

65843-3

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NO. 65843-3-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

J.S.,

Respondent,

v.

STATE OF WASHINGTON,

Petitioner.

STATE'S REPLY IN SUPPORT OF PETITION FOR REVIEW

ARB

(KCSC NO. 09-1-07979-6 SEA)

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I. REPLY

A. Neither the District Court nor the RALJ Court Addressed the *Ishikawa* factors.

Respondent J.S. contends that the district court based its sealing ruling on the *Ishikawa*¹ factors. See Brief of Respondent at 7 (hereinafter "Resp. Br."). This is not correct. The district court transcript shows that neither the parties nor the court mentioned the *Ishikawa* case and the court did not address the *Ishikawa* factors.² See 10/27/09 VRP at 1-31.

J.S. contends the RALJ court, in its "oral ruling", noted that it could treat the motion to modify or redact the title of the case name under GR 15(b)(4) as a motion to seal. Resp. Br. at 8, 23. This is incorrect. The RALJ court made no ruling on July 2, 2010, and thus, there is no ruling contained in the transcript of the hearing. See 7/2/10 VRP at 1-20. The court did *inquire*, however, as to whether J.S. was asking the court to modify the district court's order

¹ *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982).

² At pages 13-14 of Resp. Br., J.S. cites an order he alleges the district court entered on his motion to expunge non-conviction data. There is, however, no signed order by district court Judge Harper in the record. J.S. appears to be citing to a proposed order, which King County has been unable to locate in the record on appeal. The record does reflect that on November 4, 2009, Judge Harper modified and signed an order submitted by J.S. CP 6-7. But because there is no signed order in the record, it is impossible to determine what modifications Judge Harper made or the actual content of the order. For these reasons, the State has filed a separate motion to strike defendant's quotation of the alleged order appearing on pages 13-14 of Resp. Br.

to seal by deleting the name and substituting “name withdrawn”. *Id.* at 10-11.

J.S. contends that “the right to inspect and copy public records is not absolute...”, and he cites cases from Washington³ and other jurisdictions⁴ for this rule. See Resp. Br. at 10. While this proposition is generally correct, J.S. conducts no analysis as to how these decisions relate to the issues in this case, which involve the interpretation of a state court rule and state case law governing the standards for destroying, sealing and redacting court records.

J.S. goes on to contend, relying on the rationale of these

³ See *State v. Waldon*, 148 Wn. App. 952, 957, 202 P.3d 325 (2009) (public's right of access to courts is not absolute); *Dreiling v. Jain*, 151 Wn.2d 900, 909, 93 P.3d 861 (2004) (openness is presumptive, but not absolute).

⁴ See *Nixon v. Warner Communications, Inc., et al.*, 435 U.S. 589, 598, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978) (in upholding federal district court's discretionary decision not to release to press taped conversations introduced in criminal trial of defendants charged with conspiracy to obstruct justice in connection with Watergate investigation, Court recognized rule stating that the “right to inspect and copy judicial records is not absolute...”); *Press-Enterprise Company v. Superior Court of California, Riverside County*, 464 U.S. 501, 501-02, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (presumption of openness of jury selection process not rebutted – state court erred in denying press access to *voir dire* process without considering whether alternative measures were available to protect the prospective jurors' interests); *Chicago Tribune Company v. Bridgestone/Firestone Inc.*, 263 F.3d 1304, 1315 (11th Cir.2001) (where third party (press) seeks access to material disclosed in discovery and covered by a protective order, constitutional right of access requires a showing of good cause by the party seeking protection; district court erred in unsealing records without applying proper standard); *In re the Matter of 2 Sealed Search Warrants*, 710 A.2d 202, 213 (Del.Sup.Ct. 1997) (First Amendment qualified right of access did not extend to pre-indictment search warrant information; common law presumption of openness, while including search warrant documentation, was outweighed by protecting integrity of arson investigation).

decisions, that the public has no interest in his court record, and that the public should be forever barred from accessing it. See Resp. Br. at 11. The State has previously set forth its position that J.S. is incorrect (see Brief of Petitioner at 8-18), and will not restate those arguments here. In any event, J.S. ignores the public's potential interest in the fact that the offense underlying his "fugitive from justice" charge in Washington was a Colorado felony conviction serious enough to allegedly warrant intervention by the Governor of Colorado.⁵

J.S. next argues that the RALJ court actually did properly apply GR 15 in conjunction with the *Ishikawa* factors, and that the RALJ court's decision should therefore be affirmed. See Resp. Br. at 11-19. He is incorrect on both counts.

