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Criminal Procedure - Discovery - Criminal Witness Discovery under Wyoming Rule 18 - Jackson v. State

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CRIMINAL PROCEDURE—DISCOVERY—Criminal Witness Discovery Under Wyoming Rule 18. Jackson v. State, 522 P.2d 1286 (Wyo. 1974).

Appellant Freddie L. Jackson was charged with the crimes of possession of marihuana with intent to deliver and delivery of marihuana.[1] Prior to trial his attorney successfully moved the court, under Rule 18(b),[2] for an order for inspection of various prosecution documents. These documents, including reports of the attorney general's investigations, revealed that a person identifed only as SN-0100 had contacted Jackson, arranged for the transaction, and then purchased the drug. Subsequently, Jackson's attorney filed a motion to require the prosecutor to produce the name and address of SN-0100 supported by an affidavit which stated that it was impossible to prepare a defense without interviewing SN-0100. At the hearing on the motion the prosecutor informed the court that SN-0100 was Alfredito Sanchez. The prosecutor insisted that Sanchez was an informer and opposed revealing the address because Sanchez's life was reportedly in danger. The court denied the motion, but required that the informer's statements be made available to Jackson[3] and that the informer be present at trial. Sanchez appeared at the trial as a prosecution witness. The court, sitting without a jury, found Jackson guilty of the crimes as charged. Jackson grounded his appeal to the Wyoming Supreme Court on the contention that denial of his motion for disclosure

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1. WYO. STAT. § 35-347.31(a)(ii) (Supp. 1973).
2. WYO. R. CRIM. P. 18(b) provides:

   Upon motion of a defendant the court may order the prosecuting attorney to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the State, upon a showing of the materiality to the preparation of his defense, and that the request is reasonable. Except as provided in subdivision (a) (2) this rule does not authorize the discovery or inspection of reports, memoranda or other internal governmental documents made by government agents in connection with the investigation or prosecution of the case, or of statements made by State witnesses or prospective State witnesses (other than the defendant) to governmental agents except as provided in subdivision (c) of this rule.
3. The trial court advanced the ordinary time of discovery of statements of witnesses by requiring this pre-trial disclosure. WYO. R. CRIM. P. 18(c)(1) provides in part:

   After a witness called by the State has testified on direct examination, the court shall, on motion of the defendant, order the State to produce any statement (as hereinafter defined) of the witness in the possession of the State which relates to subject matter as to which the witness has testified.

   18 U.S.C. § 3500(a) (1970), commonly referred to as the "Jencks Act", is the parallel federal provision.

was prejudicial error. The court, in setting aside the verdict and remanding the case to the district court, held that where a prosecution witness participates in the offense charged and entrapment is a possible defense, the court must grant a defendant's pre-trial motion for discovery of the witness and must require that the defendant be provided with an opportunity to interview the witness.[4]

WITNESS DISCLOSURE: RULES AND STATUTES

No rule of procedure existed at common law which permitted an accused to obtain a list of the witnesses intended to be produced against him.[5] Presently, however, at least twenty-two states[6] and the federal government[7] have enacted specific statutes which provide for witness disclosure. The state statutes typically require endorsement upon the charging document of the names of witnesses appearing before the grand jury; or of names of witnesses known to the prosecuting attorney; or of the names of witnesses the prosecution intends to call at the trial.[8] Prior to 1969, Section 7-119 of the Wyoming Statutes required the prosecutor to endorse upon the information "the names of witnesses known to him at the time of filing," and also "the names of such witnesses as may thereafter become known to him."[9] Section 7-120 provided that the failure of the prosecutor to endorse the names of witnesses was not a proper ground for quashing the information, and that if the defendant failed to request the endorsement, he was deemed to have waived his right thereto.[10] However, both Sections 7-119 and 7-120 were super-

4. Jackson v. State, 522 P.2d 1286 (Wyo. 1974).
5. J. WIGMORE, EVIDENCE § 1850 (3rd ed. 1940).
6. Comment, *Discovery of Witness Identity Under Preliminary Proposed Federal Criminal Rule 16*, 12 WM. & MARY L. REV. 603, 608 (1971).
7. 18 U.S.C. § 3423 (1970) provides:

> A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each venireman and witness.

