IN THE SUPREME COURT OF OHIO
APPEAL FROM THE COURT OF APPEALS OF SANDUSKY COUNTY, OHIO

06-2402

STATE OF OHIO,

Plaintiff-Appellee,

vs.

MICHAEL A. LATHER, JR.,

Defendant-Appellant.

Supreme Court
Case No. _____

Court of Appeals
Case No. S-03-008

Appeal from the Sixth District Court of Appeals, County of Sandusky, State of Ohio

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APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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SUPREME COURT OF OHIO

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APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

EXPLANATION OF WHY LEAVE TO APPEAL SHOULD BE GRANTED

This matter involves a felony criminal case and originated in the Court of Appeals upon Motion by Defendant-Appellant after reversal by this Honorable Court in Case No. 05-0400, and further involves a constitutional question and is of great general interest.

STATEMENT OF THE CASE AND FACTS

This case originally arises from an Indictment filed, on September 6, 2001, in the Sandusky County Court of Common Pleas charging Defendant-Appellant, Michael A. Lather, Jr., with Trafficking in Crack Cocaine in violation of Ohio Revised Code § 2925.03 (A)(1), (C)(4)(f), a first degree felony. Defendant-Appellant entered a not guilty plea. Subsequently, Defendant-Appellant filed a Motion to Suppress all evidence seized during the search of Defendant-Appellant's apartment and vehicle, and any and all statements made by Defendant-Appellant following his arrest, in the trial court.

On October 24, 2002, following the hearing on the Motion to Suppress, the Trial Court denied Appellant's Motion, and allowed all of the Defendant's statements to be admitted at trial.

The case then proceeded to jury trial on November 21, 2002 which resulted in a hung jury.

A second Jury Trial commenced on January 29, 2003, and Defendant-Appellant was found Guilty. On February 5, 2003, Defendant-Appellant was sentenced to seven (7) years

of imprisonment, a $7,500.00 mandatory Fine.

The Court of Appeals reversed the Defendant-Appellant's conviction based on Miranda. State vs. Lather, 6th Dist. App. No. S-03-008, 2005-Ohio-668, wherein the Court of Appeals stated

> "....in order for Appellant to, at minimum, impliedly waive his Miranda rights, it must be shown that he understood those rights. Such an understanding may not be presumed. Accordingly, we find appellant's first assignment of error well-taken, in part, as it relates to the August 13, 2001 interrogation.
>
> Accordingly, based on our disposition of appellant's first assignment of error, we find Assignments of Error Nos. II through VI are moot and not well-taken...."

The remaining Assignments of Error II through VI assigned by Appellant, but held moot by the Court of Appeals are as follows:

1) The Trial Court erred to the prejudice of the Defendant in calling as the Court's Witness, Jeffrey Moore, at the request of the Prosecuting Attorney.

2) The ruling of the Trial Court denying the Defendant's Motion for Acquittal was erroneous and the verdict of the Jury was against the manifest weight of the evidence.

3) The Trial Court erred to the prejudice of the Defendant in admitting evidence regarding other unrelated acts regarding the alleged conduct of the Defendant that allegedly occurred subsequent in time to the arrest of the Defendant herein, which denied the Defendant a fair trial.

4) The conduct and demeanor of the Trial Judge during the Defendant's Trial in the presence of the Jury was prejudicial to the Defendant and denied the Defendant a fair trial.

5) The Trial Court erred to the prejudice of the Defendant in failing to hold a Hearing to determine his ability to pay the mandatory drug fine when the Trial Court previously found the Defendant to be Indigent for purposes of Court Appointed Counsel.

This Honorable Court then reversed the decision of the Sixth District Court of Appeals, on September 13, 2006, in Case No. 05-0400, holding that "we reverse the judgment of the court of appeals and hold that a suspect need not be asked directly whether he or she understands the Miranda warnings before an understanding waiver of the Miranda rights may be inferred from the totality of the circumstances."

