STATE OF MINNESOTA
COUNTY OF LYON

IN DISTRICT COURT
FIFTH JUDICIAL DISTRICT

STATE OF MINNESOTA,

Plaintiff,

vs.

OLGA MARINA FRANCO DEL CID,

Defendant.

File No. 42-CR-08-220

ORDER

The above-entitled matter came before this Court on Defendant's Motion for Court Order Allowing Deposition. A hearing was not held on the motion.

Based upon all the files and records herein,

IT IS HEREBY ORDERED:

1. Defendant's motion to allow deposition of Dr. Paul R. Diekmann, M.D. is DENIED.

Dated: July 16, 2008

BY THE COURT:

David W. Peterson
Judge of District Court

MEMORANDUM

Defendant has been charged in the Amended Complaint with four counts of Criminal Vehicular Homicide, in violation of Minn. Stat. § 609.21, Subd. 1(1), seventeen counts of Criminal Vehicular Injury, in violation of Minn. Stat. § 609.21, Subd. 1(1), one count of False Name and Date of Birth to a Peace Officer, in violation of Minn. Stat. § 609.506, Subd. 2, one count of Stop Sign Violation, in violation of Minn. Stat. § 169.20, Subd. 3(a), and one count of No Minnesota Driver's License, in violation of Minn. Stat. § 171.02, Subd. 1. Defendant has

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7-16-08
Karen J. Bierman
COURT ADMINISTRATOR
Marshall Lyon County, Minnesota

filed a motion requesting that she be allowed to schedule a deposition of Dr. Paul R. Diekmann, M.D., prior to the trial date "to preserve his testimony and save expenses to [Defendant] or the State." The Court denies Defendant's motion.

Minnesota Rule of Criminal Procedure 21.01 provides, in part:

> "Whenever there is reasonable probability that the testimony of a prospective witness will be used at hearing or at trial under any of the conditions specified in Rule 21.06, subd. 1, the court before whom the proceedings are pending may [...] order that the testimony of such witness be taken by oral deposition[...]"

Rule 21.06, Subd. 1 outlines the necessary conditions:

> "At the trial, or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if it appears: (a) that the witness is dead or unable to be present or to testify at the trial or hearing because of then existing physical or mental illness or infirmity; or (b) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena, order of court, or other reasonable means."

Depositions are permitted in a criminal case only upon a showing of reasonable probability that the witness will be unavailable. State v. Deal, 740 N.W.2d 755, 763 (Minn. 2007) (citing State v. Rud, 359 N.W.2d 573, 578 n.1 (Minn. 1984); Minn. R. Crim. Pro. 21.01). This Court "may order the deposition of a prospective witness only when there is a 'reasonable probability' that the prospective witness will be unavailable for trial because of the conditions specified in Minn.R.Crim.P. 21.06, subd. 1." City of Bemidji v. Harr, 368 N.W.2d 359, 360 (Minn. Ct. App. 1985) (holding that trial court erred by ordering a deposition when counsel asserted the proposed witness would not give information unless subpoenaed). There is a stark contrast between the analytical framework regarding depositions in criminal cases and in civil cases. See Henry W. McCarr; Jack S. Nordby, 8 Minn. Prac., Criminal Law & Procedure § 16.18 (3d ed.) ("The criminal rules do not permit the liberal use of depositions sanctioned by the Rules of Civil Procedure.")

The law is clear that, to obtain a deposition in a criminal case, there must be a reasonable probability that deponent will be (1) dead, (2) unable to testify because of physical or mental issues, or (3) unable to be procured via subpoena, court order, or other reasonable means. Defendant has made no allegation or offer of proof relating to any of these three conditions. Rather, the motion outlines that Defendant wishes "to preserve his [Dr. Diekmann's] testimony and save expenses." Only if there is some reasonable probability that Dr. Diekmann would die, become so ill as to be unable to testify, or refuse to respond to subpoena or order of this Court, could this Court even consider allowing Dr. Diekmann to be deposed. And even then, that deposition would not be allowed to be used at trial unless either one of those possibilities was actualized, or one of the other conditions in Rule 21.06 was met (inconsistent testimony or impeachment). Therefore, Defendant's motion must be denied.

DWP
7-16-08