

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, *ex rel.* : Case No. 2015-1222
THE CINCINNATI ENQUIRER, et al. :
: Relators, :
: vs. :
JOSEPH T. DETERS, HAMILTON :
COUNTY PROSECUTING ATTORNEY, :
: Respondent. :
:

**MEMORANDUM IN OPPOSITION TO MOTION
FOR JUDGMENT ON THE PLEADINGS**

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INTRODUCTION

This court should deny Respondent Deters' ("Deters") Motion for Judgment on the Pleadings. While the Motion offers a hodge podge of legal arguments, it is based on the underlying premise that a prosecutor has unfettered discretion whether and when to release body camera footage of a routine traffic stop. This position is belied by controlling Ohio law and is untenable. This court should deny the Motion.

FACTS

The facts relevant to this Motion are relatively simple. At approximately 6:30 pm on July 19, University of Cincinnati Police Officer Ray Tensing made a routine traffic stop of a driver named Sam DuBose. Officer Tensing was wearing a body camera which recorded his interaction with Mr. DuBose. After asking Mr. DuBose for his license and registration and following a brief conversation, Officer Tensing, in what he claims was self-defense, shot and killed Mr. DuBose.

Each of the relators – The Cincinnati Enquirer newspaper, the Associated Press and the four local broadcast television stations – requested the body camera footage that recorded the incident. The Enquirer's experience was typical. The University's Assistant General Counsel responded to the Enquirer's request by stating: "[a]s to the remainder of your public records request [which included the body camera footage], the University is collecting the information and working cooperatively with the Cincinnati Police Department and the Hamilton County Prosecutor's Office to make certain that release of information does not hinder any part of their investigation."¹

¹ See July 23, 2015 Affidavit of Rebecca Butts ("Butts Affidavit"), ¶3, filed July 27, 2015 in this action.

Thereafter, on Wednesday, July 22, Deters' office sent a notification to the local media which provided as follows:

The body cam video in the July 19th UC officer involved shooting will not be released pursuant to:

“1. Sixth Amendment to the United States Constitution and ORC Section 149.43 (A) (1) (v) as release could jeopardize a possible future fair trial; and

2. ORC Section 149.43 (A) (1) (h) Confidential law enforcement investigatory records. See specifically ORC Section 149.43 (A) (2) (c), Specific confidential investigatory techniques or procedures or specific investigatory work product, and *State of Ohio ex rel. Mark W. Miller vs. Ohio State Highway Patrol*, 2014-Ohio-2244.” See Butts Affidavit, ¶4.

Relators filed this action on Friday July 24. Deters released the body camera footage at a press conference on Wednesday July 29. At that same press conference Deters announced that a grand jury had indicted Officer Tensing on murder and a related charge stemming from the July 19 incident. In response to a question at the press conference regarding the decision to withhold the video footage, Deters stated:

“It was an investigatory technique. We have a cop that was the target of an investigation and he was talking. I didn't want the video to be on television and then have, later, witnesses and/or a targeted defendant couch his testimony around that. So, **I chose to do that** and you all sued me, so congratulations. And you all lose, too.” (emphasis added) (See Transcript, attached as Exhibit A).

ARGUMENT

1. This Case is Not Moot.

The release of the video does not render this case moot. The Ohio Supreme Court has recognized that: “[A] claim is not moot if it is capable of repetition, yet evading review.” This exception `applies only in exceptional circumstances in which the following two factors are both present: (1) the challenged action is too short in its duration to be fully litigated before its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party

will be subject to the same action again. See *State ex rel. Dispatch Printing Co. v. Geer*, 114 Ohio St.3d 511, 2007-Ohio-4643, 873 N.E.2d 314, ¶ 10; *State ex rel. Calvary v. Upper Arlington*, 89 Ohio St.3d 229, 231, 727 N.E.2d 1182 (2000); see also *State ex rel. Cincinnati Enquirer v. Heath*, 121 Ohio St.3d 165, 2009-Ohio-590, ¶ 11.

