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

Indictment No. 028189C2011
Decision and Order

-against-

DAVID ELLIOTT
Defendant
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FABRIZIO, J.

In this domestic violence-based case, defendant asks the Court to compel the People to directly give him, as an element of pre-trial discovery, the psychiatric records of the complaining witness, who is the mother of his child. Defendant argues that the records are discoverable pursuant to CPL Article 240 as a matter of right under that statute. He also claims that the People must directly provide him with the records because he claims they are exculpatory, simply because the complaining witness has been diagnosed with and treated for bipolar disorder. Alternatively, defendant asks the Court to order the People to provide him with the name of the complaining witness's psychiatrist, so that he may issue a *subpoena duces tecum* for those records. The applications are denied in all respects.

Defendant is charged with criminal contempt in the second degree (PL § 215.50(3)). It is alleged that the defendant violated an order of protection issued in connection with his plea to harassment involving the same complaining witness in 2009. That plea was part of a negotiated and court-approved plea bargain in a case in which he had been charged with aggravated harassment, a misdemeanor. The final order of protection, issued on June 29, 2009 and valid until June 29, 2011, directs defendant to

have absolutely no contact with the complaining witness, including forbidding him from calling her on the telephone. According to the same complaining witness, between March 28, 2011 and May 15, 2011, defendant called her on her personal cellular telephone at least three times each day, leaving the same message, which was, in substance, “Pick up the phone. I want to talk to the baby.” Defendant was arrested on May 18, 2011, three days after the last alleged call was placed. As part of the procedures involving domestic violence cases, the accusatory instrument contains a notation about the relationship between the parties. In this case, it says, “child in common.” When defendant was interviewed by the criminal justice agency, he reported he lived in a private house in New Jersey, and had a working telephone number. He also stated he did not provide financial support for anyone other than himself. It is unknown whether he has acknowledged paternity, or has sought to have custody or visitation from the Family Court as provided for in the temporary orders of protection in this case. Apparently, the child lives with the complaining witness.

On August 11, 2011, defendant moved to dismiss the accusatory instrument, an application which was later denied. At about the same time, he filed a demand for discovery. In that demand, he requested, *inter alia*, “all evidence that may tend to exculpate the defendant, either by indication of innocence or by potential impeachment of a prosecution witness . . . including . . . any medical or psychological records of the complaining witness.” This request is included in discovery demands served in the same or similar form in virtually every case in Bronx County. There is no factual basis spelled out in that demand that such records even exist, let alone why they would be exculpatory if they did. The People’s response to this demand, which is also filed as a

matter of course in every case, simply acknowledges that they "are aware of their *Brady* obligation to furnish the defendant with exculpatory information and will do so immediately if and when such exculpatory information becomes available to the District Attorney." However, at this point, it is undisputed that the complaining witness has received psychiatric treatment, and that medical records do in fact exist.

The defendant's current motion to compel was filed on February 24, 2012. In the sworn affirmation in support of the motion, defense counsel alleges that during a court appearance on January 9, 2012, "the prosecution stated on the record that it will not disclose any information known to it relating to the doctor or doctors who are treating [the complaining witness] for bi-polar disorder." No other sworn allegations of fact are submitted. In an annexed unsworn memorandum of law, counsel refers to discussions had with the prosecutor, in which counsel states that the People indicated they are "are aware that [the complaining witness] suffers from bi-polar disorder, that she continually takes medication, and that she was hospitalized at least once for her condition." Counsel also alleges that at one point prior to the filing of the current motion, the People said they had "spoken with [the complaining witness's] doctor, and as a result of that conversation, the prosecution feels the psychiatric records are irrelevant." It is presumed that the People had the complaining witness's consent to have that discussion.

In that same memorandum of law, counsel alleges that the defendant "has known [the complaining witness] for a number of years and they share a daughter in common. Because of the length of their relationship, [defendant] is all too aware of [her] mental history, including the fact that she has long been diagnosed with bi-polar disorder, has been hospitalized for this disorder at least once in 2005, and receives Supplementary

Security Income because the bipolar disorder is so devastating that she cannot work." Counsel argues that this Court should order the People to turn over all records relating to any psychiatric treatment sought and received by the complaining witness at any time because it is alleged that such information "is necessary to evaluate [the complaining witness's] susceptibility to testify falsely or misconstrue reality."

