

[Cite as *State v. Pointer*, 2010-Ohio-5067.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
FAYETTE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-03-003
- vs -	:	<u>OPINION</u> 10/18/2010
WILLIAM L. POINTER,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 09CRI00142

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YOUNG, P.J.

{¶1} Defendant-appellant, William L. Pointer, appeals a decision of the Fayette County Court of Common Pleas denying his motion to compel the state to disclose the identity of a confidential informant. For the reasons set forth below, we affirm the decision of the trial court.

{¶2} In July 2009 appellant was indicted on two counts of trafficking in crack cocaine in violation of R.C. 2925.03(C)(4)(a) and (c) felonies of the fourth and fifth degrees. Count one involved trafficking in an amount less than one gram, with a forfeiture of property specification pursuant to R.C. 2981.04. The second count alleged that appellant trafficked in an amount equal to or greater than one gram but less than five grams.

{¶3} The charges stemmed from a controlled drug purchase on April 10, 2009 in Washington Court House, in which appellant allegedly sold crack cocaine to a confidential informant working for the Fayette County Sheriff's Office. The transaction was arranged by a telephone call placed by the informant requesting \$50 of crack cocaine to be delivered to a residence on Lewis Street. Shortly thereafter, a vehicle pulled into the driveway of the residence. Appellant was seated in the front passenger seat. The informant walked to the front passenger window of the vehicle and exchanged the cash for an "off-white rock" which was later determined to be 0.4 grams of crack cocaine. The transaction was witnessed by a detective from the sheriff's office.

{¶4} On December 14, 2009, appellant filed a motion to compel the state to disclose the identity of the confidential informant, as well as a notice that he intended to proceed on an entrapment defense at trial. Although it is not clear from the record whether the trial court ruled on appellant's motion, it is apparent that the identity of the informant was not disclosed. On March 9, 2010, appellant was convicted by a jury of the first trafficking count and sentenced to one year in prison.¹

1. The record indicates that the forfeiture specification and the second trafficking count were dismissed by the trial court.

{¶15} Appellant appeals the trial court's failure to compel the state to disclose the confidential informant's identity, raising a single assignment of error for our review:

{¶16} "THE TRIAL COURT ERRED BY FAILING TO ORDER THE DISCLOSURE OF THE IDENTITY OF THE CONFIDENTIAL INFORMANT."

{¶17} In his sole assignment of error, appellant argues that the informant's testimony was essential to proving his defense of entrapment, and as a result, the trial court abused its discretion by failing to order the disclosure of the informant's identity. Appellant claims that the contents of the telephone call made by the informant would have provided the "substance of the entrapment defense."

{¶18} An accused is entitled to the disclosure of the identity of a confidential informant when "the testimony of the informant is vital to establishing an element of the crime or would be helpful or beneficial to the accused in preparing or making a defense to criminal charges." *State v. Williams* (1983), 4 Ohio St.3d 74, syllabus. The defendant bears the burden of establishing the need for disclosure. *State v. Parsons* (1989), 64 Ohio App.3d 63, 69. In order to meet this burden, "[s]omething more than speculation about the possible usefulness of an informant's testimony is required." *Id.*

{¶19} A trial court's decision regarding the disclosure of a confidential informant's identity is reviewed on appeal under an abuse of discretion standard. *State v. Stevenson*, Warren App. No. CA2003-08-085, 2004-Ohio-4783, ¶8. An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *State v. Atkinson*, Warren App. No. CA2009-10-129, 2010-Ohio-2825, ¶7. When applying the abuse of

discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Id.*

{¶10} It is unclear whether the trial court ruled on appellant's motion to disclose the identity of the confidential informant. In his brief, appellant asserts that the court failed to rule on his motion prior to trial. The state claims, however, that a hearing was held immediately prior to trial and appellant's motion was overruled by the court at that time. The record on appeal does not include a journalized entry by the court with regard to the motion, and a transcript of the hearing is also absent. Nevertheless, we may presume that the trial court overruled appellant's motion. See *State v. Rivera*, Butler App. No. CA2008-12-308, 2010-Ohio-323, fn. 1 (an appellate court may presume a trial court overruled a motion when the record reflects that the court failed to rule on the motion).

{¶11} Appellant has the burden to ensure that the record, or whatever portions thereof that are necessary for the determination of an appeal, is filed with the appellate court. App.R. 9(B); *State v. Kelly* (2001), 145 Ohio App.3d 277, 283, citing *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 19. If no transcript or report of the proceedings is available or if there are missing portions of the transcript, an appellant can reconstruct the record pursuant to App.R. 9(C) and (D). Where the record is incomplete, "an appellate court will indulge in all reasonable presumptions consistent with the record in favor of the validity of the judgment under review and the legality of the proceedings below." *State v. Bowman* (2001), 144 Ohio App.3d 179, 189, citing *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199.

{¶12} There is nothing in the record to indicate that the trial court abused its discretion in overruling appellant's motion to release the identity of the confidential

informant. Upon review, we note that appellant failed to specifically argue in his motion how the testimony of the informant would be helpful in establishing an entrapment defense. Appellant claimed only that the testimony was necessary because "the confidential informant is a material and necessary witness in the case as the individual was present during the alleged transaction and did actively participate in said transaction." Although the benefit of an informant's testimony need not be proven by evidentiary material, a defendant must set forth "some record of what occurred between him and the informant that might constitute entrapment." *State v. Maye* (Dec. 24, 1996), Hamilton App. No. C-950657, 1996 WL 733147 at 2, quoting *State v. Butler* (1984), 9 Ohio St.3d 156, 157.

{¶13} Moreover, in the absence of a transcript or an App.R. 9 statement of the evidence or proceedings, we are unable to determine whether appellant presented any arguments to the trial court regarding what transpired between him and the informant that would constitute entrapment. We must therefore presume the regularity and validity of the proceedings below and affirm the trial court's judgment. *Knapp*, 61 Ohio St.2d at 199.

{¶14} Appellant's sole assignment of error is overruled.

{¶15} Judgment affirmed.

POWELL and BRESSLER, JJ., concur.