

STATE OF WISCONSIN : CIRCUIT COURT : COUNTY OF DANE
BRANCH 7

STATE OF WISCONSIN,
Plaintiff,

Case No. 2012CF001602

v.

ANDREW D. SPEAR,
Defendant.

COPY

PROCEEDINGS: Hearing

DATE: June 12, 2013

BEFORE: The Honorable Judge WILLIAM E. HANRAHAN

APPEARANCES: The state of Wisconsin appeared by Assistant District
Attorney MATTHEW D. MOESER; Madison, Wisconsin.

Also appearing was Attorney DIANE M. WELSH of Von Briesen
and Roper SC; 3 South Pinckney Street, Suite 1000;
Madison, Wisconsin 53703.

Defendant ANDREW D. SPEAR appeared by telephone and with
Attorney G. BRIAN BROPHY of Sipsma, Hahn, and Brophy LLC;
701 East Washington Ave., Ste. 201; Madison, Wisconsin 53703.

PATRICK A. WEISHAN, RPR
Official Court Reporter
Branch 7

1 And I went on to say, "Indeed the contents of those records
2 are not going to be disclosed to anyone, period." That's
3 "...still going to be the subject of a motion in limine in
4 advance. And, once again, I don't believe that there's any room
5 ... in this courtroom for purely salacious details meant to pique
6 the prurient interests of onlookers or for the purposes of
7 inflaming the prejudice on the jury. There's going to be a
8 strict examination of the theory of admissibility, and if it's
9 consistent with the proposed defense--and ... I will also have to
10 take into context or into account ... any records that may be
11 relevant from healthcare providers--I'll consider that again."

12 Now, let me summarize what I believe the defense to be
13 which the pretrial discovery order was predicated upon. It was
14 claimed that seeking access to the contents of the victim's
15 computer and the medical records of the victim, and I should say
16 purported victim at this point, the defendant claimed that there
17 was a likelihood that exculpatory evidence relevant to support
18 your theory that Mary Spear suffered from a mental illness that
19 would predispose her to self-harm, that she was having an affair
20 with a political appointee who, if the affair was discovered,
21 would lose it all; so, to protect him and so as not to alienate
22 his affection for her, fueled both, I guess figuratively and
23 literally, by mental illness and gasoline, tried to harm
24 herself. Is that a fair characterization of the defense?

25 ATTORNEY BROPHY: It is, Your Honor, though we-- The

1 defense isn't that she tried to harm herself. It's that she
2 tried to give the appearance that she would harm herself. And I
3 think that that is an important distinction when the Court is
4 engaged in the in camera inspection of the medical records, and
5 I am couching what I'm saying, but there were behaviors that we
6 believe are in the medical records that may be consistent with
7 behaviors that Ms. Spear was alleged to have engaged in on or
8 reported engaging in on the date of the incident.

9 THE COURT: All right.

10 ATTORNEY BROPHY: Okay.

11 THE COURT: So maybe there's a distinction between
12 giving the appearance of trying to harm herself, but I think
13 that if you do indeed splash gasoline around your feet and light
14 a match, that there's a likelihood that in fact it would be more
15 than just the appearance of harming yourself.

16 Now, having said that, I did look through the medical
17 records, and there was absolutely no support for those claims in
18 the medical records. To the contrary, the correspondence from
19 the defendant to the medical providers in advance of the crimes
20 that have been charged show that the defendant knew of the
21 existence of the emotional ties between his wife and this other
22 man and sent e-mails that appear to have been intercepted by the
23 defendant, with cover letters, to the therapist.

24 Now, these letters, I think, and I'll provide them to you,
25 although presumably your client should have copies of them since

1 they appear to have been sent by him, they could be interpreted
2 two ways. One way, they appear to be sent from a patient,
3 remarkably understanding, and caring husband of the type that
4 I've never seen. Granted, I perhaps lead a life here where my
5 immersion in the criminal law for the past 25 years, I may have
6 a skewed view of these kinds of things, but a remarkably
7 patient, caring, and concerned husband sent these to the
8 therapist, or the other interpretation could be a cold,
9 calculated, controlling individual plotting retaliation and
10 revenge for basically having his heart stomped on by someone
11 that he trusted.

