

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

PEOPLE OF THE VIRGIN ISLANDS,	)	
	)	CRIMINAL NO. ST-11-CR-631
Plaintiff,	)	
	)	14 V.I.C. § 299(2)
vs.	)	16 V.I.C. § 91(b)(1)(2)
	)	
MATTHEW D. WILLEY	)	
(D.O.B.: 04-20-77),	)	
	)	
Defendant.	)	
	)	

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Department of Justice
St. Thomas, Virgin Islands
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St. Thomas, Virgin Islands
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SMITH, ALAN D., Magistrate

MEMORANDUM OPINION
(Filed: March 27, 2012)

Summary

The assistant attorney general prosecuting this matter has subpoenaed, pursuant to 4 V.I.C. § 601 *et seq.*, a witness for questioning as part of the People's investigation. The Defendant, Matthew D. Willey, challenges the issuance of this subpoena and argues that once criminal charges have been filed, the Attorney General no longer has the power to issue Section 601 subpoenas but may only act in accordance with court rules. The Court disagrees and holds that Section 601 is drafted broadly enough to allow for the issuance of attorney general's subpoenas subsequent to the filing of formal charges. Furthermore, the Court holds that Section 601 will control in the event there is any conflict with court rules governing discovery or subpoena power.

Facts

Willey was arrested on November 1, 2011. Thereafter, on November 10, 2011, the People filed a complaint charging Willey with two counts of simple assault and battery – domestic violence. On or about February 21, 2012, the Defense filed a witness list with the Court and served a copy on the People.¹ Sometime in early March 2012, the assistant attorney general prosecuting this matter subpoenaed, pursuant to Section 601, a defense witness to appear at the Department of

¹ Witness lists are not discoverable and do not need to be furnished to the Court or opposing party. *See* FED. R. CRIM. P. 16 advisory committee's note. Furthermore, the Court never ordered the disclosure of a list of defense witnesses.

Justice for questioning. On March 13, 2012, Willey filed an Emergency Motion for Hearing to Quash Subpoena, arguing that issuance of the subpoena was improper. On March 14, 2012, the People filed an Opposition to Willey's Emergency Motion. Later on March 14, 2012, the Court temporarily stayed the subpoena to give it time to fully address the issue at hand.

Issue

Section 601 reads as follows: "The Attorney General or an Assistant Attorney General . . . shall have the authority to issue subpoenas, subscribed by them for witnesses, and/or for chattels, books, papers or documents, within the Virgin Islands in the conduct of the investigation of any crime . . . within [his] . . . jurisdiction[]." ² Willey argues that an attorney general's subpoena may only be issued prior to a defendant being charged with a crime. The attorney general's subpoena at hand issued subsequent to the filing of the complaint against Willey. He, therefore, contends that the People must use mechanisms found in the court rules, rather than this statutory scheme, to interview the witness.

Willey relies solely on the District Court of the Virgin Islands Appellate Division case, *Fonseca v. Government*.³ In that matter, one of the defendants challenged a Section 601 attorney general's subpoena issued to the hospital in which she had been treated. In its discussion of the issue, the Appellate Division stated that while the term "investigation" found in Section 601 is not defined, such subpoenas have historically only been used for pre-charge investigations.⁴ The Appellate Division also compared Section 601 to Fed. R. Crim. P. 16 and 17 regarding discovery procedures and noted that, under those rules, opposing counsel needs to be notified and court approval may be required.⁵ Based on its analysis, the Appellate Division concluded that an attorney general's subpoena may only issue before the defendant is criminally charged, stating that "[a]fter charges are filed, the government must proceed through the channels and procedures outlined in the Federal Rules of Criminal Procedure if it desires to obtain what is more properly deemed discovery and not investigation."⁶

Fonseca, however, as the People correctly pointed out in its Opposition, was appealed to the United States Court of Appeals for the Third Circuit. In its opinion, the Third Circuit stated that while the Appellate Division drew conclusions regarding the issuance of the subpoena, it was not the basis on which it reversed the trial court.⁷ "The discussion of the Attorney General's subpoena is, therefore, *obiter dicta*. It is not part of the holding, and not precedential."⁸ Accordingly, Willey's challenge of this attorney general's subpoena presents a question that has remained unaddressed in Virgin Islands jurisprudence.

Discussion

Willey's entire argument is based on the dicta found in *Fonseca*. He has not provided any additional substantive argument to support his contention that an attorney general's subpoena

² VI CODE ANN. tit. 4, § 601 (1997 & 2010 Supp).

³ *Fonseca v. Government*, 119 F. Supp. 2d. 531 (D.V.I. App. Div. 2000).

⁴ *Id.* at 533.

⁵ *Id.* at 533-34.

⁶ *Id.* at 534.

⁷ *Government v. Fonseca*, 274 F.3d 760, 764 (3rd Cir. 2001).

⁸ *Id.*

may not issue after formal criminal charges have been filed. The Appellate Division reached its conclusion primarily by strictly distinguishing both the meaning of terms “discovery” and “investigation” as well as the procedures and policies for each. The Court will address these points.

