

65843-3

65843:3

NO. 65843-3-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

J.S.,

Respondent,

v.

STATE OF WASHINGTON,

Petitioner.

BRIEF OF PETITIONER

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

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FERRY, J. J.

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I. INTRODUCTION

The issue in this case centers on whether the public should be able to access a court record reflecting that in 1992, J.S. was charged in King County with being a fugitive from justice on a Colorado felony charge, even though the State later dismissed the charge. J.S. wants the court file sealed and his full name permanently removed from the court record so that the public will never be able to find it. The court should find that there is no basis for this relief under the Washington Constitution, statute, or court rule, and that even when redaction, sealing, or destruction is ordered, the public must be able to access a record reflecting the court's decision that bears J.S.'s full name.

II. ASSIGNMENTS OF ERROR

a. The Superior Court on RALJ (RALJ court) erred by modifying the sealing order of the district court so that the caption of J.S.'s court record reads "State v. Name Redacted."

b. The RALJ court erred in concluding that J.S.'s privacy interests outweighed the public's interest in access to a court record bearing his name.

c. The RALJ court erred by relying solely on the factors listed in GR 15(c)(2) in affirming and remanding this case to the district court to change the caption of this case to “State v. Name Redacted.”

Issues Pertaining to Assignments of Error

a. When sealing or redacting information in a court record, courts are required to apply the GR 15(c)(2) factors in conjunction with the five-part test stated in *Seattle Times Co. v. Ishikawa*.¹ In this case, the RALJ court relied solely on GR 15(c)(2) in permanently redacting J.S.’s full name from the caption of his sealed court record. Did the RALJ court err in failing to apply the *Ishikawa* factors in conjunction with GR 15(c)(2), and should the court reverse and remand for application of the proper standard?

b. Under GR 15(h)(1), court records may not be destroyed without express statutory authority. A record is considered destroyed if it is permanently irretrievable. When a court, without statutory authority, orders a court record altered so that it cannot ever be retrieved by the public, has the court improperly destroyed the record?

¹ 97 Wn.2d 30, 640 P.2d 716 (1982).

c. In *Indigo Real Estate Services v. Rousey*, 151 Wn. App. 941, 215 P.3d 977 (2009), this court ruled that the definition of “court record” under GR 15 includes information contained in the Superior Court Management Information System (SCOMIS), and that GR 15 applied in conjunction with *Ishikawa* permits trial courts redact such information, including the name of a party. GR 15 also provides, however, that certain case information, including the parties’ names, is to be available for public viewing on court indices. Should the court clarify its decision in *Rousey* by holding that a trial court’s redaction authority does not extend to information that must remain available on court indices under GR 15?

d. The Washington Constitution guarantees the public’s right of access to court records, and GR 15 mandates that when court records are destroyed, sealed or redacted, a publicly- accessible order reflecting the record’s existence must be available. As a practical matter, the only way a citizen can learn of a court record’s existence is to be able to search for it by a party’s full name. To guarantee the public’s right to access court records and comply with court rules, whenever a court destroys, seals or redacts a court record, must a publicly-available record remain that contains the party’s full name?

III. STATEMENT OF THE CASE

J.S. contends that as a teenager in 1990, he pled guilty to a “felony level four” offense in Colorado. He alleges he later moved to Washington state to attend college, and in 1992, he was arrested and charged in King County as a “fugitive from justice” from the Colorado offense. The state dismissed the charge shortly thereafter. CP 11-15.

J.S. claims that the governor of Colorado then pardoned him on the “felony level four” offense, and that no record of it can be found in Colorado. He also alleges the Washington State Patrol, Seattle Police Department, and the FBI have all expunged the “fugitive from justice” offense from its records, and that the only remaining record of it exists in the Judicial Information System (JIS) maintained by Washington courts. J.S. contends the offense record hinders his ability to travel for work and pleasure, and that it has twice caused him border delays while traveling between the United States and Canada. CP 11-15.

