

[Commonwealth v. Rose](#)

Supreme Judicial Court of Massachusetts

October 31, 2024, Decided

No. SJ-2024-0336

Reporter

2024 Mass. LEXIS 473 *

COMMONWEALTH V. DAVID ROSE

Prior History: [*1] Hampshire Superior Court. No. 2380CR00036.

Core Terms

complaining witness, supplemental, records, judge's order, prior statement, defense motion, record holder, third-party, clarify, stay of proceedings, trial advantage, text message, court order, clarification, evidentiary, limitations, oppositions, complaints, inspection, summonsed, terms

Case Summary

Overview

HOLDINGS: [1]-The motion judge's order simply allowed the request in paragraph one of defendant's motion, which stated only: "All prior statements in the possession of any of the complaining witnesses." This may have included further limitations of time or scope, but such limitations were not clear from either the motion or the judge's order. Because the motion judge's order, as issued, did not impose necessary time or scope limitations on the statements to be produced, the court remanded this matter and ordered the motion judge to clarify his order in this regard.

Outcome

The petition for extraordinary relief was allowed in part.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Witnesses > Subpoenas > Discovery

Evidence > Burdens of Proof > Allocation

[HN1](#)[\[↓\]](#) Subpoenas, Discovery

Pursuant to Lampron, a defendant seeking an order under [Mass.R.Crim.P. 17](#): must establish good cause, satisfied by a showing (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. [Rule 17](#) is reserved for evidentiary materials that are likely to be admissible at hearing or at trial. The requesting party must satisfy the standard before the court orders production from the third-party record holder.

Criminal Law & Procedure > ... > Witnesses > Subpoenas > Scope

[HN2](#)[\[↓\]](#) Witnesses, Subpoenas

A court's order pursuant to [Mass.R.Crim.P. 17](#) should also state precisely what the third-party record holder must produce. In any criminal case, the keeper of records summonsed has an obligation to produce only the records specifically summonsed by court order. A complainant or witness should be forced neither to retain counsel nor to appear before a court in order to challenge potentially impermissible examination of her personal effects and the records of her personal interactions.

Judges: Scott L. Kafker, Associate Justice.

Opinion by: Scott L. Kafker

Opinion

MEMORANDUM OF DECISION AND JUDGMENT

This matter is before the Court, Kafker, J., on a petition pursuant to [G. L. c. 211, § 3](#), seeking partial relief from an order of the Hampshire Superior Court, issued on

July 16, 2024, allowing in part the defendant David Rose's motion for records pursuant to [Mass. R. Crim. P. 17 \(a\) \(2\)](#), 378 Mass. 885 (1979) ([Rule 17](#)).¹ I conclude that the order lacked sufficient clarity. Therefore, I allow the petition in part to the extent it seeks clarification of the July 16, 2024, order, and I remand this matter to the Superior Court and order the motion judge to clarify that order in accordance with the terms of this decision.

Background. The petitioners, E.W., K.M., and K.B., are complaining witnesses in the case of *Commonwealth v. David Rose*, No. 2380CR00036 (Hampshire Sup. Ct.), wherein the defendant is charged with one count of rape in violation of [G. L. c. 265, § 22 \(b\)](#), and eight counts of indecent assault and battery on a person fourteen years of age or older in violation of [G. L. c. 265, § 13H](#). The Commonwealth alleges that the defendant committed these offenses against the complaining witnesses while he worked as a massage therapist during the course of [*2] an athletic camp that they attended.

The defendant's motion, filed on October 30, 2023, asserted that: "A complaining witness informed that the complaining witnesses were working to accurately record everything that occurred prior to lodging any complaints with [the organization running the camp] and prior to complaining to law enforcement." On this basis, the defense argued that "[t]he defendant is entitled to all of these prior statements," and in relevant part, he "request[ed] the court to order" production of: "1. All prior statements in the possession of any of the complaining witnesses[.]"

On December 11, 2023, counsel from the Victim Rights Law Center entered an appearance on behalf of the petitioners and filed an opposition to the defendant's motion. The Commonwealth filed its opposition on December 12, 2023. That same day, the defendant filed a supplemental affidavit and exhibits to respond to the arguments in the oppositions. The motion and oppositions were argued at a [Lampron](#) hearing on January 18, 2024. See [Commonwealth v. Lampron, 441 Mass. 265, 269-272, 806 N.E.2d 72 \(2004\)](#). The petitioners supplemented their opposition on the day of the hearing. After the hearing, the defendant supplemented his motion twice more, and the petitioners filed corresponding [*3] supplements to their opposition.

