

STATE OF NEW MEXICO
COUNTY OF TAOS
IN THE EIGHTH JUDICIAL DISTRICT COURT

FILED IN OFFICE OF CLERK OF
DISTRICT COURT, TAOS COUNTY,
NEW MEXICO, AT 4:20 CLOCK P.M

APR 8 2014

NO. D-820-CR-2013-129

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NO. D-820-CR-2013-130

STATE OF NEW MEXICO,

Plaintiff,

vs.

ISAAC MARTINEZ,

Defendant.

**DECISION OF THE COURT ON DEFENDANT'S
"EXPEDITED MOTION TO QUASH INDICTMENT
DUE TO GROSS PROSECUTORIAL MISCONDUCT..."**

THIS MATTER was before the Court on January 8, 2014 for oral argument on the aforesaid motion. The State appeared through Deputy District Attorney Emilio Chavez. The defendant was personally present with his attorney Todd Coberly, Esq. Carla Casias, the defendant in the joined case D-820-CR-2013-130 was also personally present with her attorney, Justin B. Lea, Esq., who joined in Mr. Martinez's motion. The defendant offered supposed polygraph evidence at the hearing but the Court refused the exhibits. The Court was also tendered a video by the State, purporting to be material to the armed robbery claim, and likewise the Court has refused and not considered that evidence. Furthermore, the Court has received from the State, on February 20, along with its requested findings of fact and conclusions of law, additional legal argument and authority. Consequently, the Court received a response from the defendant to these extra argument points. The Court has considered neither argument contained in the parties' transmittals. The Court has considered the oral and written arguments of counsel, and sets forth here its decision, rejecting and refusing any of the parties' requested findings of fact and

conclusions of law not set forth and adopted herein. The Court has additionally made independent findings and conclusions.

Findings of fact

1. The Court has jurisdiction over the parties and controversies herein, and venue is proper.
2. The defendant's motion is timely.
3. The defendant has statutory and constitutional standing.
4. The Taos County grand jury indicted the defendant on August 8, 2013.
5. The grand jury heard presentations from the prosecutor against both defendants simultaneously, and indicted them on separate indictments, but on the same evidence and in the same proceeding.
6. In that indictment, the State alleges that an employee of Kit Carson Electric Cooperative ("Kit Carson") was robbed at gunpoint on April 10, 2013.
7. The Taos Police Department immediately after the crime was reported began an investigation which was directed by Detective John Wentz.
8. Circumstances examined quickly led Detective Wentz to surmise that the heist was an "inside job"- that is, that persons employed by Kit Carson were materially involved in arranging and committing the crime.
9. During the police investigation, on April 12- a mere two days after the crime, the prosecutor issued, in the name of the district court for this county the first of a series of eleven subpoenas to various cell phone service providers. The subpoenas were issued in three groups as follows: April 12-Verizon and Cingular; April 22-Verizon and T-Mobile; and May 28-Comnet Wireless, Cricket Wireless, Sprint/Nextel, T-Mobile, Verizon Wireless and Cingular.
10. Each of the subpoenas is returnable to an officer of the Taos Police Department, at the Taos Police Department offices.

11. Each cell phone service provider had out-of-state business addresses endorsed on their subpoena.
12. The deputy district attorney signed the subpoenas. They were not signed by a judge or clerk of this Court. The prosecutor when signing the subpoenas did not indicate at the signature line which of "JUDGE/CLERK/ATTORNEY" his function was. The DDA also signed the certificate of service on each subpoena.
13. Each of the subpoenas is captioned "State of New Mexico, plaintiff, vs. John Doe, defendant".
14. Each of the subpoenas is assigned case number "CS-2013-1" which identifies this Court's Administrative Criminal Miscellaneous files. These files receive and hold mostly and normally evidence destruction papers, bond forfeitures and oaths of office for each calendar year.
15. Each subpoena form threatens, advises or promises contempt of court sanctions if not complied with.
16. Each of the subpoenas duces tecum were complied with by the respective recipient cell phone service providers. The April 12 subpoenas returned information spanning thirty-six days for three telephone numbers. The April 22 three subpoenas produced 186 days of information concerning 12 cell phone numbers, including the defendant Martinez's. Subscriber and billing records pertaining to twenty-five cell phone numbers was provided to the Taos police detective through the prosecutor's subpoenas of May 28.
17. The subpoenas issued by the prosecutor were not in the form approved by the Supreme Court of New Mexico.
18. Essential language approved by the Supreme Court that informs a subpoena recipient of remedies and protective measures available did not appear on the subpoena forms.
19. At the time he issued the subpoenas in question, the prosecutor did not represent a party, as no criminal case had commenced.

