

1 CRIMINAL DISTRICT COURT FOR THE PARISH OF
2 ORLEANS

3
4 STATE OF LOUISIANA CASE NUMBER: 523-930
5 VERSUS SECTION 'J'
6 MATTHEW TOTARO

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8
9 Transcript of the Motion to Quash Article
10 66 Subpoena in the above entitled Matter,
11 as Heard before the Honorable Darryl A.
12 Derbigny, Judge presiding under the date of
13 September 15, 2016.

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16 APPEARANCES:

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18 FOR THE STATE
19 Iain Dover, Esq., ADA

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22 FOR THE DEFENSE:
23 David Anderson, Esq.

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30 REPORTED BY:

31 Linda B. Legaux,
32 Certified Court Reporter

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I N D E X

TYPE OF EXAMINATION

PAGE #

Proceedings

3

Court's Ruling

18/20

Reporter's certificate

22

1 P R O C E E D I N G S

2 MR. DOVER:

3 Good morning, sir. This is an off-
4 docketed Matter, Judge, that to protect
5 the identity of the parties involved, I
6 will refer to as letters [REDACTED]
7 [REDACTED]

8 Judge, in regards to this Matter, I
9 have been communicating with an attorney
10 in California. However, this morning, I
11 was advised that local counsel has been
12 retained, and is present before Your
13 Honor with a Motion to Quash the Article
14 66 Subpoena issued yesterday. Judge, I
15 am prepared to go on the Record with
16 that.

17 MR. ANDERSON:

18 Afternoon, Judge. David Anderson on
19 behalf of [REDACTED]
20 (phonetically) and the juvenile referred
21 to as [REDACTED] This is actually the case
22 State versus Matthew Totaro, 523-930.
23 And these two witnesses are the victims
24 in this case. I have been enrolled to
25 represent them on -

26 THE COURT:

27 Are we talking about two alleged
28 victims, or one?

29 MR. DOVER:

30 Just one, Judge. We have -

31 THE COURT:
32

1 That's what I thought.

2 MR. DOVER:

3 The other one was not served.

4 THE COURT:

5 Thank you. Okay.

6 MR. ANDERSON:

7 I have a record of an Article 66
8 subpoena being issued to [REDACTED], as
9 well as [REDACTED] but it's the victim and
10 her mother. So I have moved to quash
11 both subpoenas.

12 THE COURT:

13 On what basis, sir?

14 MR. ANDERSON:

15 Well, there are several reasons.
16 First of all, [REDACTED] called me last
17 night and informed me that a police
18 officer pulled [REDACTED] out of school at
19 [REDACTED] and gave the subpoena to
20 her directly, so there's a mechanical
21 defect because you can't serve a child
22 with a subpoena. You have to serve the
23 parents.

24 The second is, these subpoenas were
25 applied for yesterday and they were
26 served yesterday afternoon, returnable
27 at 9:00 a.m. That's less than 18 hours,
28 by my calculation, from the time that
29 the subpoena went into the juvenile's
30 hand, which is defective service, from
31 when they were supposed to show up at
32 the D.A.'s office.

1 The State was aware that these
2 people had counsel in California, but
3 rather than contact their lawyer, they
4 pull this girl out of school, which is
5 incredibly disruptive.

6 The first time that we can determine
7 that the State attempted to contact
8 Counsel of Record was this morning when
9 the State left a message with the lawyer
10 saying "If [REDACTED] is not in my office by
11 11:00 a.m., I will arrest her."

12 I have directed the Court in a
13 written Motion to *State versus Derrick*
14 *Todd Lee*, where the Louisiana Supreme
15 Court directly addressed Article 66
16 Subpoenas, and the Supreme Court said
17 that this Court can grant relief
18 whenever a person applies, from
19 hardship, abusive process, unreasonable
20 or oppressive subpoenas.

21 I would argue that pulling the
22 juvenile out of school on a less than 24
23 hour turnaround is abusive process.
24 However, we don't have to prove abusive
25 process. We can prove any hardship,
26 unreasonable nature of the subpoena, or
27 its oppressive nature.

28 Frankly, there is no emergency in
29 this case. It's set for trial on
30 September 26th. And when I checked the
31 docket master at 11:00 p.m. last night,
32 it looked as though it were stayed for

1 an appellate proceeding.

