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DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 S. Potomac St. Centennial, Colorado 80112	▲COURT USE ONLY▲
People of the State of Colorado **v.** **James Eagan Holmes,** **Defendant**	Case No. **12CR1522** Division: **26**

ORDER REGARDING JANA WINTER'S SECOND RIPENESS CONTENTION RAISED IN SUPPORT OF HER MOTION TO QUASH SUBPOENA AND FOR PROTECTIVE ORDER (C-26(a))

INTRODUCTION

The defendant is charged with shooting, and killing or injuring, numerous people inside an Aurora movie theatre during the early morning hours of July 20, 2012. On October 2, he filed a motion for sanctions. In connection with that motion, he served a subpoenaed *duces tecum* and *ad testificandum* on Jana Winter, an investigative journalist employed by FoxNews.com in New York. The matter is before the Court on the motion filed by Winter, pursuant to the Colorado newsperson's privilege, § 13-90-119, C.R.S. (2012), to quash the subpoena and for a protective order ("motion to quash"). The defendant opposes the motion. The People take no position on it.

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During a hearing held on April 1, Winter advanced two ripeness challenges related to the statutory requirements the defendant must satisfy to overcome her newsperson's privilege: (1) she argued that the defendant has not yet exhausted all reasonably available sources that might provide the news information he seeks from her; and (2) she asserted that until the Court determines whether the contents of a notebook seized by law enforcement on July 23 are admissible, the Court will be unable to assess whether the credibility of the witnesses who testified at a December 10 hearing will be a "substantial issue" at trial. At the end of the hearing, the Court sustained the first challenge and granted the defendant leave to present additional evidence on that issue on April 10; the Court did not address the second challenge. For the reasons articulated in this Order, the Court now also agrees with Winter's second ripeness contention.

Accordingly, the Court defers ruling on the merits of Winter's motion to quash and the defendant's motion for sanctions until the Court determines whether the contents of the notebook seized on July 23 are admissible. The Court notes that the notebook's admissibility depends on whether it is protected by the physician-patient privilege or the psychotherapist-patient privilege, an issue that was previously deferred by agreement of the parties until the defendant decides whether he will attempt to enter a not guilty by reason of insanity plea or to introduce expert evidence of his mental condition.

Considering the significant First Amendment interests of Winter and the general public, the Court must proceed with caution and only upon a complete record. As the Colorado Supreme Court stated in *Gordon v. Boyles*, 9 P.3d 1106, 1121(Colo. 2000), a trial court may compel a newsperson to disclose confidential information "only as a last resort when necessary to promote the effective administration of justice."

The hearing scheduled for April 10 shall remain set, as the defendant intends to present additional evidence on the ripeness objection raised by Winter and sustained by the Court at the April 1 hearing. Because Winter is entitled to question any witness called by the defendant at the April 10 hearing, and because the Court continued her subpoena until April 10, her presence at that hearing is still required.

BACKGROUND

The defendant's motion for sanctions alleges that law enforcement violated the Court's July 23 Order limiting pretrial publicity ("July 23 Order") by leaking privileged and confidential information to Winter. The motion is based on an "exclusive" report published by Winter on July 25 which included information purportedly provided to her on or about July 24 by two "law enforcement source[s]" about the contents of a notebook found by the University of Colorado at Denver Police Department ("UCD-PD") around noon on July 23 in a mailroom of

the University of Colorado's Anschutz Medical Campus ("CU-Medical"). The notebook was mailed by the defendant to Dr. Lynne Fenton, the medical director of the Student Mental Health Service at CU-Medical, on July 19, just hours before the crimes charged. Dr. Fenton testified on August 30 that she had seen the defendant as a patient on June 11, 2012, while he was a student at CU-Medical.

Pursuant to a search warrant, the notebook was seized by the Aurora Police Department ("APD") at about 9:10 p.m. on July 23. After the defendant was charged, the Court ordered the notebook delivered to it. The parties thereafter submitted multiple pleadings related to the contents of the notebook, including the defendant's D-9 motion, which requested that the notebook not be disclosed to the People and remain in the Court's custody for safekeeping.