20. The subpoenas were issued by the prosecutor before the grand jury was convened, before the defendant was targeted or charged, but while a police investigation was underway.
21. The subpoenas were not issued by a grand jury, but instead, in aid of a police investigation.
22. The prosecutor is not a police officer or law enforcement officer, and does not represent the Taos Police Department, as an attorney.
23. The initial subpoenas revealed information that begat the second series of subpoenas and so forth.
24. While it may be, as the State asserts, that only two of the subpoenas, (April 22 and May 28) directly or indirectly relate to the defendant Martinez, detective Wentz utilized all the obtained information to prepare further exhibits and testify before the grand jury.
25. Included in this voluminous data was information linking the defendant to telephone number 575.613.0449.
26. The grand jury was ordered convened on May 23, 2013.
27. The grand jury is a distinct constitutional entity from the district attorney.
28. The presentation of the instant matter to the grand jury took place on August 8, 2013.
29. Mr. Chavez, the deputy district attorney who issued the subpoenas, was sworn in as an aid to the grand jury on June 20, 2013.
30. The crimes alleged against the defendant occurred on or about April 10, 2013, according to the indictment.
31. Defendant Martinez and defendant Casias were indicted on the charges of aiding and abetting armed robbery and conspiracy to commit armed robbery as requested by the prosecutor.
32. The defendant brings his motion pursuant to the provisions of §31-6-11, NMSA 1978.
33. The court has reviewed and taken notice of the contents of the grand jury file, number D-820-GJ-2013-1 pertaining to this matter.
34. The Court has also reviewed the file contents in the District Court file designated D-820-CS-2013-1, the Court's miscellaneous criminal matters file.

35. The Taos Police Department detective testified at the grand jury that his analysis of a "web" of cell phone communication was evidence against the defendants.
36. The detective's testimony was based on his review and analysis of cell phone records that were seized by the State through its subpoenas.
37. The Taos Police Department detective testified at the grand jury that the cellphone records were lawfully obtained.
38. Based on the detective's analysis of the cellphone records obtained by the subpoenas in question, he later applied for and obtained search warrants for additional information relating to cellphone evidence and other evidence.
39. On July 25, 2013 subpoenas were issued to three persons commanding appearances before the grand jury in connection with this case, for a hearing on August 8, 2013.
40. The transcript of the grand jury proceedings, with which the State took no issue in their pleadings or at oral argument, demonstrates that ninety-three pages were devoted to the testimony in this matter. Of that, sixty-five pages related the testimony of the investigating officer, detective John Wentz; and of that, roughly 36 pages set forth testimony about cell phone records and analysis of cell phone records.

41. Detective Wentz testified that his review of the cell phone records obtained through these subpoenas duces tecum heightened his suspicion of defendant Carla Casias.
42. It appears to the Court that Detective Wentz attempted, in his testimony, to correlate the video evidence from the Kit Carson scene to the cell phone evidence and analysis.
43. The detective linked a phone number, 575.613.0449, which he associated with defendant Martinez, to the web of calls and texts that was the subject of his analysis.
44. Using the cellphone records and his analysis, Detective Wentz further linked Ashley Casias, Carla Casias and defendant Martinez in critical times around the time of the crime, testifying to their telephone communications with each other, and drawing a larger picture of his theories of how the crime was constructed and accomplished.

45. More than half of the questions from members of the grand jury of the detective, concerned the cell phone evidence or his analysis.
46. The information obtained by the prosecutor's subpoenas duces tecum was not obtained through the grand jury subpoena authority, nor in aid of the grand jury, but in aid of a police investigation.
47. The prosecutor was not representing a party in a criminal or civil matter and was not prosecuting a case in the district or magistrate courts.
48. The Taos District Attorney's Office has issued 49 like "John Doe" stand-alone subpoenas in calendar year 2013, which are filed in the Court's miscellaneous criminal matters file.
49. The vast majority of the other like subpoenas were issued by the prosecutor of record in this case.

Conclusions of law

1. The Court has jurisdiction over the parties and controversies herein, and venue is proper.
2. The New Mexico Constitution provides persons with greater protections than does the Constitution of the United States.
3. The grand jury is a distinct constitutional entity from the district attorney.
4. A district attorney is a "law officer" with only those powers that are prescribed in the Constitution and laws of New Mexico.
5. The grand jury may consider only lawful, competent and relevant evidence, §31-6-11, *NMSA 1978*.
6. To be lawful, the evidence must have been obtained lawfully, based on established legal authority.
7. *Rule 5-511 NMRA* governs the procedure concerning "every subpoena". Its terms permit an attorney who represents a party to issue and sign a subpoena requiring testimony or document production.

