2013 WL 753235 (Fla.Cir.Ct.) (Trial Order)
Circuit Court of Florida.
Miami-dade County

State of Florida, Plaintiff,
v.
Wayne WILLIAMS, Defendant.

No. F11-20364C.
February 18, 2013.

Order Denying in Camera/Ex Parte Motion for Subpoenas Duces Tecum

cc: Amy Agnoli, Esq., via email: abrahamagnoliatt@bellsouth.net, Ansley Peacock, Esq., via email: ansleypeacock@MiamiSAO.com, Michael Von Zamft, Esq., via email: michaelvonzamft@MiamiSAO.com, Alejandra L. Lopez, Esq., via email: alejandralopez@MiamiSAO.com, Herb Smith, Esq., via email: hsmith @pdmiami.com, Anthony Britt, Esq., via email: abritt@bfhllaw.com.

Miguel M. De La O, Circuit Court Judge.

SECTION 15

THIS CAUSE came to be heard before this Court on Defendant, Wayne Williams' ("Williams"), In Camera Motion for Subpoena Duces Tecum with Notice (the "Motion"). The Court has reviewed the Motion and the State of Florida's response.

Initially, the Court notes the Motion is mislabeled as in camera rather than ex parte. "[A]n in camera inspection and an ex parte proceeding are not one and the same." *State v. Calloway,* 937 So. 2d 139, 141 (Fla. 3d DCA 2006). It does not appear that Williams is asking the Court to conduct an in camera inspection of the documents produced pursuant to the proposed subpoenas [1] duces tecum.

Rather, it appears Williams is asking this Court to review the proposed subpoenas duces tecum in an ex parte proceeding. Williams does not wish to disclose to the State the names of the persons to whom the subpoenas are directed, nor does he wish to disclose prematurely the documents produced pursuant to the subpoenas. If the Court grants the Motion, the subpoenas would be issued and served, and the documents gathered and produced to Williams, without the State ever knowing to whom the subpoenas were directed or what documents were produced (although based on the nature of the documents produced, the State could subsequently divine how Williams obtained them).

The Court denies the Motion because (1) Williams cannot point to any authority which supports the issuance of a secret subpoena duces tecum; (2) although the Rules of Criminal Procedure provide for ex parte proceedings in certain instances involving discovery, they do not provide for ex parte proceeding in this circumstance, and (3) the Florida Supreme Court implicitly rejected Williams' entitlement to such relief in *Heath v. Becktell,* 327 So. 2d 3 (Fla. 1976).

DISCUSSION

The Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *California v. Trombetta,* 467 U.S. 479, 485 (1984). Part and parcel of this guarantee is the ability of an accused to gather the evidence necessary to present a defense.

To safeguard that right, the Court has developed "what might loosely be called the area of constitutionally guaranteed access to evidence." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982). Taken together, this group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system.

Id.

Williams is free to issue subpoenas pursuant to Florida Rule of Criminal procedure 3.220 to any person or entity that has information which could lead to the discovery of admissible evidence. *See* Rule 3.220(h) ("the procedure for taking the deposition, including the scope of the examination,... shall be the same as that provided in the Florida Rules of Civil Procedure."). [2] Williams' ability to gather such information gives meaning to his constitutional right to present a complete defense.

Williams, however, seeks to go further. He asks this Court to allow him to gather this evidence in secret, without being required to share even the parameters of the subpoena -- much less the information he obtains -- with the State, until Williams decides he will seek to introduce the evidence at trial. [3]

Williams fails to point to any authority which allows this Court to issue an ex parte subpoena duces tecum. The Motion relies solely on Florida Rule of Criminal Procedure 3.220(m) and *Calloway* for its requested relief. Neither supports Williams' request.

Rule 3.220(m)(1) allows in camera consideration of requests to deny or regulate the disclosure of sensitive matters. Thus, subsection (1) is inapplicable because Williams does not seek to deny or regulate any such disclosure [4] -- he seeks to obtain information.

Rule 3.220(m)(2) allows a defendant to make an ex parte showing of good cause for "taking the deposition of a Category B witness." This subsection is obviously inapplicable here. Subsection (3) is likewise inapplicable because it concerns the court record of "all proceedings authorized under this subdivision."

In *Calloway*, the Third DCA did not address a trial court issuing an ex parte subpoena duces tecum. The court ruled that in the context of appointing and paying experts, a trial court can make such determinations in ex parte proceedings. Importantly, for the purposes of the discussion at hand, the court warned that "an ex parte proceeding is only proper where permitted by law." *Calloway*, at 141. *See In re Inquiry Concerning a Judge: Clayton*, 504 So. 2d 394, 395 (Fla. 1987) ("This judicial] canon was written with the clear intent of excluding all ex parte communications except when they are expressly authorized by statutes or rules.").

