[Cite as *In re Subpoena Duces Tecum Served upon Attorney Potts*, 2002-Ohio-2050.]

IN THE COURT OF APPEALS OF LUCAS COUNTY

In the Matter of: Subpoena Duces Tecum Served Upon Attorney John F. Potts [State of Ohio, Plaintiff v. Donald Lentz, Defendant]	Court of Appeals No. L-01-1033 Trial Court No. CR-00-1560 **DECISION AND JUDGMENT ENTRY** Decided: April 26, 2002

* * * * *

John Czarnecki, for appellant.

Julia R. Bates, Lucas County Prosecuting Attorney, and Thomas A. Matuszak, Assistant Prosecuting Attorney, for appellee.

Kevin J. Baxter, Erie County Prosecuting Attorney, and Mary Ann Barylski, Assistant Prosecuting Attorney, for Amicus, Ohio Prosecuting Attorneys Association.

Betty D. Montgomery, Ohio Attorney General, and James D. Barnes, Assistant Ohio Attorney General, for Amicus, Attorney General of Ohio.

C. Thomas McCarter, for Amicus, Maumee Valley Criminal Defense Association.

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SHERCK, J.

{¶1} This appeal comes to us from the Lucas County Court of Common Pleas. There, the court found an attorney in contempt for refusing to submit his billing records for a criminal client to the court for an in camera inspection when ordered to do so. Because we conclude that the material at issue is not per se privileged and

may be relevant to the pending criminal prosecution, we affirm the court's order with respect to its in camera inspection. However, because we find the attorney acted in good faith in an unsettled area of law, we set aside his contempt, conditioned on his compliance with the trial court's order.

{¶2} In 1999, Donald Lentz retained appellant, Attorney John F. Potts, to represent him in a civil forfeiture action. The state alleged that Lentz, through a straw man, James Toth, used drug money to purchase two vehicles. In December 1999, a grand jury indicted Lentz and Toth on six counts of money laundering. The state amended its forfeiture action to a criminal forfeiture and the two cases were consolidated. Appellant continued his representation of Lentz throughout.

{¶3} In January 2000, the state served notice to Lentz that it intended to employ an "expenditure analysis" to prove, by inference, that Lentz had substantial income from presumably illegal sources. An "expenditure analysis" involves a compilation of an individual's expenditures, compared to that person's reported legitimate income. The state sought to show that, while Donald Lentz reported that he had little or no household income for years, he, nevertheless, spent tens of thousands of dollars.

{¶4} As part of its compilation of expenditures, the state served a Subpoena Duces Tecum on Attorney Potts, demanding that he appear at the prosecutor's office on April 7, 2000, and produce a variety of documents, including his fee agreement with Lentz and

records of payments received from Lentz for the period of January 1, 1999 to December 1, 1999. Ultimately, the state withdrew this subpoena. The state then issued another subpoena demanding the same material, but specifying a May 8, 2000 appearance before the court. Both appellant and Lentz moved to quash.

{¶5} While the motion to quash was under consideration, the state filed a subpoena amendment, changing the date of appellant's order of appearance to coincide with the commencement of Lentz's trial. The amended subpoena also expanded the scope of the material to be produced to include not only the forfeiture billing records, but billing records for the pending criminal case. The amendment also expanded the time frame covered by the subpoena to include the date of appellant's ordered appearance.

{¶6} In support of their motion to quash, appellant and Lentz argued that the state failed to establish a threshold showing of relevance concerning subpoena material and failed to make a showing of need sufficient to warrant an in camera inspection. Moreover, appellant and Lentz maintained that the documents were privileged and their submission to the state would interfere with Lentz's Sixth Amendment federal rights and, independently, Lentz's rights under Article I, Section 10 of the Ohio Constitution.

{¶7} The trial court rejected these arguments and ordered the documents submitted to the court for an in camera review. When appellant refused to obey the court's order, the court found him in

direct contempt, fined him $250 and ordered his incarceration for ten days. The court stayed execution of the order pending appeal.

{¶8} Appellant now brings this appeal, setting forth the following assignment of error:

> **{¶9}** "The trial court erred when it denied appellant's Motion to Quash a subpoena ordering appellant, an attorney-at-law, to produce records regarding his representation of a criminal defendant and, thereafter, finding appellant in criminal contempt as a result of his refusal to comply with the order to produce."

{¶10} Appellant's contempt citation is the proper vehicle to use in bringing us this interlocutory appeal. See Smith v. Bd. of Trustees (1979), 60 Ohio St.2d 13, paragraph one of the syllabus.

{¶11} Appellant challenges the trial court's ruling that Lentz's fee information may be subpoenaed, or even viewed in camera. Neither party nor any of the amicus has directed our attention to any Ohio authority which is controlling or even persuasive on this issue.

{¶12} Crim.R. 17(C) governs the production of documentary evidence and the procedure for challenging the issuance of a subpoena for such material. The rule provides:

> **{¶13}** **"(C) For production of documentary evidence.** A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein; but the court, upon motion made promptly and in any event made at or before the time specified in the subpoena for compliance therewith, may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that the books, papers, documents or other objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time they are offered in evidence, and may, upon their production, permit them or

portions thereof to be inspected by the parties or their attorneys."

{¶14} Ohio's Crim.R. 17(C) is materially the same as Fed.R.Crim.Pro. 17(c). For this reason, Ohio Courts interpreting the rule have freely relied upon federal cases for guidance in construing the rule. See e.g. State v. Geis (1981), 2 Ohio App.3d 258.

