Police seize lawyer's client files and work product

By: Barbara L. Jones June 20, 2019 0

In February 2019 Burnsville police searched the law office of attorney K.M. in Woodbury, looking for information about her clients M.W. and J.S. But according to K.M., they seized electronic devices containing information about her entire law practice, including privileged client materials.

It presents a matter of first impression — "This Court has never decided the constitutional limits on a search and seizure of an attorney's files when the government accuses the attorney of criminality," asserted attorneys seeking Supreme Court review of the denial of a writ of prohibition.

After attorneys sought Supreme Court review, the state charged K.M. with one count of theft by swindle by taking money from a client by artifice or trick. Her first appearance is July 10.

The Supreme Court on June 18 granted review of the denial of the writ and granted the requests of several organizations to participate as amicus curiae. It previously also granted leave to four John Does to participate as intervenors. The intervenors are K.M.'s clients whose records were seized by the police.

"This is a frightening circumstance. I'm very grateful to the Supreme Court for taking this case, not just for my client but for all the clients and attorneys in the state of Minnesota," said Andrew Birrell, K.M.'s lawyer. "This may be the most important case the Supreme Court hears this year."

Ex parte hearing

In the search of K.M.'s office, which is in her home, police seized approximately 1,500 to 2,000 files of former and current clients, including active criminal cases. The seizure included paper files, notes on yellow pads, attorney work product and photographs. The police broke down the door and searched a filing cabinet and a safe in addition to the computers that were seized. This disarray made it impossible to tell what exactly they police examined, Birrell told the court.

At that time the search warrant application and affidavit had not been filed and she and her lawyer had not been allowed to read the affidavit. Birrell had not yet read the affidavit when Minnesota Lawyer went to press.

Birrell told the court, "Even the most particular warrant cannot adequately safeguard client confidentiality, the attorney/client privilege, the attorney's work product and the criminal Defendant's constitutional right to counsel of all the attorney's clients."

Petitioner moved for return of the property and other relief in a Dakota County court, asking the court to "stop the bleeding" but it was denied.

The state argued that it could not reveal information because it concerned an ongoing investigation. "[T]his is an end-around the statute in order to try to get information about that investigation and get evidence back that may be necessary to proceed in this investigation perhaps for criminal charges as well," said Henry Schaeffer, assistant Burnsville city attorney.

After an ex parte hearing with the prosecutor under Minn. Stat. 624.04,

The District Court denied relief stating that the city told the court that it was holding the files as potential evidence in an uncharged matter. In his March 11 order the court said it was convinced that the evidence was being held in good faith. The city provided exhibits to the court but the petitioner was not allowed to see them.

The petitioner filed a petition for a writ of prohibition on March 13, 2019 and told the court she could not challenge the allegations of wrongdoing because she had not been told what they are. The Court of Appeals denied the writ on March 26.

A petition for review of the Court of Appeals was filed at the Supreme Court on March 28. Also on March 28 John Does 1-4 moved to intervene. At that time, John Does 1 and 2 had not been charged with crimes, but John Does 3 and 4 had. Their motion was granted on April 15. All four clients filed affidavits with the court saying that they had confidential communications with K.M. and believed she had notes of the discussions.

On April 3 the police provided K.M. a hard drive with all duplicable files seized during the search.

On June 18, the Supreme Court granted review and granted leave to the National Association of Criminal Defense Lawyers, the Minnesota Association of Criminal Defense Lawyers, the Minnesota Board of Public Defense and the Minnesota State Bar Association to appear as amici curiae. It ordered that the Does should be treated as appellants and file briefs under the rules of civil appellate procedure.

Irreparable harm

"It is difficult to overstate the importance of the issues raised in the Petitions to the functioning of our judicial system," the petitioners argue.

Irreparable harm occurs when privileged materials are disclosed to the government, the petition continues. In contrast, the Court of Appeals held that K.M. had not established that time was of the essence and that an appeal would be inadequate. But the undisputed record shows that the police seized files pertaining to at least 25 active civil and criminal cases and the "danger to K.M.'s practice and clients is self-evident," the petition states. Furthermore, the government has "unfettered access to the petitioners' privileged communications," it notes

Attorney-client privilege

"The constitutional guarantees of due process, effective assistance of counsel, and freedom from unreasonable searches and seizures require the imposition of safeguards before, during, and after searches and seizures of attorney files," petitioners assert.

Petitioners note that the state suggests that judicial concern over governmental invasions of the attorney-client relationship evaporates once the attorney is accused of using the instrumentalities of the profession to commit crimes. But the opposite is true — judicial vigilance remains necessary until all privileged material has been returned, the petitioners argue.

Petitioners rely on O'Connor v Johnson, a 1979 Minnesota Supreme Court opinion which states that a warrant authorizing the search of an attorney's office is unreasonable and invalid when the attorney is not suspected of criminal wrongdoing and there is no threat the evidence will be destroyed. It held that the attorney-client relationship can only be ensured when the client is unafraid that the police will seize files. But the state proposes a new rule, the petitioners argue: *"Police may search attorneys' offices, so long as that is accompanied by ex parte, unchallengeable finger pointing at an attorney."* (Emphasis in original.) At the time the search warrant was executed, K.M. had not been charged with a crime, Birrell pointed out.

State response

Responding, the state argues that the petitioners did not provide a compelling reason to support their petition, emphasizing that O'Connor says that search warrants of attorney offices are unreasonable when the attorney is *not* suspected of a crime. K.M. is suspected of unspecified wrongdoing, the state argued.

Furthermore, the warrant describes the items to be seized with sufficient particularity, the state continues. The items are documents showing occupancy, digital pictures prior to and during the search, computers, electronic devices that could contain or access files, a mobile phone associated with a specific number, confidential informant form, any documents associated with representation of M.W. and J.S. and a retainer agreement for M.W.

Attorneys are not per se excluded from governmental searches, the state continues. "The attorney-client relationship cannot be used as a shield for the perpetration of a wrongful act," its response asserts.

Continuing, the state argues that a writ of prohibition is appropriate only when a court is exercising power unlawfully and where it will result in an injury without a remedy. Here, the search and seizure was lawful. The warrant was signed by a judge and reviewed by another judge, the state points out.

After an ex parte summary and hearing were held, and the ex parte record was sealed due to an ongoing investigation, the District Court found that the seized property was being held in good faith as potential evidence in a matter that was uncharged at the time, the state argued. The Court of Appeals reviewed the sealed records before denying the request for a writ of prohibition.

How to draw boundaries

The amici representing the defense bar are concerned about the due process right of the attorney being searched and the absence of any controls on the search, as well at the attorney-client privilege, said MSBA past president Robin Wolpert. The MSBA membership includes both defense attorneys and prosecutors and it will not support either party, Wolpert said, but will focus on the process.

The big question is how to draw boundaries in a search process to protect the attorney-client privilege, Wolpert said, and she hopes there will be resolution of that issue. All law firms, not just criminal defense firms or solo practitioners, have clients who rely on their confidential information remaining that way, she noted.

Legal representation of K.M. is provided by the Lawyers Assistance Strike Force of the National Association of Criminal Defense Lawyers. Birrell is an 8th Circuit representative on the strike force.

The attorney for the city could not be reached for comment.