[Cite as *State v. Sumpter*, 2011-Ohio-486.]

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

State of Ohio — Court of Appeals No. F-10-017

Appellee — Trial Court No. 09CR178

v.

Walter B. Sumpter — **DECISION AND JUDGMENT**

Appellant — Decided: February 4, 2011

* * * * *

Scott A. Haselman, Fulton County Prosecuting Attorney, for appellee.

Jordan J. Grant, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from the June 17, 2010 judgment of the Fulton County Court of Common Pleas, which sentenced appellant, Walter B. Sumpter, after he was convicted by a jury of violating R.C. 2925.11(A) and R.C. 2923.03, complicity to commit possession of marijuana; R.C. 2925.03(A)(2) and R.C. 2923.03, complicity to commit

trafficking in marijuana; and R.C. 2923.24(A) and R.C. 2923.03, complicity to commit possessing criminal tools. Upon consideration of the assignments of error, we affirm the decision of the lower court. Appellant asserts the following single assignment of error on appeal:

{¶ 2} "THE STATE'S FAILURE TO HAND OVER STATEMENTS MADE BY THE DEFENDANT TO THE OHIO HIGHWAY PATROL, AS REQUIRED BY OHIO RULE OF CRIMINAL PROCEDURE 16, AND THE COURT'S DECLINING THE MISTRIAL AMOUNTED TO REVERSABLE ERROR."

{¶ 3} The following evidence was admitted during the first day of trial. Trooper Stroud testified that at 12:45 a.m. on November 1, 2009, he stopped a car driven by Edward Martin, for speeding. As the trooper approached the car, he could see that the front passenger windows were down and he could smell burnt marijuana coming from the interior of the car. He believed that the smell was strong enough to indicate that the marijuana had been recently smoked. Martin had a Kansas driver's license and the car was a rental. Martin's demeanor was very laid back and calm, which the trooper testified is typical behavior of someone high on marijuana. Martin was also very cooperative.

{¶ 4} Trooper St. Clair was called in as a backup because the car would be subject to a search. After St. Clair arrived, the troopers approached the car and asked appellant, who was sitting in the front passenger seat, to exit the vehicle. Appellant was acting very nervous and talkative, which Trooper Stroud testified is not a common

behavior of someone high on marijuana. When asked who he was riding with, appellant responded "Edward Bill Martin." Trooper Stroud thought this was a very unusual way to respond, especially in light of the fact that Martin produced two different licenses with two different middle names. When asked about their travel plans, appellant gave an account which conflicted with Martin's statement. When appellant was told that the trooper thought the vehicle "reeks like weed," appellant repeated the statement and directed the troopers to talk to Martin. When the trooper determined that he would place both men under arrest, he went to the car in which appellant had been placed and told him that he was under arrest for possession of marijuana and his response was something like, "There's marijuana?"

{¶ 5} Upon a search of the vehicle, the troopers found a marijuana cigarette inside the passenger side door, a small baggie of marijuana in the glove compartment, a loaded, semi-automatic gun under the passenger seat (which was registered to someone in Cleveland who alleged that the gun had been stolen a few years earlier but he had never reported it missing), and four vacuum-sealed packages of marijuana and one Ziploc bag of marijuana in an orange bucket inside of a duffle bag in the trunk. Martin was carrying $1,900 in cash and appellant had less than $200 in cash. The trooper testified that large amounts of cash are sometimes found with large shipments of drugs and that is not unusual for drug traffickers to have multiple alias or identifications.

{¶ 6} The two men were arrested and transported back to the patrol post where they were held while the officers completed paperwork. Appellant was seated in a room where officers were working and Martin was placed in a separate room. Appellant would have been able to overhear the officer who weighed the marijuana state that the amount was roughly nine pounds. While the officers were discussing the charges and mentioned the word "felony," appellant spoke up and said, "That's not a felony. Ten pounds would be a felony." Trooper Stroud believed that appellant also made mention of the State of California and that this was what the law was there. Appellant seemed very agitated and nervous that night and had been jumping into conversations between the troopers with comments. Trooper Stroud also recalled that when the gun was brought in and placed on the table, appellant became more agitated and stated, "What's that I don't--I don't know what that is."