The statute has been interpreted as not entitling the defendant, as a matter of right, to a list of witnesses in a noncapital case. United States v Hughes, 429 F.2d 1293 (10th Cir. 1970).

8. Comment, *Discovery of Witness Identity Under Preliminary Proposed Federal Criminal Rule 16*, *supra* note 6, at 609.
9. WYO. STAT. § 7-119 (1947), *superseded by* WYO. R. CRIM. P. 56 (1969).
10. WYO. STAT. § 7-120 (1957), *superseded by* WYO. R. CRIM. P. 56 (1969).

seded by the adoption of the Wyoming Rules of Criminal Procedure in 1969.[11] Rule 9[12] pertaining to the sufficiency of indictments and informations does not require witness disclosure.

Discovery and inspection of various items of prosecution evidence are authorized by Rule 18[13] of the Wyoming Rules of Criminal Procedure. Upon motion of the defendant, the court may order inspection and reproduction by the defendant of his statements and confessions, results of physical or mental examinations and scientific tests or experiments, and his recorded testimony before a grand jury.[14] If the defendant shows that his request is reasonable and that the subject matter of the request is material to the preparation of his defense, the court may order the prosecutor to permit the defendant to inspect and/or copy any books, papers, documents, tangible objects, buildings, or places.[15] However, inspection of internal governmental reports, memoranda, or other documents prepared in connection with the investigation or prosecution of the case is not authorized.[16] After a witness has been called by the state to testify on direct examination, the statement of that witness may be made available to the defendant.[17] The Wyoming court has stated that Rule 18(b)[18] is "practically identical"[19] to the federal discovery rule, 16(b).[20] As neither rule refers to witness discovery it would require a strained reading to bring names of witnesses within either rule's scope.[21] The majority of the federal courts confronted with witness discovery requests under Rule 16(b)[22] have held that such requests are not authorized.[23]

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11. WYO. R. CRIM. P. 56.
12. WYO. R. CRIM. P. 9.
13. WYO. R. CRIM P. 18.
14. WYO. R. CRIM. P. 18(a).
15. WYO. R. CRIM. P. 18(b).
16. WYO. R. CRIM. P. 18(b).
17. WYO. R. CRIM. P. 18(c)(1).
18. WYO. R. CRIM. P. 18(b).
19. Simms v. State, 492 P.2d 516, 523 (Wyo. 1972).
20. FED. R. CRIM. P. 16(b).
21. With reference to the federal rule, *see* 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE, Rule 16 § 254, at 517 (1969). With reference to the Wyoming rule, *see* Herschler, *The Wyoming Rules of Criminal Procedure, A View by the Defense*, 5 LAND & WATER L. REV. 599, 603 (1970).
22. FED. R. CRIM. P. 16(b).
23. 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE, Rule 16 § 254, at 517 (1969).

THE INFORMER'S PRIVILEGE

Notwithstanding any statute or procedural rule allowing criminal witness discovery, the prosecution may successfully resist defense attempts to learn the identity of a witness both prior to and during trial if that witness comes within the protection of the so-called informer's privilege.[24] Although this governmental privilege to withhold from the accused the identity of persons supplying the government with information concerning the commission of the crime is well established, it is not without limits.[25] The Supreme Court, charged with the duty of defining the scope to be accorded to common law evidentiary privileges in the trial of federal criminal cases,[26] defined the scope of the informer privilege in *Roviaro v. United States*.[27]

Roviaro had been charged with an illegal sale of narcotics to an informer. Prior to trial his motion for a bill of particulars disclosing the name and address of the informer was denied. During trial his repeated attempts to elicit this same information on cross examination of testifying government agents were objected to successfully. The informer did not testify. Roviaro appealed his conviction, contending that because the informer had actively participated in the offense, the Government could not invoke the privilege of nondisclosure. The Court agreed and in reversing the conviction held, "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."[28] The Court de-

