UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1775

September Term, 2014

JEFFREY VINCENT CORBY

v.

STATE OF MARYLAND

Hotten,
Leahy,
Davis, Arrie, W.
(Retired, Specially Assigned),

JJ.

Opinion by Hotten, J.

Filed: October 9, 2015

After a jury trial in the Circuit Court for Garrett County, appellant, Jeffrey Vincent Corby, was convicted of manufacturing methamphetamine (Md. Code (Repl. Vol. 2012), § 5-603 of the Criminal Law Article ("Crim. Law")), possession of methamphetamine production equipment (Crim. Law § 5-603), possession of methamphetamine (Crim. Law § 5-601(a)(1)), and two counts of possession of drug paraphernalia (Crim. Law § 5-619(c)(1)). Appellant was sentenced to eight years of imprisonment for manufacturing, with two years of that sentence suspended, and five years of supervised probation. Appellant also received three four-year sentences for possession of production equipment (plastic bottles), possession of drug paraphernalia administration equipment (hypodermic syringe), and possession of methamphetamine, with all three sentences running concurrent to appellant's sentence for manufacturing. The court did not impose a sentence for possession of drug paraphernalia (electronic scale). Appellant appeals and presents two questions for our review:

> [I]. Did the circuit court commit reversible error in denying [a]ppellant's motion to compel the disclosure of the identity of the State's confidential informants?
>
> [II]. Was [a]ppellant entitled to merger of his sentences for possession of production equipment, possession of drug paraphernalia, and possession of methamphetamine into his sentence for methamphetamine manufacturing?

For the reasons that follow, we affirm the judgments of the circuit court, but vacate the sentences for possession of production equipment and possession of methamphetamine and merge those sentences into appellant's sentence for manufacturing methamphetamine.

FACTUAL AND PROCEDURAL HISTORY

On November 13, 2013, members of law enforcement obtained a warrant to search a single family home at 15 O'Brien Street in Mountain Lake Park, Maryland. In applying for this warrant, Detective David Teets ("Det. Teets") of the Garret County Narcotics Task Force recited his own personal experience in the detection of controlled dangerous substance ("CDS") violations, and also alleged as follows:

> During November 2013, your Affiant received information from Confidential Informant 94-244 (herein referred to as CI). The CI advised that [appellant] is living with Sarah Greene and Corby is make and using methamphetamines.
>
> On November 7, 2013, your Affiant spoke to Captain Helbig of the Garrett County Sherriff's office. Captain Helbig advised he spoke to Carl Cathell, Pharmacist at Gregg's Pharmacy in Oakland. Mr. Cathell advised that Billy Boyce and Donna Dewitt (aka: Squaw) are buying cold medicine that contains pseudoephedrine. They are buying it for Sarah Greene.
>
> On November 8, 2013, at 0904 hours, Sgt. Robbie Zimmerman advised that he was at CVS in Oakland. Sgt. Zimmerman observed Roger Strawser and [appellant] inside and could tell they observed him, both knowing he is a police officer. He later saw them in the parking lot and they were in a white Subaru Outback that had West Virginia registration. Your Affiant knows from prior law enforcement encounters that [appellant] is in a relationship of some kind with Sarah Green. Your Affiant knows that Sarah Greene has a white Subaru Outback that has West Virginia registration.
>
> On November 8, 2013, at 0921 hours, Captain Helbig contacted your Affiant and advised that he was at Walmart in Oakland. He observed Roger Strawser and [appellant] at the pharmacy side of the store in Walmart. Captain Helbig advised they observed him and left Walmart, where he observed them get into Sarah Green's white Subaru Outback.
>
> During November 2013, CI 94-191 contacted TFC Bittinger. The CI advised that [appellant] and Roger Strawser are making meth. Confidential Informant 94-191 has proven to be credible and reliable. CI 94-191 has provided information to the Garrett County Narcotics Task Force in the past

that has led to several arrests for violations of Maryland's Controlled Dangerous Substance Laws.

Based on the information that was received by two Confidential Informants, and Captain Helbig's and Sgt. Zimmerman's observations on [appellant] and Roger Strawser, your Affiant decided to make checks of Pseudoephedrine logs.

Your affiant made a check of Pseudoephedrine logs at pharmacies in the Garrett County Area. Your Affiant knows that Pseudoephedrine and/or ephedrine are necessary ingredients to manufacture methamphetamines and that individuals who are manufacturing methamphetamines need these ingredients to make methamphetamines. The following information was discovered:

> [Appellant] purchased cold medicine that contained Pseudoephedrine:
> September 30, 2013 – CVS Oakland
> October 5, 2013 – Walgreens Oakland
> November 5, 2013 – Gregg's Oakland
> November 6, 2013 – Gregg's Oakland
>
> Sarah Greene purchased cold medicine that contained Pseudoephedrine:
> October 2, 2013 – CVS Oakland
> October 6, 2013 – CVS Oakland
> November 6, 2013 – Gregg's Oakland
>
> Roger Strawser purchased cold medicine that contained Pseudoephedrine:
> November 2, 2013 – Walgreen's Oakland
> November 8, 2013 – Walgreen's Oakland
>
> William Edward Boyce purchased cold medicine that contained Pseudoephedrine:
> October 30, 2013 – Gregg's Oakland

A check of these logs show that the individuals who are reportedly making methamphetamines have purchased ten times over a forty day period.

On November 12, 2013, your Affiant spoke to staff from Gregg's Pharmacy in Oakland. As your Affiant was reviewing their Pseudoephedrine logs your Affiant observed a side note on Boyce's purchase. The side note

says "girl comes in after & got inst. cold pk cash". One of the pharmacy techs advised that they wrote that on there. Your Affiant asked them if they knew who the girl was that purchased the instant cold pack and they pointed to a name on the pseudoephedrine log. The name they pointed to was Sarah Greene. Your Affiant observed a side note beside her name that says "came in with William Boyce 10/30/13".