{¶ 7} Trooper St. Clair testified that he was called to the scene and searched the driver's side of the car first because Martin had admitted to Trooper Stroud that he had been smoking marijuana earlier and that there was a burnt cigarette somewhere in the car. But, the burnt marijuana was found in a compartment on the passenger-side door. Trooper St. Clair also recalled appellant speaking up when the troopers were discussing the charges and stating something like, "That's only a misdemeanor amount of drugs. Nine pounds shouldn't be a felony." Appellant also said something about, "It's only possession of drugs, that's not trafficking amount of drugs."[sic]

{¶ 8} At the beginning of the next day of trial, appellant moved for a mistrial alleging the prosecution committed a discovery violation pursuant to Crim.R. 16(B)(1)(a)(ii) when it elicited a statement from the troopers about oral statements appellant made at the patrol post on the night of his arrest that had not been provided to defense counsel. The police report that had been provided to the defense did not include this statement. The court, believing that the statement was innocuous and not exculpatory, denied the motion for a mistrial. Appellant was subsequently sentenced and he sought an appeal from this judgment.

{¶ 9} In his sole assignment of error, appellant argues that his statement was the only evidence in the case to establish that he acted knowingly. Had he known that this statement would be used against him, appellant contends that he could have taken the stand to explain it or he would have been prepared to cross-examine the trooper. He argues that the state used the evidence on four different occasions to discredit the defense theory that appellant was not aware of the drugs. He further argues that the impact of the statement is apparent when one considers that the jury did not convict him on the weapon charge (complicity to improper handling of a fire arm) because he did not make any statement related to the weapon, but did make statements regarding marijuana.

{¶ 10} Appellant made a timely motion for discovery pursuant to Crim.R. 16. Crim.R. 16(A)(1)(a)(ii) requires that any "[w]ritten summaries of any oral statement, or copies thereof, made by the defendant * * * to * * * any law enforcement officer" shall

be disclosed. It is not the state's role to determine whether the statement is material to the case or not. *State v. Moore* (1988), 40 Ohio St.3d 63, 68. Furthermore, knowledge on the part of a law enforcement officer is imputed to the prosecution. *State v. Wiles* (1991), 59 Ohio St.3d 71, 78, certiorari denied (1992), 506 U.S. 832. Strong enforcement of the rule is required because the purpose of the rule is to remove the element of gamesmanship from the trial. *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St.3d 420, 435-436, and *State v. Parker* (1990), 53 Ohio St.3d 82, 86.

{¶ 11} The trial court must determine the circumstances surrounding the discovery violation in order to determine an appropriate sanction. *State v. Wharton*, 4th Dist. No. 09CA3132, 2010-Ohio-4775, ¶ 21 (citations omitted). Ultimately, the trial court has the discretion to determine the appropriate sanction pursuant to Crim.R. 16(E)(3). *State v. Parson* (1983), 6 Ohio St.3d 442, 445. Relevant considerations for the court include whether: (1) "the prosecution's failure to disclose was a willful violation of Crim.R. 16," (2) "foreknowledge of the statement would have benefited the accused in the preparation of his defense," or whether (3) "the accused was prejudiced by admission of the statement." Id. at syllabus. While the trial court has discretion power to grant or deny a motion for a mistrial, it should not order a mistrial unless the substantial rights of the defendant are adversely affected. *Wharton*, supra, at ¶ 25 (citations omitted). An "'abuse of discretion' * * * implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 12} In this case, the prosecution did not explain why it failed to comply with the discovery rule. It was asserted that the prosecution did not learn of the statement until speaking with the trooper the morning of trial. However, no explanation was given as to why the prosecution immediately incorporated it into its opening statement and yet did not immediately disclose the statement to the defense. In light of the rule that the discovery rules are to be strictly enforced, we must presume that the failure to disclose the statement was willful.

{¶ 13} Furthermore, the failure of the defense to have prior knowledge of the statement clearly could have affected its preparation for trial since it centered its defense on appellant's lack of knowledge about what was happening. Failure to timely disclose the statement prevented appellant from having the opportunity to reconsider his trial strategy or prepare for cross-examination.

{¶ 14} However, we agree with the trial court that admission of the statement into evidence was not prejudicial to appellant. The statement is unrelated to appellant's guilt or innocence and only indicates that appellant has knowledge of the drug offenses in California. There was other circumstantial evidence presented to convince a jury that appellant was a part of the trafficking activities and not merely an innocent passenger. Therefore, we find that the trial court did not abuse its discretion by denying the motion for a mistrial. Appellant's sole assignment of error is not well-taken.

{¶ 15} Having found that the trial court did not commit error prejudicial to appellant and that substantial justice has been done, the judgment of the Fulton County Court of Common Pleas is affirmed. Appellant is hereby 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.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE