IN THE SUPREME COURT OF THE STATE OF VERMONT

IN RE: VSP-TK / 1-16-18 SHOOTING

***

STATE OF VERMONT, APPELLEE

GRAY TELEVISION, INC., APPELLANT

SUPREME COURT DOCKET NO. 2018-392

APPEAL FROM THE

SUPERIOR COURT OF VERMONT – CRIMINAL DIVISION
WASHINGTON COUNTY
DOCKET NO. 1-1-18 Wncm

BRIEF OF THE APPELLEE

Rory T. Thibault, Esq.
State's Attorney

Washington County
State's Attorney's Office
255 N. Main Street, Suite 9
Barre, Vermont 05641
(802) 479-4220
rory.thibault@vermont.gov

Attorney for Appellee

STATEMENT OF THE CASE

THE DECISION OF THE SUPERIOR COURT SHOULD BE AFFIRMED AS THE COURT PROPERLY CONCLUDED THAT INQUEST PROCEEDINGS AND RULINGS MADE THEREIN ARE CONFIDENTIAL AND NOT SUBJECT TO PUBLIC DISCLOSURE.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

PRELIMINARY STATEMENT

The Appellant, Gray Television, Inc., has filed this appeal challenging the decision of the Washington County Superior Court, Criminal Division, denying the unsealing of the court's prior decision to quash an inquest subpoena directed toward WCAX-TV in relation to video and audio footage captured of a police involved shooting that occurred on January 16, 2018 in Montpelier, Vermont. The Superior Court properly denied Appellant's requested relief, applying applicable rules concerning access to judicial and public records within the State of Vermont.

STATEMENT OF THE FACTS AND CASE

On January 16, 2018, Nathan Giffin was shot and killed by law enforcement officers on the grounds of Montpelier High School following his robbery of the Vermont State Employee Credit Union across the street from the school campus. A standoff developed, and Mr. Giffin, armed with what appeared to be a functional pistol, engaged in a pattern of provocative behavior toward law enforcement officers on scene. After repeatedly disobeying the directives of law enforcement, and advancing toward officers in a vulnerable position, Mr. Giffin was shot multiple times, resulting in his death.

An investigation into the officer involved shooting was initiated immediately by the Vermont State Police Major Crime Unit. Among the detectives assigned was Detective Sergeant Tyson Kinney. On January 17, 2018, Detective Sergeant Kinney contacted the Washington County State's Attorney's Office for support in securing a subpoena for video footage of the incident recorded by WCAX, a

television station based in Burlington, Vermont and a division of Gray Television, Inc. The inquest subpoena sought the edited (aired) video of the incident, the raw footage of the incident, and contact information for the reporter on scene. WCAX personnel arrived during the course of the incident and filmed the incident from a

WCAX ran several segments on this incident, including two on January 18, 2018 that featured a legal expert, former U.S. Attorney Jerome O'Neill, evaluating the video. The journalist interviewing Mr. O'Neill, noted on air that "O'Neill reviewed raw video captured by a Channel 3 News photographer which shows suspect Nate Giffin walking around on an athletic field while holding a gun." WCAX broadcast clips of the incident on multiple broadcasts.

On January 17, 2018, the State opened an inquest and subpoenaed the WCAX video relating to the incident, specifically requesting "[a]ny and all raw video (unedited) and audio (unedited) recordings pertaining to the police shooting that occurred at Montpelier High School on January 16, 2018." P.C. 32-34. The State's intent was to assist investigators in determining whether law enforcement officers acted lawfully or whether criminal charges would be appropriate. Appellant moved to quash the subpoena (see P.C. 13-17) and a hearing was held on February 13, 2018. The Superior Court, following hearing, issued a ruling quashing the subpoena on February 16, 2018.

On July 24, 2018, Appellant moved the Superior Court to unseal the decision quashing the subpoena. The State responded in opposition on September 4, 2018. The Superior Court issued a decision declining to unseal the February 16, 2018

decision on November 8, 2018. Appellant has appealed this decision, claiming error by the Superior Court in applying the Vermont Public Records Access law, as well as a First Amendment interest in the disclosure of the decision.

STANDARD OF REVIEW

Appellee stipulates and agrees to the recitation of the standard set forth in the Appellant's brief, that is, this Court reviews for an abuse of discretion by the Superior Court.

ARGUMENT

I. The decision of the Superior Court should be affirmed as the court properly concluded that inquest proceedings and rulings made therein are confidential and not subject to public disclosure.