Defendant-Appellant then moved the Sixth District Court of Appeals to address the Defendant-Appellant's Assignment of Errors II through VI which were previously briefed and orally argued before the Sixth District Court of Appeals, but which were held moot by the Court of Appeals, and not decided since the court of appeals granted the Defendant-Appellant's First Assignment of Error (see Page 11 of the Court of Appeals Decision of February 18, 2005) (Appendix 2). The Sixth District Court of Appeals has now denied the Defendant's request to rule on these remaining Assignments of Error asserting lack of jurisdiction for the reason that this Honorable Court did not explicitly order the Sixth District Court of Appeals to rule on these undecided Assignments of Error II through VI in the mandate issued in Case No. 05-0400. See, Decision of the Sixth District Court of Appeals, dated November 14, 2006, attached hereto. (Appendix 1).

PROPOSITION OF LAW

IT IS THE DUTY OF THE COURT OF APPEALS TO DECIDE ALL ASSIGNED ERRORS, UPON REVERSAL BY THE OHIO SUPREME COURT OF THE COURT OF APPEALS' DECISION, AND REMAND TO THE COURT OF APPEALS BY THE SUPREME COURT FOR FURTHER PROCEEDINGS, THE COURT OF APPEALS

MUST DECIDE ALL OF THE OTHER ASSIGNED ERRORS THAT WERE PREVIOUSLY HELD MOOT.

The Mandate from the Ohio Supreme Court, Case No. 05-400, dated September 13, 2006, and the Decision of the Ohio Supreme Court in State of Ohio vs. Michael A. Lather, 110 Ohio St. 3d 270, 2006-Ohio-4477, which reversed the judgment of the Sixth District Court of Appeals, dated February 18, 2005, wherein the Ohio Supreme Court Ordered "this cause is remanded to the Court of Appeals, consistent with the Opinion rendered herein," and the Ohio Supreme Court's Opinion at Page 5, specifically held that "Finding the Court of Appeals erred, we reverse the Judgment of the Sixth District Court of Appeals, and remand for further proceedings"; the further proceedings can only be those issues that the Sixth District Court of Appeals in granting Appellant's First Assignment of Error found Assignments of Error II through VI to be moot and not well taken. The Mandate of the Ohio Supreme Court remanding this matter to the Court of Appeals for further proceedings is consistent with O.R.C. Section 2505.39.

Therefore, now that the Ohio Supreme Court has reversed the Sixth District Court of Appeals judgment as to Assignment of Error I, in Case No. 05-0400, the remaining Assignments of Error II through VI still pending and undecided by the Sixth District Court of Appeals are now subject to decision on the merits. The Defendant-Appellant would be greatly prejudiced if these assigned errors are never ruled upon as every Defendant-Appellant is entitled to an appeal of right to the court of appeals in every case, and the Defendant-Appellant herein has not had that opportunity as to his Assignments of Error II through VI. See, O.R.C. Section 2953.02 and Ohio Constitution, Article IV, Section 3.

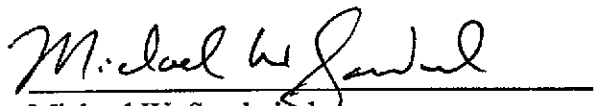
It is the duty of the court of appeals to pass upon all properly assigned errors; however, when the record in the Ohio Supreme Court affirmatively shows that some of the assignments of error were not passed on by the lower appellate court, the case will be remanded for the consideration of such assignments. Peer v. Industrial Commission of Ohio, 134 Ohio St. 61 (1938); Winslow v. Ohio Bus Line Co., 148 Ohio St. 101 (1947) (disapproved on other grounds by Oberlin v. Friedman, 5 Ohio St. 2d 1 (1965)); and Taylor v. City of Toledo, 96 Ohio St. 603 (1917).

Wherefore, Defendant-Appellant respectfully requests this Honorable Court for a reversal of the decision of the Sixth District Court of Appeals' decision of November 14, 2006, and an Order directing the Sixth District Court of Appeals to rule and decide upon the Defendant-Appellant's Assignment of Errors II through VI which were previously briefed and orally argued before the Sixth District Court of Appeals, in Case No. S-03-008, but not yet ruled upon by the Sixth District Court of Appeals, now that this Honorable Court has overturned the Sixth District Court of Appeals' Decision as to Assignment of Error I only in Case No. 05-0400 on September 13, 2006.

