



IN THE SUPREME COURT OF THE STATE OF DELAWARE

CATHERINE D. WAPLES,)
)
 Defendant Below,)
 Appellant,)
)
 v.) No. 201, 2017
)
 STATE OF DELAWARE,)
)
 Plaintiff Below,)
 Appellee.)

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

On August 8, 2016, Catherine Waples (“Waples”) was charged by Indictment, which was later amended, alleging she committed two counts of Drug Dealing Plus Aggravator and two counts of Conspiracy in the Second Degree. Super. Ct. Docket Items (“DI”) 2, 25; Indictment. (A1-2; B1-3). The Indictment alleged that the drug was cocaine, the aggravator was a vehicle, and that she conspired with George White (“White”).¹ (B1-3).

The Superior Court held Waples’ jury trial February 27-March 1, 2017. (A3). Once the State rested its case, Waples moved for judgment of acquittal on all counts. (DI 26; A3). The Superior Court granted Waples’ motion with respect to the two counts of conspiracy. *Id.* The jury found Waples guilty of the two drug charges. (DI 35; A4). The Superior Court ordered a presentence investigation. (DI 36; B4).

On March 3, 2017, Waples filed a Motion for Judgment of Acquittal, or in the Alternative, a *Flowers* Hearing and a New Trial. (DI 37; A4, 23-44). The State filed its response on March 17, 2017. (DI 38; A4; B91-100). On April 28, 2017, the Superior Court denied Waples motion.

The Superior Court sentenced Waples to a total of 30 years at Level V, with

¹ Prior to Waples’ trial, George White pled guilty to one count each of Drug Dealing and Conspiracy in the Second Degree. His Level V sentence was suspended for probation. (B60, 65-67, 74).

credit for time-served, to be suspended after successful completion of the Key Village program for 1 year of Level IV Residential Substance Abuse Treatment, and upon successful completion of that treatment, the sentence would be suspended for one year of Level III Aftercare. Sent. Ord. (Op Br. Ex. B).²

Waples has appealed, and filed her Opening Brief. This is the State's Answering Brief.

² The court's sentence as stated differs from the written sentence order—at sentencing, the Superior Court suspended Waples' sentence on the second count for one year at Level III, whereas, in the written order, the sentence is 18 months at Level III. *Compare* Sent. Trans., at 9 (Op. Br. Ex. A) *with* Sent. Ord. at 2 (Op. Br. Ex. B). In this situation, the oral sentence prevails. *Bland v. State*, 2006 WL 2960050 (Del. Oct. 17, 2006); *Priest v. State*, 2008 WL 1991820 (Del. May 9, 2008).

SUMMARY OF ARGUMENT

I. DENIED. The Superior Court did not abuse its discretion in denying Waples' motion for judgment of acquittal or a new trial. The court correctly found that the CI was not present during the transactions. The CI was involved only to introduce the detective to White and Waples on a prior date, and had no role in the two drug transactions for which Waples was charged. Waples has failed to establish how disclosure of the identity of a CI could aid her defense in a case where she sold drugs directly to an undercover officer who testified and identified her at trial. There was no discovery violation, no basis for a *Flowers*³ hearing, and no basis for reversal.

³ *State v. Flowers*, 316 A.2d 564 (Del. Super. 1973).

STATEMENT OF FACTS

On June 22, 2016, pursuant to an ongoing drug investigation, an undercover detective with the Delaware State Police Sussex County Drug Unit contacted Catherine "Cat" Waples ("Waples") by cell phone, and arranged to buy \$60 worth (about 6/10 of a gram) of crack cocaine from her. (B6-9, 15). The two agreed to meet at the Dollar General in Laurel. (B10).

Within minutes, the undercover officer arrived at the Dollar General, got out of his vehicle, and approached Waples' blue minivan. (B10, 34-35). As he arrived, George White ("White")⁴ got out of Waples' minivan and walked away.⁵ (B11). Waples told the detective to get into the minivan, and he sat in the rear passenger seat behind Waples, who was in the driver's seat. (B11). Also in the van were an unknown black male (in the front passenger seat) and two children sitting in the row next to the detective. (B11).

