

1980

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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:  
STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- :

Case No.  
16350

RALPH WYNFIELD FORSHEE, :

Defendant-Appellant. :

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:  
BRIEF OF RESPONDENT  
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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 OF A CON-  
TROLLED SUBSTANCE, THE HONORABLE JAMES  
S. SAWAYA, JUDGE, PRESIDING  
-----

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## TABLE OF CONTENTS

	PAGE
STATEMENT OF THE NATURE OF THE CASE -----	1
DISPOSITION IN THE LOWER COURT -----	2
RELIEF SOUGHT ON APPEAL -----	2
STATEMENT OF THE FACTS -----	2
ARGUMENT	
POINT I: THE TRIAL COURT'S FAILURE TO COMPEL DISCLOSURE OF THE IDENTITY OF THE CONFIDENTIAL INFORMANT DOES NOT CONSTITUTE REVERSIBLE ERROR -----	5
CONCLUSION -----	14

## CASES CITED

Lopez v. State, 574 S.W. 2d 563 (Tex. Cr. App. 1978) --	11,12
People v. Langford, Colo. 550 P.2d 329 (1976) -----	2
People v. Marquez, Colo., 546 P.2d 482 (1976) -----	3
Roviaro v. United States, 353 U.S. 53 (1957) -----	5-13
State v. Bankhead, 514 P.2d 800 (Utah, 1973) -----	10
State v. Hull, 487 P.2d 1314 (Mont. 1971) -----	13
State v. Tuell, 541 P.2d 1142, 1145 (Ariz. 1975) -----	9

## STATUTES CITED

Utah Code Ann. § 58-37-8 (1953), as amended -----	1
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## OTHER AUTHORITIES

Utah Rules of Evidence, Rule 36 -----	5,8,9
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IN THE SUPREME COURT OF THE  
STATE OF UTAH

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

----- :  
BRIEF OF RESPONDENT  
-----

STATEMENT OF THE NATURE OF THE CASE

The appellant appeals from a jury verdict finding him guilty of Unlawful Distribution for Value of a Controlled Substance as proscribed by Utah Code Ann. § 58-37-8 (1953), as amended.

DISPOSITION IN THE LOWER COURT

The appellant was tried by a jury on February 7, 1979, in the Third Judicial District Court, in and for Salt Lake County, State of Utah. The trial was presided over by the Honorable James S. Sawaya. The jury found appellant guilty of Unlawful Distribution of a Controlled Substance contrary to the provisions of Utah Code Ann. § 58-37-8 (1953) as amended. Pursuant to the verdict of the jury, Judge Sawaya

sentenced appellant to imprisonment in the Utah State Prison for an indeterminate term not to exceed five years.

#### RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the judgment and sentence of the court below.

#### STATEMENT OF THE FACTS

On April 21, 1978, a Deputy Sheriff of the Salt Lake County Sheriff's Department, while working as an undercover agent, met a confidential informant in order to meet a third person to purchase narcotics (T.12-13). The confidential informant took the deputy to a duplex near 3100 South 3450 West in Salt Lake County and the two walked into the residence (T.14). Once inside, the informant introduced the deputy to appellant and Mrs. Forshee, appellant's ex-wife (T.14). In court, Deputy Whittaker identified the appellant and Mrs. Forshee as the persons whom he met that evening (T.14-15). Mrs. Forshee then pointed to a baggie on the kitchen table which Deputy Whittaker testified appeared to be marijuana (T.16). Deputy Whittaker and the appellant, after discussing briefly the quantity and quality of the contents of the baggie, agreed to make the sale for fifty dollars (T.17). The deputy paid appellant, took the baggie, and left the residence (T.17). The confidential informant did not

leave with the deputy, and Deputy Whittaker testified that the informant lived at the residence in which the transaction took place (T.18).

Approximately one hour after the transaction, Deputy Whittaker met Deputy Randall Anderson in the Valley Fair Mall parking lot and transferred to Deputy Anderson the baggie of marijuana (T.18-19,40-41). Deputy Anderson delivered the marijuana to Joseph Tyree, a toxicologist for the Salt Lake City-County Health Department (T.41,43). Joseph Tyree, after conducting two tests on the contents of the baggie, concluded that the substance was marijuana (T.48).

Deputy Whittaker was instructed not to disclose the name of the confidential informant at the trial (T.13). Appellant moved before trial to dismiss the information based upon the state's failure to disclose the name of the confidential informant as requested in a bill of particulars. This motion was denied (T.5) since the name of the confidential informant would be irrelevant if appellant actually made the sale to the officer.

Appellant's defense presented at trial consisted of his own testimony, the testimony of his ex-wife, Vickie Forshee, and that of his new girlfriend, Val Densley.

Appellant testified that at the time of the alleged transaction, his ex-wife was living with a Richard Garrett, whom appellant and his trial counsel believed to be the confidential informant (T.53,R.27). Since Richard Garrett is no longer working as an undercover informant for the Salt Lake County Sheriff's Department, the state can now disclose that he was the confidential informant involved in the transaction at issue in this case.

