LEXSEE

STATE OF OHIO, Plaintiff-Appellee v. STEPHEN K. LAMBERT, Defendant-Appellee

C.A. Case No. 13483

COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT, MONTGOMERY COUNTY

1993 Ohio App. LEXIS 1523

March 16, 1993, Rendered

PRIOR HISTORY: [*1] T.C. Case No. 91-CR-3476

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JUDGES: GRADY, BROGAN, WOLFF

OPINION BY: GRADY

OPINION

OPINION

GRADY, P.J.

This is an appeal by the State of a pretrial discovery order that required the State to produce all investigative reports and witness statements obtained in an investigation of alleged environmental violations. By decision and entry rendered July 13, 1992, we determined that the order is a final order for purposes of our review, as it would be impracticable for the State to appeal the trial court's order of disclosure after the case [*2] is concluded.

Defendant Stephen K. Lambert was indicted on March 11, 1992, on sixteen alleged violations of hazardous waste and water pollution control laws. These charges arise from Defendant Lambert's ownership and operation of Kemp Precision Circuits, a plating facility.

Agents of the Ohio Environmental Protection Agency ("Ohio EPA") became aware of possible environmental violations during routine compliance inspections of Defendant Lambert's facility. Agents of the Ohio EPA and of the Ohio Bureau of Criminal Identification & Investigation ("BCI&I") subsequently interviewed employees and other personnel of the facility. None of these interviews produced written statements signed or otherwise adopted by those persons. The agents did, however, prepare their own investigative reports and summaries of the interviews, which are in the State's files.

On April 2, 1992, the State agreed to provide partial disclosure of the documents in its possession by making some documents available for Defendant Lambert's inspection. However, the State failed to provide investigative reports and interview summaries, contending that those items were exempt from discovery.

In a motion filed [*3] April 28, 1992, Defendant Lambert requested the court to order the State to disclose "all reports of the investigations made by the State in connection with this case and all witness statements

obtained by the State in connection with this case." Defendant Lambert's discovery request was made pursuant to Crim.R. 16 and Loc.R. 3.03 of the Court of Common Pleas of Montgomery County.

By entry filed June 2, 1992, the trial court ordered the State to provide the documents requested by Defendant Lambert. The State has filed an interlocutory appeal of the order. Its sole assignment of error states:

> THE PRE-TRIAL DISCOVERY ORDER OF THE TRIAL COURT, REQUIRING THE STATE'S PRODUCTION OF ALL INVESTIGATIVE REPORTS, WITNESS STATEMENTS AND WITNESS SUMMARIES PREPARED BY STATE INSPECTORS WHO ARE NOT POLICE OR LAW ENFORCEMENT OFFICERS, IS IN ERROR BECAUSE IT IS CONTRARY TO CRIMINAL RULES 2 AND 16.

The central element of the State's argument is that Montgomery County Loc. R. 3.03, and the order of the trial court made pursuant to it, is contrary to law. This is also the dispositive issue in the case.

The courts of common pleas have the inherent power to adopt and enforce reasonable [*4] rules concerning the conduct of their business so long as those rules are not in conflict with the general law. *Cassidy v. Glossip* (1967), 12 Ohio St.2d 17, 231 N.E.2d 64. In general, the time, place, form, and mode of doing an act in court is the proper subject of regulation by rules of the court. 20 American Jurisprudence, Courts, Section 84.

The Modern Courts Amendment, adopted in 1968, gives the Supreme Court oversight of all courts in the state, empowers it to prescribe for all courts rules of practice and procedure which override conflicting statutes, and provides it with the tools to make the most efficient use of judicial resources throughout the state.

The powers of the Supreme Court to enact rules is created in Article IV, Section 5(B) of the Ohio Constitution, which provides:

> *The supreme court shall prescribe rules governing practice and procedure in all courts of the state,* which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed [*5] rules may be so filed not later than the first day of May in that session. such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.
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> *Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court.* The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted. (Emphasis supplied).

Pursuant to this power the Supreme Court has promulgated the Civil, Criminal, Appellate, and Juvenile Court rules of procedure and the Rules of Evidence.

Crim. R. 57(A) explains the rule-making power of the Supreme Court and local courts. It provides:

> Rule of Court. The expression "rule of court" as used in these rules means: a rule promulgated by the supreme court; or a rule concerning local practice adopted by another court and [*6] filed with the supreme court, which local rule is not inconsistent with the rule promulgated by the supreme court.

A local rule of court is not "inconsistent with" a rule promulgated by the Supreme Court if the provisions of the local rule are but additional to the Supreme Court rule. *Vorisek v. Village of North Randall* (1980) 64 Ohio St.2d 62, 413 N.E.2d 793. If the local rule contradicts the

rule of the Supreme Court the local rule is inconsistent with it. The two must be in accord or harmony. See, *Repp v. Horton* (1974), 44 Ohio App.2d 63, 335 N.E.2d 722.

