Duquesne Law Review

Volume 6 | Number 2 Article 12

1967

Criminal Law - Disclosure of Identity of Eyewitness Informer

W. Bryan Pizzi II

> ing purporting to be a complete binding contract. It would seem to assume the very question in issue by giving effect to a provision of the writing when the question is whether the provisions of the writing collectively and severally are to be given effect at all. Certainly if the provision is to be given conclusive effect, as apparently is intended, this objection is valid. However, if the provision may be considered as evidentiary merely, the rule is desirable in directing attention to it. The provision should be utilized in court as an admission or a prior inconsistent statement of the party seeking to establish the condition precedent.[16] (Footnotes omitted.)

David J. Kozma

CRIMINAL LAW—DISCLOSURE OF IDENTITY OF EYEWITNESS INFORMER—The Supreme Court of Pennsylvania has held that the governmental privilege[1] to refrain from disclosing the identity of an informer does not limit the duty of the prosecution to make available the name and whereabouts of all material eyewitnesses to the defense.

Commonwealth v. Carter, 427 Pa. 53, 233 A.2d 284 (1967).

Norton Wilder, an undercover agent for the Philadelphia Police force and the prosecution's principal witness testified that he went to a street corner in Philadelphia where he was introduced to the appellant, Carter. Wilder was accompanied by an informer and both were under the surveillance of a federal narcotics agent. Wilder testified that after being introduced to the appellant, the appellant sold heroin to the informer in the presence of Wilder. The agent for the Federal Bureau of Narcotics testified that he saw Wilder, appellant, and the informer conversing at the scene of the alleged sale. The agent, who was sitting in an automobile parked a half block away, stated that he did not see the transaction but that he did recognize the appellant.

The appellant was arrested two months after the alleged sale and indicted for the felonious possession and sale of narcotic drugs. At the jury trial counsel for appellant asked Wilder to disclose the name of the informant. The prosecution objected and the trial judge sustained the objection. The defense at the close of the Commonwealth's case made a motion to have the case dismissed because of the Commonwealth's failure

16. *Id.*

1. In n.3, at 56 of 427 Pa. 53, and at 285 of 233 A.2d 284 (1967), it is stated that "neither statute nor appellate decision in Pennsylvania has yet recognized such a privilege. To simplify the issues in this appeal, we have assumed without deciding such a privilege exists."

to provide the defense with the name and whereabouts of the informer. The motion was denied.

Carter's entire defense was his claim of mistaken identity, alleging that he never sold the narcotics, and had never met Wilder prior to the arrest. When the trial judge charged the jury he called to their attention the absence of a material witness, and said that they were to infer that if such a witness did take the stand his testimony would not aid the Commonwealth. The jury returned a verdict of guilty and Carter received a five to ten year sentence. The case was appealed to the Superior Court which affirmed, two judges dissenting.[2] Carter then filed a petition for allowance to appeal which the Pennsylvania Supreme Court granted.

In the instant decision the Supreme Court of Pennsylvania reversed and granted a new trial. Justice Roberts, speaking for a unanimous court, ruled that the refusal of the Commonwealth to disclose the name of the informer when the informer is a material eye-witness constituted reversible error. The unanimous court based its holding on two significant factors: (1) a Pennsylvania rule which requires the prosecution to make the names and whereabouts of material eye-witnesses available to the defense,[3] and (2) the case of *Roviaro v. United States*,[4] a United States Supreme Court case which established certain guidelines in the disclosure of informer's area.

Justice Roberts began his opinion by stating that, "Pennsylvania decisions have long recognized that . . . the prosecution is not absolutely bound to call to the stand all available and material eyewitnesses."[5] The first case which affirmatively[6] recognized such a rule was *Commonwealth v. Dietrick*,[7] where the District Attorney called an eyewitness to the stand whose testimony conflicted with another eyewitness's testimony. The trial judge then permitted the District Attorney to call witnesses who testified that the conflicting eyewitness had previously told them a story that agreed with the testimony of the other eyewitness. In the trial judge's charge to the jury, he stated that a District Attorney must call all eye-

2. 208 Pa. Super. 245, 222 A.2d 475 (1966). The dissenting Judges were Jacobs and Hoffman.

3. See nn. 10-16 *infra* and accompanying text.

4. 353 U.S. 53 (1957).

5. 427 Pa. at 54-5, 233 A.2d at 285.