CONCLUSION

It is therefore respectfully submitted that Appellant's Memorandum in Support of Jurisdiction substantiates that this matter originated in the Court of Appeals by Motion following a reversal by this Honorable Court in Case No. 05-0400, and involves a felony and is of public or great general interest for the reasons stated herein, and therefore, the Appellant's Motion Requesting Jurisdiction should be Granted.

Respectfully Submitted,



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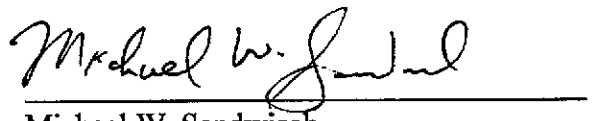
PROOF OF SERVICE

This is to certify that a copy of the foregoing was mailed by regular United States Mail to the office of the Sandusky County Prosecuting Attorney, Attn: Mr. John Kolesar, 100 North Park Avenue, Fremont, Ohio 43420, on December 29, 2006.



Michael W. Sandwisch
Attorney for Defendant-Appellant
Michael A. Lather, Jr.

SANDUSKY COUNTY
COURT OF APPEALS
FILED

NOV 14 2006

WARREN P. BROWN
CLERK

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

State of Ohio	Court of Appeals No. S-03-008
Appellee	Trial Court No. 01-CR-726
v.	
Michael A. Lather	**DECISION AND JUDGMENT ENTRY**
Appellant	Decided: NOV 14 2006

* * * * *

Defendant-appellant, Michael A. Lather, Jr., has filed a motion requesting that this court now address his Assignments of Error Nos. 2 through 4 which, in our February 18, 2005 decision and judgment entry, we determined were moot based upon our disposition of appellant's first assignment or error. Appellant's request is based upon the September 13, 2006 judgment of the Supreme Court of Ohio which reversed our decision.

Although the court remanded the matter to this court (presumably to enter the judgment on the docket), the court did not direct us to rule on the assignments of error that had not been addressed. See *State v. Hill*, 92 Ohio St.3d 191, 204, 2001-Ohio-141; *Vance v. Consol. Rail Corp.*, 73 Ohio St.3d 222, 234, 1995-Ohio-134; *State ex rel. Paluf*

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v. Feneli, 69 Ohio St.3d 138, 1994-Ohio-325. Moreover, the court issued a mandate to the Sandusky County Court of Common Pleas to "carry th[e] judgment into execution * * *." A mandate has been defined as not merely a suggestion or request, "it is a command or order which the issuing court has authority to give, and the receiving court is bound to obey. It directs what action is to be taken." *First Bank of Marietta v. Roslovic & Partners, Inc.* (2000), 138 Ohio App.3d 533, 539.

Based on the foregoing, because the Supreme Court of Ohio failed to direct this court to rule on the assignments of error not addressed and because it issued a mandate to the Sandusky County Court of Common Pleas to execute the judgment, we lack jurisdiction to further consider the matter. Appellant's motion is not well-taken and it is denied.

Peter M. Handwork, J. _____ JUDGE

Mark L. Pietrykowski, J. _____ JUDGE

Arlene Singer, P.J. _____ JUDGE
CONCUR.

FAXED

SANDUSKY COUNTY
COURT OF APPEALS
FILED

FEB 18 2005

WARREN P. BROWN
CLERK

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

State of Ohio

Appellee

v.

Michael A. Lather

Appellant

Court of Appeals No. S-03-008

Trial Court No. 01-CR-726

DECISION AND JUDGMENT ENTRY

Decided: FEB 18 2005

* * * * *

Thomas L. Stierwalt, Prosecuting Attorney, and John P. Kolesar, Assistant Prosecuting Attorney, for appellee.

Michael W. Sandwisch, for appellant.

* * * * *

PIETRYKOWSKI, J.

Defendant-appellant, Michael A. Lather, Jr., appeals the February 5, 2003 judgment of the Sandusky County Court of Common Pleas which, following a jury trial, found appellant guilty of trafficking in crack cocaine, in violation of R.C. 2925.03(A)(1),

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(C)(4)(f), and sentenced him to seven years of imprisonment and a $7,500 mandatory fine. From that judgment and the court's prior judgment denying his motion to suppress, appellant raises the following six assignments of error:

"1) The trial court erred to the prejudice of the defendant in denying defendant's motion to suppress.

"2) The trial court erred to the prejudice of the defendant in calling as the court's witness, Jeffrey Moore, at the request of the prosecuting attorney.

