The State of New Hampshire

Strafford SS. Superior Court

State of New Hampshire

v.

Ronald A. Letendre, Jr.

No. 219-2020-CR-0792

Order on Defendant's Motion to Delay Disclosure of Internal Investigation Report

The defendant, a former Dover Police Officer, is charged by indictment with one felony count of Falsifying Physical Evidence in violation of RSA 641:6. According to the indictment, the defendant is alleged to have removed a portion of a quantity of controlled drugs seized during a drug investigation on or about September 16, 2016, prior to the seized drugs being entered into evidence at the Dover Police Department. An internal police department investigation revealed the occurrence of other unrelated alleged improprieties and culminated with the production of a 49-page report (the Report). The defendant was terminated from his employment.

The New Hampshire Chapter of the American Civil Liberties Union (ACLU) filed a Right-to-Know request with the Dover Police Department seeking disclosure of the Report. By letter to the ACLU dated November 6, 2020, Dover City Attorney Joshua Wyatt thoroughly analyzed the RSA 91-A request, identified certain exemptions to disclosure, and indicated that he would disclose a redacted version of the report in compliance with RSA 91-A. The City Attorney further indicated that he would make the disclosure on Monday November 23, 2020. He provided copies of the letter to multiple interested parties, including the defendant and his criminal defense counsel. On Friday November 20, 2020, defense counsel in the within criminal case filed a motion under seal seeking an order delaying the RSA 91-A disclosure until after the

criminal case is resolved, on the grounds that disclosure would result in prejudicial pretrial publicity and deprive the defendant of a fair trial in this county. The State, the City, and the ACLU have filed responses. All of the related pleadings and the Report are under seal pending further order of the court. The court conducted a Webex video hearing on the motion on Thursday December 3, 2020. Following the hearing, the ACLU submitted additional authorities in support of its objection to the defendant's motion.

The question before the court is whether the defendant has sufficiently proved prejudice to his right to a fair trial under Part I, Article 15 of the New Hampshire Constitution by disclosure of the Report such that its disclosure should be delayed until after the criminal trial.[1] With one limited exception, the defendant does not challenge the RSA 91-A determinations made by the City that the contents of the Report should be disclosed under the Right to Know law. The one exception is that the City determined in its decision to release the redacted report "that any potential impact of pretrial publicity on fair jury trial rights can be best addressed through voir dire or other tools available to the presiding justice." Letter from Dover City Attorney, dated November 6, 2020. The court's focus, then, is solely on the issue of whether pretrial disclosure will impair the right to a fair trial.

I. Background Facts

This case began in the summer of 2020 when, on July 10, 2020, the defendant called police to his Rollinsford home to report that his wife, Sarah Letendre, was assaulting him. As a

[1] The ACLU challenges the jurisdiction of the court in this criminal case to interfere with the RSA 91-A process. The ACLU notes that RSA 91-A:7 provides for a remedy for persons aggrieved by a decision of a government body with respect to its determination whether to disclose information under the Right to Know law. By statute, that remedy is an action for injunctive relief in Superior Court wherein all interested parties to the RSA 91-A procedure can fully litigate the issues. Letendre did not avail himself of the remedy provided by the legislature and, the ACLU argues, he should not be allowed to circumvent the RSA 91-A process through his criminal case. In light of the court's decision on the merits, the court declines to address this issue at this time.

result of the Rollinsford investigation, Mrs. Letendre was arrested for assault and obstructing the report of a crime, and later for stalking and resisting arrest. She fled when police attempted to arrest her. She later turned herself in and, in turn, accused the defendant of assaulting her and breaking her ribs. According to the defendant, local media reported extensively on the case, especially the protests brought on by the decision to charge Mrs. Letendre. The matter was ultimately transferred to the Merrimack County Attorney's office to investigate the case and make a prosecution decision. After its investigation, the Merrimack County Attorney decided not to prosecute either Mrs. Letendre or the defendant for any offense related to the July 2020 assault complaints.

