

Exam Number: 4970

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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)
THE PEOPLE OF THE STATE OF NEW YORK,)
)
-against-)
) Index No. 666/20
Enoch ‘Nucky’ Thompson,)
)
Defendant.)
)
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PEOPLE’S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO
CLOSE THE COURTROOM

INTRODUCTION

This is a felony action brought against Enoch “Nucky” Thompson for the crime of Criminal Sale of a Controlled Substance in the Third Degree, in violation of Penal Law §220.39(1). The People file this brief in support of their motion to close the courtroom to the public during the testimony of the undercover officer, whose testimony is invaluable to the case. The defendant has refused this motion. The Court held a *Hinton* Hearing on January 28, 2022. Based on the facts established and relevant legal precedent, the People file this brief to establish that there is an overriding interest likely to be prejudiced if the courtroom is not closed to the public during the detective’s testimony.

STATEMENT OF FACTS

The undercover officer, Shield #1357, has been with the Staten Island Narcotics Division for about six months working in an undercover capacity. H. 4. Previously, he was with the Manhattan North Narcotics Division for about three and a half years. H. 4-5. His undercover responsibilities include purchasing narcotics, observing sales, and making arrests on the streets usually one or two days every week. H. 5.

His assignment in Staten Island is a temporary position expected to last 15 months. H. 7. After the assignment, he expects to be transferred back to Manhattan

North where he would once again cover the area of Manhattan from 96th Street north, river to river. H. 7.

He has around 12-15 open cases currently pending, 8-10 of which are in Manhattan. H. 5. His open cases include some arrests around 104th Street and Amsterdam Avenue, the same area the defendant in this case was arrested. H. 7. He returned to that area about 10 times before his transfer to Staten Island. H. 7. He will likely return to the same area when his Staten Island assignment ends because it is an area known for high narcotics activity. H. 7.

At least a few defendants in his open cases are out on bail. H. 6. He has about six or eight “lost subjects” in Manhattan, from whom he has purchased drugs but have not yet been apprehended. H. 6.

He does not carry a badge, a weapon, or any police paraphernalia in his undercover work to keep his identity hidden. H. 10. He does not travel in marked cars and never uses his real name while undercover. H. 10-11. On the day of the Hinton Hearing, he used his police-issued permit to park his unmarked car near the intersection of Leonard and West Broadway, about a ten-minute walk from the courthouse. H. 14. He wore street clothes and walked six avenues from his car to the courthouse and used a side door instead of the main entrance so that he would be less likely to be noticed. H. 10. He comes to the courthouse in Manhattan about once a month. H. 9. He has not yet encountered any of his subjects in the

courthouse, though he says that he could, and has a cover story ready to explain his presence there if that encounter were to happen. H. 9.

He has been searched by subjects in the past and has been threatened around six times. H. 8-9. He has encountered subjects who carry weapons like knives or guns at least eight times. H. 8-9. He has never publicly testified in previous cases, and fears for his safety, believing that open-court testimony could ruin his cover and endanger his life. H. 11.

On or around January 3, 2021, the officer purchased cocaine from the defendant, Mr. Thompson, who was then arrested and charged with Criminal Sale of a Controlled Substance in the Third Degree. The officer testified against Mr. Thompson at his first trial that ended in a mistrial in May 2021. H. 15. Mr. Thompson was present during that testimony, but the trial was closed to the public. H. 15.

ARGUMENT

- I. THE OFFICER'S SAFETY IS AN OVERRIDING INTEREST LIKELY TO BE PREJUDICED BY OPEN-COURT TESTIMONY BECAUSE HE WILL BE RETURNING TO THE AREA OF ARREST, HE HAS OPEN CASES AND LOST SUBJECTS IN THE AREA, HE HAS BEEN THREATENED BY SUBJECTS IN THE PAST, AND HE TAKES PRECAUTIONS TO MAINTAIN HIS ANONYMITY.

Although a criminal defendant's Sixth Amendment right to a public trial is fundamental, it is neither absolute nor inflexible. People v. Martinez, 82 N.Y.2d 436, 441 (1993). Courts have inherent discretionary power to exclude public from

the courtroom but must exercise such discretion sparingly and only when unusual circumstances necessitate it. People v. Hinton, 31 N.Y.2d 71, 74 (1992). Any closure of a suppression hearing over the objections of the accused must meet the criteria outlined by the Supreme Court in Waller v. Georgia, the first prong of which states, “the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced [by open-court testimony.]” Waller v. Georgia, 467 U.S. 39, 48 (1984). The proponent of closure must assert that a substantial probability of prejudice to a compelling interest will result from an open proceeding; thus, a nexus between the overriding interest and open-court testimony must be established. People v. Jones, 96 N.Y.2d 213, 217 (2001). Courts have been clear that this discretion should be used sparingly and should not permit a *per se* rule of closure for undercover testimony; however, courts have consistently used this discretion when considering the risk to an officer’s safety. People v. Echevarria, 21 N.Y.3d 1 (2013).

Here, the People assert, first, that the undercover officer’s safety is an overriding interest, and second, that such overriding interest is likely to be prejudiced by open court testimony.

A. THE SUBSTANTIAL RISK TO THE UNDERCOVER OFFICER’S SAFETY CONSTITUTES AN OVERRIDING INTEREST.

It is well established that an undercover officer's safety and effectiveness are overriding interests that may warrant courtroom closure, particularly when there is a legitimate fear substantiated by a particularized threat. Martinez, 82 N.Y.2d at 441. In People v. Ramos, the Court of Appeals explicitly stated that “[p]rotecting the safety of law enforcement officers, as a general matter, unquestionably constitutes a compelling interest.” People v. Ramos, 90 N.Y.2d 490, 496. (1997).