On August 30, the Court held a hotly-contested hearing to address whether the contents of the notebook are protected by the physician-patient privilege, *see* § 13-90-107(1)(d), C.R.S. (2012), or the psychotherapist-patient privilege, *see* § 13-90-107(1)(g), C.R.S. (2012). The defendant argued that the notebook is protected under the latter privilege; the People countered that the former, not the latter, privilege applies, but the notebook does not fall within the scope of that privilege.

Because the hearing could not be completed on August 30, a second hearing was scheduled on September 20. However, on September 20, the People advised

the Court that they had reassessed their position on the litigation over the notebook:

> We are aware . . . based on statements [defense counsel] made in open court . . . that they [are] assessing . . . mental illness or mental health issues . . . related to the defendant. And we have come to the conclusion, then, that there is a high degree of likelihood that whatever privilege exists in this notebook will end up being waived by the defendant pursuant to Colorado Revised Statutes [§ 16-8-103.6(2)(a)], which says that a privilege is waived if the defendant places his mental condition at issue [by pleading not guilty by reason of insanity or by seeking to introduce expert evidence of his mental condition].

9/20/13 Tr. at pgs 21-22. Although the defendant did not express a position on the People's interpretation of § 16-8-103.6(2)(a), he did not object to the proposed course of action. Accordingly, the Court deferred ruling on the privilege issue.[1]

On December 10, the Court held a hearing on the defendant's motion for sanctions. The defendant presented six affidavits and testimony from fourteen law enforcement agents, all of whom denied speaking to the media about the notebook or knowing anyone who had done so.

Two law enforcement agents, Chief Douglas Abraham of the UCD-PD and Detective Alton Reed of the APD, admitted during the December 10 hearing that

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[1] On March 12, over the defendant's objection, the Court entered a not guilty plea on his behalf. Under Colorado law, the defense of insanity may be raised after the arraignment if the Court permits the defendant to do so "for good cause shown." *See* Crim. P. 11(3)(1); § 16-8-103(1.5)(a) C.R.S. (2012). Likewise, if the defendant fails to provide at arraignment the required notice of his intent to present expert testimony regarding his mental condition, he must show good cause as to why he should be allowed to give such notice at a later date. *See* § 16-8-107(3)(b); *People v. Flippo*, 159 P.3d 100, 106 (Colo. 2007).

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they learned of some of the contents of the notebook as Detective Reed thumbed through it before it was placed into evidence. Officer Jason McDonald of the APD was present as the notebook was thumbed through. However, he testified that all he could tell is that the pages had words written on them; they were not blank. He further stated that he heard a conversation about the contents of the notebook in Chief Abraham's presence immediately after Detective Reed leafed through it.[2]

Chief Abraham and Officer McDonald both testified that they had not talked to anyone about the contents of the notebook. Detective Reed did not indicate whether he had shared his knowledge of the contents of the notebook with anyone. Nor was he asked if such communications had taken place.[3]

In light of the evidence presented at the December 10 hearing, the defendant subsequently served a subpoena *duces tecum* and *ad testificandum* on Winter in New York, compelling her to appear before this Court on April 1 and to disclose, both through testimony and her notes, the identity of the two law enforcement sources referenced in her July 25 report. Relying on § 13-90-119, Winter moved to quash the subpoena.

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[2] Commanders James Myrsiades and Stephen Smidt of the UCD-PD were also present as Detective Reed flipped through the notebook. However, Commander Myrsiades testified that he could only see "letters" on the pages of the notebook and could not make out any words, and Commander Smidt testified that he could not see the contents of the notebook.

[3] Sergeant Matthew Fyles testified that as he prepared the affidavit in support of the search warrant for the notebook, he spoke to Detective Reed on the phone about the notebook.