During the investigation of the assault allegations, Mrs. Letendre provided several recorded statements which are summarized in the Report. On August 6, 2020, the Merrimack County Attorney provided Mrs. Letendre with a letter of immunity and she spoke with Dover police for three hours. The Report summarizes Mrs. Letendre's accusations that the defendant assaulted her on several prior occasions; that he sometimes used marijuana; her admission that she abused controlled substances; and her marital infidelities. In addition, in the August, 2020 interview, Mrs. Letendre told investigators that the defendant had on occasion brought home marijuana that he had seized as part of his work as a police officer. She alleged one such instance occurred in 2016 when she claims the defendant brought home THC infused candies for her use.

The information provided by Mrs. Letendre about the THC candies led to an investigation into the defendant's past involvement in drug seizures as a police officer. The Report sets forth in detail the investigation into the instant charge relating to the 2016 drug investigation.

As part of the internal investigation, police questioned the defendant on August 11 and 25, 2020. During those interviews, the defendant was represented by a lawyer and was advised of his administrative rights. None of the defendant's statements can be used against him in this case. His statements are compelled testimony and under part I, Article 15, "cannot be put to any use whatsoever by the State in a criminal prosecution." State v. Burris, 170 N.H. 802, 811 (2018) (use and derivative use immunity applies by operation of law when a government employee is compelled to provide a statement). The Report summarizes the content of the interviews in significant detail.[2]

II. Pretrial Publicity and the Right to Fair Trial

The defendant argues that pretrial release of the Report will prejudice his ability to have fair trial in Strafford County. He basis his claim on the fact that his case has particular notoriety because he is a former police officer; that the events with Mrs. Letendre have already garnered extensive press attention; the report discloses not only salacious details about their relationship, but also myriad other allegations and information that will not be admissible at trial; and the Report contains a detailed summary of the evidence that supports the instant charge, as well as his own protected statements about the allegations.

Part I, Article 17 of the New Hampshire Constitution provides:

> In criminal prosecutions, the trial of facts, in the vicinity where they happened, is so essential to the security of the life, liberty and estate of the citizen, that no crime or offense ought to be tried in any other county or judicial district than that in which it is committed; except in any case in any particular county or judicial district, upon motion by the defendant, and after a finding by the court that a fair and impartial trial cannot be had where the offense may be

[2] The content of the defendant's statements during the internal investigation are not set forth in this order in an effort to avoid unintended disclosure of the statements to the prosecution. The necessity of omitting the defendant's statements points up the problem with allowing a challenge to an RSA 91-A decision in the context of this criminal case. The State is a party and is entitled to litigate the issue fully, but is hamstrung by the need to avoid tainting its prosecution. If the issue had been litigated as RSA 91-A:7 seems to require, the State would not need to be a party and could more effectively insulate itself from exposure to the content of the report.

committed, the court shall direct the trial to a county or judicial district in which a fair and impartial trial can be obtained.

Our Supreme Court has explained that Part I, Article 17 grants a criminal defendant the right to be tried where the crime was committed and the right to obtain a change of venue upon proof that he cannot obtain a fair trial there. State v. Gribble, 165 N.H. 1, 16 (2013) The due process requirements of Part I, Article 15 of the New Hampshire Constitution and the Sixth Amendment to the United States Constitution guarantee a defendant the right to a trial by a fair and impartial jury. State v. Smart, 136 N.H. 639, 646 (1993). As such, if there is community prejudice impairing a trial by a fair and impartial jury, a defendant has a right to a change of venue. See Petition of State of N.H. (State v. Johanson), 156 N.H. 148, 154 (2007).

Our Supreme Court has discussed two types of prejudice that can result from publicity in a case. State v. Laaman, 114 N.H. 794, 798 (1974). The first is inherent or presumptive prejudice, which exists when the publicity by its nature has so tainted the trial atmosphere that it will necessarily result in a lack of due process. Id.; see State v. Smart, 136 N.H. 639, 647 (1993). The second type of prejudice is actual prejudice which exists when the publicity has infected the jurors to such an extent that the defendant cannot receive, or has not received, a fair and impartial jury trial. Laaman, 114 N.H. at 798, 331 A.2d 354. In this latter situation, the defendant must show that the nature of the opinions formed by the jurors as a result of the publicity are such that they cannot be set aside to enable them to render a verdict based upon the evidence presented in court. Id.; see also Irvin v. Dowd, 366 U.S. 717, 723 (1961).