6. There is an 1880 case, Donaldson v. Commonwealth, 95 Pa. 21 (1880), where an appeal was made to the Supreme Court on numerous assignments of error, one of which was that the prosecution did not call the examining doctor as a witness. The Supreme Court reversed on other grounds, and there was no holding as to the duty of the prosecution to call witnesses, although the court voiced an opinion that the prosecution should have called such a witness. Also in the case of Commonwealth v. Danz, 211 Pa. 507, 60 A. 1070 (1905), the court held the prosecution need not call a doctor as a witness, however, the doctor was not a material eyewitness.

7. 221 Pa. 7, 70 A. 275 (1908).

witnesses. On appeal, the Supreme Court of Pennsylvania stated that they were not reversing for reasons concerning the trial judge's charge, but said "an expression of view seems to be required,"[8] because of various misconceptions by District Attorneys in regard to a "supposed rule" in criminal law which requires the state to call all eyewitnesses. "The impression that there is such a rule very widely obtains, but it is without judicial sanction. The disregard of it, if it ever existed, never of itself resulted in reversal."[9] The court then stated its position on the matter: "In all such cases very much must be left to the discretion of the District Attorney, under the general direction of the trial judge. There may be . . . justifying if not compelling reasons why a prosecution officer should not be required to call each and every eyewitness."[10] A rule of law thus rapidly evolved from "an expression of view."

In *Carter* Justice Roberts, after stating that the prosecution is not bound to call all material witnesses, then went on to say that if the prosecution does not call an eyewitness to the stand, "it must apprise the defense of the witnesses' name and whereabouts at trial . . . ."[11] The first case which suggests such a rule in Pennsylvania was *Commonwealth v. Danz*.[12] In *Danz* there was an assignment of error to the Supreme Court of Pennsylvania relating to the alleged misconduct of the District Attorney. The District Attorney failed to call a medical doctor who had examined the body, but whose report to the coroner did not shed any light on the case. Early in the trial, the District Attorney informed the defense that he was not going to call the doctor, and that if the defense thought the doctor would be useful he (defense) could call him to the stand. The court stated their opinion as to whether the District Attorney had performed his duty satisfactorily: "His full duty to the prisoner was discharged when he notified her that he would not call him, coupled with the notice that she must do so if she thought his testimony would help her."[13] Thus *Danz* seems to say that when the prosecution in their discretion decides not to call a witness that they must so inform the defense of their action. A later case, *Commonwealth v. Horn*,[14] seems to state such a rule which is more closely linked with Justice Roberts' statement of the rule. In *Horn* the court stated both rules to which Justice Roberts refers in the instant opinion:

> There is no duty on the Commonwealth to call witnesses whose names appear on a Bill of Indictment or even eyewitnesses

8. *Id.* at 14, 70 A. at 277.
9. *Id.*, 70 A. at 278.
10. *Id.*
11. 427 Pa. at 55, 233 A.2d at 285.
12. 211 Pa. 507, 60 A. 107 (1905).
13. *Id.* at 522, 60 A. at 1075.
14. 395 Pa. 585, 150 A.2d 872 (1959).

> . . . . The law in such a case merely requires a District Attorney to notify the court and defense counsel that he does not intend to call certain persons whose names appear on the bill of indictment as Commonwealth witnesses . . . .[15]

However, there is one discrepancy between the above statement and Justice Roberts' statement, that being the reference in *Horn* to all persons whose names are on the Bill of Indictment. The informer eyewitness's name in the instant case did not appear on the Bill of Indictment, and this was noted in the Superior Court opinion[16] but not in the instant opinion. Thus the cases cited to support the rule that the prosecution must apprise the defense of the names and whereabouts of an eyewitness if they are not going to call them might be distinguished on the ground that they only applied to cases where the witness's name appeared on the indictment as a witness for the Commonwealth. However, Justice Roberts in *Carter* does not rely heavily on the rule discussed *supra*, but appears to place primary reliance on the United States Supreme Court case of *Roviaro*,[17] as indicated by his statement that, "[t]hose aspects of the *Roviaro* test which concern the value of the informer's testimony to the accused point clearly toward reversal . . . ."[18]

In *Roviaro* the defendant was convicted for knowingly possessing and transporting illegally imported heroin. The government refused to disclose the identity of an undercover informer who had taken a material part in bringing about defendant's possession of the drugs, who had been present with defendant at the occurrence of the alleged crime, and who might have been a material witness as to whether defendant knowingly transported the drugs. The trial court sustained the government's refusal to disclose the informer's name, and the Supreme Court granted *certiorari* in order to pass upon the propriety of the nondisclosure of the informer's identity. Justice Burton said that what is usually called the informer's privilege is really the government's privilege "to withhold from disclosure the identity of persons who furnished information of violations to officers . . . ."[19] Burton went on to state that the purpose of such a privilege "is the furtherance and protection of the public interest in effective law enforcement . . . . The scope of the privilege is limited by its underlying purpose."[20] Justice Burton discussed the various limitations on

15. *Id.* at 589, 150 A.2d at 874.

