by the United States Supreme Court on non-federal grounds. The majority opinion, written by Mr. Justice Clark, was based on the ground that the Constitutional issue was not properly raised in the trial court. The four dissenting justices were strongly in favor of requiring disclosure of the informant's identity. 32 U.S.L. WEEK 4298 (U.S. March 31, 1964).

[3] In re Quarles and Butler, 158 U.S. 532 (1894). This seems to be the foundation case upon which the privilege of non-disclosure of a confidential informant's identity rests. Interestingly enough, the case actually dealt with the privilege of non-disclosure in regard to the contents of the communications and not with regard to the informant's identity. See Worthington v. Scribner, 109 Mass. 487 (1872).

The justification for this governmental privilege of non-disclosure of the confidential informant's identity has rested largely upon the broad lines of public policy;[4] wherein the courts try to balance the public interest in protecting the flow of information to the Government against the individual's right to prepare his defense.[5] Consequently, where knowledge of the informant's identity is relevant to the defense of the accused or is essential to a fair trial, the governmental privilege of non-disclosure must give way.[6]

The question which becomes determinative in such cases is, what is essential to a fair trial or helpful to the defense of the accused? *In United States v. Whiting*,[7] the United States Court of Appeals, for the Fourth Circuit, refused to disclose the informant's identity where the defendant sought to invalidate a search warrant issued pursuant to the informant's communications which were used to establish probable cause for its issuance. The court placed great emphasis on the need to protect the sources of information which enable the police to enforce the criminal law for the protection of the public. The court did recognize, however, that disclosure of the informant's identity is necessary where it is essential to the defense of the accused. Seemingly, in refusing disclosure, the court has overlooked the fourth amendment to the Constitution of the United States which provides that search warrants shall be issued only upon probable cause.[8] This is highly significant, in light of the fact, that the reliability of the informant is an important factor in establishing probable

[4] Miller v. United States, 273 F. 2d 279 (5th Cir. 1959); Cannon v. United States, 158 F. 2d 952 (5th Cir. 1946).

[5] Roviaro v. United States, 353 U.S. 53 (1956); Miller v. United States, 273 F. 2d 279 (5th Cir. 1959); United States v. One 1957 Ford Ranchero Pickup Truck, 265 F. 2d 21 (10th Cir. 1959); Wilson v. United States, 59 F. 2d 390 (3rd Cir. 1932).

[6] Roviaro v. United States, 353 U.S. 53 (1956); United States v. One 1957 Ford Ranchero Pickup Truck, 265 F. 2d 21 (10th Cir. 1959); Miller v. United States, 273 F. 2d 279 (5th Cir. 1959); Anderson v. United States, 273 F. 2d 75 (D.C. Cir. 1959); Pegram v. United States, 267 F. 2d 781 (6th Cir. 1959); Cochran v. United States, 291 F. 2d 633 (8th Cir. 1961); United States v. Whiting, 311 F. 2d 191 (4th Cir. 1962); Gilmore v. United States, 256 F. 2d 565 (5th Cir. 1958); Costello v. United States, 298 F. 2d 99 (9th Cir. 1962); Wilson v. United States, 59 F. 2d 390 (3rd Cir. 1932). See, Uniform Rules of Evidence Act 36; MODEL CODE OF EVIDENCE, Rule 230 (1942); 8 WIGMORE, EVIDENCE § 2374 (3rd ed. 1940).

[7] United States v. Whiting, 311 F. 2d 191 (4th Cir. 1962). See also, Bruner v. United States, 293 F. 2d 621 (5th Cir. 1961); Cannon v. United States, 158 F. 2d 952 (5th Cir. 1946) held that public policy forbids disclosure of an informant's identity unless essential to the defense of the accused on the merits. United States v. Li Fat Tong, 152 F. 2d 650 (2d Cir. 1945) held that disclosure will be denied unless it would establish the innocence of the defendant.