Additionally, Williams implies that the he is entitled to the relief sought in the Motion because "[t]hese records would constitute Defendant's investigative work product." Motion, at 2. Williams is incorrect.

> Work product can be divided into two categories: "fact" work product (i.e., factual information which pertains to the client's case and is prepared or gathered in connection therewith), and "opinion" work product (i.e., the attorney's mental impressions, conclusions, opinions, or theories concerning his client's case)

State v. Rabin, 495 So. 2d 257, 262 (Fla. 3d DCA 1986). "Generally, fact work product is subject to discovery upon a showing of 'need,' whereas opinion work product is absolutely, or nearly absolutely, privileged." *Id. See* Fla. R. Crim. P. 3.220(g) ("(1) Work Product. Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting or defense attorney or members of their legal staffs."). Documents produced pursuant to a discovery subpoena are, by definition, *not* work product. Indeed, the Rules

of Civil Procedure, which Rule 3.220(h)(1) incorporates into the Rules of Criminal Procedure, require the receiving party to furnish copies of documents received pursuant to a subpoena to any party who requests them. *See* Fla. R. Civ. P. 1.351(e) ("Copies Furnished. If the subpoena is complied with by delivery or mailing of copies as provided in subdivision (c), the party receiving the copies shall furnish a legible copy of each item furnished to any other party who requests it upon the payment of the reasonable cost of preparing the copies.").

The Rules of Criminal Procedure could have made provision elsewhere for the relief Williams seeks, but they do not do so. In particular, Rule 3.220(h) sets forth the procedure for discovery depositions, and the issuance of subpoenas for depositions, but does not set forth any procedure for the ex parte issuance of a subpoena duces tecum. Rule 3.220(m) not only fails to support Williams' Motion, but a fair reading strongly implies the Court consciously decided not to authorize ex parte proceedings for the purpose of issuing a subpoena duces tecum. Certainly, the Florida Supreme Court is well-aware of how to authorize such proceedings, as evidenced by Rule 3.220(m)(2)'s express authorization of ex parte proceedings regarding depositions of Category B witnesses.

Finally, the Florida Supreme Court has implicitly addressed this subject. In *Heath v. Becktell*, the Chief Judge of the 17th Judicial Circuit had issued an administrative order prohibiting the clerk of the court from "issuing, subpoenas duces tecum for discovery depositions in criminal cases upon praecipe of defense counsel" unless it was accompanied by a court order granting leave for the issuance of such a subpoena. 327 So. 2d at 4. The Court agreed with the Chief Judge that the Rules of Criminal Procedure do not provide for the issuance of a subpoena duces tecum without court order. *Id.* Nor do they provide for issuing such an order in an ex parte proceeding. [5]

To the extent that the failure to obtain the discovery which Williams seeks through the proposed subpoena duces tecum has stymied Williams' efforts to obtain a report from his expert, and to consequently disclose the expert to the State, this Order should allow Williams to move forward. Williams can either ask this Court to issue the subpoenas and set the matter for hearing, or he can seek interlocutory review of this Order.

DONE and ORDERED in Miami-Dade County, Florida this 18th day of February, 2013.

<<signature>>

Miguel M. de la O Circuit Court Judge

cc:

Amy Agnoli, Esq.

via email: *abrahamagnoliatt@bellsouth.net*

Ansley Peacock, Esq.

via email: *ansleypeacock@MiamiSAO.com*

Michael Von Zamft, Esq.

via email: *michaelvonzamft@MiamiSAO.com*

Alejandra L. Lopez, Esq.

via email: *alejandralopez@MiamiSAO.com*

Herb Smith, Esq.

via email: *hsmith@pdmiami.com*

Anthony Britt, Esq.

via email: *abritt@bfhllaw.com*

Footnotes

1 Williams has provided the Court with three (3) subpoenas duces tecum. Although directed at three different persons, the subpoenas are in sum and substance identical.

2 The Rules of Civil Procedure provide:
1.280 General Provisions Governing Discovery.
(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
(1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

3 More likely, the specific information sought by the subpoenas attached to the Motion would not be disclosed to the State until, and unless, the expert at issue (1) relies on the information in reaching conclusions which Williams believes will aid his defense, and (2) the expert is deposed.

4 After reviewing the proposed subpoenas duces tecum in deciding this Motion, the Court finds they do not appear to seek any information that could be considered "sensitive." However, the Court is troubled that the subpoenas appear to be extraordinarily overbroad. Even if the Court had the discretion to grant the relief Williams seeks, it would not issue the proposed subpoena without obtain more information, and would likely curtail and/or eliminate some of the category of documents requested.

5 The effect of a clerk issuing a subpoena duces tecum upon praecipe of defense counsel is similar to this Court issuing an ex parte subpoena duces tecum -- the documents are ordered to be produced without the State having an opportunity to object. If the documents are produced in lieu of an appearance at the deposition, the State may never learn of their existence unless the defendant seeks to introduce them at trial.

End of Document