24. The informer's privilege allows the government to offer protection to the informer, and by doing so, to maintain the flow of confidential information. 8 J. WIGMORE, EVIDENCE § 2374 (McNaughton rev. ed. 1961). At least one court has expressly rejected the idea that the purpose of the privilege is to protect the witness. "Such evidence is excluded, not for the protection of the witness, but because of the policy of the law." Wilson v. United States, 59 F.2d 390, 392 (3d Cir. 1932).
25. 8 J. WIGMORE, EVIDENCE § 2374, at 762 (McNaughton rev. ed. 1961).
26. FED. R. CRIM. P. 26 provides in part:
    The admissibility of the evidence and the competency and privilege of witnesses shall be governed, except where an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.
27. 353 U.S. 53 (1957).
28. *Id.* at 60.

clined to formulate a fixed rule with respect to disclosure and stated that the public interest in protecting the flow of information must be weighed against the individual's right to prepare his defense.[29] In a footnote to the opinion, the Court expressed its view that the denial of Roviaro's motion for a bill of particulars was error.[30]

Ten yeare following *Doviaro* the Court held that the due process clause of the fourteenth amendment and the confrontation clause of the sixth amendment do not require, in every case, government disclosure of the identity of an informer at a preliminary hearing to determine probable cause.[31] The Court distinguished this constitutional adjudication which is binding on the states[32] from the exercise of supervisory jurisdiction over the federal courts in *Roviaro*.[33]

THE *Jackson* DECISION

Jackson contended that he was misled by the prosecution's characterization of Sanchez as an informer, and that he was unable to prepare his defense without interviewing Sanchez. The Wyoming court adopted a narrow definition[34] of an informer, and held that Sanchez was not an informer, but rather a participating witness.[35]

> Generally an informer is defined as an undisclosed person who confidentially discloses material information of a law violation, thereby supplying a lead to officers for their investigation of a crime. A person who supplies information only after being interviewed by law enforcement officers, or gives infor-

29. *Id.* at 62.
30. *Id.* at 65, n. 15. WYO. R. CRIM. P. 9(d) provides in part: "The court for cause may direct the filing of a bill of particulars." For the view that disclosure of the names of witnesses is not a proper function of a bill of particulars, *see* United States v. Robinson, 42 F.R.D. 421 (S.D.N.Y. 1967).
31. McCray v. Illinois, 386 U.S. 300 (1967).
32. Pointer v. Texas, 380 U.S. 400 (1965).
33. McCray v. Illinois, *supra* note 31, at 309.
34. The term informer has been applied to the tipster who informs law enforcement agents that a crime will be or is being committed; to the eyewitness who has observed the commission of a crime and then reports this observation to law enforcement officers; and also to the participating witness, who by prior arrangement with law enforcement officers participates in the illegal conduct under police observation. Annot., 76 A.L.R.2d 262 (1961).
35. Jackson v. State, *supra* note 4, at 1287.

> mation as a witness during the course of investigation or trial is not an informer in the usually accepted sense of the word.[36]

Citing *Roviaro,* the court then stated, "While usually the identity of an informer need not be revealed, the general rule is that the identity of a witness may not be withheld from the defense."[37] Although the identity of the witness Sanchez was revealed when he testified at the trial, the court found that pre-trial nondisclosure, by improper characterization of Sanchez as an informer, was prejudicial error. This possible narrow holding that improper characterization is itself a ground for reversal is indicated by the court's emphasis of its conclusion that the trial judge was in fact misled. The trial record revealed that entrapment was a possible defense—a defense which Jackson was unable to pursue without interviewing Sanchez. The court would appear to adopt the position that entrapment is a possible defense whenever a state's witness, by prearrangement with the police, participates in the offense. The court characterized Sanchez as a "quasi police officer."[38] The state's argument that Jackson could have developed his defense upon cross examination of Sanchez was rejected in the court's statement that no attorney is required to develop a defense for the first time at the trial.[39] In support of its holding, the court concluded that, "The interviewing of prospective witnesses, or any party who may have some knowledge of the subject event, is such a basic procedure in the proper preparation of either a civil or criminal case that it is axiomatic."[40]