Appellant testified that the transaction had not taken place, and that the first time he had seen Deputy Whittaker was at appellant's preliminary hearing (T.54). The essence of appellant's story was that Richard Garrett and Deputy Whittaker must have fabricated the charge against appellant (T.56). Appellant admitted on cross-examination that he had previously been convicted on a marijuana charge (T.60).

Appellant's ex-wife also testified that she had never seen Deputy Whittaker before the preliminary hearing for appellant (T.64). She also established that Richard Garrett had been living with her at the time, that Garrett hated appellant, and that Garrett was capable of setting appellant up to commit the crime (T.63,66,67). Finally, appellant's girlfriend testified that she had accompanied appellant every time appellant went to see his children at the residence occupied by appellant's



ex-wife and Richard Garrett and had never seen Deputy Whittaker before (T.72). The jury discredited the testimony of the defense witnesses and returned a verdict of guilty against appellant (T.91).

## ARGUMENT

### POINT I

#### THE TRIAL COURT'S FAILURE TO COMPEL DISCLOSURE OF THE IDENTITY OF THE CONFIDENTIAL INFORMANT DOES NOT CONSTITUTE REVERSIBLE ERROR.

Appellant's sole assignment of error is that the trial court refused to compel the state to disclose to appellant the identity of the confidential informant who arranged the transaction between Deputy Whittaker and appellant. Appellant requested such information in a Motion for Bill of Particulars (R.9-10). The state refused to supply the identity of the informant because, first, the informant was still being used in undercover narcotics investigations and disclosure might prejudice those investigations, and, second, the informant was not a participant in the transaction between appellant and Deputy Whittaker (R.10-12). Appellant now avers that under the rule established by the United States Supreme Court in Roviaro v. United States, 353 U.S. 53 (1957), and under Rule 36 of the Utah Rules of Evidence, it was error for the trial court not to compel disclosure of the identity

of the informant as an exception to the government's informer privilege.

In Roviaro, supra, the defendant was convicted of knowingly possessing and transporting unlawfully imported heroin. The defendant demanded disclosure of the identity of a confidential informant who allegedly bought heroin from the defendant and was the only other witness to the alleged transaction. The government invoked its informer's privilege and the trial court sustained the failure to disclose. The Supreme Court recognized the purpose of the privilege:

The purpose of the privilege is the furtherance and protection of the public interest in law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials, and by preserving their anonymity, encourages them to perform that obligation.

353 U.S. 53, 59.

The court identified three exceptions to the privilege of non-disclosure as:

1) The contents of communications between the informant and others are not privileged;

2) Once the identity of the informant "has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable;" Roviaro, supra at p. 60, and

3) "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." Roviaro, supra at pp. 60-61.

In rejecting any fixed rule when nondisclosure is erroneous, the Court stated:

The problem is one that calls for balancing the public interest in protecting the free 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.

353 U.S. 53, 62. The Court emphasized the third exception to the privilege in holding that under the facts of Roviaro, the failure to require disclosure was error:

This is a case where the Government's informer was the sole participant, other than the accused, in the transaction charged. The informer was the only witness in a position to amplify or contradict the testimony of government witnesses. . . . We conclude that, under the circumstances, the trial court committed prejudicial error in permitting the Government to withhold the identity of its undercover employee. . . .

353 U.S. 53, 64-65.

The case at bar is factually distinguished from Roviaro in that here the transaction in which the marijuana was exchanged took place between Deputy Whittaker and the appellant, not between the informant and the appellant. In addition, the informant here was not the sole witness, besides appellant, to the transaction. Appellant's ex-wife,

Vickie Forshee, was also present and testified at trial to bolster appellant's defense. Thus, Roviaro does not determine the issues in this case.

Rule 36 of the Utah Rules of Evidence recognizes the privilege to withhold disclosure of a confidential informant's identity, subject only to two exceptions: (a) where the identity of the informant has been "otherwise disclosed," and (b) where disclosure is essential to assure a fair determination of the issues. These exceptions are two of those recognized in Roviaro, supra.

As to the first exception ((a) above), the language of Roviaro shows that the disclosure referred to goes beyond mere knowledge of the appellant or his counsel of the identity of the informer. The Supreme Court stated:

. . . [o]nce the identity of the  
informer has been disclosed to those who  
would have cause to resent the communication,  
the privilege is no longer applicable.

353 U.S. 53, 60 (emphasis added). In the case at bar, the class of persons who would resent communication by the confidential informant includes those who are the subject of investigations in which the informant may participate. Such broad disclosure was not made in this case. In fact, the state did not "disclose" the identity of the informant

even to the appellant. Appellant merely alleges that he felt Richard Garrett was the informant, and since his identity was known, disclosure should have been made (Appellant's Brief, p. 12). This allegation fails to recognize that the state's purpose in invoking the privilege was to protect the confidentiality of the informant as to other persons under investigation, not as to the appellant. Thus, this exception does not apply to the instant case.

