STATE OF MICHIGAN

IN THE DISTRICT COURT FOR THE COUNTY OF MECOSTA

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v

KEITH ERIC WOOD

Defendant.

Case No. 15-45978-FY

Hon. Kimberly L. Booher

/

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OPINION & ORDER

Pursuant to Plaintiff's Motion to Quash Subpoenas Served on Prosecuting Attorney, Assistant Prosecuting Attorney, Mecosta County District Court Judge, and Magistrate, filed on December 7, 2015, heard on December 10, 2015, in the 49th Circuit Court for the County of Mecosta.

PRESENT: HONORABLE KIMBERLY L. BOOHER
Circuit Court Judge

FACTS

On November 24, 2015, Defendant Keith Eric Wood ("Wood") was arraigned on one count of Obstruction of Justice, contrary to MCL 750.505, and one count of Jurors – Attempting to Influence, contrary to MCL 750.120a(1).

A Preliminary Exam was set for December 10, 2015. Prior to the Preliminary Exam, the Defendant issued subpoenas to the following persons: Prosecutor Brian Thiede, Assistant Prosecutor Nathan Hull, District Court Judge Peter Jaklevic, and Magistrate Tom Lyons.

Defendant has subpoenaed Prosecutor Thiede and Assistant Prosecutor Hull to produce "[a]ll communications related to this case, including, but not limited to, written notes, e-mails, text messages, and voicemails, either sent or received to any Mecosta County employee and/or Mecosta County court employee," including Judge Jaklevic and Magistrate Lyons. Moreover, subpoenas delivered to Judge Jaklevic and Magistrate Lyons require them to produce certain documents. Additionally, Defendant seeks to call Mr. Thiede and Mr. Hull as witnesses – thereby triggering disqualification of their prosecutorial roles – and Plaintiff argues that Mr. Thiede and Mr. Hull are not necessary witness and cannot be forced to testify. At the hearing on this motion, the parties agreed that there was no argument about Judge Jaklevic and Magistrate Lyons, who were also listed as witnesses, being brought forth to testify. If Mr. Thiede and Mr. Hull are called as witnesses, then they must be disqualified from a prosecutorial role in this case.

LAW AND ANALYSIS

In this case, all four subpoenaed individuals were subpoenaed for the purpose of testifying. However, the only individuals over which there is an argument about whether or not testimony is proper are Mr. Thiede and Mr. Hull – there is no argument that Judge Jaklevic and Magistrate Lyons may be called. Additionally, the parties argue with respect to all four individuals whether certain information is discoverable. The Court will consider, where applicable, whether each individual's testimony is proper, and the Court will also address whether or not the discovery sought is proper with respect to each subpoenaed person at issue.

I. Judge Jaklevic

There is no argument over whether or not Judge Jaklevic may be called as a witness – it is clear he may be so called. The parties argue over whether or not defendant may include within the scope of discovery communications, as they relate to this case, between Judge Jaklevic and the prosecutor's office, any Mecosta County employee, or the jury pool. Plaintiff argues that the subpoenas demand information that cannot be discovered in a criminal case because the subpoena seeks communications regardless of their relevancy to the criminal case. Plaintiff notes that a subpoena duces tecum must specify with "as much precision and particularity as is possible" the records sought. Defendant states he is entitled to communications related to this case from any potential witness who made or received statements regarding the case.

Defendant is entitled to any communications that (1) relate to this criminal case and (2) were made by any witness that may be called at trial. As much is evident from MCR 6.201(A), which states:

> (A) Mandatory Disclosure. In addition to disclosures required by provisions of law other than MCL 767.94a, a party upon request must provide all other parties:
>
> * * *
>
> (2) any written or recorded statement, including electronically recorded statements, pertaining to the case by a lay witness whom the party may call at trial, except that a defendant is not obliged to provide the defendant's own statement

In this case, it is undisputed that Judge Jaklevic is a lay witness and that he may be called at trial. Straightforward application of MCR 6.201 mandates that any written or recorded statements made by Judge Jaklevic, including any electronically recorded statements, be furnished to Defendant so long as the statements pertain to the case at hand.

The above Michigan Court Rule raises a question as to what exactly qualifies as a statement. The Michigan Court Rules related to civil procedure apply in criminal cases except where the criminal provisions explicitly create their own overriding rule, where the civil provisions clearly restrict application to civil procedure, or where a statute or court rule provides another procedure in place of the civil provisions. MCR 6.001(D). Consequently, the Court looks to civil procedure for the definition of "statement." MCR 2.302(B)(3)(c) defines statement as:

> (i) a written statement signed or otherwise adopted or approved by the person making it; or
> (ii) a stenographic, mechanical, electrical, or other recording, or a transcription of it, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

The language of this provision does not appear to explicitly constrain its application to civil procedure, and there is no other statute or court rule which overrides it with respect to criminal procedure. Consequently, this definition of "statement" applies to MCR 6.201(A)(2).