Crim. R. 16(B)(1) identifies various types of information which the state must provide, and which the court shall order provided, on the motion of the defendant. In addition to information obtained from the defendant or a co-defendant, the Rule requires:

> (c) *documents and tangible objects.* 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 [*7] 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 belong to the defendant.

The scope of Crim. R. 16(B)(1)(c) arguably could include any information in the state's files relevant to the charges against a defendant. However, the application of the rule is limited by Crim. R. 16(B)(2), a further provision of the same, which states:

> Information not subject to disclosure. Except as provided in subsections (B)(1)(a), (b), (d), (f), and (g), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal documents made by the prosecuting attorney or his agents in connection with the investigation or prosecution of the case, or of statements made by witnesses or prospective witnesses to state agents.

The effect of this provision is to deny a defendant access to such materials to the extent that a right of access upon the motion of the defendant is otherwise conferred by Crim. R. 16.

Defendant Lambert argues that Crim. R. 16(B)(2) operates only to restrict the application of Crim. R. 16(B)(1) and does not limit the inherent power [*8] of the courts to provide discovery. The argument relies on the statement in *State v. Landrum* (1990), 53 Ohio St.3d 107, 559 N.E.2d 710, that "Discovery beyond what the rules require is at the trial court's discretion." *Id.*, at 119. A careful reading of *Landrum*, and of *State ex rel. Lighttiser v. Spahr* (1985), 18 Ohio St.3d 234, 480 N.E.2d 779, on which it relies, indicates that the specific exercises of that power concerned in those cases was, nevertheless, within and based on Crim.R. 16. Therefore, we must conclude that the statement in *Landrum* is not determinative of the issue of law with which we are concerned.

A more specific and controlling statement of the law concerning the restrictive effect of Crim. R. 16(B)(2) was made in *State v. Jenkins* (1984), 15 Ohio St.3d 164, 473 N.E.2d 264. In that case the court was concerned with whether Crim. R. 16(B)(2) creates an exception to the requirements of Crim. R. 16(B)(1)(g), which concern use in cross-examination of written statements prepared by a witness who is a police officer and the writing is a "police report". The court stated:

> Clearly, a signed written statement of a state witness would serve [*9] the purpose of Crim. R. 16(B)(1)(g) and fall within the plain meaning of the word "statement," just as would a recording of the witness' words or a transcription thereof. We see no reason why the mere fact that the document was a report of a police officer would automatically bar its disclosure. When it is doubtful whether any discoverable statement exists, the court, on motion of the defendant, shall conduct a hearing on the issue of disclosure held *in camera* with both attorneys present and participating. *State v. Daniels* (1982), 1 Ohio St.3d 69, 437 N.E.2d 1186. See, also. *Palermo v. United States* (1959), 360 U.S. 343; *Fortenberry v. State* (1975), 55 Ala. App. 1, 312 So.2d 573; *State v. Johnson* (1978), 62 Ohio App.2d 31 [16 O.O.3d 74, 403 N.E.2d 1003].
>
> This is not to say that all portions of a

> police report are discoverable under Crim. R. 16(B)(1)(g). Reading this section *in pari material* with Crim.R. 16(B)(2), it becomes apparent that those portions of a testifying police officer's signed report concerning his observations and recollection of the events are "statements" within the meaning of Crim.R. 16(B)(1)(g). *Those portions which recite* [*10] *matters beyond the witness' personal observations, such as notes regarding another witness' statement or the officer's investigative decision, interpretations and interpolations, are privileged and excluded from discovery under Crim. R. 16(B)(2).* C.F. *State v. Houston* (Iowa 1973), 209 N.W. 2d 42, 46. Hence, once it is determined that a report in which a producible out-of-court statement of the witness being examined exists, the trial court, on motion of the defendant, must afford attorneys for all parties the opportunity to inspect the "statement" portions personally. *State v. Daniels, supra,* at 70-71.

Id., at 225-226. (Emphasis supplied).

Montgomery County Local rule 3.03 concerns proceedings at criminal arraignments and during pre-trial and scheduling conferences of criminal cases. It provides:

> (a) Arraignments will be scheduled at the time of preliminary hearing or as ordered in the indictment. All arraignments will be heard by the same judge, Tuesdays and Thursdays at 8:30 a.m.
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> (b) If the defendant is not represented by counsel, the arraignment shall be continued, and an attorney assigned from a list of eligible counsel or from the County [*11] Public Defender's Office.
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> (c) If at arraignment a guilty plea is entered by defendant:
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> 1. A disposition date shall be set before the judge assigned via Local Rule 1.19, if said plea is to be a felony offense.
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> 2. An immediate disposition shall be made by the Arraignment Judge, if said plea is to be a misdemeanor offense.
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> (d) If at arraignment a not guilty plea is entered by the defendant:
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> 1. The Arraignment Judge will set a date and time for a prosecutor's pretrial, and for a scheduling conference before the Judge assigned via Local rule 1.19.
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> 2. An information packet shall be delivered to defendant's counsel upon execution of a Demand and Receipt for same.
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> 3. The INFORMATION PACKET shall contain:
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> a. *All police reports*
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> b. *All witness statements*
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> c. Any statements of defendant
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> d. All available laboratory reports
>
> e. Names and addresses of all witnesses
>
> 4. The police reports supplied in the information packet shall *not* be used for cross-examination of any witness unless same is properly qualified under Rule 16(b)(1), (g) Ohio Rules of Civil Procedure and Rule 613 Ohio Rules of Evidence.
>
> 5. Execution of a demand and receipt, [*12] and acceptance of the information packet by counsel for defendant automatically obligates defendant to supply reciprocal discovery as provided in Rule 16 Ohio Rules of Criminal Procedure.

