

**Commonwealth of Pennsylvania v. Michael Boden, Defendant**  
Court of Common Pleas of the 39th Judicial District of Pennsylvania, Franklin County Branch, Criminal Action -  
Law No. 2012-1465

Headnotes

*Criminal Law – Mandatory Disclosure of Audio Surveillance by the Commonwealth under Pa. R.Crim.P. 573(B); Protection of the Identity of a Confidential Informant*

*Defendant’s Motion to Compel and Commonwealth’s Protective Order*

1. Where Defendant sought disclosure of an audio recording of alleged drug transaction, but the recording contained statements made by a confidential informant, the Commonwealth objected to disclosure based on protecting the informant’s identity.
2. This Court ordered that Defense Counsel advise the Commonwealth as to the informant’s identity, and if the identity was correct, Defendant would be permitted to listen to the recording. If the identity was not correct, Defense Counsel would listen to the recording, but the Defendant would not be permitted to listen to it, for the purpose of protecting the identity of the informant.
3. Upon motions of reconsideration, the Court held a hearing and subsequently found that the materiality of the informant’s testimony was at issue. Evidence indicated that the Defendant, the informant, and a third person were present at the transaction. The identity of that third party was not protected.
4. The existence of another potential witness negates the necessity of the informant’s remarks, as “production of the informant is [not] the only way in which the defendant can substantiate [his] claim.” Commonwealth v. Baker, 946 A.2d 691, 693 (Pa. Super. 2008). “[W]here other corroboration of the officer’s testimony exists, disclosure of the informant’s identity is not necessarily required.” Commonwealth v. King, 932 A.2d 948, 952 (Pa. Super. 2007). This is especially true where the informant’s identity should remain confidential to ensure his safety, and where there exists a risk of violence.
5. Based on the risk that violence would be directed against the informant if his identity was revealed on the audio recording, the existence of another witness to the alleged offense, and the fact that Defense Counsel refused to listen to the audio recording as offered by the Commonwealth, the Defendant’s motion for reconsideration was denied.

*Petition to Amend Interlocutory Order – Commonwealth’s alleged Failure to Disclose*

1. Defendant requested that the Court amend its prior order, to include the interlocutory language found in 42 Pa. C.S.A. § 702(b), so that the issues he claimed could be raised by immediate appeal.
2. Defendant claims as follows: (1) that “it has become the policy of the Commonwealth to deny disclosure of surveillance material, even though required by the Rules of Criminal Procedure,” (2) this case involves a “controlling issue of law at stake that will not only be applicable to this case, but also all future cases involving surveillance intercepts contemplated by Rule 573(b),” and (3) the issue here is one where “substantial ground for the difference of opinion” clearly exists.
3. First, the Defendant’s claim that the Commonwealth has refused to disclose the audio recording is without merit. The audio recording was made available to Defense Counsel pursuant to this Court’s order. The Commonwealth has also made transcripts of that surveillance material available for the Defense’s trial preparation. The Commonwealth had provided Defense Counsel the opportunity to listen to the audio recording. Defense Counsel however, refused to listen to that recording.
4. This Court cannot find, within the confines of reason and common sense, any support for the conclusion that, because Defense Counsel has refused to listen to the audio recording provided by the Commonwealth, that the Commonwealth has refused to disclose that audio recording to the Defense.

*Petition to Amend Interlocutory Order – “Substantial Difference of Opinion”*

5. Second, this Court finds that this case is not one that presents a difference of opinion on a controlling issue of law. It is well-settled that a qualified privilege is recognized regarding the identity of confidential informants. This includes protecting an informant’s remarks over an audio recording where the Defendant could recognize the informant’s voice and therefore identify him.
6. It is true that the issue of whether the identity of an informant should be disclosed is one with no definite answer. However, that is true across the Pennsylvania courts, not just within this jurisdiction.
7. The Pennsylvania appellate courts have consistently found that setting a bright line rule for the disclosure of informant identities is not appropriate. See, e.g., Commonwealth v. Carter, 233 A.2d 284, 287 (Pa. 1967) (“We believe that no fixed rule with respect to disclosure is justifiable. The problem is on that calls for balancing the public interest in protecting the flow of information against the individual’s right to prepare his defense.”); Commonwealth v. King, 2007 932 A.2d 948, 952 (Pa. Super. 2007) (applying balancing test). It is for precisely that

reason that the three part tests set forth above exists.

*Surveillance Recordings involving Confidential Informants - Competing Interests of the Defense and the Commonwealth*

8. The issue presented here involves the competing interests of protecting an informant's identity and the Defendant's right to inspect audio recordings pursuant to Rule 573(B). While the Defense has a right to access the audio recording at issue here, to aid in preparation of its defense, the Commonwealth has the right to protect its informant. The issue of whether an informant's identity should be protected or disclosed must be decided on a case-by-case basis.

