

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

ORDER

v.

03:07-cr-101-jcs-03

JAMES J. SANDERSON,

Defendant.

Before the court is defendant James J. Sanderson's motion to compel early disclosure of the identity of government witness UC 209, an undercover police officer who allegedly bought crack from Sanderson in the transaction underlying Count 5 of the indictment. *See* dkt. 49. The government has agreed that it will provide the undercover officer's identity two weeks before trial; Sanderson argues that this is not enough time properly to investigate UC 209's background in order to impeach UC 209 at trial; he wants at least a month, preferably six to eight weeks. For the reasons stated below, I am denying this motion.

In support of his motion, Sanderson has submitted the affidavits of his attorney, Joseph Sommers, and his investigator, Pat Garrott, who opine that a thorough background investigation of any person usually takes six to eight weeks, and that there is no danger to the officer from early disclosure because Sanderson is not a violent or vindictive man. *See* "trial brief" and attachments, dkt. 81. The government responds that the court has discretion to do what whatever justice requires, and that justice does not require early disclosure here. Sanderson has made no more than a generalized claim of necessity that would require early production of

witness lists in every case, a policy that is not required by the law of this circuit. *See* dkt. 83. Sanderson replies that the government's arguments are illogical. *See* dkt. 86.

In *Weatherford v. Bursey*, 429 U.S. 545 (1977), the Court held that the defendant suffered no violation of his rights under the Due Process Clause or *Brady v. Maryland*, 373 U.S. 83 (1963) when an undercover officer, while undercover, assured the defendant that he would not testify at defendant's trial but then did so with absolutely no advance warning to the defendant. Among other things, the Court held that there is no general right to discovery in a criminal case and *Brady* did not create one; "It does not follow from the prohibition against concealing evidence favorable to the accused that the prosecution must reveal before trial the names of all witnesses who will testify unfavorably." To the same effect, surprise witnesses or unexpected evidence are not, without more, a denial of constitutional rights. *Id.* at 845-46. *See also United States v. Cruz-Velasco*, 224 F.3d 654, 665 (7th Cir. 2000) ("it is well established . . . that there is no constitutional right to discovery in non-capital criminal cases and that the prosecution has no constitutional obligation to reveal its witnesses prior to trial").

So, Sanderson has no constitutional right to *any* pretrial identification of UC 209, let alone to pretrial disclosure along a time line deemed necessary by his attorney and investigator. Under *Weatherford*, it would not violate Sanderson's rights if the government kept UC 209 under wraps until he testified at trial and then sprang him unannounced as the first prosecution witness. But just because a practice is not unconstitutional does not mean the court should endorse it. Notwithstanding the upper courts' dismissive antipathy to such demands by defendants, the parties' arguments deserve a bit more analysis.

As a starting point, the government doesn't owe the court or the defendant any explanation at all for its decision not to provide a witness list or to identify UC 209 before trial. That said, it's enlightening to explore the thought process underlying this overarching criminal case policy. Here, the government has not claimed any specific need to protect UC 209's identity based on his continued undercover work or his fear of retribution from Sanderson or his sympathizers. Since the government has volunteered to identify UC 209 by March 17, 2008, it's not clear how much practical difference it makes in this particular case for the government to resist disclosure in early February. Therefore, I surmise that the government's biggest concern is that once this court has ordered early disclosure in a case in which the defendant has not shown a particularized need, then this will become the de facto or de jure disclosure rule for all future prosecutions.

To which the defense bar would respond, "and why is this a bad thing?" This would be a fair rejoinder, but an unpersuasive one. Rule 16 and the case law demarcate the parties' respective discovery obligations in federal criminal prosecutions. Neither authority requires early disclosure; absent a persuasive showing that the court should deviate from the rule in either direction, I am not going to re-draw the boundary on criminal pretrial discovery.

Sanderson's attorney and investigator have not offered anything specific about their need for six to eight weeks of investigative time. I realize that this is something of a chicken-and-egg situation for them: they can't offer specifics about UC 209 until they know who he is and begin their investigation. Even so, they have offered no specifics about what they hope to find that's admissible impeachment evidence at trial, or why it would take six to eight weeks to develop this

evidence. More generally, they have not provided any foundational support for their assertion that such an investigation actually has yielded admissible information against a police officer in some previous case, or for their assertion that two weeks isn't enough time to achieve the same result. Even then, one or two success stories would not necessarily militate toward ordering early identification of the undercover officer in this case; it would depend on the totality of circumstances presented. The bottom line is that Sanderson is not entitled to the early disclosure he is requesting and he has not made a sufficient showing that this court should order early disclosure in this case.

It is ORDERED that defendant's motion for earlier disclosure of UC 209's identity is DENIED.

Entered this 28th day of January, 2008.

BY THE COURT:
/s/
STEPHEN L. CROCKER
Magistrate Judge