12 What I'm saying is that the original basis--that is to say,
13 the scenario, the theory--behind this unusual discovery
14 accommodation has, in a word, evaporated. What remains appears
15 to be an unwarranted fishing expedition into the private matters
16 of the victim.

17 I'll provide these records here. These are not medical
18 records. They are contained in the file of an MD, presumably a
19 psychiatrist, in Dallas, but they are letters from your client
20 that include e-mails which clearly spell out the notion that
21 your client believed that there was an affair and had proof, at
22 least in his mind, that there was an affair, of an emotional tie
23 between his wife and this other man. So, the initial notion
24 that he did not know about the affair, that he simply suspected
25 the affair really are not borne out by the records that I have

1 evaluated. The notions of-- The other relevant, arguably
2 relevant, materials that were sought by the defense are not
3 present in the medical records that I've reviewed, and there
4 were very many pages of medical records from various service
5 providers.

6 And so I'll give the defense a chance to briefly respond,
7 if you wish. If you need to regroup, you can do that as well.
8 But I'll provide copies of this material to you.

9 Now, having said that, turning to the State, have materials
10 from the laptop been distributed, or what was the status of
11 that?

12 ATTORNEY MOESER: No. I apologize for the shifting
13 position the State's taken as I've tried to figure out what the
14 best way is to resolve this issue. Where things stand right now
15 is that, consistent with my letter to the Court on May 20,
16 Mr. Brophy did provide me an external hard drive, which I turned
17 over to the city of Madison Police Department. Detective Cindy
18 Murphy imaged the hard drives for both Mr. Spear and Ms. Spear's
19 computers which are in evidence and placed a forensic image of
20 those hard drives onto these hard drives. Because of the
21 Court's prior oral ruling about controlling the production of
22 things, I did not want to simply hand these over to Mr. Brophy.
23 That's why I wrote the letter.

24 One development I've become aware of since writing the
25 letter that I think would relate to how the State would like to

1 proceed in this case is that apparently Mr. Spear, the
2 defendant, posted on Facebook something regarding accessing a
3 Carbonite account, which is a remote backup system people can
4 download on their computers and upload their files to preserve
5 data and information in case their computer is stolen or
6 destroyed or something. Mr. Spear had posted something along
7 the lines of--I don't recall the exact wording--suggesting that
8 he was reviewing access to e-mails from Ms. Spear through
9 Carbonite.

10 When this information came to my attention, the first
11 concern we had was whether Mr. Spear had somehow gained access
12 to current e-mails or current computers owned or operated by
13 Mary Spear. The city of Madison Police Department looked into
14 this. Based on conversations with Carbonite and information
15 given to them by Carbonite, at best they can determine that what
16 Mr. Spear is accessing are whatever was backed up before
17 August 16th, 2012, onto the Carbonite system, and I don't know
18 what that includes or what that involves, but potentially it
19 would involve anything that was on Mary Spear's computer as of
20 the date of this incident. So, to my mind--and again, I don't
21 know what he's accessed--to some point that reduces the privacy
22 concerns that I think I might have had, because Mr. Spear,
23 frankly, probably has access to a substantial amount of data
24 right now which would be the same data potentially that's on
25 these--was on the computers and is now on this external drive.

1 After the hearing we had in March, I had to confer briefly
2 that week with the city of Madison Police Department,
3 specifically with Detective Murphy, who is an expert in computer
4 forensics, about doing this. And, you know, her position, well,
5 her information she provided to me was what the Court had
6 proposed doing simply was not feasible. She couldn't simply
7 search for e-mails given the way she understood how the file
8 structures of the AOL files work or the web-based e-mail work.
9 I conferred with her again in April, and she explained to me
10 that it would take multiple weeks to extract data, reduce it,
11 and redact it, and you still might run into an issue of a later
12 claim by the defense that something hadn't been done properly or
13 the State was somehow withholding information.

14 So, frankly, my number one concern at this point is not to
15 be in a situation, given what I think would be the limited
16 relevance of this information, where there would be a discovery
17 issue, and so I felt that the safest course of action after
18 conferring with Detective Murphy multiple times and considering
19 this with other people in my office was to simply produce these
20 hard drives, allow the defense to do what it wants with them
21 subject to whatever limitations the Court places on it, but to
22 not be in a situation where there would be a claim later on
23 that, because the State or Detective Murphy didn't do something
24 the way a different forensic investigator may have done it,
25 somehow the State has violated the Court's order and violated

1 the discovery ruling. So that's my--that's the main basis of my
2 desire to produce these.

