COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE: PART 18

THE PEOPLE OF THE STATE OF NEW YORK

DECISION AND ORDER
Indictment No: 00853-2020

vs.

DESEAN COOPER

Defendant

APPEARANCES: HON. JOHN J. FLYNN, Erie County District Attorney
Sean B. Bunny, Esq.
Appearing for the People

Brittanylee Penberthy, Esq.
Appearing for the Defendant

Eagan, J.

This case raises issues surrounding the People's discovery obligations relating to police disciplinary records, what must be disclosed, and to what extent, if any, the disclosure of police disciplinary records impacts the People's ability to effectively enter a declaration of readiness.

The defendant was arraigned before this court on December 1, 2020 on an indictment charging Criminal Possession of a Weapon in the Second Degree, in violation of Penal Law 265.03(3) and Criminal Possession of a Weapon in the Third Degree, in violation of Penal Law 265.02(3). The People did not file a certificate of compliance at that time. At a pretrial conference on December 16, 2020, the People attempted to file a certificate of compliance and declare ready. The defense objected on the basis that they had not received all the police disciplinary records as it relates to the six officers involved in the case and what they had received was a summary card that was two years old. The People responded they had provided the defense with what they had physically received from the Buffalo Police Department (BPD), acknowledged the existence of other disciplinary records that had not yet been turned over but

argued that they had a "flow of information" established with the Buffalo Police and that satisfied their discovery obligation. The Court did not accept the People's declaration of readiness pending a resolution of this issue, adjourned the matter and asked the parties to further explore this issue, consistent with CPL 245.35(1). The matter was adjourned until January, at the People's request.

On January 6, 2021, the People indicated that they had not received any further records from BPD, they reasserted their readiness, arguing that the records sought were administrative records that were not in the People's physical possession, and reiterated their position that they had established a flow of information and were in compliance with their discovery obligations. The Defense continued their objections. It was not clear to the Court as to what efforts had been made to resolve the issue. Given the novel nature of this question, the Court asked the parties to provide written submissions concerning their arguments.

On February 3, 2021, during oral argument, the Defense argued that under CPL 245.20 (1)(k) and the repeal of Civil Rights Law 50-a the People are required to provide the defense with the police disciplinary records as automatic discovery and cannot affectively declare ready until those records are provided. Additionally, the Defense noted that the People are required to provide more than a summary of the records.

The People argued that their discovery obligations are limited to the subject matter of this case including their obligation as it relates to impeachment material and disciplinary records. By extrapolation, if any police disciplinary record did not relate to the subject matter of this case it was not discoverable. They reiterated their position that if there is other impeachment material that's contained in the disciplinary records that they are not in physical possession of, they are not deemed to be in possession of it until they actually have it, as long as they are maintaining the flow of information under 245.55(1). The People then described the "flow of information" that they have been working to establish with all law enforcement agencies in the County and

especially BPD. Acknowledging that while BPD had provided disciplinary records for 50 officers in the department, they had not been fully responsive to the People's requests as it relates to the department as a whole and this case in particular, the People asked the court to exercise its authority to assist them in complying with their discovery obligations by issuing an order directing BPD to provide the records. Further, the People argue that "invalidating" their declaration of readiness is unwarranted since the Defendant has not shown any prejudice.

NY Civil Rights Law 50-a

As enacted in 1976, NY Civil Rights Law 50-a, made all police, among other public officers, personnel records confidential and not subject to inspection or review without the express written consent of such police officer, except as may have been mandated by lawful court order. One of the purported purposes at the time of its enactment was "to prevent criminal defense attorneys from using these records in cross-examinations of police witnesses during criminal prosecutions" (2019 NY S.B. 8496). Effective June 12, 2020, the Legislature repealed Civil Rights Law 50-a. The Legislature's purpose in repealing 50-a was the belief that enactment and subsequent application since 1976 served to undermine the public policy goals of the *Freedom of Information Law* (FOIL), (Public Officers Law 84-89), of "mak[ing] government agencies and their employees accountable to the public" (2019 NY S.B. 8496). FOIL "is rooted in a presumption favoring access to all agency records, ... The theory is that 'public records belong to the public.'" (*Schenectady Police Benev. Ass'n v. City of Schenectady*, 2020 WL 7978093, at 3 [N.Y. Sup. Ct. Dec. 29, 2020]). By repealing 50-a the Legislature made police personnel records public records open to inspection and review by the public, individually and collectively (Public Officer's Law 84).

While doing so, the Legislature further modified FOIL to include specific definitions of what type of records are considered disciplinary records and added protections to prevent the

release of sensitive or private information. In relevant part, Public Officers Law 86 defines the following terms;

> 6. "Law enforcement disciplinary records" means any record created in furtherance of a law enforcement disciplinary proceeding, including, but not limited to: (a) the complaints, allegations, and charges against an employee; (b) the name of the employee complained of or charged; (c) the transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing; (d) the disposition of any disciplinary proceeding; and (e) the final written opinion or memorandum supporting the disposition and discipline imposed including the agency's complete factual findings and its analysis of the conduct and appropriate discipline of the covered employee.
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> 7. "Law enforcement disciplinary proceeding" means the commencement of any investigation and any subsequent hearing or disciplinary action conducted by a law enforcement agency.
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> 8. "Law enforcement agency" means a police agency or department of the state or any political subdivision thereof, including authorities or agencies maintaining police forces of individuals defined as police officers in section 1.20 of the criminal procedure law, a sheriff's department, the department of corrections and community supervision, a local department of correction, a local probation department, a fire department, or force of individuals employed as firefighters or firefighter/paramedics.
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> 9. "Technical infraction" means a minor rule violation by a person employed by a law enforcement agency as defined in this section as a police officer, peace officer, or firefighter or firefighter/paramedic, solely related to the enforcement of administrative departmental rules that (a) do not involve interactions with members of the public, (b) are not of public concern, and (c) are not otherwise connected to such person's investigative, enforcement, training, supervision, or reporting responsibilities.

Section 89 of the Public Officers Law limits disclosure of personal information such as medical or credit histories, home addresses, personal phone numbers, emails, social security numbers, the use of employee assistance programs, mental health services, substance abuse services and any technical infractions, as that term is defined above. Pursuant to Public Officers Law § 87(4-b), such information may be redacted prior to providing the records to a requesting party. Each agency was given 60 days from the enactment of the legislation to promulgate uniform rules and regulations consistent with the legislation to ensure availability of the records. Accordingly, each agency had until August 12, 2020 to establish their procedures for making the records available.

As it relates to the use of the unredacted information in the cross examination of a law enforcement officer, the Legislature explicitly noted that the Courts are capable of setting appropriate limits and determining admissibility (2019 NY S.B. 8496).

The People's Discovery Obligations and Trial Readiness

CPL 245.10 establishes that the People shall act with diligence and good faith in providing "automatic" discovery to the defense in a timely manner. CPL 245.20 delineates a lengthy but non-exhaustive list of items and categories of information that the People are required to provide, without the need for a demand from the defense, when such items and information "are in the possession, custody or control of the prosecution or persons under the prosecution's direction or control" (CPL 245.20[1]). A prosecutor is required to make a diligent and good faith effort to ascertain the existence of discovery material and make it available to the defense even when the information is not in the prosecutor's physical possession and control. "All items and information related to the prosecution of a charge in the possession of any New York State or local police or law enforcement agency shall be deemed to be in possession of the prosecution" (CPL 245.20[2]).

The statute contemplates instances where information has not been timely disclosed and imposes additional and continual discovery duties on the People. "Article 245 envisions two situations in which nondisclosure may arise: (1) when the "prosecution … subsequently learns of additional material or information which it would have been under a duty to disclose … had it known of it at the time of a previous discovery obligation or discovery order," (*CPL* 245.60), and (2) "when, despite the People's diligent and reasonable inquiries to obtain material subject to required disclosure, they … identify some particular items they have not yet acquired" (*People v. Adrovic*, 69 Misc 3d 563, 572 [Crim Ct, Kings County 2020], and *People v. Quinlan*, 2021 WL 474940 [N.Y. City Crim Ct. Jan, 29, 2021]). When such circumstances arise, the People are required to "expeditiously notify the other party and disclose the additional material and

information," (CPL 245.60), or "are required to move, upon good cause shown, for an extension of time to comply with their discovery obligations (245.70 [2])." (*Quinlan*, at 3). In both instances the materials referenced are **subsequently** identified or acquired.

To facilitate the People's continuing discovery obligation CPL 245.55 requires the creation a flow of information. A prosecuting agency must be able to establish sufficient communication for compliance such that a flow of information has been created between the prosecutor and the police "sufficient to place within his or her possession or control all material and information pertinent to the defendant and the offense or offense charged," including impeachment material of a prosecution witness (CPL 245.55[1]).

