

<b>Matter of News 12 (Bonie)</b>
2015 NY Slip Op 32424(U)
December 7, 2015
Supreme Court, Bronx County
Docket Number: 1431/2014
Judge: Ralph A. Fabrizio
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**SUPREME COURT OF THE STATE OF NEW YORK  
BRONX COUNTY, PART H98**

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**IN THE MATTER OF THE SUBPOENA DUCES TECUM  
TO NEWS 12 FOR PRODUCTION OF INTERVIEW  
BETWEEN RAY RAIMUNDI AND DEFENDANT, INCLUDING  
BROADCAST AND NON-BROADCAST FOOTAGE**

**THE PEOPLE OF THE STATE OF NEW YORK**

**Indictment No. 1431/2014  
Decision and Order**

**-against-**

**CORRECTED COPY**

**NASEAN BONIE,**

**Defendant.**

-----X  
**FABRIZIO, J.:**

This decision addresses the People’s motion to compel compliance with a trial subpoena as well as a belated cross-motion to quash that subpoena. The People obtained and served a so-ordered subpoena compelling non-party witness News 12 the Bronx, LLC, a subsidiary of Cablevision (“News 12”), to provide the broadcast portions of a thirty-minute, one-on-one interview between News 12 journalist Ray Raimundi and criminal defendant Nasean Bonie, as well as the “out takes” or the portions of that interview not chosen to be broadcast. News 12, through their attorney Dina Sforza, argues that the People have failed to satisfy all three prongs of the test for non-confidential reporter information contained in New York Civil Rights Law § 79-h and O’Neill v. Oakgrove Construction, 71 NY2d 521 (1988). The Court grants the People’s motion to the extent of directing that News 12 provide this Court with the video tape made of the entire interview, for in camera inspection. See Matter of National Broadcasting Co. 238 AD2d 618 (2<sup>nd</sup> Dept 1997). The cross-motion is denied.

## BACKGROUND

On July 31, 2012, Ramona Moore vanished from her residence on Jefferson Place, in Bronx County. She lived in an apartment in a multi-family home. The defendant owned the home and rented the apartment to Ms. Moore. An investigation ensued and defendant became a person of interest. Nearly two years later, in June 2014, the defendant was indicted for Ms. Moore's murder. According to the People, they have no direct evidence linking defendant to the homicide; their case is wholly circumstantial. There is no physical evidence connecting the defendant to the homicide. He did not make an inculpatory statement to the police or the District Attorney's office. According to the People, motive evidence exists, in part, based on allegations that the defendant asked Ms. Moore to submit false paperwork that would have resulted in the government paying him additional funds to subsidize her rent.

At the time of the indictment, Ms. Moore's body had not been discovered. Thus, this was to be the first prosecution for a homicide in Bronx County in which the body of the victim had not been recovered and the People would have been required to prove a homicide without the testimony of a medical examiner. Because of this, the case attracted an unusual amount of press coverage. See e.g., Michael Wilson, [No Body Is Found, but a Man Is Charged With Murder](#), N.Y. Times, June 10, 2014; Thomas Tracy, [Bronx Superintendent Indicted in Woman's 2012 Disappearance, Killing](#), N.Y. Daily News, June 11, 2014. News 12, the local cable channel for Bronx County news and events, joined in that coverage.

On December 15, 2014, News 12 reporter Ray Raimundi visited the defendant at

the Manhattan Detention Complex to conduct an agreed-on one-on-one interview.<sup>1</sup> News 12 had interviewed defendant in 2012, after he claimed police officers searched his residence without a warrant. News 12 broadcast portions of that earlier encounter, as well as portions of the December 15, 2014 interview, on January 20, 2015, in a segment of a news program entitled “Burden of Proof.” Although the entire segment is just over five minutes long, the broadcast part of defendant’s December 2014 interview comprises less than a minute.

The broadcast begins with Raimundi describing the circumstances of the interview. He said that the defendant is “speaking out, eight months after his arrest for a crime he did not commit.” Raimundi states that he spoke with defendant for “about 30 minutes,” and characterizes it as a “riveting interview.” Raimondi reports that the defendant is “confident about his innocence” and that he is “struggling to understand why he’s in jail for murder.” Raimundi tells the viewers that they will only be able to see the interview on News 12.