3 And, to some extent, I think the privacy concerns, although
4 legitimate, in my mind are reduced by the fact at this point
5 that it appears Mr. Spear may have access to not just e-mail
6 records, but potentially other files that would have been on
7 these computers, in the Carbonite system. Nothing has been
8 produced to me in discovery, and I've spoken to Mr. Brophy about
9 that, and I don't know if Mr. Brophy knows exactly what
10 Mr. Spear has accessed or gained access to, but I think that
11 it's not like this is the sole repository of this information at
12 this point, and the defendant may well have access to, frankly,
13 this data in a much more usable form than the State would have.

14 So what I would be asking the Court is to simply allow me
15 to produce these to comply with the State's obligations, and if
16 the Court believes a limitation should be put on Mr. Spear or
17 Mr. Brophy in terms of disseminating this outside the court
18 process, to resolve the issue that way.

19 THE COURT: All right. Certainly I know that,
20 Attorney Brophy, you've always been a straight shooter with this
21 court, and you have a sterling reputation in the community for
22 your integrity, and I'm guessing, and I'm not going to ask you,
23 I'm guessing your client didn't tell you that he stacked this
24 information in the records of the service providers and knew
25 about the subject that he was communicating to them in advance.

1 ATTORNEY BROPHY: I'm not quite sure what you're
2 saying.

3 THE COURT: I'm saying that your client, although it
4 was represented to the court that he did not know or he merely
5 suspected the affair, and although your client indicated that
6 the victim had tried to set herself on fire in the past or had a
7 tendency to rip her clothes off, perhaps he wasn't entirely
8 candid with you about those beliefs, and perhaps he wanted
9 somebody to look in the records of this psychiatrist to discover
10 the materials that he forwarded to the psychiatrist for the
11 purposes of gaining some sort of tactical advantage. That's
12 what I'm saying. I don't know that to be the case, but it's
13 very bizarre that you would come to court asking the court to
14 turn over information that might tend to suggest that she was
15 actually having an extramarital affair when he already knew it,
16 as evidenced by the letters that were in the provider's files
17 sent by your client.

18 ATTORNEY BROPHY: I haven't seen those letters, Your
19 Honor.

20 THE COURT: Exactly.

21 ATTORNEY BROPHY: And I would say that I, thus far,
22 I believe that my client has been straight with me, and I think
23 that my client was struggling and wanting very much to
24 disbelieve that there was an affair. I haven't seen the
25 letters, but I think that he was both convinced that there was

1 and wanting to be convinced that there wasn't.

2 THE COURT: Again, that's one possible
3 interpretation of what I've read here, and that may not be the
4 one that prevails with the jury. Your client may not have
5 believed it, but I think any objective, reasonable person, upon
6 reading the e-mails that he furnished, would not have such a
7 hard time believing it. So I'll furnish that, and I do at this
8 time, based upon the information that's been uncovered, allow
9 the State to, if the State is requesting to return the personal
10 computers to the victim, you may do so at this time along with
11 the hard drives that you've replicated, and I do appreciate your
12 cooperation.

13 ATTORNEY MOESER: Return to--

14 THE COURT: To the victim.

15 ATTORNEY MOESER: So not turn it over to Mr. Brophy?

16 THE COURT: Not turn it over to Mr. Brophy.

17 ATTORNEY BROPHY: So you are telling us that we are
18 not getting the computers?

19 THE COURT: Correct.

20 ATTORNEY BROPHY: All right. And I, just for the
21 record, what's the basis for that ruling?

22 THE COURT: Well, we can--we can have it read back
23 to you. The court's ruling was narrow to begin with. It was a
24 question of, first of all, the relevance of the materials that
25 were sought. The request was made in the context of-- The

1 court, it was explained to the court that the medical records
2 contained information that would suggest that the victim was
3 emotionally unstable to the point where she would set herself on
4 fire and that there was a likelihood that she would do this so
5 she could distract attention from her boyfriend and the like.
6 And that theory, that offer of proof has absolutely no support
7 in the medical records, no support in the medical records. And
8 the notion of whether or not she was having an affair and
9 whether the defendant suspected that, the defendant already had
10 sufficient knowledge of the goings-on to make up his mind about
11 that. There was no need to go any farther.

