

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT  
FOR SUFFOLK COUNTY  
SJ-2018-162

Taunton District Court  
No. 1731CR002866

COMMONWEALTH

v.

KEVIN DAVIS

MEMORANDUM OF DECISION & JUDGMENT

Background. The petitioner, Sandra Ferreira, was the attorney for the defendant, Kevin Davis, on May 11, 2017, when she appeared in Attleboro District Court in a case where the defendant was charged with breaking and entering. As alleged by the Commonwealth, the defendant's wife appeared in the courtroom that day and handed an eyeglass case to Court Officer Castro, asking him to deliver it to the defendant. Court Officer Castro then handed the eyeglass case to attorney Ferreira, who went to the lockup and asked Court Officer Dacey to give the eyeglass case to the defendant. A search of that eyeglass case revealed numerous Suboxone film strips located in between the linings of the case.

The Commonwealth wishes to call attorney Ferreira as a witness in a trial alleging that the defendant conspired to violate the drug laws. Under Mass. Rule of Prof. Con. 3.8 (e), a prosecutor in a criminal case shall not subpoena a lawyer in a criminal proceeding to present evidence about a past or present client unless: "(1) the prosecutor reasonably believes: (i) the information sought is not protected from disclosure by any applicable privilege; (ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and (iii) there is no other feasible alternative to obtain the information, and (2) the prosecutor obtains prior judicial approval after an opportunity for an adversarial proceeding." The prosecutor obtained such approval, and now seeks to call attorney Ferreira to testify regarding her transfer of the eyeglass case. The Commonwealth does not contend that Ferreira knew of the presence of Suboxone in the eyeglass case. Ferreira informed the judge that she intends to exercise her right against self-incrimination under the Fifth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights. The judge denied her right to do so, without prejudice, stating that she had no such privilege.


Discussion. The petitioner appeals from the judge's allowance of the motion approving the issuance of a subpoena to her, contending that the judge erred in doing so where the prosecutor has failed to meet her burden of demonstrating either that the evidence sought is essential to the successful completion of the prosecution, or that there is no other feasible alternative to obtain the information. I agree that the judge erred in concluding that the prosecutor had satisfied this burden. If all that the Commonwealth seeks to show from her testimony is the chain of custody, it can demonstrate it through the testimony of Court Officer Castro that he handed the eyeglass case to Ferreira and the testimony of Court Officer Dacey that Ferreira handed the case to her. Attorney Ferreira's testimony is not essential to prove that chain of custody.

Ferreira's testimony would be essential only if the defendant intended to argue that attorney Ferreira placed the Suboxone in the eyeglass case between the time she received it from Court Officer Castro and the time that she handed it to Court Officer Dacey, in which case the prosecutor would be entitled to offer her testimony to rebut that claim. The judge before jury selection can explore with defense counsel whether he intends to make such an argument and, if defense counsel fails to provide the judge with assurance that no such argument

is intended, I shall revisit this decision upon the request of the Commonwealth.

The subpoena of an attorney to testify regarding a client is narrowly limited by the terms of Mass. R. Prof. Con. 3.8 (e). The circumstances of this case do not appear to satisfy those terms and therefore do not warrant such a subpoena. Where I vacate the order issuing a subpoena to attorney Ferreira, I do not address her claim that she is entitled to exercise her right of self-incrimination where the Commonwealth claims that she acted entirely innocently in transferring the eyeglass case. Nor do I consider whether Ferreira has standing to present such a claim to this court. See Pixley v. Commonwealth, 453 Mass. 827, 833 (2009).

For the reasons stated above, it is ORDERED that Ferreira's G. L. c. 211, § 3 petition seeking to vacate the order approving the issuance of a subpoena to her be, and hereby is, ALLOWED.

  
Ralph D. Gants  
Chief Justice

Entered: April 11, 2018