

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-002098-MR

JAMIE SHAWN AVERY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE SHEILA R. ISAAC, JUDGE  
ACTION NOS. 02-CR-00331 AND 02-CR-00331-1

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

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BEFORE: BUCKINGHAM, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. Jamie Shawn Avery (Avery) entered a conditional guilty plea to trafficking in the first degree;<sup>1</sup> possession of marijuana;<sup>2</sup> possession of drug paraphernalia;<sup>3</sup> and being a persistent felony offender, second degree,<sup>4</sup> and received a ten-year sentence. Appellant contends the trial court erred

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<sup>1</sup> KRS 218A.1412; see KRS 218A.010(28), which defines trafficking to include "possess with intent to . . . sell. . . ."

<sup>2</sup> KRS 218A.1422.

<sup>3</sup> KRS 218A.500(2).

<sup>4</sup> KRS 532.080(2).

in denying his motion for the Commonwealth to disclose the identity of the confidential informant used by the police to secure the search warrant of Avery's apartment. Because the Commonwealth agreed to base the trafficking charge on possession with intent to sell rather than on the actual sales, we believe the trial court was correct in not requiring the release of the confidential informant's name. Therefore, we affirm.

On December 20, 2001, Detective Keith Ford of the Lexington Police Department's Narcotics Unit received a tip from an informant that Avery sold crack cocaine and possibly powder cocaine from his residence. This particular confidential informant previously assisted the narcotics unit. Detective Ford used this informant to make a controlled purchase of cocaine from Avery the same day. On January 18, 2002, a second controlled purchase was made from Avery by the same confidential informant. Subsequently, Detective Ford obtained a search warrant for Avery's residence and executed it on January 18, 2002. Five individuals, including Avery, were arrested. Avery was charged with trafficking in the first degree,<sup>5</sup> and other charges based upon the controlled buys. Avery requested the identity of the confidential informant as a material witness to the buys. The police invoked the privilege of nondisclosure<sup>6</sup> and

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<sup>5</sup> KRS 218A.1412.

<sup>6</sup> KRE 508(a).

Avery moved to suppress. A suppression hearing was held by the trial court on April 22, 2002.

At the suppression hearing, it was disclosed that during the execution of the search warrant the police recovered over 25 grams of cocaine, \$2,327.00 in cash, over 20 grams of marijuana, and drug paraphernalia. After a discussion with the trial court concerning the identity of the informant, the Commonwealth agreed that it would present its case based on the evidence obtained in the search warrant (under KRS 218A.010(28), trafficking includes possession with intent to sell) and not have the charge based on any evidence or information from the confidential informant indicating a past sale of cocaine. With the changes, the circuit court did not require disclosure of the confidential informant's name. Nevertheless, Avery made a second request for the informant's identity and a hearing was held on May 17, 2002. The court denied the request and Avery entered the conditional plea. This appeal followed.

On appeal, Avery has one argument, that the trial court erred in not requiring the Commonwealth to disclose the identity of the confidential informant used by the police to secure the search warrant of Avery's residence. Avery contends that under KRE 508(c)(2), there is an exception to the nondisclosure policy of KRE 508(a) that calls for a release of the confidential informant's identity when "it appears that an

informer may be able to give relevant testimony. . . ." Both Avery and the Commonwealth cite to Roviaro v. United States, 353 U.S. 53, 62, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957), which held that:

[n]o fixed rule with respect to disclosure is justifiable. 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.

Kentucky followed this reasoning in Taylor v. Commonwealth, Ky., 987 S.W.2d 302, 304 (1998), after the adoption of KRE 508. By agreeing to base the charge on "possession" instead of "sales," the Commonwealth changed the status of the informant from a material witness to a mere tipster. In Hargrave v. Commonwealth, Ky., 724 S.W.2d 202, 203 (1986), our Supreme Court dealt with a trafficking case based on "possession", similar to the present case. In Hargrave, the informant witnessed the sale of drugs, but the charge was possession, not the sale. The Court denied the defense the identity of the informant because at the time of the search, the informant "was not present and the fact that the informant witnessed the possession of the drugs clearly is immaterial." Hargrave at 203. (emphasis

original). The Hargrave Court went on to conclude that “[t]he fact that Appellant may or may not have been present does not bear upon the effect of this information.” Id. at 204. Under the circumstances of this case, we believe the trial court did not err in failing to order disclosure of the informant’s identity. See Taylor, 987 S.W.2d 302.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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