

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0196**

In re Program to Aid Victims of Sexual Assault, Petitioner,

State of Minnesota,
Respondent,

vs.

Matthew John Brett King,
Respondent.

**Filed April 13, 2020
Writ granted
Cleary, Chief Judge**

St. Louis County District Court
File Nos. 69DU-CR-18-3985, 69DU-CR-18-3987

Rana S. Alexander, Standpoint, St. Paul, Minnesota (for petitioner)

Keith Ellison, Attorney General, St. Paul, Minnesota; and

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Duluth, Minnesota (for respondent State of Minnesota)

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King)

Considered and decided by Cleary, Chief Judge; Worke, Judge; and Florey, Judge.

S Y L L A B U S

To obtain privileged or confidential records in the possession of a third party for in
camera review by the district court, a criminal defendant must comply with the

requirements of Minn. R. Crim. P. 22.01, subd. 2(c), and obtain a court order for a subpoena.

SPECIAL TERM OPINION

CLEARY, Chief Judge

This matter is before a special term panel of this court on a petition for a writ of prohibition filed by Program to Aid Victims of Sexual Assault (PAVSA), a nonprofit rape-crisis counseling center. PAVSA seeks a writ to prevent the district court from enforcing an order directing PAVSA to produce privileged records for in camera review by the district court. Because the district court did not have authority to order PAVSA to produce the records without a valid subpoena, we grant the writ.

Respondent Matthew John Brett King, a massage therapist at Massage Envy in Duluth, is charged with third- and fourth-degree criminal sexual conduct for allegedly engaging in nonconsensual sexual penetration and contact with two women while performing massages for hire. PAVSA assisted the women in reporting the incidents to the police. In each case, King's counsel filed a motion for in camera review of all records from PAVSA, including "the dates and times the alleged victims visited their facility," and any statements that were made about King. King's counsel relied on Minn. R. Crim. P. 9.01, subd. 2(3), which provides for disclosure of "any relevant material" on the defendant's motion. In a supporting memorandum, King's counsel argued that the records are relevant to determine whether the alleged victims' disclosures to PAVSA are inconsistent with their statements to police because the state intends to use each case as

*Spreigl*¹ evidence in the trial on the other case, making credibility the primary issue. King's counsel sought the dates and times that the victims visited PAVSA to determine whether they may have had contact with each other. The state opposed the motion.

In an August 15, 2019 order, the district court directed the state to obtain the records in PAVSA's possession and to deliver them to the court for in camera review. The state thereafter informed the court that it was unable to comply with the order, because PAVSA is not a state agency and is unwilling to provide the records. On October 9, 2019, the district court issued an amended order directing PAVSA to produce the records for in camera review. PAVSA filed a motion to reconsider, arguing that King's motion should be denied for several reasons, including that PAVSA is not a party and "the district court lacks personal jurisdiction over PAVSA," and because PAVSA is precluded from disclosing privileged records under Minn. Stat. § 595.02, subd. 1(k) (2018).

After a hearing, the district court issued an order on January 27, 2020, denying PAVSA's motion to reconsider. The order directed PAVSA to produce the records to the district court for in camera review within 14 days. In a supporting memorandum, the district court recognized that King should have sought a subpoena for the PAVSA records under Minn. R. Crim. P. 22.01, subd. 2(c), and commented that the court "likely would have granted a subpoena seeking such records," in light of its conclusion that in camera review was appropriate. The district court also acknowledged that, if a subpoena was issued, PAVSA could move to quash the subpoena. Nonetheless, the district court

¹ In Minnesota, other-crimes evidence is often referred to as *Spreigl* evidence, after the supreme court's decision in *State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965).

concluded that its prior order “acted as a subpoena,” and PAVSA had an opportunity to be heard on its motion to reconsider. The court concluded that, “while the procedure was not technically correct, it would have been inefficient to grant PAVSA’s motion only to allow the defense to go through the proper procedure and get to the same place.” PAVSA filed a petition for a writ of prohibition seeking to prevent enforcement of the order to produce the records.

D E C I S I O N

To obtain a writ of prohibition, PAVSA must show three things: “(1) an inferior court or tribunal must be about to exercise judicial or quasi-judicial power; (2) the exercise of such power must be unauthorized by law; and (3) the exercise of such power must result in injury for which there is no adequate remedy.” *State v. Turner*, 550 N.W.2d 622, 625 (Minn. 1996) (quotation omitted). A writ of prohibition is an extraordinary remedy, and the appellate courts have limited its availability “to those cases where the lower court has exceeded its jurisdiction and no other adequate remedy exists.” *Id.* “For example, a petition for a writ of prohibition is an appropriate means of obtaining review of a discovery order, which is not appealable as of right, where the district court has ordered the production of information clearly not discoverable.” *Id.* at 625-26.