The video portion of the broadcast interview shows defendant sitting in an empty room in a city jail facility. Other than the defendant, there was at least one videographer present from News 12. No corrections officers or any other individuals are visible in the video. During the broadcast portion of the interview, defendant states, “I’ve committed no crime.” Mr. Raimondi asks defendant, “Did you kill Ramona Moore?”; the defendant replies, “no, I definitely did not kill her. I didn’t have any personal issues with her. Never had any kind of quarrel.”

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<sup>1</sup>The Court asked News 12 to disclose whether the defendant reached out to News 12, or they first contacted him. News 12 has not provided the answer.

The interview stops and Mr. Raimondi addresses the camera: “In fact, Nasean says Ramona was a good tenant, and a good person who always paid her rent on time and was friendly with fellow neighbors. Nasean claims that the charges are all due to a vendetta, orchestrated by the NYPD after he sued the department for ransacking his house, stealing \$40,000 from a safe in his home, and taking his dog.” The defendant then again appears in another clip from the interview. He says, “If I was a suspect, why wasn’t I a suspect in 2012 when I was helping in the investigation – looking for her – allowing the police to enter my home without a search warrant. As I’m suing the department, they charge me.” Mr. Raimondi concludes the broadcast with these words: “There’s a lot more going on here.”

In April 2015, utility workers clearing some brush from the side of a road in Orange County, New York, discovered human remains. On the following court date, April 22, 2015, News 12 applied for video coverage of the court proceedings. Because of the notoriety of the case, as well as purported claims made by the defendant in the past that Ms. Moore was still alive, the Court received an unprecedented number of applications for audio-visual coverage that day. All applications were granted.

During the court appearance, Assistant District Attorney Edward Talty updated the Court on the criminal investigation following the discovery of the body. Two days earlier, medical tests confirmed it was Ramona Moore’s remains. The defendant’s attorney raised an issue regarding a subpoena issued to the New York City Housing Authority Law Department, relating to payments made to defendant for Ms. Moore’s rent through the government’s Section 8 housing program. Counsel said that the records were relevant to show that Moore was up to date with all payments, and because of that

the defendant had no reason to murder her. ADA Talty replied that his case included proof of what he called a “financial motive” for defendant to have killed Ms. Moore. According to ADA Talty, evidence exists showing that defendant tried to “extort” additional money from Ms. Moore, through Section 8 rental payments. Defense counsel agreed that “the issue of the Section 8 payments is very much going to be at issue at trial.” (Minutes, April 22, 2015 at pages 11 - 12).

### THE SUBPOENA

On September 9, 2015, a so-ordered subpoena duces tecum was served on News 12, seeking the aired and un-aired footage of the interview between Raimundi and defendant. The subpoena was returnable to this Court on September 30, 2015. News 12 did not move to quash the subpoena. Nor did they appear in court or send any materials to the Court, or anyone else, prior to the return date. Instead, they chose to mail a letter to the People on the return date itself. In the letter, News 12 told the People they would not be complying with this Court’s order, claiming that the information sought was privileged under New York law. They did, however, provide a copy of the January 20, 2015 “Burden of Proof” broadcast, while claiming to be “reserving all rights and objections to the Subpoena, including, without limitation, the right to seek an order to quash.” (Letter of Dina Sforza to ADA Marisol Martinez-Alonso, dated September 30, 2015). The District Attorney thereafter moved by order to show cause, signed by this Court, to hold News 12 in contempt. That application was returnable on October 28, 2015.

On October 27, 2015, the day before the People’s motion was scheduled to be heard, News 12, through their attorneys, moved, via cross-motion, to quash the

subpoena; the cross-motion was not personally served and was returnable on one day's notice. The next day, attorneys from News 12 appeared in court, along with the People. The Court in its discretion excused News 12's procedural default under CPLR §2215, although News 12 provided no appropriate answer for having ignored the Court's subpoena. The Court heard argument from the People as well as from News 12's attorneys related to their applications. The People argued, inter alia, that defendant's statements to the reporter constituted admissions. Reference was made to the Section 8 rental payments. Counsel for News 12 argued in substance that the information already in the People's possession that would show a motive, combined with the information already disclosed in the broadcast parts of the interview, rendered the People's request for out takes unnecessary. The People argued that they were entitled to all relevant statements contained in the out takes. The attorneys disagreed about whether the People had satisfied their burden to overcome the qualified journalist privilege. The Court set a briefing schedule and adjourned the case for written decision.