On July 16, 2024, the motion judge issued his ruling, which stated in relevant part as follows:

¹ As a threshold matter, I conclude that it was appropriate for the petitioners to seek relief through [G. L. c. 211, § 3](#), because they have no other avenue to obtain appellate review and because they raise a substantial claim that their substantive rights were violated by the ruling at issue. See [Ardaneh v. Commonwealth, 492 Mass. 1019, 1020, 213 N.E.3d 601 \(2023\)](#); [Commonwealth v. Fontanez, 482 Mass. 22, 25, 28, 120 N.E.3d 707 \(2019\)](#). Cf. [Commonwealth v. Lam, 444 Mass. 224, 229, 827 N.E.2d 209 \(2005\)](#). Accordingly, I exercise my discretion to review the merits of the petition.

“ALLOWED in part after hearing. Relevance is established under [Rule 17](#), as to para[graph] 1, statements of complaining witnesses, in any written form including but not limited to handwritten, typed, text, emails, social media or other recording.”

On August 30, the petitioners filed with the Superior Court a motion to stay the order.

The petition before this court was filed on September 16, 2024. Through it, the petitioners ask this court to limit the ordered production to “text messages sent between and among” the complaining witnesses “between January 8, 2023[,] and January 13, 2023,” and only insofar as those text messages “regard[ed] drafting their individual complaints to” a certain organization that takes reports of alleged abuse.

On October 4, I ordered a stay of proceedings in the Superior Court.

HN1^[↑] *Discussion.* Pursuant to [Lampron, 441 Mass. at 269](#), a defendant seeking an order under [Rule 17](#):

“must establish good cause, satisfied by a showing (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; [***4**] (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’” (quotation omitted).

See *id.* (“[\[R\]ule 17](#) is reserved for evidentiary materials that are likely to be admissible at hearing or at trial”). The requesting party must satisfy the [Lampron](#) standard before the court orders production from the third-party record holder. See [Matter of a Motion to Compel, 492 Mass. 811, 818, 216 N.E.3d 1206 \(2023\)](#); [Commonwealth v. Mitchell, 444 Mass. 786, 791 n.12, 831 N.E.2d 890 \(2005\)](#).

HN2^[↑] A court's order pursuant to [Rule 17](#) should also state precisely what the third-party record holder must produce. See [Martin v. Commonwealth, 451 Mass. 113, 123 n.18, 884 N.E.2d 442 \(2008\)](#) (“In any criminal case, the keeper of records summonsed has an obligation to produce only the records specifically summonsed by court order”). Cf. [Matter of a Motion to Compel, 492 Mass. at 818](#) (emphasizing importance of notice to third-party record holders); [Commonwealth v. Lam, 444 Mass. 224, 229, 827 N.E.2d 209 \(2005\)](#) (“A complainant or witness should be forced neither to retain counsel nor to appear before a court in order to

challenge . . . potentially impermissible examination of her personal effects and the records of her personal interactions”).

Here, the motion judge's order simply allows the request in paragraph one of [*5] the defendant's motion, which states only: “All prior statements in the possession of any of the complaining witnesses.” This may include further limitations of time or scope, but such limitations are not clear from either the motion or the judge's order. Because the motion judge's order, as issued, does not impose necessary time or scope limitations on the statements to be produced, I remand this matter and order the motion judge to clarify his order in this regard.

Conclusion. Upon consideration, it is **ORDERED** that the petition for extraordinary relief under [G. L. c. 211, § 3](#), shall be, and hereby is, **ALLOWED IN PART** to the extent it seeks clarification of the motion judge's order of July 16, 2024. I hereby order the motion judge to clarify his order of July 16, 2024, consistent with the terms of this decision, and I hereby lift the stay of proceedings in the Superior Court imposed by my order of October 4, 2024. It is **FURTHER ORDERED** that the Commonwealth's supplemental filing in Support of the petition and the opposition of the defendant are impounded.

By the Court,

/s/ Scott L. Kafker

Scott L. Kafker

Associate Justice

Dated: October 31, 2024

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