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Section 13-90-119 codifies the newsperson's privilege in Colorado. Subsection (3) of the statute makes the privilege qualified, not absolute. The privilege may be pierced if the person seeking the news information can demonstrate by a preponderance of the evidence: (1) that the news information is directly relevant to a substantial issue involved in the proceeding; (2) that the news information cannot be obtained by any other reasonable means; and (3) that a strong interest of the party seeking the news information outweighs the interests under the First Amendment to the United States constitution of the newsperson in not disclosing her confidential sources and the general public in receiving news information.

The Court heard oral arguments on Winter's motion on April 1. In addressing the first statutory requirement, the defendant maintained that the identity of the law enforcement sources is relevant to two substantive issues in the proceedings: (1) the alleged violation of the July 23 Order limiting pretrial publicity, including any prejudice resulting therefrom and any sanctions that might be warranted;[4] and (2) the credibility at trial of one or more of the witnesses who

[4] Winter maintains that in order to prove that law enforcement violated the July 23 Order, the defendant has to establish that his rights were prejudiced. *See* 4/1/13 Tr. at pgs. 40, 43, and 47. *See also* Motion to Quash at pg. 22. Winter misreads the July 23 Order. The Order made law enforcement officers "subject to the same restrictions" applicable to attorneys, and, with some exceptions not pertinent here, attorneys were prohibited from making "an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication . . . ." Thus, while the defendant asserts that he suffered prejudice as a result of the alleged violation

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testified on December 10.[5] The defendant further averred that these substantive issues, in turn, affect his constitutional right to a fair trial, which outweighs any First Amendment interests of Winter and the general public. Finally, the defendant argued that he has exhausted all reasonably available sources that might provide the information he seeks from Winter.

As relevant here, Winter asserted that the matter is prematurely before the Court and not ripe for ruling because: (1) the defendant has not yet exhausted all reasonably available sources that might provide the information requested; and (2) whether the credibility of any of the witnesses who testified on December 10 will be a "substantial issue" at trial hinges on the admissibility of the contents of the notebook, a question which the Court has not yet resolved. Based on the concerns expressed by the Court during oral argument related to the first challenge, the defendant presented additional testimony from Sergeant Fyles, who had previously testified on December 10. On April 1, Sergeant Fyles testified that what he learned about the notebook when he spoke with Detective Reed on the phone is that it has an unknown number of pages and unknown writing. The Sergeant added that

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of the July 23 Order and that such prejudice should be considered by the Court in its § 13-90-119 (3) analysis, he is not required to prove he was prejudiced to establish a violation of the Order.

[5] The defendant did not raise the credibility issue in his response to Winter's motion to quash. However, Chief Judge Sylvester mentioned it in the January 18 Certificate he issued to compel Winter, an out-of-state witness, to appear before this Court with her relevant notes. More importantly, without objection, the defendant advanced the credibility argument at the April 1 hearing.

neither Detective Reed nor anyone else has ever shared information with him about the actual contents of the notebook.

At the end of the April 1 hearing, the Court agreed with Winter that the defendant has not yet exhausted all reasonably available means to obtain the identity of the law enforcement sources quoted in the July 25 report. More specifically, the Court explained that the defendant failed to ask Detective Reed during the December 10 hearing whether he had shared his knowledge of the contents of the notebook with anyone between July 23, when he examined the notebook, and July 25, when Winter's report was published.[6] Accordingly, the Court deferred ruling on Winter's motion and scheduled another hearing on April 10. Without objection, and pursuant to § 16-9-203(2), C.R.S. (2012), the Court continued Winter's subpoena until April 10.

The Court did not address Winter's ripeness challenge to the defendant's credibility contention at the April 1 hearing. The Court does so now.