Waples put a piece of crack cocaine on the center console and broke off the amount to sell to the detective. (B12-13, 39). The detective handed her State-issued currency,⁶ and she handed him the crack cocaine. (B14). The detective got out of the minivan, returned to his vehicle, and transported the purchased crack

⁴ The detective was familiar with White from an ongoing drug investigation. (B12).

⁵ The minivan had temporary registration tags. (B38).

⁶ The detective photocopied the currency before the exchange, in order to record the serial numbers. (B17-19).

cocaine to Troop 4, to be transferred to the evidence detection unit. (B20-22).

On the next day, June 23, 2016, the undercover detective again contacted Waples to buy crack cocaine, using the same cell telephone number. (B23). He asked to purchase \$20, or 2/10 of a gram. (B23). This time, they agreed to meet at the Hollybrook Apartment complex in Laurel. (B24).

Within minutes of the phone call, the detective arrived at the complex. (B24). It was around noon. (B27). Waples arrived a short time later, again driving her blue minivan. (B24). Again, White got out of the vehicle and walked away. (B24). The detective walked up to the passenger-side window, handed Waples \$20 in State-issued currency, and she handed him crack cocaine. (B25-26, 29-30, 39). This time, no one else was in the minivan during the exchange. (B26).

After the purchase, the detective went back to Troop 4 and entered the crack cocaine into evidence. (B31-32). It weighed about .17 grams. (B33). The substance from each purchase was tested by the Division of Forensic Science and found to be crack cocaine. (B48-59).

At trial, Waples initially presented an alibi and misidentification defense—that the detective negotiated and conducted the transaction with White’s girlfriend Gloria Hoodie, not Waples, because Waples was in Florida at the time with her boyfriend, Tavares Jackson (“Jackson”). (B4-5, 40). In support, White testified that Gloria Hoodie, was in the van with him on June 22 and 23, 2016, but he

handed the drugs to Tony Farlow, who conducted the transactions.⁷ (B61-64, 70). He testified that the June 22 transaction took place in front of the detective's truck in front of two trailers across from a truck stop, not at the Dollar General. (B71). He testified that the second transaction took place in the detective's vehicle, at a Hardee's. (B72-73). Jackson testified that he is Waples' boyfriend, and that White brought Waples to Florida to join him after June 22, 2016. (B75-76).

Waples dropped her alibi defense mid-trial, when the State was preparing to present (in rebuttal) an Alderman Court judge to testify that Waples was present in his court on June 23 and signed a form to transfer her case in that court to the Court of Common Pleas. (B40-47, 77-80). Waples testified that she was present in Delaware on June 22-23, 2016, but was not present at the drug transactions. (B78, 82-84, 90). She testified that on June 23, 2016, she was in Alderman's Court, and signed to transfer her case from that court to the Court of Common Pleas. (B81-84). She testified that she signed the document at 10:03 a.m. (the document is stamped "10:03"), and (on cross-examination) that it would take no longer than six minutes to get from Alderman's Court to the Hollybrook Apartments (where the June 23, 2016 drug transaction took place at 12:30 p.m.). (B85-89).

⁷ White maintained this was true despite his prior guilty pleas to drug dealing and conspiring with Waples to sell drugs. (B66).

I. THERE WAS NO DISCOVERY VIOLATION; THE CONFIDENTIAL INFORMANT’S IDENTITY WAS NOT MATERIAL TO WAPLES’ DEFENSE.⁸

Question Presented

Whether there was a discovery violation or a basis for a *Flowers*⁹ hearing where a confidential informant (“CI”) did introduce the undercover officer to Waples and White in the past, but the CI was not present at, did not witness, and did not participate in either of the two drug transactions.

