

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FOURTH DEPARTMENT

THE PEOPLE OF THE STATE OF
NEW YORK

v.

ORDER TO SHOW CAUSE

TO: John Flynn, Erie County District Attorney

It is ORDERED that the Erie County District Attorney's Office show cause before Hon. _____, a Justice of the Appellate Division, _____ Department, located at _____, Buffalo, New York 14210, at _____. on _____, why the following relief should not be granted.

1. An Order invalidating a protective issued by Hon. _____ on _____, or modifying it to allow the discoverable items and information to be disclosed to defense counsel only; or
2. In the alternative, an Order granting a hearing with full participation by defense counsel.

It is further ORDERED that service of a copy of this order, together with the papers upon which it is granted, be made personally upon the Erie County District Attorney's Office on or before _____, which shall be deemed sufficient service.

Justice of the Appellate Division

TO:

ADA [REDACTED], Esq.
Erie County District Attorney's Office
25 Delaware Ave.
Buffalo, New York 14202
(716) 858-2400
Rebecca.fioravanti@erie.gov

Hon. [REDACTED]
Erie County Family Court
1 Niagara St.
Buffalo, New York 14202
(716) 845-7400

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. Along with co-counsel ██████████ ESQ., I am the attorney for ██████████, who is charged in this indictment with attempted murder in the second degree (Penal Law §§ 110.00, 125.25[1]), aggravated assault upon a police officer or a peace officer (Penal Law § 120.11), two counts of assault in the first degree (Penal Law §§ 120.10[1], [4]), assault on a peace officer, police officer, firefighter or emergency medical services professional (Penal Law § 120.08), reckless endangerment in the first degree (Penal Law § 120.25), grand larceny in the third degree (Penal Law § 155.35[1]), criminal possession of stolen property in the third degree (Penal Law § 165.50), and unlawful fleeing a police officer in a motor vehicle in the second degree (Penal Law § 270.30).
2. I make this affirmation in support of the defendant's request for an expedited review of the protective order issued by Hon. ██████████ on ██████████.
3. Following a proceeding at which defense counsel was not allowed to participate, Judge ██████████ issued an order denied the following discovery to both the defendant and counsel.
 - a. the identity, personal information or statements of "Witness A";
 - b. all documents, materials, notes, or information that pertain to "Witness A" and the information the witness provided to law enforcement and the Erie County District Attorney's Office;

- c. transcripts of testimony of “Witness A” given to the Erie County District Attorney’s Office and provided to the Erie County Grand Jury;
 - d. any and all recordings made to and from “Witness A”;
 - e. the search warrant and application of “Witness A’s” cell phone, as well as the cell phone records of “Witness A”;
 - f. exculpatory material; and
 - g. pending cases.
4. The order was served on the defense by ADA [REDACTED] on [REDACTED].
 5. A party that has unsuccessfully sought, or unsuccessfully opposed the granting of, a protective order “relating to the name, address, contact information or statements of a person may obtain expedited review of that ruling by an individual justice of the intermediate appellate court to which an appeal from a judgment of conviction in the case would be taken” (CPL 245.70[6][a]).
 6. This review is being sought within two business days of service of the order (CPL 245.70[6][b]). The ruling affects substantial interests, and no accommodation of the discovery dispute was feasible, nor was any opportunity to oppose the order, in light of the decision to deny defense counsel full participation in the underlying proceedings (CPL 245.70[6][b][i], [ii]).

The protective order should be invalidated or modified to allow the discoverable items and information to be disclosed to defense counsel only.

7. Upon a showing of good cause, the court may order that discovery be “denied, restricted, conditioned, or deferred” (CPL 245.70[1]). The factors to consider in determining good cause are listed in CPL 245.70(4).
8. One of these factors is “constitutional rights or limitations” (CPL 245.70[4]).

9. The Defense requests a review of the underlying papers to determine if a showing of good cause was made for the granting of a protective order. If it was not, then the order should be invalidated in its entirety.
10. The Defense questions the need for such a restrictive protective order. The Defense is unaware of what makes this case unique and extraordinary. This case does not involve gang shootings. The allegation is that the defendant is one of several teens who were stealing motor vehicles. It is alleged that the defendant operated a stolen car during a car chase and that he intentionally struck a pedestrian police officer. The Defense is unaware of any allegations that the defendant is a danger to others or that anyone has been threatened. Conclusory statements of danger in releasing the identity of a witness are insufficient (*People v. Nesmith*, 144 AD3d 1508 (4th Dept 2016)).
11. Even if a showing of good cause was made, the court was required to consider the viability of sharing the material with defense counsel only (*People v. Beaton*, 179 AD3d 871, 875 [2nd Dept. 2020]).
12. There is no valid reason why the items information cannot be disclosed to defense counsel only.
13. The protective order deprives the defense of information that it is constitutionally entitled to, including *Brady* material. No statute or court order can relieve the prosecution of its constitutional obligations. A defendant is unable to make a knowing decision as to whether or not to plead guilty unless his or her attorney can evaluate the proof.
14. The order was, at a minimum, overbroad. It must be modified to bring it into compliance with the statute and the constitutions of this State and of the United States.

In the alternative, a hearing should be ordered with full participation by defense counsel.

15. Defense counsel must be allowed full participation in the proceedings underlying a protective order unless, in the case of a defendant charged with a violent felony, there is a showing of good cause for excluding counsel.

16. There was no valid reason to exclude counsel from full participation.

17. If the order is not invalidated or modified, a hearing should be ordered with full defense participation.

For the reasons stated, the defendant requests that the relief listed above be granted, along with any further relief this Court deems proper.

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