

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

STATE OF FLORIDA

v.

Case No. 50-2019-CF-001606-AXXX-MB

HUA ZHANG,

Defendant.

STATE OF FLORIDA

v.

Case No. 50-2019-CF-001606-BXXX-MB

LEI WANG,

Defendant.

**ROBERT KRAFT'S EMERGENCY MOTION TO INTERVENE TO OPPOSE
DISCLOSURE OF CERTAIN VIDEO RECORDINGS AND NOTICE OF JOINDER**

Pursuant to Florida Rule of Criminal Procedure 3.220(m)(1), Robert Kraft respectfully moves to intervene in these proceedings on an emergency basis to oppose the State's intended disclosure of certain video recordings that are the subject of motions for protective orders currently pending both in this Court and before the Honorable Judge Leonard Hanser in Case Nos. 2019MM002346AXXXNB and 2019MM002348AXXXNB ("Videos") and hereby gives written notice of his joinder in and adoption of the Joint Emergency Motion to Prohibit State From Releasing Documents Pending Resolution of Defendants' Motion For Protective Order and Motions to Intervene by the Media filed by Defendant Lei Wang ("Defendant") earlier today. As explained below, releasing the Videos would violate Mr. Kraft's constitutional rights if disseminated, and Mr. Kraft has an obvious and profound stake in any potential disclosure of the sensitive materials at issue, which, among other things, depict him naked, and should therefore be permitted to intervene for the sake of protecting his interests and informing this Court's decision.

Crucially, the State's declared intention to release the Videos in this posture runs contrary to assurances it made before this very Court and to Judge Hanser, promising to withhold disclosure until both courts have an opportunity to rule on the motions for protective orders. To quote what the State itself represented on the record to this Court:

THE COURT: I am now back in civil court. Good to see you folks. So that's one thing I wanted to be clear. Whether it's Judge Hanser or myself has a ruling, nobody has any intention to let this out until the judge has ruled.

MR. KRIDOS: We do not, Judge

Transcript of April 12, 2019 Hearing at 9:14–18

MR. KRIDOS: Judge, I can promise the court that nothing is being released until you issue an order. Obviously Ms. Wang's case is different from Mr. Cras (phonetic) case downstairs, but we're going to rely on the order of the court. With that said Ms. Phang filed a demand for discovery. We provided discovery and a list of the evidence. We did not provide copies of the videos. We identified all of the videos in this case of 29 Defendants as part of her discovery. But as I said, I will assure the court we've had various defense attorneys come to Jupiter Police Department and we have been more than accommodating in allowing them to look at the videos, but I can promise the court we are not going to release them without an order from your Honor.

THE COURT: Very nice. I appreciate your honorable position.

Id. at 13:20–14:9.

Unfortunately, by today threatening to release the video without awaiting further order of this Court, the prosecution has made clear that its “honorable position” was, in actuality, just their latest ruse. Releasing the Videos now would flout both Judge Hanser’s and this Court’s authority, adding to a pattern of prosecutorial misconduct that is nothing short of appalling. Because permitting release of the Videos would amount to a “cat-out-of-the-bag” scenario that thereafter precludes judicial remedy (as the prosecution no doubt is banking on), it is appropriate and necessary that this Court on an emergency basis prohibit release of the Videos, at least until such time as Judge Hanser has had opportunity to rule on the motion pending before him.

BACKGROUND

1. The State of Florida has filed misdemeanor charges against Mr. Kraft in a parallel proceeding, alleging that he engaged in solicitation of prostitution in violation of Florida Statutes Section 796.07(2)(f) and (5)(a)(1).

2. These misdemeanor charges were filed in or about February 2019, and all arose out of a law enforcement investigation concerning the Orchids of Asia Day Spa, located at 103 S. U.S. Highway 1, Suite C2, in the Jupiter Square Plaza (the “Spa”)—the same investigation that gave rise to the charges in this case. According to law enforcement, that investigation began in or about October 2018 and was led by the Town of Jupiter Police Department, in consultation with other law enforcement agencies involved in related investigations.

3. Evidence collected during the course of that investigation includes video recordings made by a set of hidden cameras, which were surreptitiously installed by law enforcement inside the Spa on or about January 17, 2019, pursuant to a warrant issued on or about January 15, 2019, authorizing continuous, unbounded video surveillance of private massages over a period of five days. There is no dispute that the hidden cameras were placed in private massage rooms and

recorded Mr. Kraft and other patrons disrobing as a matter of course; certain of those videos allegedly depict Mr. Kraft engaged in alleged sexual acts. The videos pertaining to Mr. Kraft are hereinafter referred to as the “Videos.”

