

ORIGINAL

In the
Supreme Court of Ohio

STATE, *ex rel.* THE CINCINNATI
ENQUIRER, a Division of Gannett
Satellite Information Network, Inc.

Case No. 2011-1643

Petitioner,

vs.

Original Action in Mandamus

HONORABLE NADINE ALLEN

Respondent.

MERIT BRIEF OF THE CINCINNATI ENQUIRER

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I. STATEMENT OF FACTS

On or about Tuesday, September 20, 2011, The Cincinnati Enquirer learned that Martin Morris, the plaintiff in the case of *State of Ohio v. Martin Morris*, Case No. B1001826, Hamilton County Court of Common Pleas, may have pled guilty to aggravated theft and telecommunications fraud.¹ Those were two counts of a fourteen-count complaint. Apparently, the remaining twelve counts were dismissed.

On the Hamilton County Common Pleas Clerk's electronic docket, there was no listing for Case No. B1001826. According to John Williams, the acting Clerk, this is so because Judge Allen, the judge in the Morris case, had issued an order sealing all records in the case ("the Order").

As a result of the Order, the public could not see the motion for sealing, or any other case documents. The public could not see the case docket of any schedule of events. Nor was there any way to determine the grounds for the Order.

On the morning of September 21, counsel for The Enquirer delivered a letter to Judge Allen expressing the concerns. A true and correct copy of the letter is attached as Exhibit B to the affidavit of John C. Greiner.

Later on September 21, The Enquirer learned that Judge Allen would conduct a hearing on the matter on September 22 at 1:00 p.m.

At 1:00, Judge Allen called the prosecutor, Andy Berghausen, and the defense counsel, Amy Higgins into her chambers. The three of them were in there for about 20 minutes. When they emerged from chambers, Judge Allen sat at the bench and announced that she reviewed her

¹ See Affidavit of John C. Greiner (all factual references set forth in this section are set out in that affidavit unless otherwise noted).

original Order in light of the applicable Rules of Superintendence. She said that she was satisfied there was a risk of injury if the case were not sealed, and that therefore, public policy favored sealing the records. She did not specify the injury, nor who would suffer the injury. She announced she would maintain the Order in place.

The Enquirer filed this action on September 27, 2011. On September 30, Judge Allen conducted another “hearing.” At that time Judge Allen stated that she had conducted a hearing on August 25, and at **that** hearing “the attorney for the victim, that would be Ms. Ferguson, and the defense’s attorney expressed concern that public disclosure of certain documents would cause a risk of injury to the victim.”² In fact, however, at the August 25 hearing, neither defense counsel nor the victim’s counsel made **any** such representation.³

On October 7, Judge Allen filed a motion to dismiss, which she amended on October 12. Judge Allen argued that The Enquirer was not “aggrieved” by Petitioner’s action. On November 2, 2011, Judge Allen filed a suggestion of mootness, arguing that the case was rendered moot by Judge Allen’s October 26, 2011 “Entry Unsealing Records.”

On December 21, 2011 this court denied the motion to dismiss, rejected the suggestion of mootness and granted an alternative writ.

² See Transcript of Proceedings, September 30, 2011, p. 4, attached as Exhibit 2 to The Enquirer’s Memorandum in Opposition to Motion to Dismiss.

³ See Transcript of Proceedings, August 25, 2011, attached as Exhibit 38 to Respondent’s Submission of Evidentiary Documents.

I. ARGUMENT

PROPOSITION OF LAW NO. 1.

A COURT'S FAILURE TO ABIDE BY RULE 45 OF OHIO'S RULES OF SUPERINTENDENCE JUSTIFIES A WRIT OF MANDAMUS.