Throughout the proceedings at the district court and RALJ court, J.S. argued that RCW 10.97.060 provided express statutory authority to expunge his court record, or, in the alternative, to modify his record so that the public could not access it.⁶ Neither he nor the State made any argument concerning the *Ishikawa* factors.

⁵ See State's Motion for Discretionary Review at 9; State's Reply in Support of Discretionary Review at 4.

⁶ Both this Court and the State Supreme Court have rejected J.S.'s argument that RCW 10.97.060 grants courts the express statutory authority to destroy or delete court records.

Moreover, as a review of the court transcripts and RALJ order confirm, the RALJ court did not even mention *Ishikawa* in the proceedings below. The RALJ court's order shows that it considered only GR 15 in deciding to redact J.S.'s name from the previously-sealed court file. See CP 130-31.

The RALJ court did not consider, on the record, whether J.S.'s **sealed** court file *continued* to pose a *serious and imminent* threat to his stated interests or whether there were any less-restrictive alternatives to permanently removing the sealed record from public access. The court heard no actual evidence on this point. It simply relied on J.S.'s arguments unsupported by competent, admissible evidence in the record.⁷

Additionally, the RALJ court's order places no requirement on J.S. to ever come forward at a future date to justify the

⁷ The first *Ishikawa* factor requires a showing that is more specific, concrete, certain and definite than a "compelling" concern. *Waldon*, 148 Wn. App. at 962-63. J.S. may have presented compelling *allegations* at the district court level about his guilty plea to a "felony level four" offense in Colorado, the gubernatorial pardon, the complete absence of any record of this offense in Colorado or elsewhere, his admirable life accomplishments, and his belief as to how an *unsealed* court file revealing his arrest as a fugitive from justice impacted his privacy interests. But J.S. has never presented any specific, admissible evidence to support these allegations – a deficiency the State pointed out at the RALJ hearing. See 7/2/10 VRP at 14-15. See also *Indigo Real Estate Services v. Rousey*, 151 Wn. App. 941, 951-52, 215 P.3d 977 (2009) (emphasizing need of courts to support GR 15/*Ishikawa* findings with actual evidence). Indeed, there is no evidence (or allegation) in the record as to what his Colorado felony even involved. This would seemingly be an important area of inquiry in any sealing or redacting analysis under *Ishikawa*.

permanent removal of his court record. While the record clearly demonstrates that the RALJ court failed to incorporate all the *Ishikawa* factors into its analysis, at the very least, the record and the court's order are ambiguous as to which factors it actually did consider. Therefore, the appropriate remedy is to remand the case to the district court with instructions to apply the standards the State anticipates the court will announce in this case. See *Rousey*, 151 Wn. App. at 951.

B. When a Defendant's Name is Permanently Severed from a Court Record, as a Practical Matter, it is Destroyed under GR 15.

J.S. next argues that (1) the mere inability of the public to locate a court record does not mean it has been destroyed; (2) the record is not destroyed because the public can locate it by using the case number, and (3) there are many instances where initials are used in case captions, yet the record is not considered destroyed. Resp. Br. at 19-23.

As a practical matter, once a person's name is severed from his or her sealed court file, it is permanently irretrievable under GR 15(b)(3) and thus effectively destroyed without the statutory authority required by GR 15(h)(1). Indeed, that is the whole point behind respondent's request to redact his name. He wants the

case to be dropped down a well and forgotten forever. J.S. is not required to ever come forth and justify the continued elimination of his record from public access, and the public has no basis to request a file unless there is some publicly-available record of its existence. A cause number is of no help to the public because it has no way of connecting the cause number with a person's name.

J.S. claims that parties are permitted to proceed anonymously in some cases, and that case records are not considered "destroyed" in such instances merely because a name search may not locate the court record. Resp. Br. at 21.

J.S. cites a Washington case, *State v. John Doe*, 105 Wn.2d 889, 719 P.2d 554 (1986), where the defendant – who was charged with taking indecent liberties with his four-year-old daughter – was identified only as "John Doe". See Resp. Br. at 21. This appears to have been done to protect the child's identity. See *Doe*, 105 Wn.2d at 891 note 1. Regardless of the reason, this case's existence - along with the full name of the defendant - may still be found online. See "Appendix A."

GR 15 was re-written in 2006 – years after the *Doe* decision – and for all practical purposes is an entirely new rule.⁸ Absent some statutory exception, GR 15 arguably *would* apply to any current effort to delete a defendant’s name or change it to a pseudonym. Whether GR 15 applies to situations in which a case is *commenced* using a pseudonym or fictitious name is not presently before the court. The Rule appears to address only alterations to existing court records.