#### CONCLUSIONS OF LAW

News 12 is correct that the law relating to confidential news sources is irrelevant to this application. The defendant spoke with the reporter without any promise that any of his statements would be confidential. The relevant law in this matter requires an application of the statutory test where only a "qualified" privilege exists against disclosure of news-gathering materials that are either unpublished or not broadcast. See In re Grand Jury Subpoenas Served on NBC, 178 Misc. 2d 1052, 1055 (Sup Ct NY Cty 1998). Under that test, the party seeking production must make a simple, three-part

showing that the material sought from the reporter “(i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party’s claim, defense, or proof of an issue material thereto; and (iii) is not obtainable from any alternative source.” N.Y. Civ. Rights Law § 79-h (McKinney’s 2015); See People v. Combest, 4 NY3d 341, 345-46 (2005). In considering whether a party is granted disclosure of non-confidential footage in the possession of a reporter, a court is required to view these factors as a “balancing” test weighing the “competing interests” involved. Id. at 346. (citing O’Neil, 71 N.Y.2d at 529). Under this test, “in a criminal case, [a] defendant’s interest in nonconfidential material weighs heavily . . . in *any* case, the interest in sharing non-confidential information is significantly lower than when confidential material is at issue.” Id. (emphasis in original).

Although there is support for the People’s argument, pursuant to People v. Cheche, 151 Misc. 2d 15 (Cayuga Cnty. Ct. 1991), that this Court should consider whether the defendant himself arranged for the interview and used the press as a forum to proclaim his position, as part of the calculus in determining under the balancing test whether the qualified privilege asserted for non-confidential news has been overcome, this Court has no information from either side about who initiated the discussions that resulted in the interview. A criminal defendant, of course, has a constitutional right to remain silent and not make any statements that can be used as part of the prosecution. The prosecution in a criminal case is entitled to utilize any and all relevant evidence to meet their burden of proof, including statements made by a defendant. When a criminal defendant chooses to use the media to “proclaim his innocence,” and actually arranges for the press to come to a prison facility to interview him, it would seem that, on balance,

the press's interest in "shielding" the statements from the prosecution by invoking a "qualified" privilege would be quite low. Nonetheless, this ruling is made without regard to information about who initiated the discussions that led to the journalist's jailhouse interview with the defendant. The People have satisfied their burden even without this information.

First, the People have established that the out takes of defendant's interview contain highly material and relevant information in this homicide prosecution. Anytime a defendant makes a statement related to their guilt or purported innocence, those statements are considered to be "highly material and relevant to a criminal prosecution." Combest, 4 NY3d at 347. In this case, since the broadcast parts of the interview contain statements made by the defendant about the case, it is a very logical conclusion, without even more of a demonstration, that the out takes contain statements relating to the case as well. See Matter of Magrino, 226 AD2d 218 (1<sup>st</sup> Dept 1996).

The DVD of the broadcast provided by the People in support of their argument not only supports this conclusion, but provides an additional, very specific reason for the Court to find that defendant made highly relevant statements to the reporter that are contained on the out takes. News 12 argues that because the People have not demonstrated that defendant admitted to killing Ms. Moore, his exculpatory statements are neither highly relevant or material. Their conclusion narrowly construes the definition of what the rules of evidence recognized as highly relevant, especially in a criminal case. The People do not contend that this is a confession; they argue his statements constitute an admission. And, based on their proffer in this case, they are correct. Any statement made by a defendant which is inconsistent with other evidence in the

People's possession constitutes an admission, making that statement highly material and relevant to the prosecution. See People v. Mercereau, 24 Misc 3d 366, 368 - 69 (Sup Ct Richmond Co 2009) (citing Prince, Richardson on Evidence § 8 - 203)); see also People v. Garcia, 5 AD3d 150 (1<sup>st</sup> Dept 2004) (evidence of defendant's false statements, combined with independent evidence of its falsity, relevant and probative evidence of consciousness of guilt). News 12's argument that this Court should restrict disclosure of statements made to reporters by criminal defendants to only those that are confessions is rejected out of hand.