Counsel's claim that these records must be provided on demand as part of a routine discovery demand is not at all supported by the discovery statute itself. The provision referenced states that, on demand by the defendant, the People must provide "any written report or document . . . concerning a physical or mental examination . . . relating to the criminal action or proceeding, which was made by, or at the request of . . . law enforcement . . . or which was made by a person whom the prosecutor intends to call as a witness at trial, or which the People intend to introduce at trial." CPL § 240.20(1)(c). In this case, the People have not refused to comply with this demand, thereby triggering a reason for the current application. And in fact there is no reason for them to comply with the demand, as not one of the statutory criteria apply here. Defendant has demanded personal medical records generated as a result of private appointments made by the complaining witness with her doctor or doctors. They were not prepared by or at the direction of law enforcement. And, there is nothing in the record remotely suggesting that the People have ever contemplated calling the doctor, or that they will seek to have these private records admitted into evidence. Therefore, the defense application to have the Court order the People to provide psychiatric records of the complaining witness as part of a statutory discovery right that applies to medical records relevant to the case is denied.

Defendant also asks this Court to compel the People to turn over the records because he claims that they may contain exculpatory information bearing on the complaining witness's credibility. It goes without saying that the People are required, as part of an ongoing obligation, to disclose any and all exculpatory information known to them, including information that would impeach a prosecution witness to be called at trial. *See e.g. People v. Fuentes*, 12 NY3d 59, 63 (2009). This Constitutional requirement can be satisfied in a myriad of ways, however, it does not necessitate that the People subpoena records in a pretrial discovery related context, even where psychiatric records of a witness do exist. *See Commonwealth of Pennsylvania v. Ritchie*, 480 US 39, 52 - 55 (1987). Of course, any exculpatory information sought must be in the People's possession. *See People v. Villardi,* 76 NY2d 67,79 (1990). Where information known to the defense is brought to the People's attention by defense counsel and is claimed to be exculpatory, the People may as a practical matter conduct their own investigation to see whether the allegations have any merit. They are not required to do so as a matter of law, but probably should do so as a matter of fairness. In this instance, however, since the defense already has the information it claims to be exculpatory in nature, the People have no additional duty of disclosure if they do not have additional information themselves. *See People v. Buxton,* 189 AD2d 996, 997 (3rd Dept 1993); *see also People v. Smith*, 204 AD2d 140, 141 (1st Dept 1994); *People v. Scattareggia*, 152 AD2d 679 (2nd Dept 1989).

In this case, defendant petitions the Court to compel the People to turn medical records which, at this point, are not in their possession. He does of course have information about the complaining witness's diagnosis. And, the People verbally

confirmed that the information provided to defense counsel by the defendant is correct, namely, that the complaining witness has bipolar disorder. The application to compel would be unnecessary if the information already known can be used by the defendant to impeach the complaining witness. Defendant asserts that diagnosis is itself exculpatory in the sense that he a person with bipolar disorder is presumed to be unreliable and/or "prone" to hallucinations. However, defendant also states that he is seeking an order to compel disclosure of psychiatric records so that he can determine whether there is any evidence to support this assumption. And the seemingly contradictory claims made about the relevance of the diagnosis itself simply does not justify granting the broad application made in this case.

"The days are long past when any mental illness was presumed to undermine a witness's" credibility or competence to testify. *United States v. George,* 532 F.3d 933, 937 (D.C. Cir 2008). In terms of bipolar disorder, there is apparently no published New York authority directly on point about whether such a diagnosis would tend to make a witness in any proceeding incredible or unreliable. However, there are many rulings in other state courts as well as federal courts that stand for the opposite proposition. *See, e.g, Lepping v. Greeno,* 2011 U.S. Dist LEXIS 119017 (D. Alaska, October 14, 2011) (absent specific showing that bipolar disorder has an effect on a witness's ability to recall and testify, allowing cross-examination about this diagnosis would "confuse the issues, mislead the jury, and waste time); *State v. McGill*, 903 A 2d 1016, 1021 (Sup Ct New Hampshire 2006) (no showing that bipolar disorder was relevant to witness's credibility); *State v. Deiterman*, 29 P3d 411, 417 (Sup Ct Kansas 2001) (in capital murder case, court's restriction of cross examination of essential witness about bipolar disorder

diagnosis proper where no showing made that diagnosis had any relevance to credibility); *see also George*, 532 F.3d at 532 F.3d at 937 (in bank robbery case, no proffer made about why main witness to crime should be permitted to be cross-examined about a diagnosis of bipolar disorder where no evidence that disorder itself can cause an individual to have "difficulty in perceiving reality").

