

FILED
May 29, 2015
Court of Appeals
Division III
State of Washington

NO. 33064-8-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

JOHN DOE,

Appellant,

v.

BENTON COUNTY PROSECUTING ATTORNEY'S OFFICE,

Respondent.

REPLY BRIEF

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A. ARGUMENT

UNDER GR 15 AND THE ISHIKAWA FACTORS, THE COURT ERRONEOUSLY DENIED PETITIONER'S MOTION TO REDACT OR SEAL THE DEFENDANT'S RECORD

The State argues in its Response Brief that “GR 15(c)(2), as *recently* amended” requires written findings that sealing/redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record.

Response at 7. First, the court rule has not been recently amended. GR 15 was last amended nine years ago in 2006 after the decisions of Rufer and Dreiling. In re Marriage of R.E. and S.E., 144 Wn.App. 393, 400, 183 P.3d 339 (2008), citing 1 Washington Court Rules Annotated, GR 15 editorial commentary at 25 (2d ed.2006).

The parties here agree, as they did below, that the public’s right of access to court records is not absolute, and when considering whether privacy matters outweigh the public’s right to access, the court must satisfy not only GR 15 but also the Ishikawa factors. Compare AOB at 15-16 with Response at 6. Similarly, the parties also agree that the only factor at issue in the instant case is whether John Doe has established that he faces a serious and

imminent threat to his privacy rights warranting sealing of his court record.

1. The record shows that the threat to John Doe's privacy is serious and imminent and not just a potential threat. The facts surrounding the instant case demonstrate an identified compelling privacy and safety concern, and John Doe has established that he faces a serious and imminent threat to his privacy. The three Divisions of the Court of Appeals and the Washington Supreme Court believe that Donna Zink poses a serious imminent threat to the privacy and safety concerns of level one sex offenders. The Washington Supreme Court granted review and will hear argument on June 6, 2015 concerning the injunction cases against Ms. Zink.

The Washington Legislature also believes that Donna Zink poses an imminent threat and that this is a unique circumstance that requires action. This past session, SB 5154 was considered by the Washington Legislature. A section of this Bill intended to make sex offender registration information exempt from public disclosure under chapter 42.56 RCW. The Legislature recognized that clear statutory language would clarify what information could be disclosed to the public regarding registered sex offenders, and importantly, that current law "allows for too much exposure for

Level 1 offenders and has too many collateral consequences.”
Senate Bill Report SSB 5154. Although the Bill ultimately passed, the language concerning exemption from public disclosure was stricken. The Washington Legislature has required the Sex Offender Policy Board to review and make findings and recommendations concerning public disclosure of sex offender information. See Senate Bill Report SSB 5154.

In Benton County itself, Superior Court Judge Bruce Spanner in the injunction case found that John Doe and the other nine plaintiffs had a “well grounded fear of invasion of their privacy rights.” CP 20. The court found that release of information to Ms. Zink would in fact be “highly offensive to a reasonable person” and that there was no evidence of any risk of harm to the public. Id.

The State argues in its Response Brief that the record failed to show that Ms. Zink wanted to put a list of level one sex offenders on a website. Response Brief at 10. But the record below showed that Ms. Zink will publish Doe’s name on her website – this is not a “potential” threat but a serious and imminent threat. In the Order Granting Plaintiffs’ Motion to Seal Records in cause number 13-2-02039-1, Finding of Fact 2 specifically states, “Donna Zink has indicated her intent is to disclose information about Plaintiffs on the

internet.” CP 14. Similarly, in the Order Granting Preliminary Injunction in the same cause number, Finding of Fact 6 states, “Defendant Zink has indicated she intends to publish the names of Level 1 offenders on the internet.” CP 20. Because of the imminent threat of Ms. Zink publishing the names of Level 1 offenders on the internet, Finding of Fact 7 states, “Accordingly, Plaintiffs have a well grounded fear of invasion of their privacy rights.” CP 20. The Court also found that the release of the information about John Doe to Ms. Zink “would be highly offensive to a reasonable person where there is no evidence whatsoever that the current Plaintiffs present any risk of harm to the community.” CP 20, Finding of Fact 10. These findings of fact were submitted to Benton Superior Court Judge Carrie L. Runge in cause number 14-2-01916-2. Accordingly, the State’s arguments that the record did not show Ms. Zink wanted to put a list of level one sex offenders on a website or that this is only a *potential* threat are meritless. The mere fact that injunction lawsuits were filed against Ms. Zink and have been taken up to the Washington Supreme Court demonstrates this is a serious and imminent threat.

