IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SEAN McCLENDON,	)	
	)	
Plaintiff,	)	
	)	**No. 22 C 5472**
v.	)	
	)	**Magistrate Judge**
CITY OF CHICAGO; MILOT CADICHON; BRYANT McDERMOTT; ROBERT McHALE; and DONALD SMITH,	)	**Maria Valdez**
	)	
Defendants.	)	

ORDER

This matter is before the Court on Plaintiff and Third-Party Witness Emmanuel Poe's Motion to Quash [Doc. No. 70] and Plaintiff's Motion to Quash Deposition Subpoenas [Doc. No. 71].[1]

BACKGROUND

On October 10, 2014, the defendant officers seized Plaintiff and his friend Emmanuel Poe on a porch near a parking lot where they had parked their vehicle, which the officers had been tailing. Defendant Cadichon claimed that he saw Plaintiff drop an object on the porch, and another officer later found a gun behind a couch located there. Plaintiff was arrested for possession of the gun based on defendant Cadichon's claim and Plaintiff's alleged later admission to defendants

[1] Defendants did not file written responses to the motions, but argument was heard on January 17, 2024.

McHale and McDermitt he did possess the gun because people were after him. Plaintiff asserts that both bases for his arrest were false and concocted by the individual defendants. Plaintiff testified at trial that he did not possess a gun, nor did he ever admit to the officers that he possessed a gun. He was nevertheless convicted and sentenced to a term of eight years in the Illinois Department of Corrections. The sentence was later vacated without remand on March 7, 2022 after the Illinois Appellate Court concluded there was "no reasonable articulable suspicion for the warrantless seizure" of Plaintiff and Poe. *See People v. McClendon*, 2022 IL App (1st) 163406, ¶ 21. Plaintiff subsequently sued the City of Chicago and the arresting officers under 42 U.S.C. § 1983, alleging that his constitutional rights were violated because he was falsely arrested after the individual defendants concocted a false story and fabricated evidence against him.

In previous subpoenas, Defendants sought all of Plaintiff's jail calls[2] as well as a number of calls associated with third parties whose ID numbers Plaintiff was alleged to have used to make calls. On August 8, 2023, this Court granted Plaintiff's motion to quash the subpoenas issued to the Cook County Sheriff's Office and two IDOC facilities, dismissing Defendants' conclusory argument that "common sense" suggests Plaintiff would have discussed topics relating to liability or damages in the calls. Instead of "fishing," The Court advised Defendants they would need to provide

[2] The Court uses the term "jail calls," but some were made from state prison, where he served four months beginning a few days after his October 2014 arrest. After his stint at the Illinois Department of Corrections, he returned to the Cook County Jail until he was bonded out in May 2015. He returned to the CCJ in July 2016 after the guilty finding and then returned to IDOC custody until his conviction was reversed in 2022.

some specific assurance that there is a reasonable likelihood the calls contain relevant information.

Two months later, Plaintiff and third party Poe moved to quash additional subpoenas seeking, among other things, recordings of all calls Plaintiff made to Poe from 2016 to 2022 and logs for calls Poe made to any number. That motion was also granted on the basis of relevance. Plaintiff's and Poe's stories about the events surrounding the arrest were consistent with each other before, during and after the underlying criminal trial, and thus this was not a case where, for example, the conversations would show Plaintiff's efforts to get Poe to recant a prior accusation.

Defendants' next round of subpoenas sought to obtain recordings of Plaintiff's and Poe's calls with each other and with various other individuals. Plaintiff and Poe have again moved to quash, primarily on the basis of relevance.

DISCUSSION

Under Federal Rule of Civil Procedure 45, a court must quash or modify a subpoena if the movant establishes that it "subjects a person to undue burden." Fed. R. Civ. P. 45(d)(3)(iv). The parties do not dispute that Plaintiff and Poe have standing to quash a subpoena directed to third parties based on undue burden where the subpoena implicates their privacy interest in the calls at issue. *See Simon v. Northwestern Univ.*, No. 15 C 1433, 2017 WL 66818, at *2 (N.D. Ill. Jan. 6, 2017). Numerous courts have held that although prisoner calls are recorded and may be monitored by jail or prison officials, the incarcerated individual nevertheless retains at least a minimal privacy interest in those calls, in that "he would not

necessarily have expected that recordings of those calls would be handed over in bulk to an adverse party in a civil case." *See Bishop v. White*, No. 16 C 6040, 2020 WL 6149567, at *3 (N.D. Ill. Oct. 20, 2020); *see also DeLeon-Reyes v. Guevara*, No. 18 C 1028, 2020 WL 7059444, at *2 (N.D. Ill. Dec. 2, 2020); *Pursley v. City of Rockford*, No. 18 C 50040, 2020 WL 1433827, at *2 (N.D. Ill. Mar. 24, 2020).

