FILED
MAR 14 1977
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Appellee,

v.

BEVERLY ROCELE KOPF,

Appellant.

Filed March 14, 1977

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59466

Appeal from Scott District Court - James R. Havercamp, Judge.

Appeal from conviction for shoplifting over $20 and resulting sentence. Reversed and remanded.

John J. Carlin, Carlin and Darbyshire, of Davenport, for appellant.

Richard C. Turner, Attorney General, Edward N. Wehr, Scott County Attorney, and Gary L. Sissel, Assistant Scott County Attorney.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

ALLBEE, C.J.

Defendant, Beverly Rocele Kopf, appeals her conviction for shoplifting over $20 in violation of section 709.20, The Code. The sole error assigned is trial court's failure to allow defense counsel to inspect the pretrial statement of the prosecution's only witness, Judith Brown, at the close of the State's evidence. Finding abuse of trial court's discretion, we reverse and remand.

At trial, Judith Brown, a security guard for Turnstyle Store in Davenport, Iowa, testified that on July 31, 1975 she noticed defendant and her daughter, Contessa, purchasing an inexpensive ice chest in the store. Brown subsequently saw defendant and Contessa re-enter the store and over the next 45 minutes observed them place numerous articles in a bag containing the ice chest. Defendant later left Contessa and went into the grocery section of the store. Brown arrested Contessa after she had left the store with the unpaid items. This led to the arrest of defendant.

During cross-examination, defense counsel established that following the incident, Brown prepared a written summary of her observations which she turned over to the Davenport Police Department. Counsel closely questioned Brown whether in this summary she had stated that Contessa alone, rather than accompanied by defendant, had purchased the ice chest. Brown denied having made this statement. A certified copy of the report filed with this court shows that Brown had, in fact, made such a written statement.

After the State had rested, defendant moved for production of the report. Trial court inspected the report in camera and overruled defendant's motion on the grounds that any

opportunity for the defendant to impeach Brown had passed. Defendant asserts this ruling was reversible error.

In its brief, the State concedes that Brown's statement containing this inconsistency should have been produced for defense counsel as a matter of right if the request for production was timely made. See State v. Deanda, 218 N.W.2d 649, 651-652 (Iowa 1974); State v. Mayhew, 170 N.W.2d 608, 613-615 (Iowa 1969). The State argues the request was not timely and, consequently, constituted a waiver.

There is no Iowa case considering the issue of when during the proceedings, defense counsel must move for the production of a witness's written statement in order to be timely. However, our Supreme Court has declared: "During trial, statements of witnesses or police officers should be supplied in accordance with the procedures of the Federal Jencks Act." State v. Fryer, 226 N.W.2d 36, 40 (Iowa 1975). Accordingly, for guidance we turn to federal decisions interpreting 18 U.S.C. 3500. Under this statute, federal courts have held that defense requests for witness's prior statements made after the government has rested are not timely and hence not available as a matter of right but a trial court in its discretion may order production at a later point during the trial. United States v. Harris, 458 F.2d 670, 679 (5th Cir. 1972); United States v. Trigg, 392 F.2d 860 864-865 (7th Cir. 1968); United States v. Sacasas, 381 F.2d 451, 454 (2d Cir. 1967); Hellman v. United States, 339 F.2d 36, 39 (5th Cir. 1965). Based upon these authorities we hold defendant's request for Brown's statement made after the State had rested was untimely.

Defendant seeks to avoid the consequences of this

result by arguing that, nevertheless, trial court abused its discretion in overruling her untimely request. We agree. Judith Brown was the State's sole witness. A conviction could only be obtained by the jury's acceptance of Brown's testimony and, therefore, her credibility was crucial to the establishment of the State's burden of proof. Her word was the State's case. Because of counsel's failure to receive Brown's statement, he was unable to impeach her and, as a result, received no impeachment instruction. The knowledge that the State's sole witness had made contradictory statements concerning the incident may have been of decisive importance to the jury if properly instructed on impeachment.

Furthermore, we are unable to discern any compelling reason why the report should not have been produced even though defendant's request was untimely. The motion was made within five minutes after the State rested. Compare United States v. Sacasas, supra. Compliance with defendant's request would not have resulted in any inconvenience to either the State or trial court.

Armed with Brown's statements, counsel may have attempted to recall her, or failing that, subpoened the police officers to whom the statements had been given. In a *felony* case in which the State's only witness's credibility is so much in issue, defense counsel should be given some latitude. Trial court abused its discretion in not ordering the statement produced. Defendant's conviction hereby is reversed and the case remanded for a new trial.

SNELL, OXBERGER and CARTER, JJ., concur; DONIELSON, J., dissents.

DONIELSON, J. (dissenting)

I dissent. The majority points out that the request for Brown's statement was untimely. I agree. The trial court considered this motion made after the state had rested and after recess, and after the court examined the statement, overruled the defense counsel's request. Although I see no substantial reason not to give the statement to the defense, I am not willing to go so far as to call a denial by the trial judge to produce a statement after the state has rested an abuse of discretion requiring a reversal.

This would also necessitate the ultimate conclusion that had the trial judge given the statement and then failed to permit the defense counsel to reopen and recall the witnesses that this would have also been an abuse of discretion.

Even though this was a setback in trial tactics for the defense counsel by merely *"shifting gears"* so to speak and in focusing on the *"missing statement"* in his defense, the defense counsel could have well accomplished his purpose, perhaps more effectively. He could have recalled Brown as his witness, and perhaps she would have been hostile permitting him to cross-examine, but if not, he could have made substantial inquiries that relates to the statement. He could have called the officers as it relates to the statement. He could have even gone so far as to call the prosecutor who no doubt had the statement. This would have to be with the court's permission, but had the defense counsel focused on the missing statement as being as important as this appeal would appear to make it, it would be worthwhile to consider as a trial tactic. See State v. Brewer, 247 N.W.2d 205, at 212 (Iowa 1976). One could easily envision that the missing statement might be far more effectively presented by the defense

than its simple use as impeachment in the state's case. I do not envision these two miscalculations by the trial attorney now adding up to an abuse of discretion by the trial judge who was acting within what I would envision to be within the bounds of judicial discretion and the orderly disposition of the trial, whether I agree with his handling of the statement or not.

New counsel on appeal now gets another chance to try his trial strategy by the majority ruling. I would have limited this defendant to one trial, one strategy and one trial lawyer by affirming the trial judge.