STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

State of Minnesota, | Court File No.: 27-CR-11-12095

Plaintiff,

vs.

MEMORANDUM IN SUPPORT OF NOTICE OF MOTION AND MOTION TO DISMISS CHARGES

D[redacted] P[redacted] B[redacted],

Defendant.

TO: THE HENNEPIN COUNTY ATTORNEY'S OFFICE; HENNEPIN COUNTY COURT ADMINISTRATION – CRIMINAL COURT FILING.

INTRODUCTION

The above-titled matter was heard for a *contested omnibus hearing* on **August 15, 2011 at 8:45 a.m.** Ms. B[redacted] seeks an ORDER from the Court dismissing the complaint against her for lack of probable cause pursuant to Minn. R. Crim. P. 11.04, Subd. 1 and *State v. Florence*, 239 N.W.2d 892 (Minn. 1976).

ARGUMENT

D[redacted] B[redacted]'s case has received significant media attention. The State's allegations have caused significant harm to her reputation, her mental well-being, and have significantly interfered with her 42-year career as a nurse. In addition, the Board of Nursing has temporarily requested that she stop practicing due to the allegations in this case. Ms. B[redacted]'s case is the rare type of criminal case where she seeks to attack the complaint by presenting evidence subject to cross-examination, and subsequently will be requesting that the court dismiss all charges for lack of probable cause. Given all of the evidence in this case, there is not substantial evidence to warrant the case going forward, and it is not fair to make Ms. B[redacted] stand trial.

A probable cause motion requires a judge to determine whether it is more probable that not that a crime was committed and that the defendant committed the crime. *State v. Florence*, 239 N.W.2d 892, 896 (Minn. 1976). Pursuant to Rule 11.03 of the Minnesota Rules of Criminal Procedure, in felony and gross misdemeanor cases, a motion for insufficient probable cause may be brought and evidence offered in support or opposition of the motion.

A rare type of probable cause hearing, referred to in Minnesota as a *Florence* hearing, occurs when the defendant or witnesses testify on the defendant's behalf and the testimony would exonerate the defendant. *See id.* at 892. Where it is believed that the record developed by the time of the omnibus hearing fails to demonstrate the existence of probable cause, the defendant is free to move the court for dismissal for lack of probable cause pursuant to Minn. R. Crim. P. 11.03. *Id.* at 900. Though a probable cause hearing should not be used as a substitute for discovery, a defendant has a legitimate concern to resolve a case lacking in probable cause before trial. *Id.* at 898. If the defendant supports her motion by producing witnesses who give testimony that, if believed, would exonerate her, the court will have to base its decision upon "substantial evidence that would be admissible at trial" and limited hearsay evidence as described in Minn. R. Crim. P. 18.06, subd. 1. *Id*. at 900. "Substantial evidence" means "evidence adequate to support denial of a motion for a directed verdict of acquittal."[1] *Id.* at 902 n.21.

Thus, if the record before the trial judge consists of the complaint and the police reports, the defendant produces a witness subject to cross-examination whose testimony, if believed, would exonerate the defendant,[2] and the prosecutor presents no rebuttal testimony, the motion

[1] Motions for a directed verdict are abolished and motions for judgment of acquittal are used in their place. Minn. R. Crim. P., Rule 26.03, subd. 17(1).

[2] Such a witness would include a witness to the offense who describes it in terms which, if true, demonstrate the absence of one or more essential elements of the crime charged. *Florence*, 239 N.W.2d at 903.

will be granted unless there is substantial evidence in the record that would be admissible at trial to justify denying a motion for judgment of acquittal. *Id.* at 903. Ultimately, the court must address whether, given all the facts disclosed by the record, it is fair and reasonable to require the defendant to stand trial. *Id.*

The Minnesota Supreme Court in *Florence* did not describe every possible situation that may arise; it did however give examples of what the court believed may commonly occur in regard to testimony at a probable cause hearing. One example given, that is relevant to this case, is that when the defense brings a motion challenging probable cause, it will be granted unless the prosecution submits substantial evidence, admissible at trial, such that this evidence would justify denying a directed verdict of acquittal. *Id.* at 903. The testimony required to grant this motion includes testimony by a defendant, subject to cross-examination, and testimony of a witness who places the defendant elsewhere than the scene of the crime. *Id.* The court also stated that the function of the District Court at the procedural stage "does not extend to an assessment of the relative credibility of conflicting testimony." *Id.*

