

STATE OF WISCONSIN,

Case No. 2012 CF 1602

Plaintiff,

vs.

ANDREW SPEAR,

Defendant.

**NOTICE OF MOTION AND MOTION TO COMPEL PRODUCTION OF
PHONE, TEXT AND E-MAIL RECORDS**

To: Mr. Matthew Moeser
Assistant District Attorney
3000 Dane County Courthouse
215 South Hamilton Street
Madison, WI 53703

Now comes the defendant, Mr. Andrew Spear, appearing specially by his attorney, G. Brian Brophy of Sipsma, Hahn & Brophy, L.L.C., and reserving his right to challenge the court's jurisdiction, hereby seeks a subpoena compelling the production of Mary Spear's and Dennis Smith's phone records, text records and e-mail communications from June 2012 through February 10, 2012.

This motion is brought pursuant to the 5th, 6th, and 14th Amendments to the United States Constitution; article 1, sections 1, 7, and 8 of the Wisconsin Constitution; sections §905.01; 971.31(1); and 971.23(1)(h) of the Wisconsin Statutes; *Brady v. Maryland*, 373 U.S. 83 (1963); *State v. Harris*, 2004 WI 64, 272 Wis. 2d 80, 680 N.W.2d 737.

AS GROUNDS, the defendant through counsel, based on a review of the discovery provided by the State, upon personal knowledge and upon information and belief asserts:

On Sept. 17th 2012, the defendant's attorneys issued a subpoena to AT&T seeking access to Mary Spear's phone and text records. Mary Spear was notified of the subpoena and her attorneys contacted AT&T and the State seeking to block the production of the records. The State filed a motion to quash the defense subpoena. The defense did not demand a hearing as Assistant District Attorney Moeser stated the State might be getting

the records. To date, the State has not gotten the records; or, if they have, has not turned them over to the defense.

The dispute leading to the allegations in the complaint has at its genesis the defendant's observations of secretive behavior by Mary Spear and the discovery of e-mails indicating Mary Spear was having an affair with her boss, Dennis Smith. (Complaint, pg. 4). Mary Spear alleged that the defendant lit her on fire while the two were in his woodshop. (Complaint). The defense contends Mary Spear threatened to light herself on fire and then did light a fire which came closer to her than she'd imagined it would in a pattern of increasingly dramatic behavior intended to keep the defendant from calling Dennis Smith's wife. (State's Discovery pgs. 13-17). Mary Spear and Dennis Smith have denied any affair. (State's Discovery, pgs. 54, 143-44)

After the events in the woodshop, Mary Spear drove the defendant home. She then went into their condo retrieved only her computer, the defendant's computer and a pair of tennis shoes and then quickly headed out. (State's Discovery pg. 3). She was stopped in the hallway by the defendant who was demanding the keys to his truck so that he could leave. (State's Discovery pg. 8). Neighbors observing the ruckus called police. *Id.*

Mary Spear was transported to the hospital where she was subsequently met by Dennis Smith. (State's Discovery pg. 53). She refused to allow police access to her or Mr. Spear's computers. (State's Discovery pg. 109). Subsequently, nearly 24 hours passed prior to Mary Spear giving a statement to the case detective, Detective Grann. (State's Discovery pg. 53-54, 62).

This case, like nearly all criminal cases, will call on the fact-finder to judge the credibility of the witnesses. Whether Mary Spear was having an affair with Dennis Smith and the extent of Mary Spear's contacts with Dennis Smith before and after the date of the events leading to charges will shed light on the veracity of their statements regarding their relationship. Their phone records are potentially highly exculpatory evidence and certainly evidence that may be used to impeach their credibility. Mary Spear communicated with Dennis Smith both through her AT&T cell phone and through a State issued Blackberry. (Affidavit of Andrew Spear). It is unknown whether the SMS, MMS or other Blackberry messages are saved on the State server.

Moreover, Dennis Smith told police that two phone calls from Mary Spear phones were made to his home number during the time period it is alleged that the defendant and Mary Spear were in the wood shop. (State's Discovery pg. 54). This information is both relevant and potentially exculpatory as it puts the defendant's and Mary Spear's behavior on August 16, 2012 into context.