4. In his misdemeanor proceedings, Mr. Kraft filed Motions for Protective Order to prevent the release of the Videos on March 21, 2019, and amended them on March 28, 2019. On April 12, 2019, County Court Judge Leonard Hanser conducted a hearing on the Motions for Protective Order. Those Motions are now pending before Judge Hanser and are ripe for decision. Indeed, per Judge Hauser’s instruction, proposed orders were submitted to him on the morning of Tuesday, April 16.

DISCUSSION

5. Florida Rule of Criminal Procedure 3.220(m)(1) provides that “[A]ny person may move for an order denying or regulating disclosure of sensitive matters.” “Under this provision, a nonparty has ‘standing to challenge the release of the discovery materials.’” *Times Pub. Co. v. State*, 903 So. 2d 322, 326 (Fla. 2d DCA 2005) (quoting *Post-Newsweek Stations, Florida Inc. v. Doe*, 612 So. 2d 549, 550 (Fla. 1992)).

6. For example, in *Post-Newsweek Stations, Florida Inc. v. Doe*, several nonparty John Does named on the client list of an alleged prostitute brought motions to intervene and restrict public access to the list. *Post-Newsweek Stations*, 612 So. 2d at 550; *Doe v. State*, 587 So. 2d 526, 527 (Fla. 4th DCA 1991). The Florida Supreme Court held that, under the broad language of Rule 3.220, the Does had standing to bring their challenge in the criminal prostitution proceedings even though they were nonparties. *Post-Newsweek Stations*, 612 So. 2d at 550 (“Rule 3.220(m) provides that ‘[u]pon request of *any person*, the court may permit any showing of cause for denial or regulation of disclosures, or any portion of such showing to be made in camera.’ . . . Even

though the Does are not parties named in the state's criminal action against the Willets, the broad language of rule 3.220 permits them to show cause for denying the disclosure of the discovery information at issue in the criminal proceeding.” (emphasis in original)).

7. The rule articulated in *Post-Newsweek Stations* governs here: even though Mr. Kraft is not a party to this proceeding, he has standing under Rule 3.220 to challenge disclosure of the Videos—especially when such disclosure could cause him harm, just as the Does argued in *Post-Newsweek Stations*.

8. By noticing its intent to release the Videos now, the State has taken a position that has been calculated to flout the express representations it made before this Court and Judge Hanser. Wang Hr’g Tr. at 9:14–18; Kraft Hr’g Tr. 86:12–87:25. At the hearing, this Court asked the State to confirm, “Whether it’s Judge Hanser or myself has a ruling, nobody has any intention to let this out until the judge has ruled.” Wang Hr’g Tr. at 9:15–17. The State confirmed, “We do not, Judge.” *Id.* at 14:18. Later in the hearing, the State reiterated this representation: “Judge, I can promise the court that nothing is being released until you issue an order. Obviously Ms. Wang's case is different from Mr. [Kraft’s] case downstairs, but we're going to rely on the order of the court. With that said, Ms. [Zhang] filed a demand for discovery. . . . I can promise the court we are not going to release them without an order from your Honor.” *Id.* at 13:20–14:7.

9. This Court responded: “I appreciate your honorable position.” *Id.* at 14:8–9. Of course, everyone can know see that the prosecution’s purportedly “honorable position” was nothing more than a lie, offered to deceive the Court for the sake of affording it false comfort and forestalling ruling.

10. The State made a similar representation before Judge Hanser. At the hearing on Mr. Kraft’s protective order, the State affirmed that it “would not take any action before [Judge

Hanser] or Judge Marx issued the order.” Kraft Hr’g Tr. 86:19–21. Later the State doubled down, affirming that it was “not releasing the videos because Mr. Burck and other attorneys have filed motions of protection. So we’re waiting for those to be heard and ruled on. There’s nothing—that’s why obviously, we’re not releasing the videos at this point.” *Id.* at 87:1–5. The State continued that “in respect for both parties and the Court,” it wouldn’t release the Videos. *Id.* at 87:21–22. When Judge Hanser asked if the State was “just waiting for the courts to rule,” the State replied “Absolutely.” *Id.* at 87:23–25.

11. As Mr. Kraft has argued in support of his Motions in his misdemeanor proceedings, the Videos should not be released to the Media or the public because, among other things, disclosing the Videos would violate his constitutional rights to privacy and his right to a fair trial.

