ORIGINAL

In the Supreme Court of Ohio

STATE, *ex rel.* THE CINCINNATI ENQUIRER,	:	Case No. 2013-0945
Appellee/Cross-Appellant,	:	ON APPEAL FROM THE BUTLER COUNTY COURT OF APPEALS, TWELFTH APPELLATE DISTRICT
vs.	:	
HON. MICHAEL J. SAGE, *et al.*,	:	
Appellants/Cross-Appellees.	:	Court of Appeals Case No. CA 2012-06-0122

APPELLEE/CROSS-APPELLANT THE CINCINNATI ENQUIRER'S RESPONSE IN OPPOSITION TO APPELLANT/CROSS-APPELLEE'S MOTION FOR RECONSIDERATION OR IN THE ALTERNATIVE MOTION FOR CLARIFICATION

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MEMORANDUM IN OPPOSITION

Appellee/Cross-Appellant The Cincinnati Enquirer ("The Enquirer") submits this memorandum in opposition to Appellant/Cross-Appellee Michael T. Gmoser's ("Gmoser") Motion for Reconsideration ("Motion").

I. THE COURT SHOULD DENY GMOSER'S MOTION FOR RECONSIDERATION.

Gmoser begins his memorandum in support of his Motion by citing the applicable standard for reconsideration, and then promptly ignores it. Pursuant to the Supreme Court Rules of Practice 18.02(B), this Court will not "grant reconsideration when a movant seeks merely to reargue the case at hand." *Dublin City Sch. Bd. of Educ. V. Franklin County Bd. of Revision*, 139 Ohio St.3d 212, 2014-Ohio-1940, 11 N.E.3d 222, ¶ 9 (2014). The Court only uses its reconsideration authority to "correct decisions which, upon reflecting, are deemed to have been made in error." *Id., quoting State ex rel. Huebner v. W. Jefferson Village Council*, 75 Ohio St.3d 381, 383, 663 N.E.2d 339 (1995). Gmoser's Motion is merely a reargument of his prior brief and he fails to identify any evidence or claims the Court did not address. Gmoser's disagreement with this Court's decision is not grounds for granting reconsideration.

A. No Sixth Amendment Violation.

Gmoser contends that this Court's ruling on his Sixth Amendment argument is internally inconsistent. For this reason, he asks the Court to reconsider its ruling.

Gmoser deems it inconsistent for the Court to find that the 911 recordings contained "prejudicial information," but ultimately conclude that prejudice alone cannot justify withholding the tapes.

Essentially, Gmoser wants this Court to reconsider its holding requiring him to provide **evidence**, not speculation, establishing the likelihood of pervasive and negative publicity. In

Gmoser's view, a judge is entitled to make this determination based on nothing more than the judge's in-camera review of the tape.

But this is precisely the argument Gmoser made in his appeal (see pp. 20 - 21, Merit Brief of Appellant/Cross-Appellees Hon. Michael J. Sage, et al. ("First Merit Brief")). He is merely rearguing that position now. Rule 18.02(B) expressly prohibits him from doing so.

Moreover, the Court's recognition that the Sixth Amendment concerns are "valid" is in no way inconsistent with a demand for evidence supporting the point. Thus, even if the Court ignored Rule 18, the substance of Gmoser's reargument lacks merit.

Gmoser also asks this Court to reconsider its ruling because according to Gmoser, he did present evidence of the likely pervasive negative publicity. This "evidence" consists of The Enquirer's dogged efforts to obtain a copy of the 911 recordings. Gmoser considers "[t]he Enquirer's persistent demand for the recording ... a clear demonstration of its intention to publicize the audio recording...." Gmoser apparently has the omniscient knowledge that "[t]he 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."

Gmoser made this "where there's smoke there's fire" argument in his original appeal (pp. 21 - 23, First Merit Brief) and this Court properly rejected it. Thus, this position is reargument, and barred by Rule 18.02(B). But again, even if this Court considers the substance, it should find it frivolous. Speculation is not evidence. And Gmoser's contention about The Enquirer's desire to exploit the contents of the 911 tapes is bizarre, given that, due to Gmoser's refusal to produce them, The Enquirer had no idea what the tapes said.

B. No Independent Claim Under Crim. R. 16(C).

Gmoser argues this Court should reconsider its holding because it failed to consider his argument that Crim. Rule 16(C) provides an independent basis for refusing to produce the 911 recordings. But this contention is simply false. This Court **did** consider that argument, and found Gmoser waived it by failing to raise it in the original mandamus proceeding in the Twelfth Appellate District.

The Enquirer pointed to Gmoser's waiver in its Merit Brief (Brief of Cincinnati Enquirer in Opposition to Merit Brief of Michael Sage, et al., pp. 21) and Gmoser responded (Reply and Response Brief of Appellants, pp. 20 ("Reply Brief")). Thus, the Court fully considered the parties' positions and correctly sided with The Enquirer. Gmoser is attempting to reargue this very same point, in violation of Rule 18.02(B).

