

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BARRY HAITH,	§	
	§	No. 6, 2003
Defendant Below,	§	
Appellant,	§	
v.	§	Court Below—Superior Court of
	§	the State of Delaware, in and
	§	for Kent County in IK01-08-
STATE OF DELAWARE,	§	0305, 0307, 0309 through
	§	0312, 0314.
Plaintiff Below,	§	
Appellee.	§	Def. ID No. 0108002394

Submitted: December 29, 2003  
Decided: March 1, 2004

Before **HOLLAND, BERGER** and **STEELE**, Justices.

**ORDER**

This 1<sup>st</sup> day of March, 2004, upon consideration of the appellant’s brief filed pursuant to Supreme Court Rule 26(c), his attorney’s motion to withdraw, and the State’s response thereto, it appears to the Court that:

(1) At around Noon on August 2, 2001, the Delaware State Police received a tip from a confidential informant who claimed that Barry Haith and a companion, Herbert Watkins, had left the Dover area at around 10:00 that morning to travel to New York City to buy cocaine. The informant told the police that Haith and Watkins would return to Dover at approximately 6:00 that evening and would be traveling in a purple-blue Ford Expedition.

(2) Based on that information, and after confirming with DELJIS<sup>1</sup> that Haith was a co-owner of a Ford Expedition, the police set up surveillance along State Route 1, south of Odessa. Sometime after 5:30 p.m., the police observed Watkins and Haith traveling in Haith's Ford Expedition heading southbound on Route 1. At approximately 6:00 p.m., as Haith and Watkins exited Route 1 at Exit 95 in Dover, the police attempted to stop Haith's vehicle, using two unmarked police vehicles. During the stop, Haith's vehicle and the two police vehicles collided. Haith attempted to flee the scene on foot, but he was chased down by a K-9 police dog and was apprehended. After a pat-down search, Haith was found with a large quantity of cocaine and a small amount of marijuana.

(3) As a result of this incident, Haith was arrested and indicted on numerous drug and drug-related offenses. He was eventually released on a secured bond pending his trial.

(4) Haith, through counsel, filed two pretrial motions: (a) a "Motion for Specific Brady Material" that sought extensive information about the confidential informant; and (b) a motion to suppress, arguing that there was a

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<sup>1</sup>DELJIS is Delaware's computerized criminal justice information system.

lack of probable cause for the arrest and search. At a suppression hearing that began on March 20, 2002, the Superior Court denied Haith's Motion for Specific Brady Material, ruling that the prosecution was not required "to undertake . . . [an] . . . extensive search for an accumulation of information concerning the confidential informant."<sup>2</sup> Later, on day three of the hearing,<sup>3</sup> the Superior Court denied the motion to suppress, concluding that the tip that led to Haith's arrest was from a past-proven reliable informant, and that the information was corroborated.<sup>4</sup>

(5) Haith represented himself for much of his jury trial. At several points during the trial, Haith sought leave of court to call his wife as a witness to ask her specifically if she was the confidential informant in the case. In support of his request, Haith argued that his wife had disclosed to him that she was, in fact, the confidential informant.

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<sup>2</sup>Suppression Hr'g Tr. at 18-19 (Mar. 20, 2002).

<sup>3</sup>The suppression hearing was protracted due to Haith's failure to return to the hearing after the first day. When Haith failed to return to the hearing on the second day, the Superior Court excused the jury, issued a capias for Haith and recessed the proceedings until the following Monday, March 25, 2002. When Haith failed to appear on March 25, 2002, the Superior Court issued a rule to show cause why Haith's bail should not be forfeited and allowed his counsel to withdraw. Haith was eventually located in North Carolina in May 2002 and was returned to Delaware where he was committed to the Department of Correction pending his trial in September 2002.

<sup>4</sup>Suppression Hr'g Tr. at 6-7 (Mar. 25, 2002)

(6) The Superior Court refused Haith's requests to call his wife as a witness to ask her whether she was the confidential informant. Initially, on the prosecution's motion in limine, the Superior Court limited any questions that sought to disclose the identity of the confidential informant.<sup>5</sup> Later, after an *in camera* hearing with Haith's wife, the Superior Court ruled that Haith could call his wife as a defense witness, but that neither side was "permitted to ask her directly whether she was or is the confidential informant or whether she . . . is the one who called the police that day."<sup>6</sup> The Superior Court reiterated that ruling when Haith, with the assistance of counsel,<sup>7</sup> sought to reopen the pretrial motion to suppress on the basis that (a) his wife had told him that she was the confidential informant, and (b) she was not reliable. Ultimately, the defense elected not to call Haith's wife as a witness, and Haith did not testify.

(7) On September 24, 2002, the jury convicted Haith of seven of the original offenses. He was sentenced to a total of twenty-seven years at Level

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<sup>5</sup>Trial Tr. at 42 (Sept. 19, 2002).

<sup>6</sup>Trial Tr. at 146-147 (Sept. 23, 2002).

<sup>7</sup>Haith requested the assistance of counsel on September 24, 2002, the last day of his three-day trial. *See* Trial Tr. at 5 (Sept. 24, 2002).

V, suspended after sixteen years, for eleven years of probation. This is Haith's direct appeal.

(8) Haith's counsel has filed a brief and a motion to withdraw pursuant to Supreme Court Rule 26(c). In his motion to withdraw, Haith's counsel represents that he conducted a conscientious review of the record and concluded that there are no meritorious issues on which to base an appeal. Moreover, Haith's attorney informed him of the provisions of Rule 26(c) and provided Haith with a copy of the motion to withdraw and the accompanying brief. On appeal, Haith identifies three issues for this Court's consideration. The State has responded to Haith's points, defense counsel's position, and has moved to affirm the Superior Court's judgment.

