

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX: KINGSHILL

GOVERNMENT OF THE VIRGIN ISLANDS,	)	
	)	
Plaintiff,	)	CRIMINAL NO. 141/1985
	)	
	)	
v.	)	POSSESSION OF A
	)	CONTROLLED SUBSTANCE
REUBEN MADURO,	)	WITH INTENT TO DISTRIBUTE
	)	
Defendant.	)	
	)	

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PETERSEN, Judge

MEMORANDUM OPINION
November 12, 1985

This matter is before this Court after a jury trial in which defendant, Reuben Maduro, was found guilty, on two counts, of possession with intent to distribute a controlled substance. Defendant now moves this Court for a judgment of acquittal and/or for a new trial. For the reasons set forth below both motions must be denied.

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FACTS

On April 16, 1985 a search warrant was issued and executed upon defendant Maduro's residence. The government confiscated various drug paraphernalia and controlled substances. Defendant was not at home during the search but was arrested on a warrant at his residence the following day, April 17, 1985.

Defendant filed a Motion for a Bill of Particulars, which was granted by this Court on May 21, 1985. Defendant submitted a subsequent Motion to Compel the government to disclose the identity of its confidential informant and further to suppress all evidence obtained as a result of the aforementioned search. A suppression hearing was held on June 28, 1985, during which both motions were denied.

This matter came on for trial September 17, 1985. During the course of the trial defense attorney objected to the admission of test results, reports and testimony by the government's expert witness. This Court allowed the expert witness' testimony as well as the introduction of the test results and reports by said expert.

At the conclusion of the trial the jury began deliberations. After approximately three and one-half hours had elapsed, the Court through its marshal inquired as to the

jury's progress. The Marshal was advised by the foreman that the jurors would be through shortly. After returning a verdict of guilty on both counts, the jury was questioned individually by this Court to determine the effect, if any, of the Court's previous inquiry. When asked if they had felt pressured in any way to make a decision or coerced into deciding as they did, all twelve jurors replied in the negative.

ISSUES

This Court must determine whether it erred in (1) allowing the expert witness' testimony, (2) denying disclosure of the confidential informant's identity (3) making an inquiry of the jury during its deliberations. This Court must also decide whether the evidence presented by the government was sufficient to find guilt beyond a reasonable doubt.

DISCUSSION

I.

Defendant Maduro contends that this Court erroneously admitted the testimony of the government's expert witness and results of tests conducted by said witness. Whether to allow expert testimony has long been held to be within the discretion of the trial judge, and, unless abused,

that discretion is left undisturbed. Whether the circumstances warrant the use of expert testimony is to be determined on the basis of assisting the trier of fact. Fed. R. of Evid. 702. The case law supports the opinion that "... the trial judge is uniquely suited to make such determinations and we are loath to overturn his considered judgment as to the admissibility of expert testimony." United States v. Lopez, 543 F.2d 1156, 1158. (5th Cir. 1976)

Relief under the discovery rules is also subject to the judgment of the trial court. Again, the court's discretion unless abused is indisputable. United States v. Krohn, 558 F.2d 390, 394 (8th Cir. 1977), United States v. Crow Dog, 532 F.2d 1182, 1189 (8th Cir. 1976), United States v. Cole, 453 F.2d 902, 905 (8th Cir.) cert. denied, 406 U.S. 922 (1972). In the instant case, the defendant filed a timely demand for discovery under Rule 16(d) of the Federal Rules of Criminal Procedure. The government responded yet failed to mention their planned use of an expert witness or scientific reports. This Court permitted the testimony of chemist, John A. Richards, Jr., as to the results of tests conducted on the controlled substances confiscated from defendant's residence. Defendant charges this Court with prejudicial error for not excluding the expert's testimony.