In Ms. B[redacted]'s case, the complaint relies almost solely upon the statements of an individual listed by the name of B.B.[3] Specifically, the complaint states that B.B.:

> *heard T[redacted] B[redacted] speaking with his mother, D[redacted] P[redacted] B[redacted], Defendant herein, over the telephone on April 15, 2011. B.B. stated he heard Defendant tell T[redacted] B[redacted] that he had to get rid of the car that night. She also stated she would sign the title.*

After discovery was provided to Ms. B[redacted], defense counsel requested that investigator Ray Diprima interview the individual identified as B.B.[4] The interview established several key points. First, it directly contradicted the information alleged in the complaint, and,

[3] B.B.'s full name as been redacted to protect his identity.
[4] Ray Diprima is an investigator with 38 years of law enforcement experience, with 28 of those years as an agent for the state. His CV is attached to this motion.

although B.B. heard T[redacted] B[redacted] talking to *someone* on the phone that night, B.B. did not know the substance of the conversation or the identity of the other individual on the phone. Second, after viewing his statement provided to law enforcement and listening to the various news reports, B.B., on his own initiative, called the police at least three times to inform them that he misstated his original statement to police, or that police had misheard what he had said. B.B.'s subsequent conversations with police about the incorrect statement occurred *before* Mr. Diprima approached him with a request for an interview. Third, Mr. Diprima's interview establishes that T[redacted] B[redacted] did not tell B.B. about the alleged accident prior to the purchase agreement.[5] In fact, T[redacted] B[redacted] allegedly did not tell B.B. about the accident until *after* the title was signed and *after* B.B. had purchased the vehicle. Finally, T[redacted] B[redacted] has provided absolutely no information to the State about the alleged criminality of Ms. B[redacted].

Under the standard set forth in *Florence*, it cannot be said that there is substantial evidence in the record that would be admissible at trial to justify denying a motion for judgment of acquittal in this case. In summary, it would not be fair or reasonable to require Ms. B[redacted] to stand trial for the charge listed in the complaint.

I. The Facts Presented by the Government Do not Establish Probable Cause that Ms. B[redacted] Was an Accomplice After the Fact to Murder in the Second Degree.

As stated in the statute, to be guilty of being an accomplice after the fact, Ms. B[redacted] must have:

> intentionally aid[ed] another person whom the actor [knew] or ha[d] reason to know ha[d] committed a criminal act, by destroying or concealing evidence of that crime, providing false or misleading information about that crime, receiving the proceeds of that crime, or otherwise obstructing the investigation or prosecution of that crime…

[5] B.B.'s statement to Investigator Ray Diprima is attached to this motion.

Minn. Stat. § 609.495, subdiv. 3. To prove beyond a reasonable doubt that Ms. B was an accomplice after the fact, the government must prove (1) that T B committed Murder in the Second Degree, (2) that Ms. B knew that he committed Murder in the Second Degree, (3) that Ms. B encouraged T B to get rid of the evidence of that crime (i.e., the car), (4) that Ms. B acted with intent to aid T B, and (5) that Ms. B did this on or about April 15, 2011 in Hennepin County. *See* 10A Minn. Prac. Jury Instr. Guides CRIMJIG 24.13 (2010).

The only evidence presented at the contested omnibus hearing is hearsay evidence. T B allegedly told B.B. and S.F.[6] that Ms. B said he should get rid of the car. Not only is this hearsay, as T B will not testify, but the Government has no evidence to corroborate that this statement is correct. The only other evidence the Government has is so vague as to be unhelpful at all: B.B. heard a woman's voice in the background of their phone call conversation with T B. B.B., however, had never met Ms. B, had never heard her voice, could not make out the words spoken, and, most importantly, does not claim or even speculate that the unknown voice was Ms. B or that she said to get rid of the car. Similarly, S.F. had never met Ms. B and has every reason to lie to police (i.e., to gain time off his sentence through cooperation and assistance). None of this evidence is reliable enough to provide for probable cause.