2 If the State wants to interview
3 these witnesses, and believe me, they're
4 cooperative, they're showing up through
5 counsel today, they can simply call and
6 schedule a time.

7 It's manifestly unnecessary, and
8 it's far more disruptive than reasonable
9 to pull this girl out of school and
10 serve her without her mother there, and
11 to show up at the house, and then
12 threaten to arrest the witnesses when
13 there is no evidence that they have been
14 uncooperative.

15 So I have moved to Quash because of
16 the mechanical defect, and also because
17 these witnesses have Constitutional
18 Rights. They are entitled to the
19 regularity and dignity of the
20 proceedings, just like any witness, but
21 they have additional Rights because
22 they're registered victims in Matter,
23 the juvenile and her mother.

24 They have a Right that the criminal
25 proceeding will move forward in a way
26 that it is - it's a general obligation
27 of the State, least disruptive to their
28 daily lives. And they have disregarded
29 that obligation here.

30 So in connection with the Motion to
31 Quash, I have further moved in the
32 written motion that the State contact

1 these witnesses through their attorney
2 only. I'm present here today. I've
3 given the State a copy of my Motion to
4 enroll, which has my office number, and
5 I'm going to give them, also, my direct
6 line and my cell phone. They've got my
7 email. And I'll be glad to schedule an
8 interview at the District attorney's
9 office.

10 I'm moving the Court to instruct the
11 State to stop contacting them directly.

12 [REDACTED] has said that the District
13 Attorney's office and a representative
14 of their office not only had gone to the
15 high school, but also opened her front
16 door in order to leave a subpoena in her
17 foyer, which is a little excessive,
18 given that there is no exigent reason
19 why they would need to deliver the
20 subpoena by hand. They simply could
21 have mailed it.

22 There was never a reason why they
23 would need to open her front door.
24 They're demolishing their relationship
25 with their own witnesses. And I am here
26 to interpose myself as an advocate for
27 the victims, and to make sure that the
28 case can proceed in an orderly and
29 dignified fashion.

30 That's why the Motion has two
31 separate orders, and those are the
32 grounds on which we base it.

1 I'll conclude my argument, but I
2 just want the Record to reflect I'm
3 giving over my business card. I'm going
4 to write my cell phone on the back, even
5 though it also has my direct line.

6 MR. DOVER:

7 Yes, sir. Thank you. So, Judge,
8 Counsel's own argument is self-
9 defeating. Counsel argued that we had
10 not made sufficient attempts to contact
11 the victim, but then does articulate,
12 Judge, that as of Friday, the State went
13 out to the house to attempt to contact
14 the victim, short of issuing an Article
15 66 Subpoena.

16 And let me just clarify a few
17 things, Judge, 'cause I was one of the
18 parties that actually went out to the
19 house on that Friday. The victim, Ms.
20 [REDACTED] (phonetically), was -

21 THE COURT:

22 [REDACTED]
23 MR. DOVER:

24 [REDACTED] I'm sorry, [REDACTED]
25 was - and also, Judge, on that same note
26 -- and I apologize, and Defense Counsel
27 didn't mean anything by it either -- may
28 we redact out the relationship between
29 [REDACTED] and the other named party,
30 because that would then show the
31 relationship, because -

32 THE COURT:

1 And I will so order. And also
2 redact out the name of the alleged
3 victim's name that was previously placed
4 on the Record.

5 MR. DOVER:

6 Thank you.

7 THE COURT:

8 Thank you.

9 MR. ANDERSON:

10 No objection. But, also, I was
11 informed by the Minute Clerk, I noticed
12 that the State was referring to the
13 older individual by her full name. I
14 believe that an argument can be made
15 that she falls under the victim
16 protection law as well.

17 THE COURT:

18 Sure.

19 MR. ANDERSON:

20 And, so perhaps we can go forward by
21 referring to both individuals by their
22 initials rather than their full name in
23 order to afford them the protection of
24 the law.

25 MR. DOVER:

26 No problem. No problem.

27 THE COURT:

28 Very well.

29 MR. DOVER:

30 So I was one of the individuals that
31 went to the residence of [REDACTED] The
32 door was not open. It was ajar, but

1 still within the frame. And at no time
2 did the State of Louisiana or any
3 representative, any law enforcement
4 manipulate, open the door, or whatever.
5 The door remained closed the whole time.
6 We merely just stuck the subpoena in the
7 crack. So at no time did we touch the
8 door or open it like that. I just want
9 to make that perfectly clear.

