IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA ex rel. WILLIAM G. MONTGOMERY, Maricopa County Attorney,

Petitioner,

v.

THE HONORABLE JEANNE GARCIA, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA,

Respondent Judge,

JENNIFER ORTEGA QUINTANA,

Real Party in Interest.

No. 1 CA-SA 13-0247
FILED 11-26-2013

Petition for Special Action from the Superior Court in Maricopa County
No. CR2011-153595-001 SE
The Honorable Jeanne Garcia, Judge

JURISDICTION ACCEPTED; RELIEF GRANTED

COUNSEL

Maricopa County Attorney, Phoenix
By Gerald R. Grant

Counsel for Petitioner

Janelle A. McEachern, Chandler

Counsel for Real Party in Interest

MEMORANDUM DECISION

Judge Jon W. Thompson delivered the decision of the Court, in which Presiding Judge Lawrence F. Winthrop and Judge Margaret H. Downie joined.

T H O M P S O N, Judge:

¶1 This special action arises out of the superior court's decision precluding all of the state's evidence of a defendant's admissions to both police and store employees that she shoplifted as a sanction for a purported discovery violation. For the following reasons, we accept jurisdiction and grant relief.

FACTUAL AND PROCEDURAL HISTORY

¶2 In September 2011, the real party in interest, Jennifer Quintana (defendant), allegedly left a Sears store with four bottles of perfume that she had not paid for. She was stopped and questioned by Sears loss prevention employees who had observed her via security cameras putting the perfume in her purse. Defendant admitted to the Sears employees that she had stolen the perfume in order to sell it, and she signed two pages of the Sears loss prevention report prepared by the Sears employees. On page two of the report she signed next to a statement that she "admit[ted] to the theft of the cash/merchandise listed above" (four bottles of perfume); she also signed page four which stated at the top, "Quintana also admitted to Loss Prevention that reason for theft was to sell items."

¶3 The Sears employees called Mesa Police and provided them with a copy of their report, but the copy given was not the one signed by defendant. The signed report remained in the store's internal records. Police read defendant her Miranda rights and she admitted to police that she had stolen the perfume to sell it. The police provided the prosecutor's office with the unsigned report.

¶4 The state charged defendant with one count of shoplifting with two or more predicate convictions, a class 4 felony.[1] The state made a plea offer: plead guilty with one prior with an open sentencing range of 2.25 years to 7.5 years. Defendant sought a deviation to the plea offer but the state rejected the deviation request and the plea offer expired. The state filed an information adding the allegation that defendant committed the offense while she was on probation and that she had two prior felony convictions. The state made another plea offer for 4.5 years, which defendant rejected in October 2012.

¶5 In February 2013, two days before trial, the prosecutor interviewed the two Sears employees and discovered the existence of the signed report. The prosecutor immediately disclosed the signed report to defense counsel. The prosecutor then filed a motion in limine requesting that the court allow the state to introduce into evidence the signed report. Defendant filed a response requesting that the signed report be suppressed because the state knew or should have known of the existence of the signed confession, and requesting additional sanctions including dismissal of the indictment. Defense counsel argued that "[h]ad [defendant] been aware that the State possessed her signed confession, she would have accepted the 4.5 sentence," (the last plea offer made by the state). Defendant also filed a motion for a voluntariness hearing/Miranda violation asking the court to determine the voluntariness of her statements to both police and the Sears employees. The February trial date was continued to March 11, 2013.

¶6 The trial court held a hearing on March 1, 2013. At the hearing, defense counsel admitted that he was aware that defendant made

[1] Quintana had been convicted of shoplifting in municipal court three times in the five years previous to the filing of the complaint in this matter.

oral admissions to the Sears employees.[2] The trial court, citing Arizona Rule of Criminal Procedure 15.8 and *Rivera-Longoria v. Slayton*, 228 Ariz. 156, 264 P.3d 866 (2011), found that the signed admissions were material, that the state failed to timely provide them, and that defendant's decision on the plea offer was materially impacted. The court advised defendant to "ascertain the offer made at RCC and further advise what sanction is requested." Subsequently, defendant filed a motion for sanctions, requesting the following: dismissal of the case with or without prejudice, preclusion of any admissions made by defendant, or allowing the state to no longer allege that defendant committed the offense while on probation. The state opposed defendant's request for sanctions.