And once again, even putting aside the Rule 18 issue, Gmoser's argument has no merit. Gmoser contends he had raised Rule 16(C) in the original proceeding. But the only reference to Rule 16 was the acknowledgement that Gmoser was using that procedural mechanism to obtain a protective order.

Gmoser argued in his Motion for a Protective Order that R.C. 149.43(A)(2) (Confidential Law Enforcement Investigatory Record exception) and R.C. 149.43(A)(4) (Trial Preparation Record exception), along with the Sixth Amendment, justified the imposition of the protective order. He reiterated those arguments in the subsequent mandamus action in the Twelfth District.

But Gmoser never argued that Crim. Rule 16(C) provides an **independent** ground for withholding a public record until he filed his First Merit Brief in the Supreme Court. This Court correctly held that Gmoser had waived that argument by failing to raise it in the Twelfth District. Gmoser's contention to the contrary lacks merit.

C. **The Enquirer is Entitled to Attorney Fees.**

Gmoser argues this Court, in ruling on the attorney fee issue, relied on "inaccurate factual determinations from the record and disregarded a prosecutor's duty to uphold the constitution." For this reason, he seeks reconsideration.

But this Court already reviewed the factual record and considered Gmoser's "duty to uphold the constitution." His position is merely a reargument, barred by Rule 18.02(B).

And once again, he is substantively wrong. A prosecutor's duty to "uphold the constitution" does not allow him to withhold a record absent evidence to support that action. This Court unequivocally concluded Gmoser had no such evidence.

And this Court did not make an inaccurate factual determination regarding Gmoser's initial defective response to The Enquirer's record request. While The Enquirer originally requested the 911 recordings from the Butler County Sheriff, it was Gmoser who responded to that request. And, as this Court correctly found, he cited no legal authority in that response. *State ex rel. The Cincinnati Enquirer v. Sage*, Slip Opinion No. 2015-Ohio-974, ¶ 43.

Furthermore, Gmoser's argument that he was required to withhold the recordings under Rule 3.6(a) of the Ohio Rules of Professional Conduct is another reargument. Gmoser raised the Rule 3.6 issue in his reply brief to this Court and attached a copy of the rule as an exhibit. (Reply Brief, pp. 41-43). This Court has already considered the application of Rule 3.6(a). Reconsideration is not appropriate merely because Gmoser disagrees with the Court.

Gmoser's request that this Court reconsider its ruling on statutory damages fails for the same reasons.

II. CLARIFICATION ON ATTORNEY FEES IS NOT NECESSARY.

Gmoser's alternate request that the Court clarify its ruling on attorney fees is procedurally deficient. The Supreme Court Rules of Practice provide for no such request. But even if this Court considers the clarification request, it should summarily reject it.

To support his requests, Gmoser points to the following passage from paragraph 41 of the Court's ruling:

> "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."

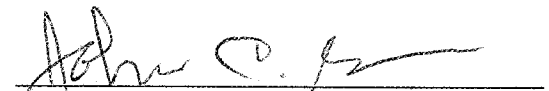
Ironically, Gmoser seeks to use this public reprimand to his advantage, by arguing the Court intended to limit The Enquirer's attorney fee recovery to those additional fees related only to responding to the frivolous protective order motion.

But Gmoser completely ignores paragraph 43, where the Court states: "[t]he prosecutor's office **lacked legal authority for withholding the records,** it drove up The Enquirer's burdens and costs by dragging The Enquirer into Ray's criminal case, and it stymied a significant public benefit in the process." Sage, ¶ 43. (emphasis added) This passage makes it clear that The Enquirer is entitled to recover all of its fees, since it incurred those fees in the first instance due to Gmoser's unjustified refusal to produce the records. The Enquirer is entitled to all of its attorney fees, not just fees related to the protective order. There is no need for "clarification."

III. CONCLUSION.

For the forgoing reasons, The Enquirer respectfully requests the Court to deny Gmoser's Motion.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing ***Response in Opposition to Appellant/Cross-Appellee's Motion for Reconsideration or in the Alternative Motion for Clarification*** was served via regular U.S. Mail, postage prepaid, this 3rd day of April, 2015, upon the following:

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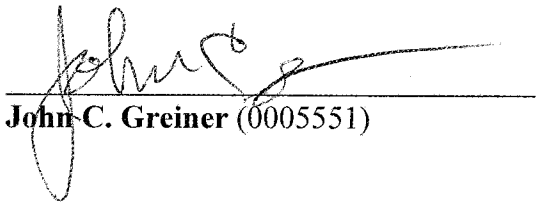

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