10 But, I'd like to talk about the
11 procedural history. So we went out,
12 attempted to make service on [REDACTED]
13 That was not successful. [REDACTED] would
14 not come to the door.

15 We later confirmed that [REDACTED] was
16 present at the time when I spoke with
17 counsel that was previously retained out
18 of California, but I'll get to that in a
19 moment.

20 Then, Judge -- that was on the 9th
21 of September. On the 10th of September,
22 we received a fax at 3 o'clock in the
23 morning from counsel that had been
24 retained in California, and stated that
25 at no time did either represented party
26 [REDACTED] or [REDACTED] wish to speak with or
27 be contacted by any representative of
28 the District Attorney's office.

29 THE COURT:

30 Is that in written communication,
31 sir?

32 MR. DOVER:

1 That was a written communication.
2 It was faxed to us, Judge.

3 THE COURT:

4 Very well.

5 MR. DOVER:

6 And then, we understood that. And
7 Counsel out of California cited the
8 Louisiana Victim's Rights Act to bolster
9 that respecting the wishes of the
10 parties.

11 What was not cited, Judge, was the
12 part of the Victims Rights Act and
13 subsequent code articles that compel the
14 State to interview victims, require the
15 State to interview victims prior to
16 trial. That is a Right that must be
17 held. The Counsel left that out.

18 So what did, Judge, is, yesterday we
19 came before Your Honor and asked that an
20 Article 66 Subpoena be drafted to compel
21 the presence of ██████████ in court - I'm
22 sorry, at our office, today by 9:00 a.m.

23 After Your Honor signed that, I then
24 furnished a copy, on both counsel for
25 Totaro and counsel for ██████████ and
26 ██████████ counsel being the representative
27 in California.

28 I then followed up and actually
29 spoke with counsel in California
30 yesterday, informing her of same. Her
31 final response was "well, okay". As of
32 9 o'clock this morning, ██████████ had not

1 appeared. I then contacted counsel, in
2 California again, and said "I'll give
3 y'all 'till 11. My next remedy will be
4 a Material Witness Warrant".

5 That message was relayed to counsel
6 by her assistant. I spoke to a live
7 person; her assistant. As of 11:00
8 a.m., [REDACTED] had not shown up, so I came
9 to Your Honor's court.

10 Now, I'd like to address the Motion
11 to Quash the subpoena that Counsel has
12 filed. Counsel cites that the case is
13 currently Stayed, pending appellate
14 review, so that there is no exigency.

15 First of all, Judge, exigency is not
16 a requirement for the issuing of an
17 Article 66 Subpoena. Further, the case
18 is not Stayed. It's set for trial, not
19 this week, but next week. Also, Judge,
20 there's a subtle and nuance case.

21 Now, these are the documented
22 efforts to contact [REDACTED] This does
23 not account for the numerous phone
24 calls, to going to family members in
25 different parishes trying to find this
26 witness. This is what we've documented
27 so far. So certainly, Judge, time is of
28 the essence.

29 Also, Judge, as it says here,
30 "Rather than attempt service through
31 counsel of record". Well, Judge, at the
32 time that the Article 66 Subpoena was

1 signed, counsel of record was an
2 attorney in California, who has not
3 practiced, by her own admission, not
4 practiced to license (sic) in the State
5 of Louisiana. So, obviously effecting
6 service through the attorney in
7 California is not possible. Also,
8 Judge, it's not practicable. Also, it
9 doesn't have the effect of law.

10 Second, Judge, [REDACTED] is not a
11 juvenile. She has reached the age of
12 majority in the State of Louisiana. She
13 is still in high school. She has
14 reached the age of majority.

15 An official for the school called
16 her into that official's office. At
17 which time she was handed a subpoena.
18 Present were local law enforcement from
19 that jurisdiction, as well as a post-
20 certified district attorney
21 investigator, James O'Hearn, who is
22 authorized under the code to serve
23 subpoenas for the district attorney's
24 office.

25 So again, personal service was
26 effected on a person who has reached the
27 age of majority in the State of
28 Louisiana.