While the discovery statute was specifically designed with a presumption in favor of disclosure (CPL 245.20[7]) it also recognizes a legitimate need by the prosecution to protect sensitive information or individuals from disclosure and allows the People to decline making disclosure of such information by seeking a protective order pursuant to CPL 245.70 (*See also,* CPL 245.20[5]). CPL 245.30 and 245.35(4) allow the parties to seek the Court's assistance in obtaining discoverable material that requires preservation, special access or may necessitate the use of the Court's authority to carry out the goals of the discovery statute.

Once the People have met their discovery obligation, they are required to certify their compliance. "The certificate of compliance shall state that, after exercising due diligence and making reasonable inquiries to ascertain the existence of material and information subject to discovery, the prosecutor has disclosed and made available all known material and information subject to discovery. It shall also identify the items provided." (CPL 245.50[1]). If following the filing of the initial certificate of compliance the People subsequently learn of additional material subject to disclosure, the People shall file a supplemental certificate identifying the additional material and information provided. (CPL 245.50[1])

Upon the filing of a valid certificate of compliance the People may declare readiness for trial. Pursuant to CPL 30.30(5), the Court is required to make an inquiry on the record as to the

prosecution's "actual" readiness. In making this inquiry, the court must consider any objections made by the defense regarding the prosecution's compliance with discovery. Absent any individualized exceptional circumstances, if the Court determines that the prosecution has not satisfied their discovery obligations, the statement of readiness is not valid for speedy trial purposes (CPL 245.50[3]).

Law enforcement disciplinary records and the People's discovery obligation

This case turns on the issue of what constitutes the People's possession of material and what is known to the People. The Court in *People v. Quinlan*, *supra*, considered these issues in the context of a motion pursuant to CPL 30.30 seeking dismissal of a charge on speedy trial grounds. In interpreting the same statutes references above, the court found that the "language is clear and unambiguous: regardless of whether the People have *actual* possession of discoverable material and information from law enforcement, such material and information is statutorily *deemed* to be in the People's possession" (*Quinlan*, at 4). Compliance with the discovery statute "'requires disclosing 'all known' materials, as well as affirming that due diligence has been exercised to ascertain the existence of any other materials'"(*Quinlan*, at 3 (citing *People v. Adrovic*, 69 Misc 3d 563, 572 [Crim Ct, Kings County 2020]; *see also* CPL 245 [50] [1])). In order for the People to file a valid certificate of compliance "they must actually turn over all known material and information" (People v. Quinlan, 2021 WL 474940, at 3 [N.Y.City Crim.Ct. Jan. 29, 2021]. In other words, the People may not withhold known material and information subject to automatic discovery and expect the court to accept a certificate of compliance and statement of readiness. Considering these concepts in the context of the repeal of 50-a and the People's discovery obligation, it is undisputed that police personnel records are in the possession of the police. Therefore, possession of the records is imputed to the People.

In this case, the People suggest that their discovery obligation as it relates to police personnel records is limited to the subject matter of the charges or the case file. This Court does

not believe that to be a sound interpretation of the plain language of the statute or the legislative intent of the statute. CPL 245.20(1)(k)(iv) specifically delineates and codifies the People's obligation as it relates to categories of information commonly known as *Brady/Giglio* material; information favorable to the defendant and material tending to impeach the character or testimony of a prosecution witness at trial (*Brady v Maryland,* 373 US 83 [1963], *Giglio v United States,* 405 US 150 [1972]. Pursuant to CPL 245.20(1)(k)(iv), "all evidence and information, including that which is known to police or other law enforcement agencies acting on the government's behalf in the case that tends to: . . . (iv) impeach the credibility of a testifying prosecution witness . . . shall be disclosed." The People have a duty to disclose this information "whether or not such information is recorded in tangible form and irrespective of whether the prosecutor credits the information" (CPL 245.20[1][k][iv]). The law does not allow for this information to be filtered by subject matter or by the People's assessment of its credibility or usefulness.

Since the repeal of 50-a, "any record created in furtherance of a law enforcement disciplinary proceeding, including, but not limited to: (a) the complaints, allegations, and charges against an employee; (b) the name of the employee complained of or charged; (c) the transcript of any disciplinary trial or hearing, including any exhibits introduced at such trial or hearing; (d) the disposition of any disciplinary proceeding; and (e) the final written opinion or memorandum supporting the disposition and discipline imposed including the agency's complete factual findings and its analysis of the conduct and appropriate discipline of the covered employee" is, with specific statutorily dictated redactions, subject to review, inspection and discovery (Public Officers Law 86[6]).

