Ueki v. ROP, 10 ROP 153 (2003)
VALENTINE UEKI,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 02-02
Criminal Case No. 01-51

Supreme Court, Appellate Division
Republic of Palau

Argued: August 25, 2003
Decided: September 19, 2003
⊥154
Counsel for Appellant: Meredith Allen

Counsel for Appellee: David H. Matthews

BEFORE: LARRY W. MILLER, Associate Justice; R. BARRIE MICHELSEN, Associate Justice; KATHLEEN M. SALII, Associate Justice.

Appeal from the Supreme Court, Trial Division, the Honorable ARTHUR NGIRAKLSONG, Chief Justice, presiding.
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MILLER, Justice:

Valentine Ueki appeals from his convictions and sentence on four counts of trafficking in methamphetamine in violation of 34 PNC § 3301(b)(5). We vacate Ueki's convictions for the reasons stated below and remand for proceedings consistent with this opinion.

BACKGROUND

Ueki was charged by Information filed March 5, 2001, with three counts of trafficking in methamphetamine and one count of possessing methamphetamine with the intent to distribute. The three trafficking counts arose out of controlled buys made by a confidential informant. Before trial, Ueki moved the trial court for an order requiring that the Republic reveal the identity of the informant. Counsel stated in his motion that the Republic had revealed the informant's identity to defense counsel for the sole purpose of determining whether he had a conflict of interest, but that he was not permitted to reveal the informant's identity to his client. Ueki argued that preventing his defense counsel from doing so raised constitutional concerns under both the Confrontation Clause and the Due Process Clause. The trial court orally denied Ueki's motion at the beginning of trial. At the end of trial, the court found Ueki guilty of all four

counts and sentenced him to four 25-year terms of imprisonment, to run concurrently, and fined him a total of $200,000.

At trial, the Republic relied on the testimony of several police officers as well as a criminalist from the Guam Police Department. On February 16, 2001, the Narcotics Division received an anonymous report that Ueki was selling methamphetamine behind the Sakura Mart across from Asahi Field in Ngerbeched. In response to the report, Officer Cedric Tatingal began searching for an informant through whom he could set up a "controlled buy" from Ueki–a controlled buy is an investigative tactic which consists of the police using an informant to buy drugs from a suspect while under police surveillance. Officer Tatingal approached a personal acquaintance who agreed to perform the controlled buy as a confidential informant. Tatingal testified that he was not personally aware whether the confidential informant had a criminal record, but he acknowledged that it was possible.

The first controlled buy occurred on February 27, 2001. Tatingal picked up the confidential informant and drove to Did ra Ngmatl where he did a pat-down search of the informant's clothes to make sure the informant did not have any drugs or money on him. Tatingal told the informant how to perform the buy and asked the informant to meet him behind the Bank of Hawaii after the buy was over. Tatingal then gave the informant $50 and released him. Tatingal watched the informant walk to the pedestrian gate next to Sakura Mart, across from Asahi Field. The informant entered the gate, after which Tatingal lost sight of him. Tatingal then drove to the parking lot of the Asahi baseball field and waited.

In the meantime, four other police officers had stationed themselves in various places behind Sakura Mart. Officer John Gabriel was stationed on top of a tank by the Red Cross office. He saw the informant walk through the gate and disappear behind a shipping container. About two minutes later, the informant reappeared and exited through the gate. Tatingal saw the informant come out through the small gate, walk toward NECO Plaza, and then walk along the road to the Bank of Hawaii. Tatingal followed him there ⊥156 and parked behind the bank. The informant got into Tatingal's car and gave him a straw. Tatingal searched the informant again and did not find any drugs or money on him. He paid the informant, and released him. The contents of the straw later tested positive for methamphetamine.