"3) The ruling of the trial court denying the defendant's motion for acquittal was erroneous and the verdict of the jury was against the manifest weight of the evidence.

"4) The trial court erred to the prejudice of the defendant in admitting evidence regarding other unrelated acts regarding the alleged conduct of the defendant that allegedly occurred subsequent in time to the arrest of the defendant herein, which denied the defendant a fair trial.

"5) The conduct and demeanor of the trial judge during the defendant's trial in the presence of the jury was prejudicial to the defendant and denied the defendant a fair trial.

"6) The trial court erred to the prejudice of the defendant in failing to hold a hearing to determine his ability to pay the mandatory drug fine when the trial court previously found the defendant to be indigent for purposes of court appointed counsel."

On August 17, 2001, appellant was arrested in Fremont, Sandusky County, Ohio, following a traffic stop, for allegedly trafficking in crack cocaine earlier in the day in Huron County, Ohio. Thereafter, on August 31, 2001, the Ottawa County Sheriff's

Department, concerning an unrelated drug investigation involving appellant, obtained a search warrant through Sandusky County to execute on appellant's alleged residence. Three digital scales were recovered.

On September 6, 2001, appellant was indicted on one count of trafficking in crack cocaine for the August 17, 2001 incident; appellant entered a not guilty plea. Subsequently, appellant filed a motion to suppress all evidence seized during the search of appellant's apartment and vehicle and any statements made by appellant following his arrest after each incident. On October 24, 2002, following a hearing, the trial court denied appellant's motion.

The November 21, 2002 trial on the matter resulted in a hung jury. Thereafter, appellant filed a motion in limine to prevent the state from offering any evidence regarding any charged or non-charged alleged drug dealings involving appellant, for which he had not been convicted. Following a hearing on the matter, the motion was denied.

The second trial commenced on January 29, 2003, and appellant was found guilty. On February 5, 2003, appellant was sentenced to seven years of imprisonment, a $7,500 mandatory fine, and forfeiture of his 1988 BMW and the $3,143 found on appellant's person at the time of his arrest. This appeal followed.

In appellant's first assignment of error he argues that the court erroneously denied his motion to suppress because the August 31, 2001 search warrant was not based on probable cause and, even assuming the warrant's validity, it did not give the officers

authority to search for the scales. Appellant further contends that during the August 17 and August 31, 2001 incidents he was not properly advised of his *Miranda* rights.

We first note that when considering a motion to suppress, a trial court is in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366. When reviewing a trial court's ruling on a motion to suppress, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594. An appellate court must independently determine, without deferring to a trial court's conclusions, whether, as a matter of law, the facts meet the applicable standard. *State v. Klein* (1991), 73 Ohio App.3d 486, 488.

In reviewing whether the affidavit sufficiently supported the issuance of the search warrant, the role of the trial court and the appellate court is limited as follows:

"In reviewing the sufficiency of probable cause in an affidavit submitted in support of a search warrant issued by a magistrate, neither a trial judge nor an appellate court should substitute its judgment for that of the magistrate by conducting a de novo determination as to whether the affidavit contains sufficient probable cause upon which that court would issue the search warrant. Rather, the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. In conducting any after-the-fact scrutiny of an affidavit submitted in support of a search warrant, trial and appellate courts should accord great deference to the magistrate's determination of probable cause, and doubtful or marginal cases in this area

should be resolved in favor of upholding the warrant." *State v. George* (1989), 45 Ohio St.3d 325, paragraph two of the syllabus.

In determining whether and affidavit in support of a request for a search warrant provides sufficient information to satisfy the probable cause requirement, the issuing magistrate must determine whether, "* * * given all the circumstances set forth * * * including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability [that evidence will be found.]" Id. at paragraph one of the syllabus.

The affidavit in this case chronicled the events from appellant's arrest on August 17, 2001, through the following week. Included was information that the affiant/detective had been informed that appellant, prior to his arrest on August 17, 2001, had given a large amount of narcotics to his girlfriend living in Port Clinton, Ottawa County, Ohio. According to the named informant, on approximately August 21, 2001, the narcotics were located in her apartment, in a Black & Decker box under her kitchen sink. The affiant stated that following a consent search of the informant's apartment, a detective recovered a Black & Decker box which contained a "large plastic wrapped package." The package was tested and preliminary results indicated that the substance was crack cocaine in an amount greater than 500 grams.