9. The Court must balance between these two concerns. In its prior order, this Court was attempting to strike such a balance, taking into account all the relevant factors and concerns. *Commonwealth v. King*, 2007 932 A.2d 948, 952 (Pa. Super. 2007) ("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.").

10. By doing so, the Court did not reverse itself, but instead set out its findings and support for the decision to refuse to order the disclosure of the informant's identity, thereby applying the relevant legal precedent and attempting to reach a decision that would protect the legitimate concerns of both parties.

11. This case is not one involving a "controlling question of law as to which there is a substantial ground for difference of opinion." It is for these reasons that this Court will not modify its prior Order to insert the language under Rule 702(b).

Appearances:

Anthony Miley, Attorney for Defendant  
Franklin County District Attorney's Office

Opinion

Before Meyers, J.

On January 3, 2014, Defendant Michael Boden filed a *Petition to Amend Interlocutory Order* Pursuant to 42 Pa. C.S. 702(b). The Commonwealth filed its *Answer* on January 17, 2014. The focus of the Defendant's petition involves mandatory disclosure of certain evidence under the Pennsylvania Rules of Criminal Procedure. Defendant previously filed a *Motion to Compel* discovery of surveillance tapes, pursuant to Pa. R.Crim.P. 573(B)(1)(g). The Commonwealth filed a *Motion for Protective Order*, indicating the use of a confidential informant.

**Procedural History**

This Court issued an Order, dated March 7, 2013, in which it addressed the issue of the confidential informant and the audio recording sought by the Defense. Defense Counsel was first ordered to advise the Commonwealth as to the identity of the informant, after which the Commonwealth was ordered to confirm or deny whether that identity was correct. If the identity was correct, the Commonwealth would provide copies of the audio recording to Defense Counsel, who would be permitted to play the audio for the Defendant. If the identity was not correct, the Commonwealth would allow only Defense Counsel to listen to the entire audio recording, but no copies would be provided. The Defendant would not be permitted to listen to the audio for the purpose of protecting the identity of the informant. Lastly, the Court noted that the Commonwealth agreed to provide a copy of the video surveillance to Defense Counsel, and thus it did not address that issue at that time.

Subsequent to that Order, both parties filed motions for reconsideration. This Court scheduled a hearing for April 12, 2013. At that hearing, both motions were continued generally upon a proposed out-of-court resolution by the Commonwealth and Defense. The parties were unable to resolve this issue, and the matter was rescheduled for a hearing on December 23, 2013. At that hearing, the Defense argued that copies of the audio recording should be provided, so that the Defendant and Defense Counsel could listen to it. The Commonwealth objected, arguing against revealing the confidential informant's identity. Following that hearing, this Court issued an Order dated December 31, 2013. This ruling is summarized as follows:

The Court found that the Defendant raised an issue as to the materiality of the informant's testimony. The informant was present at the transaction in which drugs were purchased, and after which the Defendant was arrested. However, the informant was not the only person present. The evidence showed another person was present at the transaction, in addition to the Defendant and the informant. The Commonwealth never sought to protect the identity of this "middle man," so presumably the Commonwealth has not objected to disclosing that identity to the Defendant.

Thus, the Court noted that this third party “presumably can corroborate or distinguish what was said or occurred during the alleged transactions.”<sup>1</sup> The existence of another potential witness negates the necessity of the informant’s remarks, as “production of the informant is [not] the only way in which the defendant can substantiate [his] claim.” Commonwealth v. Baker, 946 A.2d 691, 693 (Pa. Super. 2008) (applying three prong test to determine whether Commonwealth must disclose identity of a confidential informant); Commonwealth v. King, 932 A.2d 948, 952 (Pa. Super. 2007) (“[W]here other corroboration of the officer’s testimony exists, disclosure of the informant’s identity is not necessarily required.”). This is especially true where the informant’s identity should remain confidential to ensure his safety. In its Order, this Court noted a legitimate concern of violence directed at the informant, as the evidence indicated that weapons were displayed during at least one of the transactions. Finally, the Court noted that, as of the date of the hearing, Defense Counsel had refused to listen to the audio recording as offered by the Commonwealth. It was for those reasons that this Court denied Defendant’s *Motion for Reconsideration*.