¶7 The trial court heard argument on the request for sanctions in May 2013. At the conclusion of the hearing, the court ordered the parties to file additional briefing on whether the signed report had been within the prosecution's control and whether the state had waived the issue. The court clarified its earlier ruling, stating that the unsigned Sears report was not material and would be admissible. The state then filed a motion for reconsideration and defendant filed a response.

¶8 The court held a third hearing in July and denied the state's motion for reconsideration in September 2013. The court declined to order defendant's preferred sanction, "that the court dismiss the allegations of her second prior felony conviction and that she was on probation, essentially forcing the State's prior plea offer." The court agreed that this sanction would violate the separation of powers doctrine by usurping the prosecutor's power regarding a plea offer and the legislature's power to define the proper range of punishment. The court instead precluded the state "from presenting any evidence that Defendant admitted that she shoplifted: no verbal statements, no unsigned documents, and no signed documents." Citing *State v. Smith*, 123 Ariz. 231, 599 P.2d 187 (1979), the court found that the state "had better access to the signed documents, particularly since Sears provided the unsigned documents to begin with." The court acknowledged that "Sears is not a law enforcement agency," but concluded "they do have a procedure in place to address shoplifters." The court found that defendant had requested all documents intended to be used at trial as well as any statements she made, and that "[b]ecause [defendant] was apparently

[2] "[T]he defense knows that, number one, she did make an oral admission. That's clear in those documents, but . . . was the Defense on notice that she actually signed a document as characterized by the State? No."

unaware of the existence of the documents, she could not attempt to get them directly from Sears."

¶9 The court set a trial date of September 24, 2013. At a status conference on September 10, the state asked for clarification of the court's order, and the court ruled:

> What is precluded is ALL statements made by Defendant regarding the charge of shoplifting, including verbal statements to Sears personnel and later to law enforcement officers, unsigned as well as signed documents, and verbal statements noted in the police report.

Subsequently, the trial court granted the state's request to stay the trial, and this special action followed.

DISCUSSION

A. Special Action Jurisdiction

¶10 The state has no equally plain, adequate or speedy remedy by appeal because it cannot appeal from the trial court's order suppressing the defendant's written and oral admissions and unsigned documents. *See* Ariz. Rev. Stat. (A.R.S.) § 13-4032 (2010). Defendant concedes that the state has no right to appeal the court's order, but still urges us to decline jurisdiction. In the exercise of our discretion, we accept jurisdiction of the state's petition for special action.

B. Analysis

¶11 Arizona Rule of Criminal Procedure 15.8 (Rule 15.8) provides:

> If the prosecution has imposed a plea deadline in a case in which an indictment or information has been filed in Superior Court, but does not provide the defense with material disclosure listed in Rule 15.1(b) at least 30 days prior to the plea deadline, the court, upon motion of the defendant, shall consider the impact of the failure to provide such disclosure on the defendant's decision to accept or reject a plea offer. If the court determines that the

> prosecutor's failure to provide such disclosure materially impacted the defendant's decision and the prosecutor declines to reinstate the lapsed plea offer, the presumptive minimum sanction shall be preclusion from admission at trial of any evidence not disclosed at least 30 days prior to the deadline.

Rule 15.1(b) requires the prosecutor to make available to the defendant certain enumerated "material and information within the prosecutor's possession or control." Defendant argues that the signed report was within the prosecutor's "constructive" possession or control, because he had access to it. She concedes, however, that the state is not required to disclose material it does not possess, *see State v. Armstrong*, 208 Ariz. 345, 356, ¶ 55, 93 P.3d 1061, 1072 (2004), and that a business victim does not become an agent of the state merely by cooperating with the state. *See State v. Piper*, 113 Ariz. 390, 392, 555 P.2d 636, 638 (1976).

