

DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 S. Potomac St. Centennial, Colorado 80112	▲ COURT USE ONLY ▲
PEOPLE OF THE STATE OF COLORADO v. JAMES EAGAN HOLMES, Defendant	Case No. 12CR1522 Division: 26
<p style="text-align: center;">ORDER REGARDING JANA WINTER’S MOTION FOR INSPECTION BY COUNSEL (C-43)</p>	

INTRODUCTION

This matter is before the Court on Jana Winter’s motion to allow her counsel to inspect the notebook seized by law enforcement at the University of Colorado’s Anschutz Medical Campus on July 23, 2012 (hereinafter “the notebook”). The defendant and the People both object to the motion. For the reasons articulated in this Order, the motion is denied.

BACKGROUND

The defendant is charged with shooting, and killing or injuring, numerous people inside two adjacent Aurora movie theatres during the early morning hours of July 20, 2012. On October 2, the defendant filed a motion for sanctions, arguing that law enforcement agents violated the Court’s July 23 pretrial publicity Order by

leaking information about the contents of the notebook to Winter, an out-of-state investigative journalist. In connection with his motion, the defendant served a subpoena *duces tecum* and *ad testificandum* on Winter. Winter moved for a protective order and to quash the subpoena (“motion to quash”), based on the newsperson’s privilege in Colorado, § 13-90-119, C.R.S. (2012).¹

The Court heard oral argument on both motions on April 1, 2013. As relevant here, the defendant asserted that the identity of Winter’s confidential sources was relevant to “substantial issues” in the case, including the credibility at trial of one or more of the law enforcement witnesses who admitted under oath on December 10 to have acquired knowledge of the contents of the notebook, but who denied ever sharing that knowledge with Winter. Winter countered that the matter was prematurely before the Court and not ripe for ruling. More specifically, Winter maintained that whether the credibility of any of the December 10 witnesses was a “substantial issue” in the case hinged on the admissibility of the contents of the notebook, and the Court had not yet determined whether the notebook was protected by the physician-patient privilege or the psychotherapist-patient privilege.

¹ The newsperson’s privilege in Colorado is qualified, not absolute. A Court may compel a newsperson to disclose information only if the party seeking the information can show: (1) that the information is directly relevant to a substantial issue involved in the proceeding; (2) that the information cannot be obtained by any other reasonable means; and (3) that a strong interest of the party seeking to subpoena the newsperson outweighs the interests under the First Amendment to the United States Constitution of such newsperson in not responding to a subpoena and of the general public in receiving the information. § 13-90-119(3)(a)-(c).

A week after oral argument, the Court deferred ruling on the merits of the motions pending a determination as to whether the contents of the notebook are protected by either of the aforementioned privileges. At a subsequent hearing held on April 10, the Court continued the motions and Winter's subpoena until August 19.² The Court also indicated that supplemental briefing on the motion to quash might be appropriate at some point.

On June 4, the Court accepted the defendant's plea of not guilty by reason of insanity and concluded that, to the extent the contents of the notebook were protected by the physician-patient privilege and the psychotherapist-patient privilege, those privileges had been waived, pursuant to § 16-8-103.6(2)(a), C.R.S. (2012), as a result of the defendant's plea. A few days later, on June 7, the Court ruled that this determination made it appropriate to allow the parties and Winter an opportunity to file supplemental briefs on the "substantial issue" contention related to the motion to quash. Thereafter, the Court set a supplemental briefing schedule.

Winter now argues that in order to brief the Court on "the significance of the contents of the notebook," her attorneys first need to inspect the contents of the notebook. Motion at p. 3 (quoting June 7 Order). According to Winter, granting her motion for inspection "is also necessary to serve the interests of fairness and helpfulness to the Court," as defense counsel and the prosecution both have had

² The Court recently postponed the hearing until September 30.

access to the contents of the notebook and, without a similar opportunity to examine the contents of the notebook, she will be “handicapped in her ability to brief the Court on the significance of those contents” and to meaningfully address arguments raised by the parties. *Id.*

ANALYSIS

Although Winter knew that both parties opposed her motion, she cited no authority in support of it. The legal arguments and authority presented for the first time in her reply are untimely and improper, as Winter deprived the parties of an opportunity to respond to them. *See generally Keller Cattle Co. v. Allison*, 55 P.3d 257, 261-62 (Colo. App. 2002) (“Because the argument was untimely raised [in the reply] and [the non-moving party] was not given an opportunity to counter it, to the extent the summary judgment was granted on that basis, it must be reversed.”). At any rate, the Court concludes that Winter’s motion lacks merit.