The defendant here does not distinguish which type of prejudice will likely result from pretrial publicity potentially arising from release of the Report. Since his focus is on the potential for the jury pool to be tainted by media coverage of the details around his termination, the court assumes that he is referring to the type of prejudice brought on by publicity that the

jurors will be unable to set aside and render a verdict based solely on the evidence. See Def. Mot., ¶ 16. For this type of prejudice, the defendant is obligated to show actual prejudice that has so infected the jurors in this county that they cannot render a fair and just verdict on the evidence.

At this stage of the proceedings, the risk of actual prejudice is purely conjectural. Based on the record, however, at least some helpful observations can be made. On the one hand, the prosecution involves an alleged corrupt act by a sworn police officer. The case is likely therefore to draw greater public attention than routine felony prosecutions. In addition, the report summarizes the evidence against the defendant that led to his indictment here. Thus, the potential jurors may well be exposed to the evidence before the trial and make prejudgments about the evidence. Finally, the report sets forth a great deal of information about the defendant's relationship with his wife and their conduct in their marriage. Some of the information could fairly be described as salacious or disturbing, and might cause the public to draw negative conclusions about their character or credibility.

On the other hand, this case does not run much risk of causing widespread community outrage. The defendant asserts that following the decision not to prosecute the defendant for domestic violence offenses in late summer 2020, the media covered the understandable backlash from protestors who were deeply upset by the decision. The defendant has not, however, submitted any evidence to this court of the actual coverage or how widespread or persistent the media coverage actually was. The court also notes that this case does not involve the kind of gruesome violence or other horrific details that might cause widespread community prejudice against the defendant.

In balance, the court finds that the defendant has not demonstrated that he will likely suffer actual prejudice by the pretrial disclosure of the Report. To the extent that pretrial publicity is an issue at jury selection, the voir dire process is designed to ferret out potentially contaminated jurors. If the defendant is able to demonstrate at the time of trial that his right to a fair trial has been sufficiently impacted by the pretrial publicity, he can seek a change of venue.

III. RSA 91-A and the Right to Fair Trial

As a constitutional matter, the defendant has not demonstrated that the Report should not be disclosed. The same answer obtains under the Right to Know law.

The New Hampshire Right-to-Know Law does not explicitly address requests for police investigative files. To fill the void, the New Hampshire Supreme Court in Lodge v. Knowlton, 118 N.H. 574, 577 (1978) and Murray v. N.H. Div. of State Police, 154 N.H. 579, 582 (2006), has looked to the language of the federal Freedom of Information Act (FOIA) to evaluate whether police investigative reports should be disclosed under the RSA 91-A. Pertinent to the issue in this case, the so-called (7)(B) exemption relates to a request for law enforcement records and precludes disclosure "only to the extent that the production of such law enforcement records or information … (B) would deprive a person of a right to a fair trial or an impartial adjudication . . . . 5 U.S.C. § 552 (b)(7)(B).

Though the New Hampshire Supreme Court has not directly addressed the contours of the (7)(B) as it relates to a request under RSA 91-A, federal courts have devised an analysis for applying the (7)(B) exemption. "[T]o withstand a challenge to the applicability of (7)(B) the government bears the burden of showing: (1) that a trial or adjudication is pending or truly imminent; and (2) that it is more probable than not that disclosure of the material sought would seriously interfere with the fairness of those proceedings." Wash. Post Co. v. United States

