

STATE OF NEW YORK
ERIE COUNTY COURT

THE PEOPLE OF THE STATE OF
NEW YORK

v.

NOTICE OF MOTION

YOUR HONOR:

Please take notice that at a term of Erie County Court, [REDACTED], held at 9:30 a.m. on February 14, 2023 or as soon thereafter as counsel can be heard, the defendant will move for the following relief.

1. Inspection of the Grand Jury minutes and an Order dismissing the indictment on the ground that the evidence before the Grand Jury was insufficient to establish the offenses charged.
2. An Order directing the prosecution to provide all items and information related to the Grand Jury presentation.
3. A hearing to determine the admissibility of identification testimony.
4. Any further relief the Court deems proper.

Respectfully yours,

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DATED:

[REDACTED]
Buffalo, NY

TO:

Hon. [REDACTED]

ADA [REDACTED]
Erie County District Attorney's Office
25 Delaware Ave.
Buffalo, NY 14202

STATE OF NEW YORK
ERIE COUNTY COURT

THE PEOPLE OF THE STATE OF
NEW YORK

v.

SUPPORTING AFFIRMATION

STATE OF NEW YORK)
COUNTY OF ERIE) ss.
CITY OF BUFFALO)

██████████, ESQ., an attorney licensed to practice in the courts of this State, affirms the truth of the following statements under penalties of perjury.

1. I am counsel to the defendant, who is charged in this indictment with four counts of criminal possession of a weapon in the second degree (Penal Law § 265.03[3]) for his alleged possession of three pistols and a revolver at 114 Olympic Ave. in the city of Buffalo on ██████████.
2. I make this affirmation in support of the relief described below. Unless otherwise stated, this affirmation is made upon information and belief, the source of which is my review of the discovery provided by the prosecution.

The indictment is not supported by legally sufficient evidence.

3. A court may dismiss the indictment, or any count thereof, upon the ground that “[t]he evidence before the grand jury was not legally sufficient to establish the offense charged or any lesser included offense” (CPL 210.20[1][b]). Legally sufficient evidence is “competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant’s commission thereof” (CPL 70.10[1]).
4. The defendant moves for inspection of the Grand Jury minutes for the purpose of determining whether the evidence before the Grand Jury was legally sufficient to support all of the offenses charged in the indictment (CPL 210.30[2]).

5. The defendant is charged with possessing four specific firearms recovered inside 114 Olympic Street.
6. However, there is insufficient evidence that he possessed any of them.
7. On the evening of [REDACTED], the police responded to a call of shots fired on [REDACTED] [REDACTED] in the city of Buffalo (11-12; numbers in parentheses refer to pages of the Grand Jury minutes).
8. Lt. [REDACTED] obtained and viewed a surveillance video from a nearby establishment (13). According to [REDACTED], the defendant was on video firing the gun and then running into 114 Olympic (14-15).
9. When the police arrived, several people were in the house, including the defendant, who was eventually taken out (17-18). He did not live at [REDACTED] (9).
10. During a search of the house, four firearms were recovered in a crawl space in the basement (19). Two were 9-mm pistols, one was a 5.7x28-mm pistol, and one was a revolver (28). Two were loaded, and matching ammunition was recovered nearby for the other two (33).
11. Where a defendant is not in actual possession of a firearm, possession “may be established through the doctrine of constructive possession, which is based on the exercise of dominion and control over the area in which an item is found” (*People v. Ward*, 104 AD3d 1323, 1324 [4th Dept. 2013]).
12. Here, the proof was insufficient to establish constructive possession. It was not the defendant’s house, there was no testimony about his proximity to the firearms, no admissions were made, and no DNA evidence was presented. Although he is alleged to have fired 9-mm cartridges from a gun, only two of the firearms match the caliber, and there is no indication as to which one – if either – he possessed.
13. Because legally sufficient evidence was not presented to the Grand Jury, the indictment must be dismissed.

The defendant is entitled to all items and information related to the Grand Jury presentation.

14. The prosecution has provided the Grand Jury minutes, but it has not provided either the legal instructions or the attendance and voting sheets, although these items exist and are in their possession.

These items are part of the prosecution's automatic discovery obligation.

15. As part of their automatic discovery obligation, the prosecution must disclose to the defendant "all items and information that relate to the subject matter of the case and are in the possession, custody or control of the prosecution or persons under the prosecution's direction or control, including ***but not limited to***" the categories of discovery that follow (CPL 245.20[1], emphasis added).
16. The discovery statute includes a presumption of openness under which "[t]here shall be a presumption in favor of disclosure when interpreting sections 245.10 and 245.25, and subdivision one of section 245.20, of this article" (CPL 245.20[7]).
17. There is no question that all items and information related to the Grand Jury presentation – the source of the indictment – are related to the subject matter of the case.
18. Through this motion, the defendant is notifying the prosecution that their Certificate of Compliance is deficient until these items are provided (CPL 245.50[4][b]).

In the alternative, the Court should issue a discovery order.

19. If the Court finds that these items are not subject to automatic discovery, it may order their disclosure under its discretionary discovery authority. A discovery order may be issued "upon a showing by the defendant that the request is reasonable and that the defendant is unable without undue hardship to obtain the substantial equivalent by other means" (CPL 245.30[3]).

20. The request is reasonable. The legal instructions are necessary to ensure that the Grand Jury was properly instructed on the law and that the charges voted by the Grand Jury are consistent with the indictment. The voting and attendance sheets are necessary to ensure that the requisite number of grand jurors heard all of the testimony and voted the indictment (CPL 210.35[2], [3]). There are no interests that will be adversely affected by the disclosure of these items.

21. The defendant is unable to obtain these items unless they are provided by the prosecution.

The defendant requests a hearing to challenge the admissibility of the identification testimony.

22. The CPL 710.30 notice lists five pre-trial identification procedures.

23. The earliest of these, on the date of the defendant's arrest, are labeled as "confirmatory" identifications, one by [REDACTED] and the other by Lt. [REDACTED]

24. The defendant moves to suppress the identification testimony and requests a hearing to determine whether the pre-trial identification procedures were confirmatory (CPL 710.20[6], 710.60[4]).

25. Although the defendant has made every effort to include all motions in the same set of papers, he reserves the right to file further motions, should they become necessary.

For these reasons, the defendant requests the relief described above, along with any further relief this Court deems proper.

[REDACTED]