

IN THE DISTRICT COURT OF LEE COUNTY, ALABAMA

STATE OF ALABAMA,

vs.

YAZEED IBRAHEEM,

DEFENDANT.

DC-2019-001775.00

FILED

NOV 18 2019

IN OFFICE  
MARY B. ROBERSON  
CIRCUIT CLERK

MOTION TO INTERVENE AND LIFT GAG ORDER

Come now the BH Media Group, Inc. on behalf of the *The Opelika-Auburn News*; Gray Media Group, Inc. on behalf of WSFA-TV Montgomery, WBRC(TV) Birmingham, WVTM(TV) Columbus-Opelika, WTVY-TV Dothan and WAFF(TV) Huntsville; The Advertiser Company, Inc. on behalf of *The Montgomery Advertiser*; the Alabama Press Association; the Alabama Broadcasters Association; the Radio Television Digital News Association; Nexstar Media Group, Inc. on behalf of WRBL-TV Columbus, WKRG-TV Mobile, WAIT-TV Birmingham, WHNT News 19-Huntsville and WDHN-TV Dothan; Sinclair Broadcast Group on behalf of ABC 33/40 Birmingham; Hearst TV on behalf of WVTM-TV Birmingham; and Bahakel Communications on behalf of Alabama News Network Montgomery (hereinafter "Media Movants") and move this Honorable Court to lift the Gag Order entered November 11, 2019 [Doc. 6] on the grounds that it is unconstitutionally overbroad. *See, e.g., Ex parte Wright*, 166 So. 3d 618, 632 (Ala. 2014). To further support this motion, the Media Movants state as follows:

1. The Media Movants seek to intervene for the sole purpose of moving this Court to lift the Gag Order entered November 11, 2019 [Doc. 6]. The relief sought is not criminal in nature. The relief sought involves the protection of First Amendment civil rights of the parties, press and public.

2. The Gag Order in question was issued without prior notice to the Media Movants or an opportunity to be heard. “In order to provide the requisite notice, pretrial motions for closure ‘must be docketed reasonably in advance of their disposition so as to give the public and press an opportunity to intervene and present their objections to the court.’” Ex parte Birmingham News, *supra*, 624 So. 2d at 1134 *citing* In re Washington Post Co., 807 F.2d 383, 390 (4th Cir.1986) (emphasis added).

3. The Media Movants have standing. Although there is no criminal procedural rule providing a direct mechanism for intervention in Alabama courts, the news media generally have standing to intervene in a criminal proceeding to object to the restriction of access to court matters and public information. Ex parte Birmingham News Co., Inc., 624 So. 2d 1117, 1121 (Ala. Crim. App. 1993) *citing* Ex parte Balogun, 516 So. 2d 606, 611 (Ala. 1987) (emphasis added). Media Movants are involved with covering or supporting efforts to cover judicial proceedings in Alabama. Media Movants, and members of the public in general, have a constitutional right to such access and these rights have been recognized by

the Alabama Supreme Court. Ex parte Consolidated Publishing Company, Inc., 601 So. 2d 423 (Ala. 1992) (Holding the qualified First Amendment right of access to criminal proceedings described in Press-Enterprise II [Press-Enterprise Co. v. Superior Ct. of Cal., 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986)] applies to pretrial hearings).

4. The Gag Order is impermissibly overbroad and specifically bans all communications with Media Movants. Here, the Court, *sua sponte*, and without giving the public or press an opportunity to intervene and object, entered a “Gag Order” which prohibits the (1) “parties and any potential witnesses” (2) “from making any statements,” (3) “to members of the media.” [Doc. 6]. The gag order additionally prohibits the parties or potential witnesses from (4) “directly discussing their involvement in this case or any current or future trial proceeding with members of the media.” This prohibition was defined to include, but was not limited to, “interviews with reporters representing media outlets, as well as publication or posting of same of social media.” *Id.* Members of the Media Movants employ “reporters representing media outlets.”

5. The Gag Order is a prior restraint. “Court orders aimed at preventing or forbidding speech ‘are classic examples of prior restraints.’” Alexander v. United States, 509 U.S. 5544, 550, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1193). Here, the order “explicitly restricts the expression of attorneys and parties in...litigation as it relates

to the media and prevents...expression in the Website. As a result, the protective order qualifies as a prior restraint.” Ex parte Wright, *supra*, 166 So. 3d at 631 *citing* Marceaux v. Lafayette City-Parish Consolidated Government, 731 F.3d 488, 493 (5<sup>th</sup> Cir. 2013) (Holding a gag order that required counsel for a party to take down an entire website devoted to the case was impermissibly broad).

6. “Prior restraints ‘face a well-established presumption against their constitutionality.’” Ex parte Wright, *supra*, 166 So. 3d at 631 *citing* United States v. Brown, 218 F.3d 415, 424 (5<sup>th</sup> Cir. 2000) (‘Any prior restraint on expression comes ... with a “heavy presumption” against its constitutional validity.’).

