

1979

# State of Utah v. Ralph Wynfield Forshee : Brief of Appellant

Utah Supreme Court

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Ronald J. Yengich; Attorney for Appellant;

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH,	:	
	:	
Plaintiff-Respondent,	:	
	:	
-v-	:	
	:	
RALPH WYNFIELD FORSHEE,	:	Case No. 16350
	:	
Defendant-Appellant.	:	

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BRIEF OF APPELLANT

Appeal from a conviction in the Third Judicial District Court in and for Salt Lake County, State of Utah for the crime of Unlawful Distribution For Value Of a Controlled Substance, to wit: Marijuana, a Third Degree Felony, The Honorable Judge James S. Sawaya presiding.

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Attorney for Respondent

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction of the defendant-appellant, Ralph Wynfield Forshee, for the crime of Unlawful Distribution for Value of a Controlled Substance, to wit: Marijuana, a Third Degree Felony, Utah Code Ann. §58-37-8 (1953) as charged in an Information filed in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable James S. Sawaya, Judge presiding.

DISPOSITION IN THE LOWER COURT

The appellant was tried by jury before the Honorable Judge James S. Sawaya and found guilty of Unlawful Distribution for Value of a Controlled Substance, to wit: Marijuana, as charged in the Information on July, 17, 1978. Appellant was sentenced to The Utah State Prison for the indeterminate term of 0-5 years as provided by law.

## RELIEF SOUGHT ON APPEAL

Defendant-Appellant seeks reversal of his conviction and a new trial.

## STATEMENT OF THE FACTS

The testimony in this case in reference to a single alleged occurrence concerning the sale of marijuana by the Appellant to Deputy Sheriff Mark Whittaker was at extreme variance. As to this alleged occurrence, the prosecution produced the testimony of only one witness, Deputy Whittaker. The defense offered the testimony of three witnesses, all of whom denied that the alleged event occurred. These witnesses were the Appellant, Vickie Forshee and Val Densley.

### a. According to the testimony of Deputy Whittaker:

Officer Whittaker had been employed only a short time at the Salt Lake County Sheriff's Office prior to the alleged sale of marijuana by Appellant. (Tr. 12). Officer Whittaker began working at the County Sheriff's Office in January of 1978. (Tr. 24). He did not begin working as an undercover officer until three months later. (Tr. 12). Deputy Whittaker testified his duty was to meet with informants who were originally introduced to him by other officers. Those informants would introduce the undercover officer to people allegedly "dealing narcotics". (Tr. 12).

Whittaker called an informant on April 21, 1978. Whittaker stated the informant had arranged previous sales for him, but those arrangements had always fallen through. (Tr. 27). Whittaker met the informant at the Delton Bowling Lanes in Granger two hours after the phone conversation, at approximately 5:30 p.m. in order to meet someone to purchase "narcotics". (Tr. 13). The informant and Whittaker traveled to a new location "just north of 3100 South 3450 West". (Tr. 14). At this destination, Whittaker entered

a residence wherein he met a man he identified at the trial as the Appellant (Tr. 14) Whittaker testified two "little girls" were present along with the defendant's former wife, Vickie Forshee. The only other person present was the informant. The informant had previously given Officer Whittaker Vickie Forshee's name (Tr. 15) and had told Officer Whittaker that he lived with Vickie Forshee at this residence.

After Officer Whittaker entered the residence, Vickie Forshee pointed to a small plastic bag on the kitchen table. (Tr. 16) Whittaker sat at the kitchen table while the others remained in the living room. (Tr. 35) No one else left or entered the rooms. (Tr. 17) Whittaker "mentioned it seemed to be kind of a small bag." According to Whittaker the Appellant replied it was "as good as tiestick" (Tr. 16).

Officer Whittaker gave the Appellant \$50.00 for the bag of marijuana and the Appellant placed the money in his wallet. (Tr. 17) Whittaker kept the marijuana in his possession until giving it to Deputy Sheriff Randall Anderson one hour later at Valley Fair Mall. (Tr. 19) The informant did not leave the residence when Whittaker left because he lived there. (Tr. 18) Whittaker stated he returned twice to this residence after April 21st. The first time was approximately two days later. (Tr. 28,29) He talked to Vickie Forshee both times attempting to locate the Appellant. The informant was no longer living at Vickie Forshee's residence the second time Whittaker returned. (Tr. 29)

Whittaker testified he had not known the informant was a convicted felon, but he had been aware that the informant "had been in and out of jails." (Tr. 36)