"Court records are presumed open to public access."⁴ Under Sup. R. 44(B), the term "court records," includes "case documents," which are defined as follows:

a document and information in a document submitted to a court or filed with a clerk of court in a judicial action or proceeding, including exhibits, pleadings, motions, orders and judgments, and any documentation prepared by the court or clerk in the judicial action or proceeding, such as journals, dockets, and indices * * *.⁵

Under Ohio Rule of Superintendence 45, a court "shall restrict public access to information [in a case document or, if necessary, the entire document] . . . if it finds by clear and convincing evidence that the presumption of allowing public access is outweighed by a higher interest after considering . . . (a) [w]hether public policy is served by restricting public access; (b) whether any state, federal or common law exempts the document or information from public access; and (c) whether factors that support restriction of public access exist, including risk of injury to persons...."⁶

Moreover, if a court decides to restrict access to a case document, under Sup. R. 45(E)(3), it must do so in the least restrictive means possible:

- (3) When restricting public access to a case document or information in a case document pursuant to this division, the court *shall* use the least restrictive means available, including but not limited to the following:
 - (a) Redacting the information rather than limiting public access to the entire document;

⁴ Sup. R. 45(A).

⁵ Sup. R. 44(C)(1).

⁶ Sup. R. 45 (emphasis added).

- (b) Restricting remote access to either the document or the information while maintaining its direct access;
- (c) Restricting public access to either the document or the information for a specific period of time * * *.⁷
- (d) Using a generic title or description for the document or the information in a case management system or register of actions;
- (e) Using initials or other identifier for the parties' proper names.

In addition to the Rules of Superintendence, the First Amendment to the United States Constitution guarantees the public and press a coextensive right of access to criminal proceedings.⁸ This right of access can only be overcome if the court makes specific findings, on the record, demonstrating that closure is necessary to preserve higher values and that the closure order is narrowly tailored to achieve that interest.⁹

Judge Allen ignored the Rules of Superintendence and the Constitution by sealing this case in its entirety. Her rulings are improper for a host of reasons.

First, the Rules of Superintendence by their very terms, do not permit a blanket order sealing all records in a case. Rule 45(E)(2), which sets out the process for restricting access to information in a case document, provides clearly that the court must consider the issue on a document by document basis. The pertinent text of Rule 45(E)(2) provides: "A court shall restrict public access to information *in a case document* or, if necessary, the entire document..." (emphasis added) The rule is drafted in the singular, not the plural. A court can only restrict access to a case document by considering the specific document. A blanket order - which by its

⁷ Sup. R. 45(E)(3) (emphasis added).

⁸ *State ex rel. Beacon Journal Publishing Co. v. Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117, 781 N.E.2d 180, ¶15.

⁹ *Id.* at ¶17

very nature restricts access to current and yet to be filed case documents - violates Rule 45(E)(2) on its face.

Judge Allen's August 25, 2011 order¹⁰ is just such a blanket order. Even when Judge Allen amended the August 25 order by way of her October 3 order¹¹ she continued to do so in a blanket fashion, sealing "all documents filed on or after August 25, 2011." This order applied to documents not yet filed and made no document by document analysis. On its face, it violated Rule 45(E)(2).

Second, Rule 45(E)(3) requires that the Court use the least restrictive means when entering an order restricting access to a case document. The rule sets out five methods the court may use to minimize the impact on the public's right of access, including redacting specific information.

Neither Judge Allen's August 25 order, nor her October 3 order contain any meaningful discussion of whether the blanket order constituted the least restrictive means. The August 25 order makes a passing mention of the term "least restrictive" but it does not analyze the five methods set forth in Rule 45(E)(3) and explain why those methods are inadequate.¹² The October 3 amended order doesn't even bother mentioning the term less restrictive means, at all.¹³

Third, Judge Allen failed to comply with the dictates of the United States Constitution in issuing the orders. Judge Allen did not conduct an evidentiary hearing, nor did she make any on the record findings identifying any higher value that compelled the entry of the order. She made no inquiry nor any finding that the blanket sealing order constituted the least restrictive means for achieving the protection of any higher value.

¹⁰ Exhibit 20, Respondent's Submission of Evidentiary Documents.

¹¹ Exhibit 26, Respondent's Submission of Evidentiary Documents.

¹² Exhibit 20, Respondent's Submission of Evidentiary Documents.