The informant performed a second buy at the same location on February 28, 2001. Tatingal picked up the informant and went to Did ra Ngmatl where he performed a pat-down search of the informant, which did not turn up any drugs or money. Tatingal gave the informant $100 and released him. Once again, Tatingal watched the informant enter the gate next to Sakura Mart and disappear. Officers Gabriel and Kenny Mers were behind Sakura Mart watching through nail holes in a tin retaining wall. Gabriel and Mers saw Ueki standing near a shipping container. Next to the container was a blue tent that was covering a boat. As the informant approached Ueki, Ueki disappeared into the tent and then returned. Gabriel and Mers saw the informant hand Ueki something, but neither Gabriel or Mers could tell what it was. Ueki pulled a brown-colored container out of a vest he was wearing, shook it, and handed it to the informant. The officers were unable to follow the informant's movements all the way back to the gate. Meanwhile, as before, a few minutes after releasing him, Tatingal saw the informant exit the gate

and walk toward NECO Plaza. Tatingal followed him to the Bank of Hawaii, where the informant gave him two straws, the contents of which later tested positive for methamphetamine.

The informant performed a third controlled buy at the same location on the following day, March 1, 2001. Once again, Tatingal searched the informant and found no drugs or money. He gave the informant $100 and watched the informant enter by the gate next to Sakura Mart and disappear. Officers Gabriel and Mers were in the same location as the previous buy. They saw Ueki hanging out in front of an open container talking to some other people. They then witnessed the informant approach Ueki and hand him some money, after which Ueki walked into the open container. After a couple of minutes, he returned and handed the informant something. As the informant walked away, Gabriel witnessed Ueki counting money. A couple of minutes after the informant had disappeared from Tatingal's view, Tatingal saw him exit the gate and followed him to the Bank of Hawaii. The informant gave Tatingal one straw, the contents of which subsequently tested positive for methamphetamine.

Immediately after the third controlled buy, the police executed a search warrant. Officer Flory Esebei arrested Ueki and performed a pat-down search. He found one envelope containing $500 in Ueki's right front pocket, a gold clip with money in it, and a small leather pouch, all of which he gave to Tatingal. Two five-dollar bills and one twenty-dollar bill recovered from Ueki matched the serial numbers of the money used to conduct the second controlled buy which had occurred the day before. In the shipping container, the officers found a number of straws, one of which had residue that tested positive for methamphetamine. Their search also uncovered two glass pipes and $110 in cash.

At the end of the Republic's case-in-chief, counsel for Ueki made a motion for acquittal, contending that the Republic failed to establish an adequate chain of custody regarding the drug evidence. The court denied Ueki's motion, after which he rested his case. After closing argument, the trial court found Ueki guilty on all four counts and sentenced him to four concurrent 25-year ⊥157 terms of imprisonment and a $50,000 fine for each count for a total of $200,000. Ueki appeals both his convictions and his sentence.

DISCUSSION

1. Hearsay

Officer Tatingal testified that after the informant exited the container area, he got into Tatingal's car and handed him drugs. Ueki claims that Tatingal's testimony that the informant handed him drugs was testimony of a nonverbal out-of-court assertion made by the informant. As such, its admission violated the hearsay rule. Ueki maintains that without this testimony, there was insufficient evidence to sustain his convictions on Counts I, II, and III. The Republic insists that Ueki's failure to make a contemporaneous objection to the admission of this evidence is fatal to his claim of error.

The Appellate Division is empowered by ROP R. Crim. Pro. 52(b) to reach forfeited errors in criminal cases: "Plain errors or defects affecting substantial rights may be noticed

although they were not brought to the attention of the court." Pursuant to Rule 52(b), an appellant must show that there was an "error or defect," that the error was "plain," and that the appellant's "substantial rights" were affected. *Scott v. ROP* , 10 ROP 92, 95 (2003) (quoting *United States v. Olano*, 113 S. Ct. 1770, 1777 (1993)).

The first limitation on appellate authority under Rule 52(b) is that there indeed be an error. *Olano*, 113 S. Ct. at 1777. If a legal rule was violated during the trial court proceedings, and if the defendant did not waive the rule, then there has been an "error" within the meaning of Rule 52(b) despite the absence of a timely objection. *Id.* Ueki alleges that the admission of Tatingal's testimony violated ROP R. Evi. 802, which provides that hearsay is generally not admissible. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ROP R. Evi. 801(c). Statements include the "nonverbal conduct of a person, if it is intended by him as an assertion." ROP R. Evi. 801(a).