7. In Ex parte Wright, *supra*, a trial court entered a gag order prohibiting the plaintiffs and their attorneys from making any “extrajudicial references to the circumstances of [these] case[s].” Additionally, the trial court ordered plaintiff’s counsel to “remove all mention of the above-styled case[s] and the surrounding circumstances of the above-styled case[s] from the firm’s website and from the firm’s and/or his individual Facebook page, LinkedIn Page, and all social media...” 166 So.3d at 632. The Alabama Supreme Court found that the initial and amended gag orders entered in the lower court were not “narrowly tailored to protect the defendant’s right to a fair trial.” *Id.* “Further, the orders do not provide any exceptions for making statements that are expressly allowed under Rule 3.6(c)(7), Ala. R. Prof. Conduct.” *Id.*

8. Indeed, the Alabama Rules of Professional Conduct specifically prohibit certain extrajudicial statements and allow others. For example, the Rules provide that lawyers may state the general nature of the claim or defense, the information contained in a public record, the general scope of the investigation, the scheduling or result of any step in the litigation, or a request for assistance in obtaining evidence. Ala. R. Prof. Conduct 3.6(c)(1-6). And as mentioned in Ex parte Wright, in a criminal case counsel may state without elaboration the identity, residence, occupation and family status of the accused, the fact, time and place of arrest or information necessary to aid in the apprehension of that person. And, importantly, “a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or lawyer’s client.” *Id.* at 3.6(c)(8). *See, United States v. McGregor*, 838 F.Supp.2d 1256, 1263-64 (M.D. Ala. 2012).

9. The Gag Order as currently worded prohibits parties, counsel and potential witnesses from answering any question from the media pertaining in any way to the disappearance of the alleged victim. The Gag Order at issue prohibits “any communication” with members of the media which would include prohibiting any attorney from making statements specifically permitted by the Rules of Professional Conduct. It would prevent “potential witnesses” (a very broad term) from engaging in discussions with the “media” (another very broad term) for the

purpose of discovering additional “potential” (an additionally broad term) witnesses or in an attempt to discover new evidence. And, it should not be overlooked that, as of the writing of this motion, the whereabouts of the alleged victim is still unknown and the Gag Order would prohibit communications with the media intended to try to seek their assistance in learning the whereabouts of the victim or in encouraging potential witnesses to her whereabouts to come forward.

10. After noting the existence of similar overly-restrictive provisions of a gag order in a civil case, the Alabama Supreme Court ruled that a trial court’s entry of two protective orders was overbroad and a violation of the First Amendment. Ex parte Wright, 166 So.3d at 632. In support of that ruling the Alabama Supreme Court cited two cases which held gag orders were unconstitutionally overbroad. *See Johanson v. Eighth Judicial Dist. Court of State of Nev. Ex. Rel County of Clark*, 124 Nev. 245, 252, 182 P.3d 94, 99 (2008) (holding that a gag order that "prevented 'the parties, their attorneys and any employees or persons associated with the parties or their counsel...from disclosing any documents in this case or discussing the case with any...other party or disclosing any information about this case to any other party or individual'" was unconstitutionally overbroad) *and Kemner v. Monsanto Co.*, 112 Ill.2d 223, 246, 492 N.E.2d 1327, 1338 (1986) (holding that a gag order that provided that Monsanto "'shall not,' in any press release, etc., 'mention this case or intimate its existence or its trial or any particular facts or circumstances or positions

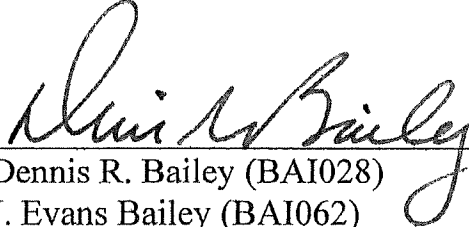
concerning it until judgment is entered by this court" was unconstitutionally overbroad).

11. Media Movants would point out, as did the Alabama Supreme Court in Ex parte Wright, that demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements. 166 So.3d at 633. The Court further noted that if a trial court finds that the parties or their counsel have made false or deceptive statements, it has the authority to proscribe such statements. *Id.* Any protective or gag order should balance the interest in protecting the defendant's right to a fair trial against the First Amendment rights of the opposing parties and their attorneys. Ex parte Wright, *supra*, 166 So. 3d at 633.

12. The only grounds supplied in the Gag Order is that it would serve "the interests of justice." Such an assertion falls far short of meeting the extremely high burden which must be established before participants in criminal trials can be subject to an order prohibiting them from any communication with the media. *See Ex parte Consolidated Publishing Company, Inc.*, *supra*. *See also, Ex parte Birmingham News Co., Inc.*, 624 So. 2d 1117 (Ala. App. 1993). To the Media Movants' knowledge, there has been no evidence presented that it is substantially probable the publicity expected will prejudice the defendant's right to a fair trial nor that the order sought by the prosecution would be narrowly tailored to protect the defendant's fair-trial interests. Accordingly, the conclusory statement that an extremely broad gag

that an extremely broad gag order is required by the “interests of justice” does not begin to meet the high burden required to warrant such drastic actions by this Court nor to narrowly tailor the order. *See Ex parte Consolidated Pub. Co.*, *supra* 601 So. 2d at 434.

WHEREFORE; the Media Movants’ Motion to Intervene and Lift the Gag Order should be granted.

  
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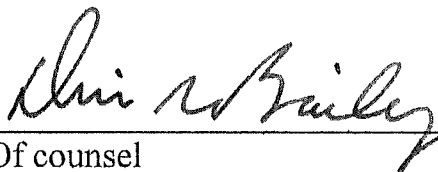
CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2019, a copy of the foregoing was served upon the following via electronic mail and/or by placing a copy in the United States Mail, First Class Postage prepaid:

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