Given the above definition of "statement," it is still unclear precisely when a written statement that is not signed is "adopted or approved" by the writer. Michigan has espoused the view that adoption or approval means unambiguous and specific approval by the witness. *People v Holtzman*, 234 Mich App 166, 179-180; 593 NW2d 617 (1999). For example, if a witness was read the prosecutor's notes which recounted the interview that had just taken place between the

prosecutor and witness, and the witness approved of the notes, that approval would not constitute "approval" such that it would become a "statement" of the witness. *Id.* at 179. In that scenario, the notes would be adopted or approved by the prosecutor, rather than the witness. Only unambiguous and specific approval by the witness, such that it is clear the witness intends to make the statement her own, qualifies.

In this case, any "statement" which was signed or either "adopted" or "approved" by Judge Jaklevic must be turned over to Defendant – given that the statement is related to the case at hand. While "Michigan follows an open, broad discovery policy that permits liberal discovery" of relevant information, *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616; 576 NW2d 709 (1998), limitations on that approach bar impermissible discovery requests based on conjecture. Plaintiff argues that allowing discovery in the manner Defendant seeks permits Defendant to engage in a "fishing expedition." However, the Defendant's request does not entail mere conjecture. Judge Jaklevic is a lay witness who was present during the events in this case as they transpired. His statements related to the case must be disclosed to Defendant pursuant to MCR 6.201, but they need be disclosed only insofar as they are within the definition of "statement" under MCR 2.302.

II. Magistrate Lyons

As with Judge Jaklevic, the parties do not dispute that Magistrate Lyons may be called as a witness to give his testimony. Instead, the parties argue over the same discovery issue that arose with respect to Judge Jaklevic. Consequently, the same rules and principles that applied to Judge Jaklevic also apply to Magistrate Lyons.

In this case, Magistrate Lyons is indistinguishable from Judge Jaklevic. The Court finds that Defendant's subpoena as it relates to Magistrate Lyons' discovery issue is not indicative of a "fishing expedition." Consequently, the Court will permit the same scope of discovery with respect to Magistrate Lyons as it will with respect to Judge Jaklevic.

III. Prosecuting Attorney Thiede

A. Prosecuting Attorney Thiede is Not a Necessary Witness

The parties argue over whether or not Prosecuting Attorney Thiede may be called as a witness by Defendant. Michigan Rules of Professional Conduct 3.7 provides as follows:

> (a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness except where:
>
> (1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or
(3) disqualification of the lawyer would work substantial hardship on the client

Defendant maintains that Mr. Thiede is a necessary witness. Therefore, the Defendant proposes that Mr. Thiede must be disqualified from prosecuting this case, and that a special prosecutor should be requested. Plaintiff argues that, under case law that expounds on the meaning of the term "necessary witness," Mr. Thiede is not a necessary witness.

In *People v Tesen*, 276 Mich App 134; 739 NW2d 689 (2007), the Michigan Court of Appeals addressed the definition of the term "necessary witness" under MRPC 3.7. It noted that the burden of showing that an attorney is a necessary witness resides with the party seeking disqualification. *Id.* at 144. The *Tesen* court then stated that "attorneys are not necessary witnesses if the substance of their testimony can be elicited from other witnesses and the party seeking disqualification did not previously state an intent to call the attorney as a witness." *Id.* Thus, in this case, Defendant must satisfy two requirements: he must show that (1) the substance of Mr. Thiede's testimony cannot be elicited from other witnesses and (2) he previously stated an intent to call Mr. Thiede as a witness. There is no argument over the second requirement – Defendant subpoenaed Mr. Thiede one day after receiving initial discovery in this case.

Defendant argues that Mr. Thiede is a necessary witness because (1) he took on the role of lead investigator and (2) it is appropriate to examine the prosecutor's thought processes because the criminal charges in this case are allegedly unconstitutional.

First, Defendant does not offer any reason as to why Mr. Thiede's hands-on approach in this case demands that he be characterized as a necessary witness. It is alleged, from the facts provided to the Court, that Mr. Thiede "discussed the issue with Judge Jaklevic, worked with Judge Jaklevic and the police" to bring Mr. Wood into the courthouse, "directly questioned Mr. Wood, and helped confiscate evidence of the alleged crime from Mr. Wood." These actions do move beyond what is routine for a prosecuting attorney, as arrests and interviews of witnesses – even interviews of victims – normally occur after police reports are filed and charges are formally brought. Yet nothing in the Michigan Rules of Professional Conduct and nothing in *Tesen* indicates that such actions alone make Mr. Thiede a necessary witness. Judge Jaklevic was present during all these events as well, and the parties have already noted that he may be called as a witness. Judge Jaklevic can testify to these events just as well as Mr. Thiede can. Consequently, Prosecuting Attorney Thiede is not a necessary witness under this theory.

