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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JUDITH ELAINE WALTHERS, *Petitioner*,

v.

THE HONORABLE BRADLEY ASTROWSKY, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA, *Respondent Judge*,

v.

STATE OF ARIZONA, *Real Party in Interest.*

No. 1 CA-SA 17-0106
FILED 5-18-2017

Petition for Special Action from the Superior Court in Maricopa County
No. CR2014-108856-001
The Honorable Bradley H. Astrowsky, Judge

JURISDICITON ACCEPTED; RELIEF GRANTED

COUNSEL

Maricopa County Office of the Legal Defender, Phoenix
By Raquel Centeno-Fequiere, Jeremy L. Bogart
Counsel for Petitioner

Maricopa County Attorney's Office, Phoenix
By Karen Kemper
Counsel for Real Party in Interest

Arizona Voice for Crime Victims, Phoenix
By Jessica Gattuso, Colleen Clase, Eric Aiken
Counsel for Victim

MEMORANDUM DECISION

Judge Samuel A. Thumma delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Patricia K. Norris joined.

T H U M M A, Judge:

¶1 Accepting jurisdiction in this special action, this court grants relief because, on the record presented, the consulting expert's extraction of data, at the direction of Petitioner's counsel, from a cellphone in the State's possession is subject to protection under the work product doctrine.

FACTS AND PROCEDURAL HISTORY

¶2 Petitioner Judith Elaine Walthers is facing various felony charges, including first degree murder where the State is seeking the death penalty. The police recovered the victim's flip-phone, which the State then forensically analyzed. The State disclosed to Petitioner various "victim-information-redacted cell phone data report[s]" reflecting use of the phone. The State did not, however, disclose the underlying "raw" digital data on the phone. Petitioner claims the phone contains deleted text messages that the State has been unable to extract.

¶3 Seeking additional digital data from the phone, Petitioner moved to allow her consulting expert to examine the phone, at the direction of Petitioner's counsel. Specifically, Petitioner sought an order allowing her expert access to "the phone to determine which forensic operating system is necessary to clone the phone" so that the expert could create a forensic image of the data on the phone for further analysis. In an affidavit supporting that motion, Petitioner's consulting expert stated he needed "to have access to the phone itself so it can be analyzed and then determine how to best extract the data." The affidavit also described how, working at a police facility, he would make a forensic image of the data on the phone

and then isolate for analysis only data within a specified date range. The State opposed the request, arguing the Victim's Bill of Rights barred the Petitioner's request and the motion was a "fishing expedition," but did not request a copy of the data extracted by Petitioner's consulting expert.

¶4 At the hearing on the motion, the court suggested it might require the Petitioner's consulting expert to present the data obtained to the court under seal and "also share with the State." In response, the State requested "an exact replica of the raw data that [the expert] gets," to which the court responded "[s]ure." Petitioner immediately objected. Noting she could not, "in good faith, hire an expert to provide evidence that could very well be detrimental to my client," Petitioner's counsel stated

> The State is within their privy to hire a completely different expert, other than the police department's that they're using to extract the information, that they can do so, but I would object to this Court ordering that we have to disclose information from the cell phone without us first determining if it is information that we should be disclosing and information that we would be using or not using.

¶5 The court noted that it viewed Petitioner's motion as "tantamount to a request to do independent testing, just like they could do an independent DNA test, blood test, et cetera. That's exactly what this is." The court added "I think it would be a due process violation if the Court required the defendant to a hundred percent exclusively rely upon the State's examination and findings concerning same. I think they're entitled to do their own examination with the data, and that's what this is." In granting the motion, along with issuing orders ensuring preservation of the data on the phone, the court limited disclosure of any such data to Petitioner's consulting expert and Petitioner's attorney, making plain that "[a]t no time, under any circumstances," could they "disseminate, disclose, share or distribute to any persons . . . including [Petitioner], the information obtained, . . . absent further order of the Court."

¶6 Over Petitioner's objection, the court also ordered her consulting expert to disclose "a copy of his raw data to the State" at the same time he obtained the data. In this special action, Petitioner claims this

disclosure requirement violates the work product doctrine. *See* Ariz. R. Crim. P. 15.4(b)(1) (2017).[1]

DISCUSSION[2]

¶7 Because the work product doctrine is implicated and Petitioner has no "equally plain, speedy, and adequate remedy by appeal," special action jurisdiction is appropriate. *See* Ariz. R.P. Spec. Act. 1(a); *Villares v. Pineda*, 217 Ariz. 623, 624 ¶ 10 (App. 2008). Accordingly, this court, in the exercise of its discretion, accepts special action jurisdiction.

¶8 The State acknowledges that Petitioner's consulting expert is part of her investigative team, meaning his work is subject to the work product doctrine. *See* Ariz. R. Crim. P. 15.4(b)(1). The State also acknowledges that a consulting expert's "opinions, theories or conclusions" are protected by the work product doctrine and "only subject to disclosure should Petitioner elect to call the expert to testify." The State argues, however, that raw data are "not a report," suggesting it does not reflect "the opinions, theories or conclusions of anyone," and therefore is not protected by the work product doctrine.