The affiant further stated that he had been employed with the Ottawa County Drug Task Force for the past five and one-half years and, that based upon this experience, he knows that drug traffickers maintain certain records, secrete contraband, use certain

electronic devices to store telephone numbers of customers; keep various drug paraphernalia for packaging, diluting, weighing and distributing drugs, and attempt to secret their profits. Based on the foregoing, the affiant stated that he had reason to believe that appellant, at his Sandusky County residence, had the above property which was used in drug trafficking.

After careful review of the affidavit, we find that the judge had a substantial basis for determining that there was sufficient probable cause to issue a search warrant. Appellant was recently arrested on a drug trafficking charge; and a large quantity of crack cocaine, allegedly his, was recovered in Ottawa County.

Also relating to the issuance of the search warrant, appellant claims that the search warrant did not give the officers the authority to search for and confiscate, inter alia, three electronic scales. Appellant contends that the officers were limited to the items listed on the face of the warrant. The search warrant authorized seizure of the following items:

"a) letters, correspondences, records, or any documentation of any transactions, including but not limited to checking and saving accounts, bank statements, income tax returns; safety deposit keys and/or records, or records of purchases of any and all items. Also, any record, correspondence or photographs that would connect the possessor with a criminal enterprise or to other members of a criminal enterprise. Instruments used to facilitate the criminal enterprise, including but not limited to cell phones and/or pagers and records indicating their purchase and or use in the enterprise. Fruits and/or evidence of the criminal enterprise, such as large sums of cash and other assets."

In *State v. Kobi* (1997), 122 Ohio App.3d 160, this court found that "[e]vidence not specifically described in a search warrant may be validly seized if, based on evidence known to the officers, the seized items were closely related to the crime being investigated or were instrumentalities of the crime." Id. at 171, citing *State v. McGettrick* (1988), 40 Ohio App.3d 25, 29.

In this case, the criminal enterprise under investigation was drug trafficking. Digital scales are commonly used as instrumentalities of drug trafficking. Accordingly, we find that the officers did not seize items beyond the scope of the search warrant.

In his motion to suppress, appellant also argued that the police officers, following the August 17 and August 31, 2001 arrests, failed to advise him of his rights as required under *Miranda v. Arizona* (1966), 384 U.S. 436. We will separately examine each arrest.

At the April 18, 2002 suppression hearing, Officer Woolf testified that following appellant's August 17, 2001 arrest, Woolf, at the Fremont Police station, read appellant the Miranda warnings and confirmed that he understood them. Appellant then signed a waiver of rights form which was admitted into evidence.

Appellant testified that Woolf never explained that he was signing a waiver of rights form; Woolf just requested that appellant sign a "group of papers." Appellant testified that he did not understand that anything he said could be used against him. During cross-examination, appellant admitted that he had been arrested on several prior occasions.

According to *Miranda v. Arizona*, before a suspect in police custody is questioned, the suspect:

"must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." Id. at 479.

A suspect may waive his Miranda rights provided his waiver is knowing and voluntary. *Edwards v. Arizona* (1981), 451 U.S. 477, 483. In *North Carolina v. Butler* (1979), 441 U.S. 369, 373, the United States Supreme Court explained:

"An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. As was unequivocally said in *Miranda*, mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The court must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated."

The issue of waiver is determined by the totality of the circumstances in each case, including the defendant's background, experience and conduct. Id. The state is required to prove only that appellant waived his right to remain silent by a preponderance of the evidence. *Colorado v. Connelly* (1986), 479 U.S. 157.

Upon review of the evidence presented at the suppression hearing, we find that the court did not err by admitting appellant's statements following his August 17, 2001 arrest. Testimony was presented that appellant was read his rights and understood them; he also signed the written waiver form. Further, appellant had completed high school and some college, and had been arrested on prior occasions.