The testimony of Officer Whittaker was admittedly based on a typewritten report of the alleged April 21st occurrence as well as his memory. (Tr. 23) The typewritten report was taken from Officer Whittaker's notes written after he left Vickie Forshee's residence and prior to his meeting Deputy Sheriff Anderson. (Tr. 22) The report was typed that night, April 21st, at approximately 10:00 p.m. (Tr. 38) Whittaker did not examine the report after being typed until August 22nd, the date of the preliminary hearing. (Tr. 23)

b. Testimony of the Appellant Vickie Forshee and Val Densley:

The Appellant and Val Densley testified that they had never seen Officer Whittaker prior to the preliminary hearing in August. (Tr. 54, 72). Vickie Forshee testified she saw Whittaker for the first time at the pretrial conference, because she did not attend the preliminary hearing. (Tr. 64) The defendant did not have any specific recollection of April 21, 1978. (Tr. 58) The Appellant testified he has two children, one boy and one girl, both from his former wife, Vickie Forshee. (Tr. 61) He admitted to having been convicted on a previous marijuana charge "over three years ago." (Tr. 61)

Vickie Forshee testified she lived at 3488 8B West Lake Road with her children from January 1 until the first of June. (Tr. 62) She met Richard Garrett one week before Christmas of the previous year. (Tr. 63) Richard Garrett lived with her from the first of January until the first or middle of April 1978, when he severely beat her and she requested he leave. (Tr. 63, 64)

The Appellant, Vickie Forshee and Val Densley testified to the intense jealousy and hatred felt by Richard Garrett for the Appellant. Because of this jealousy, the Appellant brought Val Densley, his girlfriend, with him to his former wife's residence when he visited his children. (Tr. 54,65,71) Only once did the Appellant not bring Val Densley with him to Vickie Forshee's residence when he went to visit his children.

Richard Garrett threatened to kill the Appellant in approximately April of 1978. (Tr. 54,55,73) He attempted to go to the defendant's residence taking a 30.06 rifle but was arrested by the Kearns police after Vickie Forshee informed them of Garrett's intent. (Tr. 63, 64) A police report of this attempt was filed.

Vickie Forshee testified she had known that Garrett had been in prison until September 1977. (Tr. 66) He was arrested the following year while he lived with Vickie Forshee during the commission of a burglary, (Tr. 55, 67) Vickie Forshee did not know if Richard Garrett was an informant for the police. (Tr. 64) Richard Garrett was released on bond for the burglary. Vickie Forshee stated, "He went and pulled another robbery, stole a car and split. They caught him in California and he's in prison in California right now." (Tr. 67)

Counsel for Appellant was thwarted in efforts to determine if the alleged confidential informant and Richard Garrett were one and the same.

Counsel for Appellant repeatedly attempted to discover the identity of the confidential informant who supposedly "set up" the drug transaction and who was present for the alleged consumation of this transaction. A formal "discovery" request was made in the form of a "Motion for A Bill of Particulars".

In the Motion it was requested:

1. Provide the names of all persons present at the time of the alleged sale of a controlled substance.....

The State of Utah answered this request without disclosing the name of the said informant as follows:

1. Present at the time of the alleged sale of a controlled substance were, Deputy Mark Wittaker Salt Lake County Sheriff's Office, Vicki Forshee, the defendant Ralph Wynfield Forshee, and a confidential informant whose identity will not be disclosed. The confidential informant is not disclosed for the reason that he is still being utilized by other police agencies in undercover narcotics work and to disclose his identity would compromise and prejudice those investigations. Furthermore, the entire transaction took place between Deputy Whittaker and the Forshee's and the confidential informant was not involved in the transaction other than the fact that he was present.  
(Emphasis Supplied)

Appellant also requested:

4. Provide the number of other arrests and alleged unlawful sales that the undercover officer entered into during the month of the alleged distribution by the above named defendant.

Respondent through counsel answered:

4. Question number four relates to information involving a confidential informant, which information is not furnished as stated in question no. one.

Appellant then filed a motion to dismiss the prosecution for failure to disclose the name of the alleged confidential informant, informing the court that the informant was believed to be Appellant's antagonist Richard A. Garrett. This motion was denied and all efforts of Appellant to secure the disclosure of the identity of the informer were denied by the court. (Tr. at 12-5)

On the 11th day of January, 1979 Appellant filed a "Notice of Intent" to use the defense of entrapment.

