NORFOLK, ss

NORFOLK SUPERIOR COURT
DOCKET. 2282cr000117

COMMONWEALTH

v.

KAREN READ

BRIAN ALBERT'S MOTION TO QUASH THE SUBPOENA OF DEFENDANT KAREN READ

Now comes Brian Albert and moves this Court to issue an order quashing a subpoena issued by defendant Karen Read compelling Albert to provide testimony during a hearing on May 25, 2022.[1] The subpoena issued by Read's defense team is apparently done in support of Read's attempt to have this Court reconsider its earlier denial of the defendant's motion under Mass. R. Crim. P. 17(a)(2) for access to records on the cellular device of Brian Albert.

PROCEDURAL HISTORY

The defendant filed a motion under Mass. R. Crim. P. 17 on September 16, 2022 requesting "any cell phones" possessed by Brian Albert (and others) for a period of January and February of 2022. That motion was denied on October 5, 2022 with the following notation from the court: "The Court is not satisfied that the requested phones contain information that is evidentiary and relevant nor is the Court satisfied that the application is made in good faith and is not intended as a general fishing expedition. (Cannone, RAJ)."

A Rule 17 motion was again filed by the defendant on April 12, 2023, with accompanying affidavits of Alan Jackson and Richard Green submitted the following day. This

[1] See attached Exhibit A.

renewed motion under Rule 17 sought access to the same materials that the Court denied access to in October of 2022.

On May 3, 2023, Brian Albert filed a written opposition to the renewed motion under Rule 17. Counsel for Brian Albert filed a notice of appearance and appeared in court for the hearing on May 3, 2023.

In court and prior to the hearing, counsel for Brian Albert and counsel for Karen Read conferenced the matter. Counsel for Karen Read indicated for the first time that they would be asking the Court to continue the argument on the Rule 17 motion regarding Brian Albert's cell phone until a date later in May. No mention of a subpoena or live witnesses – other than for testimony regarding forensic cell phone examination – was mentioned by counsel for Karen Read.

On the afternoon of Friday, May 19th, 2022, counsel for Brian Albert was notified by defense counsel for Karen Read of their intent to call Brian Albert as a witness during a hearing on May 25, 2023.

Brian Albert now files this Motion to Quash the subpoena issued by defendant Karen Read.

RELEVANT CASE LAW

Massachusetts Rule of Criminal Procedure 17(a) reads:

(a) Summons

(1) For attendance of witness; form; issuance

> A summons shall be issued by the clerk or any person so authorized by the General Laws. It shall state the name of the court and the title, if any, of the proceeding and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein.

(2) For production of documentary evidence and of objects

> A summons may also command the person to whom it is directed to produce the books, papers, documents, or other objects designated therein. The court on motion may quash or modify the summons if compliance would be unreasonable or oppressive or if the summons is being used to subvert the provisions of rule 14. The court may direct that books, papers, documents, or objects designated in the summons be produced before the court within a reasonable time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents, objects, or portions thereof to be inspected and copied by the parties and their attorneys if authorized by law.
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> Mass. R. Crim. P. 17(a)

A party has standing to move to quash a subpoena if the subpoena infringes upon the movant's legitimate interests. United States v. Raineri, 670 F.2d 702, 712 (7th Cir. 1982) (citing In re Grand Jury, 619 F.2d 1022, 1027 (3rd Cir. 1980)).

Courts interpreting the ability to quash subpoenas in this context have recognized an interest in preventing undue lengthening of a case and undue harassment of its witness. Commonwealth v. Kawa Lam, 444 Mass. 224, 229 (2005) (citing Raineri, 670 F.2d at 712). "A... witness should be forced neither to retain counsel nor to appear before a court in order to challenge, on the basis of a partial view of the case, potentially impermissible examination of her personal effects and the records of her personal interactions." Kawa Lam, 444 Mass. at 229.

In considering whether compliance "would be unreasonable or oppressive," a court must take into account the nature of the subject of the subpoena, including whether the documents and materials are privileged as a matter of statute or confidential as a matter of custom. Commonwealth v. Bougas, 2000 Mass. Super. LEXIS 157, 6-7 (2000) (citing Commonwealth v. Rodriguez, 426 Mass. 647 (1998)).

In considering whether the summons is being used to subvert the provisions of Mass.R.Crim.P. 14, a court must consider, among other things, "whether the documents, if in the

possession of the Commonwealth, would be subject to mandatory or discretionary discovery." Bougas, 2000 Mass. Super. LEXIS 157, 6-7 (2000).

