

State of New York : County of Erie
Supreme Court

People of the State of New York

...as Plaintiff.

Motion to Suppress
Index No. [REDACTED]

-V.-

[REDACTED]

...as Defendant.

SIRS:

COMES NOW the defendant, [REDACTED], by and through his undersigned counsel, [REDACTED], Esq., and based upon the attached affidavit of [REDACTED], Esq., hereby moves this Court at a date and time to be set by the Court, for the relief set forth in the attached affidavit and any such other and further relief as the Court may deem just and proper.

Dated: Buffalo, New York

[REDACTED]

Yours, etc.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

County of Erie

State of New York : County of Erie
Supreme Court

People of the State of New York

...as Plaintiff.

Affidavit of Counsel
Index No. [REDACTED]

-v.-

[REDACTED]

...as Defendant.

[REDACTED], Esq. hereby affirms:

1. I am counsel to the defendant in the above entitled action, admitted to the practice of law before this court.
2. Preamble. The assertions of fact made herein are based upon information and belief which is the result of my review and independent review and investigation in this matter, including but not limited to interviews with the Defendant.
3. This Court entered a decision on [REDACTED] which in relevant part, denied the Defendant's motion to Suppress the evidence seized from the defendant's residence as the result of a search warrant issued by Justice [REDACTED] on [REDACTED] 2021 for the premises described therein as "[REDACTED]".
4. However, the tangible evidence the People intend to introduce was seized from the attic common space over the front of the structure at [REDACTED]. There was no lawful authority to enter that area. This affidavit is made for reconsideration of the defendant's motion to suppress the evidence seized from the common space attic of the dwelling at [REDACTED]. The search warrant in this case did not authorize the search of the attic space. But the authority it did have was premised upon an application that contained false information.
5. That attic is not a part of the rear apartment. It is accessible only through a doorway that is in the common area between the apartments. It contains, among other things, the electric meters and fuse boxes for both the front and back units of the multi unit dwelling and the furnace for both units. See Exhibit A.
6. This has been confirmed with the residents of [REDACTED] by your affiant as well as an investigator who has visited the premises. These facts were not clear prior to the omnibus motions because I relied to my client's detriment upon a schematic drawing of the premises that was misleading.
7. These facts are nearly identical to those considered in People v. Moore, 195 AD3d 1585 (4th Dept. 2021). There the Court ruled that the record before it lacked any evidence to

support that the attic space was not common space and suppressed the evidence seized therefrom. Its determination includes an illustrative definition of common space:

The question thus becomes whether the area where the drugs and packaging materials were found constitutes a common ****601** area. Common areas of multi-unit buildings are those areas “‘accessible to all tenants and their invitees’” (*People v. Espinal*, 161 A.D.3d 556, 557, 77 N.Y.S.3d 371 [1st Dept. 2018], *lv denied* 32 N.Y.3d 1064, 89 N.Y.S.3d 118, 113 N.E.3d 952 [2018]; *see People v. Murray*, 233 A.D.2d 956, 956, 649 N.Y.S.2d 265 [4th Dept. 1996], *lv denied* 89 N.Y.2d 927, 654 N.Y.S.2d 729, 677 N.E.2d 301 [1996]; *see generally People v. Powell*, 54 N.Y.2d 524, 530, 446 N.Y.S.2d 232, 430 N.E.2d 1285 [1981]).

