



On October 24, 2014, this Court issued an Order requiring the State to disclose to Defendant Marvin Spady (“Spady”) the identity of a confidential informant (“informant”). At the time the Order was issued, the State was aware that two informants were involved in the case or as part of an underlying criminal activity. Defense counsel for Spady was in possession of a police report that referenced two informants and thus was also aware that two informants were involved in the case. Neither party made the Court aware of a second informant. The Order, therefore, referred only to one informant (“first informant”). The Order also required the State to produce the complete criminal history and all arrest reports of the first informant, as well as all promises, benefits, and plea bargains offered to the first informant by the State. On February 13, 2015, counsel for Spady filed this motion to dismiss for failure to disclose a confidential informant. For the following reasons, the motion to dismiss is **DENIED**; however, because the State failed to comply with the Court’s Order of October 24, 2014, the Court will suppress any evidence linked to the first informant.

### **FACTS**

In May 2014, the State obtained an indictment charging Spady with five counts each of Drug Dealing with an Aggravating Factor, Conspiracy Second Degree, and Possession of Drug Paraphernalia. Additionally, similar indictments were obtained against Spady’s codefendant, Brian L. Tunnell. The charges were the result of controlled purchases between Spady and a informant. Based upon the informant’s involvement in each transaction, counsel for Spady filed a motion in October 2014

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to require the State to disclose the identity of the informant under *State v. Flowers*.<sup>1</sup> The Court was informed that the State agreed to the motion and the motion was therefore granted.

Despite an Order to disclose the identity and history of the informant, the State engaged thereafter, understandably, in plea negotiations with the Defendant in order to avoid disclosure. Additionally, perhaps other agreements were also reached between the parties. Negotiations failed to produce a plea agreement. At Final Case Review, the State inquired whether counsel for Spady was still wanting the identity of the informant, and counsel allegedly responded that he already knew the identity. Upon receipt of this motion to dismiss, the State immediately disclosed the identity of the informant, but did not produce a criminal history, arrest report, or disclose any promises, benefits, or plea bargains provided by the State. At the October 6, 2015 hearing on this motion, counsel for Spady stated that he thought he know who the informant was, but was mistaken.

At the October 6, 2015 hearing, the Court learned for the first time of the existence of a second informant. Counsel for Spady was in possession of a police report from July 7, 2014 that referenced a second informant, and the State was also aware of a second informant. These are the facts as the Court sees them at this time.

### **DISCUSSION**

The State contends that they entered into plea negotiations to avoid having to

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<sup>1</sup> *State v. Flowers*, 316 A.2d 564, 567 (Del. Super. 1973) (noting that the disclosure of a Informant's identity is required when the Informant was an actual party to the illegal transaction).

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disclose the identity of the first informant. At the October 6, 2015 motion hearing there was reference to agreements between Spady and the State, but the sides disagreed as to the substance of those agreements. No agreement between Spady and the State was submitted to this Court, and therefore this Court is not required to recognize any agreement between the parties. Superior Court Criminal Rule 57(d) entitled Procedure Not Provided states that “[i]n all cases not provided for by rule or administrative order, the court shall regulate its practice in accordance with the applicable Superior Court Civil Rule or in any lawful manner not inconsistent with these rules or the rules of the Supreme Court.” Thus, Superior Court Civil Rule 90(c) is applicable. Rule 90(c), entitled Agreements Between Attorneys, states that “[a]greements between attorneys will not be considered by the Court unless they are in writing and filed with the Prothonotary or stated on the record in the presence of the Court.” Thus, under Civil Rule 90(c), as applied through Criminal Rule 57(d), this Court does not recognize any agreement between Spady and the State that has not been placed on the record.

At the October 6, 2015 hearing, the Court became aware of a second informant’s involvement in this case. The nature and extent of that involvement as it applies to Spady and/or Tunnell is not apparent at this point, nor is it relevant. Despite being in possession of a police report referencing multiple informants, counsel for Spady filed a motion to require the disclosure of a confidential informant that requested the identity of the informant involved in the controlled buys. Spady contends that police reports can be confusing and that a *Flowers* motion should apply

to any informant involved in the case. The State contends that the second informant was not involved in the controlled buys, and therefore his disclosure under *Flowers* was not required. In any event, both parties were aware of a second informant, but neither party made the Court aware of a second informant until the October 6, 2015 hearing, one day before trial was to begin.

Spady's argument that the State be required to divulge all informants involved in a case whenever the defendant files a *Flowers* motion is unavailing. Spady offers no case law to support his contention. Additionally, multiple informants may be used in differing circumstances. The *Flowers* court found four standard situations in which the identity of a confidential informant may arise: "(1) The informer is used merely to establish probable cause for a search. (2) The informer witnesses the criminal act. (3) The informer participates but is not a party to the illegal transaction. (4) The informer is an actual party to the illegal transaction."<sup>2</sup> The identity is protected in the first situation, and disclosure is required in the fourth. The second and third situations require the trial court to hold an in camera examination in order to determine whether the identity of the informant should be revealed. The State has an interest in protecting the identity of an informant, and is not required to disclose information relating to a informant unless ordered by the Court. Moreover, counsel for Spady specifically asked for the identity of the informant involved in the controlled buys. Spady could just as easily asked for the identification of any informant involved in the case, at which point the State would have been required to

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<sup>2</sup> *State v. Flowers*, 316 A.2d 564, 567 (Del. Super. 1973).

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divulge the number of informants under the circumstances.

### **CONCLUSION**

For the foregoing reasons, Spady's motion to dismiss is **DENIED**. However, because the State failed to comply with the Court's October 24, 2014 Order to disclose the identity and information related to the first informant, all evidence and information related to the use of the first informant is suppressed.

**IT IS SO ORDERED.**

/s/ William L. Witham, Jr.  
Resident Judge

WLW/dmh

oc: Prothonotary

xc: Gregory R. Babowal, Esquire  
Andre M. Beauregard, Esquire