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Mr. Richards is the chemist of record in numerous cases, involving illegal drugs, in this jurisdiction. His testimony, as well as the introduction of chemical tests, is determinative of the composition of the seized contraband. However, assuming arguendo, that defendant Maduro's contentions with regard to the alleged abuse of discretion by this Court were valid, defendant would still be denied relief for failing to demonstrate any specific prejudice which flows from this Court's alleged error. United States v. Crow Dog, supra, at 1189.

Although defense counsel proclaims that he was surprised by the eleventh hour disclosure of the expert witness, an examination of the record reveals that chemist Richards was thoroughly cross-examined. After indicating that the confiscated controlled substances tested positive for hashish and marijuana, Richards was painstakingly questioned by defense counsel as to his testing procedure. At no time did defendant request a continuance in order to more effectively investigate and utilize the eleventh-hour knowledge disclosed in the expert witness' report, nor has the defense made a showing of prejudice to his substantial rights. United States v. Cole, supra at 904, United States v. Swanson, 509 F.2d 1205, 1209, (8th Cir. 1975) United States v. Crow Dog, supra at 1189, United States v. Krohn, supra at 394.

II

Defendant Maduro further asserts that this Court erred in denying his motion to compel government disclosure of its confidential informant. This Court disagrees.

There is no fixed rule with respect to the disclosure of the government's confidential informant. Whether such disclosure is proper must be determined on a case by case basis. Roviaro v. United States, 353 U.S. 53, 62, 77 S.Ct. 623 (1957), United States v. Scott, 555 F.2d 522, 523 (5th Cir. 1977). Courts must take into account a crucial and delicate balancing of the desirability of preserving the informant's anonymity, thus furthering and protecting the public interest in effective law-enforcement, against the fundamental fairness attendant to the individual's right to prepare his defense. Roviaro, supra at 59-60. United States v. Medina, 18 V.I.R. 7,9 (1980).

Disclosure has been deemed proper where the confidential informant was a participant in an illegal drug transaction and/or when informant was the sole witness to the alleged crime. Government v. Petersen, Cr. No. 156/85 (T.C. Opinion 1985). Roviaro v. United States., supra, at 64, State v. Buffington 452 So.2d 1313, 1313 (La. App. 1 Cir 1984). The present case mirrors neither scenario.

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The record demonstrates that the confidential informer, "John Doe," has proven on many occasions be a reliable source for the government. The information provided by John Doe did not in itself establish probable cause but was corroborated by a narcotics agent and a private pilot. The information gleaned from the above sources, in total, is sufficient to show probable cause. Scott, supra at 527, United States v. Trejo Zambrana, 582 F.2d 460, 463 (9th Cir. 1978).

While it is generally accepted that the government's privilege to withhold the identity of its informant must give way when John Doe's identity is relevant and helpful to the defense or is essential to a fair trial, the burden is on the defendant to demonstrate the need for disclosure. Trejo, supra, at 466 (1978), United States v. Marshall, 532 F.2d 1279, 1282 (9th Cir. 1976), United States v. Estrada, 441 F.2d 873, 879 (9th Cir. 1971) and Gaylor v. United States, 426 F.2d 233, 234-235 (9th Cir. 1970). Mere speculation that disclosure would prove beneficial is insufficient to require it. Marshall, supra, at 1282.

The factual situation in the case at bar is easily distinguishable from that of Roviaro, and Medina. "John Doe" did not participate in the commission of any crime. Defendant Maduro has made no such showing for disclosure which outweighs

the government's interest in protecting its source of information. In this case, a proper balance does not render government's nondisclosure erroneous.

III.

In his final assignment of error defendant Maduro claims that this Court disturbed the sanctity of the jury deliberations by communicating with the jurors through its marshal. Defendant contends that said communication constitutes reversible error.

The Supreme Court held that the trial judge's inquiry as to the jury's progress during its deliberations, specifically its numerical division, is reversible error. Brasfield v. United States, 272 U.S. 448, 450 (1926). This ruling is applicable to the courts of the Virgin Islands. Government v. Romain, 16 V.I.R. 151, 154 (3rd Cir. 1979).