¶12 The trial court relied on *State v. Smith*, 123 Ariz. 231, 599 P.2d 187 (1979), but *Smith* is inapplicable here. *Smith* was a *Brady* materials case. *See* 123 Ariz. at 238, 599 P.2d at 194. The defendant in *Smith* argued that the state should have disclosed information about a prosecution witness's felony convictions where the state only had the witness's FBI rap sheet (indicating charges, not disposition of charges), but could have found out about the felony convictions by cooperating with another law enforcement agency. *Id.* In this case, the evidence complained of is inculpatory to the defendant. But even if *Smith* applies, the requirement in *Smith* that the state disclose information **not** in its possession or under its control if the state has better access to the information cannot be met. Defendant signed the report and thus knew about the signed admission long before the state ever did.[3] Nor did defendant make a specific request for the report. Once the state finally learned about the signed admission it promptly disclosed the report to defense counsel. Defendant's argument that "had [she] known that the signed form existed, she would have **considered** accepting the plea offered to her" is implausible given that she signed it. (Emphasis added). Moreover, although defense counsel asserted that the signed report was material, there is no evidence that defendant would have accepted the plea had she known about the report.

[3] Defendant's signature appears twice on the report. She has never argued that she did not sign the report.

¶13 Furthermore, Rule 15.8 did not apply. *See Rivera-Longoria v. Slayton*, 228 Ariz. 156, 159, ¶¶ 14-15, 264 P.3d 866, 869 (2011):

> Rule 15.8 disclosure obligations relate to Rule 15.1(b) evidence that is within the prosecutor's possession or control when the offer lapses.
>
> The state does not face Rule 15.8 sanctions if it declines to reinstate a lapsed offer after obtaining new information subject to disclosure under Rule 15.1(b) and Rule 15.6. Nor must a prosecutor extend an outstanding offer's deadline for another thirty days when, after Rule 15.1(b) disclosures have been timely provided, new information comes within the prosecutor's "possession or control." *Id.* 15.1(b). In that situation, if the prosecutor promptly supplements the prior disclosures before the deadline lapses, the disclosures will be "seasonably" made under Rule 15.6.

Even if Rule 15.8 did apply, the court's order was nevertheless too broad, going far beyond the presumptive Rule 15.8 sanction, in light of the inadvertence of the disclosure.

¶14 Left with a Rule 15.1/Rule 15.7 analysis, we must next consider what the prejudice was to defendant from late disclosure. We review the trial court's imposition of sanctions for untimely disclosure for an abuse of discretion, and will not reverse a disclosure sanction unless the sanction "is legally incorrect or unsupported by the facts." *State ex rel. Thomas v. Newell*, 221 Ariz. 112, 114, ¶ 6, 210 P.3d 1283, 1285 (App. 2009) (citations omitted). "An abuse of discretion occurs where the court's reasons for its actions are 'clearly untenable, legally incorrect, or amount to a denial of justice.'" *Id.* (quoting *State v. Chapple*, 135 Ariz. 281, 297 n. 18, 660 P.2d 1208, 1224 n. 18 (1983)). "In selecting the appropriate sanction [for non-compliance], the trial court should seek to apply sanctions that affect the evidence at trial and the merits of the case as little as possible." *State v. Roque*, 213 Ariz. 193, 210, ¶ 50, 141 P.3d 368, 385 2006). "Before sanctioning the offering party, the court should consider (1) the importance of the evidence to the prosecutor's case, (2) surprise or prejudice to the defendant, (3) prosecutorial bad faith, and (4) other relevant circumstances." *State v. Towery*, 186 Ariz. 168, 186, 920 P.2d 290, 308 (1996) (citation omitted).

¶15 Here, the precluded evidence was critical to the state's case, and there was no prejudice to defendant from the late disclosure. The evidence was disclosed before trial, and trial was continued. Furthermore, the trial court found that there was no bad faith on the prosecutor's part.

CONCLUSION

¶16 We conclude that the trial court erred by precluding the state's evidence of defendant's admissions to both police and store employees as a sanction. We therefore accept jurisdiction of the state's special action petition, reverse the trial court's order, and remand for further proceedings consistent with this decision.