¹³ Exhibit 26, Respondent's Submission of Evidentiary Documents.

The affidavits submitted as part of Judge Allen's evidence do not support her case, and in fact establish that The Enquirer is absolutely entitled to a writ of mandamus. The affidavits were submitted by Amy Higgins, the attorney for Martin Morris, the defendant in the underlying criminal case, and by Amy Schott Ferguson, the attorney for Donna Collins, the victim of Martin Morris.

As an initial matter, both affidavits are littered with inadmissible hearsay, which this court cannot consider in resolving this matter. Thus, paragraphs 7, 8, 11, 13, 19, 20, 22 and 31 of Ms. Higgins' affidavit consist almost entirely of hearsay and/or double hearsay.¹⁴ Similarly, paragraphs 3, 3 (there are two paragraphs marked "3") and 5 of Ms. Ferguson's affidavit consist primarily of hearsay and/or double hearsay.¹⁵

In addition, much of Ms. Higgins affidavit, which raises unfounded and false accusations concerning whether counsel for The Enquirer was **actually** representing The Enquirer in this matter are utterly irrelevant.¹⁶

But putting aside these fundamental evidentiary concerns, the substance of the affidavits indicate that the justification for the sealing order was: 1) to prevent Mr. Morris's wife from learning details about the court's restitution order (contained in the defendant's plea agreement), in the hopes that her ignorance would result in a more expeditious divorce settlement; and 2) to prevent the victim's creditors from learning details about the restitution order so that the victim

¹⁴ Paragraphs 7 and 20 primarily recounts statements made by the divorce lawyer for Mr. Morris's wife. Paragraphs 8 and 11 primarily recount statements by the prosecutor in the Morris criminal case. Paragraphs 13, 22 and 31 consist of statements by the victim's counsel. Paragraph 19 consists of statements by attorney John O'Shea relaying comments by the clerk of courts, and comments by Scott Brenner, Judge Allen's law clerk, relaying comments allegedly made by counsel for The Enquirer.

¹⁵ Both paragraphs marked "3" consist of statements by Amy Higgins relaying statements allegedly made by Martin Morris's wife. Paragraph 5 contains a statement from an appraiser.

¹⁶ See, e.g., pp. 19, 24 and 25.

would be able to obtain a waiver of a deficiency judgment from one of those creditors by keeping that creditor in the dark.¹⁷

Rule 45 allows a court to restrict public access only for the following specific reasons:

- (a) If public policy is served by restricting public access;
- (b) If state, federal or common law exempts the document from public access;
- (c) If factors support restriction of public access, including risk of injury to persons, individual privacy rights and interests, proprietary business information, public safety and fairness of the adjudication process.

None of those factors apply here. There is **no** public policy justification for the sealing orders, and indeed, Judge Allen offers none. The only justification presented for the order is to advance the private interests of two individuals.

No state, federal or common law exempts the records here. Indeed, the United States and Ohio Constitutions **compel** disclosure.

There was and is no risk of injury associated with public access here, and Judge Allen has identified none.

Neither the defendant nor the victim has a privacy right in the particulars of a plea agreement. Indeed, the public has a compelling interest in access to that information.

There are no issues here related in any way to proprietary business information or public safety.

Finally, the final factor – “fairness of the adjudicatory process” – favors disclosure, **not** restricted access. The affidavits submitted in support of Judge Allen demonstrate that counsel for the defendant and counsel for the victim sought an order sealing the records to keep adversaries in the dark, to gain an advantage in unrelated contested litigation. That tactic is

¹⁷ Affidavit of Amy Higgins, ¶ 9.

anything but fair. Once again, Rule 45 requires unrestricted access on the facts presented, not a blanket order sealing the records and eliminating the very mention of the case from the docket.

Substantively, the justification for Judge Allen's actions is woefully deficient. The Rules of Superintendence were not designed to allow a judge to conspire with counsel to shield public court records from public view solely to advance the private interests of litigants before her.

