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**STATE OF OHIO Plaintiff-Appellee v. ANTHONY DAVIS Defendant-Appellant****No. 9472****Court of Appeals of Ohio, Second Appellate District, Montgomery County****1986 Ohio App. LEXIS 7970****August 25, 1986, Decided**

**DISPOSITION:** [\*1] The judgment will be reversed, the sentence imposed vacated and the case remanded for further proceedings.

**JUDGES:** KERNS, J., concurs, BROGAN, P.J. concurs.

**OPINION BY:** McBRIDE

**OPINION**

McBRIDE, J., (By Assignment)

While there may be constitutional implications in this criminal case the issue is whether the trial court properly refused to permit a defense witness, Tia Jefferson, to testify for the reason that the defendant did not disclose before trial that she would be called as a witness for the accused. The appellee relies upon Criminal Rule 16 and local rules of court.

The narrow limits of the appeal dispenses with a review of the testimony relating to the offense and requires a search of the record on issue of the absence of pretrial disclosure by the appellant.

On May 9, 1985, an indictment was filed charging appellant with one count of receiving stolen property, a felony of the third degree due to prior convictions for theft offenses. Appellant entered a not guilty plea and trial was set for June 24, 1985. The case was tried to a jury on July 9, 1985, and a verdict of guilty was returned. Appellant was sentenced to a term of incarceration of 2 years to be served at the Ohio State Reformatory.

[\*2] The witness rejected by the court was expected to contradict a state witness and to provide a different

source for stolen money orders.

The transcript of the docket entries and of the testimony point to the fact that there is no evidence that either the state or the defendant made any request or filed any motion or otherwise brought any question of discovery or request for discovery of evidence to the attention of the trial court until sometime during the morning of the one day jury trial. The record is void of any request or motion for discovery or other disclosure by *either* party. If such facts existed, they are not demonstrated in the proceedings at trial.

The record fails to provide any fact as to how a duty arose for the defendant to disclose his witnesses before trial. It equally fails to suggest what rule the defense violated or the court enforced in not permitting defendant's witness to testify.

The right of discovery allowed to the state in Criminal Rule 16 is restricted in subsections (C)(1), (a), (b) and (c). Specifically, subsection (C)(1)(c) provides:

*If on request or motion* the defendant obtains discovery under subsection (B)(1)(e), the court shall, [\*3] *upon motion of the prosecuting attorney*, order the defendant to furnish the prosecuting attorney a list of the names and addresses of the witnesses he intends to call at the trial. (Emphasis added)

Disclosure by the defendant of the identity of witnesses is subject to express conditions: (1) The defense must first request and obtain discovery of the prosecution's witnesses under subsection (B)(1)(e), and (2) *if, and only if* the defense makes such request, then a *motion* for discovery of the defense witnesses must be made by the prosecuting attorney. The record fails to

indicate that the defense made any request for disclosure and it fails to report any motion for discovery by the prosecution. In view of the failure to establish both conditions, we find that the defendant did not violate Criminal Rule 16.

Neither party identifies or refers to any local rule requiring the defendant to disclose a list of witnesses, and there is no possible local rule that could require such disclosure contrary to the general rules for criminal procedure.

The parties do refer to what is identified as a "Court Management Plan." A copy of this "plan" is attached to the brief of the appellant. [\*4] It carries a caption: "Court Management Plan/Criminal Case Processing Procedure/Common Pleas Court/Montgomery County, Ohio." Neither party represents that such plan for processing criminal cases is a rule adopted by the local court.

This "plan" is basically one for movement in processing cases; however, as to discovery -- as applicable to this case -- it recites that "Prosecutor, Montgomery County, *in addition to normal duties, delivers information packet* to defense attorney containing xxx(5) List of witnesses names." (Emphasis added).

Under such attempted addition to the normal, and we assume lawful, duties of the prosecutor, the plan continues in paragraph (B) that the prosecutor "has defense attorney sign an information packet receipt in which defense counsel agrees to comply with discovery demands of the prosecutor pursuant to Rule 16(C). A form for such receipt is attached to the draft of the Court Management Plan.

We note that the record in this case contains no reference to such management "plan," no indication that the prosecutor furnished an "information packet" and no receipt by the defense of an information packet -- whatever its effect.

The management "plan" continues [\*5] as to duties of defense counsel in addition to his normal, and we assume lawful, duties. This again recites that acceptance of the information packet from the prosecutor by defense counsel obligates defendant to comply with Rule 16(C) to provide discovery to the prosecutor. This imposes no additional duties upon a defendant.