Your Affiant knows from my training and experience as a narcotics investigator that instant cold packs are used in the process of making methamphetamines.

The following report is form Deputy Dustin Lewis, Garrett County Sherriff's Office:

On November 11, 2013 at approximately 20:39 hrs I, Dep. Lewis responded to 10 B Street for a reported CDS complaint.

Upon arrival I met with Daryl Parson at the end of the driveway. Daryl said he found what appeared to be methamphetamine. Daryl led me to a covered porch area over the left side entrance door. Daryl showed me a [W]almart bag. Inside the bag contained a clear plastic soda bottle. The label on the bottle was removed and had two horizontal lines drawn on it with black marker. The middle of the bottle was slightly melted and shrank. A white residue covered the inside of the bottle. The bottle still had the cap on and the residue in the bottle appeared to be not active.

Daryl said that today (11-11-2013) at approximately 11:00 hrs his wife was looking out the window and saw a man running down O'Brien Street toward the rail road tracks with the bag in his hands. Daryl said his wife told him this and he began to watch out the window also. Daryl said when the man came back up the street he did not have the bag. Daryl described the man as a white male possibly in his late 20's to early 30's. The man had on camo pants and a flannel jacket. Daryl said the man then went back in the residence at 15 O'Brien Street. Daryl said he did not know the man or who lives there.

Daryl said that when he got home from work he went to look for the bag. Daryl said at approximately 20:30 hrs he found the bag on the bank near the railroad tracks at the end of O'Brien Street. Daryl said he then collected the bag and took it to his residence and placed it outside under the porch.

I then collected the plastic Walmart bag containing the bottle and placed it in an evidence bag. I then turned the bag over to Det. Meyers and Det. Teets at the Sherriff's Office.

Your Affiant and Detective Meyers responded to the Sherriff's Office.

Your Affiant observed the plastic bottle inside the plastic bag. The bottle contained an unknown, thick white liquid that was white/cream colored. The bottle had shrank in the middle and appeared to have burned inside. Your Affiant unscrewed the lid. Your Affiant observed the opening of the bottle to be burnt/melted. There was a strange odor that emitted from the bottle. Deputy Lewis provided the details of the call and the address where the unknown white male ran back to. Your Affiant and Det. Meyers are familiar with that address due to the above information that we received about Sarah Green, [appellant] and Roger Strawser making methamphetamines at 15 O'Brien Street. Your Affiant also knows that methamphetamines are being cooked by the "one pot" method or the "shake and bake" method. Your Affiant knows from [m]y training and experience as a narcotics investigator that individuals that use these methods commonly use plastic bottles to make the methamphetamines. Your Affiant is also aware that these plastic bottles can be volatile and could explode or be toxic to individuals. Your Affiant then contacted TFC Penny Kyle, Maryland State Police, C31-Narcotics, Maryland State Clandestine Lab team member. Your Affiant sent TFC Kyle a picture of the bottle. TFC Kyle advised that it appears to be a bottle that was either used to make methamphetamines and or it was a bottle that something went wrong during the process of making methamphetamines and the individuals that were trying to make it had to get rid of it. This would account for the person seen running from the 15 O'Brien Street residence, as observed by the Parsons.

Not knowing if the plastic bottle was toxic, your Affiant contacted the Alleghany County Hazmat Team. Your Affiant requested they respond to take custody of the bottle for proper disposal. Your Affiant met with Roger Bennet, Alleghany County Director of Emergency Management. He took possession of the bottle for disposal. Based on my training, your Affiant knows the chemicals used and the product that can be made can be volatile, flammable or otherwise hazardous. Therefore, your Affiant elected to dispose of the bottle and substance without any attempts at testing.

On November 12, 2013 your Affiant traveled to 15 O'Brien Street, Mt. Lake Park, Maryland. Your Affiant obtained a description of the residence. Your Affiant also observed a motorcycle parked beside the residence in the driveway.

On November 12, 2013, your Affiant contacted DFC Eric Parks of the Garrett County Sherriff's Office. Your Affiant requested DFC Parks to go

> to 15 O'Brien Street in an attempt to obtain a tag number from the motorcycle. DFC Parks obtained Maryland registration 29082LD from the motorcycle. Your Affiant caused a check to make through the Maryland Motor Vehicle Administration on that tag number. The tag comes back registered to [appellant], 2590 Old Crellin Road, Oakland, Maryland on a 1982 Yamaha motorcycle.
>
> On October 2, 2013 Sarah Green provided an address 15 O'Brien Street, Mt. Lake Park, Maryland to Garrett County Law Enforcement. Green advised that 15 O'Brien Street is where she is currently living.
>
> During October 2013, Detective Meyers of the Garrett County Narcotics Task Force received information from Confidential Informant 94-242 that [appellant] is living with Sarah Greene at 15 O'Brien Street, Mt. Lake Park, Maryland.

On November 14, 2013, police executed the search warrant. During the search, officers discovered appellant at 15 O'Brien Street, along with evidence of multiple CDS violations.

Appellant was found with a hypodermic needle, a metal spoon, and a plastic container with cotton balls on his person. The cotton balls, the plastic container in which they were contained, and the metal spoon were sent to the Maryland State Police Crime Lab and tested positive for trace amounts of methamphetamine.

