ORIGINAL

In the Supreme Court of Ohio

STATE, *ex rel.* THE CINCINNATI ENQUIRER Appellee/Cross-Appellant, vs. **HON. MICHAEL J. SAGE, *et al.*** Appellants/Cross-Appellees.	:	**Case No. 2013-0945** **On Appeal from the Twelfth District Court of Appeals, Case No. CA2012-06-0122**

REPLY BRIEF OF APPELLEE/CROSS-APPELLANT THE CINCINNATI ENQUIRER

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INTRODUCTION

The Cincinnati Enquirer's Cross-Appeal from the judgment of the Twelfth District raises two very straightforward issues: (1) whether Cross-Appellee Judge Michael Sage's ("Judge Sage") June 27, 2012 protective order ("Protective Order"), which purported to prohibit Cross-Appellee Michael Gmoser ("Gmoser") from releasing the recording of the outbound 9-1-1 call containing Michael Ray's admissions of guilt ("Outbound Call"), was lawful so as to warrant the issuance of a writ of prohibition; and (2) whether the Twelfth District Court of Appeals ("Twelfth District") abused its discretion in denying The Enquirer's request for its reasonable attorney's fees under R.C. 149.43(C)(2)(c). In ruling against The Enquirer on both issues, the Twelfth District committed reversible error. The Enquirer seeks reversal of the Twelfth District's decision denying its petition for a writ of prohibition, and denying its request for attorney's fees.

With respect to the first issue, Cross-Appellee Judge Sage's Protective Order was unlawful because it sought to resolve legal issues in a mandamus action The Enquirer had not yet filed. By moving for a protective order before The Enquirer even filed a complaint, Cross-Appellee Gmoser attempted to circumvent the procedure set forth in R.C. 149.43, and consequently, coaxed Cross-Appellee Judge Sage into issuing nothing more than an advisory opinion on issues that were not yet ripe for decision. Because the Protective Order purported to resolve issues that were—at that point—non-justiciable, the Protective Order was unlawful and the proper subject of a writ of prohibition. Accordingly, the Twelfth District committed reversible error when it denied The Enquirer's petition for a writ prohibiting enforcement of that order.

As to the second issue, the Twelfth District's denial of The Enquirer's request for attorney's fees was unreasonable, as the court based its denial solely upon an application of a

subjective "good faith" standard. The remedial nature of an attorney's fees award, and the language of R.C. 149.43(C)(2)(c), mandate that any inquiry into the reasonableness of the actions of a public office vis-à-vis a request be made using the objective "well-informed public office or person" standard, not the subjective "good faith" standard applied by the court below. Because the Twelfth District acted unreasonably, and contrary to law, in applying a subjective legal standard to The Enquirer's request for attorney's fees, it abused its discretion. This Court should therefore reverse the Twelfth District's denial of The Enquirer's request.

ARGUMENT

Proposition of Law No. I:
Appellant Gmoser's Motion for Protective Order raised non-justiciable matters on which the trial court had no jurisdiction to rule.

Appellants/Cross-Appellees Sage and Gmoser (collectively "Cross-Appellees") concede that Crim.R. 16 authorizes a prosecuting attorney to designate documents as "counsel only" in a criminal proceeding, without filing a motion asking the court for permission to do so. In other words, Cross-Appellees concede that there was no procedural need for Cross-Appellee Gmoser's Motion for Protective Order in the Michael Ray criminal proceeding. And since The Cincinnati Enquirer ("The Enquirer") had not yet filed a mandamus action against Cross-Appellee Gmoser, the Protective Order was nothing more than Cross-Appellee Judge Sage's advisory opinion on whether the Outbound Call recording was exempt from disclosure under R.C.149.43 due to Sixth Amendment concerns. Thus, because the Protective Order was merely advisory in nature, it had no force of law, and the Twelfth District erred when it denied The Enquirer's petition to prohibit Cross-Appellee Judge Sage from enforcing it.