If it could be demonstrated from Tatingal's testimony that the informant intended his conduct as an assertion, e.g., "I bought these drugs from Ueki," the evidence would not be admissible to prove the truth of the matter asserted. We could infer that the informant's conduct was assertive if, for instance, Tatingal had testified that the informant handed him the drugs in response to his request for the drugs the informant acquired from Ueki. *See Stevenson v. Commonwealth*, 237 S.E.2d 779 (Va. 1977) (holding that wife's handing clothes to police officer pursuant to officer's request for clothes defendant was wearing on day he committed murder was nonverbal assertion and inadmissible hearsay). This was not, however, the actual testimonial context in which the evidence was presented. Tatingal's testimony was that "when [the informant] came into [my police] car, he gave me one plate of ice." This does not sound like "the informant told he bought these drugs from Ueki," as Ueki maintains.

When viewed in context, it appears to us unlikely that the informant's conduct was intended as an assertion, and it was not presented as such. Tatingal's testimony regarding the informant's conduct establishes the non-assertive fact that when the informant returned to the officer's vehicle from the container area, he was in the possession of drugs, which leads to the reasonable inference ⊥158 that he acquired the drugs from somebody in the container area. In any event, to the extent there is any doubt as to the assertive nature of the informant's conduct, we must resolve that doubt in favor of admissibility. *See* Fed. R. Crim. P. 801(a) (Advisory Committee Notes) ("[T]he rule is so worded as to place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility."). We therefore find no error, much less "plain error" cognizable under Rule 52(b).

2. Sufficiency of the Evidence.

Ueki argues that there was insufficient evidence on all four counts of the Information. The standard for assessing the sufficiency of evidence requires us to determine whether, viewing the evidence in the light most favorable to the prosecution and giving due deference to the trial judge's opportunity to hear the witnesses and observe their demeanor, any reasonable trier of fact

could have found that the essential elements of the crime were established beyond a reasonable doubt. *Ngirarorou v. ROP*, 8 ROP Intrm. 136, 139 (2000).

There is a surfeit of evidence establishing the factual basis for Counts II and III. Tatingal testified that he searched the informant prior to the informant entering the container area, and his search did not turn up any drugs. Each time the informant returned from the container area, he was found to be in possession of drugs. Police officers witnessed hand-to-hand exchanges between the informant and Ueki during the second and third controlled buys, and money from the second controlled buy was discovered on Ueki during the execution of the search warrant. Any reasonable trier of fact could have found that the essential elements of Counts II and III were established beyond a reasonable doubt.

Count I presents a closer case in that none of the Republic's witnesses saw an exchange between the informant and Ueki during the first controlled buy. However, the evidence was sufficient to show that the informant acquired methamphetamine from somebody in the container area, and the direct visual evidence of Ueki's involvement in the second and third buys in the same location made it permissible, if not inevitable, to infer Ueki's involvement in the first buy as well.

In Count IV, Ueki was charged with possessing methamphetamine with intent to distribute. This count arises from evidence recovered as a result of the search warrant executed on March 1, 2001, immediately after the third controlled buy. During the search, the police found two glass pipes, $110 in cash, and a number of straws. One of the straws had residue in it that later tested positive for methamphetamine. When weighed at the crime lab in Guam, the methamphetamine in the straw had a net weight of 0.001 grams. Ueki argues that there was insufficient evidence to establish possession with intent to distribute because the small amount of methamphetamine recovered during the search was not enough to sell. We agree.

In prior cases, testimony was elicited to the effect that the smallest saleable dose of methamphetamine is 0.1 grams, *see Ngirarorou*, 8 ROP Intrm. at 140, 100 times greater than the 0.001 grams discovered in Ueki's possession. No evidence was presented here that this much lesser amount constituted a saleable quantity. Circumstantial evidence, like the cash found on Ueki or empty straws found in the shipping container, may establish that the defendant intended to distribute the drugs found in his possession. *United States v. Lopez* , 42 F.3d ⊥159 463, 467 (8th Cir. 1994). But, at the very least, the government must also demonstrate that the defendant possessed enough illegal drug to actually distribute. *See State v. Todd* , 6 P.3d 86, 91 (Wash. Ct. App. 2000) ("[P]ossession with intent to deliver requires that the defendant have something–that is that he possess drugs to deliver."). Accordingly, Ueki's conviction on Count IV is vacated for lack of sufficient evidence and remanded to the trial court for entry of a verdict of not guilty.