In 2009, J.S. filed a motion in King County District Court to have all records of the “fugitive from justice” offense deleted and/or expunged from Washington state court records. *See generally* 10/27/09 Tr. at 5. Alternatively, he wanted the court record

modified so that the public could not access it; he claimed the court could do this by replacing his name in the Judicial Information System (JIS) with the term "expunged record" while still maintaining a "mirror image" of the entire record accessible only by court personnel. 10/27/09 Tr. at 5-6; 11-12. He alleged the court was authorized to delete "nonconviction data" from its records under RCW 10.97.060. 10/27/09 Tr. at 9-10. The State opposed J.S.'s request, although it did not oppose entry of an order sealing the record. 10/27/09 Tr. at 10, 30.

The court heard testimony from Cathy Grindle, the Director of Technology for the King County District Court. 10/27/09 Tr. at 17-18. Ms. Grindle stated that the courts implemented the modern statewide JIS system in the late 1990s, and that the district court deleted and expunged files prior to that time. See 10/27/09 Tr. at 20.

Currently, when a record is sealed, the name of the case and case number come up in response to a search. If the record is destroyed, the name of the case is deleted but the file remains. The expunge function merely breaks the link between the name and the case. 10/27/09 Tr. at 23, 26. The file is accessible by case number but not by case name. 10/27/09 Tr. at 23. The

"mirror image" case data remains in a "JIS warehouse," accessible only to court employees. 10/27/09 Tr. at 20-21; 23.

Ms. Grindle identified another option, where the court could create a record called "name removed" and just move the case over to that record. 10/27/09 Tr. at 27. She testified that she had authority to do this if ordered by the court; in her opinion this was permissible because it did not involve destroying the record.

10/27/09 Tr. at 28.

Without objection from the State, the court converted J.S.'s motion to expunge to a motion to seal, and ordered the file sealed. 10/27/09 Tr. at 16-17, 30. The State did not oppose the order. But the court denied J.S.'s motion to delete or expunge the records (10/27/09 Tr. at 17), ruling that court records were public records and that it was bound by court rules governing access to them. See 10/27/09 Tr. at 12, 14. While perhaps technologically feasible, the court indicated that a provision of the Criminal Records Privacy Act, RCW 10.97.060, did not grant authority to destroy court records, and that the legislature had no authority to tell the court it could do so. See 10/27/09 Tr. at 13, 15-16.

J.S. appealed to King County Superior Court. 7/2/10 Tr. at 2. He renewed his argument that the court had express statutory

authority under RCW 10.97.060 to eliminate his name from the caption and all other portions of the previously-sealed court file. The State argued, however, that this would amount to destruction of a court record, which is prohibited under court rules unless expressly authorized by statute. The State further argued that RCW 10.97.060 did not grant courts authority to destroy court records. 7/2/10 Tr. at 15.

The superior court did not adopt the reasoning of the district court or of either party, and it did not reference RCW Chapt. 10.97 in its decision. Instead, the court “affirmed” but modified the district court’s decision, and remanded the case with instructions to redact J.S.’s name from the sealed court record and replace it with “name redacted.” Relying on GR 15(c)(2), which governs the sealing or redacting of court records, the court concluded that J.S.’s privacy interests outweighed the public’s interest in access to a court record bearing his name. CP 130-31.

The State sought discretionary review of the superior court’s decision, and this court granted review by order dated December 29, 2010. J.S. filed a cross motion for discretionary review, arguing that the RALJ court erred in refusing to order his record expunged under authority of GR 15(h)(1) and RCW 10.97.060. The court

denied review on this issue, finding that RCW 10.97.060 did not provide courts with express statutory authority to destroy court records, and that J.S. had failed to identify any other statute authorizing destruction.²

IV. ARGUMENT

1. The Court Should Reverse the RALJ court's decision and remand to the Trial Court to Evaluate J.S.'s Motion to Seal and/or Redact Under the Standards of GR 15 and *Ishikawa*.