A. Criminal Rule 16 does not apply to public records requests, and even if it did, it does not prevent the disclosure of routine incident reports such as 9-1-1 calls.

In defense of the Twelfth District's holding, Cross-Appellees first argue that Cross-Appellees Gmoser's motion, and the resulting protective order, were proper because they "were consistent with the spirit of Crim.R. 16" and because Crim.R. 16(L) "gives the trial court broad discretion to regulate discovery in order to protect the integrity of the criminal justice process and the rights of the parties involved." (Reply and Response Brief of Appellants/Cross-Appellees Hon. Michael J. Sage and Michael T. Gmoser ("Cross-Appellees' Response Brief") at 32.) In making this argument, Cross-Appellees rely on the false premise that a trial court's power to regulate discovery in a criminal proceeding extends to public records requests made by non-parties. It does not.

This Court recently affirmed the basic principle that R.C. 149.43 "provides an independent basis for obtaining information potentially relevant to a criminal proceeding" from that of Crim.R. 16. *State v. Athon* (2013), 136 Ohio St. 3d 43, 2013-Ohio-1956, 989 N.E.2d 1006 (paragraph 1 of the syllabus). Despite the recent *Athon* decision, Cross-Appellees would have this Court depart from the well-established rule that Crim.R. 16 and R.C. 149.43 are independent of one another, and hold that rulings made on discovery issues raised under Crim.R. 16 can—and should—impact the substantive rights of non-parties seeking government records under R.C. 149.43.

This Court long ago held that Crim.R. 16 cannot be used to abridge the right of access to public records created by R.C. 149.43. *See State ex rel. Clark v. Toledo* (1990), 54 Ohio St. 3d 55, 56-57, 560 N.E.2d 1313 ("Because the right to access is substantive, it cannot be abridged by Crim.R. 16."), *overruled on other grounds by, State ex rel. Steckman v. Jackson* ("*Steckman*")

(1994), 70 Ohio St. 3d 420, 639 N.E.2d 83. Cross-Appellees provide no good reason to revisit that holding here.

But even if Crim.R. 16 did apply to public records requests by non-parties to a criminal proceeding (which it does not), routine offense and incident reports—such as 9-1-1 calls—are subject to immediate release upon request even under that rule. *See Steckman*, 70 Ohio St. 3d at paragraph 5 of the syllabus, 639 N.E.2d 83. This Court held that "[i]f release is refused, an action in mandamus, pursuant to R.C. 149.43(C), will lie to secure release of the records." *Id. See also State ex rel. Rasul-Bey v. Onunwor* (2002), 94 Ohio St. 3d 119, 120, 2002-Ohio-67, 760 N.E.2d 421 (same). In light of the treatment of 9-1-1 calls under Crim.R. 16 between parties to a criminal proceeding, it is impossible to conclude why it should have any application to a third party's public records request.

Indeed, Cross-Appellees struggle to find any reason to apply Crim.R. 16 to a non-party's public records requests, diverting attention with the straw argument that "the foundation for the Enquirer's position . . . has been that public records requests trump Crim.R. 16 as well as a prosecuting attorney's constitutional, procedural, and ethical duties to protect an accused's constitutional right to a fair trial." (Cross-Appellees' Response Br. at 35.) Suffice it to say, that is not the foundation of The Enquirer's position.

Rather, The Enquirer bases its position on the fact that Cross-Appellee Gmoser failed to present evidence of a potential Sixth Amendment violation, and that Cross-Appellee Judge Sage issued his Protective Order despite Cross-Appellee Gmoser's failure to meet his burden of proof. The Twelfth District agreed with The Enquirer on the proof issue. This Court therefore need not consider the red herring issue whether R.C. 149.43 "trumps" the Sixth Amendment.

B. Cross-Appellee Judge Sage's Protective Order did not attempt to regulate discovery in the Michael Ray criminal proceeding, but purported to rule on an issue in an as-of-yet unfiled mandamus action.

