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This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3017-16T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

PURNELL DAVIS,

Defendant-Appellant.

Submitted March 8, 2018 — Decided April 24, 2018

Before Judges Simonelli and Haas.

On appeal from Superior Court of New Jersey,
Law Division, Monmouth County, Indictment No.
15-01-0082.

Byrnes, O'Hern & Heugle, LLC, attorneys for
appellant (Sean F. Byrnes, on the brief).

Christopher J. Gramiccioni, Monmouth County
Prosecutor, attorney for respondent (Mary R.
Juliano, Assistant Prosecutor, of counsel;
Marilyn J. Tenpenny, Legal Assistant, on the
brief).

PER CURIAM

A grand jury indicted defendant for third-degree possession
of a controlled dangerous substance (CDS), N.J.S.A. 2C:35-

10(a)(1); third-degree possession of a CDS with intent to distribute, N.J.S.A. 2C:35-5(b)(3); third-degree possession of a CDS with intent to distribute within 1,000 feet of school property, N.J.S.A. 2C:35-7; and second-degree possession of a CDS with intent to distribute within 500 feet of a public housing facility, N.J.S.A. 2C:35-7.1. The charges stemmed from heroin found in defendant's home pursuant to a consent to search.

Defendant filed a motion to suppress.¹ Asbury Park Police Officer Fil Lao testified at the hearing that at approximately 3:30 p.m. on July 16, 2014, he received information from a confidential informant (CI) that defendant was selling a large amount of heroin from his home in Asbury Park and there was a gun on the living room table and a two-year-old child in the home. Lao took notes of his meeting with the CI, formalized the notes in a memorandum, and placed the notes and memorandum in a file retained by the Asbury Park Police Department (the CI file).

Lao also testified that the police arrived at defendant's home at approximately 7:45 p.m., encountered him on the front porch, and explained they were there because they suspected he had drugs in his home. Defendant and his girlfriend both consented

¹ Defendant did not provide the transcript of the motion to suppress. We derive the facts from the transcript of the motion to compel production of the CI file.

to the search of the home and executed a consent to search form at 8:01 p.m. The search revealed approximately fifteen bricks of heroin and \$1185. The police arrested defendant and his girlfriend, transported them to police headquarters, and fingerprinted them at approximately 8:40 p.m.²

Defendant's girlfriend testified the police arrived much earlier than 7:45 p.m. and spent hours coercing them to consent to the search.³ The motion judge found the officer's testimony credible, and denied the motion.

Defendant subsequently filed a motion to compel production of the CI file or, alternatively, for an in-camera review to determine which materials are not privileged and subject to production. He questioned the police testimony about the timing of their arrival at his home and the duration of the detention and search. He submitted his girlfriend's work records, which indicated she had called out of work at 5:15 p.m. because the police were at the home. Defendant stated he "believe[d] that the

² Defendant argues, incorrectly, that the fingerprinting occurred at 8:12 p.m. Defendant misinterpreted the fingerprint form, which indicates a "CREATION DATE/TIME" on July 16, 2014 at 8:21 p.m. and a "PRINT DATE/TIME" of July 16, 2014 at 8:40 p.m. The "PRINT DATE/TIME" of 8:40 p.m. indicates the actual time the fingerprinting occurred.

³ There is no support in the record before us that defendant's girlfriend testified the police arrived at the home shortly after she came home from work around 4:00 p.m.

facts set forth in the CI file and the notes taken by the officer [would] be corroborative of what really happened."

The motion judge denied the motion, finding defendant's mere speculation that the CI file contained relevant evidence was insufficient to overcome the exception to the CI privilege. The judge also found the CI file was not relevant to the charges against defendant. The judge determined the information in the CI file was compiled well before the police arrived and the occurring of the consent search, and thus, defendant failed to adequately demonstrate how the CI file would lead to information relevant to the CDS offense for which he was charged.

The judge declined to conduct an in-camera review, finding as follows, in pertinent part:

[D]efendant has no more than a hunch that the information in the CI file will be relevant and helpful. . . . If this [c]ourt were to conduct an in-camera review of the CI file based merely on defendant's suspicion that the requested materials may contain helpful information or information that contradicts an officer's testimony, this [c]ourt would be allowing the defendant to engage in the type of fishing expedition that New Jersey Courts have discouraged in criminal cases. Additionally, this [c]ourt has already made credibility findings with reference to the contradictory suppression testimony of the witnesses. This [c]ourt cannot concede that any notes compiled prior to the actual search would have an impact on testimony about an incident that had not happened yet.

Thus, defendant has failed to demonstrate that [he] ha[d] reason to believe that the CI file has information which is essential to a fair determination of the facts at issue.

The judge noted that defendant could address the challenged police testimony on cross-examination at trial. This appeal followed.

On appeal, defendant states he does not seek disclosure of the CI's identity. Rather, he "seeks to review the CI file, believing the notes and memorandum would confirm his and [his girlfriend's] version of events" and "examine the file for clarity relating to the timing of the officer's arrival and amount of time [he and his girlfriend] were detained prior to the search." He posits an in camera review "is exactly the sort of procedure that should be utilized to determine if the CI file is able to address any of the blatant contradictions in the officers' version of events."

Defendant cites no New Jersey authority allowing an in-camera review of a CI file. Instead, he urges us to adopt the policy set forth in Commonwealth v. Dias, 451 Mass. 463, 471-72 (2008), which allows trial courts to hold in-camera hearings to assist in determining whether disclosure of CI information would provide something material to the defense. However, Dias does not support defendant's position. There, the Supreme Judicial Court of Massachusetts stated a judge may hold an in-camera hearing where

it is not clear from the record that disclosure of information regarding a CI would provide something material to the defense. Id. at 471. The court held no in-camera hearing "was necessary because it was clear from the record that the informant possessed information relevant and helpful to the defense." Id. at 472.

Here, it is clear from the record that the information in the CI file would provide nothing material to the timing of the officer's arrival and the duration of the detention of defendant and his girlfriend prior to the search. The information the CI provided to the police at 3:30 p.m. would not confirm defendant's and his girlfriend's version of the events or contradict the officer's version.

Further, defendant's mere speculation that the CI file might contain contradictory evidence is insufficient to require disclosure. See State v. Adim, 410 N.J. Super. 410, 435 (App. Div. 2009) (holding that "a defense request based on 'the possibility that the informer's testimony might controvert' an officer's story is deemed 'too speculative and remote' to require the State to choose between identifying an informer and foregoing a prosecution." (quoting State v. Milligan, 71 N.J. 373, 392 (1976))). Accordingly, the motion judge properly denied defendant's request for an in-camera review of the CI file.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