Undue burden is not the only consideration, however, and the scope of a subpoena is also constrained by the general rules of discovery. Federal Rule of Civil Procedure 26 provides that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1); *see Pursley*, 2020 WL 1433827, at *2 ("[I]n determining whether to quash a third-party subpoena based upon a party's privacy interests, courts weigh the relevance of the information against the strength of the privacy interest.").

I. Plaintiff and Poe's Motion to Quash [Doc. No. 70]

A. Calls to Ken Ross

Ken Ross testified in his deposition that he owned the gun Plaintiff was alleged to have thrown behind a couch on a porch. Ross stated that he knew the gun for which Plaintiff was arrested belonged to him, and Plaintiff also testified that he

knew as of the night of his arrest that the gun was Ross's. Plaintiff claims he had an in-person conversation with Ross after he was bonded out of jail in 2015, in which he asked Ross to testify on his behalf at the underlying criminal trial. Although Plaintiff asserts that Ross agreed to testify, he did not ultimately do so. When asked during the criminal trial if had seen the gun before, Plaintiff denied recognizing it. Both Plaintiff and Ross testified that they did not speak on the phone while Plaintiff was in jail. However, the phone logs from the CCJ show six calls made from March to May 2015 to a number associated with Ross.[3] Defendants believe that Plaintiff and Ross are lying.

Plaintiff's theory is that the gun recovered from behind the couch was already there before he and Poe went onto the porch. Defendants characterize this as a theory made up for the civil case, and it would have been raised during the criminal trial if it were true. Defendants acknowledge, however, that based on the timing of the calls, they would not directly show collusion between Plaintiff and Ross to concoct a story. Instead, Defendants ask for the calls to either corroborate or contradict the allegation that the gun belonged to Ross. They believe that because at the time the calls were made, Ross knew Plaintiff had been arrested for possessing his gun, and Plaintiff knew the gun belonged to Ross, it is almost a certainty that they would have spoken about the matter. If they did discuss the

[3] Defendants already possess these six calls from Plaintiff to Ross's number, due to the CCJ inadvertently producing those records prematurely. Defendants also want to subpoena any calls Plaintiff made while in IDOC custody prior to that time.

gun's ownership, that would be exculpatory evidence in Plaintiff's favor. If they did not, then according to Defendants, that would be relevant by omission.

Defendants have not explained why the ownership of the gun is relevant to any claims or defenses in the case, specifically the question of whether Plaintiff threw the gun behind the couch or it was already there. However, in an abundance of caution, the Court agrees to listen *in camera* to the recording of first conversation between Plaintiff and Ross, which may have taken place while Plaintiff was in IDOC or CCJ custody. Defendants may obtain the IDOC call logs to determine whether any calls were made to Ross's number, and if so, then they may subpoena the recording of the first call. If there are no IDOC calls, then Defendants shall submit to the Court the first CCJ call they have in their possession.

B. Calls Immediately After Arrest

Defendants want to listen to five calls Plaintiff made to three individuals from October 11, 2014, the day after his arrest, to October 13, 2014. Plaintiff testified that in his initial calls to these three individuals – his mother, his now ex-wife, and a friend – he said he had been framed. Defendants want the calls to corroborate or contradict Plaintiff's testimony as well as to prepare for the anticipated depositions of Plaintiff's mother and his ex-wife.

Defendants have not offered any specific reasons these calls may be relevant, only the general argument that because Plaintiff admits he told the three individuals about his arrest, he may have given them details about the underlying

circumstances. Accordingly, the motion to quash is granted as to these calls, whose slight potential relevance is outweighed by Plaintiff's privacy interest.

C. Disciplinary Report Calls

While in prison in May 2018, Plaintiff made a call that was the subject of a prison disciplinary report characterizing it as a "Security Threat Group or Unauthorized Organizational Activity" because he allegedly made gang-related comments during the call. Defendants argue this is relevant because shortly after his arrest, Plaintiff allegedly told officers he needed a gun because people were after him. Plaintiff has denied making that statement and further denies ever being a member of a gang. Defendants' theory is that if Plaintiff were a gang member, that would lend credibility to the officers' report that Plaintiff told them he needed a gun. But even assuming that gang affiliation is relevant to the claims and defenses in this case, and further assuming that the call at issue proves Plaintiff's prison gang membership in 2018, that would not be at all relevant to whether he was a member at the time of his arrest nearly four years earlier.