Cross-Appellees also argue that the Protective Order was proper because Cross-Appellee Judge Sage had "power to assume general subject matter jurisdiction over the dispute" and because "[t]he Criminal Rules of Procedure grant trial courts the discretion to render decisions that regulate discovery when presented by the parties." (Cross-Appellees' Response Br. at 36.) But whether or not Cross-Appellees' abstract statement of the law is correct, it does not apply here for at least two reasons.

First, no "dispute" existed when Cross-Appellee Judge Sage issued his Protective Order, as The Enquirer had not yet formally challenged Cross-Appellee's Gmoser's initial decision to deny its request. In other words, there was no "justiciable matter" involving The Enquirer over which Cross-Appellee Judge Sage could assert jurisdiction. And neither R.C. 149.43, nor any other Ohio law, empowers common pleas courts to *sua sponte* assert jurisdiction over a non-party to a criminal proceeding in order to adjudicate the propriety of a non-party's request for public records under R.C. 149.43.

Second, The Enquirer's request for a recording of the Outbound Call was not a discovery request. Rather, it was a straightforward R.C. 149.43 request for a public record. The *Athon* decision makes clear that the rights of the public under R.C. 149.43, and those of a criminal defendant under Crim.R. 16, are separate and independent. And because they are separate and independent, they may not be conflated in the way Cross-Appellees propose.

Accordingly, because Cross-Appellee Judge Sage's Protective Order adjudicated non-justiciable issues that were not properly before him, the Twelfth District erred when it denied The Enquirer's petition to prohibit enforcement of that order.

Proposition of Law No. II:
The Twelfth District abused its discretion in denying The Enquirer's request for its reasonable attorney's fees.

Cross-Appellee Gmoser's defense of the Twelfth District's unreasonable denial of The Enquirer's request for attorney's fees centers on his contention that the Twelfth District properly considered whether he denied The Enquirer's request in "good faith." That is, whether Cross-Appellee Gmoser's subjective belief as to whether release of the Outbound Call recording would violate Michael Ray's Sixth Amendment right to a fair trial was "reasonable." (Cross-Appellees' Response Br. at 41-45.) The subjective standard applied by the court below, and promoted by Cross-Appellee Gmoser, is not only unworkable in practice, it is contrary to the plain language of R.C. 149.43.

The revisions the Legislature made to R.C. 149.43 in 2007 instruct that courts are to treat an award of attorney's fees under R.C. 149.43 as remedial in nature, not punitive. *See State ex rel. Doe v. Smith* ("*Doe*") (2009), 123 Ohio St. 3d 44, 2009-Ohio-4149, 914 N.E.2d 159, ¶ 26. Consistent with this directive, the court must consider the actions of the public officer against those of a "well-informed public office or person" in deciding whether to *reduce* an award of attorney's fees. *See* R.C. 149.43(C)(2)(c). The "well-informed public office or person" standard is an objective one that precludes consideration of the public office's subjective knowledge or belief at the time.

As this Court noted in *Doe*, however, the analysis under R.C. 149.43(C)(2)(c) begins with whether an award of attorney's fees should be made in the first instance, not whether a reduction is proper. *Doe*, 123 Ohio St. 3d 44, 2009-Ohio-4149, 914 N.E.2d 159, ¶ 33. For this inquiry, the *Doe* Court provided limited guidance, noting only that the "public benefit conferred" and the reasonableness of the denial against the "well-informed public office or person" standard

described in R.C. 149.43(C)(2)(c)(i) could be considered in making this determination. *Id.* at ¶¶ 33-34. The *Doe* Court did not hold that a reviewing court should (or could) consider the subjective "good faith" of the public office or person. And indeed, the *Doe* decision demands that a reviewing court consider the "reasonableness" of the public office's conduct against the objective "well-informed public office or person" standard devised by the Legislature. *Id.*