Dep't of Justice, 863 F.2d 96, 102 (D.C. Cir. 1988); see also Seacoast Newspapers, Inc. v. City of Portsmouth, 173 N.H. 325, 338 (2020) ("we often look to federal case law for guidance when interpreting the exemption provisions of our Right-to-Know Law, because our provisions closely track the language used in FOIA's exemptions"). In this case, Letendre's trial is not "pending or truly imminent." He was only recently indicted by the grand jury on October 15, 2020, and there have been no preliminary proceedings. A Dispositional Conference is scheduled for March 16, 2021, at which trial dates are likely to be selected. In the ordinary course, trial would not likely be scheduled until the summer of 2021. However, due to the Covid-19 pandemic, criminal trials in Strafford County have been cancelled since March of 2020, and have not yet resumed, despite efforts to do so. Given the significant backlog of jury trials, this case is not likely to be scheduled until after the summer of 2021. The lengthy interval between any press coverage from the disclosure of the Report and trial will likely cause any public attention to lessen. See People v. DeBeer, 774 N.Y.S.2d 314, 316 (N.Y. Cnty. Ct. 2004) (lengthy interval between disclosure and trial will allow public attention to subside).

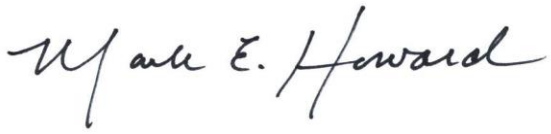
As to the second prong, the defendant's contention that disclosure of the Report would result in a serious interference with his ability to obtain a fair trial is speculative. First, the court cannot predict with certainty if, or to what extent, the media will cover the details in the Report. Similarly, the court cannot predict how widespread the coverage will likely be, or more importantly, how many potential jurors will likely follow any coverage or be impacted by it. While the case may be of some interest to Dover citizens, it is not a given that people in the surrounding towns and cities in this county will take an interest in the details of one terminated Dover police officer.

As the D.C. Circuit held, the burden of proof for invoking the 7(B) exemption cannot be met by "merely conclusory statements." 863 F.2d at 101. Though the defendant faces a criminal charge, "it [does] not automatically follow that disclosure . . . would deprive [him] of a fair trial." Id. at 102. Instead, he "must show how release of the particular material would have the adverse consequence that [FOIA] seeks to guard against." Id. at 101; See also, Playboy Enterprises, Inc. v. United States Dep't of Justice, 516 F. Supp. 233, 246 (D.D.C. 1981) (denying 7(B) exemption because "the degree of publicity that might come about as a result of the disclosure . . . [was] speculative at best"); Dow Jones Co. v. FERC, 219 F.R.D. 167, 174–75 (C.D. Cal. 2003) (denying 7(B) exemption in part because "defendant has failed to demonstrate that disclosure . . . would generate pretrial publicity that could deprive the companies or any of their employees of their right to a fair trial"). Of course, all criminal prosecutions involve information that is unflattering, prejudicial, and sometimes inflammatory, but "pre-trial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 554 (1976). To the extent that pretrial publicity leads to any potential juror prejudice, voir dire of the jurors during selection is a sufficient safeguard. State v. Andersen, No. 218-2018-CR-241 (Rock. Super. Ct.)(Schulman, J.)(August 31, 2018)(any exposure to media coverage from the disclosure of police reports while case is pending can be adequately addressed through voir dire).

In sum, the court finds and rules that the defendant has not demonstrated a sufficient risk of actual prejudice to his rights to a fair and impartial jury; that there is an effective alternative to delaying disclosure of the report, i.e. voir dire of the prospective jurors or, if proven necessary, a change of venue; and that the public's right to know is paramount under these circumstances. Accordingly, the motion is DENIED.

The pleadings related to this issue will be unsealed (Court Index ## 4, 5, 6, 8, 9, 10, 12, 13, 15, 16, 20, 23 and 30) on February 15, 2021, in the absence of a motion to reconsider the within order. The Report (Court Index #24) will remain under seal as a court exhibit on the basis that public disclosure of the Report should be done through RSA 91-A process and not this court.

So Ordered.



Date: February 4, 2021

Mark E. Howard
Presiding Justice