

[Cite as *State v. Kopniske*, 2023-Ohio-2489.]

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

STATE OF OHIO, :
 :
 Plaintiff-Appellee, :
 : No. 112242
 v. :
 :
 DAVID KOPNISKE, :
 :
 Defendant-Appellee. :
 :
 [Appeal by Vanessa Kopniske,
 Nonparty-Appellant] :

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: July 20, 2023

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-22-673961-A

Appearances:

T. Hess & Associates, LLC, and Timothy A. Hess, *for appellee* David Kopniske.

Stafford Law Co., LPA, Joseph G. Stafford, Kelley R. Tauring, and Nicole A. Cruz, *for appellant* Vanessa Kopniske.

MICHAEL JOHN RYAN, J.:

{¶ 1} Nonparty Vanessa Kopniske (“Vanessa”) appeals from the trial court’s November 23, 2022 judgment denying her motion to quash a subpoena. After a thorough review of the facts and pertinent law, we reverse.

{¶ 2} The defendant in this criminal case, David Kopniske (“David”), is Vanessa’s estranged husband.¹ In August 2022, David was charged in the Lyndhurst Municipal Court with burglary and criminal damage. The charges were bound over to the common pleas court and in October 2022, David was indicted on charges of burglary, theft, safecracking, and receiving stolen property. The charges stem from David’s alleged break-in of Vanessa’s home while she was away on vacation.

{¶ 3} David issued a subpoena duces tecum to Vanessa, seeking for inspection by counsel “any and all cell phones,” particularly one that the subpoena identified by phone number. Vanessa filed a motion to quash the subpoena, contending that David’s request was “unreasonable and oppressive.” The trial court denied her motion and stated that “subpoenaed records are for attorney’s eyes only.” This appeal followed, with a sole assignment of error challenging the denial of Vanessa’s motion to quash the subpoena without a hearing.

{¶ 4} As a preliminary matter, we note that although discovery orders are generally interlocutory and not immediately appealable, *Walters v. The Enrichment Ctr. of Wishing Well, Inc.*, 78 Ohio St.3d 118, 120-121, 676 N.E.2d 890 (1997),

¹ The parties are engaged in a divorce proceeding. Vanessa sought, and was granted, a domestic violence civil protection order against David in that proceeding.

denials of motions to quash subpoenas served on nonparties are final, appealable orders. *Tisco Trading USA, Inc. v. Cleveland Metal Exchange, Ltd.*, 8th Dist. Cuyahoga No. 97114, 2012-Ohio-493, ¶ 5, citing *Munro v. Dargai*, 8th Dist. Cuyahoga No. 54622, 1988 Ohio App. LEXIS 1144 (Mar. 31, 1988).

{¶ 5} We review the denial of Vanessa’s motion to quash under an abuse-of-discretion standard. *Parma v. Schoonover*, 8th Dist. Cuyahoga No. 100152, 2014-Ohio-400, ¶ 8. An “abuse of discretion” occurs where “a court exercise[s] its judgment, in an unwarranted way, in regard to a matter over which it has discretionary authority.” *Johnson v. Abdullah*, 166 Ohio St.3d 427, 2021-Ohio-3304, 187 N.E.3d 463, ¶ 35.

{¶ 6} Vanessa’s motion to quash was made under Crim.R. 17(C). The Supreme Court of Ohio has adopted a four-part test with regard to a motion to quash filed pursuant to Crim.R. 17(C). *In re Subpoena Duces Tecum Served upon Attorney Potts*, 100 Ohio St.3d 97, 2003-Ohio-5234, 796 N.E.2d 915, paragraph one of the syllabus, citing *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L. Ed.2d 1039 (1974). In accordance with *Nixon*, the proponent of the subpoena must show (1) that the subpoenaed documents are evidentiary and relevant; (2) that they are not otherwise reasonably procurable in advance of trial by due diligence; (3) that the proponent cannot properly prepare for trial without production and inspection of the documents and that the failure to obtain the documents may tend to unreasonably delay the trial, and (4) that the subpoena is made in good faith and is not intended as a general fishing expedition. *Potts at id.*

{¶ 7} “Pursuant to *Nixon*, the trial court is required to conduct an evidentiary hearing, at which the party filing the subpoena duces tecum must convince the court that the information sought in the subpoena meets the *Nixon* test.” *Potts* at ¶ 14. “At the hearing, which may be held in camera, the proponent of the subpoena must demonstrate that the subpoena is not unreasonable or oppressive by showing that the request satisfies the *Nixon* factors.” *Potts* at ¶ 16.

{¶ 8} Thus, under *Potts*, once a motion to quash a subpoena duces tecum is filed, the proponent of the subpoena bears the burden of showing, at an evidentiary hearing, that he or she can meet the four-factors set forth in *Nixon* to show that the subpoena is not unreasonable or oppressive.

{¶ 9} Vanessa contends that no hearing was held, while David contends the opposite. According to David, “the trial court held an in-camera hearing with defense counsel and the prosecutor for the state of Ohio[,] and [i]n that hearing, discussions were had that addressed the four-step test of * * * *Nixon* * * *.” The certified record before us does not demonstrate that a hearing was held. Rather, the record shows that a pretrial was held on the same date that Vanessa’s motion was denied. The hearing was not recorded, and there simply is nothing in the record before us indicating that the trial court considered the four *Nixon* factors. Moreover, even if it is true that the subpoena and the *Nixon* factors were discussed at the pretrial, Vanessa and her counsel state before this court that neither of them were present at the pretrial and there is nothing in the record contradicting their assertion.

{¶ 10} On this record, the trial court abused its discretion by denying the motion to quash without an evidentiary hearing. Vanessa's sole assignment of error is therefore sustained. The judgment denying her motion to quash the subpoena is reversed, and the case is remanded for further proceedings consistent with this opinion.

{¶ 11} Reversed and remanded.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MICHAEL JOHN RYAN, JUDGE

ANITA LASTER MAYS, A.J., and
LISA B. FORBES, J., CONCUR