At paragraph 31 of his Answer, Deters admits the case is not moot, noting:

“[r]espondent concedes that it is a matter capable of repetition but evading review and, accordingly, Respondent would make no objection if the Court decided to entertain the matter and decide the case on the merits.”

And indeed Deters is correct on this point. Given his belief that the timing of the release of the body camera footage is solely in his discretion, it clear that he or any prosecutor could replicate this behavior and frustrate any effort to obtain a judicial ruling simply by releasing the footage at any time before a ruling. This is precisely the rationale for the “capable of repetition” doctrine, and exactly why it applies here.

2. **Deters Did Not Follow Controlling Law.**

Deters took the position that he had unfettered discretion whether and when to release the body camera footage. This position is completely contrary to the Ohio Public Records Law, which exists to eliminate any such discretion. A public record must be promptly produced. There is no judgment call involved. Thus, Deters did **not** follow controlling law. He violated it.

Moreover, the specific controlling law does not permit Deters’ actions. The controlling law here is *State ex rel. Beacon Journal Publ. Co. v. Maurer*, 91 Ohio St. 3d 54, 741 N.E.2d 511 (2001). *Maurer* ruled:

“[I]ncident reports initiate criminal investigations but are not part of the investigation. . . Today, we hold that this report, including the typed narrative statements, is not a confidential law enforcement investigatory record but is a public record, and that its custodian, Mauer, must release an unredacted copy immediately upon request. Consequently, we reject the court of appeals’ treatment of this incident report as a confidential law enforcement investigatory

record and order Maurer to release an unredacted copy of it to the Beacon Journal. Maurer relied on the ruling in *State ex rel. National Broadcasting Co., Inc. v. Cleveland* (1988), 38 Ohio St.3d 79, 84, where the Court ruled: The specific investigatory work product exception, R.C. 149.43(A)(2)(c), protects an investigator’s deliberative and subjective analysis, his interpretation of the facts, his theory of the case, and his investigative plans. The exception does not encompass the objective facts and observations he has recorded.”

See also *State ex rel. Beacon Journal Pub. Co. v. University of Akron*, 64 Ohio St. 2d 392, 397, 415 N.E.2d 310 (1980).

Officer Tensing’s body camera recorded his interaction in the course of a routine traffic stop. It is an incident report. The fact that the stop escalated and resulted in an officer involved shooting does not change the nature of the footage. It recorded objective facts. It contains no deliberative process nor other investigatory activity. And because it is an incident report it is subject to immediate production with no redactions. A prosecutor has no discretion to withhold it.

State ex rel. Miller v. Ohio State Highway Patrol, 2014-Ohio-2244, 14 N.E.3d 396, does not change the controlling law. First, *Miller* is not controlling authority on the Hamilton County Prosecutor. Second, *Miller* is contrary to the *Maurer* decision and likely would not survive Ohio Supreme Court scrutiny.² Finally, the *Miller* decision rested largely on the fact that the footage in that case captured an OVI stop which included the administration of a field sobriety test. Thus, *Miller* is distinguishable from this case, which involved a routine traffic stop with absolutely no investigative activity.

3. **The Body Camera Footage is Unquestionably a “Record” for which the Hamilton County Prosecutor is Responsible.**

² In an interim appeal in the *Miller* case, the Supreme Court expressed skepticism for the position that dash camera video constituted “investigatory work product.” See *State ex rel. Miller v. Ohio State Highway Patrol*, 136 Ohio St.3d 350, 2013-Ohio-3720, 995 N.E.2d 1175, ¶¶ 25-27.

Deters cannot seriously argue that Officer Tensing’s body camera footage is not a public record. It records the activities of a public office. Indeed, police records – particularly records that record the power of the state to arrest or kill - are quintessential public records. See *State ex rel. Schiffbauer v. Banaszak*, 142 Ohio St.3d 535, 2015-Ohio-1854, 33 N.E.3d 52, ¶13.

Deters’ other argument is that somehow the footage is not a record “of” the Hamilton County Prosecutor. But this creative argument is unavailing. Deters’ himself, as well as his office, admitted that it is the office responsible for the footage.