## ARGUMENT

### POINT I

THE FAILURE OF THE STATE TO DISCLOSE THE NAME AND WHEREABOUTS OF THE SO-CALLED CONFIDENTIAL INFORMANT WAS CONSTITUTIONALLY IMPERMISSABLE AND NOT IN ACCORDANCE WITH RULE 36, UTAH RULES OF EVIDENCE.

In the case at bar, Appellant requested the disclosure of the name and whereabouts of the so-called confidential informant who was present during the alleged transaction which lead to the charge in this case. Counsel for the State objected to such disclosure claiming a privilege against the disclosure of such information. Appellant submits that under both the Utah Rules of Evidence, Rule 36 and by Constitutional dictate, Roviaro V. United States, 335 U.S. 53 (1957) that the State must disclose the information sought or dismiss the Information against Appellant. In Roviaro, as in the instant case, the accused was charged with illegal drug trafficking. Roviaro was specifically charged with Distribution of Heroin for Value and Importation of Heroin in a two count indictment (353 U.S. 565). As in the instant case through both pretrial discovery motions and at trial defense counsel sought the name and whereabouts of the government informer who was present for the "sales" transaction which formed the basis of the Indictment. The Court denied all such defense efforts for disclosure. The United States Supreme Court in reversing the defendant's conviction on both counts on Due Process grounds, held that since the informant was an active participant in the transactions and his testimony might be relevant and helpful to the accused's defense, then the prosecution was under a duty to disclose the name and whereabouts of the informant or dismiss the case against Roviaro. (353 U.S. at 62).

The Roviaro decision and the various State statutes and rules which embody the so-called informer privilege merely clarify and raise to the level of constitutional significance what was the Common Law Rule.<sup>1</sup> The Court in Roviaro held that the Government is privileged to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. The Court stated that the purpose of this Governmental privilege is the furtherance and protection of the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officers and by preserving their anonymity, encourage them to perform that obligation.<sup>2</sup>

The Court went on to hold that this policy concern must of necessity yield on certain occasions and engrafted certain specific limitations on the scope of that privilege.

The Roviaro rule and its exceptions has subsequently become enacted in Utah and other jurisdictions as a Rule of Evidentiary Privilege. See Utah Rules of Evidence, Rule 36 (Enacted 1971) which provides in its entirety:

Rule 36. Identity of Informer

"A witness has a privilege to refuse to disclose the identity of a person who has furnished information purporting to disclose a violation of a provision of the laws of this State or of the United States to a

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1. See Underhill, On Criminal Evidence, (3d ed. 1898) §287 at 395-396; 54 Cal. Jur. 2d, Witnessess, §45 at 305 and People v. Garcia, 67 Cal. 2d 830, 64 Cal. Rptr. 110, 434 P.2d 366 (1967) and Honore v. Superior Court 70 Cal. 2d 162, 74 Cal. Rptr. 233, 449 P.2d 169 (1969) (Which speaks in terms of Federal and State Due Process violations.)

2. McCormick, On Evidence (12th Cleary Ed. 1972) §111 at 236 Roviaro, v. United States, 353 U.S. at 59.

representative of the State or the United States or governmental division thereof, charged with the duty of enforcing that provision, and evidence thereof is inadmissible, unless the judge finds that (a) the identity of the person furnishing the information has already been otherwise disclosed or (b) disclosure of his identity is essential to assure a fair determination of the issues."<sup>3</sup>

The exceptions to the confidentiality requirement and which under the Utah rule and Roviaro's dictates require disclosure are as follows:

- (a) The privilege does not extend to the disclosure of the contents of a communication which will not tend to reveal the identity of an informer;<sup>4</sup>
- (b) The privilege is not applicable where the identity of the informer has been disclosed;<sup>5</sup>
- (c) Where the disclosure of an informer's identity is relevant and helpful to the defense of an accused, or is essential to a fair determination of the crime.<sup>6</sup>

Where any of the above situations exist, the trial court should compel disclosure and, if the Government withholds the information pertaining to the identity of the informant, the case should be dismissed.<sup>7</sup>

In the instant case, both the second and third limitations are applicable.

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3. The Utah Rule is based upon and identical to Uniform Rule of Evidence, Rule 36. See also Federal Rules of Evidence, Rule 510 (P.O.D. 1971) (a similar Rule was not enacted as part of the new Federal Rules of Evidence) See also Section 78-24-8 (5), U.C.A. (1953) and III, Whartons Criminal Evidence (13th Torcia Ed. 1973) §580 at 116-117.