8. *Rule 5-511* requires that "every subpoena" be in the form approved by the Supreme Court.
9. The shorter subpoena form proposed in form *9-503, NMRA* appears to coincide only with the magistrate, metropolitan and municipal court counterparts of *Rule 5-511*, and seems therefore inapplicable.
10. The State's subpoenas in the instant case most closely resemble this form.
11. Form *9-217 NMRA* is the corollary form to *Rule 5-511*, and sets forth the Supreme Court approved language and content.
12. The subpoenas issued by the prosecutor were not in the form approved by the Supreme Court.
13. Essential language approved by the Supreme Court that informs a person receiving a subpoena of remedies and protective measures was not present on these subpoenas, therefore no argument that the recipients of the subpoenas knew what their remedies were will stand.
14. *Rule 5-511* states that subpoenas may be served in any place within this State.
15. At the time the subpoenas were issued by the prosecutor, he did not represent a party, as no criminal case had been commenced.
16. All subpoenas shall issue from the court in which the matter was pending.
17. The subpoenas were issued before the grand jury was convened, before the defendant was charged, but while a police investigation was ongoing. The prosecutor was acting as an investigator, not as an aid to the grand jury.
18. The subpoenas were not issued by the grand jury.
19. No criminal matter had commenced or was pending in this court at the time the prosecutor issued the subpoenas in question.
20. At the time the prosecutor issued the subpoenas, the defendant was not a party, "target", "accused" or "defendant".
21. The Court's file number *D-820-CS-2013-1* is not a "cause" as the State asserts. That file number identifies the Court's miscellaneous administrative criminal matters file, and filing a document, like the subpoenas in question does not "commence" a criminal cause.

22. New Mexico law is so devoid of any established authority for this practice, a reasonable prosecutor, upon the exercise of diligent research could determine that the practice was very probably unlawful.
23. The subpoenas in question were issued by the prosecutor without any judicial oversight, and allowed the police to obtain evidence during a criminal investigation without meeting the requirements of *Article II §10 of the Constitution of New Mexico*.
24. Detective Wentz was acting in mistaken good faith reliance on the legality of the prosecutor's activity, but to no avail. The State asserts in its proposed findings that detective Wentz "requested" the subpoenas. Whether this is a fact or not, the Court believes it is irrelevant but, indicative of Detective Wentz's misplaced good faith.
25. The Taos District Attorney's office has issued 49 of these same "John Doe" subpoenas duces tecum over the calendar year during this activity, so the current events are not isolated.
26. The federal Stored Communications Act, ("SCA"), *18 USCA §§2701 through 2712* does not grant a New Mexico prosecutor authority to issue stand- alone subpoenas. Indeed, the SCA permits an electronic communication provider (cell phone service provider) to respond to "authorized" state or federal subpoenas.

27. The SCA neither preempts nor supersedes New Mexico state constitutional provisions, statutes and rules of procedure, nor provides an exclusive remedy for violation of state law.
28. The provisions of *§36-2-11, NMSA 1978* are completely inapplicable in this instance.
29. A stand-alone subpoena, in improper form, issued and signed by a prosecutor in aid of a police investigation, before a criminal cause is properly commenced, as in the instant facts is simply without precedent, analogy or lawful authority in New Mexico law.
30. The grand jury heard presentations from the prosecutor against both defendants simultaneously, and indicted them on separate indictments, but on the same evidence and in the same proceeding.

31. If the grand jury is to play any role at all as a credible, independent entity charged with determining whether the prosecution has probable cause to go forward with criminal charges against an accused, the grand jury must remain free of the taint that would come from being perceived to be under the complete and absolute control of the prosecution. *DeLeon vs. Hartley*, Supreme Court of New Mexico, No. 34,018, filed December 30, 2013. Here, the police investigator was aided in his investigation by the prosecutor issuing subpoenas for records the investigator believed might yield evidence that could be employed in his investigation. He testified in mistaken good faith that the subpoenas were lawful. The detective used the subpoenaed evidence in his investigation and in the grand jury.
32. The prosecutor had no reasonable basis in law for issuing the subpoenas and had no reasonable basis in law to present the evidence to the grand jury, and therefore acted in objective bad faith, and tainted the grand jury with this evidence.
33. The subpoenaed records were not "lawful evidence".
34. Through the introduction of these subpoenaed materials the prosecutor exerted an improper influence on the grand jury.
35. The prosecutor's subjective belief that he was acting lawfully and properly in issuing these subpoenas is irrelevant.
36. The existence of bad faith in these matters is further demonstrated by the long term pattern and practice of the State in issuing these stand-alone subpoenas prior to a criminal case being commenced. There appear in the Court's criminal miscellaneous administrative files for 2013 at least 49 other "John Doe" subpoenas duces tecum, most issued by the prosecutor in the instant case.
37. It is objectively unreasonable for the prosecutor to believe that his conduct was lawful.
38. The grand jury result would have been different had this improperly subpoenaed evidence not been presented to the grand jury.

39. Because the Court holds that the motion to quash the grand jury indictment is well-taken and properly granted, it is unnecessary for the Court to review and consider the alternative motion to suppress this subpoenaed evidence and its fruits.

THE MOTIONS TO QUASH ARE WELL-TAKEN, AND SHOULD BE GRANTED.

IT IS SO ORDERED



JOHN M PATERNOSTER
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I delivered a true copy of the foregoing Decision and Order to all counsel of record on 8 April 2014, as follows:

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