R.C. 149.43(C)(1) provides:

(1) If a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section or by any other failure of a public office or the person responsible for public records to comply with an obligation in accordance with division (B) of this section, the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the public office **or the person responsible for the public record** to comply with division (B) of this section (emphasis added)

Deters is asking this Court to elevate form miles above substance in an effort to avoid his responsibility. And yet both before the fact (courtesy of Julie Wilson’s e-mail) and after the fact (courtesy of his press conference comments) Deters expressly admitted his office was responsible for the footage and all decisions on whether to release it. This court should not allow Deters to control the decision on the release of the footage but then dodge accountability for the decision.

4. **Deters Did Not Release the Footage in a “Reasonable Time.”**

Deters completely misconstrues the law in this argument. The Public Records Act requires “prompt” action in response to a public records request. The Act purposely does not provide for a “minimum” response time. It uses the term “promptly” to avoid the scenario where a public body could delay production for no compelling reason. Promptly means “[w]ithout

delay and with reasonable speed and its meaning ‘depends largely on the facts in each case.’” *State ex rel. Wadd v. City of Cleveland* (1998), 81 Ohio St.3d 50, 53, 689 N.E.2d 25 (1998).

In practical terms, it means the public body needs to produce the record as soon as it is available. Thus, in *Wadd*, the Court ruled that a 24 day delay in providing records violated the Public Records Act because the records were capable of being produced within seven days. In *State ex rel. Consumer News Services, Inc. v. Worthington City Board of Education*, 97 Ohio St.3d 58, 2002-Ohio-5311, 776 N.E.2d 82, ¶¶ 39-42, the Supreme Court ruled a six day delay was unreasonable when the records custodian had custody and control of the records at the time they were requested. Finally, in *State ex rel. Montgomery County Pub. Defender v. Sioki*, 108 Ohio St.3d 227, 2006-Ohio-662, 842 N.E.2d 508, ¶28, the Court held a two day delay would be unreasonable if the custodian was capable of providing the records sooner. The question is not whether, after the fact, the public body turned over the record in some amorphous “reasonable” amount of time. The question is whether the public body turned over the record when it was able to do so.

Thus, a ten day delay could be reasonable, if for example, the record was particularly voluminous or maintained off site, such that the copying effort was reasonably delayed. But by Deters own admission, this was not the case here. By July 22 – three days after the shooting – Deters had sufficiently reviewed the three and one half minute video to make a legal determination (erroneously) that it was exempt from production. Thus, the decision was not delayed ten days by virtue of any legal review. Moreover, the record – a three and one half minute video clip – takes minutes to copy. Thus, this was not a situation where the copying process in any way delayed the production.

The footage was available for production no later than July 22, but was not released for a full week from that point. And it was held for no reason other than because the Prosecutor, in his sole and unfettered discretion, chose to withhold it. As a matter of law, he did not produce the footage promptly and did not act reasonably.

5. **Deters' Standing Argument is Frivolous.**

Deters contends that relators The Cincinnati Enquirer, WCPO and WXIX did not request the footage from Deters' office and therefore lack standing to prosecute a mandamus suit against him for his refusal to release it. That argument ignores the fact that each entity requested the footage, and in each case, the response to the request was delivered by Deters' office, making it clear he was declining to release it and directing others in the chain from doing so. Deters' office is unquestionably the office "responsible" for the record. The Enquirer, WCPO and WXIX have standing to bring this action.

CONCLUSION

Deters has failed to provide any grounds supporting his request for judgment on the pleadings. This Court should deny the Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing *Memorandum In Opposition To Motion For Judgment On The Pleadings* was served upon all counsel of record via Regular U.S. Mail, postage prepaid, pursuant to Ohio R. Civ. P. 5(B)(2)(c), on this 4th day of September, 2015.

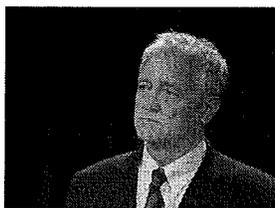
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Transcript of Deters' press conference

The Enquirer 9:33 p.m. EDT July 29, 2015



(Photo: The Enquirer/Cara Owsley)

Here are highlights from Hamilton County Prosecutor Joe Deters' Wednesday press conference on the indictment of Ray Tensing.