During the broadcast part of the interview, defendant spoke broadly with the reporter about not having had "any personal issues" with Ms. Moore. Mr. Raimundi revealed that defendant disclosed more specific information relevant to this case. He said defendant also told him, inter alia, that Ms. Moore was a "good tenant" who "always paid her rent on time." The People have contended all along that there was, in fact, a bad relationship between defendant and Ms. Moore, and that there was a specific motive for the murder – namely that she refused to go along with a scheme to have Section 8 pay him additional rent for her apartment. In the context of this case, even defense counsel has alleged that any documentation and/or proof of the defendant's receipt of rental payments is highly relevant. As such, since the short clip broadcast from the thirty minute interview does not contain any of the actual statements made by the defendant and summarized by the reporter about the nature of what the reporter characterized as a good landlord-tenant relationship, the People have demonstrated that the out takes contain material which would be highly relevant to this criminal prosecution. See Magrino, 226 AD2d at 218.

The People have also taken sufficient steps to establish that the material contained on the out takes is not available from any other source. Cf. In the Matter of CBS, Inc., 232 AD2d 291 (1<sup>st</sup> Dept 1996). Unlike a civil case, this defendant is not subject to any kind of pre-trial deposition where he could be questioned about what he told the reporter. There is no one else visible in the broadcast who might have been in a position to overhear anything the defendant said. At the Court's request, the People contacted the Department of Corrections to ascertain whether any corrections officers assigned to guard defendant that day would have been in a position to have heard defendant's admissions. They spoke with counsel from the Department of Corrections (DOC) who could find no record of which corrections officer was assigned to defendant on the date of the interview. A former employee of the DOC, Robin Campbell, described as a press liaison, was apparently present in some manner, but they could not provide the People with any current contact information for Mr. Campbell.<sup>2</sup> Even if a DOC employee was in some proximity to hear some of what was said, the Court agrees with the People that such a witness would be unlikely to remember word for word what the defendant might have said ten months ago.

In any event, a thirty-minute long recorded statement is, almost by definition, not something available from another source, unless that source was a transcript. The People seek to introduce evidence of defendant's actual words. No other source of the exact words possibly can exist other than the News 12 footage. And, this is not merely

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<sup>2</sup>In their reply affirmation, News 12 provides documentation showing that Mr. Campbell now works in Maryland. They argue that, since the People never spoke with him, they cannot satisfy their burden of showing that everything the defendant told the reporter was not available from an alternate source. This Court rejects that argument.

an audio recording – this is a videotape, which shows defendant’s demeanor as he spoke the words, which is, of course, an aid to the jury in assessing the credibility of the communicator as well as the content of the communication. See Combest, 4 N.Y.2d at 349 - 50. Thus, since the videotape is the best, and most reliable evidence of the defendant’s exact words, as well of whether he freely made the admissions at issue, and there is no other source of this exact information, the People’s application satisfies the third part of the test. See Matter of Subpoena Duces Tecum to Mike Ayala, 162 Misc. 2d 108, 113 (Sup Ct Queens Cty 1994).

The remaining part of the test requires the People to demonstrate that the information on the out takes is “critical and necessary” to either their case in its entirety, or “proof of an issue” material to the case. Citing Flynn v. NYP Holdings, 235 AD2d 907, 908 (3<sup>rd</sup> Dept 1997), News 12 argues that the People must show that their ability to convict the defendant of the homicide “virtually rises or falls” based on the information contained in the out takes. The New York Court of Appeals has never used this specific language in connection with a finding about whether particular evidence is critical and necessary. In Flynn, 235 AD2d at 909, the civil “plaintiff simply stated that the materials were ‘critical’ to his claim without setting forth any analysis in support thereof.” (citation omitted). As the defendant also recognizes, even the second circuit recognizes that this “rise and fall” requirement has only been imposed by “several courts.” In re Application to Quash Subpoena to NBC, 79 F.3d 346, 351 (2<sup>nd</sup> Cir 1996). When dealing with a criminal prosecution based on circumstantial evidence, an admission made by a defendant is always a critical piece of evidence. The assessment of whether any particular piece of evidence is critical and necessary in a criminal case must take into

account the type of other evidence the People have in the particular case, even if the test were to require that their ability to convict the defendant “virtually rises and falls” on their ability to have access to, and use, that defendant’s admission.