¶9 Resolution of this issue focuses on what the efforts of Petitioner's consulting expert may reveal, looking at two alternative outcomes. Either the analysis by Petitioner's consulting expert will yield the same data as the State's analysis to date, or it will yield different data.[3]

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[1] Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

[2] This court has received and considered the filings made on behalf of Petitioner, the State and the Victim. *See* A.R.S. §13-4437(A); *A.S. v. Padilla (Simcox)*, 238 Ariz. 560, 565 ¶ 20 (App. 2015).

[3] The State argues, alternatively, the data are not work product because they are "physical fact[s]." But the State cites no authority requiring a defendant charged with a crime to make any disclosure of possibly-inculpatory evidence the defense gathers on its own. Petitioner, of course, must disclose any reports (and underlying data) considered by a testifying expert. But at this point, Petitioner's expert is a consulting expert, not a testifying expert. Accordingly, even if not work product, the data Petitioner seek are in a real sense the equivalent of a box of documents, containing potentially-

¶10 If the imaging by Petitioner's consulting expert yields the same data as the State's analysis, the State could make no showing of "substantial need" for disclosure because the State already has that data. Ariz. R. Crim. P. 15.2(g). Thus, independent of the work product doctrine, if imaging by Petitioner's consulting expert yields the same data as the State's efforts, the State has no "substantial need" for court-ordered disclosure.

¶11 If the imaging by Petitioner's consulting expert yields data different than the State's analysis, the question is whether that imaging implicates the work product doctrine. The premise upon which the State's argument is based –- that raw data are not protected by the work product doctrine -– turns under these circumstances on how the data are obtained. Although distinguishable in some factual respects, *Corbin v. Ybarra*, 161 Ariz. 188 (1989), provides the analysis.

¶12 *Ybarra* held that a consulting environmental expert engineer's soil test report was protected by the work product doctrine. 161 Ariz. at 190-91, 194. After concluding the expert was part of defense counsel's investigative staff, an issue not disputed by the State in this case, *Ybarra* then discussed what is necessary to determine whether an expert's work contains his or her "opinions, theories or conclusions" so that it is protected by the work product doctrine. *Id.* at 193.

¶13 The court of appeals in *Ybarra* held the report was not work product because it "only described 'the chemical contaminants found in the soil and their concentrations and notes which chemicals were hazardous wastes . . . it contains no theories, opinions or conclusions regarding how the results may [a]ffect'" the company. *Id.* The Arizona Supreme Court, however, held this was too narrow an interpretation of the work product doctrine. *Id.* Specifically, it held that "[t]he ability to make expert scientific observations necessarily requires professional judgment and, therefore, opinion and conclusion. Thus, the determination that certain compounds or chemicals exist in the soil samples is a conclusion." *Id.* Like the expert in *Ybarra*, the record in this case shows that Petitioner's consulting expert will necessarily exercise professional judgment to determine which methods and tools are most likely to yield the data sought.

¶14 *Ybarra* also noted that, "[o]n any consideration of the work product doctrine, [a court] must consider an additional factor: availability

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inculpatory information, the defense team has gathered on its own that it may or may not decide to use at trial.

of the item sought in discovery. If the information sought is equally available to both parties, it receives the broadest protection." *Id.* at 194. *Ybarra's* directives apply with full force here, recognizing both the soil in that case and the data in this case

> are physical facts to which the [S]tate and defense have equal access. They came from property owned by a third party. The [S]tate took . . . samples at the beginning of this proceeding, and presumably could have taken . . . samples again any time . . . In short, the [S]tate had equal access . . ., could have taken its own samples, and could have hired its own expert.

¶15 The State argues the extracted data is not protected because "[r]aw data, by itself, is like a shovel full of soil." This analogy is inapposite. Rather, the phone itself is more like the soil from which samples and analysis are drawn. As Petitioner argues, her "attorney retained the expert to extract cell phone data that the State has been unable to obtain. That expert, at the direction of counsel, will apply his expertise in order to perform the extraction." If Petitioner's consulting expert can extract data the State was not able to extract, the expert's choice in methods and tools of extraction will be the result of professional judgment, meaning the compelled disclosure runs counter to the work product doctrine applicable to a consulting expert. Ariz. R. Crim. P. 15.4(b)(1).[4]

[4] This conclusion is made on the current record, recognizing Petitioner has not designated, and may never designate, the consulting expert as a testifying expert and the State has not shown undue hardship if the information is not disclosed.

CONCLUSION

¶16 This court accepts special action jurisdiction and, on this record, grants relief by vacating, on work product grounds, that portion of the superior court's order requiring Petitioner's consulting expert to provide the State with a copy of the data he extracts from the cellphone.

AMY M. WOOD • Clerk of the Court
FILED: AA