

IN THE SUPREME COURT OF OHIO

STATE EX REL. :
CINCINNATI ENQUIRER, :
Appellee/Cross-Appellant : CASE NO. 2013-0945
vs. :
HON. MICHAEL J. SAGE, et al., :
Appellant/Cross-Appellee. :

APPELLANT/CROSS-APPELLEE'S MOTION FOR RECONSIDERATION
OR IN THE ALTERNATIVE MOTION FOR CLARIFICATION

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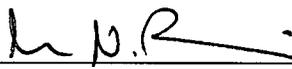
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CASE NO. 2013-0945

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MOTION FOR RECONSIDERATION
OR IN THE ALTERNATIVE MOTION FOR CLARIFICATION
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Now comes Appellant/Cross-Appellee Prosecutor Gmoser of Butler County and moves this Court to reconsider its March 19, 2015, decision, or in the alternative clarify Appellee/Cross-Appellant's entitlement to attorney fees. This Court's March 19 decision contains several internal conflicting holdings and is based on an inaccurate recitation of the record of the case as more fully discussed in the Memorandum in Support attached hereto.

Respectfully Submitted,
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MEMORANDUM IN SUPPORT

I. RECONSIDERATION

S.Ct.Prac.R. 18.02(A) provides that a motion for reconsideration “must be filed within ten days after the Supreme Court’s judgment entry or order is filed with the Clerk of the Supreme Court.” The Rule continues and requires that “[a] motion for reconsideration shall not constitute a reargument of the case and may be filed only with respect to the following Supreme Court decisions: (1) Refusal to accept a jurisdictional appeal; (2) The sua sponte dismissal of a case; (3) The granting of a motion to dismiss; (4) A decision on the merits of a case.” S.Ct.Prac.R. 18.02(B). The standard for reviewing a motion for reconsideration is “whether the motion calls to the attention of the court an obvious error in its decision, or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been.” *Columbus v. Hodge*, 37 Ohio App.3d 68, 523 N.E.2d 515 (1987), paragraph one of the syllabus. “An application for reconsideration may not be filed simply on the basis that a party disagrees with the prior appellate court decision.” *State v. Owens*, 112 Ohio App.3d 334, 336, 678 N.E.2d 956 (1996).

Appellant/Cross-Appellee Gmoser prays that this Court grant his motion for reconsideration. First, this Court’s decision consisted of conflicting holdings. Second, this Court did not consider Appellant/Cross-Appellee’s Criminal Rule 16 argument by finding it was not raised in the lower court. The Court’s decision, however, is not supported by the record. In its lower appellate brief, Appellant/Cross-Appellee raised that issue and a discussion followed on 4 pages. Third, the record does not support the conclusion that no evidence was presented to support the finding that Appellee/Cross-Appellant (hereinafter “Enquirer”) was going to publicize the recording of Ray’s statements of “I am a murderer, and you need to arrest me.”

A. The Constitution Does Not Prohibit Release of the Record - Sixth Amendment

It is evident after a thorough reading of the decision that this Court announced inconsistent holdings and overlooked key facts from the record of the case. This Court concluded that concerns for Ray's Sixth Amendment right to a fair trial were "certainly valid." *State ex rel. Cincinnati Enquirer v. Hon. Judge Sage, et al.*, ___ Ohio St.3d ___, 2015-Ohio-974, ¶ 20. This finding was pursuant to the legal precedent:

We have previously recognized that where the release of a record "would prejudice the defendant's rights under the state and federal Constitutions, the information at issue would constitute 'records the release of which is prohibited by state or federal law.'" *State ex rel. Vindicator Printing Co. v. Watkins*, 66 Ohio St.3d 129, 609 N.E.2d 551 (1993). Specifically, where "release of the records would prejudice the right of a criminal defendant to a fair trial, such information would exempt from disclosure pursuant to R.C. 149.43(A)(1) during the pendency of the defendant's criminal proceeding."

Id.

Further, this Court reiterated that "the First Amendment does not give the Enquirer the right to open the prosecution's evidence locker[.]" and "even evidence exchanged during pretrial discovery falls outside the First Amendment right of access." *Id.*, at ¶ 22. Consequently, this Court held that "at the time the Enquirer made its public-records request, it had no First Amendment claim to the recording[.]" *Id.*, at ¶ 23.

However, even though there was "valid" concern for Ray's Sixth Amendment right to a fair trial without any opposition from the First Amendment right of public access, this Court still held that there was insufficient evidence to support the conclusion that release of the recording would have prejudiced Ray. *Id.*, at ¶ 24. Specifically, this Court concluded that "there is nothing in the record regarding whether publicity might result, the probable extent of that publicity, the nature of the publicity, or how that publicity would affect the jury pool." *Id.* This Court failed to clarify or give guidance as to what

evidence is required to support the finding of prejudice to an individual's Sixth Amendment right to a fair trial, and simply held:

And while we can certainly agree that **the recording contains prejudicial information**, that fact alone is insufficient for us to predict a Sixth Amendment violation. We still need to know whether this prejudicial information would create extensive publicity and whether this publicity would be so pervasive and negative that it would prevent Ray from finding 12 impartial jurors. *See id.* We cannot assume or speculate our way to these necessary findings; **there must be some evidence** in the record that speaks to the possible publicity and its effect on the jury pool.