12 ATTORNEY BROPHY: Your Honor, may I respond?

13 THE COURT: Yes.

14 ATTORNEY BROPHY: The medical records were not
15 requested to suggest whether or not she would set herself on
16 fire. The medical records were there to show that her husband
17 had reason to believe that she could at times be suicidal. The
18 medical records were requested to show that she had suffered
19 seizures in the past when in stressful situations, because
20 Mr. Spear has stated that she appeared to be acting as if she
21 were going to have a seizure during the course of the incident
22 that led to the charges. Likewise, the medical records were
23 requested because during the course of those seizures, Ms. Spear
24 had made specific statements about fire and had made specific
25 statements or had taken her clothes off, all of which are

1 corollary or correlate to the events that are alleged in the
2 Complaint. Those were some of the reasons for the medical
3 records.

4 So I am taking it from the Court's ruling that there is no
5 record of seizures in the medical records, that there is no
6 record of suicidal ideation or of Ms. Spear threatening suicide,
7 and that there is no record of her talking about feeling that
8 she was on fire or taking her clothes off. Those were the
9 reasons that the medical records were sought.

10 THE COURT: There was no--there was no evidence
11 consistent--

12 ATTORNEY BROPHY: With that.

13 THE COURT: --with the defendant's assertions.

14 ATTORNEY BROPHY: Okay. And then with regards to
15 the computer records and the e-mails, etc., the defense is that
16 Ms. Spear engaged in behavior she engaged in in order to protect
17 herself and others going forward. There have been public
18 statements made not by the defense. I've noted that in
19 Ms. Welsh's filing, there are constant assertions of the defense
20 trying to disparage Ms. Spear. I note that the only public
21 statements that have been made in this case have been made by
22 Mr. Smith, I believe, that deny any affair with Ms. Spear, that
23 deny any plans going forward with Ms. Spear. That is the
24 information which we believe is on the computer, and we have
25 stated to the State that we know that at some point in time

1 Mr. Spear saw, you know, e-mails between Ms. Spear and her
2 father talking about going to Washington should candidate Romney
3 have won the election, and there are discussions about the
4 affair which he learned of, and perhaps those are in the e-mail,
5 the records which the Court is going to turn over to me now, but
6 certainly we anticipate that there is a great deal of discussion
7 which goes directly to the credibility of Mr. Smith and of
8 Ms. Spear that is in that computer.

9 THE COURT: All right. I'm sure there's a lot of
10 good dirt in that computer, but whether you have a right to
11 access it, that's a different story. In the previous ruling, my
12 discovery order to begin with, I left off the first few lines.
13 It says-- I said as follows. "I've got initially the manner by
14 which this was presented appeared to urge the court to find that
15 the actual existence of an extramarital affair was of
16 significance here, and I still find that it's not. The
17 defendant's belief in the existence of..." the "affair may be of
18 significance in the State proving this case to explain their
19 characterization of rage on the day of the event." And, again,
20 "The victim's belief--this is according to the defense--of an
21 impending discovery of the actual extramarital affair, the
22 effect that that would have on her future and potentially the
23 futures of others around her as an explanation for the defense
24 characterization of the facts here I think is arguably
25 relevant..."

1 That's the passage that I cited before, and I can tell you
2 that based upon the documentation sent by your client to the
3 service providers, the issues I think have been fully fleshed
4 out and narrowed down to the time period in question. The time
5 period in question was immediately before the events that are
6 contained in the Criminal Complaint. That is certainly
7 sufficient. Anything beyond that is unwarranted, speculative.
8 I just can't imagine how that would lead to any relevant
9 material that would be admissible. So I'm going to deny any
10 further discovery in that regard.

11 ATTORNEY BROPHY: All right.

12 THE COURT: Now, I would like to get this back on
13 track. I know we don't have--we have a trial date coming up,
14 jury selection I think on the 22nd of July. We've got a status
15 date on the 11th of July. If there's been plea negotiations--
16 Have there?