In the living room on the top floor of the split level dwelling, law enforcement seized a digital scale containing trace amounts of marijuana and methamphetamine. In the kitchen, also on the top floor of the residence, police discovered a plastic container with trace amounts of methamphetamine. In a bedroom in the top floor of the residence, police seized a container which tested positive for the presence of CDS (either methamphetamine or cocaine). In the trash, police discovered four empty packages of cold medicine

containing pseudoephedrine, and also receipts for the purchase of various items used in the manufacturing of methamphetamines.

In the basement of the residence, police discovered multiple plastic soda bottles containing methamphetamine that were apparently used to produce methamphetamine through the "one-pot" or "shake and bake" method. Also stored near these bottles was Coleman camp fuel, Prestone starting fluid, and a bottle of muriatic acid, all of which are commonly used in the production of methamphetamine. Police also discovered a tackle box in the basement that contained small plastic containers, metal spoons, a pen body, and a socket. Each of these items tested positive for the presence of either cocaine or methamphetamine. In all, there were fifteen different items seized from either appellant or the residence that were tested by the Maryland State Police. Twelve of these items tested positive for the presence of methamphetamine, and three tested positive for cocaine.

After being charged with seven CDS offenses, appellant filed a motion to suppress the evidence against him on the grounds that police included improper or inaccurate information in the search warrant application. Appellant also filed a motion to dismiss the charges against him, in which he requested "the [c]ourt to have the State's Attorney produce the names and information of the confidential informants that were listed within the application for search warrant."

The Circuit Court for Garrett County held a hearing on September 17, 2014. Appellant argued that the State was relying on the CI's to show probable cause supporting the search warrant, and he should have an opportunity to confront the CI's to test their

reliability. The State opposed this motion on the grounds that the CI's were "tipster[s]" as opposed to informants, and that the tips provided by the CI's merely corroborated the other information indicative of methamphetamine production. Ultimately, the Court concluded that "[T]here's no suggestion of bad faith, so the motion to suppress is denied. Likewise, there is no basis for purposes of the motion to divulge the informants or the identity of the informants. Okay, so that motion's denied as well."

Appellant proceeded to trial on the same day his pretrial motions were denied. He was ultimately found guilty of manufacturing methamphetamine, possessing production equipment (plastic bottles), possessing CDS paraphernalia administration equipment (hypodermic syringe), possessing methamphetamine, and possessing CDS paraphernalia (electronic scale). Appellant was sentenced to eight years of imprisonment for manufacturing, with two years of that sentence suspended, and five years of supervised probation. Appellant also received three four-year sentences for possessing production equipment (plastic bottles), possessing CDS paraphernalia administration equipment (hypodermic syringe), and possessing methamphetamine, with all three sentences running concurrent to appellant's sentence for manufacturing. The court did not impose a sentence for possessing CDS paraphernalia (electronic scale).

Appellant timely noted this appeal.

Additional facts shall be provided, *infra*, to the extent they prove relevant in addressing the issues presented.

STANDARD OF REVIEW

In determining whether the circuit court erred in refusing to disclose the identity of a confidential informant, "we look to see whether the court applied correct legal principles and, if so, whether its ruling constituted a fair exercise of its discretion." *Elliott v. State*, 417 Md. 413, 444 (2010) (quoting *Edwards v. State,* 350 Md. 433, 442 (1998)). "The burden is on the defendant to show a 'substantial reason indicating that the identity of the informer is material to his defense or the fair determination of the case.'" *Id.* (citation omitted).

DISCUSSION

I. Informer's privilege

Appellant's first allegation of error is that, in denying appellant's motion to compel disclosure of the identity of the CI's, "the circuit court failed to perform the balancing test required by *Roviaro v. United States*, 353 U.S. 53 (1957)." According to appellant, had the circuit court conducted this balancing test, disclosure would have been required because the "reliability of the information [the CI's] provided was essential to a fair determination of probable cause." The State responds by noting that the CI's were "mere tipsters" and as such, the State's interest in concealing their identities outweighs the defendant's right to access their names.

For the reasons outlined below, we hold that the informer's privilege was properly applied to prevent the disclosure of the CI's identities.

The informer's privilege permits the State to withhold "the identity of persons who furnish information of violations of the law to officers charged with enforcement of that law." *Roviaro*, 353 U.S. at 59 (citation omitted). This privilege serves the public interest of effective law enforcement by encouraging citizens to report violations of the law, while maintaining anonymity. *Id.* The informer's privilege is not absolute, however, and must give way where "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[.]" *Id.* at 60-61. Thus, the Supreme Court has instructed that the application of the privilege and whether it should give way in a specific case is determined by:

> [B]alancing 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 62.

Maryland courts have since adopted the balancing test outlined by the Supreme Court in *Roviaro*. *See Edwards*, 350 Md. at 441. In *Edwards,* police were executing a search warrant and found Mr. Edwards in a dwelling that contained a large quantity of cocaine. *Id.* at 437. In the application for this warrant, police relied entirely on information provided by a CI that individual's nicknamed "Nat" and "Silko" were storing cocaine at 2125 Cliftwood Ave. *Id.* at 436. The CI had provided reliable information to police in the

past, and also went in front of the warrant issuing judge and swore under oath that the information provided was accurate. *Id.* at 437.

In defending the charges against him, Mr. Edwards filed a motion to compel the State to disclose the identity of the CI. *Id.* at 438. The court dismissed this motion and characterized the CI's appearance before the warrant issuing judge "as sufficiently establishing the reliability of the informant for purposes of assessing probable cause." *Id*. Mr. Edwards appealed on the grounds that he was entitled to "an *in camera* disclosure of the informant." *Id.* at 439.