ANALYSIS

After giving Winter's motion to quash further consideration, and having conducted an additional review of the record and the applicable legal authorities,

[6] As the Court explained, if Detective Reed told other officers about the contents of the notebook, those officers could be the law enforcement sources referenced in the July 25 article. Indeed, according to Winter and Professor Mark Feldstein of the University of Maryland, it is not uncommon for an investigative journalist to rely on confidential sources who have second-hand knowledge of the information they provide.

the Court agrees with Winter that the defendant's credibility assertion is not ripe for ruling. For the reasons set forth in this Order, the Court concludes that it would be imprudent to resolve Winter's motion to quash, and by extension the defendant's motion for sanctions, before the Court determines whether the contents of the notebook are privileged. Since, by agreement of the parties, that issue has been tabled until the defendant decides whether he wishes to attempt to enter a not guilty by reason of insanity plea or to introduce expert evidence of his mental condition, the Court cannot address the merits of Winter's motion to quash or the defendant's motion for sanctions at this time.

As indicated, the defendant argues that the identity of the law enforcement sources is relevant to two substantial issues: (1) the alleged violation of the July 23 Order, including the prejudice resulting therefrom and any sanctions that might be warranted; and (2) the credibility at trial of one or more of the witnesses who testified on December 10. The former relates to the proceeding on the defendant's motion for sanctions; the latter relates to the anticipated proceeding at trial. "Proceeding," as broadly defined by § 13-90-119(1)(e), includes "any . . . criminal . . . hearing, trial, or other process for obtaining information conducted by, before, or under the authority of any judicial body of the state of Colorado." Thus, both of

the issues on which the defendant relies are involved in a "proceeding" in this case.[7]

The Court only addresses the credibility issue in this Order. Since the Court agrees with Winter's ripeness challenge with respect to that issue, the Court does not address the merits of the defendant's contention that the alleged violation of the July 23 Order justifies piercing Winter's newsperson's privilege.

If the notebook is not privileged and is ruled admissible, it may well prove to be a critical piece of evidence in the case. Even if, and perhaps especially if, the defendant is allowed to enter a not guilty by reason of insanity plea or to introduce expert evidence of his mental condition, the notebook, if admissible, may play a significant role in the case. Of course, the more significant any admissible contents of the notebook are, the more significant the credibility of one or more of the December 10 witnesses is likely to be at trial.

On the other hand, if the Court concludes that the notebook is privileged and inadmissible, it is difficult to discern why the credibility of one or more of the

[7] At the April 1 hearing, Winter posited that "proceeding," as used in § 13-90-119(3), must be interpreted as referring only to a "trial" or the statute is subject to abuse. According to Winter, any party seeking news information could schedule a hearing on that issue in order to satisfy the requirement that the news information requested must be directly relevant to a substantive issue in the proceeding. Winter's construction of "proceeding" flies in the face of the term's statutory definition. Moreover, her concern ignores the fact that a party seeking news information must show that his interest is "strong" and outweighs the First Amendment interests of the newsperson and the general public. For example, here, while the identity of the law enforcement sources is indisputably relevant to a substantial issue in the proceeding on the defendant's motion for sanctions, the defendant must nevertheless show that his interest in finding out who violated the July 23 Order is so "strong" that it outweighs the significant First Amendment interests of Winter and the general public.

December 10 witnesses would be of importance. Indeed, those witnesses may not even testify at trial. The agents employed by the UCD-PD, the FBI, and the Adams County Sheriff's Office who testified on December 10 may have had limited or no participation in other aspects of the investigation in this case. The APD agents who testified on December 10 may have done other work in the case, but the record before the Court is barren in this regard. Even if these witnesses were involved in other areas of the investigation, it will be awkward, and possibly contraindicated, for the defendant to attempt to impeach their credibility with their December 10 testimony if the contents of the notebook are not admitted into evidence and the jury is not allowed to hear about them.

Under these circumstances, the Court concludes that the credibility contention raised by the defendant in attempting to satisfy the first and third requirements in section 13-90-119(3) is not ripe for ruling. The doctrine of ripeness requires that a controversy between the parties is "sufficiently immediate and real so as to warrant adjudication." *Metal Mgmt. West, Inc. v. State*, 251 P.3d 1164, 1174 (Colo. App. 2010) (quotation marks and citations omitted). "Courts 'will not consider uncertain or contingent future matters because the injury is speculative and may never occur.'" *Id.* (quoting *Jessee v. Farmers Ins. Exch.*, 147 P.2d 56, 59 (Colo. 2006)). In deciding ripeness, the Court must look "to the hardship of the parties of withholding court consideration and the fitness of the

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issues for judicial decision." *Stell v. Boulder Cnty. Dep't of Soc. Servs.*, 92 P.3d 910, 914-15 (Colo. 2004). In order for an issue to be "fit," there must be "an adequate record to permit effective review." *Id.* at 915.