"'It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature'" *(Schenectady Police Benev. Ass'n v. City of Schenectady, supra* at 6 (citing, *Majewski v. Broadalbin-Perth Cent. School Dist, 91 NY2d 577, 583 [1998] quoting Tompkins v. Hunter, 149 NY117 [1896]).* The legislative intent in repealing 50-a was to make law enforcement disciplinary records fully available. The definition of "law enforcement

disciplinary records" is expansive and inclusive. It does not distinguish between unfounded, exonerated, substantiated or unsubstantiated. Indeed, there is no indication that any of these terms are used with any uniformity between law enforcement agencies and across the State. Additionally, the definition of "law enforcement disciplinary records" is a non-exhaustive list referencing "any record created in furtherance of a law enforcement disciplinary proceeding" (Public Officers Law 86[6], *see also, Buffalo Police Benevolent Association, Inc. v. Brown,* 69 Misc.3d 998 [Sup Ct, Erie County October 9, 2020]). This law was repealed to specifically allow for the information to be available in the cross examination of police witnesses. Any impeachment material relative to a prosecution witness must be disclosed. When the prosecution witness is a law enforcement officer that information includes the officer's disciplinary records. Once disclosed, the full and appropriate use of the information and its admissibility is subject to further debate and discussion before the court as a *motion in limine* before trial.

The People have candidly acknowledged that there are other disciplinary records in this case that have not yet been disclosed to the defense but have argued that they are in compliance with their discovery obligations because they are not in physical possession of the records and have established a flow of information with BPD. However, as discussed above the language of the statute is clear and unambiguous, possession of police records is imputed to the People regardless of their actual possession. The People are required to disclose "all known" material. The fact that they know this material exists but have not physically obtained the records and made them available to the defense impedes the People's ability to file a valid certificate of compliance and enter a declaration of readiness that the court is able to accept.

Accordingly, this court concludes that the BPA disciplinary records of the People's law enforcement witnesses, are subject to discovery and the People must provide those records. Moreover, given the expansive definition of law enforcement disciplinary records, providing the defense with summaries of the records will not suffice, the entire record, subject to statutorily approved redactions, must be provided.

The People have made an oral request for the court's assistance in complying with their discovery obligations by the issuance of an order directing BPD to produce the records. This Court is aware of law enforcement's reticence in disclosing these records and the obstacles this presents for the People. Indeed, the Buffalo Police Benevolent Association, Inc. and others unsuccessfully filed for declaratory and injunctive relief immediately after the repeal of 50-a to block the release of the records (*Buffalo Police Benevolent Association, Inc. v. Brown, supra*). While this court is willing to exercise its authority pursuant to CPL 245.35(4) to effectuate the goals of the discovery statute, the court lacks jurisdiction to issue such an order at this time. "A court has no power to grant relief against an individual or entity not named as a party and not properly summoned before the court" (*Hartloff v. Hartloff,* 296 A.D.2d 849, 849 [4th Dept 2002], CPLR 5015 [a][4]).

There has been a suggestion by the People in this case that as public records, the police disciplinary records are equally available to the Defense and that the People should not bear the burden of producing them. This ignores the mandatory language of the discovery statute requiring automatic discovery without the need for a defense demand. Additionally, as records in the police possession are deemed in the possession of the prosecution, requiring the defense to make a formal demand for the records by a FOIL request, subpoena or court order shifts the People's discovery burden to the defense. Moreover, this Court is aware that FOIL requests in this County to a number of law enforcement agencies have largely gone unanswered which frustrates the legislature's intent and places the burden on the defense to initiate enforcement proceedings.

Finally, the People have argued that the striking of their declaration of readiness is an extreme sanction. As a point of order, this is not a case of striking the People's readiness, rather it is matter of whether the Court has accepted the People's certificate of compliance and statement of readiness pursuant to CPL 30.30(5). "[T]he People's trial readiness is now directly tied to meeting their discovery obligations, 'such that discovery compliance is a condition precedent to a

valid announcement of readiness for trial'" (*People v. Quinlan, supra* at 3). The record in this case reflects that the Court has not yet accepted the People's statement of readiness pending their response to this discovery issue. Given that the People have not disclosed all known disciplinary records, they have not met the condition precedent; therefore their certificate of compliance is invalid and does not stop the speedy trial clock.

Dated: February 23, 2021

Buffalo, New York

Hon. Susan M. Eagan, J.C.C.