Second, it is not appropriate in this matter to delve into Mr. Thiede's thought processes. Defendant cites *People v Gilmore*, 222 Mich App 442, 457-458; 564 NW2d 158 (1997), which states:

> Judicial review is appropriate only where prosecutorial decisions are unconstitutional, illegal, or ultra vires or where the prosecutor has abused the power confided in him. Absent any such challenge (which may require examination of the prosecutor's thought processes), e.g., an equal protection claim alleging racially biased prosecutions, the ability of the prosecutor to effectively carry out his constitutional responsibilities is undermined when the courts obtain access to documents such as the disposition record. (Citations and internal quotations omitted).

The example used by the *Gilmore* court is instructive. It may be appropriate to explore a prosecutor's thought processes where there is a claim of racially-based prosecutions, as no person other than the prosecutor can shed light on whether he is motivated by racial animus. However, Defendant stretches this logic too far. If a prosecutor could be disqualified as a necessary witness any time a defendant theorized his decision to prosecute was unconstitutional, illegal, or outside the scope of his authority, then prosecutors could be disqualified far more often than is feasible. If Defendant's claim is that is that Mr. Thiede's mental processes are open to examination because he engaged in an unconstitutional prosecution, then that would be grounds to disqualify every prosecutor who combats the notion that his prosecution is unconstitutional. Without any specific argument, such as selective prosecution, Defendant's reliance on *Gilmore* is unpersuasive.

In light of the above analysis, the Court holds that Mr. Thiede is not a necessary witness, and he need not be disqualified from prosecuting this case.

B. Discovery

The parties disagree on the scope of statements that constitute discovery in this case. Plaintiff acknowledges MCR 6.201(B), which states in part:

> Discovery of Information Known to the Prosecuting Attorney. Upon request, the prosecuting attorney must provide each defendant:
>
> > (1) any exculpatory information or evidence known to the prosecuting attorney.

At the hearing on this motion, Mr. Thiede accepted that any exculpatory information must be and would be turned over to Defendant. However, Plaintiff does not flesh out its understanding of exactly what is covered by the term "exculpatory information."

Plaintiff alleges that "the demand for communications 'sent or received' is an improper request for attorney work-product in this matter." Moreover, it writes that "mental impressions, conclusions, opinions, or legal theories would be protected under the law and are not subject to [D]efendant's demands." Finally, Plaintiff notes that "[Defendant's] subpoena seems to be seeking a copy of any communications 'related to the case' regardless of their relevancy to the criminal matter, and regardless of whether the 'Mecosta County employee' may or may not be a witness for the People."

Plaintiff's argument alludes to the work product doctrine, which states that "any notes, working papers, memoranda, or similar materials, prepared by an attorney in anticipation of litigation, are protected from discovery." See *Messenger v Ingham County Prosecutor*, 232 Mich App 633, 637-638; 591 NW2d 393 (1998) (citing Black's Law Dictionary (6th ed., 1990)). The work product doctrine constitutes a privilege, and MCR 6.201(C)(1) explicitly excludes privileged information from the scope of discovery in a criminal matter. However, the doctrine does have limits. For example, in *People v Johnson*, 168 Mich App 581; 425 NW2d 187 (1988), a letter that defendant's girlfriend wrote to defense counsel did not constitute work product. Indeed, information sent to an attorney from someone other than the attorney's agent will not constitute work product, as work product must be prepared by an attorney in anticipation of litigation.

Under the above rule, Plaintiff need not release any work product that is privileged. However, statements made to the Prosecuting Attorney's Office by those parties working outside of the Prosecuting Attorney's Office, even those that are still otherwise Mecosta County employees, do not fall within the purview of the work product doctrine and, as they are not "prepared by an attorney in anticipation of litigation," are not privileged. Furthermore, the work product privilege may be waived. *Augustine v Allstate Ins Co*, 292 Mich App 408, 421; 807 NW2d 77 (2011). Disclosure to a third party waives work product privilege. See *People v Tronti*, 176 Mich App 544; 440 NW2d 62 (1989). Consequently, Plaintiff must furnish any statements that both (1) were sent to the Plaintiff by a third party, or were sent to a third party by the Plaintiff, and (2) contain exculpatory information. Plaintiff must also furnish any written or recorded statements, including electronic statements, that pertain to the case and were made by a lay witness that Plaintiff may call at trial. Plaintiff is not required to furnish any statements it made to third parties where those statements do not contain exculpatory information.