3. Confidential Informant

Ueki claims that the trial court erred by denying his motion requesting that the court order the Republic to disclose the identity of the informant. As discussed above, although Ueki's counsel was aware of the informant's identity, he was prohibited from sharing that information

with his client and thus from determining whether to call the informant as a witness at trial. Ueki contends that this was reversible error, and we agree.

We previously touched on the subject of confidential informants in *Oiterong v. ROP* , 9 ROP 195, 198 (2002), holding that "[t]here is no right for the defendant to compel the government to call the informant as a witness." In so doing, we noted that the question whether an informant's identity must be disclosed turns on whether "the informer's testimony may be relevant and helpful to *the accused's defense*," quoting in support of this proposition the leading U.S. case on the subject, *Roviaro v. United States* , 77 S. Ct. 623, 628 (1957) (emphasis added). *Oiterong*, 9 ROP at 195. Because the identity of the confidential informant had been disclosed and the defendant had been given the opportunity to call the informant at trial, but had chosen not to do so, we had no occasion in *Oiterong* to address the standard to be applied where disclosure had been withheld. *Id.* at 198 n.4.

To now address this question, we begin by revisiting *Roviaro*, on which Ueki relies. The facts of *Roviaro* are as follows: Roviaro had been indicted on one count of selling, and one count of transporting, heroin. At trial, narcotics agents described a controlled buy in Chicago, Illinois, in which they used an informant. Prior to the buy, the informant and his car were searched. One agent then climbed into the trunk of the informant's car, while other agents followed in government cars. The informant drove to a predetermined location and waited for Roviaro. Roviaro arrived, climbed into the informant's car, and they drove to another location. During the drive, the agent in the trunk overheard a conversation between the informant and Roviaro in which Roviaro asked the informant for the money he owed him and told the informant that he had brought him "three pieces this time." When they arrived at the new location, Roviaro stepped out of the car, retrieved a package from under a nearby tree and dropped it into the informant's car. The package was found to contain three envelopes containing heroin. Roviaro moved before trial for an order requiring the disclosure of the informant's identity, which the court denied, and Roviaro was found guilty on both counts.

On appeal, Roviaro contended that the trial court committed reversible error when it allowed the Government to refuse to disclose the identity of the informant. The United States Supreme Court reaffirmed the government's privilege to withhold the identity of persons who provide the police with information of violations of law. *Roviaro*, 77 S. Ct. at 627. However, the court noted that the privilege is not absolute. One of the limits of the privilege arises from considerations of fundamental fairness. As ⊥160 the U.S. Supreme Court declared, "Where the disclosure of an informer's identity, or 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." *Id.* at 628. Whether fundamental fairness requires disclosure in a particular case is a matter of balancing:

> We believe that no fixed rule with respect to disclosure is justified. The problem is one that calls for balancing the public interest in protecting the 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.

Id. at 628-29.

In analyzing the applicability of the informant's privilege, the Court concluded that the informant's testimony was highly relevant and might have been helpful to the defense as the informant was the sole participant, other than the accused, in the transaction charged, and was the only witness in a position to amplify or contradict the testimony of the government witnesses. *Id.* at 630. Subsequent cases have tended to draw a line between those informants who were active participants or eyewitnesses to the offense charged, and whose identity must be disclosed, and those informants who are "mere tipsters." *Devose v. Morris* , 53 F.3d 201, 206 (8th Cir. 1995); *see also DiBlasio v. Keane*, 932 F.2d 1038, 1043 (2d Cir. 1991) (informant "set up" deal); *United States v. Price*, 783 F.2d 1132, 1139 (4th Cir. 1986) (informant who set up deal was more than "mere tipster"); *Gaines v. Hess* , 662 F.2d 1364, 1368 (10th Cir. 1981) (informant "set up transaction and was the only witness to the sale other than [police officer] and the seller"); *United States v. Barnes* , 486 F.2d 776, 778-89 (8th Cir. 1973) (informant was "active participant"); *McLawhorn v. North Carolina* , 484 F.2d 1, 6 (4th Cir. 1973) (informant "engineered the events"); *United States v. Barnett* , 418 F.2d 309, 311 (6th Cir. 1969) (informant did not merely provide tip, but was present and participated); *Gilmore v. United States* , 256 F.2d 565, 567 (5th Cir. 1958) (informant was "active participant").[1]