Passing for the moment that we have already found that there is nothing in the record to support a violation by the defense of Criminal Rule 16(C), the appellee argues that each discovery package includes a written request by the prosecutor for discovery. This court has no way of knowing what was in the prosecutor's discovery packet. And even if such request were made, a request by the prosecutor for discovery is not allowed by the rules in the absence of an initial request or motion by the defendant. A local practice of voluntary discovery by the prosecutor under the management "plan" does not trigger a right to discovery by the prosecutor. Crim. R. 16(C)(1)(c).

In its entirety the "Court Management Plan" is a guide for the prompt movement of cases and not in any sense a modification of the Criminal Rules or the imposition of duties not otherwise required by [\*6] law. The information packet described in the plan is not required by any local rule called to the attention of this court. The "plan" is a narration of events for the movement of cases. It recites that the prosecutor "delivers" and, that defense counsel "receive(s)" such packet. There is no language of compulsion or imposition of duties upon either counsel "in addition to normal duties."

Criminal Rule 16 carefully limits the right of the prosecution to discovery. Such rule may not be avoided, directly or indirectly, by local rules or practices. More specifically, a local rule or practice imposing, directly or indirectly, upon the defendant a duty to provide discovery in the absence of a defendant's request or motion and defendant's receipt of discovery from the prosecution is contrary to Criminal Rule 16(C)(1)(c).

From the record it is undisputed that the defendant did not disclose the name of the witness, Tia Jefferson, until lunch time of the one day trial. We find that defendant was not required to do so.

While discovery may be informal upon request or formal upon motion duly filed, a party seeking to enforce sanctions must provide a record establishing the right to such relief.

[\*7] The duty of continuing disclosure arises only to discovery of additional matter after compliance with a request or order. In the absence of a proper request or order, the continuing duty does not exist. Crim. R. (D).

We find that the denial of the right of the defendant to present his witness because of a failure to disclose such persons existence or identity was contrary to law and prejudicial to the defendant. While this finding may involve a constitutional violation, it is not necessary in this case to proceed to that question.

The assignment of error is sustained.

**CONCUR BY: KERNS, BROGAN**

**CONCUR**

KERNS, J., concurs.

BROGAN, P.J. concurring:

I would reverse the judgment of the trial court and order a new trial because I believe the trial court abused its discretion in denying the accused his right to present the witness, Tia Jefferson, in his defense. Counsel for the defendant represented to the court that he was unaware of the existence of the witness until the morning of the trial. The defendant also stated he was unaware of the witness. Counsel proffered that the witness would testify that the state's witness, Jackie Davidson, purchased the money orders from someone other than [\*8] the defendant. This testimony directly contradicted the testimony of the State's immunized witness.

Available to the court were other avenues to protect the interests of a fair trial. The defense could have been required to proceed with other Witnesses available to testify. (e.g. the accused, since he had elected to testify), and to permit the State to interview the witness prior to her taking the witness stand. Since the trial was brief, even a short continuance Would have caused little inconvenience to anyone.

The Court Management Plan implemented in Local Rule 3.03 works principally to the advantage of the defense. Under the local rule, the State is obligated to provide the defendant copies of all police reports as well as witness statements. These requirements exceed the mandates of the Criminal Rules and if challenged by the State in a prohibition or contempt action stand little chance of survival. Local rules may be passed to implement the Criminal Rules of Procedure but they may *not* conflict with the Criminal. Rules. The Court Management Plan has been in existence for some time, and has apparently worked well.

Nonetheless, appellant contends that since he did not request [\*9] or move for discovery, he bore no obligation under Criminal Rule 16 to provide a list of his witnesses to the prosecution. He is correct. *See*, Crim. R. 16(C)(1)(c). The record fails to disclose any request, or motion by the defendant for discovery. The record also fails to disclose the prosecutor provided discovery, although it can be fairly inferred the prosecutor complied with the well entrenched Court Management Plan.

It is profoundly hoped that the State Will continue to carry out the provisions of the Court Management Plan by providing liberal discovery in the continuing task of fair and efficient justice. The days of trial by ambush by either side are long gone. This decision should not rekindle those memories or give solace to those who desire its return.

(Judge Robert L. McBride, Retired from the Court of Appeals, Second Appellate District, Sitting by Assignment of the Chief Justice of the Supreme Court of Ohio).