

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARSHALL J. HORSEY,)
) No. 302, 2005
 Defendant Below,)
 Appellant,) Court Below: Superior Court
 v.) of the State of Delaware in
) and for Sussex County
)
 STATE OF DELAWARE,) Cr. ID No. 0408013559
)
 Plaintiff Below,)
 Appellee.)

Submitted: December 21, 2005

Decided: January 24, 2006

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices.

ORDER

This 24th day of January, 2006, upon consideration of the briefs of the parties, it appears to the Court as follows:

1. Marshall Horsey appeals his conviction for delivery of marijuana and for delivery of marijuana within 300 feet of a church. Horsey raises two arguments. Horsey first claims that the trial judge abused his discretion when he denied Horsey's Motion to Compel the State to reveal the identity of a confidential informant who introduced Horsey to an undercover police officer just before Horsey's marijuana sale to the officer. Horsey also claims that the trial judge abused his discretion when he denied Horsey's Motion for a New Trial after the prosecution mistakenly introduced into evidence Horsey's post-arrest photograph.

Because Horsey has not shown a reasonable probability that the confidential informant's identity would have materially aided his defense and has not shown any prejudicial effect caused by the erroneous admission of his post-arrest photograph, we find that the trial judge did not abuse his discretion by denying Horsey's motions. Therefore, we affirm the judgment of the Superior Court.

2. On July 29, 2004, Georgetown Police Sergeant Lawrence Grose assisted the Milford Police Department in an undercover drug investigation of Horsey. Grose viewed a Division of Motor Vehicle photograph of Horsey¹ and then, accompanied by a confidential informant, drove to a church parking lot to meet with Horsey. The confidential informant introduced Grose to Horsey. Grose then bought a bag of marijuana from Horsey for \$20.² Approximately two weeks later, the police obtained an arrest warrant and ultimately arrested Horsey.

3. Before trial, Horsey filed a Motion to Compel disclosure of the identity of the confidential informant who accompanied Grose arguing that the disclosure would materially aid his defense. At the time of Horsey's motion, the parties could not find the confidential informant and the trial judge decided the

¹ Grose viewed Horsey's "photograph before he met with the defendant in an undercover capacity so he could familiarize himself with the defendant's features as he did an undercover buy."

² During the transaction, Detective Frank Horsman of the Milford Police Department and two other officers monitored the drug transaction by means of a wire Grose wore. Horsman and the other officers, however, did not see the exchange or Horsey.

matter on the probable cause affidavit prepared by Grose. The trial judge denied the motion because Horsey had not met his burden of showing how the unmasking would provide a material aid to his defense.

4. During the trial, the prosecutor showed Grose a photograph and asked if Grose had viewed that particular photo before the drug transaction. Grose said yes. At the post trial hearing, however, evidence established that Grose incorrectly identified the photo as the one he viewed before the drug transaction. The photo that Grose identified at trial was actually a post-arrest mugshot of Horsey and not the photo from the Division of Motor Vehicle database.³

5. On appeal, Horsey first claims that the trial judge erred by denying Horsey's motion to compel disclosure of the identity of the confidential informant. We review a trial judge's evidentiary rulings for an abuse of discretion.⁴ If we find an abuse of discretion, we must then determine whether the error rises to the level of prejudice so significant that it denied Horsey a fair trial.⁵

6. Delaware Uniform Rule of Evidence 509(a) provides the State with a privilege to refuse to disclose the identity of a confidential informant unless it

³ The trial judge found that the Division of Motor Vehicle photograph looked substantially similar to the post-arrest mug shot. The trial judge noticed one difference: the admitted post-arrest mugshot was in color, and the Division of Motor Vehicle photograph was black and white. Further, Horsey acknowledged in his testimony that he was the person pictured in both photos.

⁴ *Haith v. State*, 2004 Del. LEXIS 101 at *7 (Del. 2004).

⁵ *Id.*

appears that the confidential informant may be able to give testimony that would materially aid the defense.⁶ “The defense has the burden of establishing, beyond mere speculation, that the informant's testimony would materially aid the defense.”⁷

7. In light of Grose’s misidentification of Horsey’s photograph at trial, Horsey contends that the confidential informant may have been able to provide favorable testimony to the defense on the issue of identification. Relying on the *in camera* affidavit,⁸ the trial judge found that Horsey could not meet his burden to show that the confidential informant’s disclosure would materially aid his defense.

