

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

STATE OF OHIO)	CASE NO. CR 12 566544 C
)	
Plaintiff,)	JUDGE JOHN P. O'DONNELL
)	
vs.)	
)	
DAVID L. HUMPHRIES)	<u>JOURNAL ENTRY</u>
)	
Defendant.)	

John P. O'Donnell, J.:

STATEMENT OF THE CASE

David Humphries and four co-defendants were indicted on September 7, 2012. There are 14 counts in the indictment. Humphries is charged in nine of them: three counts of kidnapping (counts 1, 3 and 5), three counts of aggravated robbery (2, 4 and 6), two counts of felonious assault (7 and 8), and a single count of having a weapon while under disability (12).

Trial is scheduled for February 27, 2013. On January 30, the defendant filed a motion to order the creation and production of written transcripts of recorded witness statements. The plaintiff has not opposed the motion and this entry follows.

STATEMENT OF THE FACTS

The charged crimes were allegedly committed on September 1, 2012. The state claims that Humphries and his four co-defendants robbed Terrance Wilson, Ashanti Eads and Steve Harris at gunpoint. Three co-defendants have resolved their cases and only the charges against Humphries and co-defendant Celena Glover remain pending. Defendant Samuel Trawick has pled guilty and been sentenced. His plea bargain was not contingent on any agreement to testify for the prosecution. Defendant Toni Walcott has pled guilty and is awaiting sentencing,

but her plea bargain includes an agreement to testify for the state at Humphries's trial. The indictment against defendant Donte Graves has been dismissed, apparently in exchange for his agreement to testify against Humphries. Finally, the court has been orally informed by the prosecutor and counsel for the remaining co-defendant, Glover, that the charges against her are likely to be dismissed if she testifies against Humphries.

As part of the co-defendants' plea negotiations with the state, they have proffered to law enforcement their oral accounts of what happened on September 1. These statements have been recorded by audio equipment, some with a video component too. However, they have not been reduced to writing.

Humphries's motion is in the alternative. First, he asks the court to order the prosecutor to create, then produce to him, written transcripts of each witness statement. Failing that, the defendant requests that the court prepare transcripts of the statements at its expense and then provide them to the defendant.

LAW AND ANALYSIS

As an initial matter, the defendant asks that "the State"¹ produce the transcripts. In so doing he does not distinguish between the State of Ohio as the plaintiff in this lawsuit (represented by the Cuyahoga County Prosecutor) and the judicial branch of government. While the difference might not matter from the defendant's perspective, or even to the taxpayers, it must be taken into account in deciding the motion because the plaintiff and the court are not bound by the same imperatives. The principal duty of a prosecutor is to see that justice is done in each case. *Disciplinary Counsel v. Phillips*, 108 Ohio St. 3d 331, 333 (2006). Although the prosecutor must seek justice – even if a just result means a disposition in the defendant's favor – he is not required to actively assist the defendant in the preparation of trial

¹ Defendant's motion to order, etc., page 1.

materials for use in defense of the case because, after all, a prosecutor is the defendant's opponent in adversarial litigation. Meanwhile, the trial court's paramount duty is to ensure that Humphries is afforded a fair trial. *State v. Speer*, 124 Ohio St. 3d 564, 570 (2010).

As for the state in the form of opposing counsel being made to provide transcripts, Humphries argues that because the prosecutor will be calling the witnesses at trial "it is therefore incumbent on the State to produce a transcript of these statements and provide it to the defense for purposes of cross-examination."² Unfortunately, the defendant has not provided any statutory, rule or decisional authority for that proposition.

Rule 16 of the Ohio Rules of Criminal Procedure sets the boundaries for pre-trial discovery and disclosure of evidence. Rules 16(B)(1) and (7) require the prosecuting attorney to produce to Humphries any "written or recorded statement" of co-defendants and trial witnesses. In this case, that has been accomplished since Humphries admits to having the recorded statements. But the defendant wants the prosecutor to produce written transcripts of the electronically recorded statements. Yet Criminal Rule 16(B) only requires the production of statements "within the possession of" the prosecutor. There is no evidence here that written transcripts of the recorded statements are within the prosecutor's possession.

Criminal Rule 16(B) also says the prosecutor must produce evidence and statements "reasonably available" to him. But that provision exists to prevent the prosecutor from choosing not to obtain evidence just to keep from having to turn it over to the defendant. The requirement to produce "reasonably available" discoverable materials cannot be extended to impose on the prosecutor an affirmative duty to create versions of statements in a medium preferable to the defendant.

² Motion, p. 1.

As for provision to an indigent defendant by the court of transcripts of witness statements, the United States Supreme Court has held that the state must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense. *Britt v. North Carolina*, 404 U.S. 226, 227 (1971). In determining whether the transcript is needed for an effective defense a court must consider two factors: the value of the transcripts to the defendant in connection with the trial for which it is sought and the availability of alternative devices that would fulfill the same functions as a transcript. *Id.*

While *Britt* involved the defendant's request for a transcript of testimony of a first trial for use in the defense of a second trial after a mistrial, the value of the transcripts to the defendant in *Britt* and *Humphries* is analogous: they are useful to impeach trial witnesses with prior inconsistent statements. The United States Supreme Court has consistently recognized the value to a defendant of a transcript of prior proceedings, without requiring a showing of need tailored to the facts of the particular case. *Id.*, 228. *Humphries* meets the first factor *Britt* requires a trial court to consider.

However, *Humphries* cannot demonstrate a need for the transcripts because he is unable to satisfy the second factor. He has not shown that he lacks an alternative means to cross-examine witnesses about prior inconsistent statements. Indeed, *Humphries* concedes that the means are available in the form of the audiotaped and videotaped statements. Nevertheless, he argues, in essence, that it is too cumbersome to use the recorded statements during cross-examination at trial. The court disagrees.

Although the exact means by which the statements have been recorded is not in evidence, ordinarily they are on video or audio-only discs that can be played in the courtroom on a laptop computer. In the court's experience, the computer program that plays the statement

also has a timer, which allows counsel to pinpoint exactly where in the recording a critical statement was made, and a control that allows counsel to go directly to a desired time on the disc with a click and slide of a mouse. That process should be no more time-consuming and awkward than shuffling through a written transcript for a page and line number and has the extra benefit of allowing the jury to hear the contradictory statement in a witness's own voice. Additionally, because Walcott, Glover and Graves have the incentive of keeping their non-prosecution agreements with the state intact to motivate them to testify at trial consistently with their recorded statements, the probability of consequential inconsistent statements is low and a fair trial is not imperiled by denial of the requested transcripts.

CONCLUSION

Because Humphries has an adequate alternative means to written transcripts for cross-examining the plaintiff's trial witnesses about prior inconsistent statements – namely, the witnesses recorded statements – the defendant's January 30, 2013 motion for the production of transcripts of witness statements at the state's expense is denied.

IT IS SO ORDERED:

Judge John P. O'Donnell

Date: _____

SERVICE

A copy of this journal entry was sent by email, this 19th day of February 2013, to the following:

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Judge John P. O'Donnell