

[Cite as *State v. Evans*, 2007-Ohio-6587.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 21669
v.	:	T.C. NO. 2005-CR-2226/1
MICHAEL S. EVANS	:	(Criminal Appeal from Common Pleas Court)
Defendant-Appellant	:	

OPINION

Rendered on the 7th day of December, 2007.

MICHELE D. PHIPPS, Atty. Reg. No. 0069829, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

ALAN D. GABEL, Atty. Reg. No. 0025034, P. O. Box 1423, 411 East Fifth Street, Dayton, Ohio 45401
Attorney for Defendant-Appellant

WALTERS, J. (By assignment)

{¶ 1} The Defendant-Appellant, Michael Evans, appeals a judgment of the Montgomery County Common Pleas Court overruling his motion to disclose the identity of the State’s confidential informant. Evans asserts that the trial court erred in denying his motion to disclose, claiming that the testimony of the confidential informant was crucial to establishing his defense of entrapment. Finding that Evans has waived

this error on assignment, we affirm the decision of the trial court.

{¶ 2} After being informed by a confidential informant (“CI”) that an individual known as “Kevin” (later determined to be the defendant-appellant, Michael Evans) was selling crack cocaine, using his cell phone to negotiate the transactions, Detectives Emerson and House of the Dayton Police Department set up a buy-bust operation to arrest the seller. On the same date that they received this information, Emerson and House instructed the CI to call this person and order one ounce of crack cocaine. At approximately 6:45 p.m., the CI made the phone call and arranged a purchase that evening at a price of \$875. Evans instructed the CI that the transaction was to take place at the Meadows of Catalpa apartment complex at Needmore and Philadelphia in the City of Dayton. Both detectives were present during this phone call, and they could hear both sides of the conversation. After the call, the detectives arranged the plan for the buy-bust with other detectives.

{¶ 3} At approximately 7:00 p.m., the CI called Evans again, asking for better directions to the buy location. Approximately five minutes later the CI again called Evans, telling him that he was having trouble finding the apartment complex, and suggested that they meet at the Elder-Beerman store at Westgate Shopping Center. Evans agreed to the change of location. At approximately 7:28 p.m., the CI again called Evans, telling him that he was at the location, parked in front of the Dollar Store and that he was driving a green Blazer. Evans acknowledged this information and told the CI that he would be driving a pink vehicle. The detectives were present during all three of these conversations and could hear both sides of them.

{¶ 4} At this time, Detective House exited the vehicle to join the other

detectives present at the scene, leaving the CI and Detective Emerson in the Blazer. At about 7:30, a black Olds Intrigue pulled into the parking lot, with Evans in the passenger seat. At this point, Evans phoned the CI, asking which vehicle he was in. The CI again told Evans that he was in the green Blazer. Evans exited the Olds and told the CI “[o]kay, I see you.” Detective Emerson was present during this conversation and could hear both sides of it.

{¶ 5} Evans then approached the passenger side of the CI’s vehicle. Detective Emerson radioed the other officers to assist with the takedown, and he exited the driver’s side, walking towards Evans. At this time, Evans began running. Before the officers tackled and arrested Evans, the officers observed Evans remove something from his pants pocket and place it in his mouth. Immediately upon taking Evans down, the officers removed a plastic baggie from Evans’ mouth containing what was later determined to be crack cocaine. They also recovered the cell phone that Evans used during the transaction. Evans was then arrested.

{¶ 6} Evans was indicted for trafficking in cocaine, possession of cocaine, and tampering with evidence. He entered a not guilty plea to the charges. On July 19, 2006, Evans filed two separate motions - a suppression motion and a motion to disclose the identity of the confidential informant. The trial court overruled both motions, and Evans entered a no contest plea. Evans was sentenced to four years imprisonment.

{¶ 7} Evans has filed this timely appeal, asserting a single assignment of error for our review.

{¶ 8} “THE TRIAL COURT ERRED IN REFUSING TO ORDER THE STATE

TO PROVIDE APPELLANT WITH THE IDENTITY OF THE CONFIDENTIAL INFORMANT.”

{¶ 9} As noted above, Evans was convicted on his plea of no contest to one count of tampering with evidence, one count of possession of cocaine and one count of trafficking in cocaine. The Rules of Criminal Procedure provide that a plea of no contest is not an admission of the defendant’s guilt; instead, it is an admission of the truth of the facts alleged in the indictment, information, or complaint. Crim.R. 11(B)(2). Moreover, a court may not accept a no contest plea without first determining that the defendant understands the effect of the plea. Crim.R. 11(C)(2)(b). “Although the trial court retains discretion to consider a defendant’s contention that the admitted facts do not constitute the charged offense, *the defendant who pleads no contest waives the right to present additional affirmative factual allegations to prove that he is not guilty of the charged offense.*” (Emphasis added.) *State ex rel. Stern v. Mascio* (1996), 75 Ohio St.3d 422, 424, 662 N.E.2d 370. Essentially, a plea of no contest means that “‘the accused cannot be heard in defense.’ ” *Id.*, quoting *State v. Herman* (1971), 31 Ohio App.2d 134, 140, 60 O.O.2d 210, 286 N.E.2d 296.