Scope and Standard of Review

This Court reviews questions of law and alleged constitutional violations *de novo*.¹⁰ The Court reviews evidentiary rulings and application of the discovery rules for abuse of discretion.¹¹ “An abuse of discretion occurs when ‘a court has . . . exceeded the bounds of reason in view of the circumstances,’ [or] . . . so ignored recognized rules of law or practice . . . to produce injustice.”¹² “This Court generally declines to review contentions neither raised nor fairly presented to the

⁸ This Argument addresses Arguments I and II in the Opening Brief.

⁹ *State v. Flowers*, 316 A.2d 564 (Del. Super. 1973).

¹⁰ *Zebroski v. State*, 12 A.3d 1115, 1119 (Del. 2010).

¹¹ *Horsey v. State*, 2006 WL 196438, at *1 (Del. Jan. 24, 2006) (citation omitted); *Hopkins v. State*, 893 A.2d 922, 927 n.5 (Del. 2006).

¹² *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994) (quoting *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988)).

trial court for decision.”¹³ When reviewed, claims not raised below are reviewed for plain error.¹⁴ To be plain, the error must affect substantial rights, generally meaning that it must have affected the outcome of the trial.¹⁵

Argument

Waples argues that the State committed a discovery violation and that she was denied her Delaware and United States Constitutional rights to due process where the State did not disclose the identity of a confidential informant, and the Superior Court did not compel this disclosure. Am. Op. Br. at 7. She alleges that the Superior Court abused its discretion in denying her an acquittal, or a *Flowers* hearing and a new trial. Waples arguments have no merit because she has failed to establish beyond mere speculation that the CI was material to her defense.

Waples arguments on appeal differ from those raised below. Below, Waples argued there was a discovery violation. For the first time on appeal, Waples raises her claims, summarily, under the state and federal constitutions. *See* A24-27. These arguments fail because she did not present them to the Superior Court and

¹³ *Harris v. State*, 695 A.2d 34, 40 (Del. 1997); *see* Supr. Ct. R. 8.

¹⁴ *Chance v. State*, 685 A.2d 351, 354 (Del. 1996).

¹⁵ *United States v. Olano*, 507 U.S. 725, 732-34 (1993); *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (“Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.”).

has failed to brief them adequately on appeal.¹⁶ Below, she presented the argument that the CI's involvement in introducing the detective to Waples required disclosure, and that the CI would have been able to provide material information to support both misidentification and duress defenses. (A25). For the first time, on appeal, she argues that the CI was material to her defense because her co-defendant testified "that the person who introduced him to the lead investigating officer appeared to be the CI in question and did participate in the drug deals in question." Op. Br. at 3. Waples did not present this argument to the Superior Court, and it is reviewed only for plain error.¹⁷ Finally, on appeal Waples has not raised her claim that the CI could have supported a duress defense; therefore, that argument is deemed waived.¹⁸

The Superior Court did not abuse its discretion in denying her motion. In alleging only a discovery violation, Waples argued to that court that the CI who introduced the detective to Waples could have supported her argument that she sold the drugs for White under duress, or that the CI misidentified someone else as Waples. (A25). The Superior Court ruled:

¹⁶ See *Wallace v. State*, 956 A.2d 630, 637-38 (Del. 2008) (citing *Ortiz v. State*, 869 A.2d 285, 291 n.4 (Del. 2005)) ("This Court has held that "conclusory assertions that the Delaware Constitution has been violated will be considered to be waived on appeal.").

¹⁷ Supr. Ct. R. 8.

¹⁸ *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993); Supr. Ct. R. 14(b)(vi)(A)(3).

I do note that [Waples' two] arguments are, to some extent, contradictory.

I have concluded that there was no discovery violation for the following reasons:

No. 1, this case involved two hand-to-hand deliveries of cocaine by the defendant to [the undercover detective].

The confidential informant, number one, did not witness those deliveries; number two, did not participate in those deliveries; and, number three, was not a party to those deliveries.

Thus, under *Flowers*, the defendant is not entitled to know the confidential informant's name.

My second reason, No. 2, [the undercover detective] saw the defendant twice when she delivered cocaine to him.

[The undercover detective] testified to that at the defendant's trial and identified the defendant in court as the person who twice delivered cocaine to him. Thus, there is no reasonable argument regarding misidentification.