The trial judge stated:

In our case, having reviewed the affidavit submitted by the State, which will be made a Court exhibit for appellate reasons under seal for that purpose, the affidavit shows that the informant witnessed the sale of marijuana between the defendant and Sergeant Grose. The informant did not handle either the money or the drugs. The most the confidential informant did was arrange the meeting between the defendant and Sergeant Grose. The confidential informant did not participate in the transaction.

Apply [sic] the law discussed in *State v. Price*, as well as *State v. Hooks*, I find that the defense cannot satisfy its burden to show a

⁶ *Price v. State*, 763 A.2d 92 (Del. 2000).

⁷ *Id.*

⁸ The trial judge relied on the *in camera* affidavit prepared by Grose because the confidential informant was unavailable. *See Price*, 763 A.2d at 92 (we found no error when the trial judge relied on an *in camera* affidavit to deny the defendant’s motion to compel disclosure of a confidential informant).

reasonable probability that the disclosure of the informant's identity would materially aid the defense. Therefore, the identity will not be disclosed and that application is denied.

8. The trial judge did not abuse his discretion. Horsey did not provide any evidence that the confidential informant actively participated in the transaction apart from the fact that the confidential informant introduced Grose to Horsey. The mere fact that the confidential informant introduced Grose to Horsey certainly does not alone explain how the confidential informant would have materially aided Horsey's defense.⁹

9. Further, Horsey speculates that the confidential informant could have aided his defense by showing that Grose's identification of Horsey was inaccurate. Horsey bases his claim on the fact that Grose misidentified the post-arrest mugshot as the photo he had seen before the Horsey transaction. Grose's mere misidentification of a photo seen before trial during his trial testimony does not demonstrate how the confidential informant could have aided Horsey's defense. Horsey provided no evidence that the confidential informant would have testified that Grose falsely identified Horsey as the person from whom Grose bought drugs on July 29, 2004. Horsey himself admits he was the person depicted in both photos. Thus, we find that the

⁹ See *Price*, 763 A.2d at 92 (upholding a trial judge's denial of a motion to compel disclosure of a confidential informant because the confidential informant merely arranged three meetings between the undercover officer and the defendant).

trial judge did not abuse his discretion by failing to compel the disclosure of the confidential informant's identity.

10. Horsey also claims that the trial judge abused his discretion by denying Horsey's Motion for a New Trial. Horsey filed a Motion for a New Trial because the State mistakenly presented Horsey's post-arrest photograph to Grose at trial and Grose mistakenly claimed that he viewed the post-arrest photograph before the Horsey drug transaction. Horsey contends that had the photograph been properly excluded, he could have raised a reasonable doubt about the seller's identity in the jurors' minds. The trial judge found that any error from admitting the color photo was harmless.

11. We review a trial judge's denial of a Motion for a New Trial for an abuse of discretion.¹⁰ Under an abuse of discretion standard, we overturn a discretionary ruling of the trial judge only when the ruling is based upon unreasonable or capricious grounds.¹¹

12. Here, the trial judge did not abuse his discretion by finding that any error from admitting the color photo was harmless. The misidentification was of the photo – not Horsey – and was after Grose

¹⁰ *Swan v. State*, 820 A.2d 342, 350 (Del. 2003).

¹¹ *Zimmerman v. State*, 628 A.2d 62, 65 (Del. 1993).

identified Horsey in court without the aid of any photographs. Moreover, at trial, Horsey raised no issue about misidentification of photos tainting the in-court identification. Instead, Horsey suggested an alibi that placed him in Rehoboth on the day of the drug transaction. The jury simply rejected Horsey's alibi. Accordingly, the misidentification of Horsey's mugshot as the photo seen pretrial played no part in the jury's determination. Thus, we find the trial judge did not abuse his discretion when he denied Horsey's Motion for a New Trial.

NOW, THEREFORE, IT IS ORDERED, that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/ Myron T. Steele
Chief Justice