16. Commonwealth v. Carter, 208 Pa. Super. at 247, 251, 222 A.2d at 476, 478 (1966).

17. In n.4, at 57 of 427 Pa. 53, and 286 of 233 A.2d 284 (1967), the court in the instant case said that *Roviaro* "was an exercise of the United States Supreme Court's supervisory power over federal courts, rather than a constitutional ruling . . . . Thus, *Roviaro* is not technically binding on us." The court went on to say that they were impelled "to accept *Roviaro* as highly persuasive authority."

18. 427 Pa. at 59, 233 A.2d at 287.

19. 353 U.S. at 59.

20. *Id.*

the privilege and stated that the basic limitation is the necessity of "fairness"; "fairness" in the sense that when a situation arises where an informer's appearance may aid the defense, then such privilege shall be non-existent. Justice Burton provided what has come to be known as the *Roviaro* test, a test which Justice Roberts heavily relied on in the instant case:

> We believe that no 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.[21]

Justice Roberts in discussing the *Roviaro* test stated that "[t]hose aspects of the *Roviaro* test which concern the value of the informer's testimony to the accused point clearly toward reversal . . . ."[22] Roberts applied the facts in *Carter* to the test as expounded by Justice Burton and decided that "[w]e believe that a consideration of the possible defenses' and of 'the possible significance of the informer's testimony' weigh the balance heavily in favor of reversal."[23] Roberts throughout his opinion placed much emphasis on the fact that the policeman's identification of Carter was based on one observation. Roberts proceeded to include this factor in his interpretation of the test in *Roviaro* and reasoned that the balance weighed heavily in the defendant's favor. Roberts concluded his comparison of *Roviaro* and *Carter* by stating that the Pennsylvania rule alone would require reversal: "For much the same reasoning we have little doubt that the Pennsylvania rule requiring the prosecution to make the names and whereabouts of material eyewitnesses available to the defense, at least when considered in isolation, requires reversal of the instant conviction."[24] Thus the rationale of Roberts in construing the facts of the instant case would require reversal based on the *Roviaro* test, and, or based on the Pennsylvania rule, as stated by Roberts, requiring the prosecution to make the names of material eyewitnesses available.

The Commonwealth in seeking a nondisclosure rule that would protect informers such as the one in the instant case made three arguments. First, they sought to distinguish *Roviaro*, second, they argued that public policy demands nondisclosure in *Carter*-type cases, and third, that even if disclosure was required it would in no event aid the defendant.

21. *Id.* at 60-2.
22. 427 Pa. at 59, 233 A.2d at 287.
23. *Id.* at 60, 233 A.2d at 287.
24. *Id.*

The Commonwealth, in seeking to distinguish *Roviaro*, stated that the experience of law enforcement officers since the 1957 decision in *Roviaro* required "an extremely restrictive reading of the case and of our established Pennsylvania rule."[25] Roberts' view was that the only significant distinction is the fact that in *Roviaro* the informer was the only eyewitness to the entire transaction and in the instant case the informer was not. The Commonwealth contended that this distinction was significant enough to be substantiated by three lower federal court decisions which interpreted *Roviaro*.[26] In *United States v. Simonetti*[27] the defendant appealed to the Second Circuit from a judgment of conviction for wilfully failing to pay a tax which was imposed on persons engaging in the business of gambling and urged reversal "because the trial judge refused to compel the Government to reveal the identity of the "Special Employee" who introduced the agent who placed the bets."[28] In a *per curiam* opinion the court said in citing *Roviaro* that disclosure of a "Special Employee" is required "only when necessary for a fair disposition of the case,"[29] and that the testimony of the 'Special Employee' would have been merely cumulative. Justice Roberts said this case did not turn on the sole eyewitness distinction, because the court in *Simonetti* did not say why the informer's testimony would have been cumulative.[30] In *Washington v. United States*[31] the court did not discuss *Roviaro* or mention the factor of one eyewitness, so that case had no relevance to the instant case. Roberts said that in *Washington*, "the sole issue was whether the government was itself required to call him to the witness stand."[32] *In United States v. Coke*[33] the defendant contended on appeal that the trial court erred when they sustained the government's objection to defense counsel questioning of a government agent seeking disclosure of an informer who allegedly had introduced the agent to the defendant. Judge Anderson of the Second Circuit stated that other witnesses had identified the defendant and that "absent a showing by the defense at the trial that the disclosure of the informer's name and address was necessary for a fair disposition of the case, the testimony of the informer may be assumed to have been, at best, merely cumulative."[34] The court