Legitimate objections brought pursuant to a motion to quash may be wide ranging and may properly include objections to the general "lawfulness of the command to produce and other issues." Commonwealth v. Caceres, 63 Mass. App. Ct. 747, 749 (2005) (citing Rodriguez, 426 Mass. at 648).[2]

ARGUMENT

I. The Defense Is Inventing Court Procedures To Try to Make Up for The Insufficiency of Its Rule 17 Motions by Unilaterally Ordering Live Testimony of Witnesses.

This court's ruling in October denied the same defense motion on relevance grounds; in its decision, the Court questioned if the application was "made in good faith" or whether it was "intended as a general fishing expedition." Court Order of October 5, 2022. Nothing has changed since the Court's ruling in October of 2022.

At the last hearing on this matter (on May 3, 2023), the Court inquired of the defense whether they wanted to argue the Rule 17 motion on May 3, or on May 25th, noting that argument would only be done "once." The defense indicated that it wanted to "reserve argument" on the Rule 17 motion seeking Brian Albert's cell phones until May 25th. Notably, the defense said nothing to the Court (or counsel) about calling the third-party record holder for live testimony on May 25th.

[2] The subpoena implicates Brian Albert's legitimate interests. United States v. Raineri, 670 F.2d 702, 712 (7th Cir. 1982) (citing In re Grand Jury, 619 F.2d 1022, 1027 (3rd Cir. 1980)). Cell phones are "widespread" and "ubiquitous" and every individual has an objectively reasonable expectation of privacy in their contents. Commonwealth v. Almondor, 482 Mass. 35, 41-43 (2019). Brian Albert has standing to quash the subpoena under Mass. R. Crim. P. 17(a) because he is the subject of the subpoena.

Case law governing Rule 17 procedures is well established in Commonwealth v. Lampron, 441 Mass. 265 (2004), Commonwealth v. Mitchell, 444 Mass. 786 (2005), Commonwealth v. Dwyer, 448 Mass. 122 (2006), and their progeny.[3] The cases have gone into painstaking detail about the procedures of Rule 17 motion practice. In none of the cases, however, does the Supreme Judicial Court establish a procedure where the moving party can unilaterally elicit testimony by the third-party record holder in possession of the records being sought. This would, in effect, permit a Rule 17(a)(1) subpoena to issue as a means of trying to satisfy the moving party's obligations when seeking a Rule 17(a)(2) subpoena for records.

This type of "cart-before-the-horse" gamesmanship is not what the Supreme Judicial Court has set out in its Rule 17 protocols: "Our recent cases have also established that only a judge may issue a rule 17 (a) (2) summons prior to trial, and only on the *filing of a motion* that satisfies the requirements of Mass. R. Crim. P. 13 (a) (2)." Commonwealth v. Dwyer, 448 Mass. 122, 141 (2005) (emphasis added); "[A] summons for production of documentary evidence and objects prior to trial must be sought by motion, [and] the motion must be supported by affidavit." Commonwealth v. Lampron, 441 Mass. 265, 270 (2004). Thus rather than imposing more formal

[3] A defendant seeking pretrial production of records must make a demonstration of relevance, admissibility, necessity, and specificity in order to sustain her burden. Commonwealth v. Mitchell, 444 Mass. 786, 795 (2005). As part of its burden as the moving party, the defendant must demonstrate to the court that the information and records being sought are not just part of a "fishing expedition." Commonwealth v. Lampron, 441 Mass. 265, 269 (2004). Part of the court's responsibility is to determine if the affidavit and any hearsay is reliable. But "assertions of potential relevancy and of conclusory statements will not suffice." Commonwealth v. Mitchell, 444 Mass. 786, 791 (2005). The defense needs to show, among other things, that the evidence sought "has a rational tendency to prove or disprove an issue in the case." Lampron at 269-270. What the defense has done here is make up a story – unsupported by any credible evidence – and then deem that story to be an "issue in the case." This is precisely the danger that Lampron identified in considering Rule 17 motions: the defense can use them to fish for irrelevant, inadmissible information that can be used to support a fabricated narrative.

procedures for Rule 17 motions – such as sworn testimony – the SJC requires the parties to submit affidavits containing reliable hearsay. Lampron, 441 Mass at 270-271.[4]

The defense has taken every opportunity to meet its burden, submitting over 140 pages of "affidavits" in support of its motion for reconsideration.[5] There is no justification or authority for the defendant's attempt to order its own evidentiary hearing to make up for its failure to satisfy the moving party's burden under Rule 17(a)(2).[6]

II. Permitting the Subpoena for Live Testimony Would Amount to a Defense-Ordered Deposition, Subverting the Provisions of Rule 14.

There is no provision for criminal parties to unilaterally issue subpoenas for depositions.[7] The subpoena in this case has the same effect. Without any notice or motion before the Court, the defense is scheduling witnesses to provide live testimony on May 25th, and is ordering the Court to preside over those depositions. Depositions are not a part of the criminal discovery process. Allowing the subpoena in question to stand would, by definition, "subvert the provisions" of Mass. R. Crim. P. 14. Lampron, 441 Mass. at 268.

