

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

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v

**AFFIRMATION OF  
SERVICE**

APPELLATE DIVISION  
CASE/DOCKET #

[REDACTED]

ORIGINATING COURT #

[REDACTED]

[REDACTED]

Defendant

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[REDACTED] Esq., being duly sworn, deposes and says: That he is not a party to the action and is over 18 years of age. That on the 3<sup>rd</sup> day of [REDACTED] 2023, he served a copy of the Notice of Appeal upon John J. Flynn, Erie County District Attorney, by personally serving one true copy upon at his office at 25 Delaware Avenue, Buffalo, New York 14202.

Affirmed under penalty of perjury pursuant to CPLR 2106.

Dated: November 3, 2023

[REDACTED]

EG DISTRICT ATTORNEY  
NOV 3 2023 AM 11:19

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

EC DISTRICT ATTORNEY  
NOV 9 2023 4:11:19

-----X  
The People of the State of New York

- against -

██████████

Appellate Division

Case/Docket No. ██████████

Originating Court

No. ██████████

-----X

**NOTIFICATION OF CASE NUMBER AND OTHER INFORMATION  
IN E-FILED APPEAL OR TRANSFERRED PROCEEDING  
(22 NYCRR 1245.3[b])**

PLEASE TAKE NOTICE that a petitioner or appellant in this matter has notified the Court that this case is designated for electronic filing pursuant to the rules of the Appellate Division.

The case/docket number for this

appeal

transferred proceeding

is ██████████

**Parties represented by an attorney.** Within twenty (20) days of service of this notification, counsel to all other parties in this matter shall, as required by 22 NYCRR 1245.3(d):

(a) (i) register or confirm registration as authorized e-filing users with the New York State Court Electronic Filing system (NYSCEF); and

(ii) enter electronically in NYSCEF such contact information and additional information as the court may require;

or

(b) if an attorney exempt from e-filing, serve upon all parties and file with the court by hard copy service method, an attorney exemption certification.

**Parties not represented by an attorney.** Unrepresented litigants are exempt from e-filing, but may voluntarily participate in e-filing in this matter by:

(a) registering as an authorized e-filing user in this matter with the NYSCEF site and entering case and contact information about the particular cause; and

(b) recording his or her consent electronically in the manner provided at the NYSCEF

site; and

(c) serving and filing documents by electronic means as provided under these rules.

Note: An unrepresented litigant who has consented to participate voluntarily in e-filing in this matter may withdraw such consent at any time by filing and serving on all parties a notice of intent to cease e-filing (AD-EF-06).

**Important: Under 22 NYCRR 1245.5(c), upon the expiration of the 20-day registration and notice period, any party (other than persons exempt from e-filing) who fails to meet his or her obligation to register and enter information will be deemed served with any document electronically filed in this matter.**

For information on how to participate in e-filing, unrepresented litigants should contact the appropriate clerk in the court where the matter was filed or visit [www.nycourts.gov/efile-unrepresented](http://www.nycourts.gov/efile-unrepresented). Unrepresented litigants also are encouraged to visit [www.nycourthelp.gov](http://www.nycourthelp.gov).

For additional information about electronic filing and to create a NYSCEF account, visit the NYSCEF website at [www.nycourts.gov/efile](http://www.nycourts.gov/efile) or contact the NYSCEF Resource Center (phone: 646-386-3033; e-mail: [nyscef@nycourts.gov](mailto:nyscef@nycourts.gov)).

Dated: October 30, 2023

[Redacted]

Name

Firm Name

[Redacted]

Address

[Redacted]

Phone

[Redacted]

E-Mail

To: Erie County District Attorney

25 Delaware Ave.

Buffalo, NY 14202

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

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THE PEOPLE OF THE STATE  
OF NEW YORK

v.

ORDER TO SHOW CAUSE

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TO: John Flynn, Erie County District Attorney

It is hereby ORDERED that the Erie County District Attorney's Office show cause before Hon. \_\_\_\_\_, a Justice of the Appellate Division, Fourth Judicial Department, at 701 Seneca Street, Suite 350, Buffalo, New York 14210, at 10:00 a.m. on October \_\_, 2023, why the following relief should not be granted.