Courts have often considered history of threats and an officer's precautions to evaluate the extent of such interests. In People v. Ramos, the Court of Appeals determined that the undercover officers' safety was an overriding interest, where a *Hinton* Hearing revealed they feared for their personal safety if their identities were revealed, and that they took measures to conceal their identities, including using private entrances to the courthouse and travelling in unmarked vehicles. Id. at 494. The trial court granted partial closure for the first officer, Shield #27296, and full closure of the second officer, Shield #569, noting, “the distinguishing factor was that number 569 had in fact been threatened by a former subject.” Id. at 496.

The facts of the present case fall comfortably in same realm. The officer has been threatened while working undercover, has encountered subjects who carry weapons, and takes precautions to maintain his anonymity. He wears street clothes, does not carry a badge or weapon, and never uses his real name while in the field.

His use of his personal car, his parking several blocks away, and his entering the courthouse through a side door further establishes that he fears for his safety should his identity be revealed.

Therefore, the safety of the officer unquestionably qualifies as an overriding interest in this case.

**B. THERE IS A SUBSTANTIAL PROBABILITY THAT THE
UNDERCOVER OFFICER’S SAFETY WOULD BE PREJUDICED BY
OPEN-COURT TESTIMONY.**

Having determined that an officer’s safety is an overriding interest, the Court must assess if there is a “substantial probability” that that interest would be prejudiced by open-court testimony, such that courtroom closure is appropriate. Ramos, 90 N.Y.2d at 498. Mere possibility that an undercover officer’s safety or effectiveness may be compromised does not alone justify closure; rather, a specific link must be made between the officer’s safety concerns and open-court testimony to warrant closure. Id. Thus, a risk of prejudice to a compelling interest such as an undercover officer’s safety depends on the facts of each case. Jones, 96 N.Y.2d at 220. Courts have repeatedly held that the necessary nexus exists when an undercover officer testifies that he will continue to work undercover the area of the arrest or courthouse, has lost subjects or open cases pending in the courts, and takes precautions to maintain his anonymity when attending court. Ramos, 90

N.Y.2d at 498. Martinez, 82 N.Y.2d at 443. People v. Gonzalez, 34 A.D.3d 827 (2007).

In People v. Martinez, the Court of Appeals evaluated the conditions necessary to establish the necessary link based on geographic area. Martinez, 82 N.Y.2d at 443. The Court determined closure was improper because “no link was made, or even attempted, between the officer’s fear for his safety throughout the Bronx area and open-court testimony.” Id. By contrast, in the companion case, People v. Pearson, where the officer identified a particular location—Port Authority in Manhattan—at which she had worked undercover and expected to return, the Court found a sufficiently particularized showing of an overriding interest justifying closure. Id.

The Court further clarified this ruling in People v. Ayala, where, under comparison with the insufficient findings for closure by reference to the Bronx area in People v. Martinez, the officer’s designation of certain areas or precincts in which he was active was a sufficient scope to establish a link. Ramos, 90 N.Y.2d at 500. Martinez, 82 N.Y.2d at 443.

The Court of Appeals again evaluated this issue in People v. Echevarria and its companion case People v. Moss. Although the officer was mainly assigned to a different precinct, he made dozens of buys in the vicinity following the defendant’s

arrest, had several open cases in the area and stated that he could be assigned to that area at any time. Echevarria, 21 N.Y.3d at 13. The Court found this sufficient to establish a substantial probability that the officer's safety would be jeopardized by open-court testimony. Id.

In People v. Jones, where the officer had been transferred from the area of arrest but still had open cases and lost subjects in the vicinity, had been threatened by subjects in the past, and took precautions to conceal her identity, partial closure of the courtroom was granted. Jones, 96 N.Y.2d at 220. The Court found that complete closure was not warranted "because the undercover would not be returning" to work in the area of arrest. Id. at 216.

Where an officer does not specify a particular link to establish a substantial probability of prejudice, closure is improper, as demonstrated in People v. Graves, where the officer had no other cases pending in Manhattan, was no longer working in borough, and noted only a possibility that he would return to the area based on "mere talks among his workplace peers." People v. Graves, 133 A.D.3d 451, 452 (App. Div. 1st Dept. 2015).

Here, although the officer is currently working in Staten Island, he has several open cases and lost subjects in Manhattan and has occasion to go to the courthouse about once a month. Furthermore, his assignment in Staten Island is

temporary, and he expects to return to Manhattan North in about eight months, specifically identifying the neighborhood around 104th Street and Amsterdam Avenue as a heavily targeted area. The officer's experience with threatening subjects and precautions to maintain his anonymity further confirm the substantial probability that his safety would be at risk should his identity be revealed in open-court testimony.

The defense may rely on People v. Martinez to contend that “unparticularized impressions of the vicissitudes of undercover narcotics work in general” is not sufficient to warrant closure of the courtroom. Martinez, 82 N.Y.2d at 443. We do not disagree. However, in the present case, the undercover officer's testimony about previous threats and his efforts to conceal his identity extend beyond a generalized danger of the profession to establish a particularized fear that does in fact constitute an overriding interest, and the facts establish the necessary link to a substantial certainty that that overriding interest would be prejudiced by open-court testimony.

Furthermore, it is worth noting that this issue was previously ruled upon in the first case, where the trial judge concluded that the officer's safety did in fact constitute an overriding interest that warranted courtroom closure.

CONCLUSION

For the reasons stated in this brief, the People respectfully request this Court grant the motion to close the courtroom during the undercover officer's testimony.

Dated: February 24, 2022

Respectfully submitted,

Exam Number 4970
Counsel for the People