29 Now, Judge, what they're saying is
30 that it is unfair and un-burdensome, or
31 overly burdensome to compel this person
32 to appear the next day, and they cite

1 *State v Lee*, it's Derrick Todd Lee's
2 case, his capital murder case. And what
3 the Louisiana Supreme Court ultimately
4 took up in Derrick Todd Lee as it
5 relates to the Article 66 Subpoena
6 powers is not a subpoena *Atestafacatum*
7 (phonetically), but another provision in
8 Article 66 that allows for a Subpoena
9 *Duces Tecum*.

10 Specifically, in that case, the
11 State was trying to do an alternative
12 mechanism, I'll call it, for getting a
13 person's blood and DNA sample. They
14 wanted to do an Article 66 Subpoena
15 *Duces Tecum*, and the Supreme Court nixed
16 that idea.

17 The Supreme Court was silent as to
18 the power to compel a person to appear
19 at the district attorney's office, which
20 is that first person of Article 66.
21 That first paragraph. And what they're
22 saying is, Judge, that but still the
23 Article 66 Subpoena was improper because
24 [REDACTED] could not arrange child care.
25 [REDACTED] does not have a child. That
26 counsel could not be made available or
27 retained.

28 We know that's not true because she
29 has counsel in California, and was able
30 to retain counsel, who is here this
31 morning, so we know that's not a grounds
32 or an undue burden. And, Judge, that it

1 was unable to arrange transportation.

2 Long story short, Judge, this is
3 what I'm proposing: [REDACTED] is currently
4 enrolled in school. That school lets
5 out early this afternoon. It lets out
6 at 2:30. I usually stay at the office
7 until about 7:00 or 7:30, but I'll stay
8 as long as I need to. I will stay here
9 tonight until this Counsel can bring
10 [REDACTED] in to my office this evening so
11 we can conduct this interview.

12 MR. ANDERSON:

13 That's not -

14 MR. DOVER:

15 That's what I'm asking, Judge.

16 THE COURT:

17 Mr. Anderson?

18 MR. DOVER:

19 I'm sorry. That's not what we
20 agreed upon. That's what I'm asking.

21 THE COURT:

22 I understand.

23 MR. ANDERSON:

24 First of all, point in clarity,
25 Judge, the State argues that [REDACTED] has
26 attained the age of majority, therefore,
27 presumptively, it is appropriate for
28 them to pull her out of school and serve
29 her with a police officer. She's 17.
30 She has achieved the age of criminal
31 responsibility, but not the age where
32 she's competent to receive service of

1 process.

2 Second; obviously, I'm a little late
3 to the game. I'm enrolling as local
4 counsel, and I'm right in the thick of
5 it. The State indicated that the prior
6 lawyer sent a letter saying that the
7 witnesses did not want to speak with the
8 State. That's true. And this
9 highlights the reason why it's important
10 to have local counsel, because the
11 California lawyer did not know about the
12 Article 66 Subpoena issue.

13 The argument here is not that the
14 State has not made reasonable efforts.
15 The argument is that the State has been
16 extremely forceful, and what they are
17 doing is trying to strong-arm the
18 witnesses. They give an 18-hour return
19 date on the subpoena.

20 THE COURT:

21 Counsel, let's cut through the chase
22 here. You're not, based upon your
23 entire presentation this morning,
24 challenging the suggestion as to the
25 materiality of this particular witness,
26 are you?

27 MR. ANDERSON:

28 No.

29 THE COURT:

30 Okay.

31 MR. ANDERSON:

32 They want to cooperate, but they are

1 very upset with the D.A.

2 THE COURT:

3 what I also understand is that I
4 believe - I believe that -- based upon
5 the State's - the Court's rather,
6 familiarity with the efforts of the
7 State to secure the presence, or obtain
8 the presence of [REDACTED] that they, the
9 State, were under the impression, up to
10 your appearance, that was, in fact,
11 represented by California counsel, and
12 all efforts to secure her presence, in
13 all networking, if you will, toward that
14 end were conducted with California
15 counsel. Until your appearance -

16 MR. ANDERSON:

17 That makes sense.

18 THE COURT:

19 Sir, let me cut to the chase: Now
20 that you're here, what about the
21 overture made by the State just a moment
22 ago, to have you - to set a time. I'm
23 not going to hold the - The Court has no
24 interest in disrupting this person's
25 school, or another activity.

