

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

STATE OF FLORIDA

v.

Case Nos. 2019MM002346AXXXNB
2019MM002348AXXXNB

ROBERT KRAFT,

Defendant.

MOTION FOR MODIFICATION OF THE PROTECTIVE ORDER

COMES NOW, Defendant Robert Kraft (“Mr. Kraft”), by and through the undersigned attorneys, and respectfully files this Motion for Modification of the Protective Order (the “Motion”). As explained herein, this Court should take preventative measures to preserve its jurisdiction and protect the status quo against measures the State might otherwise take unilaterally to circumvent the protective order currently in effect by unilaterally publicizing protected videos. In support thereof, Mr. Kraft states as follows:

1. On April 23, 2019, this Court entered an order granting, in part, Mr. Kraft’s Motion for Protective Order. *See* Order Granting, In Part, Defendant’s Motion for Protective Order, Apr. 23, 2019, Dkt. No. 107 (“Protective Order”).¹ In granting Mr. Kraft’s motion, the Court concluded that a Protective Order preventing the pretrial dissemination of certain covert video footage (the “Videos”) obtained by the Jupiter Police Department (“JPD”) is necessary to protect Mr. Kraft’s constitutional rights to a fair trial as guaranteed under both the United States and Florida Constitutions. *See id.* at 7. Without needing to rely on additional grounds for

¹ Unless otherwise noted, the docket entries cited herein correspond to the entries for Case No. 50-2019-MM-002346.

entering the protective order (including the prospect that the Videos might be suppressed as illegally obtained), the Court therefore prohibited the State of Florida (“State”) from releasing the Videos, at least until the earliest of one of the following events: (i) trial juries being sworn in; (ii) the case being resolved by plea agreement; (iii) the State no longer pursuing the charges against Mr. Kraft; or (iv) at any other time at which the Court finds the fair trial rights of Mr. Kraft are not at risk. *See id.* at 8.

2. At the time the Court decided Mr. Kraft’s Motion for Protective Order, Mr. Kraft had a separate, unresolved Motion to Suppress pending before the Court. *See* Amended Memorandum of Law in Support of Motion to Suppress, Apr. 4, 2019, Dkt. No. 57. Among other things, that motion challenged the legality of the “sneak and peek” warrant pursuant to which the JPD obtained the Videos. *See id.* at 11–24. In apparent recognition of the impact the suppression motion could have on the Protective Order (and the ultimate release of the Videos), the Court, in issuing the Protective Order, expressly “reserve[d] the right to reconsider th[e] Order after ruling on [Mr. Kraft’s] Motion to Suppress.” Protective Order at 9.

3. On May 13, 2019—roughly three weeks after entering the Protective Order—the Court granted Mr. Kraft’s Motion to Suppress. *See* Order Granting Defendant’s Motion to Suppress, dated May 13, 2019. In doing so, the Court concluded that the “sneak and peek” warrant violated Mr. Kraft’s constitutional rights. As a result, the Videos have been suppressed. *See id.* In light of this order, Mr. Kraft now respectfully seeks modification of the Protective Order to ensure that the same Videos the Court has ruled were illegally obtained (and thus never should have been created) are not nonetheless disseminated to the public.

4. The public has no right to access suppressed evidence, particularly materials that have been suppressed because they were obtained in violation of Title III. *See, e.g., United*

States v. McVeigh, 119 F.3d 806, 814 (10th Cir. 1997) (recognizing in the Title III context that “suppressed evidence, by definition, will not be admissible at trial, and thus press access to such evidence will not play a significant positive role in the functioning of the criminal process, as that evidence is simply irrelevant to the process”); *United States v. Rajaratnam*, 708 F. Supp. 2d 371, 375 (S.D.N.Y. 2010) (recognizing that there is “no constitutional right of access extend[ed] to suppressed Title III material”); *United States v. Kemp*, 365 F. Supp. 2d 618, 631–32 (E.D. Pa. 2005) (recognizing, in the Title III context, that “the judicial system is not served by making illegally seized or inadmissible evidence available to the public”); *United States v. Rodriguez*, 2006 WL 8438023, at *2 (D.N.D. June 29, 2006) (recognizing that “the public is not entitled to access to inadmissible evidence” that is suppressed as illegal); *United States v. Rogers*, 2013 WL 5781610, at *4 (D. Minn. Aug. 2, 2013) (recognizing that “[i]f the evidence is deemed inadmissible [following suppression hearing], the public will have no right to access it”). Now that the Court has concluded that the Videos were illegally obtained and subject to suppression, it follows that the public has no right to access these materials—which materials never should have never come into existence in the first place. As such, the Court has “good cause” under Florida Rule of Criminal Procedure 3.220(1)(1) to modify the scope of the Protective Order for the sake of dispelling any doubt that State is *permanently* prohibited from releasing the same Videos that it had no legal basis to obtain, much less to retain and release.