The court below did not apply that objective standard here. Instead, the court concluded that although The Enquirer's litigation of its rights conferred a public benefit, Cross-Appellee Gmoser acted in "good faith" to protect Michael Ray's Sixth Amendment right to a fair trial. The Twelfth District predicated its "good faith" finding on its conclusion that Cross-Appellee Gmoser "reasonably believed that withholding the Outbound Call recording and issuing the protective order would promote the underlying public policy of preserving an accused's right to a fair trial." (Decision at ¶ 54.) The court further added that Cross-Appellee Gmoser had good faith, i.e., subjective, ethical concerns concerning his compliance with Ohio Prof.Cond.R. 3.6.

Under the "well-informed public office or person" standard, however, neither of Cross-Appellee Gmoser's excuses for non-compliance are sufficient. With respect to Cross-Appellee Gmoser's asserted fear that he would violate his ethical obligations as a prosecutor, Prof.Cond.R. 3.6(b)(2) expressly provides that a lawyer may ethically disclose "information contained in a public record," even if he knows it will result in prejudice.

Of course, Cross-Appellee asserts that he believed that the Outbound Call recording was not a "public record." At the time of The Enquirer's request, he defended his conclusion on the ground that the Outbound call was a confidential law enforcement investigatory record, and a trial preparation record. He further asserted that release of the Outbound Call would violate Michael Ray's Sixth Amendment right to a fair trial.

A well-informed public office or person could not have reasonably believed that these excuses were legally sufficient to withhold the Outbound Call recording from The Enquirer. At the outset, Cross-Appellee Gmoser should have known that a court would strictly construe any claimed exceptions to disclosure of the Outbound Call recording against him as the custodian. *See State ex rel. Miller v. Ohio State Highway Patrol* ("*Miller*") (2013), -- Ohio St. 3d ---, 2013-Ohio-3720. He thus should have known that he could not rely on fanciful applications of R.C. 149.43's exceptions to the definition of "public record" to satisfy the well-informed public office or person standard, as he attempted to do here.

As to the confidential law enforcement investigatory record and trial preparation record exceptions, the Twelfth District did not consider whether a well-informed public person would have believed these exceptions applied when Cross-Appellee Gmoser denied The Enquirer's request. Gmoser suggests that the Twelfth District did consider this issue in its Response Brief, quoting the court's observation that "[t]he facts confronting Gmoser and Judge Sage were unusual in that a telephone call was placed by a 911 operator who was employed by a law enforcement agency, and who solicited incriminating statements from a murder suspect." (Cross-Appellee's Response Br. at 41 (quoting Decision at ¶ ¶ 54).) The Twelfth District's opinion is clear, however, that the court below made this observation in the context of considering whether Cross-Appellee Gmoser's Sixth Amendment belief was reasonable. There is nothing in the Decision to suggest that the Twelfth District condoned Cross-Appellee Gmoser's reliance on the confidential law enforcement investigatory record and trial preparation record exceptions as a basis for denying The Enquirer's request.

Indeed, with respect to the "trial preparation record" argument, Cross-Appellee Gmoser did not even pursue that argument in this appeal. Cross-Appellee's abandonment of this excuse

follows from the complete lack of evidence supporting the argument that the Outbound Call recording contained information that was that was "specifically compiled in reasonable anticipation of . . . a civil or criminal action or proceeding." R.C. 149.43(A)(4).

As for Cross-Appellee Gmoser's attempt to shoehorn the Outbound Call recording into the confidential law enforcement investigatory record exception, the Court's recent *Miller* decision illustrates the unreasonableness of Gmoser's invocation of that exception. Even if Gmoser were to ignore this Court's clear precedent concerning the treatment of 9-1-1 call recordings, he could not have reasonably concluded that the Outbound Call recording pertained to a law enforcement investigation when it was created, or that it would create a "high probability of disclosure" of one of the categories of information enumerated in R.C. 149.43(A)(2)(a) through (d). *See Miller*, 2013-Ohio-3720, ¶ 25.