{¶ 10} Being an admission of the truth of the facts on which the charges against him are based, a no contest plea forecloses a defendant’s right to challenge the truth of those facts in a subsequent appeal from his resulting conviction and sentence. *State v. Bird* (1998), 81 Ohio St.3d 582, 584, 692 N.E.2d 1013. However, “[t]he plea of no contest does not preclude a defendant from asserting on appeal that the trial court prejudicially erred in ruling on a pretrial motion, including a pretrial motion to suppress evidence.” Crim.R. 12(I).

{¶ 11} The exception to waiver that Crim.R. 12(l) creates with respect to pretrial motions must be read in pari materia with Crim.R. 12(C), which constrains its application. Crim.R. 12(C) authorizes parties to “raise by pretrial motion any defense, objection, evidentiary issue or request that is capable of determination without the trial of the general issue.” Due to that definitional restriction, a plea of no contest does not preserve for appeal a court’s advance ruling on a defense, objection, or request which is not capable of determination without the trial of the general issue, including questions concerning the materiality and relevance of evidence. *City of Columbus v. Jordan* (1984), Franklin App. No. 84AP-415, 1984 WL 5988, at *2.

{¶ 12} Evans’ motion to compel the State to disclose the identity of its CI was grounded on his contention that the informant’s testimony was material to his defense of entrapment. Specifically, in his memorandum attached to the motion, Evans’ counsel makes the bald statements that “Evans believes the evidence will show the informant called him repeatedly at the behest of police officers and tried to induce him into selling illegal narcotics[;] * * * [that] he always said no and always told the informant to not call him anymore[;] * * * [that] the officers directed the informant to harass him into selling narcotics.” That contention, however, is merely another way of saying that the evidence is material to a determination of the general issue, which in a criminal case is always the defendant’s guilt or innocence of the offense or offenses alleged. Therefore, we find that the relief Evans requested was not proper for a Crim.R. 12(C) pretrial motion, and the court properly rejected his request. Defendant Evans’ no contest plea permitted the trial court to determine his guilt or innocence from the facts in the indictment that he admitted were true, although it precluded him from

presenting additional factual allegations demonstrating the defense of entrapment. Accordingly, the error he assigns was waived.

{¶ 13} Even if we were to conclude that Evans preserved his right to challenge the trial court's refusal to disclose the CI's identity, we find his argument unpersuasive.

As we noted above, Evans' defense of entrapment is based on the contention that he succumbed to the informant's police-directed harassment despite repeated requests that the informant stop calling him. There is no evidence before the court that would establish this claim. The only evidence provided is the cross examination of Detectives House and Emerson, which denies the allegation.

{¶ 14} The trial court, in overruling Evans' motion, found that the telephone calls made by the CI were monitored by the police; that they were neither excessive nor harassing in nature. The trial court then concluded that the testimony of the CI would not be beneficial to Evans in preparing or making his defense, and that the benefit in disclosing his identity was outweighed by the danger to the CI if his identity were disclosed.

{¶ 15} Here, Evans bears the burden of establishing the need for disclosure. Something more than mere speculation about the possible usefulness of an informant's testimony is required. See *State v. Parsons* (1989), 64 Ohio App.3d 63, 69, 580 N.E.2d 800. The mere allegation of entrapment is not, alone, sufficient to require disclosure of a confidential informant's identity. *State v. Butler* (1984), 9 Ohio St.3d 156, 157, 459 N.E.2d 536.

{¶ 16} Evans presented no evidentiary material at the hearing or in his motion sufficient to support the defense of entrapment. While there was evidence of four

telephone conversations in the less than one hour period prior to the transaction that were initiated by the CI, they were all monitored by the detectives. There is no evidence of any other phone calls. If they in fact existed, then Evans was the only person in the courtroom who knew the details of these conversations that might constitute entrapment. The trial court is not required to speculate as to the specifics of the conversations and relate them to the defense of entrapment. *Butler*, supra.

{¶ 17} Having found that his no contest plea forecloses the right to challenge the trial court's refusal to disclose the identity of the State's confidential informant, Evans' sole assignment of error is overruled. The judgment of the Montgomery County Common Pleas Court is hereby affirmed.

.....

BROGAN, J. and GRADY, J., concur.

(Hon. Sumner E. Walters retired from the Third District Court of Appeals sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

Michele D. Phipps
Alan D. Gabel
Hon. Frances E. McGee