The legal standard for sealing or redacting court records is a question of law which the court reviews de novo. *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 540, 114 P.3d 1182 (2005); *Indigo Real Estate Services v. Rousey*, 151 Wn. App. 941, 946, 215 P.3d 977 (2009). An appellate court reviews a trial court's decision to seal or redact records for an abuse of discretion, but if the trial court applied an incorrect legal standard, the court remands for application of the correct standard. *Rousey*, 151 Wn. App. at 946. General Rule (GR) 15 "sets forth a uniform procedure for the destruction, sealing, and redaction of court records." GR 15(a). Sealing or redacting court records is governed by GR 15(c).

² J.S. has filed a motion for discretionary review of this decision at the state Supreme Court. That motion is scheduled to be heard by a commissioner on March 17, 2011.

GR 15(c)(2) generally allows courts to seal or redact the files and records of court proceedings when justified "by **identified compelling** privacy or safety concerns that outweigh the public interest in access to the court record." (bold in original).

GR 15(c)(2) lists six "privacy or safety concerns that may be weighed against the public interest ..." in access to the court record. The first five contain specific privacy concerns, none of which apply in this case. See GR 15(c)(2)(A) through (E). The sixth allows the court to consider the existence of "[a]nother identified compelling circumstance that requires sealing or redaction." See GR 15(c)(2)(F).

The standard for sealing or redacting court records under GR 15(c)(2), however, must be harmonized with the five-part analysis in *Ishikawa*³ since these actions implicate the public's right

³The *Ishikawa* factors are as follows:

1. The proponent of closure and/or sealing must make some showing of the need therefore. In demonstrating that need, the movant should state the interests or rights which give rise to that need as specifically as possible without endangering those interests If closure and/or sealing is sought to further any right besides the defendant's right to a fair trial, a "serious and imminent threat to some other important interest" must be shown.

2. "Anyone present when the closure [and/or sealing] motion is made must be given an opportunity to object to the [suggested restriction]. ...

of access to court records under article 1, section 10 of the Washington State Constitution. See *Indigo Real Estate Services v. Rousey*, 151 Wn. App. 941, 948, 215 P.3d 977 (2009); *State v. Waldon*, 148 Wn. App. 952, 957, 202 P.3d 325 (2009).

In this case, the RALJ court affirmed the district court's order sealing J.S.'s court record. Then, relying on GR 15(c)(2), the RALJ court ordered J.S.'s name redacted from the caption of his court file and replaced with "State v. Name Redacted."

In support of its ruling, the court found that J.S. had never been convicted on the 18 year-old "fugitive from justice" charge -- which had been dismissed by the prosecutor -- and that the public therefore had little interest in the charge. See CP 130-31. The

3. The court, the proponents and the objectors should carefully analyze whether the requested method for curtailing access would be both the least restrictive means available and effective in protecting the interests threatened If the endangered interests do not include the defendant's Sixth Amendment rights, that burden rests with the proponents.

4. "The court must weigh the competing interests of the defendant and the public", and consider the alternative methods suggested. Its consideration of these issues should be articulated in its findings and conclusions, which should be as specific as possible rather than conclusory.

5. "The order must be no broader in its application or duration than necessary to serve its purpose ... "If the order involves sealing of records, it shall apply for a specific time period with a burden on the proponent to come before the court at a time specified to justify continued sealing. [*Waldon*, 148 Wn. App. at 958-59 (quoting *Ishikawa*, 97 Wn.2d at 37-39)].

court further found that J.S. had significant privacy interests because the court record “can affect his ability to travel and gain employment.” CP 130-31. Based on these findings, the court found that J.S.’s significant privacy interests outweighed the public’s interest in access to his court record. CP 130-31.

The RALJ court, however, did not incorporate the all of the *Ishikawa* factors into its analysis. See *State v. Waldon*, 148 Wn. App. at 967 (GR 15 and *Ishikawa* must be read together when ruling on a motion to seal or redact court records). The record does not indicate that J.S. demonstrated a *serious and imminent* threat to his right to travel or secure employment. The RALJ court failed to consider less restrictive alternatives to redacting J.S.’s full name from the court caption of his previously-sealed court record.

