

UNPUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

UNITED STATES OF AMERICA

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Case No. 1:00CR00094

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v.

)

OPINION AND ORDER

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FREEMAN LOWELL CLARK,

)

By: James P. Jones

)

United States District Judge

Defendant.

)

S. Randall Ramseyer, Assistant United States Attorney, Abingdon, Virginia, for United States; Robert Austin Vinyard, Abingdon, Virginia, and Robert F. Rider, Rider, Thomas, Cleaveland, Ferris, & Eakin, P.C., Roanoke, Virginia, for Defendant.

In this criminal case, I deny the defendant's Motion for Issuance of Subpoena Duces Tecum, finding that defendant has not properly justified his need for obtaining the documents.

I

This case, involving the prosecution of a physician for the alleged unlawful distribution of controlled substances, is set for trial to begin on July 2, 2001. On June 22, 2001, the defendant filed a Motion for Issuance of Subpoena Duces Tecum, seeking records from several local pharmacies relating to all prescriptions written by Dr. Adam

Steinberg, the government's expert witness in the case. The motion was argued at a hearing held on June 25, 2001. For reasons stated herein, I will deny the defendant's motion.

II

The defendant's motion is apparently based on Federal Rule of Criminal Procedure 17, which provides for the issuance of subpoenas for attendance of witnesses and also for production of documentary evidence and objects. A "subpoena duces tecum" is a subpoena for a witness to appear at a trial or other hearing with certain named documents or records. *See* Fed. R. Crim. P. 17(c); *see also United States v. Beckford*, 964 F. Supp. 1010, 1016 (E.D. Va. 1997). No leave of court is required for the issuance of a subpoena duces tecum where the witness is subpoenaed to attend trial and give testimony, and is simply directed to bring certain documentary evidence to trial along with him or her. However, where the production of documentary evidence is requested to be made prior to trial, a party must obtain leave of court before the subpoena duces tecum will issue. *See Beckford*, 964 F.Supp at 1016. The court has discretionary power to allow, deny, or modify the party's request for such a subpoena. *See id.*

In his motion, the defendant has not identified a date or time when he desires to receive the requested pharmacy records. In written and oral argument, however, the defendant indicated that he wished to use the documents in connection with cross-examination of Dr. Steinberg, so it is presumed that the defendant desires to receive the records in advance of Dr. Steinberg taking the stand.¹ Therefore, the request should be judged under the principles for issuance of a pretrial subpoena duces tecum under Rule 17(c), since it is apparent that for his stated purposes, counsel would need to receive and review the records before he could determine whether to seek to admit them into evidence for the defense.

At oral argument, the defendant contended that the government had no standing to object to the request for subpoenas because the government is not the holder of the records sought to be obtained. I disagree. Neither the rule nor cases addressing the rule support such a proposition. On the contrary, courts have routinely granted the government's motion to quash a subpoena duces tecum where a defendant requests records from a third party. *See, e.g., United States v. Hardy*, 224 F.3d 752, 755-56 (8th Cir. 2000); *United States v. Hughes*, 895 F.2d 1135, 1145 (6th Cir. 1990); *see also* 5 Wayne R. LaFare, et al., *Criminal Procedure* § 24.3(f) (2d ed. 1999) (noting that

¹ The defendant does not identify particular persons as the recipients of the subpoenas. The motion simply lists the names and addresses of five local pharmacies. Perhaps it is implicit that a subpoena would be directed to the custodian of records for each pharmacy.

“[t]he prosecutor or recipient of the subpoena” may challenge a request for a subpoena duces tecum). Therefore, I find that the government does have standing to object to the defendant’s motion in this case.

The issuance of a pretrial subpoena duces tecum under Rule 17(c) is proper only where the moving party can show the following:

(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 trial; and (4) that the application is made in good faith and is not intended as a general “fishing expedition.”

United States v. Nixon, 418 U.S. 683, 699 (1974). The defendant here fails this test.

At oral argument, Clark’s counsel admitted that he does not know what the pharmacy records will reveal, but expressed hope that they will be helpful in impeaching the credibility of Dr. Steinberg or will be otherwise helpful to the defense. The Supreme Court has noted, however, that “the need for evidence to impeach witnesses is insufficient to require its production in advance of trial.” *Id.* at 701. Additionally, the “mere hope” of discovering favorable evidence is insufficient to support issuance of a subpoena duces tecum. *United States v. Hang*, 75 F.3d 1275, 1283 (8th Cir. 1996). Because the defendant cannot justify his request with any specificity as to the contents

and purposes of the records sought, I find that the defendant is engaging in a “fishing expedition,” which cannot support the issuance of a Rule 17(c) subpoena duces tecum.

Moreover, even if the documents did reveal that Dr. Steinberg prescribed medicines similar to that prescribed by the defendant, the particular records requested would not likely show the medical grounds or circumstances under which the medicines were prescribed, and thus would not necessarily be relevant.

In a case factually similar to the present case, the Sixth Circuit affirmed a district court’s quashing of the defendant’s subpoena for pharmacy records pertaining to prescriptions written by a government witness. *See United States v. Hughes*, 895 F.2d 1135, 1145-46 (6th Cir. 1990). Though the defendant contended that the records may show that the government witness engaged in activities similar to those charged to the defendant, the court found that the information requested amounted to a fishing expedition and was not relevant to the case. *See id.* I find *Hughes* to be persuasive authority for the present case. I therefore will deny the defendant’s motion.

III

For the foregoing reasons, it is **ORDERED** that the defendant’s Motion for Issuance of Subpoena Duces Tecum (Doc. No. 32) is denied.

ENTER: June 27, 2001

United States District Judge