5. Such modification of the Protective Order is especially warranted because the State might otherwise argue the Protective Order leaves the State a loophole: specifically, the State may claim it is entitled simply to drop the charges against Mr. Kraft and then unilaterally release the Videos to the public, *without* affording notice to Mr. Kraft or opportunity for the Court to entertain competing submissions and decide any disputes over proposed dissemination.

See Protective Order at 8 (referencing circumstance where the State is no longer pursuing charges against Mr. Kraft).² Such a perverse approach by the State would not only violate the spirit of the Protective Order (along with applicable ethics rules), but it would effectively undermine the Court's ruling on suppression and defeat the "fruit of the poisonous tree" doctrine. See *Rodriguez v. State*, 187 So. 3d 841, 849 (Fla. 2015) ("[T]he exclusionary rule works to deter police misconduct by ensuring that the prosecution is not in a better position as a result of the misconduct If the prosecution were allowed to benefit in this way, police misconduct would be encouraged instead of deterred, and the rationale behind the exclusionary rule would be eviscerated.").

6. Additionally, permitting the State to drop the charges so that it can release the illegally obtained Videos would enable the media to serve as an illicit instrument of law enforcement by putting wrongfully obtained materials to their most damaging possible use in the public arena, thereby doing damage far surpassing any possible misdemeanor conviction. In that sense, allowing the State to release the Videos would provide perverse incentives for law enforcement to repeat their illegal searches, secure in the knowledge that suppression would prove to be weak medicine for Fourth Amendment ills once the media injects itself. Only by modifying the Protective Order to make it clear that the State is *permanently* prohibited from releasing the Videos can these outcomes be avoided.

² Given Judge Marx's parallel protective order concerning the same Videos, the State should remain bound by that, even by its own account, following a unilateral dismissal here. But the State has previously proved willing to flout its solemn assurances and corresponding ethical obligations before both this Court and Judge Marx. Moreover, there has been no assurance by the State that it might not seek dismissal in both cases simultaneously *en route* to claiming authority to release the Videos unilaterally. The only sound way to protect the Videos, therefore, is for this Court to confirm its continuing jurisdiction over them and its authority to adjudicate any relevant dispute before they might be disseminated.

7. Mr. Kraft's concern that the State may attempt to turn against him the fruits of the JPD's illegal covert surveillance operation is by no means speculative. From the start of this case, the State has wielded incessantly the threat of public disclosure of the Videos against Mr. Kraft, even after making contrary representations to the Court. *See* Hr'g. Tr., April 12, 2019 at 87:1–5 (Mr. Kridos informing the court that the State is “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 [T]hat's why, obviously, we're not releasing the videos at this point.”).

8. Just five days after representing here that it did not intend to release the Videos, the State reversed course and filed a so-called “Notice Of Intent To Comply With Chapter 119, Florida Statutes” in parallel proceedings before Judge Joseph Marx. *See State of Florida v. Hua Zhang*, Case No. 50-2019-CF-001606-AXXX-MB; *see also State of Florida v. Lei Wang*, Case No. 50-2019-CF-001606-BXXX-MB. In its Notice, the State informed Judge Marx that—contrary to its representations before Your Honor—it would “be releasing the requested [Videos] once it has retrieved and reviewed the records, and deleted any portions of the record which are statutorily exempt under Chapter 119.” Notice of Intent to Release Videos ¶ 5. In response to the State's Notice, Mr. Kraft and other interested parties filed emergency papers before Judge Marx, who promptly convened a hearing and entered a temporary protective order prohibiting the State from disclosing the Videos. *See State of Florida v. Lei Wang*, Case No. 50-2019-CF-001606-BXXX-MB, Apr. 17, 2019, Dkt. No. 324; *see also id.* at Dkt. No. 361 (order extending protective order).