Id., at ¶ 25 (emphasis added).

This Court's conclusion is contrary to well-established precedent and is clearly inapposite to the record of the case. First, this Court relied upon its precedent in the *Watkins* decision before concluding that there were "valid" concerns with regards to Ray's Sixth Amendment right to a fair trial, but dismissed *Watkins* holding:

Inasmuch as such disclosures would prejudice the defendant's rights under the state and federal Constitutions, the information at issue would constitute "records the release of which is prohibited by state or federal law." Where a **subsequent in camera inspection** reveals that release of the records would prejudice the right of a criminal defendant to a fair trial, such information would be exempt from disclosure pursuant to R.C. 149.43(A)(1) during the pendency of the defendant's criminal proceeding.

State ex rel. Vindicator Printing Co. v. Watkins, 66 Ohio St.3d 129, 138, 609 N.E.2d 551 (1993) (emphasis added).

In the matter at bar, there was a hearing and an in camera inspection of the recording. (Tr 25, Exh. D). Furthermore, the recording was not simply a confession from Ray, but was the ultimate legal conclusion (murder) that jurors are responsible for determining through the use of precise legal definitions. In the recording, Ray stated: "I am a **murderer**, and you need to arrest me." (Tr. 25, pages 60-61) (emphasis added). Requiring expert testimony on material patently inflammatory by any reasonable interpretation or observation will come as a surprise to trial judges across the State who make these decision on their own from the facts of a case.

Second, the record of the case demonstrates that the Enquirer intended to publicize the recording. Within hours of the 9-1-1 call to dispatch emergency personnel to Ray's residence, the Enquirer requested the recording of the calls from the Butler County Sheriff's office. (Tr. 25, pages 41-42, 45; Tr. 26 at Exh. C, ¶ 2). The Butler County Sheriff's office provided the Enquirer only with the incoming 9-1-1 call. (Tr. 26 at Exh. C, ¶ 4, Exh. C-2) Two days later, the Enquirer also requested the two outbound calls. Appellant/Cross-Appellee Gmoser denied the request for the outbound calls. (Tr. 26 at Exh. C, ¶ 5) Within two more days, the Enquirer's retained counsel made a second request for the outbound calls. (Tr. 26 at Exh. B, ¶3, B-1).

The Enquirer's persistent demand for the recording is a clear demonstration of its intention to publicize the audio recording in light of the fact that the press had already been informed that Ray was in custody and had confessed to the act of patricide. *See State ex rel. Cincinnati Enquirer v. Hon. Michael Sage, et al.*, 12th Dist. App. No. CA2012-06-0122, Respondent's Supplemental Notice of Filing of Evidence, filed on December 2, 2012 (Hamilton Journal News article published on June 19, 2012: "Michael J. Ray told sheriff deputies he 'did it, yes I did' when they arrived on the scene about 4:45 p.m., Sunday. * * * Ray said the knife, which deputies believe is the weapon used in the stabbing, was in his bedroom. Ray was arraigned Monday in Hamilton Municipal Court where bond was set at \$500,000.")

Thus, the record supports the conclusion that it was not sufficient for the Enquirer to report that Ray confessed to the act of killing his father. Instead, the Enquirer wanted to maximize and get a sensational reaction from the public of the victim's wife's grief in the background and the audio statements from the accuser of the crime. (Tr. 25, pages 61, 63). Any listener can clearly discern the victim's wife in the background screaming and begging the victim to stay alive, praying to God, cursing,

and expressing her love as he is dying in her arms. (Id.) At the risk of being cast as defiant, Appellant/Cross-Appellee submits that based on the Enquirer's persistence in obtaining the recording, any reasonable rational person would conclude that the Enquirer intended to publish Ray's words and the victim's wife's grief in the background.

Appellant/Cross-Appellee submits that this Honorable Court should reconsider its decision and conclude that the release of the statement "I am a murderer" would have violated Ray's Sixth Amendment right to a fair trial in support of Appellant/Cross-Appellee's position.