In *State v. Skipintheday*, the defendant was involved in a gang altercation that resulted in the death of one person and the serious injury of two people. 717 N.W.2d 423, 424–25 (Minn. 2006). The defendant told one of the people involved, X, that X "didn't see anything" to which X agreed; the defendant tried to hide a gun and ammunition (used by another person who shot

[6] S.F. was T B's cellmate during his initial incarceration and made a statement to police regarding T B's alleged statements.

another from the rival gang) when they were stopped by police; knowing a person, Y, involved had an arrest warrant, the defendant referred to Y by a different first name to the police; and denied seeing most of the incident. *Id.* at 425. The defendant, then, pled guilty to Minn. Stat. § 609.495, subdiv. 3, being an accomplice after the fact. *Id.*

In *State v. Kenard*, the defendant's fiancé got into an argument with a third party and, after the defendant left the apartment with her children to keep them away from the fight, her fiancé killed the third party, although the defendant did not know of the killing immediately upon returning home. 606 N.W.2d 440, 441–42 (Minn. 2000). There was blood on the walls and the defendant learned that the third party was tucked in a closet and knocked out—according to her fiancé—but upon closer examination, the defendant later found he was dead. *Id.* at 442. The defendant helped her fiancé clean up the blood and move the body out of the apartment by holding open doors, and again later out of the building by holding open more doors. *Id.* The defendant was initially uncooperative with police officers and denied knowing anything of the death but later admitted that her fiancé had killed the third party and that she had helped in the clean-up as well as moving the body out of the apartment and building. *Id.* The defendant acted in violation of Minn. Stat. § 609.495, subdiv. 3. *Id.* at 441.

In *State v. Latimer*, Latimer pleaded guilty to accomplice after the fact to murder after she drove a car—and two individuals, one being the killer—out to an ore pit. 604 N.W.2d 103, 104 (Minn. Ct. App. 1999). There, the killer and the other individual disposed of the weapons used in the killing and burned a towel and gun case; Latimer admitted to helping dispose of the weapons used in the killing of the victim. *Id.* (the question on appeal was a matter of Latimer's restitution).

1. **The Government has Presented Absolutely No Evidence that Ms. B[redacted] Knew that T[redacted] B[redacted] Had Committed Murder in the Second Degree**.

Ms. B[redacted] is charged in the complaint with being an accomplice after the fact to murder in the second degree based on an event that took place on April 15, 2011. Allegedly, according to what T[redacted] B[redacted] told B.B. that evening, Ms. B[redacted] told T[redacted] B[redacted] to get rid of his car. At that time, the victim was alive; he died 5 days later on April 20, 2011.

In *Skipintheday*, *Kenard*, and *Latimer*, the defendants knew that the person who committed the murder actually committed the murder. In the instant case, there is no evidence that Ms. B[redacted] *knew* of T[redacted] B[redacted]'s crime. Moreover, it would have been impossible for her to have known that T[redacted] B[redacted] had committed Murder in the Second Degree, because at that time, the victim had not died. Thus, at the time of Ms. B[redacted]'s alleged statement, T[redacted] B[redacted] himself could not have been charged with Murder in the Second Degree.

This first element of knowledge is impossible to meet in this case because when Ms. B[redacted] made the alleged statement, and there is no evidence to indicate that she knew that her son had committed Murder in the Second Degree. Not only is this element of the crime not met, but this charge is illogical because she cannot be guilty of Accomplice After the Fact to Murder in the Second Degree when there was no Murder in the Second Degree at the time of her alleged action.

2. **Ms. B[redacted] Did Not Encourage T[redacted] B[redacted] to Get Rid of the Evidence**.

Assuming that all of the facts presented by the government are true, the fact that Ms. B[redacted] told T[redacted] B[redacted] to get rid of the car is not significant evidence that she was assisting her son in hiding the evidence of his crime, but rather, that she decided that a damaged (by whatever means) car was fine to sell. Had she wanted to get rid of this evidence, she could have done so in a much more secret and calculated way. Indeed, signing the deed over to B.B. is hardly a discrete way of disposing of evidence, as the defendants in *Skipintheday*, *Kenard*, and

Latimer secretly tried to do. It is logical to assume that Ms. B[redacted] knew that she was creating a paper trail that was easily traceable back to her and thus T[redacted] B[redacted]. In addition, she signed the deed over to B.B. while the car was in its damaged state. Had she wanted to be more secret and calculated about it, among other strategies, she could have had the car repaired and then sold it after it was restored to avoid any suspicion of an accident or crime.