"The common law has long recognized that courts are possessed of an inherent authority to deny access to otherwise public court records when necessary to serve overriding public or private interests." *In re Sealed Documents*, 172 Vt. 152, 161 (2001). Inquest proceedings are an important investigatory tool that supports the pursuit of justice by law enforcement agencies and prosecutors – a matter of substantial public importance. The Appellant seeks to establish new precedent that these otherwise confidential proceedings become accessible merely because an inquest has been completed, or the purposes of the inquest have been satisfied.

In denying the Appellant its requested relief, the Superior Court noted the limited role of the judiciary in inquest proceedings, specifically, that courts "superintend" inquests by regulating their initiation and process once convened.

Thus, the role of the judiciary is secondary to the primarily executive function of inquests. *See In re D.L.*, 164 Vt. 223, 230 (1995); *State v. Chenette*, 151 Vt. 237, 251 (1989). "In the modern inquest, the court's role is limited to exercising its subpoena power, administering oaths, protecting the rights of witnesses, and using contempt powers." *In re D.L.*, 164 Vt. at 232. Further, "[t]he court's role directly relates back to its ultimate function of neutral arbiter. It assures that inquests are conducted in a way that permits the State to investigate a matter without transgressing on witnesses' liberties." *Id*. (internal citations omitted).

Recognizing the primary executive role and function within inquest proceedings, the Superior Court properly relied on *Rutland Herald v. Vermont State Police*, 191 Vt. 357 (2012) in reaching its decision. Rutland Herald determined that the Vermont Access to Public Records (APR) statutes applied to, and exempted public disclosure, of "records dealing with the detection and investigation of crime, including those maintained on any individual or compiled in the course of a criminal or disciplinary investigation." *Rutland Herald*, 191 Vt. at 365 (citing 1 V.S.A. § 317(c)(5)).

Further, "[h]aving found the investigatory files entitled to a blanket exemption under 1 V.S.A. § 317(c)(5), we need not consider whether certain materials within the files are also exempt under § 317(c)(1) (exempting 'records which by law are designated confidential or by a similar term'). As set forth above, we do not engage in a content-based analysis of these records once they have been determined to be "records dealing with the detection and investigation of crime." *Id*.

at 372. *Rutland Herald* concluded that the "[s]uch records are wholly exempt from public access … [and] do not address the Herald's arguments concerning inapplicability of the inquest secrecy statute, 13 V.S.A. § 5134, to the general disclosure exemption in 1 V.S.A. § 317(c)(1) for records designated confidential by law." *Id.*

Critically, the *Rutland Herald* decision declined to embrace a position taken by Justice Dooley, in dissent, that rejected the premise that inquest proceedings are not subject to public disclosure. The majority opinion observed that "[n]o party argued below, nor do they argue on appeal, that the inquest records are judicial branch records that must be disclosed under the Rules for Public Access to Court Records (PACR). This novel issue is raised *sua sponte* by the dissent without notice or opportunity for briefing and argument by the parties. *It is unnecessary* and inappropriate to reach this issue here." *Id.* (emphasis added, citation omitted).

The Superior Court properly applied the precedent set in *Rutland Herald*, and further concluded that the exceptions provided for under 1 V.S.A. § 317(c)(5)(A) remain applicable, even when an investigation is closed. (P.C. 4); *See also Rutland Herald*, 191 Vt. at 368 ("the exemption for investigatory files does not terminate with the conclusion of the investigation. Once an investigation ... has come into being ... materials that relate to the investigation and, thus, properly belong in the file, remain exempt subject to the terms of the statute." (internal citation omitted)) The Superior Court further observed (P.C. 5):

> In *State v. Tallman*, the Supreme Court held that an initial test for whether a particular document or proceeding was intended to be secret

> or confidential was (1) whether the place and process historically have been open, and (2) whether public access played a significant positive role in the functioning of a particular process. 148 Vt. 465, 469-70 (1987) (citing *Press Enterprise Co. v. Superior Court of California*, 478 U.S. 1, 8 (1986)). Applying this screening test to the instant request, the result is decisively against public access. In Vermont, the caselaw and practice has been for inquests to be secret and not open. Even the stenographer must be sworn to secrecy in an inquest. 13 V.S.A. § 5134. Given the history, there cannot be said to have been any public role in the operation of the inquest procedure. Tallman holds that once probable cause has been found by a judge, affidavits of probable cause are public records. *Tallman*, 148 Vt. at 473.

