

STATE OF NEW YORK
ERIE COUNTY SUPREME COURT

THE PEOPLE OF THE STATE OF NEW YORK

v.

NOTICE OF OMNIBUS MOTION

██████████

██████████

Please take notice that on ██████████ at 9:30 a.m. or as soon thereafter as counsel can be heard, the defendant will move this Court for the following relief.

1. An Order dismissing the indictment as defective within the meaning of CPL 210.35(5).
2. An Order dismissing the indictment on the ground that the evidence before the Grand Jury was not legally sufficient to establish the offense charged or any lesser included offense.
3. An Order granting a hearing on the defendant's motion to suppress the pistol on the ground that it was obtained in violation of his right to be secure against unreasonable searches and seizures.
4. An Order granting leave to file further motions, should they become necessary.
5. Any other relief that this Court deems proper.

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TO: Hon. ██████████

Erie County District Attorney
25 Delaware Ave.
Buffalo, NY 14202

STATE OF NEW YORK
ERIE COUNTY SUPREME COURT

THE PEOPLE OF THE STATE OF NEW YORK

v.

SUPPORTING AFFIRMATION

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

_____, an attorney licensed to practice law in the courts of this State, under penalties of perjury pursuant to CPLR 2106(a), affirms the following statements to be true.

1. I am the attorney for the defendant, _____, who is charged in this indictment with criminal possession of a weapon in the second degree (Penal Law § 265.03[3]) for his alleged possession of a pistol in the curtilage of _____ in the City of Buffalo on _____.
2. Unless otherwise stated, this affidavit is made upon information and belief, the sources of which include my review of the indictment, CPL 710.30 notice, and discovery provided by the prosecution.

The indictment should be dismissed.

3. At any time after arraignment, a court may dismiss the indictment, in relevant part, on the ground that “the evidence before the grand jury was not legally sufficient to establish the offense charged or any lesser included offense” or that “the grand jury proceeding was defective, within the meaning of CPL 210.35” (CPL 210.20[1][b], [c]).
4. A Grand Jury proceeding is defective, in relevant part, when it “fails to conform to the requirements of article one hundred ninety to such degree that the integrity thereof is impaired and prejudice to the defendant may result” (CPL 210.35[5]).

5. Unless otherwise provided, the rules of evidence with respect to criminal proceedings are applicable to Grand Jury proceedings (CPL 190.30[1], 60.10).
6. During the Grand Jury presentation, the prosecutor asked PO [REDACTED] one of the officers who responded to the 911 call, about the content of a conversation he had with a witness.
 - Q. And once you arrived at that location, did you or anyone around you speak to the person who reported that gun call?
 - A. Yes, we did.
 - Q. Who was that person?
 - A. The suspect?
 - Q. Yes.
 - A. [REDACTED] (Grand Jury Minutes, p. 4).
7. This statement, an out-of-court statement offered for the truth of the matter asserted therein, was inadmissible hearsay (Guide to NY Evidence §§ 8.00[1], 8.01[1][a]). The prosecutor did not lay the foundation for any exception to the rule against hearsay.
8. There was no reason to elicit this testimony. At a minimum, the prosecutor was required to instruct the Grand Jury that the statement could not be considered for its truth. She did not do so.
9. Later, when additional hearsay came out through another officer's testimony, the prosecutor said to the Grand Jury, "[j]ust a cautionary, you are hearing some hearsay. This isn't being said for the truth of the matter, just the purpose of telling a narrative" (Grand Jury minutes, p. 11). But this did not cure the earlier failure to provide a cautionary instruction; as the prosecutor did not define hearsay for the Grand Jury, they could not have known that it applied to the earlier testimony.
10. This error was highly prejudicial, as the only other evidence before the Grand Jury that the defendant possessed the pistol was a police officer's claim that he saw the defendant mouth the word "bushes," which will be further addressed below.

11. Given the prosecutor's violation of the rules of evidence before the Grand Jury, and the prejudice it caused to the defendant, the indictment was defective within the meaning of CPL 210.35. It must be dismissed.
12. Additionally, the evidence before the Grand Jury was legally insufficient.
13. Without the inadmissible hearsay, the indictment rests on the officer's claim that he saw the defendant mouth the word "bushes." This testimony should not carry any weight. The witness did not provide any background on how he was qualified to read lips.
14. In the alternative, the Court should review and inspect the Grand Jury minutes for legal sufficiency, including the exhibit containing the alleged "bushes" remark (CPL 210.30[1], [2]).

The pistol should be suppressed.

15. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" (US Const, Amend 4 [applicable to the states through Amend 14]).
16. Upon motion of a defendant who is aggrieved by unlawful acquisition of evidence, a court may order the evidence suppressed, in relevant part, on the ground that it "consists of tangible property obtained by means of an unlawful search and seizure under circumstances precluding admissibility thereof" (CPL 710.20[a], [1]).
17. The defendant is aggrieved by the unlawful recovery of the pistol.
18. "Standing generally requires a showing of some combination of the following factors: defendant's status (visitor, overnight guest, relative); the length, purpose and frequency of defendant's stays at the premises; possession of a key; and the presence of any belongings or contribution to expenses" (*People v. Jose*, 252 AD2d 401, 403 [1st Dept. 1998], *aff'd* 94 NY2d 844).

19. In an affidavit signed [REDACTED] (attached), the defendant explained that he is a regular overnight guest at [REDACTED], that he has keys to the premises, and keeps his personal belongings there. As such, he has standing to challenge the search.
20. The police recovered the pistol in the bushes immediately surrounding the residence. “The area immediately surrounding and associated with the home” – the curtilage” is “part of the home for Fourth Amendment purposes” (*Florida v. Jardines*, 569 US 1, 7 [2013]). This area is “intimately linked to the home, both physically and psychologically, and is where privacy expectations are most heightened” (*id.*).
21. The police searched the curtilage of [REDACTED] without a search warrant and without any exception to the warrant requirement. The homeowner did not consent to the search; in fact, she denied consent.
22. The defendant requests a hearing on the motion (CPL 710.60[4]).
23. Finally, although the defendant has made every effort to include all motions in one set of papers, he reserves the right to file further motions should they become necessary (CPL 255.20[2]).

Accordingly, the defendant requests that the motion be granted in all respects, along with any other relief this Court deems proper.

[REDACTED]