12. Disseminating the Videos would violate Mr. Kraft’s privacy rights guaranteed under the U.S. and Florida Constitutions. The Videos were obtained through a highly invasive and unlawful “sneak and peek” warrant that authorized law enforcement to install hidden surveillance cameras in multiple private massage rooms where Spa customers would disrobe as a matter of course; the JPD did so in order to prosecute what are at most misdemeanor offenses. Such a warrant is categorically unavailable under these circumstances. Indeed, it was only through a series of material misrepresentations and omissions that the JPD was able to convince the issuing judge to issue the “sneak and peek” warrant by leading him to believe (incorrectly) that far more serious criminal activity was afoot *i.e.* human trafficking. But no such activity was afoot, as the JPD well knew. What is more, the JPD obtained the authorization it did while knowing full well that a wide array of alternative, benign modes of proof was readily available, and without making any meaningful attempt to minimize the privacy intrusions thrust upon innocent Spa patrons, including women.

13. By proceeding as it did, the JPD violated Mr. Kraft's constitutional privacy rights guaranteed under both the United States and Florida Constitutions. Mr. Kraft has therefore moved to suppress the illegally obtained Videos, and Judge Hanser has set a hearing to address Mr. Kraft's Motion to Suppress for April 26, 2019.

14. So long as a motion to suppress remains pending before Judge Hanser, dissemination should be prohibited. Without presupposing how Judge Hanser will ultimately rule on suppression, it should suffice to note that he has yet to rule, and that materials that stand to be suppressed should not, in the meantime, be disseminated far and wide. Other courts confronting this very issue have agreed that, while a motion to suppress is pending, protective orders or other measures should remain in place so as to prevent the premature, unauthorized public distribution of challenged material. *See, e.g., United States v. Duran*, 884 F. Supp. 526, 528 (D.D.C. 1995) (“[I]t is the Court’s determination that the most prudent course at this time—and one which takes into careful consideration the Defendant’s right to a fair trial and the public’s First Amendment right of access to the document in question—is to stay resolution of the [media’s] request [for access] pending the hearing on the Defendant’s Motion to Suppress.”); *United States v. Rodriguez*, 2006 WL 8438023, at *2 (D.N.D. June 29, 2006) (“Since the Court has yet to rule on [motions to suppress], there is a potential that these documents will reveal inadmissible evidence. The public is not entitled to access to inadmissible evidence.”); *United States v. Rogers*, 2013 WL 5781610, at *4 (D. Minn. Aug. 2, 2013) (finding “no common law right to access the suppression hearing exhibits while [defendant’s] motion to suppress the contents of those exhibits is pending”).

15. Moreover, to the extent Judge Hanser determines that the Videos were unlawfully obtained, it follows that the public would not be entitled to such illegally obtained materials. *See, e.g., United States v. Kemp*, 365 F. Supp. 2d 618, 631–32 (E.D. Pa. 2005) (recognizing that “the

judicial system is not served by making illegally seized or inadmissible evidence available to the public”); *United States v. Rogers*, 2013 WL 5781610, at *4 (D. Minn. Aug. 2, 2013) (recognizing that, “[i]f the evidence is deemed inadmissible, the public will have no right to access it”); *United States v. Rodriguez*, 2006 WL 8438023, at *2 (D.N.D. June 29, 2006) (recognizing that, if the evidence is suppressed, “[t]he public is not entitled to access to inadmissible evidence”).

16. Given the pendency of Mr. Kraft’s suppression motion, which raises critically important legal objections and constitutional concerns, this Court should prohibit disclosure of the Videos until Judge Hanser has the opportunity to address fundamental, antecedent legal questions posed by Mr. Kraft’s suppression motion. Such an interim prohibition is particularly appropriate at this preliminary stage in order to preserve the status quo, hold the prosecution to its express representations and commitments, and ensure against the intervening release of the Videos, which Judge Hanser may ultimately determine to have been illegally obtained.

17. Releasing the Videos would also deny Mr. Kraft’s right to a fair trial guaranteed by the Sixth Amendment. In balancing a criminal defendant’s Sixth Amendment rights against claimed media entitlement to access and disclosure for purposes of considering protective orders, Florida courts consider three factors: (1) whether a protective order is “necessary to prevent a serious and imminent threat to the administration of justice;” (2) whether “alternatives are available, other than change of venue, which would protect a defendant’s right to a fair trial;” and (3) whether “closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose.” *Miami Herald Pub. Co. v. Lewis*, 426 So. 2d 1, 6 (Fla. 1982); see *Fla. Freedom Newspapers, Inc. v. McCrary*, 520 So. 2d 32, 35 (Fla. 1988) (finding these “Lewis factors” all “relevant to a finding of cause,” and stating that they “should be

considered in determining whether public access to a judicial record should be restricted or deferred”). All three factors favor sealing the Videos.