D. First Call to Every New Number

Defendants wish to listen to the first call Plaintiff made to every new number appearing on the call log, approximately fifty numbers for the CCJ calls. Their rationale is that if Plaintiff were to discuss the circumstances of his arrest, he would likely do so during the first conversation he had with someone. Defendants also want these calls because Plaintiff testified he believes he had a conversation with

Poe discussing the arrest, but it is unknown what phone number Poe had at the time. Defendants hope that the recordings will allow them to identify that number.

The motion to quash is granted as to this request. The fact that this subpoena seeks far fewer calls than the original one does not make it narrowly tailored or limited in scope. The Court is not persuaded by Defendants' argument that the request is limited to calls in which Plaintiff possibly or even "likely discussed his criminal case," because that is also a "form of 'dart throwing'" rather than a showing of relevance. *See Pursley*, 2020 WL 1433827, at *4. Defendants' arguments are based almost entirely on the supposition that a hypothetical person could be expected to discuss certain events with certain people at certain times, without any particularized basis to conclude that Plaintiff himself may have had those discussions. It could be just as easily presumed that the defendant officers sent texts among themselves and others about the underlying arrest in the hours, days, or weeks afterwards. Defendants would surely agree that such a presumption would not, by itself, justify handing them over to Plaintiff.

This request also fails to meet the proportionality standard. Defendants attempted to minimize the burden of the production of at least fifty calls, going so far as to suggest that Plaintiff would not need to listen to the calls unless Defendants disclose them as ones they will be using in the case. During oral argument, however, it was clear that Plaintiff's counsel understands his obligation to review all discovery materials, which could require not only listening to the calls, but likely also transcribing, abstracting, or otherwise organizing the information.

This burden, while not overwhelming, is more than enough to outweigh the theoretical relevance of the calls.

E. Call from Poe to Plaintiff's Defense Counsel

Defendants want any communication between Poe and Plaintiff's defense counsel while Poe was in IDOC. Defendants want these recordings, which may not exist, in order to test the veracity of Poe's testimony about the conversations. The Court concludes that Defendants have not established relevance outweighing Poe's privacy interests. To the extent there is a whiff of relevance to the communications, Defendants have not explained why they could not have gleaned the substance of the calls through a less intrusive means, *i.e.*, from defense counsel, given Defendants' acknowledgment that the conversations were not privileged.

F. Calls Between Plaintiff and Poe

After the Court quashed Defendants' broad subpoena for all calls between Plaintiff and Poe, Defendants responded with a narrower time frame, between October 20, 2014 and February 13, 2015, while Plaintiff was in IDOC custody. This request again is intended to find the call between Plaintiff and Poe about which Plaintiff testified. Defendants admit their search is unlikely to turn up any results, as they would be looking for calls Plaintiff made to Poe's current phone number, which he was unlikely to have had at the time in question. Defendants may obtain a log identifying any calls between Plaintiff and Poe's number, but the subpoena for the recordings must be limited to only the first conversation.

II. Plaintiff's Motion to Quash Deposition Subpoenas [Doc. No. 71]

Plaintiff seeks to quash the subpoenas of third-party witnesses Brittany Hill and Moneka Curtis. He argues that their testimony will not be relevant because they did not witness the events at issue, and that because discovery is set to close on January 31, 2024, allowing these depositions might require an extension.

Assuming that Plaintiff even has standing to object to these deposition subpoenas, the Court finds that their testimony could be relevant to Plaintiff's claim of damages stemming from his period of incarceration. Curtis was dating plaintiff at the time of the arrest, and married and divorced him while he was in prison. Hill is the mother of Plaintiff's daughter, and she likely could speak to the effect of his arrest and imprisonment on the father/daughter relationship, which is an element of his damages claim.

Finally, the Court is not concerned about the timing of the depositions. They were noticed in plenty of time to be completed by the deadline, even considering all other remaining discovery. If due to the deponents' unavoidable scheduling conflicts, a short extension may be necessary, the parties will not be prejudiced. The motion to quash is denied.

CONCLUSION

For the foregoing reasons, Plaintiff and Third-Party Witness Emmanuel Poe's Motion to Quash [Doc. No. 70] is granted in part and denied in part, and Plaintiff's Motion to Quash Deposition Subpoenas [Doc. No. 71] is denied.

SO ORDERED.

ENTERED:

DATE: **January 19, 2024**

HON. MARIA VALDEZ
United States Magistrate Judge