9. Notably, the next day *after* Judge Marx entered his temporary protective order, several news outlets reported that someone connected to Florida law enforcement was trying to sell the Videos to the press. *See* Gary Trock and Mike Walters, *Exclusive: Robert Kraft Naked*

Spa Video Being Shopped Around as Judge Halts Public Release of Tape, The Blast, Apr. 18, 2019, available at <https://theblast.com/robert-kraft-naked-spa-video-shopped-media/>; Laura Italiano, *Robert Kraft Spa Video Leaked And For Sale Say Women Arrested In Sting*, New York Post, Apr. 20, 2019, available at <https://nypost.com/2019/04/20/robert-kraft-spa-video-leaked-and-for-sale-say-women-arrested-in-sting/>. Despite repeated demands by Mr. Kraft that the State promptly investigate the apparent leak, the State has not provided any assurance or reported any findings to Mr. Kraft or Judge Marx. At no time and in no way, therefore, has the State contradicted the published accounts of efforts by law enforcement to sell and to leak the Videos.

10. Even after this Court (and Judge Marx) entered protective orders, the State has persisted in its efforts to force the release of the Videos by arguing (through successive motions and requests) that Mr. Kraft has somehow triggered their release by demanding that the State produce all *Brady* and *Giglio* materials (as the State is constitutionally required to do).

11. Given the State's repeated and pointed threats to release the illegally obtained Videos and the larger, worsening pattern of prosecutorial misconduct that has come to light, there exists *compelling* cause for the Court to modify the Protective Order. Specifically, the Court should make it abundantly clear that the State cannot make an end run around the Court's orders by simply dismissing its charges against Mr. Kraft and then releasing the Videos with impunity.

12. Finally, to the extent the State dismisses the charges against Mr. Kraft in an effort to avoid the strictures of the Protective Order or to terminate this Court's jurisdiction, such gamesmanship is properly prevented. "It is axiomatic and inherent that a trial court retains jurisdiction to enforce its own orders[.]" *Friedland v. State Dep't of Health & Rehab. Servs.*, 661 So. 2d 1286, 1287 (Fla. Dist. Ct. App. 1995); *see also, e.g., Cooter v. Hartmarx Corp.*, 496

U.S. 384, 396 (1990) (“A court may make an adjudication of contempt and impose a contempt sanction even after the action in which the contempt arose has been terminated.”); *Pino v. Bank of N.Y.*, 121 So.3d 23, 41 (Fla. 2013) (holding a trial court has continuing jurisdiction to resolve a pending motion for sanctions regardless of a plaintiff’s voluntary dismissal of case); *Whitby v. Infinity Radio, Inc.*, 961 So.2d 349, 353 (Fla. 4th DCA 2007) (finding that, after entry of final judgment, trial court retained ancillary jurisdiction to enforce contempt order that was entered prior to judgment). Having entered the Protective Order on April 23, 2019, this Court has continuing jurisdiction to adjudicate and enforce its terms. The Court’s continuing jurisdiction over this criminal case should be altogether beyond question considering that its “jurisdiction . . . includes the inherent authority over property seized or obtained in connection with the proceeding.” *Daniel v. State*, 991 So. 2d 421, 423 (Fla. Dist. Ct. App. 2008) (citing *Stevens v. State*, 929 So. 2d 1197, 1198 (Fla. 2d DCA 2006)). Here, the Court has “inherent authority” over the Videos that were obtained by the JPD in connection with this proceeding and that authority “continues ***beyond the termination of the prosecution***[.]” *Stevens*, 929 So.2d at 1198. (emphasis added). Accordingly, even if the State were to drop the charges against Mr. Kraft, this Court has plenary power to enforce or modify the terms of the Protective Order, as that order itself expressly contemplates. *See* Protective Order at 9 (“reserv[ing] the right to reconsider th[e] Order after ruling on [Mr. Kraft’s] Motion to Suppress”).

* * *

WHEREFORE, Mr. Kraft respectfully requests that the Court modify the Protective Order to prohibit permanently the disclosure, dissemination, and/or release of the Videos and to protect the Videos against any such disclosure, dissemination, and/or release after the case has

been otherwise disposed of or terminated. Alternatively, Mr. Kraft would respectfully request that the Court convene a hearing on this issue at the earliest opportunity.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed with the Clerk of Court using the Florida Courts E-Filing Portal and served via E-Service to Assistant State Attorney Elizabeth Neto and Judy Arco, on this day, May 13, 2019.

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