B. Criminal Rule 16

This Court summarily overruled Appellant/Cross-Appellee's argument that "Crim.R. 16(C) is a state law that prohibits the dissemination of the recording" because: "appellants did not raise this claim in the court below, so they waived it. More importantly, though, there is nothing in the record demonstrating that Gmoser ever designated the recording as 'counsel only.' Consequently, he cannot claim that such a designation would save the recording from public-records disclosure." *Sage*, __ Ohio St.3d ____, 2015-Ohio-974, ¶ 28. This Court seemingly disregarded the specific designation in Appellant/Cross-Appellee Gmoser's motion for the protective order of "in supplementation of the authority for non-disclosure under Rule 16(C), Ohio Rules of Criminal Procedure." (Tr. 26 at Exh. B, ¶ 5)

This Court overlooked pages 14-17 of Appellant/Cross-Appellee's appellate brief filed in the Twelfth District Court of Appeals. In the lower court, Appellant/Cross-Appellee in his merit brief defended the protective order request pursuant to Crim.R. 16(C): "the remedy Gmoser sought from the trial court in granting the protective order was that the recording be limited to 'counsel only' pursuant to Crim.R. 16(C)." (Lower Court brief, page 16) Appellant/Cross-Appellee then cited to legal precedent

from this Court's decision in *State ex rel. WHIO-TV-7 v. Lowe*, 77 Ohio St.3d 350, 355, 1997-Ohio-271, 673 N.E.2d 1360: "criminal discovery is one of those governmental activities that would be frustrated if subjected to the required disclosure contemplated by R.C. 149.43." (Id.)

As such, this Court should grant Appellant/Cross-Appellee's motion for reconsideration since this Honorable Court failed to consider the application of Crim.R. 16. Appellant/Cross-Appellee Gmoser urges this Court to address the merits of the interplay of the newly enacted divisions (C) & (D) in Crim.R. 16 with R.C. 149.43(A)(1)(v). This issue is of great importance to resolve the frequent collision of criminal cases with the Ohio public Records Act. This Court has previously held that Crim.R. (6)(E) is a "state law" within the meaning of R.C. 149.43(A)(1)(v). *State ex rel. Beacon Journal Publishing Company v. Waters*, 67 Ohio St. 3d 321, 323-324, 1993-Ohio-77, 617 N.E.2d 1110. It thus follows that this Court should similarly hold that Crim.R. 16 (C) & (D) are "state law" that prevent the disclosure under the public records statute.

C. Attorney Fees

"Apparently, no good deed goes unpunished." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 31, 129 S.Ct. 365, 380 (2008) (Chief Justice Roberts).

In addressing this issue and awarding attorney fees, this Court relied on inaccurate factual determinations from the record and disregarded a prosecutor's duty to uphold the Constitution.

At the outset, this Court held that "[t]he prosecutor's office denied the Enquirer's initial request without giving any explanation or citing any legal authority." *Sage*, ___ Ohio St.3d ___, 2015-Ohio-974, ¶ 39. This statement is in direct discord to the Court's recitation of the facts at the beginning of the decision, where it was clear that the first request went to the Butler County Sheriff's office:

Sheila McLaughlin, a reporter from the Enquirer, submitted a public-records request to

the Butler County Sheriff's Office for 9-1-1 calls. The sheriff provided McLaughlin with a copy of the incoming 9-1-1 call that Rednour had received. McLaughlin then submitted a second request for the two return calls that Rednour had placed. Appellant/cross-appellee Butler County Prosecuting Attorney Michael Gmoser responded, denying McLaughlin's request. Gmoser claimed that the return calls were both trial-preparation records under R.C. 149.43(A)(1)(g) and confidential law-enforcement investigatory records under R.C. 143.43(A)(1)(h) and thus were exempt from the public-records laws.

Id., at ¶ 4.

The record of the case also supports the finding that once a request was sent to Appellant/Cross-Appellee Gmoser, he provided the Enquirer with the reason for the denial of the request: “[w]hen the investigation is completed, I will then seek a protective order against its release.” (Tr.25; Exh. C-1). Thus, this Court's finding that Prosecutor Gmoser failed to provide a reason for the first request is not supported by the record.

Next, this Court took issue with the prosecutor's office initiative in defending the constitutional rights of Ray. However, Rule 3.6(a) of the Ohio Rules of Professional Conduct provides: “A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer *knows* or *reasonably should know* will be disseminated by means of public communication and will have a *substantial* likelihood of materially prejudicing an adjudicative proceeding in the matter.”

In the matter at bar, the Enquirer requested that Prosecutor Gmoser release Ray's statements after Ray was arrested and criminal proceedings began. The release of the recording would have exposed Prosecutor Gmoser to disciplinary sanctions for violating Rule 3.6(a). See Prof.Cond.R. 3.6(a) Comment 5(2) (“There are, on the other hand, **certain subjects that are more likely than not to have a material prejudicial effect** on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to: * *

* (2) or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession[.]” (Emphasis added); See also Prof.Cond.R. 3.8 Comment(1) (emphasis added) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. **This responsibility carries with it specific obligations to see that the defendant is accorded justice** and that guilt is decided upon the basis of sufficient evidence. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4. A prosecutor also is subject to other applicable rules such as Rules 3.6, 4.2, 4.3, 5.1, and 5.3.”)

