

IN THE COURT OF COMMON PLEAS  
MAHONING COUNTY, OHIO

STATE OF OHIO

Plaintiff

Vs.

ANTHONY M. CAFARO, JR.  
THE CAFARO COMPANY (A)  
OHIOVALLEY MALL CO. (B)  
THE MARION PLAZA, INC. (C)  
JOHN A. MCNALLY (D)  
JOHN REARDON (E)  
MICHAEL V. SCIORTINO (F)  
JOHN ZACHARIAH (G)  
MARTIN YAVORCIK (H)  
FLORA CAFARO (I)

Defendants

2010 CR 800

December 21, 2010

**DECISION AND ORDER**

JUDGE WILLIAM H. WOLFF, JR..  
On Assignment, Art. IV, Section 6  
Ohio Constitution

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This case is before the court on the Cafaro defendants' motion to temporarily seal all bills of particulars and notices of intent to introduce Rule 404(B) evidence until after trial, the motion of The Youngstown Vindicator and WFMJ-TV for an order vacating the September 9 and September 14, 2010 sealing orders and permitting public access to bills of particulars and motion to dismiss indictment, and the Cafaro defendants' motion to enlarge the January 3, 2011 pretrial motion filing deadline.

Considering first the motion to enlarge the pretrial motion filing deadline, the state has represented that it does not object to an extension of that deadline and the motion is SUSTAINED.

Consistent with the court's order of September 9, 2010, all defendants shall have 90 days---measured from the date that counsel for the State informs counsel for the defendants that discovery is complete---to file pretrial motions and provide reciprocal discovery, except for disclosure of expert witnesses.

The State's brief in response to the Cafaro defendants' motion to enlarge time, previously filed under seal, shall be unsealed.

The Cafaro defendants have asked that Exhibit 2 and portions of Exhibit 5 to their motion to enlarge time remain under seal. On December 6, the court discussed this request in chambers on the record with all present counsel, including counsel for the Vindicator, who was provided with copies of the exhibits. Upon examination of the exhibits, the court is not persuaded that the unsealing of these exhibits "will create publicity that has a substantial likelihood of prejudicing the defendants' right to a fair trial..." *National Broadcasting Company, inc. v. Presser*, 828 F.2d 340, 347 (6<sup>th</sup> Cir.1987). These exhibits shall be unsealed.

The Vindicator's motion to vacate the sealing orders and for public access to the bills of particulars and motion to dismiss indictment and the Cafaro defendants' motion to seal all bills of particulars and Crim R 404(B) notices until after trial will be considered together.

The Cafaro defendants' motion is confined to bills of particulars and notices of intent to use Crim R 404(B) evidence. Defendants Michael Sciortino, John McNally, and John Zachariah have joined the motion. (The Vindicator's motion is only concerned with the bills of particulars.)

The Cafaro defendants essentially argue that the bills of particulars and the Crim R 404(B) notices are in the nature of discovery and should not be accorded the "presumption of public access." The Vindicator argues to the opposite conclusion: that documents filed in this case come within the presumption and may not be sealed without the defendants' overcoming that presumption.

For the present, at least, the court agrees with the defendants. In *State ex rel. Mothers Against Drunk Drivers v. Gosser* (1985) 20 Ohio St.3d 30, the supreme court---construing the Public Records Act---stated at 33: "It would seem to be clear that if, as here, the requested documents are received by, are under the jurisdiction of, and are utilized by, the court to render its decision, then their retention assures the proper functioning of the governmental unit and, accordingly, could reasonably be classified as 'public records' and required to be kept within the meaning of R.C. 149.43." In *Presser, supra*, the court stated at 345: "Thus, as with the disqualification issue, we conclude that

proceedings inquiring into conflicts of interest by attorneys meet and satisfy the requirements of a qualified First Amendment right of access. Although not ‘like a trial,’

in the sense of a preliminary hearing such as the court considered in *Press-Enterprise II*, both proceedings do require the court to make factual determinations and to apply settled legal principles in order to rule.”