The RALJ court’s order effectively destroys J.S.’s court record because it is now permanently irretrievable by the public. GR 15(b)(3) defines “destroy” as “to obliterate a court record or file in such a way as to make it permanently irretrievable....”. At the district court, Ms. Grindle identified a number of technically-feasible methods of removing a court record from public access, such as creating dummy files or mirror image files accessible only to court

personnel. 10/27/09 Tr. at 23, 26. The effect could break the link between the record and a person's name. *Id.*

This makes the record "permanently irretrievable" by the public because, as a practical matter, the only way a citizen can locate a court record pertaining to a specific person is by searching court records by name. The State maintains that if a court record has been altered to make it irretrievable *by the public*, it has been destroyed for purposes of GR 15(b)(3). Under GR 15(h)(1), record destruction requires express statutory authority, and the RALJ court in this case cited no such authority.

Moreover, the RALJ court did not evaluate whether less drastic remedies (such as sealing alone) adequately protected J.S.'s privacy interests. Finally, the RALJ court's order is not limited to a specified time period, and it does not place any requirement on J.S. to come forward at a future date to justify continued redaction and sealing. See CP 130-31.

For these reasons, this court should reverse the RALJ court's decision and remand the case to the district court to apply the proper analysis and determine whether sealing and/or redaction

is appropriate. See *Rousey*, 151 Wn. App. at 946 (remand appropriate where trial court applies incorrect legal standard).⁴

2. To Ensure the Public's Constitutional Right of Access to Court Records under GR 15 and *Ishikawa*, Citizens must be able to Search Court Records using an individual's Name.

Article I, section 10 of the Washington Constitution ensures public access to court records as well as court proceedings. *Waldon*, 148 Wn. App. at 957 (citing *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861 (2004)). If a citizen has the name of a specific individual, he or she must be able to search court records and determine if a record exists in connection with that person's name.⁵ If an individual's name has been removed from all court records related to that individual, a citizen cannot learn whether any such record exists, and his or her constitutional right to access court records is meaningless.

⁴ The state did not oppose sealing at the district court, nor did the state make any argument before the RALJ court that sealing was inappropriate. If the court remands this case to the trial court to conduct the proper analysis for record redaction, however, the same test should also be applied to any request by J.S. to seal the record. See GR 15(c)(2) (agreement of parties alone does not constitute a sufficient basis for the sealing or redaction of court records).

⁵ This is true regardless of whether a court record – in this case, a criminal record -- reflects a conviction, deferral, dismissal, or some other disposition. While the Criminal Records Privacy Act (RCW 10.97.030) makes distinctions between conviction and non-conviction data, these distinctions do not apply to court records. See *State v. Shineman*, 94 Wn. App. 57, 63 note 10, 971 P.2d 94 (1999).

When a name is removed from a court record, that record becomes a “needle in a haystack” to the public. GR 15 contains several provisions to ensure this does not happen. Sealing or redacting a court record may limit the information contained in the record that is available to the public, but the rule guarantees that the public can discover that the record exists.⁶ As a practical matter, this is impossible if the person’s name is severed from his or her court record.

Moreover, procedures governing the unsealing of court records (see GR 15(e)) are thwarted if a party’s name is removed from the record. Even in the most extreme situation when court records are destroyed under GR 15(h)(1), a record documenting their destruction must be available to the public.⁷

Therefore, to safeguard the public’s constitutional right of access to court records under GR 15 and *Ishikawa*, the court should hold that citizens must be able to search publicly-accessible court records using the name of a party, and that this necessarily

⁶See GR 15(c)(4) (“[t]he existence of a court file sealed in its entirety, unless protected by statute, is available for viewing by the public on court indices...”); GR 15(c)(5)(C) (order to seal and written findings supporting order to seal shall be accessible to the public).

⁷See GR 15(h)(3)(A) and GR 15(h)(4)(C).

precludes the removal of a party's name from his or her court records.

