

STATE OF INDIANA) IN THE HUNTINGTON CIRCUIT COURT
)
COUNTY OF HUNTINGTON) CAUSE NUMBER: 35C01-1603-F3-96

IN THE HUNTINGTON CIRCUIT COURT

CAUSE NUMBER: 35C01-1603-F3-96

**WPTA-TV'S VERIFIED MOTION TO INTERVENE
AND RECONSIDER ORDER OF APRIL 20, 2017**

1. This criminal matter involves charges against Defendant for misdemeanor battery, I.C. § 35-42-2-1(b)(1), and level 6 felony sexual battery where the victim was compelled to submit by force or imminent threat of force, I.C. § 35-42-4-8(a)(1)(A).

3. On April 18, 2017, WPTA-TV filed a Request for Records, seeking access to a digitally recorded victim impact statement (the “Record”).

I. Motion to Intervene

5. As set forth by Rule 24(A)(2) of the Indiana Rules of Trial Procedure:

anyone *shall* be permitted to intervene in an action: when the applicant claims and interest relating to a property, fund or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect his interest in the property, fund or transaction, unless the applicant's interest is adequately represented by existing parties.

(emphasis added).

6. WPTA-TV has a clear property interest in the victim impact statement which it has requested and been provided, but which it is prohibited from broadcasting or disseminating as a member of the free press. Accordingly, this Court shall permit WPTA-TV to intervene to protect its rights and interests.

II. Motion to Reconsider

7. Prohibiting the use and dissemination of the Record in this manner violates the provisions of Indiana Administrative 9(G), which does not contemplate the relief ordered. Administrative Rule 9(G) allows for the restriction of public access of individual court records in two instances.

8. First, under Administrative Rule 9(G)(2), certain individual case records **must be** excluded from public access, including records declared confidential under federal law, state law or court rule, social security numbers, financial account numbers, and so forth. Here, the Record is not the type of individual case record that must be excluded from public access pursuant to Administrative 9(G)(2), as recognized by the Order in its acknowledgment that it was required to provide the requested record. (Order at ¶ 2)

9. Second, Administrative Rule 9(G)(4) states that, “in extraordinary circumstances,” an otherwise publicly available court record **may be** excluded if the following

four conditions are met: (a) a verified written request to prohibit public access to a court record; (b) notice to all parties and the right to respond; (c) public hearing; and (d) a written order. By *sua sponte* issuing a written order limiting the use of the Record here, the Court improperly bypassed the provisions of Administrative Rule 9(G)(4)(a)-(c), and its Order is thus invalid. *See Allianz Ins. Co. v. Guidant Corp.*, 884 N.E.2d 405 (Ind. Ct. App. 2008) (trial court order sealing litigation from public view violated Admin. R. 9 and was improper because no public hearing was held).

10. Even if the procedures required pursuant to Administrative Rule 9(G)(4)(a)-(c) were to be followed in this case, the victim impact statement would not qualify as a record that **may be** excluded or limited in its use. *See, e.g., In re T.B.*, 895 N.E.2d 321 (Ind. Ct. App. 2008) (although juvenile court records are generally maintained confidentially affirming in part trial court's grant of access to newspaper of certain DCS and juvenile court records where newspaper had legitimate interest in informing the public about death of child); *cf. Angelopoulos v. Angelopoulos*, 2017 Ind. App. 170 (Ind. Ct. App. Apr. 19, 2017) (petitioner proved by clear and convincing evidence that portions of deposition describing financial transactions should remain excluded from public access because of increased risk to petitioner and his family, public figures in native Greece should testimony be made public).

11. The commentary to Administrative Rule 9 makes clear that “given the societal interests in access to court records, this rule also reflects the view that any restriction to access must be implemented in a manner tailored to serve the interests in open access.” Commentary to Ind. Admin. R. 9(A); *see also Allianz*, 884 N.E.2d at 408. The stringent restriction placed on WPTA-TV by the Order – that WPTA-TV may not broadcast the Record – unnecessarily

impinges WPTA-TV's ability to report the circumstances of this case, which are of legitimate public interest. This restriction is not tailored to serve the interests of open access.

12. Further, the Order amounts to an impermissible prior restraint on free speech by prospectively restricting WPTA-TV's use of a publicly accessible document. *See In re K.D.*, 929 N.E.2d 863, 868 (Ind. Ct. App. 2010) (juvenile court order prohibiting mother from discussing legal proceedings with the media following the establishment of paternity of her child determined to be invalid prior restraint of mother's free speech rights). Use of the Record at issue here falls at the core of First Amendment protections and there is no basis to restrict WPTA-TV's method of reporting the allegations against the Defendant. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights" and are presumed unconstitutional); *U.S. v. Brown*, 250 F.3d 907, 914-15 (5th Cir. 2001) (finding prior restraints on media are constitutionally disfavored nearly to the point of extinction and will be upheld only if the government can establish that the activity restrained either poses a clear and present danger or a serious or imminent threat to a protected competing interest). The Order therefore violates the First Amendment and must be vacated.

For the foregoing reasons, WPTA-TV respectfully requests that it be permitted to intervene in this matter and that the Court vacate its Order which impermissibly restricts WPTA-TV's use of the victim impact statement at issue.

Respectfully submitted,

Daniel P. Byron, Atty. No. 3067-49
Margaret M. Christensen, Atty. No. 27061-49
BINGHAM GREENEBAUM DOLL LLP
2700 Market Tower

10 West Market Street
Indianapolis, IN 46204-2982
(317) 635-8900
(317) 236-9907 (facsimile)
dbyron@bgdlegal.com
mchristensen@bgdlegal.com

Attorneys for Intervenor, WPTA-TV

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following by certified U.S. Mail, postage prepaid this ____ day of April, 2017:

Richison, Amy Christine
Room 420, Courthouse
Huntington , IN 46750-0000

Gevers, Robert William
809 S Calhoun Street
Suite 600
Fort Wayne , IN 46802-0000

An Attorney for Intervenor

18431895

STATE OF INDIANA) IN THE HUNTINGTON CIRCUIT COURT
)
COUNTY OF HUNTINGTON) CAUSE NUMBER: 35C01-1603-F3-96

STATE OF INDIANA,)
Plaintiff)
)
vs.)
)
JOHN C. MATHEW,)
Defendant)

**ORDER GRANTING WPTA-TV'S VERIFIED MOTION TO INTERVENE
AND RECONSIDER ORDER OF APRIL 20, 2017**

WPTA-TV, having filed its Verified Motion to Intervene and Reconsider Order of April 20, 2017, and the Court, having reviewed said Motion and being duly advised in the premises, hereby GRANTS said Motion.

IT IS THEREFORE, ORDERED, that WPTA-TV is entitled to intervene in this action.

IT IS FURTHER ORDERED that the Court's April 20, 2017 Order restricting WPTA-TV's use of the victim impact statement it requested is vacated.

DATE: _____

Judge, Huntington Circuit Court

Distribution:

Richison, Amy Christine
Room 420, Courthouse
Huntington , IN 46750-0000

Gevers, Robert William
809 S Calhoun Street
Suite 600
Fort Wayne , IN 46802-0000

Daniel P. Byron
Margaret M. Christensen
BINGHAM GREENEBAUM DOLL LLP
2700 Market Tower
10 West Market Street
Indianapolis, IN 46204-2982