

FILED

JUL 20 2009

THOMAS R. FALLQUIST
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON)

Plaintiff,)

v.)

BRIAN L. MOORE)
WM 05/08/66)

Defendant(s).)

No. 09-1-01570-9

PA# 09-9-34489-0

RPT# 002-07-0356136

STATE'S RESPONSE TO SHELLYE STARK'S
MOTION TO INTERVENE AND QUASH
SUBPOENA DT

I. PROCEDURAL HISTORY

Dale Stark was shot to death on 12/9/07. As a result of her alleged involvement, Shellye Stark was charged with First Degree Murder and Conspiracy to Commit First Degree Murder. Among the State's listed witnesses was the defendant in this case, Brian L. Moore. The Shellye Stark matter went to trial under Cause #07-1-04691-8. See Court File. The trial was held before the Honorable Judge Tari Eitzen from March 2 through 17, 2009, in the Spokane County Superior Court. On March 18, 2009, a jury returned verdicts of guilty on both counts. See Court File. Sentencing was originally set for April 9, 2009. However, the sentencing was continued to April 30, 2009, to allow Julie Twyford to substitute in as counsel for purposes of sentencing and appeal. Sentencing was later held on April 30, 2009. Ms. Stark

1 was sentenced to a standard range sentence of 340 months and 270 months on Counts I and II
2 respectively. See Court File.

3 On April 27, 2009, an Information was filed in the Spokane County Superior Court, charging Brian
4 L. Moore with Murder in the First Degree and Conspiracy to Commit Murder in the First Degree. Mr.
5 Moore was arrested in the State of California and made a First Appearance in Spokane County Superior
6 Court on June 23, 2009. He was arraigned on June 30, 2009. See Court File.

7 On June 22, 2009, a hearing was held before this Court during which the State asked the Court to
8 compel discovery of the inculpatory statements made by Brian L. Moore to the Shellye Stark defense
9 investigator, Mr. Ted Pulver. Mr. Bradshaw appeared and asked the Court to quash the subpoena. The
10 Court denied the motion to quash and entered Findings and issued Orders on June 23, 2009. See Court
11 File.

12 In it's findings, this Court determined that no privilege exists between Mr. Moore and Mr.
13 Bradshaw and statements made during the investigation by Brian Moore to Ted Pulver regarding "Mr.
14 Moore's own involvement" in the murder of Dale Stark are not protected by the attorney-client privilege
15 that exists between Mr. Bradshaw and Shellye Stark. The Court ordered that Mr. Pulver and Mr.
16 Bradshaw review and deliver to the Court "any written or electronic media recorded materials contained
17 therein regarding interviews between Ted Pulver and Brian Moore". The Court would then conduct an
18 in-camera review of these materials and forward all documents and recordings to the State that are
19 properly discoverable. See Court File.

20 On July 10, 2009, the Washington Appellate Project filed a Motion to Intervene and Quash
21 Subpoena. This State's Response addresses issues raised by new defense counsel for Ms. Stark.

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II. ISSUES PRESENTED

- 1) *Whether Ms. Stark has a right to intervene in the motion and*
 2) *Whether the materials requested by the State are protected by attorney-client privilege and/or are work product such that they are protected by the Sixth Amendment and the State is not entitled to their use in the prosecution of Brian Moore?*

III. ARGUMENT

A. Intervention

The State concedes Ms. Stark's right to intervene in this motion.

B. Privilege and Work Product

In their brief, defense counsel asks the Court to extend the rulings of the courts in *Garza* [99 Wn.App. 291, 994 P.2d 868 (2000)] and *Yates* [111 Wn.2d 793, 765 P.2d 291 (1988)] far beyond those contemplated by the courts in both cases. Throughout their brief, counsel urges that the State should not now have access to materials that it could not have during Ms. Stark's trial. Defense Brief at 4 and 6. Quite to the contrary, the State believes that CrR4.7 and case law would have required the defense to provide the requested discovery had it been requested then, as it has been now.

Counsel first claims that disclosure of the requested materials to the State would deprive Ms. Stark of her Sixth Amendment right to effective assistance of counsel. Defense brief at 3. Because the duty of the defense to investigate all "known potential defenses" and to "thoroughly investigate her defense", the product of that investigation is "part and parcel" to the attorney's representation of Ms. Stark. Defense Brief at 4.

In support of above contention, defense cites to *State v. Garza*, supra. The facts at issue in *Garza* (a consolidated case involving three codefendants) could not be more divergent than here. In *Garza*, there

1 had been evidence of a suspected escape attempt in the Benton County Jail. *Id.* at 291. As a result, the
2 jail conducted a search of the prisoner pod in which evidence of the escape attempt had been found.
3 During the search, inmates in the pod were strip-searched and their personal property, including legal
4 documents containing their private communications with their attorneys were seized and “gone through”.
5 *Id.* at 293.

6 The issue for the court was whether, and under what circumstances, jail officials may seize and
7 examine criminal defendants’ legal documents. *Id.* at 293, and, equally important, what is the remedy for
8 a violation? *Id.* at 297. The defendants had moved to dismiss their cases on various grounds, including
9 that the seizure and examination of the legal materials denied them effective assistance of counsel and
10 violated the attorney-client privilege. *Id.* at 294. The Superior Court denied the motions to dismiss. *Id.*
11 at 295. The Appellate Court remanded the case back to the Superior Court for additional fact finding on
12 the issue of whether the security concerns at the jail justified such an extensive intrusion into the
13 defendants’ private attorney-client communications. *Id.* at 301-302.