The parties appear to agree that the district court’s January 27, 2020 order is an exercise of judicial power and that PAVSA, a nonparty to the criminal proceeding, does not have an ordinary remedy by appeal. The only remaining question is whether the district court’s order was unauthorized. PAVSA argues, among other things, that the district court abused its discretion by ordering a nonparty, nongovernmental entity to produce the records

for in camera review. King urges this court to deny the writ and construe the district court's order as a subpoena under Minn. R. Crim. P. 22.01, subd. 2(c).

Minnesota's "criminal rules allow only limited discovery, with a handful of provisions meant to give the defendant and prosecution as complete discovery as is possible under constitutional limitations." *State v. Deal*, 740 N.W.2d 755, 763 (Minn. 2007) (quotation omitted). The prosecutor is required to disclose, without court order, "all matters within the prosecutor's possession or control that relate to the case." Minn. R. Crim. P. 9.01, subd. 1. The prosecutor's obligations under rule 9.01, subdivision 1, "extend to material and information in the possession or control of members of the prosecution staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report, or with reference to the particular case have reported, to the prosecutor's office." *Id.*, subd. 1a(1).

Rule 9.01, subdivision 2, provides for additional discovery pursuant to a court order. On the defendant's motion and a showing of good cause, the court must require the prosecutor to assist the defendant in obtaining access to matters in the possession of a governmental agency not within the prosecutor's control, and may require the prosecutor to disclose and "to permit the inspection, reproduction, or testing of any relevant material and information not subject to disclosure without [court] order" upon establishing that the information may relate to the defendant's guilt or innocence, or negate guilt, or reduce culpability. *Id.*, subd. 2(1), (3). Because the records that King seeks are not in the state's possession or in the possession of another governmental agency, the state is under no obligation to produce them. *See id.*, subs. 1, 1a, 2(1); *State v. Schmid*, 487 N.W.2d 539,

543 (Minn. App. 1992) (declining to order prosecutors to disclose records over which they exercised no control), *review denied* (Minn. Sept. 15, 1992).

In order to obtain records from PAVSA, King was required to obtain a court order for a subpoena. “A subpoena requiring the production of privileged or confidential records about a victim . . . may be served on a third party only by court order.” Minn. R. Crim. P. 22.01, subd. 2(c); *see State v. Hummel*, 483 N.W.2d 68, 71 (Minn. 1992) (recognizing that rules permit defendant to request subpoena of psychological records in possession of third party). “A motion for an order must comply with Rule 10.03, subd. 1,” which requires that the motion be made in writing and served on opposing counsel three days before the omnibus hearing, “unless the court for good cause permits the motion to be made and served later.” Minn. R. Crim. P. 22.01, subd. 2(c), 10.03, subd. 1. “Before entering the order, the court may require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.” Minn. R. Crim. P. 22.01, subd. 2(c).

King did not comply with Minn. R. Crim. P. 22.01, subd. 2(c), and the district court did not grant a subpoena. The district court only said that it “likely” would have granted a subpoena if King had asked. Because the district court did not require King to follow the procedure in rule 22.01, subdivision 2(c), for obtaining a subpoena to produce privileged or confidential records about the victims, the district court’s discovery order directing PAVSA to produce the records for in camera review is unauthorized by law.

If King were to bring a motion to subpoena the records, the next question is whether King made a plausible showing that the records contain information that is relevant and material to his defense. PAVSA argues that the district court abused its discretion by

ordering in camera review because the information acquired by its sexual-assault counselors is privileged. See Minn. Stat. § 595.02, subd. 1(k). Although we conclude that the district court's order for in camera review is unauthorized for a different reason, we note that the supreme court has held that privileges "sometimes must give way to a defendant's right to confront his accusers." *State v. Evans*, 756 N.W.2d 854, 872 (Minn. 2008) (quoting *State v. Kutchara*, 350 N.W.2d 924, 926 (Minn. 1984)). The proper procedure to follow is for the district court to review the privileged records "in camera to determine whether the privilege must give way." *Id.* This approach "strikes a fairer balance between the interest of the privilege holder in having his confidences kept and the interest of the criminal defendant in obtaining all relevant evidence that might help in his defense." *State v. Paradee*, 403 N.W.2d 640, 642 (Minn. 1987)). We express no opinion in this case on whether the district court should grant a subpoena for the records, if presented with a proper motion, or on the possible outcome of any in camera review, if ordered.

Writ granted.