25. *Id.*, 233 A.2d at 288.

26. United States v. Coke, 339 F.2d 183 (2d Cir. 1964). United States v. Simonetti, 326 F.2d 614 (2d Cir. 1964). Washington v. United States, 275 F.2d 687 (5th Cir. 1960).

27. 326 F.2d 614 (2d Cir. 1964).

28. *Id.* at 615.

29. *Id.* at 616.

30. In *Simonetti* the facts are not given in such detail that any real credence can be given to that decision on the basis of a sole eyewitness distinction. The court there merely said that such testimony would be cumulative.

31. 275 F.2d 687 (5th Cir. 1960).

32. 427 Pa. at 61, 233 A.2d at 288.

33. 339 F.2d 183 (2d Cir. 1964).

34. *Id.* at 184.

in making this statement was relying on *Simonetti* and *Roviaro*. In *Coke* the informer waited on the sidewalk outside the building where the narcotics sale was going on so that he was not present to observe the entire transaction as was the informer in the instant case. Justice Roberts, after a careful reviewing of the three federal cases concluded that: "Considered apart from recent federal interpretations of the rule, we believe the fact that police had a somewhat better opportunity to observe the alleged crime . . . here than in *Roviaro* is not a circumstance sufficient to justify nondisclosure in the instant trial."[35] Roberts then stated that the supreme court is reluctant to permit the establishment of crucial facts solely on the basis of a single observation by a police officer "*where testimony from a more disinterested source is available.*"[36] The Commonwealth also sought to distinguish Roviaro by saying "that any prejudice caused to Carter by the failure to disclose the informer's identity was cured by the jury charge . . . whereas no such charge was given in *Roviaro*."[37] Roberts easily dismissed this argument by saying that such a charge "falls pitifully short of being an adequate substitute for the testimony of the informer."[38]

In considering the Commonwealth's public policy argument (favoring nondisclosure of informers) Roberts indicated that this argument had more merit than the Commonwealth's attempt to distinguish *Roviaro*. The Commonwealth relied on a report by the President's Commission on Law Enforcement and Administration of Justice entitled, *The Challenge of Crime in a Free Society*. In the report the Commission stated that, "there are only sellers and willing buyers. The enforcement officers must therefore initiate cases."[39] The report outlines the technique used in enforcing narcotic laws, stating that the necessity of using informers is absolutely essential to effective law enforcement in this area.[40] The Commonwealth based its policy arguments on a similar rationale, and supplemented it by explaining that once an informer's identity is made known his usefulness to law enforcement agencies ceases. The Commonwealth concluded this analysis with the statement that the policy argument in and of itself demands that there be a "broader privilege to withhold disclosure of an eyewitness informer in narcotics trials than would normally obtain."[41] Justice Roberts countered this argument by saying that the safeguards for an individual charged with a crime should not be relaxed because that individual is charged with a specific crime. Roberts concluded by stating, "we find it impossible to accept the contention that

35. 427 Pa. at 61, 233 A.2d at 288.
36. *Id.*
37. *Id.* at 62, 233 A.2d at 288.
38. *Id.*, 233 A.2d at 289.
39. At p. 218 of the Report.
40. *Id.*
41. 427 Pa. at 63, 233 A.2d at 280.

the peculiar problems surrounding enforcement of the narcotic laws should play a part in our determination of the scope of the prosecution's duty to disclose to the defense the identity of material eyewitnesses . . . ."[42]

The Commonwealth's final argument was simply that even if disclosure would be required it would not aid the case of the defense because informers are generally of such a class of people that their testimony can easily be discredited on the stand. Roberts summarily dismissed this argument by simply reasoning that under our adversary system of jurisprudence each side is the better judge of what will help, or what will not help its cause.[43]

