

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

THE STATE OF OHIO)	CASE NO. CR 18 635599 A
)	
Plaintiff,)	JUDGE JOHN P. O'DONNELL
)	
vs.)	<u>JUDGMENT ENTRY OVERRULING</u>
)	<u>THE DEFENDANT'S OBJECTION</u>
BRANDON ADKINS)	<u>TO THE STATE'S NON-</u>
)	<u>DISCLOSURE OF DISCOVERABLE</u>
Defendant.)	<u>MATERIAL</u>

Brandon Adkins is charged in 33 of the 49 counts in the indictment in this case. He is accused of committing five aggravated robberies, two burglaries and a breaking and entering over the course of a week in late November 2018. Most of the other charges – receiving stolen property, theft, improperly handling firearms in a motor vehicle and having a weapon under disability – appear related to those eight core offenses. His primary co-conspirator is co-defendant Charles Trowbridge.

Adkins was arrested on November 18, 2018. He was originally indicted in case number 635061 on December 6, 2018. That indictment was superseded on March 19, 2019, by the indictment in this case. On March 26, 2019, Adkins, through counsel, requested discovery from the prosecutor pursuant to Rule 16(B) of the Ohio Rules of Criminal Procedure. The State of Ohio responded to the discovery request by producing a bill of particulars and a long list of prospective trial witnesses consisting mostly of the complainants named in the various counts of the indictment and agents of law enforcement.

But the plaintiff also produced, on April 8, 2019, a notice of certification of nondisclosure. The notice informs Adkins that the prosecutor is not disclosing the names, addresses and statements of certain witnesses on the grounds that disclosure of the information would threaten the safety of a witness or subject the witness to intimidation. The notice of nondisclosure was made pursuant to Criminal Rule 16(D), which permits the prosecutor to exempt otherwise discoverable material from pretrial disclosure where there are reasonable grounds to believe that disclosure would subject a person to harm or intimidation.

On April 10 Adkins filed the motion under consideration here: a Criminal Rule 16(F) motion for a review of the prosecutor's decision not to disclose discoverable information. A hearing on the motion was held on June 10 and this judgment follows.

Pretrial discovery in criminal lawsuits

The Fourteenth Amendment to the United States Constitution provides that no state shall deprive any person of liberty without the due process of law. The United States Supreme Court, in *Brady v. Maryland*, 373 U.S. 83 (1963), held that the due process clause requires a prosecutor to disclose to a criminal defendant evidence that is favorable to the accused and material to either guilt or punishment. But there is no general constitutional right to discovery in a criminal case, and *Brady* did not create one. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). Even still, most participants in, and observers of, the criminal justice system would hardly debate the proposition that the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial. *Wardius v. Oregon*, 412 U.S. 470, 473 (1973). Accordingly, federal and state courts have created rules of procedure to provide for and regulate pretrial criminal discovery.

In Ohio, discovery is codified at Criminal Rule 16. The stated intent of the rule is “to provide all parties in a criminal case with the information necessary for a full and fair adjudication of the facts.” Criminal Rule 16(A). But another goal is “to protect the well-being of witnesses, victims and society at large.” *Id.* Thus, the rule begins with the explicit purpose of balancing a defendant’s need for information with the safety of witnesses. The rule goes on to obligate the prosecutor to provide the defendant with any “written or recorded statement by a witness in the state’s case-in-chief.” Criminal Rule 16(B)(7). The prosecution must also produce a copy of the criminal record of any of its witnesses. Criminal Rule 16(B)(2).

But Criminal Rule 16(D) gives the prosecution discretion not to disclose certain materials otherwise owed to a defendant in discovery. In particular, the rule says:

(D) Prosecuting Attorney’s Certification of Nondisclosure. If the prosecuting attorney does not disclose materials or portions of materials under this rule, the prosecuting attorney shall certify to the court that the prosecuting attorney is not disclosing material or portions of material otherwise subject to disclosure under this rule for one or more of the following reasons:

(1) The prosecuting attorney has reasonable, articulable grounds to believe that disclosure will compromise the safety of a witness, victim, or third party, or subject them to intimidation or coercion; . . .

Reasonable, articulable grounds may include . . . the nature of the case, the specific course of conduct of one or more parties, threats or prior instances of witness tampering or intimidation . . . and any other relevant information.

The prosecuting attorney’s certification shall identify the nondisclosed material.

In this case, the prosecutor certified that he is not disclosing material identified as “names, addresses and . . . statements that would lead to the disclosure of the” identifications of the state's witnesses.¹ According to the notice, the prosecutor refuses to disclose this information on the basis that he has reasonable, articulable grounds to believe that the safety of a witness, victim or third party will be compromised by the disclosure or that such a person will become subject to intimidation or coercion.

Adkins’s challenge to the prosecutor’s certification of nondisclosure comes under the authority of Criminal Rule 16(F). That section provides that “[u]pon motion of the defendant, the trial court shall review the prosecuting attorney’s decision of nondisclosure . . . for abuse of discretion.” The rule goes on to allow the court to either order immediate disclosure of the information to the defendant where an abuse of discretion is found or, where there is no prosecutorial abuse of discretion, keep the information from the defendant, but only until the start of trial.