{¶15} Geis involved a subpoena issued to a Columbus television station for non-broadcast out takes of a video interview. On a motion by the station to quash the subpoena, the Court of Appeals of Franklin County held that a court considering a motion to quash should first determine whether the production of the documentary evidence sought is "unreasonable or oppressive."

{¶16} The analysis the court adopted to test this assertion is the one prescribed by the United States Supreme Court in United States v. Nixon (1974) 418 U.S. 683 at 699-700. Construing the federal rule, the United States Supreme Court directed that the proponent of the subpoena demonstrate:

> **{¶17}** "*** (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general 'fishing expedition.'" (Footnote omitted)

{¶18} The Geis court held that to properly evaluate the evidence at issue, the court should conduct an in camera examination of the evidence to determine admissibility and relevance.

Such an inspection should be outside the presence of the parties should the court determine that such evidence is not admissible or relevant or is subject to the protection of a privilege. Geis at 260.

{¶19} The trial court essentially followed the Geis guidelines. We cannot say that it abused it discretion in that respect. However, the court went beyond the Geis/Nixon procedures and ruled on appellant's privilege claim at the same time. In our view, the trial court's rejection of appellant's privilege arguments was premature and, perhaps, ill advised.

{¶20} Pursuant to the Geis/Nixon analysis, before considering any privilege, a court should first satisfy itself that the proponent of the subpoena has met each of the enumerated criteria.

{¶21} In this matter, before an in camera inspection of the documents, the trial court appears to have concluded that the state satisfied elements two through four of the Geis/Nixon criteria.[i] Since these are principally factual determinations, we cannot say the court's conclusions were unreasonable. Unresolved, then, is the determination of the relevancy and evidentiary value of the subpoenaed documents.

{¶22} With respect to relevance, appellant argues that the expansion of the subpoena to include billing records beyond the time coincidental with the offenses charged in the indictment casts too broad a net. While on its face this argument seems to

{¶23} have some validity, it is not for us to make this decision in the first instance. The trial court is vested with the authority to examine the contested documents and make an initial relevancy determination. The same is true with respect to appellant's ancillary argument that even if there is relevance to any of the documents sought, it is outweighed by the documents' capacity to generate unfair prejudice, confusion or be misleading to a jury. See Evid.R. 403(A).

{¶24} Concerning the evidentiary value of the documents sought, in addition to the Evid.R. 403 concerns, there are serious Sixth Amendment issues entangled in admissibility. As appellant points out, this is a trial subpoena seeking inculpatory evidence from the counsel of a criminal defendant. Were appellant to be called to authenticate these documents, the issue of attorney disqualification and the concomitant depravation of a defendant's right to the counsel of his choice may be implicated. See Linton v. Perini (C.A.6 1981), 656 F.2d 207, 208; State v. Marinichek (1983), 9 Ohio App.3d 22, 23-24 (with respect to an independent right under Section 10, Article I of the Ohio Constitution).

{¶25} The state facilely responds that the billing records may be introduced by stipulation, thus avoiding any attorney-client conflict. However, whether there is a stipulation of such evidence is not the state's decision alone. The defense would have to concur with such a stipulation: an act which might still engender a conflict. In any event, these are just some of the issues which

must be addressed prior to the consideration of any claimed privilege.

{¶26} Finally, there is the issue of privilege itself. The trial court, as we previously indicated, prematurely considered and rejected appellant's assertion of privilege with respect to these documents. Not only should consideration of privilege have been reserved until after the in camera inspection of the documents occurred and satisfaction of the Geis/Nixon criteria was met, but it also appears that the trial court failed to consider a type of privilege which may be applicable to this case.

{¶27} There seems to be little argument that ordinarily attorney-client privilege is not applicable to a client's identity or documents concerning payment of legal fees. See United States v. Hodgson (C.A.10 1974), 492 F.2d 1175, 1177; In Re Grand Jury Subpoena-Anderson (C.A.10 1990), 906 F.2d 1485, 1488. However, several of the federal circuits have created exceptions to this general rule. One of these is the "Legal Advice Exception." Under this exception, attorney fee information is protected by the attorney-client privilege when, "*** there is a strong probability that disclosure would implicate the client in the very criminal activity for which legal advice was sought." In Re Grand Jury Subpoena-Anderson, supra, citing numerous circuit opinions.

{¶28} For the exception to apply, the information sought must relate 1) to the client of the attorney involved, id, and 2) to legal advice sought about the activity for which fee information is

sought. Id at 1489; see also Baird v. Koerner (C.A.9 1960), 279 F.2d 623.[ii] In this case, the fee information sought is for the undisguised purpose of proving the guilt of appellant's client in the very criminal prosecution out of which the subpoena was issued. These are issues the trial court should address on remand.

{¶29} Consequently, we conclude that the trial court properly ordered an in camera inspection. However, we also find that appellant had a good faith basis for challenging the court's ruling. For this reason we vacate the trial court's finding of contempt, contingent upon appellant providing the disputed documents on remand. See In Re Helmick (July 23, 1999), Lucas App. No. L-98-1146, unreported.

{¶30} Upon consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. However, pursuant to the reasons and conditions stated above, appellant's contempt finding is vacated. This matter is remanded for further consideration consistent with this decision and judgment entry. Cost to appellant.

JUDGMENT AFFIRMED, IN PART,
AND VACATED IN PART.

Peter M. Handwork, J. _____
JUDGE

Melvin L. Resnick, J. _____
JUDGE

James R. Sherck, J. _____
JUDGE
CONCUR.

[1]Since the court determined that it was willing to delay the trial to permit appellant to test the subpoena, the court considered the third criteria met.

[2]Although this exception has been sometimes criticized and often distinguished, it appears currently viable.