At this time, the Court can only speculate about whether the notebook will ever be introduced at trial, and, if so, whether its contents will be of substantial value to the parties.[8] The notebook may or may not be introduced, and its contents may or may not be of significance. Given these uncertainties, the record is inadequate to allow the Court to assess whether the credibility of one or more of the December 10 witnesses will be "a substantial issue" at trial. The record is equally deficient to afford the Court an adequate opportunity to determine whether the defendant's interest in challenging the credibility of one or more of the December 10 witnesses is "a strong interest" that outweighs the interests under the First Amendment of Winter in not disclosing her confidential sources and the general public in receiving news information.[9]

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[8] The Court is aware of the contents of Winter's July 25 report. However, it is difficult to assess the significance of the notebook from that report. Furthermore, as the People observed on April 1, without reviewing the notebook, the Court is unable to determine the accuracy of the July 25 report.

[9] The determination regarding the admissibility of the notebook may also affect the defendant's assertion that the alleged violation of the July 23 Order is sufficient to overcome Winter's newsperson's privilege. This is so because the defendant has urged the Court to consider that what was allegedly leaked to Winter was confidential and privileged information and that Winter's July 25 report will prevent him from obtaining a fair trial.

Moreover, deferment of the issue will result in little hardship to the parties. This Order will not delay the case, as the motions hearings and trial dates will be unaffected by it.

The Court realizes that the defendant is understandably eager to have Winter's motion to quash and his motion for sanctions resolved.[10] The Court is just as eager. However, the Court is not comfortable proceeding on an incomplete record. As soon as the record is adequate, the Court will move forward on both motions.

The Court also recognizes that Winter will suffer some hardship as a result of her motion being deferred yet again because she will likely be ordered to return for a third hearing. But she repeatedly sought to continue her subpoena in the four letters that preceded her motion to quash. The only difference between those requests and this deferment is that the Court is requiring her to appear in person so that her subpoena may be continued. In any event, the Court will do its utmost to ensure that Winter only has to appear for one additional hearing after April 10.[11]

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[10] Before the April 1 hearing, Winter moved four times to continue her appearance before this Court until her appeal in New York challenging the subpoena issued by a New York court is resolved. *See* March 18, 19, 26, and 28 Letters to Chief Judge Sylvester. The defendant objected to any continuance of the proceedings.

[11] The Court considered granting Winter's motion to quash instead of deferring it. However, the Court concludes that the interests of justice and judicial economy are best served by deferment. First, the Court is applying the ripeness doctrine to a motion, not the entire case. Second, the motion simply seeks to quash a witness's subpoena. Third, other aspects of the motion to quash appear to be ripe for ruling. Fourth, the parties and Winter all agree that the Court has the

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CONCLUSION

For all the foregoing reasons, the Court agrees with Winter's second ripeness contention. The defendant's credibility argument is not ripe for ruling. Therefore, Winter's motion to quash and the defendant's motion for sanctions are both deferred until the Court determines the admissibility of the notebook. The April 10 hearing remains set and Winter's presence at that hearing continues to be required.

Dated this 8th day of April of 2013.

BY THE COURT:

Carlos A. Samour, Jr.
District Court Judge

authority, pursuant to § 16-9-203(2), to continue Winter's subpoena. Lastly, if Winter's subpoena were quashed, substantial additional time and expense would likely be necessary to re-subpoena her.

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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2013, a true and correct copy of **Order regarding Jana Winter's second ripeness contention raised in support of her motion to quash subpoena and for protective order (C-26(a))** was served upon the following parties of record.

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