### Discussion

In his current petition, the Defendant avers that this Court, in its December 31, 2013 Order, has “appear[ed] to reverse itself,” from its March 7, 2013 Order. The Defendant also claims that “it has become the policy of the Commonwealth to deny disclosure of surveillance material, even though required by the Rules of Criminal Procedure.” Based on the foregoing, Defendant avers that this case involves a “controlling issue of law at stake that will not only be applicable to this case, but also all future cases involving surveillance intercepts contemplated by Rule 573(b).”<sup>2</sup> Defendant argues that the issue here is one where “substantial ground for the difference of opinion” clearly exists. Thus, the Defendant requests this Court modify its prior Order, dated December 31, 2013, to include the interlocutory language found in 42 Pa. C.S.A. § 702(b). This is so that the central issue can be resolved by immediate appeal. For the reasons set forth below, the Court will not amend its prior Order.

First, the Defendant’s claim that the Commonwealth has refused to disclose the audio recording is without merit. In its *Answer*, the Commonwealth denies any allegation that it is its policy to refuse to comply with the applicable mandatory disclosure rules. To the contrary, the Commonwealth avers that it has made the audio recording available to Defense Counsel, without the Defendant. This is in compliance with this Court’s prior Order of March 7, 2013. The Commonwealth has also made transcripts of that surveillance material available for the Defense’s trial preparation. Furthermore, at the December 23, 2013 hearing, it was made clear to this Court that the Commonwealth had provided Defense Counsel the opportunity to listen to the audio recording. Defense Counsel however, refused to listen to that recording. This Court cannot find, within the confines of reason and common sense, any support for the conclusion that, because Defense Counsel has refused to listen to the audio recording provided by the Commonwealth, that the Commonwealth has refused to disclose that audio recording to the Defense. This Court is compelled to find otherwise, and thus the Defendant’s argument has no merit.

Second, this Court finds that this case is not one that presents a difference of opinion on a controlling issue of law. It is well-settled that a qualified privilege is recognized regarding the identity of confidential informants. The Commonwealth avers that there is no difference of opinion on the issue presented here, as the existence of this qualified privilege is well established in the controlling case law. This would include protecting an informant’s remarks over an audio recording where the Defendant could recognize the informant’s voice and therefore identify him.

It is true that the issue of whether the identity of an informant should be disclosed is one with no definite answer. However, that is true across the Pennsylvania courts, not just within this jurisdiction. The Pennsylvania appellate courts have consistently found that setting a bright line rule for the disclosure of informant identities is not appropriate. *See, e.g., Commonwealth v. Carter*, 233 A.2d 284, 287 (Pa. 1967) (“We believe that no fixed rule with respect to disclosure is justifiable. The problem is on that calls for balancing the public interest in protecting the flow of information against the individual’s right to prepare his defense.”); Commonwealth v. King, 2007 932 A.2d 948, 952 (Pa. Super. 2007) (applying balancing test). It is for precisely that reason that the three part tests set forth above exists.

The issue presented here involves the competing interests of protecting an informant’s identity and the Defendant’s right to inspect audio recordings pursuant to Rule 573(B). While the Defense has a right to access the

<sup>1</sup> See Trial Court Opinion, 12/31/2013, at p. 1

<sup>2</sup> Section 702(b) entitled “Interlocutory appeals by permission” reads as follows: “When a court or other government unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.”

audio recording at issue here, to aid in preparation of its defense, the Commonwealth has the right to protect its informant. As the Commonwealth notes in its Answer, the issue of whether an informant's identity should be protected or disclosed must be decided on a case-by-case basis. Thus, the Court must balance between these two concerns. In its prior Order dated March 7, 2013, this Court was attempting to strike such a balance, taking into account all the relevant factors and concerns. See King, 2007 932 A.2d at 952.<sup>3</sup> This Court did not "reverse itself" with its Order of December 31, 2013, but set out its findings from the December 23, 2013 hearing and its support for the decision to refuse to order the disclosure of the informant's identity. This Court has applied the relevant legal precedent and has attempted to reach a decision that would protect the legitimate concerns of both parties. This case is not one involving a "controlling question of law as to which there is a substantial ground for difference of opinion." It is for these reasons that this Court will not modify its prior Order to insert the language under Rule 702(b).

#### ORDER OF COURT

**AND NOW THIS** 17th day of February, 2014, the Court having read and considered the Defendant's Petition to Amend Interlocutory Order, along with the Commonwealth's Answer;

**IT IS HEREBY ORDERED** that the Defendant's petition is **DENIED**.

*Pursuant to the requirements of Pa.R.Crim.P. 114 (B)(1), (2) and (C)(1), (2), the Clerk shall promptly serve this Order or court notice on each party's attorney, or the party if unrepresented; and shall promptly make docket entries containing the date of receipt in the Clerk's office of the Order or court notice; the date appearing on the Order or court notice; and the date and manner of service of the Order or court notice.*

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<sup>3</sup> "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."