In discussing the court's decision to refuse disclosure of the CI, the Court of Appeals noted that the balancing test enunciated in *Roviaro* governs whether disclosure is proper. *Id.* at 441 (citation omitted). According to the Court, the key element under *Roviaro* is "'the materiality of the informer's testimony to the determination of the accused's guilt.'" *Id.* at 442 (quoting *Warrick v. State,* 326 Md. 696, 701 (1992)). The Court further explained that it is appropriate, when engaging in the *Roviaro* balancing test, to differentiate between informants – those "who actually participated in the criminal activity with which the defendant is charged, who may, as a result, have direct knowledge of what occurred and of the defendant's criminal agency" – and tipsters – "a person who did nothing more than supply information to a law enforcement officer, who did not participate in the criminal activity and may not even have been present when it occurred[.]" *Id*. According to the Court, disclosure of an informant's identity has generally been required, whereas the identity of a tipster has not. *Id.*

The Court went on to remark that the distinction between an informant and a tipster is relevant, but not dispositive where the informant "supplied material information in support of the probable cause used to obtain a warrant or to justify a warrantless arrest or search." *Id.* at 444. In cases where the informant's assertions are relevant to a determination of probable cause, the Supreme Court's decision in *McCray v. Illinois,* 386 U.S. 300, 308 (1967), instructs that the decision to require disclosure is entirely discretionary with the trial court. *Id.* at 445. When exercising this discretion, the *Edwards* Court observed that it is permissible for a court to strike a balance on the side of non-disclosure where "the existence of probable cause is not a significant issue in the case[,]" and to strike a balance on the side of disclosure where "the defense *does* rest on a showing that critical evidence was obtained in the absence of probable cause[.]" *Id.* at 445 (emphasis in original). The court may also err on the side of nondisclosure where probable cause is not dependent on the veracity of the confidential informant, or information provided by the confidential informant does not comprise the "main bulk" of probable cause evidence. *Id.* at 446 (citing *United States v. Tucker,* 380 F.2d 206, 212 (2d Cir. 1967)).

Lastly the *Edwards* Court noted that:

> In a close case, or where the record is otherwise insufficient to permit the court to engage in the required balancing process, an *in camera* hearing may be necessary, to allow the court to interview the informant, determine what his or her role was in the matter, and reach an informed judgment as to whether the informant's identity should be disclosed.

Id. at 446-47.

In *Edwards*, the Court applied the aforementioned principles to decide that an *in camera* hearing would ordinarily be required on the facts of Mr. Edward's case:

> The case against [Mr. Edwards] was based almost entirely on the evidence found at 2125 Cliftwood Avenue; the admissibility of that evidence, however, hinged on the validity of the warrant; and the validity of the warrant depended almost entirely on the credibility of the unnamed informant. The veracity of the informant's assertions, as stated in the officers' affidavit, thus became the crucial issue in the case.

Id. at 447. However, Mr. Edwards' assertion that disclosure was necessary was based entirely on his assertion that the CI had to be an individual named "Kelly Brooks." *Id.* at 447. The Court noted that disclosure of the CI was not necessary in light of this assertion, because the State had proffered that two police officers would testify that Brooks was not the informant, thereby obviating the need to disclose the CI's identity. *Id.* at 448.

Years later, in *Elliot v. State*, 417 Md. 413, the Court of Appeals applied the *Roviaro* balancing test to hold that the circuit court erred in denying a motion to compel the disclosure of a CI's identity. In *Elliot*, a CI who had previously provided information that had led to the seizure of marijuana, told police that Mr. Elliot would be at the Southern Marketplace in Marlow Heights, Maryland between 1pm and 3pm that day with a large quantity of Marijuana. *Id.* at 423. The CI provided police with a detailed description of Mr. Elliot, along with a description of his vehicle and license plate number. *Id.* After viewing two men pull into the marketplace in the specified vehicle, and noticing that one of the men matched the description of Mr. Elliot, police seized the men and ultimately discovered 20 pounds of marijuana in the trunk of the vehicle. *Id.* at 423-24.

Mr. Elliot was charged with possession of marijuana with intent to distribute, and subsequently filed a motion to suppress the drugs because the information provided by the CI was insufficient to establish probable cause. *Id.* at 424. Mr. Elliot also sought to compel the disclosure of the CI's identity because this information was material to his entrapment defense, *i.e.* that the "CI gave Elliott the drugs in order to set him up[.]" *Id.* at 425. According to Mr. Elliot, a friend of his who he believed to be the CI, had asked him to hang on to some belongings after the friend had gotten into a fight with his girlfriend. *Id.* at 426. Mr. Elliot went to the friend's house, the friend put the belongings in his trunk with Mr. Elliot still in the vehicle, and the next day the friend called him and asked him to meet him at the marketplace with his belongings. *Id.*

The circuit court denied the motion to suppress on the grounds that the CI's tip provided reasonable suspicion for an investigative stop, and also denied the motion to compel disclosure. *Id.* at 425. Mr. Elliot was subsequently convicted after two trials – the first ending in a mistrial. *Id.* at 426.

In discussing Mr. Elliot's allegation of error, the Court observed that the balancing test from *Roviaro* and *Edwards* was controlling. *Id.* at 445. The Court also made the following observation:

> [T]his Court and the United States Supreme Court have emphasized the importance of ensuring a fair determination of probable cause. *See Edwards*, 350 Md. at 446, 713 A.2d at 348. Specifically, in a case involving a warrantless search based on information provided by a CI, "the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication [to

> establish probable cause]." *Roviaro,* 353 U.S. at 61, 77 S.Ct. at 628, 1 L.Ed.2d at 645.

Id. at 446.

