SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY, CRIMINAL DIVISION, PART DV
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THE PEOPLE OF THE STATE OF NEW YORK

Docket No. 025540C2012

against

MARVIN HENRY,

Defendant.
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FABRIZIO, J.

This decision involves an ex parte application to "so order" a subpoena directed to a government agency. This Court receives many such applications from both the People and defense attorneys. Some of these applications are granted, others are not. This one involves an ex parte application by a defense attorney for records and video surveillance that may or may not be in the possession of the New York City Housing Authority (NYCHA). The Court orally advised counsel that it was denying this application. While it is unusual, and unnecessary, for a Court to issue a written decision in these instances, this one is meant to memorialize reasons given orally to attorneys on each side on prior occasions where applications have been denied, and involves issues that repeatedly arise with these applications.

The defendant has two pending cases on the calendar in the Domestic Violence Part on June 14, 2012. He was arrested in this matter on April 29, 2012 at about 7:30 pm. He is charged with criminal contempt in the second degree [PL 215.50(3)] and accused of violating an order of protection issued hours earlier that same day by an arraignment judge in Criminal Court, Bronx County. The accusatory instrument is an

information, sworn to by the complaining witness, who is the defendant's brother. The complaining witness alleges that at about 6:00 pm on April 29, 2012, he observed the defendant "pushing in on the door to his apartment with such force that it took three people to prevent him from getting inside the apartment." The apartment in question is apparently in a building managed by NYCHA.

According to notes made by the arraignment judge, the People represented that the order of protection, which directed defendant to have no contact with his brother and to not go to his brother's home, was in defendant's pocket at the time of the arrest. The People also alleged that defendant was arrested inside either his brother's apartment or the building in which that apartment is located; the notes are not clear in this regard. Defense counsel told the arraignment judge, in substance, that defendant's brother had not been there at the time of the alleged violation of the order of protection, but that defendant's wife was there and she was allegedly "attacked" in some manner. The People served notice of a statement made by defendant to the arresting officer at the time of the arrest in which defendant was alleged to have said, "Oh ! I wasn't supposed to be there ? I didn't even look at the order. I was so happy I was getting out." Defense counsel requested an adjournment to file pre-trial motions, and the arraignment judge adjourned the case until June 14, 2012 for decision on any motions. The case was not adjourned for trial. To date, the Court has received no defense motions, and is unaware of whether defense counsel has filed a demand for discovery. Of course, defendant has forty five days from the arraignment within which to file motions in this matter. CPL § 255.20.

On May 9, 2010, defense counsel submitted a subpoena duces tecum to be so

ordered by this Court, ex parte. It is directed to NYCHA, a government agency which is not a party to this proceeding. It is drawn to be returnable in this court part on June 14, 2012. The subpoena requests the following:

> "any and all video recordings showing the inside or outside the NYCHA building on 1184 Nelson Avenue, Apt !B, Bronx, New York from between the hours of 5:00 pm and 7:00 pm on April 29, 2012.
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> any and all NYCHA records of incidents occurring at the NYCHA building on 1184 Nelson Avenue Bronx, NY from between the hours of 5:00 pm and 7:00 pm on April 29, 2012
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> any and all records of incidents occurring at the NYCHA building on 1184 Nelson Avenue, Bronx, NY from between the hours of 1:00 pm and 2:00 pm On April 28, 2012."

Since the subpoena seeks production of documents from a government agency, that law requires that it be "so ordered" by a judge. CPL § 610.20(3). Thus, procedurally, this would be the kind of subpoena this Court could so order upon request by an attorney. However, there are procedural and legal impediments that this Court finds to its "so ordering" this subpoena.

"Subpoenas, of course, are process of the courts, not the parties." People v. Natal, 75 NY2d 379, 384 [1990] (citations omitted). As such, they can only be issued in the court's name, and under conditions authorized by statute and recognized as valid pursuant to case law. The applicant must adhere to all procedural prerequisites under relevant sections of both the Criminal Procedure Law and the Civil Practice Law and Rules. Failure to comply with the procedural and substantive requirements can constitute an "abuse of subpoena process." Id. at 385.

.Here, as in many other applications, the subpoena was handed, ex parte, to the court clerk and asked to be presented to the Court for signature. In some instances,

that procedure is fine. However, this is not a proper way to make an application for this type of subpoena. CPLR 2307, referenced within CPL § 610.20(3), requires that an application for a subpoena directed to a government agency must be made by notice of motion, and the party to whom the subpoena is directed must be given "at least one days notice . . . [u]nless the court orders otherwise." The same notice must also be given to "the adverse party," which, in this case, is the People of the State of New York, represented by the Bronx County District Attorney's Office. People v. Bolivar, 121 Misc 2d 229, 231 (Crim Ct NY Cty 1983) (ex parte defense subpoena to government agency not permitted by CPL § 610.25(2)).