4. Roviaro, 353 U.S. at 60 fn. 7; VIII Wigmore Evidence (3d ed. 1940) §2374 (1); McCormick, On Evidence (Cleary Ed. 1972) §111 at 238 fn. 50.

5. Roviaro, 353 U.S. at 60-61 fn. 8; VIII Wigmore Evidence (3d ed. 1940) §2374 (2).

6. Roviaro, 353 U.S. at 61 fn. 9; McCormick, On Evidence (Cleary Ed. 1972) §111 at 238 fn. 51.

7. (353 U.S. at 61) Liberty v. United States, 426 U.S. 1041, 1041 (1975) (1975) 2d 1998 (1957).  
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a. THE DISCLOSURE OF THE INFORMANT WAS NECESSARY TO THE DEFENSE.

The informant not only supposedly set the "deal up" but also was an eyewitness to the event and within earshot of the alleged conversation.

In dealing with this type of case, the Court in Roviaro, said:

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 non-disclosure 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. (353 U.S. at 62).

The Government in Roviaro, however, conceded the necessity of disclosure as to the heroin sales count, which is identical to the instant<sup>8</sup> case. And, the courts have uniformly held that disclosure is mandatory in such situations, as in the case at bar, wherein the informant is an<sup>9</sup> active and actual participant or eyewitness to the alleged offense. A recent case on point is People v. Goliday, 106 Cal. Rptr. 113, 505 p.2d 537 (1973) wherein the California Supreme Court in following Roviaro held that failure to disclose the name and whereabouts of a percipient eyewitness (confidential informant) to the defense or make a reasonably diligent effort to find the witness denied the defendant Due Process of Law and required<sup>10</sup> reversal of a heroin sale conviction.

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8. Roviaro, 353 U.S. at 58-59.

9. For an extensive collection of cases so holding, see III Wharton's Criminal Evidence (13th Torcia Ed. 1973) §580 at 119 fn. 67.1.

10. The courts extend the obligation of the prosecution to include disclosure as well as ... "reasonable steps to locate or obtain information about such eyewitness informants." Eleazer v. Superior Court, 1 Cal. 3d 847, 83 Cal. Rptr. 586, 464 P.2d 42, 54 (1970). People v. Goliday, supra, 505 P.2d at 542-543.



As the Supreme Court stated in Roviaro:

A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations, the trial court may require disclosure and, if the Government withholds the information, dismiss the action . . . (353 U.S. at 60-61).<sup>11</sup>

A well reasoned opinion as to the requirement of producing the identity of the informant appears in the case of Melendez v. Superintendent, Clinton Correct. Fac., 399 F. Supp. 430, 437 (E.D.N.Y. 1975), wherein the court held that to allow the Government to conceal the identity of potential witnesses is in derogation of both defendant's right to compulsory process under the Sixth Amendment and the right to be furnished exculpatory evidence under the Fifth Amendment. <sup>12</sup> The court stated:

Washington v. Texas, 388 U.S. (1967) found that right so fundamental that it was applicable to the states under the Fourteenth Amendment, and required the invalidation of a state statute, rooted in the common law, providing that persons charged as co-participants in the same crime could not testify for one another. As the court there put it:

"The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." (338 U.S. at 19).

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11. The court in Roviaro indicated that in circumstances such as those in the instant case and Roviaro the defense need only indicate that the informer's testimony might assist the defendant in presenting his case. (353 U.S. at 64); See also McCormick, §111 at 238 fn. 51. Also see the California Supreme Court's statement in People v. Goliday, supra, 505 P.2d at 543 (collecting cases) ". . . an accused need show only a possibility that a material witness might testify favorably on his behalf."

12. Accord. United States v. Edwards, 503 F.2d 838, 840-41 (9th Cir. 1974); United States v. Marshall, 526 F.2d 1439 (19th Cir. 1975); United States v. Jones, 492 F.2d 239 (3d Cir. 1974); McLawn v. North Carolina, 484 F.2d 1 (4th Cir. 1973); People v. Musgrove, Colo. 529 P.2d 313 (1975) and State v. Jackson, Wyo., 522 P.2d 1286 further appeal Jackson v. State, Wyo. 547 P.2d 1203 (1976)

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Disclosure of the informant may have assisted in Appellant's defense of Entrapment originally offered in the form of a notice of intent to rely on that defense.

