

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-09-1018

Appellee

Trial Court No. CR0200802864

v.

Scott Tristan

DECISION AND JUDGMENT

Appellant

Decided: February 5, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Michael J. Loisel, Assistant Prosecuting Attorney, for appellee.

Robert B. Scott, for appellant.

* * * * *

SINGER, J.

{¶ 1} This is an appeal from a decision of the Lucas County Court of Common Pleas finding appellant, Scott Tristan, guilty of kidnapping, rape, and attempted kidnapping. Upon review, we affirm the decision of the trial court.

{¶ 2} The relevant facts are as follows. On August 15, 2008, appellant was indicted on two counts of kidnapping in violation of R.C. 2905.01, two counts of rape in violation of R.C. 2907.02, and one count of attempted kidnapping in violation of R.C. 2923.02. One of the victims alleged that appellant brandished a black handgun during the attack. Appellant entered not guilty pleas to the charges and the matter was scheduled for a jury trial.

{¶ 3} On September 5, 2008, appellant filed a discovery motion pursuant to Crim.R. 16. On September 29, 2008, appellant filed a "motion for disclosure of exculpatory evidence." Among other things, appellant requested "[a]ny reports, pictures or documents referring to the guns seized from Defendant's home on the day of his arrest."

{¶ 4} On the day of trial, November 17, 2008, appellant's counsel expressed concern with the trial court that the state had failed to turn over any evidence related to the guns seized from appellant's home as requested by motion. Counsel argued that the gun information may prove to be exculpatory evidence in that appellant allegedly threatened one of the victims with a gun and further examination of the gun allegedly used may show that the gun's appearance was of a nonthreatening nature.

{¶ 5} The prosecutor argued that, prior to trial, he had told defense counsel that the gun was in the police property room and he gave defense counsel the name of the detective counsel should contact in order to inspect the gun. However, counsel never made contact with the detective.

{¶ 6} Defense counsel countered that he had no recollection of the prosecutor telling him how to access the gun. He maintained that the gun was not made available to him.

{¶ 7} The court, noting that the gun was in the courtroom, told appellant's counsel that he could take a few minutes to look at the gun before the trial started. The court further stated: "[T]he state has offered you that opportunity some time ago. We're not going to delay trial because you didn't take advantage of that."

{¶ 8} Following testimony, the jury found appellant guilty of kidnapping, rape, and attempted kidnapping. He was sentenced to 12 years in prison. Appellant now appeals setting forth the following assignments of error:

{¶ 9} "I. The state failed to comply with Crim.R. 16(B) when it failed to permit the defense to inspect the gun seized from Appellant's home.

{¶ 10} "II. The trial court abused its discretion when it failed to grant the Appellant's request for a continuance after discovering that the state had failed to provide the appellant an opportunity to inspect the gun seized from appellant's home, because it deprived defense counsel an opportunity to formulate a defense strategy and to investigate and interview witnesses regarding the gun.

{¶ 11} "III. The prejudice caused by the State's failure to make the pellet gun available to the defense until the morning of trial could've been avoided if the trial court granted the continuance request."

{¶ 12} In all three assignments of error, appellant argues that the trial court violated Crim.R. 16(B)(1)(c) when it failed to order the state to provide the gun to appellant for inspection prior to trial. Appellant also argues that the court erred in failing to grant him a continuance for time to inspect the gun. However, the record does not show that appellant asked the trial court for a continuance and the argument is therefore waived.

{¶ 13} An appellate court usually reviews the grant or denial of a discovery request in a criminal case under an abuse of discretion standard. *State v. Hesson* (1996), 110 Ohio App.3d 845, 851. An abuse of discretion constitutes more than an error of law or judgment; rather, it implies that the trial court acted unreasonably, arbitrarily, or unconscionably. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219,

{¶ 14} Crim.R. 16(B)(1)(c) governs what information must be disclosed to the defense prior to trial and states in relevant part:

{¶ 15} "Upon motion of the defendant the court shall order the prosecuting attorney to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, available to or within the possession, custody, or control of the state, and which are material to the preparation of his defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belonging to the defendant."

{¶ 16} As Crim.R. 16(B)(1)(c) indicates, the state must have possession, custody, or control of documents and tangible items before they are subject to disclosure. The

state is not required to provide to a defendant evidence which is not in its possession but which is instead in the possession of a third party. See *State v. Eskridge* (Sept. 10, 1991), 10th Dist. No. 91AP-182. Moreover, the plain language of the rule requires only that the defendant be permitted to "inspect and copy" the evidence.

{¶ 17} In this case, appellant's counsel does not dispute the fact that he could have inspected the gun prior to trial at the police department. He merely claims that if he was told he could view the gun at the police department, he does not remember being so instructed. For his part, the prosecutor maintained that he informed appellant's counsel that the gun was available for inspection. Based on our review of the record in this case, we do not find that the trial court abused its discretion in denying appellant's discovery request. Accord *State v. Thurman* (June 28, 1995), 2d Dist. No.14741; "[C]rim.R. 16(B)(1)(c) does not require the prosecution to physically deliver the documents to defense counsel."

{¶ 18} Appellant's three assignments of error are found not well-taken.

{¶ 19} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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