IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	
	)	
	)	
v.	)	**Case No.:1009015961**
	)	
GIOVANNI FERRANTE,	)	
	)	
Defendant.	)	

Submitted: October 18, 2012
Decided: November 1, 2012

On Defendant's Motion for Reargument
DENIED

ORDER

Danielle J. Brennan, Esquire, Deputy Attorney General, Department of Justice, 820 N. French Street, 7th Floor, Wilmington, Delaware 19801. Attorney for the State of Delaware.

Edmund Daniel Lyons, Esquire, The Lyons Law Firm. 1526 Gilpin Avenue, P.O. Box 579, Wilmington, Delaware, 19899. Attorney for Defendant.

ROCANELLI, J.

On September 17, 2010, Giovanni Ferrante ("Defendant") was arrested by Delaware State Police for Driving Under the Influence of Alcohol ("DUI") in violation of 21 Del. C. § 4177 and Driving over the Median in violation of 21 Del. C. § 4126.

On December 25, 2010, the parties appeared for a DUI case review. The parties presented a Scheduling Order to the Court. Neither party requested the presence of the State Chemist as a witness at trial. Neither party moved to amend or supplement the Scheduling Order.

On July 25, 2011, Defendant sent a Subpoena *Duces Tecum* ("Subpoena") addressed to the "State Chemist who calibrated Intoxilyzer machine with serial number 68-013516," ordering the witness to appear in Court on October 19, 2011 for trial. Defendant did not send a copy of the Subpoena to the State or notify the State that the witness had been summoned. The Subpoena also commanded several documents:

(1) Calibration, maintenance and 'out of service' records of the Intoxilyzer machine used in this case.

(2) Any records reflecting the date that the Intoxilyzer was put into service originally by the State, and the nature and extent of any modifications to the Intoxilyzer since it was put into service.

(3) Any records reflecting whether the Intoxilyzer has had an RFI detector installed on it, records reflecting whether such detector has been adjusted from its factory settings and records reflecting the last date the RFI detector was last checked for proper operation.

(4) Any records reflecting whether the Intoxilyzer has had an 'Ambient Air' module installed on it, records reflecting whether such module has been adjusted from its factory settings, and records reflecting the last date the module was checked for proper operation or calibrated.

(5) Dates of service and modifications to the Intoxilyzer.

On October 19, 2011, the Court continued the case. Trial was rescheduled for April 9, 2012. On March 13, 2012, Defendant sent a letter to State Chemist Julie Willey. Defendant did not send a copy of this letter to the State. The letter requested Ms. Willey's appearance on the new trial date. In fact, State Chemist Cynthia McCarthy, not Ms. Willey, performed the tests on the relevant Intoxilyzer machine.

On April 9, 2012, the parties appeared for trial. Neither Ms. Willey nor Ms. McCarthy appeared. The State moved to quash Defendant's Subpoena for the appearance at trial of the State Chemist. After oral argument, the parties submitted legal memoranda to the Court.

On July 10, 2012, the Court granted the State's Motion to Quash Defendant's Subpoena on the following grounds: (1) the Subpoena was procedurally defective; (2) compliance with the Subpoena would be oppressive because the State Chemist was not a necessary witness; (3) Defendant's inability to cross-examine the State Chemist did not violate the Confrontation Clause; and (4) it would not be proper to sanction the State for failing to produce Ms. McCarthy at trial because Defendant never served a copy of the Subpoena or the March 13, 2012 letter on the State.

On July 16, 2012, Defendant filed a Motion for Reargument. The State objected to reargument. By Order dated August 20, 2012, the Court ordered legal arguments to be submitted. Defendant and the State have now been given the opportunity to fully brief the Motion for Reargument.

ANALYSIS

A motion for reargument is limited to "reconsideration by the Trial Court of its findings of fact, conclusions of law, or judgment . . . ."[1] "A motion for reargument is granted only if 'the Court has overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome

[1] *Hessler, Inc. v. Farrell*, 260 A.2d 701, 702 (Del. 1969).

of the underlying decision.'"[2] "A party seeking to have the trial court reconsider [an] earlier ruling must demonstrate newly discovered evidence, a change in the law or manifest injustice."[3] A motion for reargument will generally be denied absent abuse of discretion by the trial court.[4]

First, the Court finds that the procedural propriety of the Subpoena issued by Defendant is properly before the Court. In its Order grating the State's Motion to Quash, the Court recognized and took into consideration the overall effectiveness of the Subpoena and subsequent letter sent to Ms. Willey by Defendant. The Court concluded that the Subpoena was procedurally defective because it did not state with specificity the individual required to appear; it was not reissued and served upon continuance of the trial date; and Defendant's March 13, 2012 letter was not sufficient to cure these defects. Defendant sets forth several arguments that the Subpoena was procedurally proper. However, Defendant fails to point to controlling precedent or legal principles that would suggest to the Court that it misapplied the law.

Moreover, Defendant argues that the Court erred when it supported its decision to grant the State's Motion to Quash by relying on Defendant's failure to serve notice of the Subpoena on the State and Defendant's failure to modify the Case Scheduling Order to

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[2] *State Farm Fire & Cas. Co. v. Middleby Corp.*, C.A. No. 09C–08–216, 2011 WL 2462661, at *2 (Del. Super. June 15, 2011) (quoting *Kennedy v. Invacare Corp.*, C.A. No. 04C-06-028, 2006 WL 488590, at *1 (Del. Super. Jan. 31, 2006)).