In summary, it can be said that the decision in the present case follows the trend in this area.[44] Although Pennsylvania has no statute in this area,[45] there is mention of the defendant's rights in this area in the Pennsylvania Constitution.[46] Section 9 of the First Article to the Constitution states that, "In all criminal proceedings the accused hath, . . . a right to meet witnesses face to face . . . ." However, case law interpreting the stated portion of the Constitution has construed this to mean only that the defendant must be present when a witness testifies against him.[47] California is a leading state which has followed the *Roviaro* reasoning. Chief Justice Traynor in *People v. McShann*[48] stated: "when it appears from the evidence that the informer is a material witness on the issue of guilt, and the accused seeks disclosure on cross-examination, the People must either disclose his identity or incur a dismissal."[49] Thus Pennsylvania has followed the California rationale, based on *Roviaro*, and has set a standard to be used in deciding what the scope of the prosecution's duty to disclose the identity an eyewitness to the defense shall be. Roberts stated that *Roviaro* was not technically binding upon them, but conceded that the case had constitutional overtones.[50] The supreme court placed great emphasis on the principles relied on in *Roviaro*, and those principles are the crux of Roberts' rationale. Roberts considered these principles and the added factor of the single-observation identification by the policeman in reaching a conclusion. The rule in Pennsylvania would now appear to be that when an informer is the only "neutral eyewitness"[51] to an alleged criminal act, and his testimony could possibly be crucial to the defendant then this informer's identity must be disclosed.

42. *Id.* at 64, 233 A.2d at 289.
43. *Id.*, 233 A.2d at 289-90.
44. See n.4 at 567 of 427 Pa. 53, and at 286 of 233 A.2d 284.
45. See n.1 *infra.*
46. PA. CONST. art. 1, § 9.
47. Commonwealth v. Johnson, 348 Pa. 349, 35 A.2d (1941).
48. 330 P.2d 33, 50 Cal. 2d 802 (1958).
49. 330 P.2d at 36.
50. See n.4, at 57 of 427 Pa. 53, and at 286 of 233 A.2d 284.
51. Using the term "neutral" because of Justice Roberts' statement at 62 of 427 Pa.

In a recent California case, *People v. Garcia*,[52] the disclosure of informer's identity doctrine was extended to include nonparticipating informers who had given the authorities the address of an apartment where they had purchased narcotics. The majority (4-3) of the supreme court based its holding on "fair trial" considerations. The court cited the *McShann* case as stating that identity disclosure would not necessarily be limited to those informers who took an active part in the commission of the crime. In *Garcia* the supreme court stated that the accused could force disclosure if he could "demonstrate a reasonable possibility that the anonymous informants could give exonerating evidence on the issue of guilt."[53] This case would seem to open the way for further extensions of the disclosure rule. The ramifications of a ruling that the prosecution must disclose an informant are that disclosure must be made or the case will be dismissed. The prosecution is very reluctant to disclose the identity of an informer because to do so might jeopardize his life in addition to terminating his usefulness to the law enforcement agency. Thus decisions like *Carter* and *Garcia* will force the enforcement agencies to prepare their cases without the aid of informers in many instances, a difficult task.

W. Bryan Pizzi II

INSURANCE CONTRACTS—WAIVER BY ESTOPPEL—Surrender by an insured of the right to change the beneficiary of his life insurance policy creates a vested interest in the then designated beneficiary and an acceptance by the company of the insured's subsequent request to change the beneficiary constitutes a waiver of the prohibition against such change and an estoppel to deny liability to the new beneficiary.

Phillips v. Continental Assurance Co., 210 Pa. Super. 178, 231 A.2d 422 (1967), *allocatur denied*, 231 A.2d 422 (1967).

Insured, in purchasing a life insurance policy, removed the provision reserving to him the right to change beneficiaries and inserted instead the provision that his policy be "without the right to revoke and change any beneficiary." At the same time he designated A and B as beneficiaries of the policy. The defendant company agreed to his changes and both signed the policy. Several years later insured requested defendant to change the designated beneficiary of the policy from A and B to Regina

53, and at 288 of 233 A.2d 284, that police officers are so conditioned in their duties that they cannot be objective witnesses, especially when their identification of a suspect is based on one observation.

52. 2 CRIMINAL LAW REPORTER 2307 (Calif. Sup. Ct. Dec. 7, 1967).

53. *Id.* at 2308.