17 ATTORNEY MOESER: We've had some discussions. Could
18 I just go back to one other discovery issue--

19 THE COURT: Yes.

20 ATTORNEY MOESER: --to alert the Court to? I did in
21 April contact the Department of Health Services to get
22 information which they had accumulated I think in response to
23 open-records requests, some from Mr. Brophy as well as others.
24 I did receive I think late last week a large selection of
25 documents and e-mails from health services which they turned

1 over to Detective Jamie Grann and that he brought to my office.
2 I would-- Again, I know the Court had limited how it wanted
3 things produced. My understanding is most of these items have
4 already been produced either to Mr. Brophy or to other people in
5 the form of open-records requests. There are e-mails between
6 Mary Spear and Dennis Smith. I would just ask for permission to
7 just turn those over to Mr. Brophy. I've looked at them
8 briefly. They don't seem to be personal in nature. They all
9 seem to be work related.

10 The other thing is, going back to the phone records, the
11 State did turn over to me some phone data involving both
12 Mr. Smith and Ms. Spear. I do need to subpoena additional
13 information from the different phone providers to comply with
14 the Court's orders about that. I did speak to Mr. Brophy about
15 that last week, and I'm in the process of generating those
16 subpoenas, which when served I think would result in the phone
17 records being obtained, either returned to Detective Grann or to
18 the Court, depending how the phone providers do it, probably
19 within about a week. So I would expect to have those by the end
20 of June at the latest, and that would be consistent with the
21 Court's order that Mr. Brophy and I confer to determine if there
22 were any phone numbers beyond what's already in discovery that
23 would be needed to subpoena. So I'm in the process of doing
24 that. I would just ask for the Court's permission to turn over
25 all those items to Mr. Brophy without having to come back to

1 court for any type of review.

2 THE COURT: All right. Any objection?

3 ATTORNEY BROPHY: No.

4 THE COURT: Okay. I didn't actually plan a review.

5 Did I say we were going to have a review?

6 ATTORNEY MOESER: I just-- I know the Court had
7 wanted things limited, and I thought that went to the computers,
8 but I just don't want to be turning over stuff if the Court
9 thought it just wanted to have some role in the discovery
10 process on anything else.

11 THE COURT: All right. I appreciate your concern.

12 ATTORNEY MOESER: Otherwise, Mr. Brophy and I have
13 spoken briefly, but we don't have any type of resolution at this
14 point.

15 THE COURT: All right. If there is some resolution,
16 I'll take it on the status conference date of July 11th.

17 ATTORNEY MOESER: Okay.

18 ATTORNEY BROPHY: Couple of things, Your Honor. You
19 just ordered that the computers, plural, be turned to Ms. Spear.
20 They're not Ms. Spear's computers. One computer is Ms. Spear's.
21 One is Mr. Spear's, and it should not be returned to Ms. Spear.

22 THE COURT: Are you in agreement with that? I'm not
23 here to sort out the marital estate at this point. Is that
24 possible?

25 ATTORNEY MOESER: My understanding is there's one

1 computer which was clearly identified as being Mary Spear's and
2 one that's identified as being Andrew Spear's, and I'll comply
3 with any order the Court gives me about returning things. I
4 would indicate that the images of both computers are on the
5 police department servers as well as on this external hard drive
6 for Mr. Brophy. So the State would like to maintain those
7 images in case there's any future dispute about anything
8 discovery related.

9 THE COURT: How did you access the images on the
10 defendant's computer?

11 ATTORNEY MOESER: With the consent of Mr. Brophy--

12 THE COURT: Oh, okay.

13 ATTORNEY MOESER: --to image.

14 THE COURT: All right. For what period of time do
15 you intend to keep those?

16 ATTORNEY MOESER: Well, I would say until, if there
17 is a conviction, until any conviction is final.

18 THE COURT: All right.

19 ATTORNEY MOESER: Just in case there's any
20 litigation about anything about the computers, so there's no
21 claim that the State despoiled evidence.

22 THE COURT: All right. And the machinery itself?

23 ATTORNEY MOESER: Pardon?

24 THE COURT: You can return the machine itself?

25 ATTORNEY MOESER: I will if that's what the Court is

1 instructing me to do.