Winter, as a nonparty in this criminal case, has failed to persuade the Court that she should receive any discovery, much less information that may be protected by the defendant’s physician-patient and psychotherapist-patient privileges. To the extent those privileges apply, the Court has found a *limited* waiver for purposes of the trial, any death penalty sentencing proceeding, and any hearing on the issue of the defendant’s mental condition, as well as to allow the People and the sanity examiner access to the contents of the notebook. *See* § 16-8-103.6(2)(a) (the

waiver only applies “for the purpose of any trial, hearing on the issue of such mental condition, or sentencing hearing conducted pursuant to section 18-1.3-1201 . . . C.R.S.,” further, the waiver permits an exchange of information only between the prosecution and the defense); *see also Gray v. District Court*, 884 P.2d 286, 291 (Colo. 1994) (noting that the public policy behind the waiver of privilege set forth in section 16-8-103.6(2)(a) is to allow the prosecution to investigate the defendant’s assertion of insanity because the prosecution has the burden of proving the defendant sane). Thus, if the contents of the notebook are privileged, the Court’s waiver determination does not provide Winter and all other members of the public unfettered access to them. Nor does the Court agree with Winter that the waiver found by the Court also applies to her motion to quash because such motion is “for the purpose” of trial.

Moreover, it would be the height of irony to allow Winter broader access to information which, pursuant to the Court’s pretrial publicity Order, she had no right to obtain in the first place and which she published despite being told by three separate law enforcement agencies that there was a Court Order prohibiting the dissemination of that information to the media. The requested inspection, in essence, would give Winter exclusive media coverage of the contents of the notebook. The Court will not allow such a perverse result.

It is true that Winter is not seeking to inspect the contents of the notebook herself. However, it is unrealistic to expect Winter's counsel to inspect the contents of the notebook and to refrain from discussing those contents with her. Indeed, Winter's counsel candidly admit that they "believe that it could be useful to their representation of Winter to be able to discuss those contents with her." Reply at p. 10. Furthermore, the reason Winter is asking that her attorneys be provided access to the contents of the notebook is so that they may use that information in the supplemental brief they intend to file on her behalf. Winter would likely be required to review the supplemental brief before it is filed and almost certainly would receive a copy of it afterward, even if it is suppressed. Thus, the suggestion by Winter's counsel for an "attorneys' eyes only" Order is not a sensible one.

The Court appreciates Winter's promise to abide by any Order prohibiting her from accessing the contents of the notebook or, if allowed access to them, from publishing them. Winter's representation may well be genuine, but it does not allay the Court's concern about the contents of the notebook being publicized before trial. Winter's first loyalty is to her employer and, by her own admission, she believes that doing her job well includes aggressively obtaining information about significant events, even if it means having her sources violate a Court Order in the process.

Winter's fairness claim does not alter the Court's conclusion either.³ First, the People did not discuss the contents of the notebook in their oral objection to her motion for inspection, and they have refrained from taking a position on her motion to quash or on the defendant's motion for sanctions. Second, the defendant has not discussed the contents of the notebook in any proceeding. Finally, and perhaps most importantly, the defendant, as the party seeking to pierce Winter's newsperson's privilege, has the burden to prove by a preponderance of the evidence that the news information he seeks from Winter is directly relevant to a "substantial issue" involved in the proceedings. § 13-90-119(3)(b).

To be sure, the Court continues to believe that the significance of the notebook is an important consideration in addressing the defendant's contention that the "substantial issue" to which Winter's confidential information is directly relevant is the credibility of one or more of the witnesses who testified on December 10. An evidentiary item may be directly relevant to a peripheral issue or to a crucial issue in a case. In the Court's view, the significance of the credibility of a witness testifying at trial about the seizure of an evidentiary item will likely vary according to the significance of the evidentiary item. The more significant the evidentiary item, the more significant the credibility of the witness who

³ Winter fails to mention that, according to her article, she obtained information about the contents of the notebook before the prosecution and the defense.

collected it is likely to be. In other words, for purposes of analyzing the defendant's request to pierce Winter's newsperson's privilege, there is a correlation between the significance of the notebook and the significance of the credibility of the handful of law enforcement agents who acquired knowledge of its contents while assisting in its collection, but who subsequently denied under oath in Court ever sharing that knowledge with Winter or anyone else.⁴

In *Gordon v. Boyles*, 9 P.3d 1106, 1118 (Colo. 2000), a defamation case, the Supreme Court explained that the significance of the issue to which the confidential information sought is relevant is an important consideration in the "substantial issue" analysis:

In some cases, *the confidential information may be the only evidence of a crucial aspect of the case*, while in other situations, *the information may be only marginally relevant to a less significant issue*. For instance, in a media defamation case the information about the reliability of the declarant's sources may be relevant to the significant issue of the reporter's state of mind about the truth or falsity of his broadcasts. The less credible the sources, the more likely the declarant acted with malice or a reckless disregard of the truth by broadcasting the information they provided. Hence, the identities of these persons and what they said reflects directly on the declarant's state of mind with respect to the truth or falsity about the information he broadcast.