The Superior Court correctly recognized that the gatekeeping function of the judiciary must be viewed in accord with the secrecy mandated and enforced by statute. 13 V.S.A. § 5134 provides:

> Before entering upon his or her duties, [a] stenographer shall be sworn to keep secret all matters and things coming before the judge at such inquest. Such oath shall be in writing, and the stenographer shall not disclose testimony so taken by him or her except to the attorney general, state's attorney and the judge holding the inquest. The minutes of testimony so taken shall be the property of the state and the same or copy thereof shall not go out of the possession of such attorney general, state's attorney or their successors except to an attorney appointed by the supreme court or superior court to act in the place of or assist a state's attorney. However, nothing in this section shall prevent the stenographer from disclosing such evidence on an order of the supreme or superior court, or a prosecuting attorney from disclosing such evidence to a defendant in such manner as the supreme court may by rule provide.

While not directly addressing motions practice or court rulings made during the course of an inquest proceeding, these are necessarily based upon testimony or evidence adduced during the course of such proceeding – i.e. confidential information. Thus, decisions, including a motion to quash, are necessarily derived

from the particularized facts and findings of the court based upon the confidential testimony and evidence presented before it in a closed proceeding.

The Superior Court, relying on *State v. Alexander*, 130 Vt. 54, 61 (1971), properly concluded that inquest proceedings, like grand jury proceedings, were intended to be secret, and further observed that "the minutes of testimony taken at an inquest are the property of the state ... and no private person is entitled to a transcript." *State v. Truba*, 88 Vt. 557, 561 (1915) (the Superior Court observed that though more than 100 years old, the determination in *Truba*, that inquest proceedings are a "secret investigation" remains good law, and the requirement that proceedings may only be disclosed on order of the court remains consistent with more contemporary rules and laws concerning public access to records, P.C. 3). *See also State v. Ploof*, 133 Vt. 304, 304 (1975).

The disclosure of inquest transcripts is only permissible under specific circumstances: "[i]t is our law that the statutory authority under which inquests are conducted is to be strictly construed, and will not be regarded as including use for any purpose not clearly and intelligibly described in the statutory language so as to be manifestly within the legislative intent. The limitation as appropriately applies to the purposes for which disclosure is sought as to the original basis for the convening of the inquests." *In re Certain Inquest Minutes*, 137 Vt. 595, 595 (1979) (citing *State v. Alexander*, *supra*). The decision on the motion to quash, subject to the litigation here, was based on testimony and evidence presented at a hearing, held as part of the inquest proceeding.

Vermont has adopted a generally liberal policy concerning access to court records. However, Vt.R.Pub.Acc.Ct.Rec. 6(b) provides for significant exceptions to the presumption of access to information contained within court files. Inquest proceedings are not expressly addressed, but the reasoning and policy considerations underlying a number of other exceptions, construed with relevant case law, precedent, and statutory law support the conclusion that such proceedings are not intended to be publicly accessible. Inquests, like search warrants, are tools used in support of the executive's investigation of potentially criminal matters, predicate to a criminal prosecution, and are addressed in two exceptions under the rule:

> (15) Records of the issuance of a search warrant, until the date of the return of the warrant, unless sealed by order of the court;
>
> (16) Records of the denial of a search warrant by a judicial officer, unless opened by order of the court;

Notably, the rules support disclosure in situations where a search warrant is approved and executed (i.e. the secretive nature ceases to exist, once law enforcement engages in ostensibly overt actions to execute the warrant), but support sealing in circumstances where a warrant is denied (e.g. the development of probable cause is insufficient at the time of the application). The situation in this matter is analogous; the State sought relevant materials in the possession of WCAX and was denied production upon the successful effort to quash the subpoena. Likewise, a further exception provides:

> (24) Records filed in court in connection with the initiation of a criminal proceeding, if the judicial officer does not find probable cause

> to believe that an offense has been committed and that defendant has committed it, pursuant to Rule 4(b) or 5(c) of the Vermont Rules of Criminal Procedure;

In cases where the State files a criminal information that does not result in a finding of probable cause, the case is sealed and is not publicly accessible. It is illogical that an inquest proceeding that did not yield information sufficient to establish probable cause, resulting in a declination to prosecute, would be publicly accessible while the materials filed in support of a meritless charge would remain sealed. The Superior Court properly recognized and analogized both of these situations in reaching its conclusion. (P.C. 4-5).