Moreover, the Enquirer’s request went to either the Butler County Sheriff’s office or to Prosecutor Gmoser. Thus, Ray’s criminal attorneys had no knowledge that Ray’s prejudicial statement (“I am a murderer”) was at risk of being publicized. This heightened the prosecutor’s office duty to protect Ray’s constitutional rights. More importantly, Ray’s felony criminal attorneys, who were appointed on the same day as the indictment and hearing of the protective order, joined Prosecutor Gmoser’s motion to protect the recording from being released. (Tr. 26, Exh. D, page 4) Even though Ray’s attorneys joined Appellant/Cross-Appellee Gmoser’s motion, this Court places all liability on the Prosecutor.

The United States Supreme Court held that the cure for the Sixth Amendment right to a fair trial “lies in those remedial measures that will prevent prejudice **at its inception.**” *Sheppard v. Maxwell*, 384 U.S. 333, 363, 86 S.Ct. 1507, 1522, 16 L.E.2d 600, 620 (1966) (emphasis added). The Enquirer persistently demanded the recording from the time of the incident, all of which occurred several days prior to the indictment. The prosecutor’s office filed the motion for protective order on the same day of indictment, thus, at inception, which is the cure pursuant to the High Court. (Tr. 26, Exh. D)

What is more, this Court places all responsibility on Prosecutor Gmoser for Judge Sage's decision to issue the protective order. Judge Sage issued the protective order after a hearing and in camera review of the recording. (Tr. 25 Exh. D; Tr. 36, Exh. 1) By issuing the protective order, the prosecutor's office was required to follow the directive of Judge Sage, or face contempt sanctions. This Court has imposed contempt sanctions on counsel who do not follow its directive. *See, e.g. Disciplinary Counsel v. Turner*, 141 Ohio St.3d 1235, 21 N.E.2d 1087, 2014-Ohio-5222, ¶ 2 (Upon consideration thereof, it is ordered and adjudged by this court that Talbert Randall Turner, Attorney Registration No. 0016671, last known address in Monroe, Ohio, is found in contempt for failure to comply with the court's July 23, 2014 order.")

Based upon the above, it is indiscernible that this Court concluded that "[t]hese tactics do not demonstrate good faith by the prosecutor's office[.]" *Sage*, ___ Ohio St.3d ___, 2015-Ohio-974, ¶ 41. This Court's decision is a cautionary tale to prosecutors in the state of Ohio that due diligence in upholding the Constitutional rights of defendants amounts to financial sanctions.

Wherefore, Appellant/Cross-Appellee Gmoser prays that this Honorable Court reconsider its imposition of attorney fees for a prosecutor's office's diligent preservation of Ray's Sixth Amendment right to a fair trial and following a directive from a Court of Common Pleas Judge.

D. Statutory Damages

Based on the above arguments, Appellant/Cross-Appellee Gmoser's requests that this Court reconsider its decision and find that the recording was exempt from release and reverse the award of statutory damages.

E. Conclusion

For all the foregoing reasons, this Court should grant Appellant/Cross-Appellee's motion for reconsideration and find that the release of the statement "I am a murderer" would have violated Ray's Sixth Amendment right to a fair trial and reverse the imposition of financial sanctions.

II. CLARIFICATION

In the event that this Court denies Appellant/Cross-Appellee's motion for reconsideration and affirms the sanction of attorney fees, Appellant/Cross-Appellee requests clarification as to which attorney fees are the responsibility of the prosecutor's office.

This Court held that the prosecutor's office "went on the offensive" which "forced the Enquirer into a two front war: it now had to both prosecute its own mandamus case and defend against the protective order." *Sage*, __ Ohio St.3d __, 2015-Ohio-974, ¶ 40. This Court then concluded that "[t]he protective order had no place in this public-records dispute. Mandamus actions resolve public records matters; criminal trial motions do not. * * * Thus, the protective order only served to saddle the Enquirer with more litigation and more attorney fees. These tactics do not demonstrate good faith by the prosecutor's office, and the court of appeals was unreasonable in concluding otherwise. The office forced the Enquirer to incur additional legal fees. It should be responsible, in some measure, for the extra costs that it created." *Id.*, at ¶ 41.

Wherefore, Appellant/Cross-Appellee Gmoser prays that this Honorable Court will clarify whether Appellant/Cross-Appellee is only responsible for attorney fees associated with defending the protective order. Further, Appellant/Cross-Appellee prays that this Honorable Court clarify the percentage that "some measure" equates. The question for clarification is thus whether or not the

Enquirer is entitled to every cent of its attorney fees from the onset or only those associated with the “increased burden”?

Respectfully submitted,

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