ARGUMENT

In moving to quash the defendant's subpoena for phone records the State properly relied on *State v. Schaefer*, 2008 WI 25, 308 Wis. 2d 279, 291, 746 N.W.2d 457, 463. Having

reviewed *Schaefer*, the defendant agrees it is the law and does stand for the prospect that a criminal defendant does not enjoy the same procedural discovery rights as the State or even a civil litigant, particularly prior to a preliminary hearing. However, in so holding, the Court reiterated the Constitutional rights a defendant must be afforded for a fair trial:

“It is embodied in the due process guarantees of the Fifth and Fourteenth Amendments and in the Sixth Amendment's command that the accused shall have compulsory process for obtaining witnesses in his favor. Due process preserves an accused's right to challenge the prosecution's case by obtaining evidence tending to establish the accused's innocence or by casting doubt upon the persuasiveness of the prosecution's evidence. *Id.*, ¶ 20.”

Schaefer discussed the reasons why a criminal defendant is not denied due process by being denied subpoena power **prior to the filing of an information.**¹

While denying criminal defendants the general subpoena power, Wisconsin law reiterates that a defendant has a fundamental right to pretrial discovery. “Wisconsin has moved away from the notion that a criminal trial is a sporting event. *See Irby v. State*, 60 Wis.2d 311, 320, 210 N.W.2d 755, 760-61 (1973). Rather than continue the search for truth in trial by ambush, Wisconsin permits pretrial discovery as a device to speed up trials; to encourage defendants to enter pleas after learning the strength of the state's case; and, most importantly, to make trials fair by providing a level playing field. *See id.* There is a general realization that “[t]he truth is most likely to emerge when each side seeks to take the other by reason rather than by surprise.” 2 W. LaFave & J. Israel, *Criminal Procedure* § 19.3, at 475-76 (1984) (footnote omitted). *State v. Maday*, 179 Wis. 2d 346, 353-55, 507 N.W.2d 365, 369-70 (Ct. App. 1993).

Likewise, personal messages saved on State servers and transmitted using State equipment are not open records subject to the open records law. *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, 327 Wis. 2d 572, 786 N.W.2d 177. The defendant has no available independent process to get Dennis Smith's and Mary Spear's communications, their phone calls, texts and e-mails sent or received on their State issued Blackberry's, through their State computers and saved on State servers.

¹The *Schaefer* Court left open that a defendant may be entitled to subpoena power upon a showing of a particularized need for the information sought **after the filing of an information:**

“It must be noted that the limitations on the scope of discovery in Wis. Stat. § 971.23(1) may not always prevail against a subpoena duces tecum *after* an information is filed. We have previously implied that a subpoena duces tecum may have to be honored if the defendant shows a “particularized need” for information in the possession of the state. *See Lynch*, 82 Wis.2d at 466-68, 262 N.W.2d 773. *Id.*, ¶ 59.

We are left with an adversarial system wherein a criminal defendant has a right to pretrial discovery but if legal process is required he must get it from the State. To a large extent, this leaves a criminal defendant subject to the grace of the prosecutor. Fortunately, Wisconsin has adopted the ABA standards for Prosecution. *Wold v. State*, 57 Wis. 2d 344, 349, 204 N.W.2d 482, 486 (1973). "Under the American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function, Approved Draft, p. 100, sec. 3.11(c), the prosecutor may not avoid pursuit of any evidence. The Commentary at p. 102 makes clear it is the prosecutor's duty to acquire all relevant evidence. *Id.* *Wold* specifically references rule 3.11:

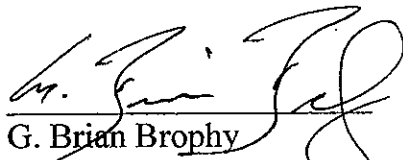
Rule 3.11 Disclosure of evidence by the prosecutor.

(c) It is unprofessional conduct for a prosecutor intentionally to avoid pursuit of evidence because he believes it will damage the prosecution's case or aid the accused.

Here, Mary Spear and Dennis Smith's phone records, their personal cell phones and State issued Blackberry's, are only available to the defense through the District Attorney's subpoena and investigative power. Therefore, based upon the facts set forth in this motion and the attached affidavits the defendant has hereby set forth facts to show a particularized need for the information sought and prays the Court issue an order compelling the State to provide the sought after records. This information is in the exclusive possession of the State, it is potentially exculpatory and it is required to be disclosed to the defense pursuant to §971.23(h).

Dated at Madison, Wisconsin this 19th day of February, 2013.

Respectfully submitted,



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