Deters: Moments ago, the Hamilton County Grand Jury has returned a murder indictment against Raymond Tensing, who is a University of Cincinnati Police Officer, for the murder of Samuel DuBose. We are going to release the video of this murder here shortly.

I've been doing this for over 30 years. This is the most asinine act I've ever seen a police officer make. Totally unwarranted. It's an absolute tragedy in the year 2015 that anyone would behave in this manner. It was senseless, and I met with the family just moments ago. It's just horrible.

Question from audience: Joe, tell me what makes it murder, under the law?

Deters: Purposeful killing of another, that's what makes it murder. He purposefully killed him.

Q: And when you say it's asinine and totally unwarranted... What contributed to a trained police officer doing something you say is asinine?

Deters: He should never have been a police officer. I work with police every day and they are some of the best people I know. Mr. DuBose simply didn't follow simple, non-violent commands. He was subdued, the cop had his license plate number. It was so unnecessary for this to have occurred. The policemen I know and the investigators I work with everyday, this situation would have never have escalated like this.

People want to believe that Mr. DuBose had done something violent toward the officer; he did not. He did not at all. And I feel so sorry for his family and what they lost. And I feel sorry for the community, too.

Because we've worked so hard to develop great police relationships with the community and to have this type of a senseless act take place in Cincinnati. This doesn't happen in the United States. This might happen in Afghanistan or somewhere... This just does not happen in the United States. People don't just get shot for a traffic stop unless they are violent toward the police officer. And he wasn't. You're gonna see it. He was simply, slowly rolling away. That's all he did.

Q: Also, cops don't get indicted for murder very often in the United States.

Deters: That's true. And you all have covered me for a long time and you know that this office has probably reviewed upwards of 100 police shootings and this is the first time that we thought 'This is without question a murder.'

Q: The officer's attorney told us that the officer was dragged. And the incident report suggests that, too. Does the video show that at all?

Deters: No, he wasn't dragged.

Q: Was he ever knocked to the ground, from the hood of the car to the ground?

Deters: No, he fell backwards after he shot him in the head.

Q: There have been some comments that perhaps this officer was in over his head making this traffic stop and panicked. Is that in any way, shape or form what we see in the video?

Deters: I think he lost his temper because Mr. DuBose wouldn't get out of the car. I think he lost his temper and when you see this [bodycam video] you will not believe how quickly he pulls his gun and shoots him in the head. It's maybe a second. It's incredible, and so senseless, and again, I feel so sorry for his family and I feel sorry for the community. This should not happen, ever.

Q: What did the officer suggest happened in his statement to the police?

Deters: He said he was dragged.

Q: What did you tell Mr. DuBose's family and what was their reaction?



Deters: They're in a very sensitive place right now because of their loss. I simply told them we were seeking a murder indictment for what happened. And I believe we can make them available... if they want to talk to you all.

Q: *Have they seen the video?*

Deters: They have.

Q: *What was their reaction?*

Deters: It was horrible. You see your relative get shot in the head. It's horrible.

Q: *Is it going to be so horrible that the community or even outsiders will look past or not see the murder... Are you concerned at all about what this is going to possibly cause.*

Deters: I think that because we acted as rapidly as we could, we returned a murder indictment against a police officer - and keep in mind this was not Cincinnati, this is the University of Cincinnati - I would hope that people would, as they reflect on this entire situation, realize that we sought justice, which is my job. And did the right thing. And when you all see this video... It's just senseless. It didn't have to happen.

Q: *Officer Kidd backed up the story of the report for Officer Tensing.*

Deters: We're looking at that entire issue right now. We promised the family that we would look at that. It is our belief that he was not dragged. If you slow down this tape, you see what happened. It takes a very short period time from when the car starts slowly rolling that the gun is out and he's shot in the head.