Although recognizing that the term “investigation” is not defined in the Code, the Appellate Division limited its definition to include only pretrial inquiries.⁹ This Court does not find that reasoning persuasive. Black’s Law Dictionary defines “investigate” as follows: “[t]o inquire into (a matter) systematically; to make (a suspect) the subject of a criminal inquiry”.¹⁰ This is a broad definition, and it would be difficult for the Court to conclude that inquiry and “investigation”, as used in Section 601, must cease after the People file criminal charges. Furthermore, in Kansas, which has a statute comparable to Section 601, granting subpoena powers to prosecution officials,¹¹ courts have allowed subpoenas to issue after the filing of formal charges. The Kansas Supreme Court, while recognizing that the statutory procedure is “most often used to determine whether probable cause exists to support a criminal prosecution, [concluded that] an inquisition may also be conducted to obtain additional evidence from the same or other witnesses after a suspect has been bound over for trial.”¹² In reaching this conclusion, Kansas courts have interpreted the phrase “matters under investigation”¹³ broadly, stating that “[t]he investigatory powers of the state do not end with the conclusion of a preliminary examination, and the state has the right and duty at any stage of the proceeding to ascertain what a witness may testify to at trial.”¹⁴ These courts also note that the language of the statute itself is not limiting as to when the procedure can be used.¹⁵ Consistent with this interpretation, Kansas courts have allowed prosecutors to subpoena and question witnesses after prosecution has commenced¹⁶ and even during an evening recess of trial.¹⁷ Similarly, this Court concludes that the term “investigation”, as used in Section 601, should be read just as broadly and agrees that the Attorney General and his assistant attorneys general have the duty to continue the investigation of violations of Virgin Islands law even after formal charges have been filed.

In *Fonseca*, the Appellate Division determined that once criminal charges are filed, the discovery rules govern; it also noted significant differences between the procedures in Section 601 and the court rules.¹⁸ This Court, however, must recognize that Section 601 is a statute whereas discovery is governed merely by rules of the Superior Court. The Superior Court’s rule-making authority derives from the Revised Organic Act: “[t]he rules governing the practice and procedure of the courts established by local law . . . shall be governed by local law or the rules promulgated by those courts.”¹⁹ The Third Circuit has stated that “[i]t is clear from this provision that the rules promulgated by the [Superior] Court must be respectful of the legislature’s power to enact substantive law.”²⁰ Therefore, if the discovery provisions in the

⁹ *Fonseca*, 119 F. Supp. 2d at 533-34.

¹⁰ BLACK’S LAW DICTIONARY 902 (9th ed. 2009).

¹¹ See KAN. STAT. ANN. § 22-3101.

¹² *State v. Cathey*, 741 P.2d 738, 742 (Kan. 1987) (citing *Hobson*, 671 P.2d 1365 (Kan. 1983)).

¹³ KAN. STAT. ANN. § 22-3101(a).

¹⁴ *Hobson*, 671 P.2d at 1375 (quoting *State v. Jones*, 446 P.2d 851 (Kan. 1968)).

¹⁵ *Hobson*, 671 P.2d at 1376.

¹⁶ *Id.* at 1376 (citing *State v. Brescheisen*, 232 P. 244 (Kan. 1925)).

¹⁷ *Hobson*, 671 P.2d at 1376 (citing *State v. McQueen & Hardyway*, 582 P.2d 251 (Kan. 1978)).

¹⁸ *Fonseca*, 119 F. Supp. 2d at 533-34.

¹⁹ 48 U.S.C. § 1611(c) (2006). See also *Government v. Durant*, 49 V.I. 366, 373 (Sup. Ct. 2008).

²⁰ *In re: Richards*, 42 V.I. 469, 483 (3rd Cir. 2000).

Federal Rules of Criminal Procedure, which are applicable to the Superior Court through court rule,²¹ conflict with Section 601, the Court must adhere to the statute.

The Appellate Division specifically stated that Fed. R. Crim. P. 16 and 17, not Section 601, are controlling. The Court does not see an immediate conflict here with R. 16 regarding discovery. For example, while a statement of a prospective witness made to a defendant or his attorney is not discoverable,²² this is different than the People subpoenaing the witness to make new statements. Specifically, neither Willey nor his attorney will be under any obligation to disclose an earlier statement made by the subpoenaed witness to either of them. Furthermore, the People should remain aware that certain information obtained through an attorney general's subpoena may be discoverable²³ or be considered *Brady* material²⁴ that must be subsequently supplied to Willey. Likewise, Willey should remember that statements a witness makes pursuant to an attorney general's subpoena are not necessarily admissible as evidence at trial. On the other hand, R. 17 regarding subpoenas may conflict with Section 601. As the Appellate Division pointed out, R. 17 places more power and control with the court. Nevertheless, this Court will not read Section 601 narrowly merely because of the existence of potentially conflicting court-made rule.

Conclusion

An attorney general's subpoena of a witness, pursuant to Section 601, is valid whether or not it is issued prior to or subsequent to the formal charging of a crime. The statute is written broadly so as to allow the prosecution to continue a meaningful investigation even after charges are filed. "There can be no doubt that the [Attorney General of this Territory] . . . has a duty to investigate all criminal activity which comes to [his] attention, and that [Section 601] is a primary tool entrusted to [him] by the legislature to assist in that function."²⁵ Furthermore, the Court finds that Section 601 controls in the event of any inconsistencies with the court rules. Otherwise, the court rules still remain in effect and complement Section 601 and any other laws the Legislature has enacted.

DATED: March 21, 2012



ALAN D. SMITH

Magistrate of the Superior Court
of the Virgin Islands

ATTEST:

VENETIA H. VELAZQUEZ, ESQ.

Clerk of the Court

BY:



COLLEEN SALEM

Court Clerk Supervisor 3/21/2012

²¹ See SUPER. CT. R. 7.

²² FED. R. CRIM. P. 16(b)(2)(B)(iii).

²³ See R. 16(a).

²⁴ See *Brady v. Maryland*, 373 U.S. 83 (1963).

²⁵ *Hobson*, 671 P.2d at 1375 (quoting *Southwestern Bell Tel. Co. v. Miller*, 583 P.2d 1042 (Kan. 1978)).