8. By that standard, it is unquestionable that the attic is “common space” for which no authorization was granted. The warrant in this case not only fails to authorize the search of the attic, it fails to authorize any place but the rear apartment at [REDACTED] New York and does not specify a second floor or attic space even exists save a reference to the defendant's alleged assertion that he lives in an attic space, a statement which has been suppressed.
9. In *People v. Brito*, “the search of the attic at defendant's residence did not exceed the scope of the search warrant for those premises. Because the attic is accessible only through the upstairs apartment, the attic may be considered part of that upstairs apartment” (11 AD3d 933, 934 [4th Dept. 2004]). In our case, of course, the attic is accessible through both apartments, so it is off limits.
10. To be clear, the recorded informant interview which was only made available to counsel after motions were filed and a hearing was held. It reveals that officers were aware of the location of the defendant's apartment and the existence of this attic space and the likelihood it would contain evidence, but they did not include this space in the description of the premises, nor does it appear that detectives learned how the attic was accessed or that it was common space, not accessible solely from the rear apartment but both units through a common hall way.
11. Instead the affiant alleges that the Defendant told him that he lived in the attic. That did not happen. The only conversation the Affiant had with the Detective was suppressed, but even if it were not, there is no statement by the defendant in which he said he lived in the attic. It did not happen. So the basis of this motion is not only that the Police failed to obtain authority to search the attic, it is that the information they provided which might possibly have attained such authority was not true.
12. The full affidavit unredacted application for the warrant was not made available to counsel until after motions were filed. It revealed that the only assertion that the defendant lived in the attic was attributed to him. But that is not true.
13. The video presented by the People which is the subject of one of many motions to reconsider filed this week, is the only conversation the defendant had with Detective

██████████ At no time does the defendant tell him that he lived in the attic. It simply did not happen.

14. In reviewing my prior motion to this Court, it was not made clear that the attic space searched in this case, the area from which the weapon was seized was accessible from both apartments in the dwelling and that the space from which the weapon was seized was the attic over the front apartment, not the rear. I respectfully submit that this belief was due to my mistaken reliance on a schematic included in the People's discovery which is incorrect. Notes from an unspecified witness included this drawing, which suggests the attic is only accessible to the rear unit. The drawing suggests that the stairs to the attic were a part of the back apartment. They are not. See figure 1, extracted from Exhibit B.