When Ms. Zink indicated her intent to put this list of level one sex offenders on a website, the threat to John Doe’s privacy

elevated from a potential threat that could occur because of a request by any person in the public to a real and specified imminent threat made by a specific person, Donna Zink. The word "imminent" is defined as follows:

ready to take place; *especially* : hanging threateningly over one's head <was in *imminent* danger of being run over>

<http://www.merriam-webster.com/dictionary/imminent>. Here, this looming threat of placing level one sex offenders on Ms. Zink's personal website was serious and imminent since she requested all the names of level one sex offenders and level one sex offenders had to bring a lawsuit to have an injunction against giving Ms. Zink such information.

This is not a mere "potential" threat. The term "potential" is defined as follows:

existing in possibility : capable of development into actuality <*potential* benefits>

<http://www.merriam-webster.com/dictionary/potential>. A potential threat would be if John Doe wanted to seal his records because there was a chance that someone in the future could place his name on a website as a level one sex offender. Because the threat would then just exist in possibility and capable of becoming an

actuality, this would be the type of threat that caselaw would prevent as a reason to seal records.

The State's argument that Hundtofte and McEnry are indistinguishable from the instant case fails because the threat involved here is simply not a mere potential threat. In McEnry, McEnry conceded only a potential threat was involved – there was a possibility that criminal records could affect his current or possible future employment.

He conceded that he did not expect his employer to conduct a security or records check on him. Nor did he know whether a records check would even affect his employment. In addition, McEnry conceded that potential loss of housing based on his court records was “not an issue” because he owns his home. RP at 10. Consequently, the record does not support the court's finding that McEnry could be harmed by an unsealed court file.

State v. McEnry, 124 Wn.App. 918, 926, 103 P.3d 857 (2004). The reason that this was a potential threat and not a serious imminent threat was because there was no records check looming over McEnry's head by any company or person. Although it *could* occur in the future, there was no current imminent threat.

Similarly in Hundtofte, the defendants had been denied rental housing due to a court record of an unlawful detainer case. Hundtofte v. Encarnacion, 169 Wn.App. 498, 503, 280 P.3d 513,

516 (2012) aff'd, 181 Wn.2d 1, 330 P.3d 168 (2014). But there was no current and imminent specific threat against them when they went before the trial court to seal their records. Accordingly, the defendants in that case, like in McEnry, could only point to the potential that unknown and yet unnamed persons *could* perform a records check and then deny them housing. Four justices of the Washington Supreme Court held that the privacy interest at stake was not sufficiently compelling to warrant redaction, since petitioners were able to find rental housing for their family but would have preferred housing closer to Burien. Hundtofte, 181 Wn.2d at 9.

Both Hundtofte and McEnry show cases where there is no current party threatening to review court records to then take negative action against defendants. Instead, in both cases, there was a mere possibility that a party *could* in the future do a records check and take negative action against defendants. That is why those cases are “potential” threat cases. Here, the threat is not an unnamed, unknown party that could take action in the future. Instead, it is a known party, Donna Zink, making a specific imminent threat of placing level one sex offenders’ names on a website. Accordingly, Judge Runge erred in finding that there was

nothing in the instant case that “somehow distinguish[ed] him or her from the McEnry case.” 12/12/14RP at 15.

2. The State’s erroneously argues that somehow this unique Donna Zink circumstance would lead to an automatic limitation making all sex offenders eligible to have their records sealed. The State on appeal argues that another reason why the records should not be sealed is because it would lead to an “automatic limitation,” which Hundtofte held was improper. Response at 11, citing Hundtofte, 169 Wn.App. at 519-20. But this is not what the Court was ruling in Hundtofte.

In Hundtofte, the Court was concerned that allowing criminal defendants to seal their records because of some future threat to employment or housing would in effect allow each criminal defendant to seal their criminal record because the same potential threat could affect any defendant in an unlawful detainer action who was also not ultimately evicted. Hundtofte, 169 Wn.App. at 502. Had the Court ruled otherwise, any such defendant at any time could raise this issue because of the potential threat.

This case is easily distinguishable. This case can be distinguished by the number of defendants facing a threat, the timing of the action, and the individual need for the sealing of court

records still to be decided on a case-by-case basis. Here, there is a unique circumstance that was not present in Hundtofte, Donna Zink. As mentioned above, the threat is serious and imminent, unlike the threat in Hundtofte. But unlike Hundtofte, the same automatic limitation is not present. Unlike any other level one sex offender that may have the same looming threat of Donna Zink over them, John Doe has a unique situation in that he can now petition the court for termination of his registration requirement. Not every level one sex offender is in those same shoes at the present time. Moreover, John Doe prevailed on an injunction suit that provided him and nine other plaintiffs protection from Donna Zink that all other sex offenders did not receive.