A prophylactic civil rule prohibiting any communication between the trial judge and the deliberating jury in the absence of counsel, despite how innocuous, has been extended to criminal cases in Yarsunas v. Boros, 423 Pa. 364, 223 A.2d 696 (1966) and Kersey Manufacturing Co. v. Rozic 422 Pa. 564, 222 A.2d 713 (1966). However, the more recent tendency in criminal cases is to require a showing of prejudice to one or both parties stemming from the

communication at issue. Commonwealth v. Bradley, 459 A.2d 733 (1983) Bailiffs (or as in the instant case a marshal acting as bailiff) are allowed to inquire if the jury has reached a verdict or to make various innoxious statements. State v. Christensen, 17 Wash. App. 922, 567 P2d 654, 656 (1977).

In the case at bar, the trial convened in the courtroom customarily assigned to the trial judge. Due to faulty air conditioning the trial was transferred to an infrequently utilized alternate courtroom. After the jury was out over three hours, the marshal, at the request of the Court inquired of the jury. "How are you, how are you doing?" To which one of the jurors responded that they were all right and would be through shortly.

Although this communication took place ex parte, this court is convinced that such an innocuous query is not the kind of instruction to which Yarsunas and Gould refer. Here as in Freeman v. State, 453 So.2d 776 (Ala. Cr. App. 1984) the trial judge was merely inquiring as to how the jury was progressing which does not constitute prejudicial error. Id at 778. This singular question did not express or imply an opinion of the judge but merely expressed a concern over whether the jurors were comfortable and whether they were making any progress toward a verdict. Webb v. State, 684 P.2d

1208, 1210 (Okla. Cr. 1984).

The defendant complains that the jury was pressured to return a verdict. The court's question in no way "imposed an arbitrary limit on the period of deliberation", Freeman, supra, at 777. This Court took several measures to insure that the jury had not interpreted the Court's question as a direction to hastily conclude its deliberation. Both attorneys were advised in chambers as to what occurred and were asked if they had any suggestions or questions. This conference immediately became part of the record. In open court when the jury returned its verdict they were polled and questioned individually, by the Court, as follows:

THE COURT: "What I would wish each juror to indicate to me, at this time, is whether or not the knock on the door, by the marshal, at the time he did, in any way, pressured you, rushed you or forced you into making a quick determination?"

Each juror, in turn, responded in the negative. The Court then asked the attorneys to approach the bench and asked if either side had any questions to ask of the jurors. Both replied that they had none.

The facts of the instant case are easily distinguishable from those cases which have held that prejudicial communications are reversible error.

Instructions on the law or its application to the facts often create a high risk of prejudice, as opposed to incidental communications such as the one involved here. Bradley, supra, at 734. The Court's question at issue in this case can not by the broadest stretch of the imagination be construed as a legal instruction. The opinions in both Gould v. Argiro, 422 Pa. 433, 434, 220 A.2d 654, 655 (1966) and Kersey, supra, were based on "both the judge's ex parte communication with the jury and his failure to promptly record the details of the incident." Bradley, supra, at 736. Here, this Court not only promptly made the occurrence part of the record, but also gave counsel for both sides ample opportunity to question the jurors, in open court, as to any undue pressure which might have flowed from the Court's inquiry. There is no basis for the defendant's claim of reversible error.

IV.

Finally, the defendant asserts that the evidence presented by the government is insufficient to find guilt beyond a reasonable doubt. Government's expert witness testified that each bag of an alleged controlled substance presented to him at trial, for identification, tested positive for either hashish or marijuana containing THC, as required by the Virgin Islands Code. This Court can find no deficiency in

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the substantive or procedural regularity surrounding the proof as to the guilt of defendant Maduro to warrant setting aside the jury's verdict.

For the reasons set forth above, the defendant's motions for a judgment of acquittal and/or a new trial are denied.


EILEEN R. PETERSEN
Judge