The question thus presented by the defendant’s motion is whether the prosecutor abused his discretion by not disclosing the discovery materials covered by the notice of nondisclosure.

The hearing evidence

1. Materials not disclosed.

At the court’s request, the prosecution provided at the hearing, *in camera*, the materials it has declined to disclose to Adkins in discovery. The items not disclosed include several written police summaries of oral interviews with two prospective trial witnesses and the police video recordings of several interviews with the same two witnesses.

2. Grounds for nondisclosure.

¹ Prosecutor’s certification of nondisclosure, filed April 12, 2019.

Two Cleveland police detectives testified at the hearing. Shane Bauhof is a detective in the Fourth District's major crimes bureau. The Fourth District is in the southwest portion of Cleveland and covers much of the neighborhood known as Slavic Village. Bauhof testified that in late 2018 he was investigating the shooting of Shania Brooks, now charged against Charles Trowbridge in counts 39 and 40 of the indictment. As part of that investigation Bauhof acquired Adkins's cell phone and then obtained a warrant for the phone's contents.

A search of the phone uncovered, among other things: a picture of Adkins and Trowbridge using hand signals and bearing the caption "Me & bro match up gang"; a picture of Gregory Adkins, the younger brother of Brandon Adkins, holding a handgun; a picture of Brandon Adkins displaying a handgun; a picture of Brandon Adkins and Trowbridge with a rifle and its magazine loaded with "cop killer" ammunition; and a picture of a black semiautomatic handgun, possibly the same one Brandon Adkins is showing in the earlier photo.

The phone also contained a video of Gregory Adkins brandishing and fetishizing a black semiautomatic handgun as he raps lyrics about "why you all gotta snitch on my n**** Brandon." A second video shows Brandon Adkins using his hand to mime pointing and shooting a handgun at the camera while Gregory Adkins does the same with an actual handgun.

Bauhof testified that Adkins – who turned 18 at the end of October, less than a month before the crimes in this indictment were allegedly committed – has an "extensive" juvenile history of violent crimes and that witnesses in the Slavic Village neighborhood are scared of being hurt by Adkins and his family. At least one witness told Bauhof that Adkins put a gun to the witness's head.

Detective Daniel Lentz is a Cleveland homicide detective who was working last year as a detective in the city's First District, covering the westernmost area of the city. He was

investigating the aggravated robbery and related crimes against Tiffany Mauser in the West Park neighborhood that are charged in counts 31 through 35 of the indictment. Lentz testified that Adkins can be seen in one of the videos “throwing” hand signs of three different gangs: the Heartless Felons, Madison and BB 900. He is also aware of Gregory Adkins threatening to kill a witness. He noted that a car likely stolen by Adkins in Lakewood was ultimately recovered near West 25 and Barber at a makeshift shrine to a dead gang leader known as “Tito’s pole.”

Trowbridge was arrested by Lentz. During that arrest, Trowbridge pointed a gun at Lentz and said he wanted to die as a “suicide by cop.” Lentz asserts that the defendant and his associates, both in and out of jail, are “a very dangerous group.” He claims that a “wave of carnage” by Adkins, Trowbridge and others has “devastated” neighborhoods of Cleveland.

The *in camera* evidence will not be detailed here; suffice to say it is consistent with the other evidence.

Abuse of discretion

An abuse of discretion implies not just an error in judgment but “perversity of will, passion, or moral delinquency – that there was an unreasonable, arbitrary, or unconscionable attitude on the part of the” decisionmaker. *Martin v. Martin*, 11th Dist. Geauga No. 1263, 1986 Ohio App. LEXIS 7991 (Aug. 22, 1986).

Criminal Rule 16(D) permits the prosecutor to refrain from producing otherwise discoverable material where the prosecutor has reasonable, articulable grounds to believe that disclosure will place somebody in danger. The rule does not obligate the prosecutor to prove that a witness has been threatened or intimidated. Nor does the rule require the prosecutor to show that a named defendant is likely to threaten or harm a witness. It only necessitates that the prosecuting authority have “reasonable, articulable grounds” supporting the nondisclosure. If so,

then the prosecuting authority has not abused its discretion and a trial court must uphold the decision not to disclose.

Here, after considering all of the evidence, it cannot be said that the prosecutor's decision to withhold from discovery the information at issue is unreasonable, arbitrary, capricious or unconscionable. This is true not only in light of the evidence produced at the hearing, but also considering that the prosecutor has disclosed the names of several dozen prospective lay and law enforcement witnesses as well as many items of tangible evidence.² It also bears mentioning that the evidence not disclosed, while neither irrelevant nor unimportant, does not appear to be the *sine qua non* for a conviction or acquittal in this case. I therefore find that the prosecutor did not abuse his discretion in refusing to disclose the evidence at issue, and pursuant to Criminal Rule 16(F)(5), the prosecutor is ordered to provide to the defendant no later than the commencement of trial a copy of the materials produced *in camera*. I will preserve the copy provided to me as part of the trial court record, under seal, for possible eventual appellate review.

IT IS SO ORDERED:

Judge John P. O'Donnell

July 3, 2019
Date

² See The State of Ohio's April 5, 2019, discovery response.

SERVICE

A copy of this judgment entry was emailed to the following on July 3, 2019:

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Judge John P. O'Donnell