State of South Carolina
The Circuit Court of the Eighth Judicial Circuit

Frank R. Addy, Jr.
Judge

Greenwood County Courthouse
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February 17, 2011

The Hon. Ingram Moon
Greenwood County Clerk of Court
Via Hand Delivery

Re: <u>State v. Bryant Smith</u>
Warrants I828738, I828775

Dear Ms. Moon,

Enclosed is the original order in the above case. Please forward clocked copies of the order to Elizabeth White with the Solicitor's Office and Megan Flannery with the Public Defender's Office.

Thank you for your attention and assistance.

Sincerely,

Frank R. Addy, Jr.

Enclosure

STATE OF SOUTH CAROLINA)
COUNTY OF GREENWOOD)

In the Court of General Sessions
Warrants I828738, I828775

State of South Carolina)

v.

Bryant Smith)

ORDER

FILED GENERAL SESSIONS
8TH JUDICIAL CIRCUIT
GREENWOOD SC
2011 FEB 18 AM 10:05

THIS MATTER CAME BEFORE THE COURT on January 26, 2011 on Defendant's motion for a bond reduction and the State's cross motion for a protective order pursuant to Rule 5. The State requested additional time to brief the issue, and the court has received and reviewed the State's memorandum dated February 4, 2011 and the Defendant's memorandum in response dated February 15, 2011. The court will address the State's request for a protective order prior to addressing the bond issue. Having considered the applicable statutory and case law and rules of procedure, I find as follows:[1]

1. In its memorandum, the State conceded that the Defendant is entitled to know the identity of the confidential informant prior to tendering a plea of guilty or proceeding to trial. Therefore, the court is not asked to decide any issue as to whether the informant in this case was a mere tipster or witness, as the State concedes the Defendant is entitled to know the identity of the confidential informant. The sole issue for the court is whether a "substantial showing" has been made entitling the State to delay disclosure of the informant until thirty (30) days before trial.

2. Having received testimony of law enforcement at the hearing of January 26th, the court wishes to note that I am fully aware of the difficulties inherent in cases such as these. By their very nature, illicit drug transactions are clandestine enterprises wherein dealers profit only by evading detection. Penetrating this world and making cases against such individuals often requires similar stealth and deception on the part of law enforcement, and certainly, use of a confidential informant in making cases against such individuals may well be an effective law enforcement technique.

[1] Although this order discusses areas which may not be germane to Mr. Smith's current charges, nothing in this order should be read as a blanket or "standing" order with regard to discovery rights in cases involving confidential informants. The court's understanding is that such an order may only be issued by the Chief Justice or the Chief Judge for Administrative Purposes. Therefore, application of this order is limited solely to Mr. Smith.

3. By electing to use confidential informants, however, the State invites and undertakes certain risks in the cases they make with such informants. This court is aware that many individuals routinely agree to act as informants in order to "work off" charges which had previously been made against them. Such informal, but nonetheless existent, understandings are ripe areas for cross examination by a defense attorney. Similarly, where the confidential informant is an active participant in the narcotics transaction, their identity cannot be indefinitely concealed from the defendants against whom cases are made.

4. The law is clear on several points. First, the identity of a confidential informant who actively participates in a drug transaction resulting in criminal prosecution must be revealed to the Defendant. Second, Rule 5 clearly requires such disclosure by the State. Third, the Chief Justice has issued an administrative order requiring such Rule 5 disclosure to be made at the Initial Appearance date. The same order requires that law enforcement provide this information to the Solicitor within twenty-one (21) days of the arrest of the defendant.

5. To justify a protective order, the State must make a "sufficient showing" that such an order would be proper. "Sufficient" is defined as "adequate; of such quality, number, force, or value as is necessary for a given purpose." *Black's Law Dictionary, 1447 (7th ed. 1999).* On its face, the State's request appears reasonable. However, in practice, the court is forced to conclude that issuance of a protective order in the present case, as well as other similar cases, would likely prove unworkable for the following reasons.