The Republic asserts that the informant's testimony would be cumulative and points to cases in which we have held that the government had presented sufficient evidence to convict without itself calling the confidential informant as a witness. This misapprehends the inquiry. As *Oiterong* made clear, the question whether a defendant is entitled to disclosure of and/or testimony from a confidential informant is entirely distinct from the question whether the government may prove its case without such ⊥161 testimony. "When disclosure is warranted, it is for the purpose of allowing the *defendant* to determine whether he wishes to call the informant as a witness in an effort to rebut the government's case." *Oiterong*, 9 ROP at 198 (emphasis in the original) (footnote omitted). Just as the defendant has no right to compel the government to call the confidential informant as a witness, so, too, it is not for the government to decide whether the defendant may do so. "The desirability of calling [the informant] as a witness, or at least interviewing him in preparation for trial, was a matter for the accused rather than the government to decide." *Roviaro*, 77 S. Ct. at 629. Here, as in *Roviaro*, the informant in the instant case was the only direct participant in the controlled buys and, thus, "the only witness in a position to amplify or contradict the testimony of government witnesses." *See id.* at 630. The informant's testimony can hardly be characterized as cumulative.

The Republic argues that requiring it to disclose the identity of confidential informants

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[1]Between the extreme categories of "mere tipsters" and "active participants," there are cases in which more information is necessary to balance the defendant's interest in obtaining testimony against the government's interest in resisting disclosure. In such circumstances, numerous courts have endorsed the use of *in camera* hearings to determine whether disclosure is warranted. *See generally United States v. Moralez*, 908 F.2d 565, 568-69 & n.1 (10th Cir. 1990) (citing cases).

may place informants in danger and will severely hinder the Republic's prosecution of narcotics cases. As to the first concern, nothing in this opinion should be read to limit the trial court's ability in appropriate cases to take steps to protect witnesses, whether confidential informants or otherwise. *See, e.g.*, Thomas M. Fleming, Annotation, *Exclusion of Public from State Criminal Trial in Order to Avoid Intimidation of Witnesses* , 55 A.L.R.4th 1196 (1987). We leave it to the Republic to demonstrate, on a case-by-case basis, the steps it believes may be necessary. As to the second concern, the simple answer is that, as important and significant as the Republic's interests are in protecting the flow of information in narcotics investigations, there will be occasions when those interests must be trumped by the defendant's constitutional due process right to a fair trial, which includes the right to adequately prepare and present his defense. *See United States v. Scafe* , 822 F.2d 928, 934 (10th Cir. 1987); *Gaines*, 662 F.2d at 1368; *see also* Palau Const. art. IV, § 7. This is such a case.[2]

4. Torture, Cruel, Inhumane, or Degrading Treatment or Punishment

Lastly, Ueki claims that the penalty for trafficking methamphetamine proscribed by 34 PNC § 3301 violates Article IV, Section 10 of the Constitution. We recently affirmed the constitutionality of 34 PNC § 3301 in *Eller v. ROP*, 10 ROP 122, 131 (2003), and *Silmai v. ROP*, 10 ROP 139, 141 (2003).

CONCLUSION

Ueki's convictions on all four counts of trafficking methamphetamine are hereby vacated. This matter is remanded to the Trial Division for entry of a verdict of not guilty on Count IV. Counts I, II, and III are remanded for proceedings consistent with this opinion.

[2]We note that there are investigative techniques at the Republic's disposal that may limit its obligation to disclose the identity of informants. For instance, in certain cases, the Republic may be able to use informants and controlled buys to gather evidence in order to obtain a search warrant and file charges based on the evidence thus collected, rather than on the buys themselves.