Where Defendant's subpoena exceeds the bounds set here by the Court, the subpoena is impermissibly broad in scope. Thus, to the extent that the subpoena seeks information not strictly in line with the limitations explicitly delineated by the Court, the Court quashes the subpoena. To the extent that the subpoena seeks information strictly in line with the limitations explicitly delineated by the Court, the Court declines to quash the subpoena.

IV. Assistant Prosecuting Attorney Hull

A. Assistant Prosecuting Attorney Hull is Not a Necessary Witness

Finally, the parties dispute whether Assistant Prosecuting Attorney Hull should be disqualified from prosecuting this case due to allegedly being a necessary witness. Defendant offers no facts that differentiate Mr. Hull from Mr. Thiede in such a way that disqualification of Mr. Hull is warranted. Defendant's sole argument on this front is that Mr. Thiede is the Prosecuting Attorney for Mecosta County and that Mr. Hull is his subordinate. Defendant states that since "both are necessary witnesses and have violated Mr. Wood's constitutional rights, [and for all other reasons stated in Defendant's Brief], it is clear that they and their office cannot continue as prosecutor in this case."

First, because the Court finds that Mr. Thiede is not a necessary witness, and no facts exist that posit a stronger case for disqualifying Mr. Hull as a necessary witness, the Court finds that Mr. Hull is not a necessary witness for precisely the same reasons Mr. Thiede is not a necessary witness. Moreover, Defendant's rationales for disqualifying Mr. Thiede do not apply to Mr. Hull. The facts presented to the Court name Mr. Thiede, not Mr. Hull, as the person who took a lead role in this case at the time events developed. Additionally, Mr. Thiede, not Mr. Hull, was the person to handle the decision to bring charges in this case. Defendant's reasons for disqualifying Mr. Thiede simply do not apply to Mr. Hull.

Second, Defendant's motion with respect to Mr. Hull is founded on the notion that Mr. Hull should be disqualified merely because he is subordinate to Mr. Thiede. Even if Mr. Thiede was disqualified, it does not follow that Mr. Hull must also be disqualified. MCL 49.160(4) states that appointment of a special prosecuting attorney is unnecessary "if an assistant prosecuting attorney has been or can be appointed by the prosecuting attorney pursuant to . . . MCL 776.18, to perform the necessary duties within the constraints of that section," or where "an assistant prosecuting attorney has been otherwise appointed by the prosecuting attorney pursuant to law and is not disqualified from acting in place of the prosecuting attorney." The Court finds that Mr. Hull is not otherwise disqualified from acting in place of the prosecuting attorney. Accordingly, even if Mr. Thiede was disqualified, a special prosecutor is not necessary.

B. Discovery

Plaintiff and Defendant also argue the same discovery issue with respect to Mr. Hull as was argued with respect to Mr. Thiede. Again, Defendant offers no basis on which to differentiate the two. Consequently, the Court holds that the scope of discovery with respect to Mr. Hull is identical to the scope of discovery with respect to Mr. Thiede, and indeed to the entire Prosecuting Attorney's Office.

CONCLUSION

In light of the foregoing analysis, the Court holds that Plaintiff's Motion to Quash Subpoenas Served on Prosecuting Attorney, Assistant Prosecuting Attorney, Mecosta County District Court Judge, and Magistrate is GRANTED IN PART and DENIED IN PART. As to the issue of testifying as a witness and the related issue of disqualification, the Court quashes Defendant's subpoenas with respect to Prosecuting Attorney Thiede and Assistant Prosecuting Attorney Hull, but does not quash with respect to Judge Jaklevic and Magistrate Lyons. As to the issue of discovery, the Court does not quash with respect to Judge Jaklevic or Magistrate Lyons. Further, the Court holds Plaintiff must furnish any statements that both (1) were sent to the Plaintiff by a third party, or were sent to a third party by the Plaintiff, and (2) contain exculpatory information. Plaintiff must also furnish any written or recorded statements, including electronic statements, that pertain to the case and were made by a lay witness that Plaintiff may call at trial. Where Defendant's subpoena exceeds the bounds set here by the Court, the subpoena is impermissibly broad in scope, and is quashed.

IT IS SO ORDERED

Dated: 2-2-16

Kimberly L Booher

Hon. Kimberly L. Booher
District Court Judge

Certificate of Service

The undersigned certifies that on the date below a copy of the within Order was served upon the parties of record in this cause by first class mail or personal service to their respective addresses on record.

Dated: 2-2-16

Adam Walker
Law Clerk