[8] "The right of the people to be secure in their homes, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause. . . ."

cause for the issuance of a search warrant or the conducting of a search without a search warrant, that is, where such information is used to establish probable cause[9] and there is a lack of sufficient evidence apart from the informant's communication to justify a search or the issuance of a search warrant.[10] Accordingly, in *United States v. Pearce*,[11] the United States Court of Appeals, for the Seventh Circuit, required the Government to disclose the informant's identity to the defense where the informant's information was used to establish probable cause for the issuance of a search warrant. The court concluded that the identity of the informant was essential to the accused's defense in order to give the defendant the opportunity to challenge the reliability of said person. Thus, it is not sufficient, where no collateral evidence exists, for the agent to testify that his informant was a reliable person.[12] It is not a question of impugning the motives or doubting the honest belief of the agent in regard to the information he has received, but of allowing the court to determine whether, under all the circumstances, such informant and his information were reliable.[13] Otherwise, the agent would be safely ensconced behind his blanket testimony that he was informed by a reliable person[14] and the defendant would be denied a reasonable opportunity to establish a lack of probable cause.[15]

In Illinois, the courts, in balancing the public interest against personal rights, seem to favor efficient law enforcement over the right of the individual to prepare a defense. In *People v. Mack*,[16] the Supreme Court of Illinois refused to disclose the informant's identity where said inform-

[9] United States v. Pearce, 275 F. 2d 318 (7th Cir. 1960); Cochran v. United States, 291 F. 2d 633 (8th Cir. 1961); Costello v. United States, 298 F. 2d 99 (9th Cir. 1962).

[10] Anderson v. United States, 273 F. 2d 75 (D.C. Cir. 1959) (by implication) no disclosure as the officer acted upon what he observed. Miller v. United States, 273 F. 2d 279 (5th Cir. 1959) (by implication), no disclosure as police made independent observations. Mosco v. United States, 301 F. 2d 180 (9th Cir. 1962) (by implication), no disclosure where the informant's communications were corroborated by independent observation. Pegram v. United States, 267 F. 2d 781 (6th Cir. 1959) (by implication), no disclosure where the defendant aroused the suspicion of the police.

[11] United States v. Pearce, 275 F. 2d 318 (7th Cir. 1960) wherein it was alleged by the police that the informant was reliable in the past. Nevertheless, the court required disclosure and the defendant was able to show that the informer was not previously known by the police to be reliable.

[12] United States v. Keown, 19 F. Supp. 639 (W.D. Ky. 1937); Wilson v. United States, 59 F. 2d 390 (3rd Cir. 1932).

[13] *Ibid.*

[14] Wilson v. United States, 59 F. 2d 390 (3rd Cir. 1932).

[15] Costello v. United States, 298 F. 2d 99 (9th Cir. 1962).

[16] People v. Mack, 12 Ill. 2d 151, 145 N.E. 2d 609 (1957). See People v. Reed, 21 Ill. 2d 416. 173 N.E. 2d 422 (1961).

ant's communications were used to establish probable cause for the issuance of a search warrant. The court based its decision on the fact that the informant's testimony would be of little help or relevancy to the defense of the accused in face of the independent evidence by which the crime was established. Then, in *People v. Durr*,[17] the Supreme Court of Illinois refused to require disclosure of the informant's identity where a search was conducted without a search warrant solely pursuant to the informant's communications. Again the court reasoned that the informant's testimony would be completely irrelevant to the question of the defendant's guilt.