Significantly, both of these cases---Supreme Court of Ohio and Sixth Circuit authority, respectively---state a test for according documents a presumption of public access that focuses on whether the documents implicate the decision making responsibility of the trial court. At this stage of the proceeding, the bills of particulars and Crim R 404(B) notices do not call upon the court to make a decision. Indeed, a bill of particulars need not be filed. Crim R 7(E). See also *State ex rel. WHIO-TV7 v. Lowe* (1997) 77 Ohio St.2d 350,354. The federal circuits are divided as to whether these documents enjoy the presumption of public access. See *United States v. Anderson*, 799 F.2d 1438 (11<sup>th</sup> Cir. 1986); *United States v. Smith* 776 F.2d 1104 (3<sup>rd</sup> Cir. 1985). In this court’s judgment, whether a document is filed is not dispositive. *Anderson, supra*. The court has caused to be filed without seal, or unsealed those documents filed to date, that do implicate the court’s decisional responsibility. Furthermore, all filings, albeit under seal, have been identified on the public docket maintained by the clerk of courts.

The Vindicator argues that the bills of particulars should be accorded the presumption of public access because they “reveal the specific alleged criminal actions of the Defendants (*the very issue to be adjudicated in this case.*)” Although the Vindicator accurately states the nature of bills of particulars, its conclusion doesn’t follow. The “alleged criminal actions” of the defendants are to be adjudicated by a jury at trial, not by the court at this stage of the proceedings. Accordingly, Exhibit 1 to defendants’ motion, the Zachariah bill of particulars, a copy of which was furnished to counsel for the Vindicator on December 6, shall remain under seal.

Although the court entered its sealing orders September 9 and 14, the Vindicator didn’t formally appear in these proceedings until mid-November. The Vindicator now

claims that the sealing orders were entered in disregard of mandatory steps that must be taken before any sealing may occur.

To the extent that the court has determined that the bills of particulars and Crim R 404(B) notices do not come within the presumption of public access, the Vindicator has not been harmed by the court's sealing orders. The court has now unsealed those documents that do implicate the court's decision making function, thus obviating any harm done to the Vindicator by the court's sealing orders.

Assuming, *arguendo*, that the bills of particulars and Crim R 404(B) notices are not insulated from the presumption of public access, the court nevertheless finds that publication of these documents would lead to a "substantial probability that the defendants' right to a fair trial" in Mahoning County "would be prejudiced." *Presser, supra*, at 346.

Hugh Martin, an associate professor at the Ohio University School of Journalism, testified as an expert witness. The court finds his testimony credible and finds that

- 1) The Vindicator and its website, Vindy.com, have a virtual monopoly on the dissemination of local news in Mahoning County;
- 2) The Vindicator's coverage of this case has been intense and "very tough" on the defendants.

Further, the court has observed the homepage of Vindy.com over time. Vindy.com's homepage contains a daily section styled "Oakhill Corruption" in which are collected numerous articles and editorials about this case and related matters as well as links to the indictment and to the Flora Cafaro/Martin Yavorcick bill of particulars.

Taking into account that the bills of particulars and Crim R 404(B) notices not only detail the alleged wrongdoing of the defendants but contain information that may not be admissible at trial, and further taking into account the Vindicator's intense, tough coverage of this case, the court concludes that publication of these documents would result in a substantial probability that seating an impartial jury in Mahoning County

would be impossible, particularly given the further difficulty of finding jurors able to serve for the duration of what promises to be a lengthy trial.