No. 3, the defendant testified at trial. She testified that she did not deliver the cocaine to Detective Callaway. If George White tried to coerce the defendant into delivering the drugs to [the undercover detective], then the defendant surely knew that and could have raised it as a defense at trial, but chose not to do so.¹⁹

The trial judge's decision was legally correct and the record supports his factual findings.

Both the discovery issue and the *Flowers* issue turn on whether the CI was material to the defense. Superior Court Criminal Rule 16(a)(1)(C) states that “[u]pon request of the defendant the state shall permit the defendant to inspect and copy or photograph books, papers [and] documents ... which are within the possession, custody or control of the state, and which are material to the

¹⁹ Sent. Trans., at 2-4. (Am. Op. Br. Ex. A).

preparation of the defendant's defense or are intended for use by the state as evidence in chief at the trial.”²⁰ If the rule is violated, Superior Court Criminal Rule 16(d)(2) provides four remedies:

The Court may: (i) order prompt compliance with the discovery rule; (ii) grant a continuance; (iii) prohibit the party from introducing in evidence material not previously disclosed; or (iv) issue such other order that the Court deems just under the circumstances. “In determining the question of whether sanctions should be imposed, the trial court should weigh all relevant factors, such as the reason for the State's delay and the extent of prejudice to the defendant.”²¹

Delaware Rule of Evidence 509 provides the State “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 to a law-enforcement officer.”²²

Where the confidential informant “may be able to give testimony which would materially aid the defense,” and the State invokes the privilege, then the court holds a hearing to determine whether the informant “can, in fact, supply that testimony” materially aiding the defense.²³ As this Court has explained:

“The Comment to D.R.E. 509 notes that the Delaware Rule of informer privilege follows, in part, the Superior Court’s holding in *State v. Flowers*.” The *Flowers* court described four circumstances under which the issues of disclosing the informer’s identity arises: (1)

²⁰ Super. Ct. Crim. R. 16(a)(1)(C).

²¹ *Taylor v. State*, 982 A.2d 279, 283 (Del. 2008) (citing Super. Ct. Crim. R. 16(d) and quoting *Snowden v. State*, 677 A.2d 33, 39 (Del.1996)).

²² D.R.E. 509(a).

²³ D.R.E. 509(c).

the informer's information formed the basis to establish probable cause for a search; (2) the informer witnessed a criminal act; (3) the informer participated in, but was not a party to, an illegal transaction; and (4) the informer is an actual party to an illegal transaction.²⁴

In the first category, the privilege is protected; in the fourth category, disclosure is required; but, in the second and third categories, the trial judge requires disclosure only if it finds that the informer's testimony would be material to the defense.²⁵

The *Flowers* court noted the purpose of the privilege:

'The privilege exists to secure a flow of vital information which can be had only upon a confidential basis. Not all such information comes from people of high motivation. The police must have the aid of men of lesser quality who respond to selfish inducements, including money. These men are needed for what they know, but also for what they can learn because of their associations. This is especially true with respect to crimes of a consensual nature as to which there is little likelihood that a victim will complain. The informer, paid or not, is subject to risks of retaliation which a regular member of a police force need not fear and hence, whether paid or not, he comes within the protection of the privilege.'²⁶

"The defense has the burden of establishing, beyond mere speculation, that the informant's testimony would materially aid the defense."²⁷ In this case, the informant was far removed from the two drug transactions, and Waples failed to

²⁴ *Kennard v. State*, 2007 WL 2523022, at *3 (Del. Sept. 6, 2007) (quoting *Butcher v. State*, 906 A.2d 798, 802 (Del. 2006) and citing *Flowers*, 316 A.2d at 567).

²⁵ *Id.* at *3, n.9 (quoting *Butcher*, 906 A.2d at 802-03 (explaining *Flowers*)).

²⁶ *Flowers*, 316 A.2d at 566 (quoting *State v. Oliver*, 50 N.J. 39, 231 A.2d 805, 807 (1967) (citation omitted)).