14 Here, the State has asked the defense to provide the statements, written, oral, and recorded, made
15 by Mr. Moore to Ted Pulver. Defense counsel argues that, though *Garza* concerned a jail staff’s seizure
16 and review of legal materials of pre-trial inmates, “the logic is equally applicable here”. Defense Brief at
17 4. The State urges this Court to find these instances are not factually nor logically similar and that *Garza*
18 does not get the defense to a 6th Amendment nor an attorney-client communication violation in our case.

19 Next, defense counsel asks this Court to find that the requested discovery is work product and, as
20 such, may never be discoverable. Defense Brief at 5. In support of this contention, defense cites to *State*
21 *v. Yates*, supra. The State believes that, though *Yates* is factually dissimilar (*Yates* involved a pretrial
22 request by the State to obtain the statements made to a defense counsel and investigator of witnesses
23 whom the State intended to call at the trial of defense counsel’s client), the ruling has applicability to our
24 case. *Yates* involved a court order which required defense counsel to produce for an in-camera review
25 “all transcripts of interviews, notes taken during such interviews, and summaries of interviews of State’s

1 witnesses prepared by defense counsel and the defense investigator". *Id* at 793. The *Yates* court found
2 that, to the extent that the trial court's discovery order encompassed the "pretrial disclosure of statements,
3 signed or unsigned, recorded or written, given by potential prosecution witnesses during interviews with
4 defense counsel or their investigator, such order was not abuse of discretion". *Id.* at 796.

5 The State contends that the requested Brian Moore statements fall directly within the discoverable
6 materials contemplated by CrR 4.7 and approved by *Yates*.

7 From *Yates*: Generally speaking, the scope of discovery is within the trial court's sound discretion
8 and the decisions of the trial court will not be disturbed absent a manifest abuse of that discretion. *Yates*
9 at 797. In Washington, the criminal discovery provisions of the Superior Court Criminal Rules, CrR 4.7,
10 guide the trial court in the exercise of its discretion over discovery. *Yates* at 797. CrR 4.7 is a reciprocal
11 discovery rule. Matters constituting mandatory and discretionary disclosure, as well as matters not
12 subject to disclosure, are carefully set out. *Yates* at 797. The rules are intended to provide for the just
13 determination of every criminal proceeding and shall be construed to secure simplicity in procedure,
14 fairness in administration, effective justice, and the elimination of unjustifiable expense and delay. *Yates*
15 at 797. The rule provides that "notwithstanding the initiation of judicial proceedings, and subject to
16 constitutional limitations, the court on motion of the prosecuting attorney or the defendant, may require or
17 allow the defendant to: ...allow inspection of physical or documentary evidence in the defendant's
18 possession;..." *Yates* at 798 citing CrR 4.7(b)(2)(x).

19 In *Yates*, the State Supreme Court determined that the trial court's order did not violate the
20 defendant's Sixth Amendment right to effective assistance of counsel nor did it violate defendant's 14th
21 Amendment right to due process. *Yates* at 800-01. Neither did the order violate the work product
22 doctrine and attorney-client privilege. The court pointed out that recorded or transcribed interviews of the
23 prosecution witnesses are unlikely to contain "opinions, theories or conclusions" of defense counsel.
24 *Yates* at 801. And, perhaps most importantly, the court found that to the extent they (the requested
25 statements) do so, the in camera review ordered by the trial court was expressly for the purpose of

1 allowing it to excise matters properly excludable as work product or protected under the attorney-client
2 privilege. *Yates* at 801.

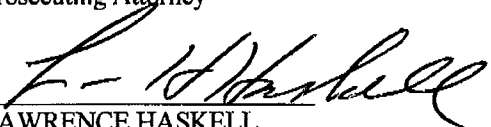
3 The order approved by the *Yates* court is exactly what this Court has done in our case. In the
4 hearing of June 22, 2009, this Court ordered, upon motion by the State, the former Shellye Stark defense
5 counsel, Russell Bradshaw, and his investigator, Ted Pulver, to provide to the Court "any written or
6 electronic media-recorded materials contained therein regarding interviews between Ted Pulver and Brian
7 Moore". See Court File. The Court intends to conduct the exact review approved by *Yates* to address the
8 same concerns raised in Defense Brief here. After such review, the Court will provide to the State all
9 materials that are, in the Court's opinion, properly discoverable. See Court's Order in Court File. This is,
10 in fact, the procedure contemplated in *Yates*. The State believes this Court has ruled correctly and in
11 accordance with current law. The parties should proceed as they have been directed by this Court.

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13 IV. CONCLUSION

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15 In their brief, defense counsel asks the Court to either quash the subpoena DT, set a hearing at which
16 counsel can appear and, if the Court still concludes the requested materials are discoverable, grant a stay so
17 that defense can seek appellate review of the discovery order. Defense Brief at 1-2. The State respectfully
18 asks this Court to find the Discovery Order is in accordance with current law and to order enforcement of the
19 order. A stay for appellate review, under these facts, is simply not necessary.

20 DATED this 20th day of July, 2009.

21 Respectfully submitted,
22 Steven J. Tucker
23 Prosecuting Attorney

24 
25 LAWRENCE HASKELL
Deputy Prosecuting Attorney
WSBA #27826