Applying the aforementioned principle, the Court ultimately held that the identity of the CI was wrongfully withheld. *Id.* at 448. First, the identity of the informant was material to the charges because the State had the burden of proving that Mr. Elliot was aware of the narcotics in the trunk of his vehicle. *Id.* at 447. Second, the CI was a material witness to the raised defenses of entrapment and lack of knowledge, because Mr. Elliot alleged that the CI had put the narcotics in his trunk without his knowledge. *Id.* at 447 (referring to the Court's decision in *Brooks v. State*, 320 Md. 516, 522 (1990)). Lastly, the information provided by the CI was vital to establishing probable cause because "[s]imilar to *Edwards,* the case against Mr. Elliott was based on the evidence seized from the vehicle and the admissibility of that evidence 'depended almost entirely on the credibility of the unnamed informant' who provided the information about the drugs to the police." *Id.* at 447-48 (citation omitted).

Turning to the facts of the present case, we hold that, contrary to both *Edwards* and *Elliot*, disclosure of the informants' identities was not required under the *Roviaro* balancing test.

The State correctly points out that both CI's were tipsters, as opposed to informants. CI 94-244 advised police that "[appellant] is living with Sarah Green and [appellant] is making and using methamphetamines." CI 94-191 advised law enforcement that "[appellant] and Roger Strawser are making meth." Nothing in the record before the circuit

court indicated that either CI 94-244 or CI 94-191 had participated in appellant's criminal activity or had first-hand knowledge of methamphetamine production. Rather, both CI's provided generally vague information to police that appellant was involved in methamphetamine production, and this information was corroborated by independent police work.

While the tipster/informant distinction weighs against disclosure, as noted in *Edwards*, the distinction is not dispositive where the informant's assertions are relevant to a determination of probable cause. Instead, the court should consider the extent to which "the defense… rest[s] on a showing that critical evidence was obtained in the absence of probable cause," and/or whether the CI's information constitutes the "main bulk" of probable cause evidence. *Edwards*, 350 Md. at 445-46.

In the case at bar, the contents of the warrant application reveal that the information provided by the CI's hardly comprised the "main bulk" of probable cause to search appellant's residence. Rather, the search warrant application contained substantial evidence from sources independent of the CI's: (1) Billy Boyce and Donna DeWit were buying cold medicine containing pseudoephedrine (a known staple of methamphetamine production) for Sarah Greene (appellant's significant other); (2) appellant and Roger Strawser were viewed at a CVS and at a Walmart pharmacy on two separate occasions, and both times left in a vehicle that was likely Sarah Greene's; (3) pseudoephedrine logs at pharmacies in the Oakland area showed that appellant, Strawser, Boyce and DeWit purchased pseudoephedrine ten times over a forty day period; (4) Sarah Greene had

purchased an instant cold pack (also used in process of making methamphetamine) from Gregg's pharmacy in Oakland with "William Boyce" present; (5) an individual ran down O'Brien Street in Mount Lake Park, Maryland, discarded a plastic bag containing a failed attempt at manufacturing methamphetamine, and subsequently returned to 15 O'Brien Street; (6) a motorcycle registered to appellant was seen at 15 O'Brien Street; and (7) Sarah Greene had told police that 15 O'Brien Street was her address on a previous occasion.

Contrary to both *Edwards* and *Elliot*, the above evidence included in the search warrant application reveals that the validity of the warrant and the admissibility of the evidence against appellant was not dependent upon the veracity of the CI's. Rather, while appellant's counsel rested on the position that the State seized the evidence from 15 O'Brien Street without probable cause, there was substantial independent evidence which corroborated key elements of the tips provided by the CI's. *See Edwards*, 350 Md. at 446 (observing that disclosure of the informant's identity has not been required where "substantial independent evidence … corroborated key elements of the tip.") (citation omitted). Therefore, revealing the identity of the CI's in the present case and allowing the appellant to confront them during the pretrial hearing would have undermined the interest in effective law enforcement, and would have also been of little benefit to appellant in mounting his defense. Such a balance cannot justify disclosure under *Roviaro.*

Appellant also contends that the circuit court erred by failing to conduct the balancing test required by *Roviaro*, and failure to engage in this test was reversible error. The State responds by proffering that "[t]he record does not indicate that the court failed

to apply the balancing test; on the contrary, the court's cursory rejection of [appellant's] specious argument suggests that the [circuit] court was aware of the relevant law and applied it properly." For the reasons that follow, we agree.

The Court of Appeals has held that failure to engage in the balancing test required by *Roviaro* and *Edwards* is reversible error, but the Court has also noted that "the practical application of the balancing test is more rudimentary in some cases." *Warrick*, 326 Md. at 701. It is also well settled in Maryland that "'trial judges are presumed to know the law and to apply it properly.'" *State v. Chaney*, 375 Md. 168, 179 (2003) (quoting *Ball v. State*, 347 Md. 156, 206 (1997)).

As noted above, revealing the identities of the CI's and allowing the appellant to examine them during the motions hearing would have undermined the interest in effective law enforcement, and would have also been of no benefit to the appellant in challenging the probable cause supporting the warrant. As such, the obvious or rudimentary result of the *Roviaro* balancing test was that the informer's privilege should prevail. We therefore presume that the trial judge's statement that "[t]here is no basis for purposes of the motion to divulge the informants or the identity of the informants," was the product of an appropriately brief consideration of the countervailing interests discussed in *Roviaro* and *Edwards.*

Appellant contends that "a court's failure to make a record of its factual findings or legal conclusions could never be error," if we presume that the trial judge applied the correct legal principle in the present case. However, we simply hold that, where the interest

in effective law enforcement is furthered by enforcement of the privilege and the existence of probable cause is unaffected by the reliability of a confidential informant[s], the court's statement that there is "no basis" for disclosure reflects a correct application of the *Roviaro* balancing test. In a case where disclosure of the informant's identity has a propensity to affect the accused ability to suppress evidence against him and/or to mount a successful defense, we would surely require a more extensive record than we do in the case at bar.