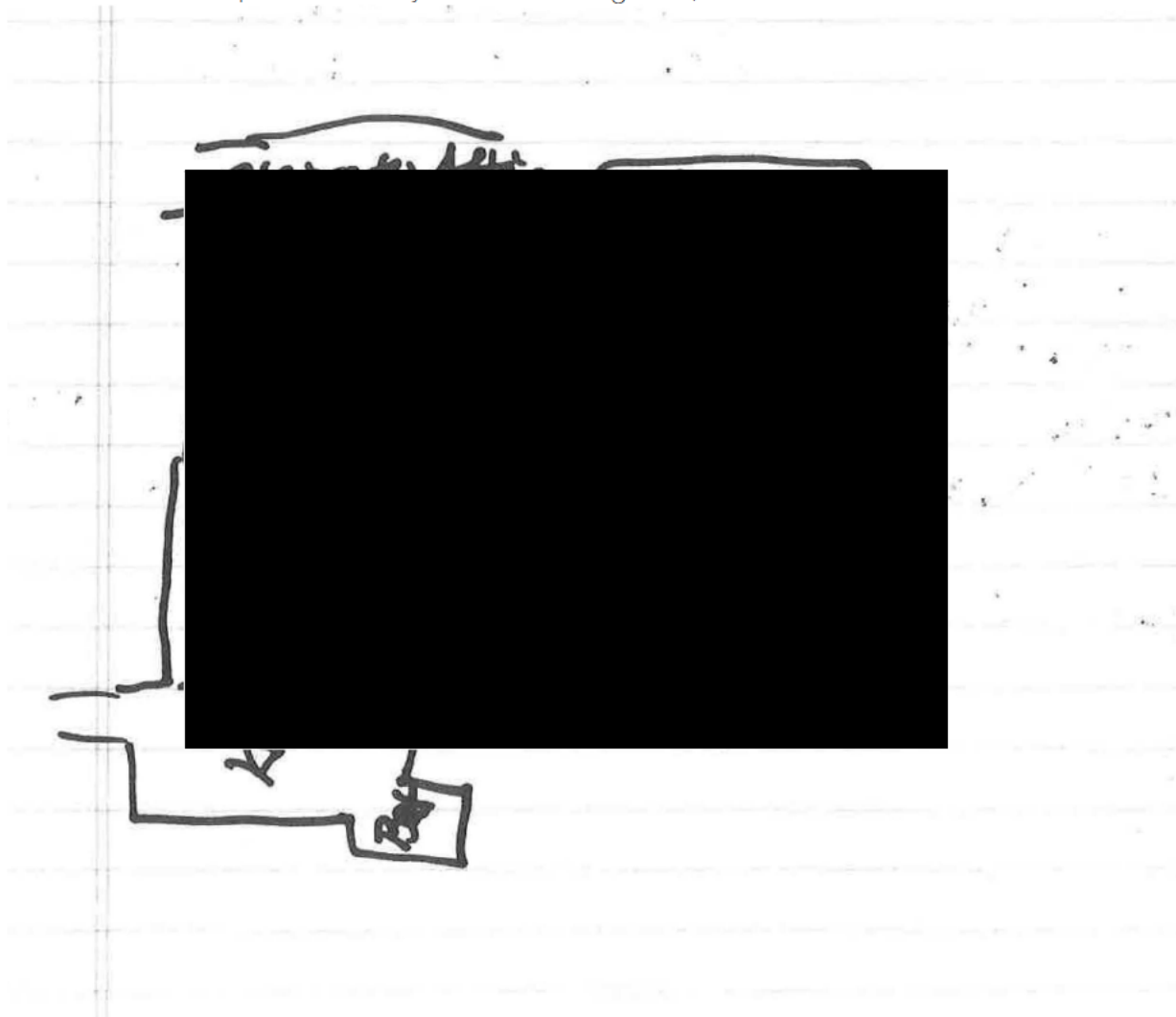


Figure 1 From Exhibit B

15. It bears repeating that the police had no lawful authority to search the attic.
16. It was only upon reviewing the recorded interview of the informant with my client that I realized the attic is common space. I was only permitted to do this last week because the People requested a protective order, hiding the identity and testimony of [REDACTED]. But even this was premised upon misinformation. Phone calls just disclosed to the defendant reveal that the defendant was well aware of the identity of the witness against him, meaning the protective order had no effect and instead, served only to frustrate counsel's ability to work effectively with my client.
17. This question is not close. This is a common area, for which there was not authority to search and what authority they did have was premised upon a material misrepresentation of fact by the affiant.
18. While it is my position that the defendant is entitled to summary relief on this issue, the defendant requests that absent an order suppressing this evidence, including the firearm, the defendant is entitled to a hearing for the purpose of allowing the People to establish the lawfulness of the search of this common area.
19. Further, it is not clear how the Grand Jury indicted this case if not for the statements suppressed by this Court. Hon. [REDACTED] had issued a decision denying the defendant's motion, but the minutes read different now. The minutes provided to counsel do not contain any evidence to draw a nexus between the defendant and the gun other than the place from which the gun was seized. The only non hearsay evidence establishing position in this manner are the suppressed statements of the Defendant.
20. Because this evidence was illegally obtained and inadmissible hearsay, the Grand Jury minutes are defective and the evidence is insufficient.
21. A detective offered hearsay that through his investigation he had learned that the defendant lived at [REDACTED], nothing more. He did not attribute that information to any source. Therefore, the defendant asks the court to reconsider its decision to deny the defendant's prior motion to dismiss this action in light of the insufficiency of the evidence before the Grand Jury.

WHEREFORE, it is respectfully requested that the Court grant the relief requested in the various branches of this Motion and afford this Defendant such other and further relief as is just under all the other circumstances of this case.

Dated: [REDACTED]



Exhibit A

Side Door, enter to hallway
which leads to Kitchen
left to Living room 2 Bedrooms
on NS of Residence



Interview Room 253 2021210 18

Exhibit B

