

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: 201
<p style="text-align: center;">ORDER REGARDING MOTION OF NON-PARTY WITNESS JANA WINTER TO VACATE THE SEPTEMBER 30, 2013 HEARING DATE (C-53)</p>	

In Motion C-53, Jana Winter moves to continue the September 30, 2013 hearing until January 2014. Both parties object. For the reasons set forth in this Order, Winter’s motion is granted over the parties’ objections. Accordingly, the September 30 hearing is continued until Friday, January 3, 2014.

On October 2, 2012, the defendant moved for sanctions based on law enforcement’s alleged violation of a pretrial publicity Order issued by the Court. *See* Motion D-17. Relying on an article authored by Winter, an investigative journalist at FoxNews.com stationed in New York, the defendant asserted that law enforcement had leaked “privileged and confidential information to the media concerning the contents of a [notebook] that [the defendant] sent to his treating

psychiatrist.” *Id.* at p. 1. The Court, the Honorable Chief Judge William Sylvester presiding, granted the defense’s request for an evidentiary hearing on the motion for sanctions. The law enforcement officers who had an opportunity to view the contents of the notebook or to hear conversations about them testified at that hearing. However, none of them admitted to providing information about the notebook’s contents to Winter or anyone else in the media.

Thereafter, the defendant sought to learn the identity of the confidential law enforcement sources credited in Winter’s article by requesting a certificate from the Court to compel Winter, an out-of-state witness, to testify and produce her notes related to the article. Because of the evidentiary hearing held by the Court and the testimony provided at that hearing, the information requested, in addition to being relevant to the defendant’s motion for sanctions, was now also pertinent to the credibility of the officers who testified at the hearing, some of whom are likely to testify at trial. Pursuant to the defendant’s request, Chief Judge Sylvester issued a certificate to compel Winter’s attendance and the production of her notes. The defendant then commenced a special proceeding in New York to cause the issuance of a subpoena by a New York court requiring Winter to appear before this Court and to produce the materials requested. The Supreme Court of New York County, the Honorable Larry Stephen presiding, granted the defendant’s request, and Winter appeared before this Court on April 1, 2013. Before doing so,

however, she filed a motion, pursuant to the Colorado newsperson's privilege, § 13-90-119, C.R.S. (2012), for a protective order and to quash the subpoena *duces tecum* and *ad testificandum* ("motion to quash") issued by the New York court. That motion is still pending.

Winter appealed Judge Stephen's decision to the New York Supreme Court's Appellate Division, the intermediate appellate court in that state. On August 20, 2013, in a 3-2 split decision, the Court affirmed Judge Stephen's ruling.

Both the defendant's motion for sanctions and Winter's motion to quash are set for a hearing before this Court on September 30. Winter wants to delay the hearing to appeal the New York Supreme Court's decision to the New York Court of Appeals, New York's highest court.

At the outset, the Court makes clear that it has not yet resolved Winter's motion to quash. Therefore, this Order should not be interpreted as addressing the merits of that motion.

Given the real possibility that Winter may face indefinite jail time in this case as a remedial sanction for her refusal to disclose her confidential sources, and given further the significant First Amendment interests of Winter and the public, the Court concludes that Winter should be afforded the opportunity to exhaust all

avenues to obtain appellate relief from Judge Stephen's decision.¹ The concerns expressed by the parties, while understandable, do not persuade the Court to deny Winter's motion.

The defendant contends that delaying the September 30 hearing "is likely to impact the timeline for both sets of motions hearings" Defendant's Response at p. 2. The Court is unconvinced. The defendant does not explain why he believes this to be the case. Nor does he indicate how deferral of the motions to quash and for sanctions will impact the timeline for the hearings in October and