2 THE COURT: Is there any reason to keep it?

3 ATTORNEY MOESER: I would want to confer with
4 Detective Murphy, but I don't think there is. I can alert the
5 Court to that.

6 THE COURT: All right. I'll give you five days to
7 do that.

8 ATTORNEY MOESER: Thank you.

9 ATTORNEY BROPHY: We simply want whatever
10 information is contained on those computers to be saved until
11 such time as there's either an acquittal or the appeals process
12 has run.

13 THE COURT: Oh, okay. So, the device itself, you
14 don't want it back?

15 ATTORNEY BROPHY: Well, I want whatever information
16 is on there. The device itself, we want Mr. Spear's device
17 back.

18 THE COURT: Yeah.

19 ATTORNEY BROPHY: But, as far as the other devices,
20 I can't make a reasonable objection to the device being turned
21 back if all of the information on it has been properly
22 documented and saved so that it can be accessed should it need
23 to be so.

24 THE COURT: Should be all right in that little green
25 box that you've got right there; is that right?

1 ATTORNEY MOESER: Yes, and that's actually
2 Mr. Brophy's green box, so I will hold onto that, too, and I'll
3 confer with Detective Murphy, and I'll, if there's some reason
4 we can't return both machines either to Ms. Spear or to
5 Mr. Spear, I'll alert the attorneys for both parties as well as
6 the Court within five days.

7 THE COURT: Okay. Very good. Anything more?

8 ATTORNEY BROPHY: Yes, Your Honor, and this is just
9 a point of housekeeping. The Circuit Court Access Program shows
10 that Ms. Welsh is an attorney for Mr. Spear. I would ask that
11 that be corrected so she is not listed as an attorney for
12 Mr. Spear and, frankly, should not be listed as a party to this
13 action. You know, at this point, I object to any standing of
14 Attorney Welsh to be filing motions, etc., in this case. That
15 should go through the State. Certainly, occasionally witnesses,
16 occasionally people with information look on the Circuit Court
17 Access Program and call the defense attorney with information,
18 and we shouldn't be having the attorney for the alleged victim
19 listed as the defense attorney or part of the defense attorney's
20 team.

21 THE COURT: So you're saying for the record that you
22 don't work together on this case?

23 ATTORNEY BROPHY: Yes, Your Honor. I think that's
24 apparent.

25 THE COURT: All right. I'll make a note of that.

1 I'll make a note of that. And, once again, it's my view, until
2 I find some authority to the contrary, that indeed it's
3 wonderful to have victim representation. I wish everyone who
4 was a victim of a crime had a capable attorney representing
5 their interests in court. But, at the same time, as I
6 understand it, the law suggests that the only other party to the
7 action is the state of Wisconsin, and those desires be funneled
8 and the needs be attended to by the prosecution. And so we'll
9 make a note to have that taken off of CCAP. Whoever knows how
10 to do that will do that.

11 ATTORNEY BROPHY: Great.

12 ATTORNEY MOESER: Thank you.

13 THE COURT: In the meantime, I've got these
14 documents. You may approach. I've got a couple of documents
15 for you each. And, again, these documents are not to be shared.
16 They're for the purposes of preparing for litigation. They
17 contain details that I wish to have kept confidential.

18 All right. Thank you.

19 (Proceedings concluded at approximately 8:50 a.m.)

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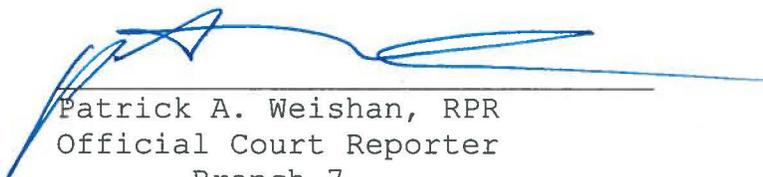
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CERTIFICATE

I, PATRICK A. WEISHAN, do hereby certify that I am the Official Court Reporter for the Circuit Court, Branch 7, Dane County, Wisconsin; and that I have carefully compared the foregoing document with the stenographic notes taken in conjunction with this proceeding by me on June 12th, 2013; and that the same is a true and correct transcript of those notes.

Dated this 17th day of June, 2013.



Patrick A. Weishan, RPR
Official Court Reporter
Branch 7