Three additional exceptions under Vt.R.Pub.Acc.Ct.Rec. 6(b) are particularly pertinent to inquest proceedings:

> (30) Any transcript, court reporter's notes, or audio or videotape of a proceeding to which the public does not have access;
>
> (31) Any evidence introduced in a proceeding to which the public does not have access; and
>
> (35) Any other record to which public access is prohibited by statute.

Each of these rules would support non-disclosure of inquest proceedings, which are otherwise closed to the public. Likewise, the Vt.R.Pub.Acc.Ct.Rec. 6, Reporter's Notes address grand jury proceedings, which are confidential and closed to the public. "Historically grand jury records have not been open to the public. This rule continues that practice." *See State v. Lapham*, 135 Vt. 393, 399, 377 A.2d 249, 253 (1977). In *Greenwood v. Wolchik*, 149 Vt. 441, 443 (1988), the Court (quoting *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 218-19 (1979)) noted that:

> [S]everal distinct interests [are] served by safeguarding the confidentiality of grand jury proceedings. First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

The Appellee was unable to identify any published case in the State of Vermont addressing a motion to quash in the context of a grand jury proceeding. The Court's decision in *In re Inquest Subpoena (WCAX)*, 179 Vt. 12, 16–17 (2005), did not find a meaningful distinction between the applicability of law (with respect to the then extant journalist shield privilege) based on the "fact that the state's attorney proceeded by way of an inquest pursuant to 13 V.S.A. § 5131, rather than by convening a grand jury." Further, "[l]ike a grand jury investigation, an inquest is a process whose purpose is to aid in the inquiry into the existence of probable cause to believe that a crime has been committed. … The essential consideration is its role in the investigation of crime." *Id.* (internal citations omitted). Here, it is illogical that a subpoena issued under a grand jury proceeding, a process entailing greater time and cost to the judiciary and executive agents, be treated differently than the same one issued in an inquest. The competing public interests and rationales for confidentiality, as well of the underlying purpose of such inquiries, are nearly identical.

The Appellee recognizes the value of transparency and fairness in the justice system. However, transparency must yield and defer to public safety considerations in the context of criminal investigations. The threat of inquest proceedings becoming public before the statute of limitations has run in any criminal matter may discourage the use of this investigative tool for fear of compromising complex investigations, especially those where the existence of the investigation may compromise the ends of justice. This entails a "a substantial threat … to the interests of effective law enforcement". *In re Sealed Documents*, 172 Vt. at 161.

The Superior Court did not abuse its discretion in determining that the decision on the motion to quash is not subject to public disclosure. Likewise, the Superior Court eschewed a more in depth analysis of considerations under the First Amendment of the U.S. Constitution; such analysis being unnecessary given the uncontested right of the State and judiciary to exercise exceptions to public disclosure statutes.

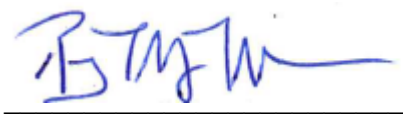
Finally, the Superior Court could have, but did not reach a determination under Vt.R.Pub.Acc.Ct.Rec. 7(a) to exercise its own discretion, upon good cause, for the sealing or redaction of records. Ultimately, should this court determine the Superior Court abused its discretion, remand for consideration under Vt.R.Pub.Acc.Ct.Rec. 7(a) would be appropriate, in lieu of the unsealing of the decision. In view of the Appellee, such action is unecessary, as the Superior Court's decision appropriately recognized the predominantly executive function of inquest proceedings, and the necessary interplay of public records exceptions and court

rules for determining disclosure, to include "written rulings the court made in its role as the superintendent of the lawfulness of the procedures of the inquest." (P.C. 6).

CONCLUSION

For the reasons articulated, the State of Vermont respectfully requests that this Honorable Court affirm the decision of the Superior Court.

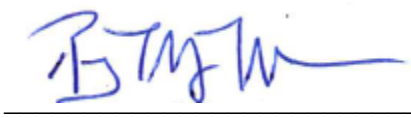
DATED at Barre, Vermont this 20th day of February 2019.



Rory T. Thibault, Esq.
State's Attorney

ERTIFICATE OF COMPLIANCE

I certify that the above brief submitted under Rule 32(a)(7)(B) was typed using Microsoft Office Word 2016 and the word count is 3,096.



Rory T. Thibault, Esq.
State's Attorney

cc: Robert Hemley, Esq.
Chad Bowman, Esq.