(a) First, as explained in paragraph 4, *supra*, the law and the Chief Justice's Case Management Order clearly require disclosure in cases such as this.

(b) Second, as conceded by the State, the Defendant is entitled to know the identity of the confidential informant prior to a plea of guilty. Because the current case management order contemplates a plea offer being made to the Defendant early in the prosecution of the case, delaying disclosure until thirty (30) days before trial prevents the Defendant from evaluating the evidence against him. Absent the ability to evaluate the evidence, there is no way this Defendant can make a knowing or intelligent decision as to whether to accept the offer or to proceed to trial. Were he to plead without such information, such a plea would constitute, by any legal definition, an unknowing, involuntary, uninformed decision and would be subject to reversal on direct appeal or collateral attack via post-conviction relief.

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(c) Third, this court is unsure how the State's proposed solution would prove workable in practice. The only way it would be possible to provide the information thirty (30) days in advance of trial is if each Defendant were to receive a "date certain" trial. However, the court is unaware of any mechanism or standing order by which this court could require the case to be called on a specific date. Section 1-7-330 of the South Carolina Code of Laws grants the Solicitor exclusive control of the criminal docket. Although a case may be placed on the trial docket, prior case law and the above statute prevent the court from requiring or forcing the Solicitor to call any case for trial.

(d) Finally, as a practical matter I note that Mr. Smith's situation is somewhat different from that of other defendants facing similar charges in that he is currently in pretrial detention. That a defendant is entitled to be informed of the nature of the charges against him, to have the assistance of counsel, and to be apprised of the evidence against him remains the cornerstone of our system of criminal justice, but these truths take on an even greater, heightened importance for someone who is detained pending trial. To permit the State to delay the production of evidence, which the law clearly states a defendant is entitled to, has the potential to invite abuse of those very rights enumerated above.

6. Although I share the State's concern that untimely disclosure could jeopardize the ongoing ability for the confidential informant to continue making cases and may well pose some physical risk to the confidential informant, I am forced to conclude for the above stated reasons that the State has failed to make the necessary sufficient showing to warrant issuance of a protective order. I note that this decision is in line with the prior rulings of Judge Griffith and Judge King on unrelated cases. Furthermore, there are ways in which the State or law enforcement could minimize the risk of disclosure to any ongoing operations. The most obvious way would be to avoid serving any warrant until the informant has made a number of cases against several defendants. Additionally, law enforcement could use undercover police or other individuals from outside the area, thereby minimizing post-arrest contact with the informant and the defendants against whom cases are made. Although these methods would have obvious disadvantages, they are ways to maintain ongoing operations and/or minimize the risk of harm to an informant.

7. Accordingly, the State's motion for a protective order is denied. Disclosure of the confidential informant shall take place within thirty (30) days of the date of this order and the

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court would encourage the Solicitor to place this case on the trial docket at the earliest possible term of court.

8. Turning to the issue of bond, Mr. Smith's bond is currently set at $250,000 on charges of distribution of crack cocaine and possession with intent to distribute crack cocaine. He had been out on bond previously on similar distribution charges at the time he was arrested for the present charges. Mr. Smith has several prior convictions for violating the narcotics laws. However, Mr. Smith does possess ties to the community in that he is married, and he has two teenage children. In light of the fact that he was out on bond for other offenses when he was arrested for these charges and considering his prior record and the substantial prison sentence facing Mr. Smith if convicted, I find that Mr. Smith's current bond is reasonably calculated to assure his appearance at trial and to assure the safety of the community. If the State fails to set this matter for trial in the coming months or if evidentiary issues arise sufficient to warrant a change in circumstances, the court would invite counsel for Mr. Smith to revisit this issue.

WHEREFORE:

(1) The State's motion for a protective order is denied.

(2) The Defendant's motion for a bond reduction is denied.

IT IS SO ORDERED.

Frank R. Addy, Jr.
Circuit Judge, 8th Judicial Circuit

February 17, 2011
Greenwood, South Carolina