C. This Court Should Clarify the Scope of its Decision in *Rousey*.

J.S. claims this court’s decision in *Rousey* authorizes courts to use their redaction power to eliminate public access to entire court files. Resp. Br. at 23; 26-32. He is mistaken again. This court did not reach the merits of Rousey’s need for redaction. *Rousey*, 151 Wn. App. at 951-52. Instead, the court remanded the case to the trial court to evaluate Rousey’s request under GR 15 and the *Ishikawa* factors.

In any event, the State has asked the court to re-evaluate the *Rousey* decision to the extent it can be interpreted as authorizing trial courts to use their GR 15 redaction power to

⁸ See 2 Karl B. Tegland, Wash. Practice GR 15 (6th Ed. 2004) (2010 pocket part at p. 20).

eliminate public access to court files and records. See Petitioner's Brief at 15-16. Such an expansive interpretation of *Rousey* conflicts with the express provisions of GR 15. See Brief of Petitioner at 15-16. As GR 15 makes clear, there must be a publicly-available court record reflecting whenever a record has been destroyed, sealed or redacted. *Id.* at 16-18. J.S.'s interpretation of *Rousey* would render these provisions of GR 15 meaningless.

J.S. moves on to contend that principles of equity allow the court to permanently delete his name from his sealed court file, and that there are alleged inequities in how various offenses are treated under GR 15. Resp. Br. at 26. But the court is not charged with fashioning equitable relief in this case. Sealing, redacting and destroying court records are governed by our state constitution, case law, and court rules, not equitable principles.

J.S. argues that GR 15 has substantive and procedural components, and he contends that GR 15(c)(4) is basically a procedural guideline that provides an upper limit on information that

can be stored on court indices. Resp. Br. at 29-32. *Rousey* provides some support for his contentions.⁹

As indicated above, however, J.S.'s expansive interpretation of *Rousey* simply cannot be reconciled with numerous provisions of GR 15. He fails to explain the purpose behind allowing trial courts to redact all identifying information from court indices while at the same time requiring that the redaction order – along with written findings – must remain publicly available.

The “procedural” rule *requiring* orders with supporting findings applies across the board to orders to seal (GR 15(c)(5)(C)), redact (GR 15(c)(6)), and destroy (GR 15(h)(3)(A)). It would be pointless to allow courts to redact away *all* identifying information from GR 15(c)(4) while requiring them to prepare orders documenting the redaction – with supporting findings – containing the very identifying information previously redacted. It would be even more pointless to require courts to enter orders documenting the sealing, redaction or destruction of court records with no information allowing the public to even find the order or connect it

⁹ See *Rousey*, 151 Wn. App. at 950 (“GR 15 authorizes courts to redact information in SCOMIS, and GR 15 and the *Ishikawa* factors together provide the legal standard for evaluating Rousey’s motion to redact her name from the SCOMIS index.”).

with any particular case.

To provide definitive answers to these questions, the State asks the court in this case to define the scope and reach of its decision in *Rousey*. The State maintains that *Rousey* should not be interpreted to allow courts to render permanently irretrievable entire court files under the guise of redaction. This would render material provisions of GR 15 superfluous, and, as a practical matter, amount to destruction of the file without the statutory authority required by GR 15(h)(1). Once this court provides further guidance on the above issues, it should remand this case for an evidentiary hearing under the proper standards.

II. CONCLUSION

For the foregoing reasons, the State of Washington asks the court to reverse the superior court's Order on RALJ and remand this case to the district court to apply GR 15 and the *Ishikawa* factors to J.S.'s motion to seal and/or redact his court record. The State also asks the court to clarify its decision in *Rousey* to make clear that trial courts may not – absent statutory authority -- redact information which GR 15 indicates should remain publicly accessible. Additionally, the court should rule that whenever a court record is destroyed, sealed or redacted, a record of that

action must be publicly available, and this requires the record to bear the party's full name.

Submitted this 15th day of June, 2011.

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King County Prosecuting Attorney

A handwritten signature in black ink, appearing to read "John R. Zeldenrust", written over a horizontal line.

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Appendix A

Westlaw

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Full History (Text) | Show Negative Treatment | View all Citing Refs | Monitor With KeyCite Alert | State Court Org Charts

Direct History for State v. Doe, 719 P.2d 554 (May 22, 1986)

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State High Court

Intermediate Court

Trial Court

Granting Review
Wash. Oct 04, 1985

KeyCited Case
State v. Doe
719 P.2d 554
Wash. May 22, 1986
Affirming 41 Wash.App. 1027

State v. Hurmence (Marvin Harvey)
41 Wash.App. 1027
Wash.App. Jul 25, 1985

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