26 I agree with you. I don't want to
27 go so far as to victimize any alleged
28 victim here. I don't want to do that.
29 By the same token, the Court is
30 concerned, and does endorse the Motion
31 of the State's responsibility to contact
32 and interview, and do what it needs to

1 in order to be able to move this case
2 forward responsibly. I think those aims
3 are not mutually exclusive.

4 MR. ANDERSON:

5 Agreed.

6 THE COURT:

7 And what I'm ordering you all to do
8 right now, is if the date and the
9 arrangement proposed just a moment ago
10 by the State is unsatisfactory, Mr.
11 Anderson, that you simply give the State
12 a date, a time, a location by which this
13 can be achieved.

14 MR. ANDERSON:

15 And that's fine, Judge. I have told
16 the State, I'm on a flight to Chicago at
17 3:00, and I'm back Monday afternoon.
18 I'm set for trial in Covington next
19 week, but based upon the text I just
20 received, I'm expecting all the trials
21 to wash. So I can be here Tuesday
22 afternoon and do an interview,
23 tentatively.

24 THE COURT:

25 Mr. Dover?

26 MR. DOVER:

27 I'd prefer Monday, Judge, if
28 possible, late evening.

29 MR. ANDERSON:

30 10:00 p.m.?

31 MR. DOVER:

32 That's fine.

1 MR. ANDERSON:

2 I'd have to ask my clients. But
3 I'm flying in Monday evening and I can
4 talk to them about that. I'm not - this
5 is splitting hairs, if we're going to
6 meet early next week, it seems fine.

7 THE COURT:

8 Look, you've got the Court in the
9 middle of this hair-splitting.

10 MR. Anderson:

11 And I don't want that, Judge.

12 THE COURT:

13 And I don't want to be here. It's
14 unnecessary.

15 MR. ANDERSON:

16 Well, I don't want them to arrest my
17 clients, and they've issued material
18 witness warrants, and I think that's -

19 THE COURT:

20 That's Counsel's responsibility to
21 make your client available; right, in
22 order for the State to discharge its
23 responsibility in connection with this
24 prosecution.

25 MR. ANDERSON:

26 Of course, Your Honor. And -

27 THE COURT:

28 And I understand your position as
29 well. I understand that. Once again, I
30 think reasonable accommodations can be
31 made to accommodate both interests. I'm
32 ordering you to do so, okay.

1 MR. DOVER:

2 Yes, Judge.

3 THE COURT:

4 We do have a trial date scheduled in
5 this case. As to the issue: I'm going
6 to deny the Motion to Quash the Subpoena
7 at this point in time. So that will
8 give you the opportunity, simply,
9 simply, to come to terms with the State
10 on how you want to produce your witness.

11 I will take no action adverse to
12 [REDACTED] unless and until I receive
13 notification that there's been some kind
14 of breakdown in communication which has
15 allowed this thing to become stalemated,
16 once again. I don't see any reason for
17 that to happen.

18 MR. ANDERSON:

19 My understanding is the Court is
20 allowing us to reschedule the subpoena
21 by consent. No objection.

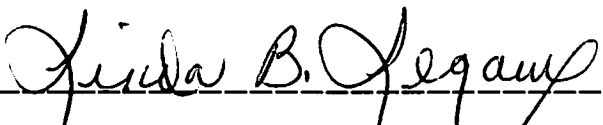
22 THE COURT:

23 That would be the proper way of
24 putting it. Thank you, Counsel.

C E R T I F I C A T E

This certificate is valid only for a transcript accompanied by my original signature and original required seal on this page.

I, Linda B. Legaux, Official Court Reporter in and for the State of Louisiana, employed as an Official Court Reporter by the Orleans Parish Criminal District Court, for the State of Louisiana, as the officer before whom this testimony was taken, do hereby certify that this testimony was reported by me in the steno mask reporting method, was prepared and transcribed by me or under my direction and supervision, and is a true and correct transcript to the best of my ability and understanding, that the transcript has been prepared in compliance with transcript format guidelines required by statute or by rules of the board or by the Supreme Court of Louisiana, and that I am not related to counsel or to the parties herein, nor am I otherwise interested in the outcome of this Matter.



Linda B. Legaux (91214)
Certified Court Reporter
Criminal District Court
Parish of Orleans
State of Louisiana