But Judge Allen's actions are procedurally deficient as well. According to the affidavits, Judge Allen learned of the "reasons" justifying the sealing orders in off the record, in chambers discussions with counsel.¹⁸ None of the information came to Judge Allen via testimony, affidavits or authenticated documents. All of it was presented to Judge Allen via unsworn statements of counsel.

Rule 45(E) permits a court to restrict public access to court records **only** if it finds by **clear and convincing evidence** that the presumption of access is overcome by a higher interest. As the affidavits conclusively demonstrate, however, Judge Allen heard **no** evidence on this point whatsoever. Accordingly, she had no legal basis whatsoever to issue the order. Based on Judge Allen's submission of evidence, this point is undisputed.

Even assuming that Judge Allen had heard evidence of the justification for the sealing order, that order would still be too broad under Rule 45(E)(3). That section of the Rule requires the court to use the least restrictive means available when restricting public access. As discussed above, Judge Allen did not consider any less restrictive means. But given the stated concern – keeping details of the restitution order from the public – the court records could have been

¹⁸ Affidavit of Amy Higgins, ¶ 12.

redacted to address that concern.¹⁹ Thus, even if the stated concern had justified **any** restriction of access, there was no basis for a blanket order.

Ohio Rule of Superintendence 47 provides for an action in mandamus to remedy a court's failure to abide by those rules:

(B) Denial of public access - remedy

A person aggrieved by the failure to a court or clerk of court to comply with the requirements of Sup. R. 44 through 47 may pursue an action in mandamus pursuant to Chapter 2731 of the Revised Code.

Sup. R. 47 expressly provides an aggrieved party with a right to pursue a mandamus action. The Enquirer is an aggrieved party because the court did not protect its interests and it is left with no opportunity to change the status quo, and therefore, has no adequate remedy at law.

Moreover, when a court fails to abide by the Constitution in restricting public access to criminal proceedings, mandamus is the appropriate remedy.²⁰

In addition to allowing this Court to right an injustice in a specific proceeding, this case offers this Court the opportunity to provide clarity to the Rules of Superintendence. First, this Court has the opportunity to affirm that Rule 45 means what it says – that a court can restrict access to a case document only after a review of **that** document. A blanket order sealing records without a document by document review is facially invalid and this court should so rule.

This court can also reiterate that an order completely restricting access, which does not even consider less restrictive means, is facially invalid.

Most importantly, however, this case provides this Court with an opportunity to firmly stand behind the spirit of the Superintendence Access Rules.

¹⁹ Obviously, because the stated concern did not justify **any** restriction of access, even redaction would not have been appropriate.

²⁰ *State ex rel. Cincinnati Enquirer v. Heath*, 183 Ohio App.3d 274, 916 N.E.2d 1090, 2009-Ohio-3415, ¶11.

The Rules of Superintendence were amended in 2009 to prevent the very sort of back room, closed door dealings described in Judge Allen's very own supporting affidavits. If the Rules mean anything at all, they mean that a judge, whether she is corrupt or merely well meaning but misguided, cannot conspire with counsel to shield public information from the public for no reason other than to advance the private interests of private litigants. By granting a writ of mandamus in this case, this Court will tell Judge Allen, and every judge in this state, that they are not above the law, and that they cannot restrict the public's right to know in the absence of **real** evidence demonstrating a **compelling** need to do so. Any action short of granting the writ would reward an abuse of power.

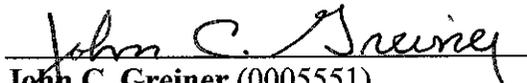
III. CONCLUSION

This Court should award The Enquirer a Writ of Mandamus ordering Judge Allen to vacate the Order.

Respectfully submitted,

Of Counsel:

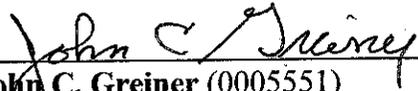
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing *MERIT BRIEF OF THE CINCINNATI ENQUIRER* was served by regular U.S. Mail, postage prepaid, this 18th day of January, 2012, upon the following:

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