Indeed, even if the Outbound Call could be characterized as having been a part of a law enforcement investigation, as Gmoser argues, nothing in the Outbound Call reveals: (1) the name of an uncharged suspect; (2) the identity of a source or witness; (3) "[s]pecific confidential investigatory techniques or procedures or specific investigatory work product"; or (4) information that would have endangered the life or physical safety of "law enforcement personnel, a crime victim, a witness, or a confidential information source." R.C. 149.43(A)(2)(c). (Appellants' Merit Br. at 10.) The only one of these categories Cross-Appellee even suggests may apply is the third, but Ms. Rednour made clear in her deposition that she was not an investigator, and that she had not received any training as an investigator. (Tr. 35, Rednour Dep. 32:3-16 & 33:9-13, Aug. 20, 2012.) Thus, disclosure of the Outbound Call recording could not have revealed any investigatory techniques or work-product.

Given that no well-informed public office or person would have reasonably relied on the confidential law enforcement investigatory record, or trial preparation record exceptions, the only remaining issue is whether a well-informed public office or person could have reasonably believed that release of the Outbound Call recording would violate Michael Ray's Sixth Amendment right to a fair trial. The Twelfth District did not conclude that a well-informed public person would have concluded as Gmoser did, but instead held only that Gmoser denied the request in "good faith" to preserve Ray's Sixth Amendment right. As to whether in fact there was a risk of a Sixth Amendment violation, the Twelfth District expressly held that there was insufficient evidence. (Decision at ¶¶ 28-31.)

Given the lack of evidence suggesting that release of the Outbound Call would violate Michael Ray's Sixth Amendment right to a fair trial, it is impossible to conclude that a well-informed public office or person could have reasonably believed this was a basis for withholding the Outbound Call recording. If Cross-Appellee Gmoser possessed such evidence, he was obligated to present it to the Twelfth District to demonstrate that an exception to disclosure applied. *See Miller*, 2013-Ohio-3720, ¶ 23. As Cross-Appellee Gmoser presented no evidence of fair trial concerns to the Twelfth District, he cannot now claim that a well-informed public office or person would have believed that the Outbound Call recording was exempt from disclosure on this basis. To conclude otherwise would be to permit public officials to deny public records requests without an evidentiary basis, and later claim nothing more than subjective "good faith" in defense to a request for attorney's fees. This is surely not the process envisioned by the Legislature when it amended the attorney's fees provisions in 2007.

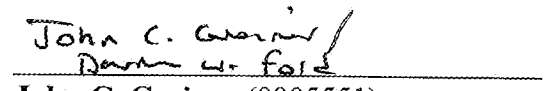
In summary, the procedural history of this case, and the lack of evidence of Sixth Amendment concerns, makes clear that Cross-Appellee Gmoser acted without legal justification

in denying The Enquirer's request for the Outbound Call recording. The Enquirer, in order to protect its rights under R.C. 149.43—and those of the public—litigated this matter for nearly a year. Moreover, it had to deal with a government actor that, as the Twelfth District found, acted without proper legal justification. This is precisely the kind of case that mandates the remedial attorney's fees award permitted by R.C. 149.43. By unreasonably denying The Enquirer request for attorney's fees, the Twelfth District abused its discretion. Accordingly, the Court should reverse the Twelfth District's decision denying The Enquirer its reasonable attorney's fees.

CONCLUSION

For the reasons set forth herein, and in its Merit Brief, The Enquirer respectfully requests that the Court affirm the Twelfth District's Decision granting its request for writ of mandamus and award of statutory damage; and reverse the Twelfth District's Decision denying its writ of prohibition and its request for its reasonable attorney's fees.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing **REPLY BRIEF OF APPELLEE/CROSS-APPELLANT THE CINCINNATI ENQUIRER** was served via regular U.S. Mail, postage prepaid, this 1st day of November, 2013, upon the following:

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