In *O'Brien v. Chapparo*, 2005 US Dist LEXIS 46214 (SD Fl 2005), the court extensively explored the question of whether a person could be impeached with evidence that they were diagnosed with bipolar disorder. Citing information from the National Institute of Mental Health, the court found that "symptoms of bipolar disorder do not include distortions of memory or delusions, except 'sometimes' during a severe episode of mania or depression, when some symptoms of psychosis can occur, reflecting the severe mood state of the person at the time. Even these temporary psychotic episodes are not accompanied by memory loss." *Id.* That court also credited testimony by an expert in psychiatry that a person with bipolar disorder "does not distort 'blatant events,' such as a specific set of facts personally observed, but rather may misconstrue subtlety." *Id.* Thus, the court concluded that absent any evidence that a witness was experiencing a severe psychotic episode during the period when the events occurred about which the witness would be testifying, it was not relevant to allow the attorney to question the witness about her bipolar disorder diagnosis.*Id.; See also Dowell El v. Howell*, 2010 U.S. Dist LEXIS 68157 (E.D. Mich 2010).

Defendant claims he has an absolute right to have the People disclose the complaining witness's psychiatric records, possibly going back years before the allegations of criminal conduct in this case, just because "he well knows" about the fact

that she has been diagnosed with bipolar disorder. And that justifies having this Court order such disclosure. That proffer is not enough to grant the relief requested. As potential additional support, defendant asserts that because the complaining witness receives SSI benefits for her mental disorder, her bipolar condition must be viewed to have the same characteristics as a long-lasting psychosis. Of course, to verify this allegation, the Court would also have to compel the People to turn over the complaining witness's completed SSI application and that agency's findings, something that takes this fishing expedition into ever deeper and more collateral waters. As a possible evidentiary proffer, defendant refers to a line from the outdated DSM IV, published in 1994, that apparently listed "detachment from reality" as a symptom of bipolar disorder. The Court has read the current section on bipolar disorder in the DSM-IV R, published in 2000. While the Court is not relying on that for any reason, there is nothing in the revised edition referring to "detachment from reality" as a symptom of bipolar disorder. Similarly, the printout provided by defendant from the Mayo Clinic.com website also contains no reference to any fact which supports the defense position that people with bipolar disorder are unreliable, or prone to fabrication or to misperceive facts. Put simply, nothing in this proffer equates the complaining witness's diagnosis of bipolar disorder with something that is relevant to her credibility or reliability in this specific case to justify granting the application to have Court direct the People to provide her psychiatric records to the defendant as an element of pre-trial discovery.

Arguably, the most relevant fact stated by defendant is that the complaining witness was hospitalized in 2005 for something related to her bipolar condition. Even if that were to be read as a statement that she suffered a severe psychotic episode at that

time, rather than being hospitalized for something less severe, that has no relevance to the alleged crime, which took place six years later. And that's the point. The defendant knows her. They have a relationship. They have at least one child together. Yet nowhere, either in a sworn affidavit, an affirmation from counsel based on information and belief, or in the unsworn memorandum of law, is there a semblance of any factual claim that the complaining witness has ever made up anything, let alone falsely accused the defendant of anything in the past. More to the point, there is nothing alleged to support even an inference that the witness had a psychotic episode that lasted over a two month period between March and May 2011. In fact, since the complaining witness did call the police to report the defendant's actions and report the existence of a real order of protection, and report that the calls involved discussions about a real baby, the record supports the inference that she was aware of the reality of the events she has alleged. If the charges are not true, that finding would not be attributable to bipolar disorder. The complaining witness knew that the order of protection was meant to keep her from getting any telephone calls from a man who pled guilty to harassing her in the past. Especially given the long term nature of the relationship, an application of this kind would be expected to be grounded in facts, not speculation. *Cf. People v. Cesar G.,* 154 Misc 2d 17, 25 (Crim Ct NY Cty 1991). Instead, this is just a case where the record made indicates only that defendant wants the Court to compel the prosecutor to turn over these records "merely in the hope of discovering material to impeach the victim's credibility." *People v. Gutkaiss*, 206 AD2d 628, 630 (2nd Dept 1994).