Q: *... Over the last week and a half, there have been so many calls to release this video earlier. Would you just comment for us, why you insisted this video not be released until now?*

Deters: It was an investigatory technique. We have a cop that was the target of an investigation and he was talking. I didn't want the video to be on television and then have, later, witnesses and/or a targeted defendant couch his testimony around that. So, I chose to do that and you all sued me, so congratulations. And you all lose, too.

Q: *The family's attorney, yesterday, had said to me that he didn't think it would be an indictment, because getting an indictment on a cop is too hard. And not enough time had passed for an investigation... Can you respond to that?*

Deters: I think it was very important that we responded rapidly to this case, especially after we saw the tape. And look, we don't mess around around here. If we think something is awry, we go after it and... A warrant for his arrest has gone out and hopefully they'll pick him up soon.

Q: *... Have you discussed if he is going to turn himself in at a scheduled time? Have you talked to his attorney about it?*

Deters: I'm treating him like a murderer.

Q: *Is he in custody right now?*

Deters: They're out to get him. We asked his lawyer to turn him in if he wants, but we're going to arrest him.

Q: *As we speak?*

Deters: Yes.

Q: *You're still going to go forward with the Supreme Court, though, try to get this idea of bodycam as a public record decided, correct?*

Deters: We'd like to. We think the issue's probably going to be moot after today, but it would be nice to get some direction from the Supreme Court.

Q: *You've worked with officers in many cases and you said you've prosecuted officers before. What should the officer have done in this case? You said he reacted moments before the car slowly rolled away and the officer fired. What should he have done?*

Deters: He wasn't dealing with someone who was wanted for murder, he was dealing with someone who didn't have a front license plate. I mean, this is - in the vernacular - a pretty chicken-crap stop, alright? And I could use harsher words. But, nonetheless, if he's starting to roll away, just - seriously - let him go, you don't have to shoot him in the head. And that's what happened.

Q: *What's the message to the community or to other police officers. Joe?*

Deters: Look, we're gonna follow the law in this office and we are going, if the facts fit the law, we're gonna pursue that no matter if you're a police officer or you're Pope Francis, I don't care who you are, we're gonna go after you.

Q: *Is this murder in the first degree? Second degree?*

Deters: There's not murder like that in Ohio. This is a purposeful killing of another person.

Q: *If convicted, what's the penalty, Joe?*

Deters: Life in prison.

Q *[from Sharon Coolidge, Enquirer reporter]: What can you tell us about the officer himself. Have you seen any of his background or his records?*

Deters: Nothing I'm gonna share with you today... Don't sue me for that, Sherry.

Q: *When you stated earlier that he should not have been a police officer, are you referring to this incident or other aspects of his police career?*

Deters: I think you have to look at his entire body of work. I don't know that UC could have found it out. And, frankly, I told UC that Cincinnati Police ought to have a District 6 and make it to the University of Cincinnati...

I graduated from UC twice, it's a wonderful university, I love their president, but they're not cops. And we have a great police department in Cincinnati, probably the best in Ohio. And I talked to the chief about it today, and I said 'you guys should be doing this stuff.' And I think he's in agreement with it.

The university does a great job educating people, and they made a lawyer out of me, kinda, and that should be their job. Being police officers shouldn't be the role of this university. I don't think so. Now, they can interview these guys and I'm sure they have great cops in the university police department, but they should be held to the same standard, and if they were with the CPD, they would be held to the same standard in training CPD officers are. And I think it would be a good thing for the university.

Q: *Have you been in contact with the university and do you know if he's still employed there?*

Deters: He's on administrative, paid leave. And hopefully soon he'll be on administrative paid leave in the justice center.

Q: *When you saw this video... share with us went through your mind given your career and what you have seen over the decades.*

Deters: I can't say it in front of the media. I was shocked. I realized what this was gonna mean to our community and it really broke my heart...

[Deters shows bodycam video]

Q: *Do you think this officer intentionally tried to mislead investigators as to what actually happened?*

Deters: Yeah. Yes. I think we was making an excuse for a purposeful killing of another person. That's what I think.

Q: *Even with the bodycam video?*

Deters: I'm not saying he's smart, I'm just saying what I think he did.

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