²⁷ *Horseley v. State*, 2006 WL 196438, at *2 (Del. Jan. 24, 2006) (quoting *Price v. State*, 2000 WL 1616590 (Del. Oct. 20, 2000)).

establish that the informant could materially aid her defense.²⁸

As in *Flowers*, the “only prejudice that could . . . require a new trial is the possibility that the informer would support the defendant’s testimony by failure to place the defendant at the scene of the alleged crime.”²⁹ The detective testified that he did not use the third party in connection with the two drug deals at issue; instead, he contacted Waples by phone, and arranged for the deal with, and bought the drugs from, Waples (also known as “Cat”). (B8-17, 23-28). According to the detective, the CI was not present when the detective engaged in either of the hand-to-hand drug deals with Waples—the detective testified that: (1) during the first drug transaction, an “unknown black male” and two children were present; and (2) during the second drug transaction, no one else was present. (B11-12, 16, 26). So, under Waples’ theory as presented to the trial court, the only way the confidential informant could materially aid the defense would be if the confidential informant misidentified someone else as Waples. But the detective testified that he verified Waples’ identity:

I was contacted by a past-proven reliable confidential informant who advised me that Catherine Waples and George White were selling crack cocaine in Laurel. I obtained a DELJIS photograph of Catherine Waples and George White. I presented it to a past-proven

²⁸ To the extent that Waples claims the CI was present at the transaction and could aid in her misidentification defense, that argument is misplaced as explained *infra*.

²⁹ *Flowers*, 316 A.2d at 568. Waples has not raised the claim on appeal that the informant could support a duress defense.

reliable confidential informant and that person said, yes, that is Catherine Waples and George White who are selling crack cocaine in the Town of Laurel, in and around the Town of Laurel. And then from there on we did control buys through the CI. Then the CI also introduced me to Cat and George.

(B36-37). Waples' assertion that the CI may support her misidentification defense is mere speculation not sufficient to justify a *Flowers* hearing.

To the extent that Waples now argues, for the first time on appeal, that the CI was potentially White's friend, Tony Farlow, whom White claimed was present for both transactions, Waples did not raise that issue at trial. When White made that revelation, Waples could have again asserted the alleged discovery violation, asked for a recess or a continuance and sought to question Tony Farlow as the alleged CI. But Waples did not do that, waiving the issue.

It appears likely that Waples did not halt the testimony upon White's disclosure that Tony Farlow was present at the transaction (and may be the CI) because White's testimony was confusing and, to the extent the two conflicted, less credible than that of the detective. White testified consistent with the detective, that he met the detective through a friend. When asked, "Did you speak with [the undercover officer] *prior to the 22nd of June?*", White responded, "I spoke with him through another friend that was with him." (A20) (emphasis added). White identified the friend as Tony Farlow. (A21). The fair inference from this response is that the detective first met White through Farlow prior to June 22, the date of the

first drug deal. White testified that Gloria Hoodie was with White during both transactions, and that “she was in the van with me.” (A20). White then stated that Farlow called him and asked where he could buy a sixty, and “[the detective] and Tony were sitting in the truck, Tony introduced him to me then.” (A21). Then, White testified that that he handed over the drugs, and the detective gave the money to Farlow, who gave it to White. White testified that Farlow handled the money for both deals. (A22). The jury did not find this testimony credible, because it convicted Waples of selling drugs to the detective. As this was the only testimony that arguably supports an assertion that the CI was present during the drug transactions, the trial judge did not abuse his discretion in finding otherwise, crediting the detective’s testimony over White’s. Waples has failed to establish “beyond mere speculation,” that the CI was present at the drug transaction.³⁰