¹ Should this Court deny Winter's motion to quash, it will order her to answer questions about the identity of her confidential law enforcement sources and to produce her notes. If she refuses to obey the Court's orders despite a warning to desist, she will be in direct contempt of Court. C.R.C.P. 107(a)(1) defines the actions constituting contempt to include "disobedience . . . by any person to . . . any lawful . . . order of the court." Under C.R.C.P. 107(a)(1), there are "two types of contempt, direct and indirect." *In re Marriage of Cyr and Kay*, 186 P.3d 88, 91 (Colo. App. 2008) (quoting C.R.C.P. 107(a)(1)). When contempt "occurs out of the direct sight or hearing of the court," it is indirect contempt. C.R.C.P. 107(a)(3). In contrast, direct contempt is "[c]ontempt **that the court has seen or heard** and is so extreme that no warning is necessary or **that has been repeated despite the court's warning to desist.**" C.R.C.P. 107(a)(2) (emphasis added). Hence, in direct contempt cases, the Colorado Rules of Civil Procedure "require the trial court to warn a person" to stop the contemptuous behavior "unless that person's conduct is 'so extreme that no warning is necessary.'" *People v. Aleem*, 149 P.3d 765, 782 (Colo. 2007) (quoting C.R.C.P. 107(a)(2)). "When a direct contempt is committed, it may be punished summarily," as ordinary due process requirements do not apply. C.R.C.P. 107(b); *People v. Jones*, 262 P.3d 982, 988 (Colo. App. 2011). Prior to the imposition of any sanction for direct contempt, the contemnor must have "the right to make a statement in mitigation." C.R.C.P. 107(b). Rule 107 "also distinguishes between two types of contempt sanctions, punitive and remedial." *In re Marriage of Cyr and Kay*, 186 P.3d at 91 (citing C.R.C.P. 107(a)(4) & (5)). "Punitive sanctions are criminal in nature and are designed to punish 'by unconditional fine, fixed sentence of imprisonment, or both, for conduct that is found to be offensive to the authority and dignity of the court.'" *Id.* (quoting C.R.C.P. 107(a)(4)). Remedial sanctions, on the other hand, "are civil in nature and are intended 'to force compliance with a lawful order or to compel performance of an act within the person's power or present ability to perform.'" *Id.* at 92 (quoting C.R.C.P. 107(a)(5)). If the contempt consists of the failure to perform an act which is within the person's power to perform and the court finds that the person has the present ability to perform the act ordered, the person may be fined or imprisoned *indefinitely* until its performance. C.R.C.P. 107(d)(2).

December. Likewise, the People generally oppose delaying the trial, but fail to articulate any reason why the motions to quash and for sanctions must be resolved before the October and December hearings. People's Response at pp. 1-2.

The Court recognizes that these motions must be resolved before trial because if Winter is compelled to reveal her sources, that disclosure could affect the credibility of one or more of the prosecution's trial witnesses. But the Court believes that ruling on the motions now and keeping the September 30 hearing may delay the case unnecessarily.

As the People acknowledge, no matter how the Court rules on these motions, an immediate appeal is almost certain to follow the September 30 hearing either by Winter or by the defendant. There is a high likelihood that the case would then be stayed pending such appeal. The People appear to have resigned themselves to this potential reality and urge the Court to get the process going as soon as possible. *See* People's Response at pp. 1-2.

The Court views the situation differently. The Court believes that the most prudent course is paved with patience and restraint.

Given that Winter is already pursuing an appeal to the New York Court of Appeals, the Court believes that it makes more sense to defer ruling on the motions to quash and for sanctions until the New York High Court has addressed Winter's appeal. If the Court proceeds with the hearing on September 30, the Court all but

guarantees that the trial will be delayed because no matter what ruling the Court issues, it will very likely trigger an appeal that will stay the proceedings.² Since it is possible that the New York Court of Appeals will rule in Winter's favor and will, in turn, render the motion to quash moot, it makes more sense to avoid any delays until that Court has addressed Winter's appeal.

Moreover, ruling on the motions to quash and for sanctions before September 30 will very likely delay both sets of motions hearings. On the other hand, postponing the September 30 hearing until January will allow the Court to complete the motions hearings scheduled for October and December. If the New York Court of Appeals later rules against Winter, this Court will have ensured that only the trial is delayed. Conversely, if the New York Court of Appeals later rules in Winter's favor, this Court will have ensured that the case is not delayed unnecessarily.