Finally, this Court is aware from the Statements of B.B. that T[redacted] B[redacted] had previously planned to sell his car to B.B. The two had discussed this sale and even a price for months. Even if Ms. B[redacted] did make the alleged statement, there is no proof whatsoever that she did so with the intent to assist her son in committing Murder in the Second Degree. This element is not met as there is no evidence that Ms. B[redacted]'s alleged statement did anything more than voice her support for a sale that was already in progress.

3. **Ms. B[redacted] Did Not Act with Intent to Aid T[redacted] B[redacted].**

Unlike *Skipintheday*, *Kenard*, and *Latimer*, the evidence in question in the present case (i.e., the car) is not an obvious assistance in a crime. The defendant in *Skipintheday*, along with lying and telling another person to lie, hid a *gun*, while the defendant in *Kenard*, again along with lying, helped to hide the dead *body*, both of which (the gun and the body) are not ordinary things that are often hidden in everyday life. *Skipintheday*, 717 N.W.2d at 425; *Kenard*, 606 N.W.2d at 442. The defendant in *Latimer* aided, admittedly not as directly as in *Skipintheday* and *Kenard*, the killer by driving him to a place where he could dispose of the weapons. 604 N.W.2d at 104. In this case, even taking everything the state alleges as true, the only thing Ms. B[redacted] did was away the title to her car, a public act that merely allowed her son to sell a damaged vehicle that was in the process of being negotatiated on for months—an act that is routinely done in everyday life.

In *Skipintheday* and *Kenard*, because the evidence was so obviously connected to the crime, it was very easy to prove that they had knowledge of the crime and had intent to hide the evidence. In *Skipintheday*, the defendant observed the altercation and a fight, even warned the people directly involved that another person had arrived, and took the gun he knew to have been used in the killing and hid it when the car he was in was pulled over by law enforcement. 717 N.W.2d at 424–25. In *Kenard*, the defendant actually saw the body and took affirmative steps to avoid law enforcement detection, such as assisting in moving the body out of the apartment and initially denying knowing anything about the crime. 606 N.W.2d at 442. In Ms. B[redacted]'s case, more evidence is needed than a statement and a title signing to get rid of the car. Ms. B[redacted]'s alleged statement does not prove that she intended to aid T[redacted] B[redacted] in his crime by getting rid of evidence, merely that she supported T[redacted] B[redacted]'s already-made decision to sell the vehicle.

This element of "intent to aid" does not even come close to being met because there is no evidence Ms. B[redacted] intended to help T[redacted] B[redacted] hide evidence of a crime; her alleged statement, if anything, supported the sale of a car, an object that is routinely bought and sold in everyday life.

As three of the five elements lack significant support for probable cause, the above facts do not establish objective probable cause that Ms. B[redacted] was an accomplice after the fact to murder in the second degree. There is no evidence that she knew that T[redacted] B[redacted] had committed murder or that she encouraged or intended to help him to get rid of the evidence of the crime.

II. <u>The Hearsay the Government Relies upon as Evidence in its Finding of Probable Cause Is not Reliable. This non-Reliable Evidence Is not Worthy of Consideration in Determining Ms. B[redacted]'s Guilt</u>.

Probable cause exists when "evidence worthy of consideration…brings the charge…within reasonable probability." *State v. Steinbuch*, 514 N.W.2d 793, 798 (Minn. 1994) (quoting *Florence*, 239 N.W.2d at 896). Stated differently, probable cause exists when "the facts would lead a person of ordinary care and prudence to hold an honest and strong suspicion that the person under consideration is guilty of a crime." *State v. Ortiz*, 626 N.W.2d 445, 449 (Minn. Ct. App. 2001), review denied (Minn. June 27, 2001).