³⁰ See *Horseley v. State*, 2006 WL 196438, at *2 (citation omitted). The above problems with Waples’ claims are rooted in the fact that she changed her defense mid-trial. Defense counsel opened, and presumably prepared the defense, based on Waples’ assertion that she was in Florida when the two drug deals took place. After the State informed counsel that it was prepared to present an Alderman’s Court judge in rebuttal to testify that Waples signed a document in that court on June 23, the date of the second transaction, Waples averred that she was in Delaware on the dates in question. After that, she changed her defense and relied solely on a misidentification—that White’s girlfriend, Gloria Hoodie, was present at the transactions, not her. Waples’ argument that “there was no option for the Defense to discover prior to trial whether a CI might have been involved in the transaction” (Am. Op. Br. at 8) has no merit. If Waples had obtained the information from her co-defendant when White spoke to her and counsel prior to trial (B68-69), Waples could have attempted to track down the alleged confidential informant, Tony Farlow, and Gloria Hoodie, and presented more evidence to

This case is analogous to, but less compelling, than *Kennard v. State*, in which the Court did not require disclosure of the CI.³¹ In *Kennard*, a CI tipped police that an individual, Jackson, was trying to dispose of some guns, and would be riding with a female in a particular area soon. Based on the CI's information, police watched Jackson, saw him riding in a car with a female, and pulled over the car for a signal violation. The driver consented to a search, and police found stolen guns in the car. They arrested Jackson, who later told them the guns belonged to Kennard. The Court upheld the Superior Court's determination that the CI's identity need not be revealed, finding that the CI had not given any information about Kennard, the "CI's tips and observations satisfied none of the four *Flowers* criteria," and holding:

[W]e conclude that because the CI did not implicate Kennard, further inquiry to derive information from the CI would not result in material aid to Kennard's defense. Furthermore, because the State continued to use the CI in other investigations, Kennard has failed to demonstrate that his need for disclosure outweighed the state's need to protect the CI's identity.³²

Like *Kennard*, the informant was not involved in the events that implicated Waples. Waples set up the sale with, and sold crack cocaine directly to, the undercover detective—the CI was not a witness, participant, or party to the drug

support the misidentification defense.

³¹ 2007 WL 2523022.

³² *Kennard*, 2007 WL 2523022, at *3.

deal. The Superior Court correctly found that none of the four *Flowers* scenarios apply, and there was no discovery violation and no basis for a *Flowers* hearing.

Waples' reliance on *Pierson v. State*³³ is misplaced. In *Pierson*, the State had not disclosed that an undercover officer was present in the informant's apartment, where a drug deal was to take place, for 45 minutes before the State was alleged to have received a call from the CI about the drug deal. The police used the informant's information as a basis for a warrantless search. *Pierson* argued on appeal that the State withheld favorable information during the suppression hearing. The Court found:

The failure of the State during the suppression hearing to disclose the presence of Corporal Testa in the apartment of the informant requires a new suppression hearing since the defendant was deprived of an opportunity to explore the pertinent factual circumstances related to the warrantless search. Protection of the identity of the confidential informant did not justify the presentation, through evidentiary omission, of a materially misleading factual case to the Court.³⁴

Waples' case is far different than *Pierson*. This case does not involve a suppression hearing and Waples has failed to establish credible evidence that the CI was present.

The Superior Court did not abuse its discretion in denying Waples' motion for judgment of acquittal or a new trial. The court correctly found that the CI was


³³ 351 A.2d 860, 861 (Del. 1976).

³⁴ *Pierson v. State*, 351 A.2d 860, 861 (Del. 1976)

not present during the transactions. The CI was involved only to introduce the detective to White and Waples on a prior date, and had no role in the two drug transactions for which Waples was charged. Waples has failed to establish how disclosure of the identity of a CI could aid her defense in a case where she sold drugs directly to an undercover officer who testified and identified her at trial. There was no discovery violation, no basis for a *Flowers* hearing, and no basis for reversal.

CONCLUSION

The judgment of the Superior Court should be affirmed.



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CERTIFICATE OF SERVICE

I, Abby Adams, being a member of the Bar of the Supreme Court of Delaware, hereby certify that on November 28, 2017, I caused the attached document to be served by File and Serve to:

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**CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT
AND TYPE-VOLUME LIMITATION**

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Time New Roman 14-point typeface using Microsoft Word 2016.
2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 4,404 words, which were counted by Microsoft Word 2016.

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