Alternatively, even if there exists sufficient proof of actual malice, the identities of the declarant's sources may be relevant for the plaintiff to

⁴ The credibility of some, but not all, of the agents who handled or had access to the notebook may be independently significant because they had major roles in the investigation of this case. However, the Court is at somewhat of a disadvantage in this regard because it does not have access to the discovery. Thus, it is limited to the testimony that has been provided in pretrial hearings and to the pleadings that have been submitted.

prove, for instance, that the statement was false or to overcome the affirmative defense of truth. In some cases, disclosure of the source may be relevant to prove that the source did not exist. Each case must rest on its own unique facts. When the news information sought bears so directly on substantial elements of a plaintiff's claims, the court may determine that [the "substantial issue" element of the statutory provision allowing the newsperson's privilege to be pierced] is satisfied.

Id. at 1118 (emphasis added) (internal citations omitted).

The Court agrees with the defendant that it does not need Winter's assistance in assessing the significance, if any, of the contents of the notebook. After all, Winter is not a party in this case, does not have access to the discovery, and has not been involved in the majority of the proceedings that have taken place.

In his response, the defendant proposes having the Court conduct an *in camera* review of the contents of the notebook so that it may make its own determination about their potential materiality and significance at trial. Response at p. 3. If the defendant is willing to waive any privileges that he believes exist and are applicable in order to allow the Court—and only the Court—to view the contents of the notebook, and if the prosecution has no objection, the defendant may submit a Bates stamped copy of those contents in a confidential and sealed envelope—with the first page Bates stamped number "1" and with an indication of the number of pages included therein—so that the Court may review them *in camera*. At the People's request, a copy of the submission should be served on them. Once the Court has had an opportunity to review the submission in

chambers, it will place it in a confidential and sealed envelope for appellate review purposes.

In the event a copy of the contents of the notebook is submitted for an *in camera* review in accordance with this Order, the Court will rescind the June 7 Order which extended the parties an opportunity to file supplemental briefs on the defendant's "substantial issue" contention. The Court invited supplemental briefs because it felt it would benefit from the parties' assistance in resolving the "substantial issue" assertion as it relates to the contents of the notebook. After an *in camera* review of the notebook, however, the Court will have first-hand knowledge of the contents of the notebook. If, following any *in camera* review conducted, the Court determines that additional briefing on any issue is appropriate or that reconsideration of the denial of Winter's request for inspection is warranted, it will notify the parties. Otherwise, the Court will rule on Winter's motion to quash based on the extensive proceedings already held and the informative briefs previously submitted.

The Court is mindful that it is denying Winter and her counsel an opportunity to examine the notebook, even though it has determined that the significance of the contents of the notebook must be included in the Court's "substantial issue" analysis. The Court is comfortable proceeding as outlined in this Order based on the concerns it has expressed and because there is not a better

alternative course of action. Moreover, the Court reiterates: (1) the parties will not have an unfair advantage over Winter because neither party has discussed—and neither party will discuss—the contents of the notebook in any filings related to the motion to quash; (2) the defendant, not Winter, bears the burden of proof on the “substantial issue” requirement; (3) according to Winter’s article, she obtained information about the contents of the notebook from two confidential sources in July 2012, long before the defense and the prosecution had access to the contents of the notebook; (4) determinations related to the materiality and significance of evidence are generally left to the Court’s discretion; (5) given that she is not a party to these proceedings and has not been involved in most of the hearings that have been held in this case, Winter is in no position to meaningfully comment on the materiality and significance of the contents of the notebook at trial; (6) the parties and Winter have submitted extensive oral and written arguments on the motion to quash; and (7) Winter seeks inspection of the notebook by her counsel in order to submit the supplemental filing allowed by the Court’s June 7 *sua sponte* Order, and that Order will be rescinded if the contents of the notebook are submitted for an *in camera* review.

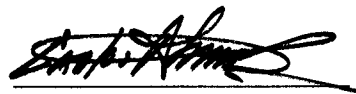
CONCLUSION

For all the foregoing reasons, Winter’s motion for inspection of the notebook by her counsel is denied. If the defendant wishes to submit a copy of the

notebook for an *in camera* review in accordance with this Order, he may do so on or before Wednesday, July 24, 2013. If the People object to the proposed *in camera* review, they must file an appropriate notice with the Court on or before Monday, July 22, 2013.⁵

Dated this 12th day of July of 2013.

BY THE COURT:



Carlos A. Samour, Jr.
District Court Judge

⁵ Winter's observation that, according to her expert witness, it is "exceedingly unlikely" that any of the December 10 witnesses were Winter's sources, carries little weight with the Court. If, without disclosing the identity of her sources, Winter is willing to state under oath and subject to limited cross-examination that her sources did not testify on December 10, such testimony may impact the Court's analysis.

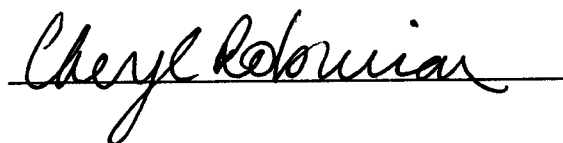
CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2013, a true and correct copy of **Order Regarding Jana Winter's motion for inspection by counsel (C-43)** was served upon the following parties of record:

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