Supreme Court of Ohio Clerk of Court - Filed February 17, 2016 - Case No. 2015-0390

IN THE SUPREME COURT OF OHIO

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| STATE OF OHIO, ex rel. THE CINCINNATI ENQUIRER, | : | CASE NO. 2015-0390 |
| | : | |
| | : | Original Action in Mandamus |
| Relator, | : | |
| | : | |
| -vs- | : | |
| | : | |
| OHIO DEPARTMENT OF PUBLIC SAFETY, et al., | : | |
| | : | |
| | : | |
| Respondents. | : | |

# BRIEF OF *AMICUS CURIAE* THE OHIO PROSECUTING ATTORNEYS ASSOCIATION IN SUPPORT OF RESPONDENTS

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## BACKGROUND

*Amicus curiae* The Ohio Prosecuting Attorneys Association (OPAA) is a private, non-profit trade organization that supports Ohio's 88 elected county prosecutors. The OPAA advocates for public policies that strengthen prosecuting attorneys' ability to secure justice for crime victims and serve as legal counsel to county and township authorities.

Videos recorded by police cruiser dashboard cameras ("dash-cam videos") and similar devices are omnipresent in the work of any prosecuting attorney. When present in a case, a dash-cam video almost invariably plays a role. They are often used in suppression hearings. *See e.g. State v. Lisac*, 11th Dist. Geauga No. 2012-G-3056, 2012-Ohio-5224; and *State v. McManus*, 6th Dist. Erie No. E-14-123, 2015-Ohio-1683. They are also used in the presentation of the State's case-in-chief at trial. *See e.g. State v. Bumbulis,* 6th Dist. Huron No. H-13-025, 2014-Ohio-520; *State v. Enos*, 11th Dist. Portage No. 2015-P-0029, 2015-Ohio-5466; and *State v. Moats*, 8th Dist. Cuyahoga No. 91646, 2009-Ohio-3063. Such videos often provide critical evidence to support an officer's probable cause determination, or to prove elements necessary for a conviction beyond a reasonable doubt.

County prosecuting attorneys also serve as the legal advisor to various law-enforcement agencies. *See* R.C. 309.09. In this context, prosecutors are tasked with advising statutory clients as to whether items such as dash-cam videos should be released pursuant to a public records request for such items. Specific guidance on this matter

from the highest court of this state is important in being able to effectively advise law enforcement on the issue of police camera videos, an issue likely to arise with greater frequency as such technology develops.

## ARGUMENT

### *A. Introduction.*

The ramifications of this case extend well beyond the issue of dashboard cameras. Recent incidents across the country have brought about calls for the wide-spread adoption of police worn body cameras, which, in many cases, are the functional equivalent of dashboard cameras. Some estimates indicate that all police departments with fifty or more officers will be using such devices by 2018. Kampfe, *Police-Worn Body Cameras: Balancing Privacy and Accountability Through State and Department Action*, 75 Ohio St. L.J. 1153, 1159 (2015). As body cameras become ubiquitous, so too will be the public records requests for their recordings. This case presents an opportunity for this Court to establish clear guidance on such requests.

Respondents argue in this case that, because the dash-cam videos activated by law enforcement to document the investigation of her reasonable suspicion of a violation of Ohio traffic law constitutes specific investigative work product within the meaning of R.C. 149.43(A)(2)(C), it is exempt from release as a public record until the investigation has concluded. (*See* Respondents' Brief at p. 5). This position is fully supported by *Amicus Curiae* The Ohio Prosecuting Attorneys Association, and the Court is urged to adopt this proposition as the best resolution of this case.

Rather than reiterate arguments already briefed by Respondents, this brief will focus on the real-world problems that would be created by the rule that Relator asks

this Court to adopt. Specifically, Relator asks this Court to adopt an absolute bright-line rule that, under all circumstances, "police dash-cam videos of non-investigatory law enforcement activities are public records under the Act, and that they are never exempt under the confidential law enforcement investigatory records or trial preparation records exceptions." (Relator's Brief at p. 3). Such a bright-line rule would overlook important exceptions to the Public Records Act, raise concerns regarding officer safety, and imperil the ability to try a defendant before an impartial jury.

*Amicus Curiae* urges this Court to instead adopt a rule that allows the flexibility to withhold police camera videos from release until the appropriate time. There is undoubtedly a distinction between the public's right to know, and the public right to *immediately* know. The media's desire to have information immediately must be balanced with appropriate functions of the criminal justice system. Delaying the release of a video until concerns relating to a complete investigation and fair trial have abated will properly balance the needs of public review of police actions with the needs of the criminal justice system.

### *B. Police camera video should not be considered a public record when its release would impair a defendant's right to a fair trial.*

Any rule adopted by this Court should account for the fact that, in some cases, police dash-cam videos, and other similar videos, may not be public records. R.C. 149.43(A) provides that the term "public record" does not encompass records "the release of which is prohibited by state or federal law[.]" A blanket holding by this Court

that dash-cam videos are public records would vitiate this vital exception to the Ohio Public Records Law. In particular, compelling the immediate release of all police camera video as public records may create prejudicial pre-trial publicity, which violates the right of an accused to a fair trial as delineated in the Sixth Amendment to the United States Constitution.

The rise in the visual medium of police camera footage, whether from a dash-cam or body-cam has corresponded to the rise in visual mass media, where "there has been a dramatic rise both in the amount of news coverage generally, and the amount of that news coverage that is about crime and prosecution. This coverage is not limited merely to sensational cases, but to a wide range of criminal cases that the public follows with rapt attention." Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 Charleston L. Rev. 1, 9 (2009). Indeed, "[w]ith the availability of new technology in the mass media saturated environment, it has become significantly less likely that trial proceedings will remain confined to the courtroom." Levine, *The Competing Roles of an Atty. in A High-Profile Case: Trying A Case Inside & Outside of the Courtroom*, 28 Geo. J. Legal Ethics 683, 690 (2015).