In general, the Court does not believe in deferring motions unnecessarily. However, in this case, there are matters beyond the Court's control, and ruling on the motions to quash and for sanctions on or before the September 30 hearing risks delaying the proceedings unnecessarily. The Court cannot prevent Winter from pursuing an appeal in New York; in fact, she is already doing so. Nor can the

² If Winter's motion to quash is denied and, as she asserts, her appeal must be to the Colorado Court of Appeals, not the Colorado Supreme Court, *see* Reply at p. 6, the delay could be even longer because regardless of what the Court of Appeals decides, the unsuccessful party will be free to ask the Colorado Supreme Court to review the matter.

Court dictate how the New York Court of Appeals will resolve her appeal. Even if this Court decided not to wait for the appeal in New York to proceed, Colorado's Appellate Courts may well stay any appeal taken from this Court's order following the September 30 hearing to allow the New York Court of Appeals to resolve Winter's appeal. Indeed, Colorado's Appellate Courts may conclude that, before determining whether Winter is protected by the Colorado newsperson's privilege, the New York Court of Appeals should be allowed to address whether Judge Stephen correctly issued Winter's subpoena in the first place.

The Court notes that, although this Order overrules the defendant's objection to a continuance, it may ultimately work to his advantage. One of the factors the majority of the New York Supreme Court considered in upholding Judge Stephen's ruling is that "the facts presented . . . d[id] not establish with absolute certainty that the Colorado District Court will require the disclosure of confidential sources." New York Sup. Ct. Op. at pp. 6-7. In the Court's view, this uncertainty "call[ed] into question whether this matter truly embodie[d] a conflict between evidence privilege under New York law and evidence that is unprotected in the demanding State." *Id.* at p. 7. The Court added that it was "not certain" that Winter would "forfeit privilege protection under the law of the demanding state." *Id.* "Given this uncertainty," the Court found no "countervailing public policy concerns that justif[ied] the refusal of [the subpoena]" *Id.* (quotation marks and citation

omitted). By seeking and obtaining a continuance of the September 30 hearing from this Court, Winter ensures that the uncertainty to which the majority of the New York Supreme Court alluded remains and will continue to be present when the New York Court of Appeals reviews her appeal.

For all the foregoing reasons, the Court concludes that it is in the interests of justice and judicial economy to grant Winter's motion to continue the September 30 hearing until January 3. The parties have failed to persuade the Court that granting Winter's motion would be prejudicial to them. Moreover, continuing the September 30 hearing allows the Court to proceed with the two sets of motions hearings as scheduled and avoids any unnecessary delay of the February 3 trial date. Accordingly, Motion C-53 is granted over the parties' objection.

The September 30 hearing is hereby converted to a subpoena return date so that the Court may continue Winter's subpoena until January 3. The motions hearings set in October and December remain set, as does the February 3 trial date.

Of course, if the New York Court of Appeals declines to take Winter's appeal, the parties should notify the Court as soon as possible. This Order is premised on Winter's representation that the New York Court of Appeals "will soon hear Winter's appeal" from the New York Supreme Court. Reply at p. 1.

Dated this 3rd day of September of 2013.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Carlos A. Samour, Jr.", written over a horizontal line.

Carlos A. Samour, Jr.
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2013, a true and correct copy of **Order regarding motion of non-party witness Jana Winter to vacate the September 30, 2013 hearing date (C-53)** was served upon the following parties of record:

Karen Pearson
Amy Jorgenson
Rich Orman
Dan Zook
Jacob Edson
Lisa Teesch-Maguire
George Brauchler
Arapahoe County District Attorney's Office
6450 S. Revere Parkway
Centennial, CO 80111-6492
(via e-mail)

Sherilyn Koslosky
Rhonda Crandall
Daniel King
Tamara Brady
Kristen Nelson
Colorado State Public Defender's Office
1290 S. Broadway, Suite 900
Denver, CO 80203
(via e-mail)

Attorneys for Jana Winter:

Michael C. Theis
Christopher O. Murray
Dori Ann Hanswirth
Hogan Lovells US LLP
1200 Seventeenth Street, Suite 1500
Denver, CO 80202
(via e-mail)

Cheryl Koburian