There is no evidence whatsoever, under *Steinbuch*, that is worth of consideration. Consider B.B.'s testimony. According to B.B's grand jury testimony and statements to police, he was present with T[redacted] B[redacted] when T[redacted] B[redacted] was speaking to Ms. B[redacted] on the phone. Directly contradicting his sworn testimony and statements to police, according to Mr. Diprima's recorded statement, B.B. was not present with T[redacted] B[redacted] during this statement, but rather was on the phone with him:

Police Report:

> Sgt. K[redacted]: So did you ever hear the mom talk about the title of the car or getting rid of the car?
>
> B.B.: [D[redacted] B[redacted]] told [T[redacted] B[redacted]] on the phone that he had to get rid of the car that night.

Grand Jury Testimony (p. 134):

> Q. So when he [T[redacted] B[redacted]] got off the phone, did you ask him who it was or did he just tell you.
>
> A. He told me it was his mother.
>
> Q. Okay. And did he tell you what the conversation was about?
>
> A. He told me that his mother advised that he got rid of the vehicle that night.

Ray Diprima Statement:

A. The cops put down that I overheard D[redacted] B[redacted] say something that night and that is not true. I have told them at least three times now that when I was on the phone, with B[redacted], that I overheard a woman. Whether it was his mother, I don't have a clue.

Also supporting this conclusion is the fact that T[redacted] B[redacted]'s cell phone records show that T[redacted] B[redacted] and B.B. spoke on the phone 9 times between 5:38 p.m. and 11:42 p.m. on April 15, 2011. In other words, B.B.'s recollection of events is drastically different depending on who he is talking to.

Also consider S.F.'s statement to police and his situation. S.F. has been convicted of an array of crimes, including assault, burglary, DWI, and aiding and abetting in a control substance crime, burglary, and criminal damage to property. At the time he made the statement, S.F. was serving time in Faribault Correctional Facility and was temporarily being housed in Hennepin County. S.F. alleges that a man who S.F. referred to as "Lindhurst," not "T[redacted] B[redacted]," spoke to him about a crime. S.F., however, did not report this until *after* he read the news story about the crime. S.F. relies on his memory ("…I have a good memory, I guess…") and written notes ("…I did write down some notes when it jogged my memory"), and refers to his notes during the interview; it is unclear when he wrote his notes or, more importantly, *why* he wrote these notes. Anyone familiar with the inner workings of the criminal justice systems knows that what S.F. is doing is called "case jumping."

S.F.'s relevant repeated statement to this case ("…he was very upset that his mother made him get rid of the car and that in parentheses I got that he explained so much how much he loved his car that it was like his baby I guess…") is directly contradicted by B.B.'s account of the sale of the car. According to B.B., both in the grand jury transcript and in interviews with Ray DiPrima, he and T[redacted] B[redacted] had talked about B.B. buying the car involved in the

accident for some time before the accident. Further, and although this is speculation, S.F. likely gains something from his cooperation with the prosecution (i.e., perhaps time off his sentence).

As neither B.B. nor S.F.'s hearsay is reliable, the only evidence the Government seems to rely upon is not credible. B.B.'s differing statements and S.F.'s situation would not lead a person of ordinary care and prudence to hold an honest and strong suspicion that the person under consideration is guilty of a crime." *Ortiz*, 626 N.W.2d at 449. In addition, the facts, as discussed above, do not lend support to the theory that Ms. B[redacted] aided T[redacted] B[redacted] in his crime after the fact. Her alleged statement only shows that she supported and approved of T[redacted] B[redacted]'s already-made decision to sell his car. The only suggestion that there was any other motive to this alleged statement is the non-reliable hearsay. The Government has not provided any other evidence that would satisfy the *Steinbuch* test for probable cause.

CONCLUSION

For the reasons stated above, it would not be fair or reasonable to make Ms. B[redacted] stand trial and this Court should grant her motion to dismiss pursuant to *Florence* for lack of probable cause.

Respectfully submitted,

RYAN GARRY, ATTORNEY AT LAW, LLC

Dated: _____

Ryan P. Garry
Attorney No. 0336129
Attorney for Defendant
North Grain Exchange
301 South Fourth Avenue, Suite 285
Minneapolis, MN 55419
Phone: (612) 436-3051