More importantly, however, there was a severe conflict in the testimony of the alleged percipient witnesses to this supposed drug transaction. Three witnesses called by Appellant, including Appellant himself, testified that the transaction alleged just did not occur. Only Deputy Whittaker testified that he purchased drugs from Appellant. The Deputy's credibility was genuinely affected by his inability to remember certain surrounding events. For example, the number and gender of Appellants children allegedly present during the transaction.

**b. THERE IS NO PRIVILEGE WHEN THE NAME OF THE INFORMANT IS KNOWN AND UNDER THOSE CIRCUMSTANCES DISCLOSURE IS REQUIRED.**

In the case at bar, disclosure was also mandated under the second prong of the Roviaro rule, ie. where the identity of the informer has been disclosed or is known.<sup>13</sup>

In the instant case, Appellant felt his antagonist Richard Garrett was the informant. If in fact Garrett was the informant, there was no confidentiality remaining and disclosure should have been made when requested.

Appellant did not request disclosure solely for disclosure's sake. In the instant case where the credibility and recollection of the alleged undercover purchase was called into severe question, then the identity and recollection of the eyewitness informant was manifest to insure the truth finding process was not abridged by faulty recollection and half-truths.

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13. Accord. Utah Rule of Evidence, Rule 36 (b)

Moreover, in order to insure effective cross-examination of Deputy Whittaker the name and whereabouts of the informant-prime mover in the transaction was necessitated.

The trial court allowed Appellant to elicit a wealth of testimony concerning Richard Garrett and his animosity towards Appellant. The forced disclosure of the name of Garrett as the informant would have allowed the jury to determine if in fact the case was a "set up". When the credibility of witnesses was the primary issue at the trial below and disclosure of the utmost necessity in allowing Appellant to effectively present his theory of the case. By holding back the names of the informant the defense was unable to effectively investigate and prepare for the cross-examination of Deputy Whittaker. This prevents the defense from truly testing the credibility and veracity of those who attack the defense case. Such preparation has long been recognized as means of effectively discrediting testimony upon which a reasonable doubt might reasonably rest.<sup>14</sup> Experience teaches that effective confrontation and cross-examination of witnesses may push a case beyond the line where a reasonable doubt exists.<sup>15</sup>

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14. See Wellman, The Art of Cross-Examination (1905). In fact without adequate preparation cross-examination can be a dangerous weapon which may "backfire on its user." II Schwartz, Proof, Persuasion and Cross-Examination (1975) Ch. 16. Jeans, Trial Advocacy (1975) Ch. 13. and Palmer, Courtroom Strategies (1959) Ch. 5 at 90-91 (Cross-Examination ". . . is a two edged sword that may cut both ways . . . Or as Hamlet would say, you may be hoist with your own petard: Cross-Examination may explode in your own face . . .)

15. Hence the courts are generally loath to restrict cross-examination by a defendant in a criminal case. Deinhardt v. State, Md., 348 A.2d 286 (1975); State v. Mason, Utah, 530 P.2d 795 (1975); State v. Warner, 79 U. 510, 12 P. 2d 317 (1932); State v. Smith, 90 U. 2d 482, 62 P.2d 1110 (1936); State v. Smelser 234 2d 246, 463 P.2d 562, 564 (1970); Davis v. Alaska, 415 U.S. 308 (1974); Giles v. Maryland, 386 U.S. 66 (1967) and Gigilio v. United States, 405 U.S. 150 (1973)

### CONCLUSION

In conclusion, the case law is clear that fundamental fairness embodied in the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article One, Section 7 of the Constitution of the State of Utah, and the letter of Utah Rules of Evidence, Rule 36 demand disclosure of the name and whereabouts of the alleged confidential informant in circumstances such as the instant case or dismissal of the Information.

Article One, Section 12 of the Constitution of the State of Utah as well as the Sixth and Fourteenth Amendments to the Constitution of the United States required effective cross-examination and confrontation of all witnesses against the accused and compulsory process to secure attendance of potentially helpful witnesses. Both of these crucial constitutional rights were abridged by allowing the State of Utah to hide behind a false mask of confidentiality in the instant case.

Wherefore, Appellant respectfully requests reversal of his conviction and the judgement and sentence entered thereon and remand of the case for new trial.

---

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MAILING CERTIFICATE

I hereby certify that I mailed two copies of the foregoing Brief of Appellant to the office of the Attorney General, 236 State Capitol Building, Salt Lake City, Utah 84114, this 17<sup>th</sup> day of December, 1979.

Sherrill M. Mayne