Mass. R. Crim. P. 35 governs the extraordinary circumstances where a criminal deposition could be requested; those circumstances do not apply here. Moreover, the Reporter's

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[4] The absence of case law is notable here. A search for Massachusetts cases with "Rule 17(a)(2)" w/8 "live testimony," "Rule 17(a)(2) w/8 "witness testimony," and "Rule 17(a)(2)" w/8 "evidentiary hearing" turns up zero applicable cases.

[5] The original Rule 17 motion and affidavit totaled 19 pages; that motion was denied by this Court in October of 2022. The pending Rule 17 motion adds an additional 24 pages of argument, coupled with 92 pages of "affidavit" and exhibits from counsel and 37 pages of "affidavit" from a purported defense expert.

[6] If the moving party on a Rule 17 motion were entitled to call live witnesses, every defendant moving for third party records would take the opportunity to compel live testimony. Viewed another way, counsel for every criminal defendant would be incentivized to create a Rule 17 request – whether essential to their case or not – because it would provide the only end-run around the prohibition against depositions in criminal cases.

[7] Mass. R. Crim. P. 35 governs the extraordinary circumstances where a criminal deposition could be requested; those circumstances do not apply here. Moreover, the Reporter's Notes to Mass. R. Crim. P. 35 provide clarity that the Rule is not designed to allow defendants to depose witnesses in order to generate testimony to support pre-trial discovery motions: "This is because criminal depositions are not for the discovery of information; rather they are intended to preserve evidence. United States v. Steffes, 35 F.R.D. 24 (1964)." Mass. R. Crim. P. 35 - Reporter's Notes, section (a).

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Moreover, the defense is telling the Court to consider the content of these improper depositions while reconsidering (without a motion to reconsider) a Rule 17 motion for Brian Albert's cell phone that has already been denied. This is also not a permissible use of the subpoena power under Rule 17(a)(1).

In the recent case of In the Matter of an Impounded Case, 491 Mass. 109 (2022), the Supreme Judicial Court dealt with a similar issue when a criminal defendant sought records from a social worker. The social worker indicated that the records sought had been inadvertently destroyed when switching into private practice.[8] A Superior Court judge ordered a deposition of the social worker.

In explaining the interplay between a Rule 17 order and the practical effect of reviewing materials, the SJC recognized that some Rule 17 orders might require creative ways of capturing a record, such as photographing a house or taking a DNA sample via a buccal swab. Both involve the identification of a record as a "tangible object." Id. at 118. The Court distinguished those scenarios from the taking of live testimony from a third-party record holder: "A deposition, by contrast, is not a tangible object. Accordingly, rule 17 does not support the order that the social worker be deposed." In the Matter of an Impounded Case, 491 Mass. 109, 118 (2022).[9]

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[8] There is no such assertion about the phone or phone records in question in this case.

[9] In In the Matter of an Impounded Case, 491 Mass. 109 (2022), the Single Justice's order vacating the trial court's deposition order was vacated and set aside based on a different justification. See Id. at 120-121.

In reviewing the Single Justice's decision vacating the Superior Court judge's order for a deposition, the SJC outlined why a deposition under Rule 17 was not appropriate:

> Rule 17 and the Lampron-Dwyer protocol thus represent a careful balancing. They establish not only that a statutory privilege sometimes must yield to a defendant's need for information to mount a defense and thus obtain a fair trial, but also that, in such circumstances, the intrusion must be made with great care and pursuant to exacting procedures. Rule 17 contemplates only the examination of existing objects, *not the creation of new evidence*. See, e.g., Lampron, 441 Mass. at 269.
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> In the Matter of an Impounded Case, 491 Mass. 109, 118 (2022) (emphasis added).

The defense is seeking to subject civilian witnesses to live testimony to combat a failed Rule 17 application. By issuing a subpoena for testimony, the defendant is no longer asking for permission to review "existing objects" under Rule 17; instead, the defendant is usurping the Court's authority by ordering that a third-party record holder be deposed to create new evidence. Id at 118-119. This is impermissible in a criminal case. It also represents an end-run around the discovery procedures of Rule 14 and a misuse of Rule 17(a)(1).

CONCLUSION

Brian Albert asks this Honorable Court to issue an order quashing the Rule 17(a)(1) subpoena issued by the defendant, Karen Read. Honoring the subpoena would endorse a procedure not authorized by statute, Rule 17, or controlling case law, and would amount to the improper taking of a deposition of a civilian witness, subverting the provisions of Mass. R. Crim. P. 14. Accordingly, the subpoena should be quashed.

Respectfully Submitted,

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