II. Merger

Appellant also alleges that the circuit court erred by failing to merge his sentences for possession of methamphetamine production equipment (Crim. Law § 5-603), possession of CDS paraphernalia (Crim. Law § 5-619(c)(1)), and possession of methamphetamine (Crim. Law § 5-601(a)(1)), into his conviction for manufacturing of methamphetamine (Crim. Law § 5-603). We analyze each of these three claims in turn, and affirm each of appellant's convictions, but hold that appellant's sentences for possession of production equipment and possession of methamphetamine are vacated and merged into appellant's sentence for manufacturing.[1]

[1] Appellant makes his arguments for merger under all three of the bases for merger in Maryland: (1) the required evidence test, (2) the rule of lenity, and (3) the principle of fundamental fairness. *See Carroll v. State*, 428 Md. 679, 693-94 (2012) (explaining the three grounds for merger). Appellant did not raise the issue of merger during sentencing in the circuit court. The State concedes that merger under the required evidence test and the rule of lenity need not be preserved at the trial court, but relies on this Court's decision in *Pair v. State,* 202 Md. App. 617 (2011) – where we held that failure to merge a sentence under the fundamental fairness doctrine does not result in an "illegal sentence" under Md. Rule 4-345(a) – to argue that appellant's failure to raise the issue of merger on the grounds of fundamental fairness in the trial court results in waiver of this issue on appeal. However,

(continued…)

a. Merger of possession of production equipment with manufacturing

Appellant alleges that possession of production equipment must merge with manufacturing of methamphetamine under both the rule of lenity and considerations of fundamental fairness. We agree.

Both possessing production equipment and manufacturing CDS are prohibited by Crim. Law § 5-603, which reads as follows:

> Except as otherwise provided in this title, a person may not manufacture a controlled dangerous substance, or manufacture, distribute, or possess a machine, equipment, instrument, implement, device, or a combination of them that is adapted to produce a controlled dangerous substance under circumstances that reasonably indicate an intent to use it to produce, sell, or dispense a controlled dangerous substance in violation of this title.

The rule of lenity, applicable only where a defendant is convicted of at least one statutory offense, requires merger "where there is no indication that the legislature intended multiple punishments for the same act[.]" *McGrath v. State*, 356 Md. 20, 25 (1999). "[I]f we are unsure of the legislative intent in punishing offenses as a single merged crime or as distinct offenses, we, in effect, give the defendant the benefit of the doubt and hold that the crimes do merge." *Kyler v. State*, 218 Md. App. 196, 228 (2014) (citation omitted). According to this rule, the lesser statutory offense must merge into the offense carrying the greater penalty, and the defendant may only be sentenced for the greater offense. *Id.*

(…continued)
this Court has previously reached the merits of a claim for merger under the fundamental fairness doctrine where the issue was not raised in the trial court, and we must adhere to that precedent in the case at bar. *See Latray v. State*, 221 Md. App. 544, 555 (2015) ("[W]e shall review appellant's arguments based on the rule of lenity and fundamental fairness despite his failure to raise them at sentencing.").

In *Fields v. State*, 50 Md. App. 717 (1982), we applied the rule of lenity where, similar to the present case, the defendant was convicted and sentenced for two violations of closely related statutory provisions. Particularly, the defendant was "sentenced to two consecutive 18 month prison terms, for storehouse breaking and stealing ([then Md. Code, Art. 27, § 33]) and storehouse breaking with intent to steal ([then Md. Code, Art. 27, § 33A])." *Id.* at 718. We noted that the elements of the two crimes were as follows:

> A conviction under the relevant portion of [§] 33A requires proof of the elements of a breaking with intent to steal money, goods or chattels under the value of $300. Section 33, however, requires a breaking and "' … a larceny amounting in value to $5.00 or more.'" *Garner v. State*, 16 Md. App. 353, 361, 297 A.2d 304 (1972), quoting *Hyman v. State*, 4 Md. App. 636, 642, 244 A.2d 616 (1968) (emphasis added).

Id (footnote omitted). Based on the above elements, we noted that "it is difficult, if not nigh impossible," to imagine a scenario where a defendant could commit a violation of § 33 without simultaneously violating § 33A, because one cannot break and enter and commit a larceny without having the intent to do so. *Id.* at 720. We therefore held that the legislature did not intend two separate punishments for a violation of § 33 and § 33A where the legislature did not express such an intention and "the 'actual evidence' indicates that theft accomplished, coincides with an intended theft[.]" *Id.* at 721; *see also Walker,* 53 Md. App. 171, 201 (1982) (applying the rule of lenity where were the Court was "aware of no indications that the Legislature intended an assault which is also the overt act of an attempt [to rape] to be punished separately from that attempt.")

This Court recently made the following observation regarding legislative intent as it relates to statutes like that involved in *Fields*:

> "It is the assumption (often not articulated) that under the circumstances of a given case, it is reasonable to believe that the legislature that enacted a particular statute or statutes would express some intent as to multiple punishment. That assumption is appropriate when a single act is charged as multiple offenses under a single statute (*Ladner*, *Bell* and *Prince*), where the subject of the two statutes is of necessity closely intertwined (*Loscomb* and *Fields*), where one offense is necessarily the overt act of a statutory offense (*Walker*), and where one statute, by its very nature, affects other offenses because it is designed to effect multiple punishment (*Whack*). Under those circumstances, it is not unreasonable to assume that the legislative body contemplated the possibility of multiple punishment and to conclude that unless the intention in favor of multiple punishment is clear … the Rule of Lenity or its equivalent should be applied against the imposition of multiple punishment."

Latray, 221 Md. App. at 556 (quoting *Johnson v. State,* 56 Md. App. 205, 212-16 (1983)).