As noted, this Court was presented with a bare subpoena. There is no notice of motion. There is no affirmation submitted by counsel stating that NYCHA has been given any notice to appear in court to address this application. There is no indication that the Bronx County District Attorney's office has been placed on notice of the application, which is its right. Among other things, the People can seek a protective order for the information requested. See People v. Austin, 64905C2010, (Sup Ct. Bronx Cty.) (unpublished decision dated March 29, 2012,Duffy, J.). This Court has not received any request to dispense with these procedural requirements. In short, there is a procedural impediment to have this Court "so order" this ex parte subpoena. The failure to comply with both CPLR 2307 and CPL § 610.25(2) constitutes an improper application to obtain records from a government agency via court order, and this "subpoena practice should not be replicated." Natal, 78 NY2d at 385..

A second impediment involves the date the witness is asked to come to court with the materials. The subpoena does not direct a NYCHA witness to bring materials

on a date scheduled for trial. This case was about two weeks old when the subpoena was presented to the Court. The subpoena is drafted to be made returnable on a date when the motion court may issue a decision, assuming defense pre-trial motions are filed in a timely manner and the People have been given adequate opportunity to respond to the motions. By no means is June 14, 2012 a trial date. "Requiring a witness to attend criminal proceedings [via subpoena] when there is no chance of testifying serves no valid purpose. The witness' mute presence on a 'motion day' adds nothing to the proceedings." People v. Neptune, 161 Misc 2d 781, 783 (Sup Ct Kings Cty 1994), Since attorneys may only issue trial subpoenas in misdemeanor cases, this is another practice that should be curtailed.

Moreover, even without these procedural impediments, there is no substantive reason given for ordering NYCHA to turn over the materials requested.. At bottom, this subpoena is being used to obtain pre-trial discovery. Assuming, arguendo, that the materials sought even exist, and are relevant, they may be discoverable upon application to the People under CPL Article 240. That is true, even if there is a claim that the items sought are exculpatory in nature. A subpoena duces tecum may not be used to circumvent statutory discovery rules or to ascertain whether certain evidence exists. People v, Gissendanner, 48 NY2d 543, 551 (1979); . Matter of Constantine v. Leto, 157 AD2d 376, 378 (3rd Dept 1990), aff'd, 77 NY2d 975 (1991); see also Matter of Terry D., 81 NY2d 1042, 1044-45 (1993). It is well-settled that there is no constitutional right to issue a subpoena to search government files even "in search of potential exculpatory evidence."See e,g. People v. Morrison, 148 Misc 2d 61, 64 (Crim Ct NY Cty 1990) (Benitez, J.) (citing Pennsylvania v. Ritchie, 480 US 39, 59 - 60 (1987);

Wetherford v. Bursey, 429 US 545, 559 (1977); United States v. Agurs, 427 US 97, 106, 111 (1976); United States v. Bagley, 473 US 667, 675 (1985)). For this reason as well, the Court declines to "so order" the subpoena.

Finally, CPL §610.30 provides that any subpoena, including a subpoena duces tecum, may be issued only to "a witness whom the defendant is entitled to call in such action or proceeding." That requires a demonstration that the records sought are not only relevant, but are "sought in connection with the guilt or innocence of the defendant, [and not] merely on a collateral issue of credibility of [a] witness." People v. Dodge, 73 Misc. 2d 80, 81 (Nassau County Ct. 1973). Courts also have a duty to insure that any items sought to be produced via subpoena do not include things of non-evidentiary value, or information that might be privileged or private. See People v. Magliore, 178 Misc 2d 489, 495 (Crim Ct Kings Cty 1998); Bolivar, 121 Misc 2d at 231 - 232.

No demonstration of relevance or materiality has even been attempted in this case. Such a demonstration is absolutely necessary, given what the Court is being asked to order NYCHA to provide. Part of the subpoena seeks production of any and all "records" of any and all "incidents" that may exist in Housing Authority files for any number of events that may have occurred during a two hour period on two separate days relating to a multiple dwelling apartment building managed by NYCHA. Aside from being overly broad, compliance with this subpoena could result in the production of documents containing personal and confidential material for individuals not remotely connected to this matter. It could also result in the production of reports that would have no possible relevance to this criminal contempt case. Of course, it also could result in the production of no reports at all; defense counsel has not demonstrated a basis for

this Court to even find that any reports were made to anyone other than the police department about this contempt allegation. Moreover, while the Court is well aware of the proliferation of video cameras throughout the city, defense counsel has provided no basis to conclude that one is in operation that is aimed in the direction of the front door of the complaining witness's apartment.

Given the premature request for a trial subpoena duces tecum, the lack of notice to the District Attorney and the New York City Housing Authority from defense counsel prior to submitting the subpoena to the Court, the attempted use of a subpoena to obtain discovery rather than seek it in the manner specifically provided by the legislature, and the failure of defense counsel to provide any basis to believe that the items sought even exist, let alone how they constitute relevant and material evidence in this case, the Court denies the ex parte application to "so order" this subpoena.

This constitutes the Decision and Order of the Court.

Dated: May 16, 2012

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Hon. Ralph Fabrizio