As noted, the People argue that their case is wholly circumstantial. There is no smoking gun. They have evidence of motive, opportunity, and a witness who saw the defendant carrying things out of the home after Ms. Moore was last seen alive. They have evidence that Ms. Moore and the defendant did not get along and fought about her rent payments. Until April of this year, they had no direct proof that Ms. Moore was even dead, let alone that her death had been ruled a homicide. Where only circumstantial evidence exists, a conviction “rises or falls” based on all of the circumstances, including a defendant’s admission. In this type of case, the jury is instructed that they must consider each and every piece of evidence and conclude “that the inference of guilt is the only one that can fairly and reasonably be drawn from the facts, and that the evidence excludes beyond a reasonable doubt every reasonable hypothesis of innocence” in order to convict the defendant. CJI – Circumstantial Evidence – Entire Case.

Even if the People can now establish through direct evidence that a homicide did occur, they argue that they can only establish defendant’s identity as her killer by circumstantial evidence, and that evidence should include the admissions defendant made to News 12. See People v. Pettis Hardy, 2015 NY Slip Op 08369 (Court of Appeals, November 18, 2015) (a defendant’s statement that does not contain a “direct admission of guilt,” but only allows a jury to draw an inference of guilt, is circumstantial and not direct evidence). Therefore, this evidence on the video – which the People state

are defendant's only admissions about a positive relationship with Ms. Moore in this matter - is critical and necessary to their case. See Mercereau, 24 Misc 3d at 369.<sup>3</sup>

Contrary to News 12's arguments, the People are not seeking to have production of the out takes based on some speculative application that the defendant will take the stand and possibly testify to things that might be inconsistent with what he said to a reporter. See People v. Novack, 41 Misc 3d 749 (Sullivan Cnty Ct 2013). The People want to use defendant's own words – his admissions – to the reporter on their direct case, and prove that they are lies. As these particular admissions are not available from any other source, granting the People's application will provide them with critical and necessary evidence to sustain their burden of proving the defendant guilty beyond a reasonable doubt.

It is hereby ordered that News 12 provide the Court with the entire footage of the interview between reporter Raimondi and the defendant, as well as any transcript they may have. They are not required to obtain a transcript. That material must be provided no later than Monday, December 14, 2015, directly to chambers, for in camera inspection. It is the intention of the Court to order disclosure of those portions of the out takes in which defendant refers to what Mr. Raimondi describes as a good landlord-tenant relationship during which Ms. Moore paid her rent on time. The Court will issue

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<sup>3</sup>In their voluntary disclosure form, annexed to the indictment, the People served notice of a statement made to a detective in this matter on August 3, 2012, three days after she disappeared and nearly two years before the arrest. According to the notice, the defendant said that the last time he saw Ms. Moore was when he had "an argument with her about not paying the rent. She has section 8 and has to pay only \$125 a month and has not paid me. I am going to take her to landlord tenant court to have her evicted. I don't have keys to her apartment because she changed the locks after she moved." His admissions to News 12 state the opposite.

findings about any other parts of the out takes that meet the requirements of what the People characterize as an admission. See In the Matter of National Broadcasting Co. Inc., 238 AD2d at 618. The Court will then inform News 12 what, if any, other material must be disclosed pursuant to the motion to compel. The parties are prohibited from disclosing any of the News 12 out takes to any other entity, forum or person.<sup>4</sup>

This constitutes the Decision and Order of the Court.

**Dated: December 7, 2015**

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**Hon. Ralph Fabrizio**

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<sup>4</sup>Defense counsel has taken no position on this application. He has asked, via letter, to be provided with any materials from News 12 ordered disclosed to the People.