This broad general statement which appears to authorize witness discovery as a matter of right runs counter to the holdings of a majority of courts which have construed the discovery rule.[41] The recent Tenth Circuit Court of Appeals decision in *United States v. Pennick*[42] clearly indicates the broad scope of *Jackson.* Although the facts of the two cases

36. *Id.*
37. *Id.* at 1288.
38. *Id.* at 1287.
39. *Id.* at 1289.
40. *Id.*
41. WRIGHT, *supra* note 23.
42. 500 F.2d 184 (10th Cir. 1974).

are nearly identical, the court found no error in the refusal of the trial court to order pre-trial government disclosure of the identity of a participating witness who subsequently testified at the trial. The court did not hesitate in its classification of the participating witness as an informer, and this informer status weighed heavily in favor of nondisclosure prior to trial. "Informers whose identity is [*sic*] revealed prior to trial are often among the missing when the trial date rolls around."[43]

While the holding in *Jackson* could be construed as authorizing discovery of participating witnesses only, the broad statement that interviewing witnesses is basic procedure in trial preparation indicates the Wyoming court's approval of discovery of all witnesses. Whatever the scope of the decision, Rule 18(b),[44] under which the defendant's motion for disclosure was filed, must now be liberally interpreted by the courts to accommodate defense requests for witness discovery. That the trend of the law is toward liberal witness discovery is evidenced by the numerous statutes requiring the endorsement of the names of prosecution witnesses upon the charging document.[45] In 1966 the Supreme Court in a unanimous opinion spoke of the "growing realization that disclosure rather than suppression of relevant materials" promotes criminal justice and referred to the "expanding body of materials, judicial and otherwise, favoring disclosure in criminal cases analogous to the civil practice."[46] The 1970 proposed amendment to Federal Rule 16[47] would authorize discovery of both the names and addresses of all witnesses whom the Government intends to call at the trial.[48] In view of this proposed amendment, an Illinois federal district court recently held that a motion for witness discovery was properly filed[49] under Rule 16.[50] The court not only ordered dis-

43. *Id.* at 186.
44. WYO. R. CRIM. P. 18(b).
45. Comment, *Discovery of Witness Identity Under Preliminary Proposed Federal Criminal Rule 16, supra* note 6.
46. Dennis v. United States, 384 U.S. 855, 871 (1966).
47. FED. R. CRIM. P. 16.
48. Proposed Amendments to Criminal Rules, 48 F.R.D. 553, 589 (1970). *See also* A.B.A. Standards Relating to Discovery and Procedure Before Trial (Approved Draft 1970).
49. United States v. Leichtfuss, 331 F. Supp. 723 (N.D. Ill. 1971).
50. FED. R. CRIM. P. 16.

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closure by the Government, but also reciprocal disclosure by the defense.[51]

CONCLUSION

Since 1969, disclosure of witness identity has not been required of Wyoming prosecutors, nor has witness discovery been formally available to Wyoming criminal defense attorneys. The Wyoming court appears to have opened the door to such discovery, but due to the absence of discussion in *Jackson* of Rule 18 and of witness discovery as a general proposition, many questions remain unanswered. Which witnesses are discoverable, whether reciprocal prosecution discovery is authorized, whether the movant is required to show materiality and reasonableness of request, and whether motions for discovery of witnesses are discretionary with the trial judge are all questions awaiting answer by further decision of the Wyoming court or by legislative enactment.

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51. United States v. Leichtfuss, *supra* note 49, at 734. The constitutional problems involved in reciprocal discovery are discussed in Wardius v. Oregon, 412 U.S. 470 (1973).

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