Most of the cases decided after Roviaro have focused upon exception (b) in Rule 36, relating to situations where disclosure is relevant and helpful to the accused's defense or is necessary for a fair determination of the issues. The courts have uniformly recognized:

An appellant seeking to overcome the state's policy of protecting an informant's identity, has the burden of proving that the informant is likely to have evidence bearing on the merits of the case. . . His burden extends only to a showing that, in view of the evidence, the informer would be a material witness on the issue of guilt which might result in exoneration and that nondisclosure of his identity would deprive the defendant of a fair trial.

State v. Tuell, 541 P.2d 1142, 1145 (Ariz. 1975). In the present case, appellant has not made any showing as to how the informant's testimony would have been material to the issue of appellant's guilt. In addition, as will be

more fully developed infra, appellant could easily have subpoenaed the person he felt was the informant as a witness if the informant's testimony would have helped appellant's defense. As the Supreme Court of Colorado recently stated:

. . . the accused is required to make at least a minimal affirmative showing of the need for disclosure; and . . . a defendant's mere unsupported assertion that he desires disclosure is not enough. A defendant's speculations, without more, will not support a conclusion that the informant would be of any substantial assistance in his defense.

People v. Langford, Colo., 550 P.2d 329 (1976). See also State v. Bankhead, 514 P.2d 800 (Utah 1973). Appellant alleged only that the informant might have assisted in developing an entrapment defense or might have helped establish that the transaction never occurred. The entrapment defense was apparently abandoned by appellant in favor of his defense that the transaction did not take place. As to the latter defense, the informant's testimony would have been merely cumulative to that offered by the three defense witnesses, assuming that testimony would be favorable to the defense at all. Given the animosity between Richard Garrett and appellant, and the remote possibility that Deputy Whittaker and Garrett somehow fabricated the charge, it is incredible that the informer's testimony would have been favorable to the defense.

In the case of People v. Marquez, Colo., 546 P.2d 482 (1976), the Colorado Supreme Court fully analyzed the post-Roviaro case law and set forth the factors which must be weighed as part of the Roviaro balancing test. Those factors include:

. . . whether the informant was an eyewitness and earwitness to the criminal transaction and whether the informer himself is available or could, in the exercise of reasonable diligence, be made available; whether other witnesses to the transaction are in a position to testify; the likelihood that the testimony of the informer will vary significantly from that of other available or potentially available witnesses; whether the defendant himself knows the identify of the informant or could without undue effort discover his identify; whether the informant was deeply or only peripherally involved in the criminal transaction.

546 P.2d 482, 485. In Marquez, the court held that since there was another witness to the alleged sale of heroin by the appellant who could have been called to support the defense and since it appeared that appellant knew the identity of the informant, the public interest outweighed the interest of the appellant.

Applying the Marquez factors to the instant case, the public interest in confidentiality outweighs the appellant's interest in disclosure. First, it is not clear whether Richard Garrett was actually an eye-or earwitness to

sale transaction between appellant and Deputy Whittaker. Since appellant denies that any such transaction occurred, whether the informant was a witness to the transaction or not, this information would not have helped the defense. Second, Mr. Garrett was only peripherally involved in the transaction. He did not receive the marijuana from appellant (as was the case in Roviaro), but merely introduced Deputy Whittaker to the appellant. Third, Richard Garrett was not the only witness besides the appellant who could "amplify or contradict the testimony of government witnesses, Roviaro, supra at 64-65. As in Marquez, there was another witness to the transaction, Vickie Forshee, appellant's ex-wife, who could and did testify in appellant's favor. This establishes that the necessity of the informant's availability to the defendant in Roviaro was not present here.

Fourth, any possible testimony given by the informant was not likely to have varied significantly from the testimony of Deputy Whittaker. Such testimony could have been helpful to appellant's defense. If Mr. Garrett had testified that no transaction took place, his testimony would have been merely cumulative and thus not substantially helpful to appellant. Finally, and most importantly, it is clear from the record that appellant in fact knew the identity of the informant (R. 27, T. 25). Nevertheless,



appellant apparently made no significant effort to locate and/or subpoena the person he suspected to be the informant to elicit his testimony. Appellant's failure to call Richard Garrett as a witness is inconsistent with his present argument that Garrett's testimony would have been relevant and helpful to his defense.

In the recent case of Lopez v. State, 574 S.W. 2d 563 (Tex. Cr. App. 1978), a case factually similar to the instant one, the court held that although normally disclosure would be required if the informant played a prominent part in bringing the offense about or was a material witness, where the defendant and his counsel know the identity of the informer and there is no indication that the defendant could not have produced the informant as a witness or that his testimony is unavailable, it is not error to refuse to compel disclosure. To the same effect is State v. Hull, 487 P.2d 1314 (Mont. 1971). In light of the factors discussed immediately above, respondent submits that the Roviaro balance should be struck in favor of the state's exercise of the privilege to protect the confidentiality of the informant. Thus, it was not error for the trial court to permit the state to withhold the identity of the confidential informant.

## CONCLUSION

Respondent submits that appellant has failed to show that disclosure of the identity of the state's confidential informant would have been relevant and helpful to his defense or essential to a fair determination of the issues of this case. Thus, appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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