1. A stay of the sentence imposed by Hon. M. William Boller on October 18, 2023, during the pendency of the appeal.
2. The defendant's release on his own recognizance.

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 October \_\_, 2023, which shall be deemed sufficient service.

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HON.  
Justice of the Appellate Division

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

---

THE PEOPLE OF THE STATE  
OF NEW YORK

v.

[REDACTED]

AFFIRMATION IN  
SUPPORT OF APPLICATION  
FOR AN ORDER TO SHOW CAUSE

[REDACTED]

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

[REDACTED] attorney licensed to practice law in the courts of this State, affirms the truth of the following statements under penalties of perjury.

1. I am counsel to the defendant [REDACTED] who was charged in this indictment with criminal possession of a weapon in the second degree (Penal Law § 265.03[3]).
2. Following the denial of his motions to dismiss the indictment and suppress the firearm, [REDACTED] pleaded guilty as charged but did not waive his right to appeal.
3. On [REDACTED] Mr. [REDACTED] was sentenced to three and one-half years imprisonment and two and one-half years post-release supervision. His sentence commenced on the same day.
4. Also on the date of sentencing, a Notice of Appeal was filed with this Court and served on the Erie County District Attorney's Office (*attached*, Exhibit A).
5. [REDACTED] seeks a stay of the sentence, and release on his own recognizance, during the pendency of the appeal. I make this affirmation in support of my application for an order to show cause why the relief should not be granted.
6. Upon application of a defendant who has taken an appeal to this Court from a judgment of conviction, a Justice of this Court may issue an order both (a) "staying or suspending

the execution of the judgment pending the determination of the appeal” and (b) “either releasing the defendant on his own recognizance or fixing bail” (CPL 460.50[1], [2][b][i]).

7. A stay should be granted because [REDACTED] is likely to succeed on the merits of the appeal, and he will be irreparably prejudiced if it is not granted.
8. Mr. Brundige is not a flight risk. He was out of custody during the proceedings below, and he voluntarily showed up for every court appearance. He should be released on his own recognizance.

**The firearm was unlawfully recovered.**

9. As the first ground for the stay application, the lower court erred in denying the motion to suppress the firearm.
10. On [REDACTED] Mr. [REDACTED] was pulled over by Buffalo Police Officer Jenna [REDACTED] for allegedly driving a vehicle with a suspended registration. The police immediately took him into custody, frisked him, and searched his vehicle. During the search, now claimed to be an inventory search, a firearm was recovered in the glove box.
11. “The People bear the burden of demonstrating the validity of an inventory search. Where an inventory search of an automobile is challenged under the State and Federal Constitutions, New York case law requires the People to establish ... (1) that the vehicle was lawfully impounded, (2) that the search was conduct pursuant to a standardized local police procedure that limits the discretion of the officers in the field, and (3) that the inventory was not conducted as a pretext to search for evidence” (*People v. Mortel*, 197 AD3d 196, 215 [2nd Dept. 2021]).

*The vehicle was not lawfully impounded.*

12. "It is the policy of the Buffalo Police Department to have a vehicle towed whenever it comes under the control of the Department and it is necessary to safeguard the vehicle and its contents from damage or theft; or when the vehicle is evidence or an instrumentality of a crime; or when a vehicle presents a hazard or inconvenience to the public" (People's 2, BPD Impound and Inventory Policy, § 6.1).
13. In § 6.3(A)-(D), the policy lists a number of circumstances under which a vehicle can be impounded, none of which are applicable here. There is no provision for impounding a vehicle on the basis of a suspended registration.
14. In its Decision and Order, the lower court cited § 6.3(E), which expressly forbids an impound solely for an expired license, registration, or inspection. However, it does not follow that this section authorizes an impound for any other reason.

*Even if the vehicle was lawfully impounded, the search violated the procedures of the Buffalo Police Department.*

15. The BPD impound policy provides that "[w]henver a vehicle is to be towed, the officer requested the tow shall ... complete the Vehicle Inventory form while conducting the inventory, noting the disposition of each item of inventory" (People's 2, § 6.7[C]).
16. There is no serious argument that the officers complied with this section of the policy. They were rummaging through the vehicle without any writing utensil, pad, clipboard, or any other way to document the contents. If there was any doubt, PO [REDACTED] put it to rest on cross-examination.