There is no question that police camera footage will produce compelling video, sometimes of crimes in progress or other grisly events. Moreover, it is important to note that even more routine videos that make it onto the nightly news may contain significantly more footage than would be admissible at trial. Even if the entire video were

admissible, it may be that the media focuses on the most prejudicial two minutes of a 20 minute video, thereby influencing what the public perceives is contained on a video. Care must be taken that any rule pronounced on the public status of such footage protects the State's right to try a defendant, and a defendant's right to receive a fair trial.

More than 20 years ago, this Court recognized the concern related to public records that "disclosure of certain inflammatory materials may prejudice the rights of a criminal defendant to an impartial determination of his guilt or innocence." *State ex rel. Vindicator Printing Co. v. Watkins*, 66 Ohio St.3d 129, 137-38, 609 N.E.2d 551 (1993). Indeed, this Court noted that "the Supreme Court [of the United States] was greatly distressed by the disclosure to the news media of information which did not and could not constitute competent evidence at trial. The prejudicial effects of such disclosures and the dissemination thereof effectively foreclosed any possibility that the criminal defendant therein could receive a fair trial before an impartial jury." *Id.* at 138.

If the State cannot try a defendant before an impartial jury, the State will rightly be barred from trying a defendant at all. The ability to try a defendant before an impartial jury for crimes he may have committed is a vital interest that the State must be able to protect. A defendant has an *absolute* right to a fair trial, as established in both the federal and state constitutions. This absolute constitutional right eclipses the conditional statutory right to the immediate release of public records.

This Court recently reaffirmed its decision in *Watkins*, noting that "where '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. Cincinnati Enquirer v. Sage*, 142 Ohio St.3d 392, 2015-Ohio-974, 31 N.E.3d 616, ¶ 20, quoting *Watkins*, 66 Ohio St.3d at 138. In *Sage* this Court determined that when evaluating whether releasing an audio 911 recording would violate a defendant's right to a fair trial, "judges must (1) 'assess the probable publicity that would [arise] prior to the time a jury was selected,' (2) 'examine the probable nature of the publicity,' and (3) 'determine how it would affect prospective jurors.' " *Id.* at ¶ 24, quoting *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 562, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976).[1]

Any rule adopted by this Court relating to the status of police camera footage, whether dash-cams or body-cams must account for the possibility that release could significantly hinder the State's ability to try a defendant in accordance with the Sixth Amendment. This concern may not be present in every case, but this Court should not adopt a rule that summarily rejects the possibility by simply establishing an absolute bright-line rule that dash-cam footage is immediately a public record in every case, as Relator urges.

[1] This Court found in *Sage*, however, that the recording alone was insufficient to make the required findings that its release would violate a defendant's right to a fair trial.

### *C. Police camera footage may constitute a confidential law enforcement investigatory record protected from disclosure under R.C. 149.43(A)(2)(d).*

Relator summarily dismisses the idea that the release of dash-cam videos would create a high probability of disclosing information that would endanger the life or physical safety of law enforcement personnel under R.C. 149.43(A)(2)(d). In this particular case, that may be true. But it must be remembered that this case will set an important precedent for reviewing the proliferation of police camera videos likely to occur in the future.

As criminals become more sophisticated and police cameras become more ubiquitous the information that can be mined from certain videos is of great concern. For example, videos may show standard patrol patterns and the time when police patrols are at various locations. Without ever leaving one's house, an enterprising individual may be able to determine, over time, when and where a police cruiser may be located. Videos may reveal routes and time-tables used by police in emergency situations. Videos may show staging, deployment, and tactics in hostage rescue situations. Keeping these variables unknown to persons planning criminal actions enhances police safety.

Any rule adopted by this Court should allow this possibility to remain a viable option for argument. Any rule that disregards the possibility that a police camera video may contain information, which if broadly available would create a high probably of endangering future police officers would create a precarious situation for law enforce-

ment and their legal advisors. The safety of law enforcement must remain an important priority. Though not necessarily readily relevant to this specific case, the Court is urged to consider how this issue may affect future police video cases.

## CONCLUSION

Relator decries any sort of discretion on the part of public officials in determining if a record qualifies as a public record, noting the importance of laws affording broad access to law enforcement records in the national debate about the use of force. (*See* Relator's Brief at p. 16). Public access to governmental records is undoubtedly an important policy. The importance of *immediate* public access must, however, yield in some situations to the importance of justice. The media plays an unquestionably important role in society, but media is not entitled to convict a defendant before the State tries a defendant.

Allowing law enforcement some degree of discretion to ensure that the premature release of the videos does not abrogate the State's ability to try a potential defendant, or allow potential criminals the ability to mine videos for useful information on police procedure is key to the effective balancing of interests of the public and the interests of the state. It is not that police videos should never be released, but that they should be released *at the appropriate time.*

*Amicus Curiae* The Ohio Prosecuting Attorneys Association urge this Court to adopt the position of Respondents on this matter and hold that a video recording initiated by a law enforcement officer to document the investigation of her reasonable suspicion that the driver of a vehicle has violated Ohio traffic law constitutes specific investigative work product within the meaning of R.C. 149.43(A)(2)(c), and is thereby exempt

from release as a public record until the investigation of the crime has concluded. In the broader context *Amicus Curiae* urge this court to fashion precedent that will guide legal advisors to local government on this issue, and allows the flexibility to withhold police camera videos from release until the case is concluded.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of *amicus curiae* The Ohio Prosecuting Attorneys Association in Support of Respondents was sent via regular United States mail on the 17th Day of February, to the following:

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