In the present case, both possessing production equipment and manufacturing CDS are prohibited by Crim. Law § 5-603, and as noted by appellant, "[s]ection 5-603 contains no anti-merger provision, and is aimed at preventing the bringing into existence of a controlled substance." Furthermore, similar to *Fields*, it is impossible to imagine a scenario where a defendant could succeed in manufacturing CDS without also possessing some type of production equipment. Accordingly, we hold that merger is required under the rule of lenity where the manufacture of CDS coincides with the possession of production equipment, as the legislature has not evidenced an intent to create multiple punishments for the same act through Crim. Law § 5-603.

We also determine that merger is required under the doctrine of fundamental fairness, although the point is moot in light of our holding that merger is required under the rule of lenity. In making this determination, we consider:

> [W]hether the two crimes are "part and parcel" of one another, such that one crime is "an integral component" of the other. *Monoker,* 321 Md. at 223–24, 582 A.2d at 529. This inquiry is "fact-driven" because it depends on considering the circumstances surrounding a defendant's convictions, not solely the mere elements of the crimes. *Pair v. State,* 202 Md. App. 617, 645, 33 A.3d 1024, 1039 (2011).

Carroll, 428 Md. at 695 (footnote omitted). The Court of Appeals, in *Carroll*, noted that offenses will rarely merge on the grounds of fundamental fairness, and one of the principal reasons for refusing such a request is that each offense is designed to punish a separate harm or wrongdoing. *Id.* at 697 (citation omitted).

The seminal case on the doctrine of merger under fundamental fairness is *Monoker v. State*, 321 Md. 214 (1990). In that case, a lawyer was convicted of various theft and forgery offenses committed against a former client. *Id.* at 216. In retaliation for the client's testimony against him, the lawyer requested that a fellow inmate at the Baltimore County Detention Center break into the clients home, assault the former client, and take any valuables he could find. *Id.* The inmate agreed, but was arrested near the client's home after a concerned neighbor had alerted police. *Id.* at 217. As a result, the lawyer was convicted of both "solicitation and conspiracy to commit daytime housebreaking," and was sentenced to consecutive ten year terms of imprisonment for each conviction. *Id.*

After deciding that merger of the two sentences was not required under the rule of lenity or the required evidence test, the Court of Appeals held that merger was required under the "principle of fundamental fairness in meting out punishment for a crime." *Id.* at 223 (citation omitted). The Court observed that, "in [the lawyer's] case the conspiracy to burglarize the [client's] home certainly did ripen from the solicitation of [the inmate] to

commit that same crime." *Id.* Accordingly, "because the solicitation was part and parcel of the ultimate conspiracy and thereby an integral component of it, it would be fundamentally unfair to [the lawyer] for us to require him to suffer twice, once for the greater crime and once for a lesser included offense of that crime." *Id.* at 223-24.

The facts of the present case also persuade us that it would be fundamentally unfair to punish appellant twice for the same criminal act. To convict appellant of manufacturing, the jury had to find that (1) the defendant manufactured the substance, and (2) that the substance was CDS. To manufacture, means "to produce, prepare, propagate, compound, convert, or process a controlled dangerous substance" or "to package and repackage a controlled dangerous substance and label and relabel its containers." Crim. Law § 5-101(q)(1)-(2). To be convicted of possessing production equipment, the jury had to find that (1) the defendant possessed the machine equipment, instrument, implement, device, or combination of them that was adapted to produce a controlled dangerous substance, and (2) the circumstances reasonable indicate an intent to use it to produce, sell, or dispense a controlled dangerous substance.

The grounds for the State's charge of possession of production equipment were that appellant "did unlawfully possess plastic bottles adopted for the production of … [M]ethamphetamine[.]" During trial, the State's expert witness, Senior State Trooper Pennie Kyle, testified that appellant was engaged in the manufacturing of methamphetamine through the "shake-and-bake" or "one-pot" method, and according to Trooper Kyle, the bottles found at appellant's residence are "indicative [of] what I've seen

in every one-pot meth lab that I've ever been to." When asked about what the evidence discovered at the residence revealed to law enforcement, Trooper Kyle further responded that "[i]t's an indication that methamphetamine was being manufactured, and all these bottles were being used to manufacture it[.]"

The above testimony from Trooper Kyle reveals the present case is similar to *Monoker*, because appellant's manufacturing of methamphetamine ripened from the lesser offense of possession of production equipment. In fact, appellant would likely not have been able to produce methamphetamine without use of the plastic bottles, and Crim. Law § 5-603 serves the singular purpose of punishing the harm that results from the production of substances such as methamphetamine. Accordingly, we hold that appellant's sentence for manufacturing must merge into his sentence for possessing production equipment under both the rule of lenity and the principle of fundamental fairness.

b. Merger of possession of paraphernalia with manufacturing

Appellant also alleges that his conviction for possession of paraphernalia must merge with his conviction for manufacturing methamphetamine under the rule of lenity and/or the principle of fundamental fairness. The State opposes this argument on the grounds that appellant's sentence for possession of controlled paraphernalia – to wit, hypodermic needles – penalizes consumption of CDS, as opposed to manufacturing, and should not merge. In reply, appellant notes that he "has not asked this Court to merge the possession of controlled paraphernalia sentence into the sentence for manufacturing; rather, [a]ppellant argued that his sentence for possession of paraphernalia – a digital scale – must

merge into his sentence for manufacturing." After a review of the record below, we decline to reach the merits of this claim because the circuit court did not impose a sentence for appellant's possession of the digital scale.[2]

c. Merger of possession of methamphetamine with manufacturing

Appellant's last contention on appeal is that his conviction for possession of methamphetamine must merge with his conviction for manufacturing on all three grounds for merger under Maryland law. We agree that merger is necessary under the required evidence test.