On August 31, 2001, pursuant to the Ottawa County arrest warrant, appellant was arrested and returned to his alleged apartment so he could be present during the execution of the search warrant. Officer Woolf testified that he "Mirandized" appellant by reading from an "Advice of Rights" form. Woolf testified that he did not ask appellant if he understood his rights and he did not asked appellant if he wished to waive his rights. Woolf also testified that he did not read the waiver of rights language on the back of the "Advice of Rights" form. Woolf stated that it was "standard protocol" for the arresting officer, in this case Sergeant Garza, to read the suspect his *Miranda* warnings. Woolf acknowledged that he never confirmed that Garza, in fact, read appellant his rights. Finally, Woolf stated that he did not interrogate appellant.

Ottawa County Detective Larry St. Clair testified that, during the search, after he found the first digital scale he asked appellant what he used it for. Appellant responded that the prior renter had left it. After St. Clair found two additional scales, he asked appellant if they were his. Appellant again responded that the prior renter left them and he stated that they were not working.

St. Clair stated that he did not read appellant his rights. St. Clair testified that he asked Officer Woolf is he had read appellant his rights, and relied on Woolf's representation that he had.. St. Clair did nothing to independently verify that appellant understood his rights and waived them.

As set forth above, a *Miranda* waiver need not be expressly made in order to be valid. However, even if the waiver is implied, it must be shown that the suspect, in fact, knowingly and voluntarily waived his rights before making the statement. *State v. Scott* (1980), 61 Ohio St.2d 155, paragraph one of the syllabus, following *North Carolina v. Butler*, 60 L.Ed. 2d 286, 292.

In *Tague v. Louisiana* (1980), 444 U.S. 469, the United States Supreme Court concluded that the petitioner's inculpatory statement was erroneously admitted into evidence where the arresting officer could not recall if he asked petitioner whether he understood the rights as read to him. In *Tague*, the Louisiana Supreme Court concluded that the arresting officer "is not 'compelled to give an intelligence test to a person who has been advised of his rights to determine if he understands them * * *.'" Id. at 469-470, quoting 372 So.2d. 555, 557. Reversing the majority, the United States Supreme Court, concurred with the dissent's analysis, quoting:

"'* * * the majority today creates a presumption that the defendant understood his constitutional rights and places the burden of proof upon the defendant, instead of the state, to demonstrate whether the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.'" Id. at 470, quoting 372 So.2d at 558.

In *State v. Murphy* (2001), 91 Ohio St.3d 516, the Ohio Supreme Court noted that "[w]here a suspect speaks freely to police *after* acknowledging that he understands his rights, a court may infer that the suspect implicitly waived his rights." (Emphasis in original.) (Citations omitted.) Id. at 519. The court noted that "[a] suspect's acknowledgment that he understands his rights should not, perhaps, 'inevitably carry the day,' but such an acknowledgment 'is especially significant when defendant's incriminating statement follows immediately thereafter * * *.'" Id., quoting 2 LaFave, Israel & King, Criminal Procedure (2 Ed.1999), 592, Section 6.9(d). The court then examined the surrounding circumstances to confirm that the waiver was voluntary. Id.

In this case, Officer Woolf unequivocally testified that he neither asked appellant if he understood his rights nor asked appellant if he wished to waive his rights. Thereafter, Officer St. Clair, without apprising appellant of his rights, questioned him about the digital scales found in the apartment. We do acknowledge that appellant had prior contacts with the criminal justice system and had recently been arrested; appellant had also completed high school and some college. However, in order for appellant to, at minimum, impliedly waive his *Miranda* rights, it must be shown that he understood those rights. Such an understanding may not be presumed. Accordingly, we find appellant's first assignment of error well-taken, in part, as it relates to the August 31, 2001 interrogation.

Accordingly, based on our disposition of appellant's first assignment of error, we find Assignments of Error Nos. II through VI are moot and not well-taken. Because

appellant's August 31, 2001 statements were admitted at trial, and because, after review of the entire record we believe that the evidence of appellant's guilt was not overwhelming, we find that the matter must be remanded for a new trial.

On consideration whereof, we find that appellant was prejudiced and prevented from having a fair trial and the judgment of the Sandusky County Court of Common Pleas is reversed. The matter is remanded for a new trial. Pursuant to App.R. 24, court costs are assessed to appellee.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Peter M. Handwork, J. — JUDGE

Mark L. Pietrykowski, J. — JUDGE

Arlene Singer, P.J. — JUDGE

CONCUR.