Defendant also claims he is entitled to have any and all information of a psychiatric nature that might cast doubt on the complaining witness's reliability directly

disclosed by the People because she is the only witness to the events named in the accusatory instrument. *See People v. Rensing,* 14 NY2d 210, 212 (1964) (in death penalty case, defendant entitled to a new trial in the interest of justice where evidence of eyewitness's "sanity" not before jury during first trial). The allegations are based upon a series of telephone calls purported to be from a telephone used by the defendant to the complaining witness's cell phone – three a day for nearly sixty days. These cases, by definition, always have more than one witness. The other one is the custodian of the records of the relevant phone providers. The presence or absence of something as glaring as hundreds of phone calls from one known telephone number to another would be more relevant to the credibility and the reliability of the charges than any speculative inferences that might be drawn based on medical records of the person who made the allegations.

Given all of this, the motion to compel the People to turn over potentially years of psychiatric records of the complaining witness is denied. In addition, the Court is denying the request that the People be ordered to turn over the name and address of the complaining witness's physician. Defendant wants this information so that he can subpoena the confidential psychiatric records of the complaining witness and get them directly. Defendants do have a right to issue a *subpoena duces tecum* in criminal cases, but that right is narrowly circumscribed by statute. CPL § 610.20(3) provides that the attorney for the defendant "may issue a subpoena . . . for the attendance . . . of any witness whom the defendant is entitled to call as a witness at the trial." The same requirement applies to a *subpoena duces tecum*. CPL § 610.10(3). The defendant does not allege that he even wants to call the complaining witness's doctor as a witness, let

alone say why he would even be entitled to do so. He only wants the doctor's records, and then only wants to use them if he finds something in them that he believes may cast doubt on the complaining witness's credibility. This would constitute an improper use of subpoena power by the defense. A *subpoena duces tecum* may not be used merely to "ascertain the existence of evidence" in a criminal case. *People v. Gissendanner*, 48 NY2d 543, 551 (1979); *see also People v. Dodge*, 73 Misc 2d 80, 81 (Nassau County Court 1973) (subpoena for production of medical records of witness quashed where witness had not waived physician-patient privilege and records were "not sought in connection with the guilt or innocence of the defendant but merely on collateral issue of credibility of the witness").

In what is captioned as an "affirmation in opposition to motion to compel," the People ask the Court to deny the application as being overly broad. As noted, the Court has done more than that. However, in an ironic turn of events, after refusing to obtain the records, the People also ask the Court to deny the motion on mootness grounds. Apparently, they have now undertaken to issue their own subpoena to the complaining witness's "treating physician" for records relating to the complaining witness's "mental health." The reason for this change of position is not spelled out. To the extent that there is something known to the People that may be in the records about a diagnosis other than bipolar disorder, or that new facts have come to light since January when they were told by the physician that there was nothing relevant in the records, then it seems prudent for them to subpoena the records. However, the People are also asking this Court to independently examine these records due to the strict requirements of the Mental Hygiene Law. Thus, they are still not agreeing to turn anything over to the

defense, which is the whole point of this motion, and does not make the defense application moot. The defense never asked the People to subpoena records for review by the Court. And now there will be an issue not contemplated by this motion that may have to be addressed based on a new application by the defendant.

In sum, the motion to compel the People to directly provide the complaining witness's psychiatric records to the defendant is denied, as is the request for the People to provide the defense with the name and address of the complaining witness's physician. The Court awaits the next defense application, based on the People's decision to get the records and have the Court now review them.

This constitutes the Decision and Order of the Court.

Dated: April 9, 2012

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Hon. Ralph Fabrizio