In *State v. Lancaster*, 332 Md. 385, 391-92 (1993), the Court of Appeals succinctly summarized the most common and preferred merger doctrine in Maryland – the required evidence test:

> The required evidence test "'focuses upon the elements of each offense; if all of the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements, the former merges into the latter.'" *Snowden v. State, supra,* 321 Md. at 617, 583 A.2d at 1059, quoting *State v. Jenkins,* 307 Md. 501, 517, 515 A.2d 465, 473 (1986). Stated another way, the "'required evidence is that which is

[2] The seventh count of the Criminal Information filed by the State charged appellant with "possess[ing] with intent to use drug paraphernalia, to wit: digital scales, used to process and prepare a controlled dangerous substance[.]" When instructing the jury on this charge, the court noted that "[p]araphernalia includes a scale or balance used, intended for use, or designed for use in weighing, measuring a controlled dangerous substance." The jury returned a verdict of guilty on this count, but at sentencing the court ruled that "[t]here will be no sentence imposed for [c]ount 7." Because no sentence was imposed, the circuit court, in effect, has already merged the sentence for possession of paraphernalia with appellant's sentence for manufacturing. *See Moore v. State*, 198 Md. App. 655, 693 (2011) ("because the merger doctrine does not affect the conviction, the intentional imposition of no sentence on a conviction for an offense subject to merger is the functional equivalent of merging that conviction into the conviction for the greater offense for sentencing purposes.") (footnote omitted).

> minimally necessary to secure a conviction for each … offense. If each offense requires proof of a fact which the other does not, or in other words, if each offense contains an element which the other does not,'" there is no merger under the required evidence test even though both offenses are based upon the same act or acts. "'But, where only one offense requires proof of an additional fact, so that all elements of one offense are present in the other,'" and where both "offenses are based on the same act or acts, … merger follows…." *Williams v. State, supra,* 323 Md. at 317–318, 593 A.2d at 673, quoting in part *Thomas v. State,* 277 Md. 257, 267, 353 A.2d 240, 246–247 (1976).

"When applying the required evidence test to multi-purpose offenses, *i.e.,* offenses having alternative elements, a court must 'examin[e] the alternative elements relevant to the case at issue.'" *Id.* at 392 (citations omitted). Once merger is appropriate under the required evidence test, the defendant may only be sentenced for the greater offense, or the offense requiring proof of an element which the lesser offense does not. *Id.* (citations omitted).

In light of this test, we must direct our attention to the elements that the State was required to fulfill in proving a conviction for both manufacturing and possession of methamphetamine. To obtain a conviction for manufacturing, the State had to show that (1) the defendant manufactured the substance, and (2) that the substance was CDS. As used in the Criminal Law Article, to "'manufacture'… means to produce, prepare, propagate, compound, convert, or process a controlled dangerous substance," or "to package and repackage a controlled dangerous substance and label and relabel its containers." Crim. Law § 5-101(q). To obtain a conviction for possession, the state must show that (1) the defendant knowingly possessed the substance, (2) the defendant knew the general character or illicit nature of the substance, and (3) the substance was CDS.

Based on the above elements, appellant is correct to note that "proof of possession requires no more than proof of successful manufacturing[,]" because one who produced, propagated, compounded, converted, or processed a substance known to be CDS would surely be said to have sufficient "constructive dominion or control" of the substance to be guilty of possession. *See* Crim. Law § 5-101(v). Therefore, possessing methamphetamine is properly considered a lesser included offense of manufacturing methamphetamine under the required evidence test.

To avoid this result, the State avers that the basis for appellant's possession conviction was the methamphetamine soaked cotton balls found on his person. As a result, merger is not be required because the facts supporting the charge of possession are independent of those which support the charge of manufacturing. *See Jones-Harris v. State*, 179 Md. App. 72, 100 (2008) (noting that merger was not appropriate under the required evidence test where "the charge of false imprisonment was supported by facts independent of the facts supporting the two charges of second-degree sexual offense.").

While the jury *may* have relied on the cotton balls in appellant's pocket to return a verdict of guilty on the count of possession, the state produced evidence that twelve different items contained trace or weighable amounts of methamphetamine. These twelve items included the bottles used to produce methamphetamine in the basement of the residence, containers found in the bedrooms and living room on the second floor of the residence, and items on appellant's person, among others. Any one of these items would have been sufficient to convict appellant of possessing methamphetamine, *see Frasher v.*

State, 8 Md. App. 439, 446 (1970) (noting that trace amounts of CDS are sufficient to convict for possession), yet we can only guess as to which one of these items the jury relied upon in returning a guilty verdict.

In light of this ambiguity, we must assume that the methamphetamine which appellant manufactured in the plastic bottles formed the basis of his conviction for possession. *See Nicolas v. State*, 426 Md. 385, 400 (2012) ("[W]here there is a factual ambiguity in the record, in the context of merger, that ambiguity is resolved in favor of the defendant."). Accordingly, we hold that the facts which supported the conviction for manufacturing methamphetamine are not independent of the facts that supported the conviction for possession of methamphetamine, and the sentences merge under the required evidence test.

JUDGMENTS OF THE CIRCUIT COURT FOR GARRETT COUNTY ARE AFFIRMED. SENTENCES FOR POSSESSION OF PRODUCTION EQUIPMENT AND POSSESSION OF METHAMPHETAMINE ARE VACATED AND MERGED INTO THE SENTENCE FOR MANUFACTURING METHAMPHETAMINE. COSTS SPLIT BETWEEN THE PARTIES: 50% TO BE PAID BY APPELLANT AND 50% TO BE PAID BY GARRETT COUNTY.