[3] *Parisan v. Cohan*, No. CPU4-11-004298, 2012 WL 1066506, at *1 (Del. Com. Pl. Mar. 29, 2012).

[4] *Id.*

request the presence of the State Chemist at trial. The Court finds Defendant's arguments unfounded. The Court articulated in the Order that it was improper to sanction the State for failing to produce Ms. McCarthy at trial because Defendant contributed to Ms. McCarthy's absence by not notifying the State through either serving a copy of the Subpoena on the Delaware Department of Justice or through modification of the Case Scheduling Order.

Second, the Court properly found that compliance with the Subpoena would be oppressive to the State. Court of Common Pleas Rule 17(c) states that "[t]he Court on motion promptly made may quash or modify [a] subpoena [*duces tecum*] if compliance would be unreasonable or oppressive."[5] Defendant argues that the Court's reliance on *State v. McCurdy*[6] is erroneous because it involved a discovery request pursuant to Court of Common Pleas Criminal Rule 16, not a Subpoena under Rule 17. The Court does not agree.

It is not dispositive that *McCurdy* dealt with Rule 16 and not Rule 17. A discovery request made under Rule 16 is broader than a subpoena issued under Rule 17.[7] The law is clear that "the subpoena power conferred by Rule 17 is not intended to be used

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[5] Ct. Com. Pl. Crim. R. 17(c).

[6] *State v. McCurdy*, Cr.A. No. K09-10-0537, 2010 WL 546499 (Del. Com. Pl. Feb. 3, 2010).

[7] *State v. Hutchins*, 138 A.2d 342, 345-46 (Del. Super. 1957) (stating "[i]t is clear from the foregoing that Rule 17(c) is not a pre-trial discovery Rule and that we must guard against its being used as such, thus rendering Rule 16 meaningless.").

as a discovery device."[8] "Rule 17(c) is applicable only to such documents or objects as would be admissible in evidence at the trial, or which may be used for impeachment purposes."[9] The Delaware Supreme Court has held:

> As to the request to examine the documents for the purpose of preparation in advance for impeachment, it is now settled in this jurisdiction that the State may be required to produce at the trial a prior written statement of a witness after he has been called to the stand by the State and his credibility has been put in issue. It is clear, however that this right does not arise until the time of trial and that pre-trial disclosure for impeachment purposes should not be directed.[10]

Thus Rule 16 allows for a wider collection of documentation then permitted under Rule 17.

Third, the Court did not err when it held that the State Chemist is not a necessary witness for the State to establish the proper foundation for admission of the Intoxilyzer calibration certification sheets.[11] Defendant does not present any contrary case law to counter the precedent relied upon by the Court to conclude that a police officer may be a qualified witness to admit the Intoxilyzer calibration certification sheets under the business records exception.

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[8] *McBride v. State*, 477 A.2d 174, 181 (Del. 1984).

[9] *Id.* (citation omitted).

[10] *Hutchins*, 138 A.2d at 346. *See also McBride*, 477 A.2d at 181.

[11] D.R.E. 803(6); *Palomino v. State*, ID # 0807040189, 2011 WL 2552603, at *3(Del. Super. April 4, 2011). *See also Talley v. State*, 841 A.2d 308, 308 (Del. 2003) (holding that the State could introduce evidence of the accuracy of the Intoxilyzer calibration through a qualified witness.).

Fourth, the Court finds that it properly concluded that Defendant's rights under the Confrontation Clause of both the United States and Delaware Constitutions were not violated by granting the State's Motion to Quash. Defendant's word-for-word recitation of his argument presented previously in response to the State's Motion to Quash failed to persuade the Court that its decision was erroneous. "A motion for reargument should not be used merely to rehash the arguments already decided by the court."[12]

Finally, Defendant argues that his rights under the Compulsory Process Clause have been violated as a result of the Court's decision to grant the State's Motion to Quash Defendant's Subpoena. The Court declines to consider this argument as it was raised by Defendant for the first time in the Motion for Reargument. It is not therefore properly raised. "[T]he Court will not entertain new arguments by the parties raised for the first time in a motion for reargument."[13]

CONCLUSION

The Court finds that it has not overlooked controlling precedent or legal principles. The Court has not misapprehended the law or facts such that the outcome of its decision to quash the Subpoena would have been different. Defendant has not presented newly discovered evidence or a change in the law. There was no abuse of discretion. Additionally, the Court's decision to quash the Subpoena will not result in manifest injustice.

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[12] *Wilmington Trust Co. v. Nix*, No. C.A. No. 00L-10-077, 2002 WL 356371, at *1 (Del. Super. Feb. 21, 2002).

[13] *Id.*

NOW, THEREFORE, DEFENDANT'S MOTION FOR REARGUMENT IS DENIED. This matter shall be scheduled for trial before this judicial officer to conclude these proceedings.

IT IS SO ORDERED this 1st day of November, 2012.

Andrea L. Rocanelli

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The Honorable Andrea L. Rocanelli