(9) The standard and scope of review applicable to the consideration of a motion to withdraw and an accompanying brief under Rule 26(c) is twofold. First, this Court must be satisfied that defense counsel has made a conscientious examination of the record and the law for arguable claims. Second, this Court must conduct its own review of the record and determine

whether the appeal is so totally devoid of at least arguably appealable issues that it can be decided without an adversary presentation.<sup>8</sup>

(10) In his first claim, Haith argues that the Superior Court committed error when it denied his request to inquire into the confidential informant's identity. Second, Haith claims that there was no evidence that the confidential informant was a reliable source of information. Third, Haith contends generally that the search and seizure of his person and motor vehicle violated his Constitutional rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

(11) This Court reviews evidentiary rulings for an abuse of discretion.<sup>9</sup> If we find an abuse of discretion, we must then determine whether the error rises to the level of significant prejudice that denied the defendant a fair trial.<sup>10</sup>

(12) Under Delaware Uniform Rule of Evidence Rule (D.R.E.) 509(a), the prosecution has a privilege to refuse to disclose the identity of a confidential

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<sup>8</sup>*Penson v. Ohio*, 488 U.S. 75, 83 (1988); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 442 (1988); *Anders v. California*, 386 U.S. 738, 744 (1967).

<sup>9</sup>*Seward v. State*, 723 A.2d 365, 372 (Del. 1999).

<sup>10</sup>*Id.*

informant. No privilege exists, however, “if the identity of the informer has been disclosed . . . by the informer’s own action.”<sup>11</sup>

(13) In this case, the prosecution asserted its privilege under D.R.E. 509(a) to refuse to disclose the identity of the confidential informant. After the *in camera* hearing with Haith’s wife, the Superior Court upheld the prosecution’s privilege, ruling that Haith was not permitted to ask his wife directly whether she was the confidential informant or whether she called the police on August 2, 2001.

(14) In our review of this case, we have assumed, for purposes of argument, that Haith’s wife, in fact, voluntarily disclosed to him that she was the confidential informant, and that such a disclosure extinguished the prosecution’s privilege not to disclose the identity of the informant. Moreover, assuming *arguendo* that the prosecution’s privilege was extinguished, it follows that the Superior Court’s later ruling upholding the privilege and refusing to allow Haith to question his wife on her identity as the confidential informant, was an abuse of discretion. Assuming an abuse of discretion, however, we are further called upon to determine whether that error rises to the level of

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<sup>11</sup>Del. Unif. R. Evid. 509(c)(1).

significant prejudice that denied Haith a fair trial. After having carefully reviewed the record, we conclude that it did not.

(15) Haith does not assert that he was prejudiced in any way, significant or otherwise, as a result of the Superior Court's alleged abuse of discretion. Moreover, having considered the overwhelming evidence of Haith's guilt, including his statement to the police, the testimony of his co-defendant, his flight from the crime scene, and the drugs that were found in his possession, we have concluded that Haith's defense was not prejudiced as a result of the Superior Court's alleged error.

(16) In his second claim, Haith challenges the Superior Court's pretrial finding at the March 2002 suppression hearing that the confidential informant was reliable.<sup>12</sup> The Superior Court's denial of a pretrial evidence suppression motion is reviewed on appeal for an abuse of discretion.<sup>13</sup>

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<sup>12</sup>Under the totality of the circumstances, corroborated information from a past-proven reliable informant can provide the basis for probable cause. *King v. State*, 1993 WL 445484 (Del. Supr.).

<sup>13</sup>*Gregory v. State*, 616 A.2d 1198, 1200 (Del. 1992).



(17) Haith's claim is without merit. The Superior Court's factual finding that the confidential informant was "past-proven reliable"<sup>14</sup> was not an abuse of discretion and, indeed, is amply supported by the pretrial evidence suppression testimony of the Delaware State Police.<sup>15</sup>

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<sup>14</sup>The Superior Court found as follows:

As to the motion to suppress in this case, the police received a tip that the defendant and his codefendant would be in possession of illegal narcotics after returning from New York.

The tip was from a past-proven, reliable informant, who had a particularly good record of reliability, in fact, after a tip, it was specific, the police were able to corroborate the material parts of it.

I find that the police had probable cause to arrest the defendant, and that the search of his person was proper as a search incident to his arrest.

Suppression Hr'g Tr. at 6-7 (Mar. 25, 2002).

<sup>15</sup>Delaware State Police Detective David M. Ellingsworth testified as follows:

Q. In your experience with the confidential informant, had the confidential informant ever given up what you later determined to be incorrect information?

A. No, they did not.

Q. Was there -- would you each time you would get some information from this individual attempt to corroborate it through other sources?

A. That's correct. Every time.

Q. But you never had a problem?

(18) In his third and final claim, Haith makes a general statement that the search of his person and motor vehicle, and the subsequent seizure, deprived him of his Constitutional rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Haith does not elaborate about those alleged errors, however, and this Court, having found no reversible error in Haith's challenges to the evidentiary rulings, nor any error in the record, concludes that there is no merit to Haith's Constitutional claim.

(19) The Court has carefully reviewed the record and has concluded that Haith's appeal is wholly without merit and devoid of any arguably appealable issue. We also are satisfied that Haith's counsel has made a conscientious effort to examine the record and has properly determined that Haith could not raise a meritorious claim in this appeal.

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A. Never had any false information, no.

Q. Approximately how many times would you estimate you had contact with this informant, excluding the other officers, just yourself, where you had some kind of transfer of information?

A. Numerous. Estimate, 34.

Suppression Hr'g Tr. at 46-47 (Mar. 20, 2002).

NOW, THEREFORE, IT IS ORDERED that the State's motion to affirm is GRANTED. The judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger  
Justice