

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-002303-MR

JUAN DE DIOS MENDOZA

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE JOHN R. ADAMS, JUDGE  
ACTION NO. 02-CR-00708

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, COMBS, AND DYCHE, JUDGES.

BUCKINGHAM, JUDGE: Juan De Dios Mendoza appeals from a judgment of the Fayette Circuit Court sentencing him to five years in prison. The issue in this case involves whether the circuit court erred in denying his motion to force the Commonwealth to reveal the identity of a confidential informant. We affirm.

On May 2, 2002, the narcotics division of the Lexington Police Department received information from a confidential informant that cocaine was being sold by a Hispanic male in his twenties from a residence at 1911 Oxford Circle.

Under the supervision and surveillance of police, the confidential informant made a controlled purchase of cocaine at that address from a man identified as "Lupe." The officer was able to see the transaction from his vantage point.

Within 48 hours of the drug buy, the police detective submitted an application for a search warrant. A search warrant for the residence was issued by a district judge, and police officers executed the warrant shortly thereafter. When the officers arrived at the residence, they found two Hispanic males present, neither of whom matched the description of Lupe. Shortly thereafter, Lupe returned to the apartment. During the search, the officers recovered numerous items including cocaine, marijuana, drug paraphernalia, a fake resident alien card for Guadalupe Del Fierro, and false social security and identification cards.

Lupe was arrested by the officers following the search, and he advised them that his full name was Guadalupe Del Fierro. After being advised of his rights, Lupe acknowledged to the officers that the drugs and other items seized in the search were his and that he had been selling drugs. Later, Lupe acknowledged that his name was not Guadalupe Del Fierro but was Juan De Dios Mendoza (the appellant).

During pretrial proceedings Mendoza sought to learn the identity of the confidential informant. The Commonwealth

objected to such disclosure and argued that disclosure was not required because none of the charges was based on the controlled buy involving the informant. Based on that response, the circuit court denied Mendoza's motion. Further, the court denied Mendoza's suppression motion following an evidentiary hearing.

Mendoza entered into a plea agreement with the Commonwealth. He then pled guilty to three drug-related offenses and a single count of possession of a forged instrument. He was sentenced to five years in prison and, because his guilty pleas were conditional pursuant to RCr<sup>1</sup> 8.09, this appeal followed.

Mendoza's sole argument on appeal is that the circuit court erred in denying his motion to compel the Commonwealth to disclose the identity of the confidential informant. In support of his argument, Mendoza asserts that the confidential informant could have given relevant testimony pertaining to the facts alleged in the indictment. Because the police detective stated he could not identify Mendoza as the person who sold the cocaine to the confidential informant and because there were two other Hispanic men in the apartment when the police arrived to execute the search warrant, Mendoza maintains that the informant had relevant information as to whether Mendoza was the person who

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<sup>1</sup> Kentucky Rules of Criminal Procedure.

sold him the cocaine. Even though Mendoza confessed at the scene to the ownership of the drugs, he maintains that his counsel would have laid the foundation to recant that confession.

As a general rule the Commonwealth has "a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law." KRE<sup>2</sup> 508(a). However, there are exceptions to that general rule. One of the exceptions is where an informant may be able to give relevant testimony. KRE 508(c)(2).

In support of his argument, Mendoza cites Roviaro v. U.S., 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed 2d 639 (1957). In that case the informant actually made the buy from the accused and thus was a participant and material witness to the sale of drugs. In the case *sub judice*, however, the charges were based upon evidence seized pursuant to the search warrant and were not based upon the controlled buy involving the informant.

In Thompson v. Commonwealth, Ky. App., 648 S.W.2d 538 (1983), this court distinguished the facts in the Roviaro case from facts similar to those in this case. The court in the Thompson case noted that the identity of the informant did not have to be revealed unless the informant was a material witness

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<sup>2</sup> Kentucky Rules of Evidence.

to the guilt or innocence of the accused. Id. at 539. Further, in Commonwealth v. Balsley, Ky. App., 743 S.W.2d 36 (1987), this court stated that "[i]n order for disclosure to be required . . . , the informant must witness material parts of the offense charged." Id. at 38.

Because the Commonwealth was not relying on the facts of the controlled buy to charge Mendoza with the crimes, the informant was not a witness to any part of the alleged offenses.<sup>3</sup> Therefore, the informant did not have relevant testimony concerning the facts surrounding the offenses. The mere fact that the informant participated in the controlled buy which led to the issuance of the search warrant did not render the facts surrounding that buy relevant to the offenses charged.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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<sup>3</sup> Further, the informant was not present when the search warrant was executed.