3. The Court should Modify its Decision in *Rousey* to make clear that a Trial Court's Redaction Authority under GR 15(c) Does Not Permit the Removal of Information from Publicly-Accessible Court Indices.

In *Indigo Real Estate Services v. Rousey*, this court ruled that information contained in the Superior Court Management Information System (SCOMIS) meets the definition of a "court record." 151 Wn. App. at 947. The court further ruled that GR 15 authorizes courts to redact information contained in SCOMIS, and that GR 15 and the *Ishikawa* factors together provided the legal standard for evaluating Rousey's motion to redact her name from the SCOMIS index. 151 Wn. App. at 949-50.

Rousey appears to authorize trial courts to redact information – including a person's name – from SCOMIS after considering the factors set forth in GR 15 and *Ishikawa*. If so, *Rousey* conflicts with several provisions of GR 15, and the State urges the court to modify the *Rousey* decision.

GR 15(c)(4) lists information to remain available on court indices for public viewing even when a court file is sealed in its entirety (a remedy which GR 15(c)(3) indicates is more restrictive

than redaction). This includes, among other information, the cause number, case type, and names of the parties.⁸ Similarly, when criminal convictions are vacated and an order to seal is entered, the adult or juvenile's name remains available in the public court indices. See GR 15(d).

In sum, the rule directs that absent statutory authority, the parties' names are to remain publicly accessible when records are sealed or redacted. The court should harmonize these provisions with *Rousey* by stating that *Rousey* does not authorize trial courts to redact information that must remain publicly accessible in court indices, such as the parties' names.

4. Even if the Court Declines to Modify the *Rousey* Decision, it should rule that there must be a Publicly Accessible Record Reflecting whenever another Record has been Destroyed, Sealed or Redacted.

Even if the court declines to limit *Rousey* as suggested by the State, it should hold that whenever a court record is destroyed,

⁸GR 15(c)(4), in relevant part, states that "[t]he existence of a court file sealed in its entirety, unless protected by statute, is available for viewing by the public on court indices. The information on the court indices is limited to the case number, names of the parties, the notation 'case sealed,' the case type and cause of action in civil cases and the cause of action or charge in criminal cases, . . . The order to seal and written findings supporting the order to seal shall also remain accessible to the public, unless protected by statute."

sealed or redacted, a publicly-accessible record reflecting the alteration must exist. This requirement is expressly stated in several provisions of GR 15.

When records are destroyed, for example, the order to destroy and written findings supporting the order must be publicly-accessible. See GR 15(h)(4)(C). Similarly, when an entire court file is sealed or individual records are sealed, the sealing order and supporting findings must be accessible to the public. See GR 15(c)(4) and (5)(C). When a court redacts records, the original, unredacted copy must be sealed. Again, the order to seal and supporting findings must be publicly-accessible.⁹

To be publicly-accessible, any order to destroy, seal or redact must contain the party's full name. Realistically speaking, this is the only way that a member of the public can locate a record pertaining to a specific individual. Absent this requirement, several

⁹GR 15(c)(6) requires that when a record is redacted, the original, unredacted record must be sealed under GR 15(c)(5):

(6) Procedures for Redacted Court Records. When a court record is redacted pursuant to a court order, the original court record shall be replaced in the public court file by the redacted copy. . . . The original unredacted court record shall be sealed following the procedures set forth in c(5). [GR 15(c)(6), in part].

This means that the unredacted record exists in a sealed file, which is accompanied by an order to seal supported by written findings, and that the order and findings are accessible to the public.

provisions of GR 15 would be rendered superfluous, and the public would be deprived of its constitutional right to access court records under Article I, section 10 of the Washington Constitution.

J.S.'s privacy interests are adequately protected by the trial court's discretion to seal or redact court records under the analysis of GR 15 and *Ishikawa*. These longstanding principles properly balance a person's privacy interests and the public's constitutional right to access court records.

V. 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. Alternatively, 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 17th day of March, 2011.

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