In addition, the timing of the remedy of sealing in the instant case is distinguishable as well. This is John Doe's motion to seal his records for the termination of his registration requirement, while the impending threat from Donna Zink is present. A case is before the Washington Supreme Court which will decide whether Ms. Zink will receive the names of all the level one sex offenders. Moreover, the Washington Legislature is currently attempting to limit the public's access to this private information to stop Ms. Zink or other

private citizens from collecting such information to release to the public.

A court deciding whether to seal the court records for the termination of his registration requirement would decide his case based on the evidence he presents. John Doe has unique circumstances where public access to the court records would lead to humiliation for his family. CP 20, 21. Doe also does not want to give up the protections afforded in his preliminary injunction case, which would happen if his identity was available to the public and hence Ms. Zink. CP 47-48.

The undersigned attorney on appeal has located no other case in which a party in this injunction case has sought such relief. The State's argument that relief in Doe's case would cause an automatic limitation for all sex offenders is baseless. United States Dep't of State v. Ray, 502 U.S. 164, 112 S.Ct. 541, 549, 116 L.Ed.2d 526 (1991) ("Mere speculation about hypothetical public benefits cannot outweigh demonstrably significant invasion of privacy").

The most important public right of access to these court records is the right the public has to ensure the judicial process is conducted fairly – as a check upon the judicial process. Globe

Newspaper Co. v. Superior Court, 457 U.S. 596, 606, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 592, 596, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) (Brennan, J., concurring); NBC Subsidiary, Inc. v. Superior Court, 20 Cal.4th 1178, 1201-02, 980 P.2d 337 (1999); Dreiling v. Jain, 151 Wn.2d 900, 903-04, 93 P.3d 861 (2004); State v. Lee, 159 Wn.App. 795, 802, 247 P.3d 470 (2011); State v. Waldon, 148 Wn.App. 952, 957, 202 P.3d 325 (2009). That public right to access to court records is not absolute. Nixon v. Warner Comm., Inc., 435 U.S. 589, 598, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978); Waldon, 148 Wn.App. at 957. The right to access “may be limited ‘to protect other significant and fundamental rights.’” Waldon, 148 Wn.App. at 957, quoting Dreiling, 151 Wn.2d at 909. While the public might be interested in the underlying criminal conviction record and the fact that he was a registered sex offender, the public’s interest in the termination of the registration requirement is not as strong as Doe’s privacy interest in that information.

Importantly, the public can still have the required constitutional check on the judicial process by attending the hearing. The information that John Doe committed a sex offense is still accessible to the public – his criminal record still can be

accessed, which shows his crime as well as the fact he had to register as a sex offender. John Doe informed the court that he was not asking the court for a closed courtroom – the public would be entitled to be present at the hearing. CP 44. Doe also asserted he was not seeking to seal all the documents in the case. Id. The public would still be able, under this situation, to fully be present at the hearing, view the administration of justice by the court, and determine how the court heard and decided the matter. Rufer v. Abbott Laboratories, 154 Wn.2d 530, 542, 114 P.3d 1182 (2005).

B. CONCLUSION

For the foregoing reasons, John Doe respectfully requests this Court reverse the Benton County Superior Court order denying petitioner's motion to redact and/or seal records to allow the modification of the name of the case on SCOMIS and JIS.

DATED this 28th day of May, 2015.

Respectfully submitted,
GORDON & SAUNDERS, PLLC

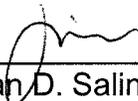
A handwritten signature in black ink, appearing to read 'Jason B. Saunders', written over a horizontal line.

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CERTIFICATE OF SERVICE

Today, May 28, 2015, I deposited in the mail of the United States of America, postage pre-paid, a properly stamped and addressed envelope to **Ryan Lukson, Benton County Prosecuting Attorney's Office, 7122 W Okanogan Pl Bldg A, Kennewick, WA 99336-2359**, containing a copy of the foregoing **Appellant's Reply Brief** filed in **John Doe v. Benton County Prosecuting Attorney's Office**, Cause No. 33064-8-III.

I certify under penalty of perjury of the laws of the State of Washington the foregoing is true and correct.

Name:  _____
Ian D. Saling
Senior Paralegal
The Law Offices of Gordon & Saunders

Date: 5/28/2015