Q. And you appear to be looking through and going through things in [the vehicle], is that fair to say?

A. Yes.

Q. And you don't have an inventory sheet open, correct?

A. No.

Q. And you're not writing things down as you're doing it, correct?

A. Correct.

Q. And you're aware that the policy for BPD is that an inventory form is supposed to be completed, conducted while you're doing the inventory?

A. Yes.

Q. But the picture is kind of evidence that that's not happening that way, correct?

A. Correct (transcript of suppression hearing from April 13, 2023, pp. 13-14).

17. The inventory policy was "little more than an excuse for general rummaging to discover incriminating evidence" (*People v. Galak*, 80 NY2d 715, 719 [1993]). The Constitution requires more.

18. As the prosecution has failed to meet its burden of demonstrating a valid inventory search, the firearm should have been suppressed.

**New York's "may issue" licensing scheme is unconstitutional.**

19. As the second ground for the stay application, the lower court erred in denying the motion to dismiss the indictment on the ground that "the statute defining the offense is unconstitutional" (CPL 210.20[1][a], 210.25[3]).

20. Here, the statute defining the offense charged, Penal Law § 265.03(3), is unconstitutional as applied to this case because it embeds an unconstitutional *may issue* licensing law.

21. The Second Amendment confers a personal right to keep and bear arms for lawful purposes, including the "core lawful purpose of self-defense," (*District of Columbia v. Heller*, 554 US 570, 630 [2008]). This right is fully applicable to the States through the Fourteenth Amendment (*McDonald v. City of Chicago, Ill.*, 561 US 742, 750 [2010]).

22. In *New York State Rifle & Pistol Association, Inc. v. Bruen*, the Supreme Court of the United States announced a rule: a firearm regulation is constitutional only if it is "consistent with




this Nation's historical tradition of firearm regulation" (597 US \_\_\_, 142 S Ct 1211, 1226 [2022]).

23. Rather than apply this simple test, the lower court limited *Bruen* to its facts and found that it had "no impact on the constitutionality of New York's Criminal Possession of a Weapon Penal Law statutes" (*People v. Brundige*, 78 Misc3d 616, 624 [Sup Ct, Erie County 2023, Boller, J.]).
24. The regulations at issue are Penal Law §§ 400.00, the exclusive mechanism for the licensing of firearms in New York, and 265.03(3), the criminal prohibition that embeds the licensing law.
25. A *shall issue* scheme is one in which licensing officials must grant a license to applicants who meet certain objective criteria. A *may issue* scheme is one in which officials have unlimited discretion to grant or deny licenses as they see fit.
26. The licensing law provides, in relevant part, that "[n]o license shall be issued or renewed except for an applicant ... of good moral character" (Penal Law § 400.00[1][b]). This standard gives licensing officials unlimited discretion to grant or deny licenses as they see fit. It is the hallmark of a *may issue* licensing law.
27. In *Bruen*, the Supreme Court struck down Penal Law § 400.00(2)(f), New York's "proper cause" requirement for obtaining a concealed carry firearms license, because it was a *may issue* provision. Logic dictates that if the entire licensing law is *may issue*, it must be unconstitutional on its face.
28. The right to keep and bear arms is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees" (*McDonald* at 780). As such, a licensing law that burdens this right must be analyzed under the same framework as one that burdens the freedom of speech.

29. Imagine a citizen's right to exercise the freedom of speech being vested in the unlimited discretion of licensing officials. Without question, and the Supreme Court has held, such a law would be unconstitutional on its face (*Shuttlesworth v. City of Birmingham, Ala.*, 394 US 147, 151 [1969]).
30. As long as different rules apply in the Second Amendment context, the right to keep and bear arms will remain a second-class right.
31. The logic for striking down Penal Law § 265.03(3) is simple: it embeds an unconstitutional licensing law.

For the reasons stated, the Order to Show Cause should be granted, the sentence should be stayed during the pendency of the appeal, and the defendant should be released on his own recognizance.

DATED:

  
Buffalo, New York