> (e) The date for trial, and/or for hearing of any preliminary motions, will be fixed at the scheduling conference or as soon thereafter as the assigned judge may determine.
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> (f) At the scheduling conference before the assigned judge, the defendant *must* indicate whether or not a guilty plea will be tendered. If no guilty plea, the case will be assigned a date for trial and/or motion hearing. The defendant can plead guilty at any time after scheduling conference *but only as charged.* No pleas to reduced charges will thereafter be accepted.
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> (g) At the final pretrial conference or, if there is no scheduled final pretrial conference, no later than seven days before trial, counsel for each party shall deliver to counsel for each other party and to the Court a written list of witnesses. The list need not include possible rebuttal witnesses. Failure to comply with this order may result in the exclusion of the testimony of the witnesses who were not timely identified. (Emphasis [*13] supplied).

The State's argument specifically concerns paragraphs (d)(3)(a) and (b) of the Loc. R. 3.03, which require the state to give the defendant all police reports and witness statements as a part of the standard Information Packet. "Police reports" and "witness statements" are terms of general description, and their form and content will vary from one instance to another. Nevertheless, in most cases they are likely to include the materials privileged and excluded from discovery by Crim. R. 16(B)(2) under the rule of *State v. Jenkins, supra;* written recitations of statements of a witness to events constituting or related to the crime alleged or an officer's investigative decisions, interpretations and interpolations.

A local court may enact rules of practice that are "not inconsistent with" those adopted by the Supreme Court. Therefore, a local rule may not, as we have said, contradict a rule of the Supreme Court. On that basis, a local rule may not require or allow that prohibited by a rule of the Supreme Court or prohibit that required or allowed by a rule of the Supreme Court. Loc. R. 3.03(d)(a) and (b), to the extent that they require the production of materials [*14] privileged and excluded from discovery by Crim. R. 16(B)(2), contradict and are "inconsistent with" Crim. R. 16(B)(2), a rule of the Supreme Court. Therefore, those terms of the local rule are invalid and unenforceable and the trial court may not order compliance with them.

The trial court's order of June 2, 1992, required the State of Ohio to disclose to Defendant Lambert "all investigative reports and witness statements obtained by Plaintiff in its investigation of the charges made against Defendant in the Indictment herein", as required by Loc. R. 3.03(d)(3). For the reasons discussed above, that order was contrary to law and must be reversed and vacated by this court.

In *State v. Chinn* (December 27, 1991), Montgomery App. No. 11835, unreported, we wrote that "Loc. R. 3.03(d) is an expansion of Crim. R. 16, not a contradiction of it, and is thus fully enforceable." *Id.*, at 61. Our holding in this case is to the contrary. Therefore, our statement in *Chinn* was erroneous and our holding today is a correct statement of the law that supersedes our statement in *Chinn.* It does not disturb our holding in *Chinn,* however; that case involved the state's refusal to provide [*15] copies of police reports and witness statements pursuant to Loc. R. 3.03(d), which we found to be harmless error because the defendant had them from other sources.

The trial court, when it ordered discovery, observed that Montgomery Loc. R. 3.03(d)(3) had been in effect for fifteen years and has given the Montgomery County Court of Common Pleas a "national reputation for fairness and efficiency in the handling of the criminal docket." We agree with that observation. The benefits of the local rule have even prompted its adoption by other courts. (See, Clark Loc. R. 5(B), effective August 10, 1992.) However, our decision is compelled by the terms of the Ohio Constitution, which governs the exercise of the judicial power by the courts of this state.

Our holding in this case is limited to those provisions of Montgomery Loc. R. 3.03(d) that require the state to disclose police reports and witness statements. The remaining portions of the local rule, which pertain to the time, place, form, and mode of doing an act in court, are unaffected by our holding. Further, our holding does not

prohibit continued, voluntary compliance by prosecutors with the practice of providing police reports [*16] and witness statements in individual cases or as a general policy. We encourage that compliance, believing that it would continue to benefit the state, the accused, and the trial courts. We also encourage the Supreme Court to consider whether the prohibitions of Crim. R. 16(B)(2) may be made optional to a local rule of court.

The trial court's order requiring the State to produce and/or disclose investigative reports and witness statements will be reversed. The case will be remanded for further proceedings.

. . . .

BROGAN, J. and WOLFF, J., concur.