The Vindicator contends that the court's concern with pretrial publicity can be alleviated by simply changing venue to an Ohio county beyond its reach, citing R.C.2901.12(K) and Crim R 18(B). While the statute and rule appear to authorize a change of venue at this time, and while a change of venue at this time might serve the interest of judicial economy (or at least make life easier for the court,) the court must also respect the defendants' right to a "public trial by an impartial jury in the county in which the offense(s) are) alleged to have been committed." Ohio Const., Art. I, Sec. 10. While this right might not be absolute, the supreme court has stated that "a careful and searching voir dire provides the best test of whether prejudicial pretrial publicity has prevented obtaining a fair and impartial jury from the locality." *State v. Treesh*, 90 Ohio St.3d 460, 464 (2000). This suggests that the court's effort to seat an impartial jury should begin in Mahoning County.

As to future filings other than the bill of particulars relating to the Cafaro defendants, should the State choose to file it rather than simply furnish it to the defendants, the court agrees with the Vindicator that it is entitled to notice of any effort to seal a document or close a proceeding and the right to participate in proceedings relating to whether a document should be sealed or a proceeding closed in whole or in part.

As to future document filings, if counsel for the defendants seek to have a document filed under seal, they shall file a motion to that effect which describes the document for which sealing is sought. A copy of the document, together with a memorandum in support of sealing, shall be served upon counsel for the Vindicator who, as an officer of the court, shall not reveal the content of the document to the Vindicator. Counsel for the Vindicator shall have seven days to respond. The court will thereafter decide whether any portion of the proposed filing should be sealed. If any portion of the proposed filing is to be sealed, the document will be redacted as necessary and filed by the court as redacted. In the event of redaction, the court will assemble the unredacted

proposed filing, memorandum in support of sealing, and the Vindicator's response, and file the package under seal. If none of the document is to be sealed, the court will overrule

the motion to seal and counsel for the defendants may proceed to file the document without seal.

If counsel for the State intends to file a document that can be reasonably expected to trigger a concern on the part of defense counsel that publication of the document will prejudice the impaneling of an impartial jury in Mahoning County, counsel for the State shall submit a copy of the document to defense counsel for review. Defense counsel shall have seven days to contact counsel for the State if they believe sealing is necessary. If defense counsel fails to contact counsel for the State, the document shall be filed. If defense counsel timely advises counsel for the State that sealing is necessary, counsel for the State shall withhold filing the document and defense counsel shall immediately file a motion to have the document filed under seal, identifying the document to be sealed. Contemporaneously with filing the motion to seal, defense counsel shall serve a copy of the document, together with a memorandum in support of sealing, to counsel for the Vindicator, who, as an officer of the court, shall not reveal the content of the document to the Vindicator. Counsel for the Vindicator shall have seven days to respond. The court will thereafter decide whether any portion of the proposed filing should be sealed. If any portion of the proposed filing is to be sealed, the document will be redacted as necessary and filed by the court as redacted. In the event of redaction, the court will assemble the unredacted proposed filing, memorandum in support of sealing, and the Vindicator's response, and file the package under seal. If none of the document is to be sealed, the court will overrule the motion to seal and the State may proceed to file the document.

The Vindicator shall have the opportunity to file an objection whenever the court seals a document in whole or in part. See *State ex rel. Dispatch Printing Company v. Lias* (1994) 68 Ohio St.3d 497,498.

The court need not address at this time the procedure to be followed where closure of proceeding is sought in the absence of any such requests at this time. Counsel for the Vindicator has indicated that *Lias, supra*, prescribes the appropriate procedure.

The Cafaro defendants' motion to temporarily seal all bills of particulars and Crim R 404(B) notices is SUSTAINED BUT SUBJECT TO FURTHER ORDER OF COURT. The Vindicator's motion to vacate the September 9 and September 14 sealing

orders is SUSTAINED PROSPECTIVELY, except as to a bill of particulars relating to the Cafaro defendants', and those orders are replaced by the procedure described above. The Vindicator's motion for public access to the motion to dismiss was sustained at bar December 6.

**IT IS SO ORDERED.**

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JUDGE WILLIAM H. WOLFF, JR.  
Sitting On Assignment  
Article IV, Section 6  
Ohio Constitution

CLERK: Copies to all counsel of record and all unrepresented parties