18. To begin, there is a serious and imminent risk that Mr. Kraft cannot enjoy a fair trial if the Videos are released. As the Court may be aware, Mr. Kraft’s case has generated more press coverage and media attention than perhaps any other misdemeanor prosecution in recent history. Much of the attention to date has focused on the illegally obtained Videos, which the JPD claims depict low level acts of solicitation. But the Media’s outsized appetite for the Videos—the substance of which is already purportedly described in publicly available documents—appears to be based not on a desire to shed light on an important public event, but rather to humiliate Mr. Kraft and appeal to the prurient interests of a certain members of the public who are zealous to inspect the supposed dirty laundry of public figures. If released, these highly prejudicial, illegally obtained, irrelevant, and non-newsworthy Videos are guaranteed to be broadcast all around the country, thereafter making it virtually impossible for Mr. Kraft to obtain a fair trial not just in Palm Beach County but anywhere in the country.

19. Next, without sealing the Videos, there would be no way to properly protect Mr. Kraft’s right to a fair trial. If the Videos are released, they will promptly be released to the Media and quickly broadcast online and on television for millions of people around the world to see. If that were to happen, it would immediately and irretrievably taint the jury pool not just in Palm Beach County, but in neighboring counties (and states) as well. Sealing is the most sensible option. *See Lewis*, 426 So. 2d at 2 (affirming trial court order to close suppression hearing and seal record “[t]he public was virtually inundated with information detailing the crime” from media coverage); *Miami Herald Media Co. v. State*, 218 So. 3d 460, 463–65 (noting that the “speed of dissemination

and the high percentage of likely jurors with access to social media and the internet also support[ed] the trial judge's concern").

20. Last, sealing the Videos would go no further than necessary to protect the rights of Mr. Kraft. *See Lewis*, 426 So. 2d at 2. Notably, the public already has access to other less inflammatory and less prejudicial materials that purport to describe the content of the Videos, and Mr. Kraft has not opposed dissemination of those materials. Because the Videos add nothing appreciable to the public discourse (as distinct from tawdry, tabloid fodder) while posing obvious, pronounced risk to Mr. Kraft's constitutional right to a fair trial, the case for a limited protective order is overwhelming.

21. Should the Videos be released, the damage they cause will be irreparable. Such sensitive material, once publicly disclosed, cannot be clawed back. Indeed, this "cat-out-of-the-bag" scenario presents a paradigmatic example of irreparable harm. *See, e.g., Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 94 (Fla. 1995) ("Discovery of certain kinds of information may reasonably cause material injury of an irreparable nature. This includes 'cat out of the bag' material that could be used to injure another person or party outside the context of the litigation, and material protected by privilege, trade secrets, work product, or involving a confidential informant may cause such injury if disclosed." (quotation marks and citation omitted)). Should the Media gain access to the Videos and release them, public disclosure would be a fait accompli—the resulting damage to Mr. Kraft's constitutional rights to privacy and a fair trial would be incurable and appeal would be moot. Whatever else may be in dispute, no one denies that the Videos, once publicly disseminated, can never be clawed back. That reality alone weighs overwhelmingly in favor of a stay at this time.").

22. As explained before, Judge Hanser held a five-hour hearing on the motion for the protective order on April 12, 2019, and has requested that the parties submit proposed orders by April 16.

23. Whatever Judge Hanser may decide as to the requested protective order that is before him, release of the Videos via this proceeding threatens to moot the issue and deny Judge Hanser any opportunity to decide the motions and fashion appropriate relief protecting Mr. Kraft's rights.

24. In sum, Mr. Kraft has multiple rights and obvious interests that give him a stake in these proceedings, just as Rule 3.220(m)(1) gives him standing to intervene in this action. Accordingly, he is respectfully seeking to intervene, joining in and supporting the Defendant's emergency motion, himself respectfully requesting that, for the reasons stated herein and in the Defendant's parallel submission of earlier today, that this Court forthwith enter an order prohibiting the State's intended release of the Videos at issue, at least for the time being.

I HEREBY CERTIFY that a copy of the foregoing has been furnished by E-Service to all attorneys of record on this 17th day of April, 2019.

CONCLUSION

For the reasons set forth above, this Court should grant Mr. Kraft's Emergency Motion to Intervene as well as the requested relief by prohibiting any release of the Videos.

Respectfully Submitted,

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