CONCLUSION

In both the *Rugendorf* case and the *Durr* case the respective courts have refused disclosure on the ground that the informant's testimony would not be relevant in regard to the defendant's guilt or innocence and therefore knowledge of the informant's identity was not essential to the defense of the accused.[18] These courts seem to overlook the fact that the law protects the guilty as well as the innocent,[19] and that law enforcement, in defeating the criminal, must maintain inviolate the historic liberties of the individual.[20] Otherwise, the fundamental distinction between our form of government, where officers are under the law, and the police state, where they are the law, would be obliterated.[21] It would seem, therefore, in order to give vitality to the requirement of reliability which the law imposes, the courts must require disclosure of the informant's identity where his information is used to establish probable cause.[22] In this manner his reliability may be subjected to meaningful judicial scrutiny, rather than accepted on the word of a policeman.[23] On the other hand, "if an officer were allowed to establish unimpeachably the lawfulness of a search merely by testifying that he received justifying information from a reliable person whose identity cannot be revealed, he would become the sole judge of what is probable cause to make the search. Such

[17] People v. Durr, 28 Ill. 2d 308, 192 N.E. 2d 379 (1963).

[18] People v. Durr, 28 Ill. 2d 308, 192 N.E. 2d 379 (1963); United States v. Rugendorf, 316 F. 2d 589 (7th Cir. 1963).

[19] Wilson v. United States, 59 F. 2d 390 (3rd Cir. 1932).

[20] Edgar J. Hoover, *Civil Liberties and Law Enforcement: The Role of the F.B.I.*, 37 Iowa L. Rev. 175 (1952).

[21] Johnson v. United States, 333 U.S. 10 (1948).

[22] United States v. Blich, 45 F. 2d 627 (D.C. Wyo. 1930); Jones v. United States, 266 F. 2d 924 (D.C. Cir. 1959); People v. Durr, 28 Ill. 2d 308, 192 N.E. 2d 379 (1963) (dissenting opinion).

[23] People v. Durr, 28 Ill. 2d 308, 192 N.E. 2d 379 (1963) (dissenting opinion).

a holding would destroy the exclusionary rule,"[24] which in essence states that the ultimate corroboration provided by the fruits of the search cannot be used retroactively to justify the search.[25] Thus, "only by requiring disclosure and giving the defendant an opportunity to present contrary or impeaching evidence as to the truth of the officer's testimony and the reasonableness of his reliance on the information can the court make a fair determination of the issue."[26]

Hence, it can be readily observed that the informant's identity is truly essential to the defense of the accused, for if the informant's identity is withheld, the defendant is without power to establish lack of probable cause.[27]

[24] *Ibid.*

[25] Johnson v. United States, 333 U.S. 10 (1948).

[26] People v. Durr, 28 Ill. 2d 308, 192 N.E. 2d 379 (1963) (dissenting opinion).

[27] This conclusion relates only to situations where the informant's information is used to establish probable cause.

LEGISLATURES–BILL PASSED AFTER LEGISLATURE CLOCK STOPPED HELD VOID

The appellants, Heck's Discount Center, Inc., and other merchants in West Virginia, were brought to court for violation of a West Virginia statute[1] which limited merchandising and selling activities "on a Sabbath day." The present action was brought to prohibit the respondents from continuing prosecution of the indictment on the ground that the statute was unconstitutional. The West Virginia legislature, in order to be technically within the sixty days allowed for a legislative session,[2] stopped the clock on the wall of the Assembly at 11:28 P.M. of the sixtieth day.[3] The legislature continued to discuss the bill and passed it around 12:15 A.M. on the sixty-first day. Neither the enrolled bill nor the legislative journal clearly stated the time of the bill's passage, although it was correct in all other respects. Appellant introduced evidence from the legislative

[1] West Virginia Code, Art. 10, Sec. 6112(6) (1963, c. 37).

[2] "The regular session of the Legislature . . . shall not exceed sixty days. . . . All regular sessions may be extended by concurrence of two-thirds of the members elected to each house." W. VA. CONST., art. VI, sec. 22. This requirement of two-thirds of each house was not met.

[3] This procedure is present in other states as well. In sixteen states, the state constitution limits the number of days the legislature may be in session. In the remaining states, adjournment is agreed upon by a concurrence of the two houses. Because of the inevitable accumulation of bills to be discussed and acted upon at the close of the session, the legislatures in some of these states have stopped the clock in order to gain more time for consideration and passage of the bills.