

APPENDIX

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DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

DALIA DIPPOLITO,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

No. 4D17-1145

[May 26, 2017]

Petition for writ of certiorari to the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Glenn D. Kelley, Judge; L.T. Case No. 502009CF009771A.

Gregory C. Rosenfeld of Law Offices of Greg Rosenfeld, P.A., West Palm Beach, and Andrew B. Greenlee of Andrew B. Greenlee, P.A., Sanford, for petitioner.

Pamela Jo Bondi, Attorney General, Tallahassee, and Elba Caridad Martin, Assistant Attorney General, Tampa, for respondent.

GERBER, J.

The defendant in a criminal case seeks certiorari review of the trial court's order prohibiting all attorneys in the case from making extrajudicial statements until the jury is sworn for the defendant's third trial. The defendant argues the court's order departs from the essential requirements of law in three respects: (1) the State made no evidentiary showing that any threat to a fair trial was imminent and substantial; (2) the order is an overbroad prohibition of political speech and the court failed to consider less restrictive alternatives like individual voir dire and striking of tainted jurors; and (3) the court's selective enforcement of the order amounts to viewpoint discrimination. We deny the petition, because the court's well-reasoned order does not depart from the essential requirements of the law. The order demonstrates that extrajudicial statements pose an imminent and substantial threat to a fair trial; is narrowly tailored in both substance and duration; and is viewpoint neutral as it applies to extrajudicial comments by both parties' counsel.

We present this opinion in six parts:

- 1) the procedural history;
- 2) the parties' arguments to the trial court;
- 3) the trial court's order and post-order proceedings;
- 4) the parties' arguments to this court;
- 5) our standard of review; and
- 6) our analysis of the defendant's three arguments.

1. Procedural History

The defendant is charged with solicitation to commit first-degree murder with a firearm. The State alleges that the defendant hired a hitman to kill her then husband. The purported hitman was actually an undercover officer from the Boynton Beach Police Department. See *Dippolito v. State*, 143 So. 3d 1080, 1081 (Fla. 4th DCA 2014).

In 2009, the Boynton Beach Police Department arrested the defendant and published video of the defendant talking to the purported hitman. Other footage showed the defendant reacting to a staged crime scene at her house and to the false news that her husband had been killed. These videos were uploaded to the police department's YouTube page, and they also aired on an episode of the national TV show *COPS*. *Id.* As this court previously noted, "[t]he case generated considerable pretrial publicity." *Id.* at 1081-82. The videos posted by the Boynton Beach Police Department were replayed and shown on national TV shows including the *Today* show, *Good Morning America*, and others. *Id.* at 1082.

In 2011, at the defendant's first trial, her theory of defense was that she believed she was auditioning for a TV show and therefore was acting during the events shown on video. At jury selection, many prospective jurors indicated they previously heard of the case by raising their hands. *Id.* It later was alleged that 28 of the 54 prospective jurors had raised their hands. *Id.* After a ten-day trial, the jury found the defendant guilty as charged. On appeal, we reversed, concluding the defendant was deprived of an impartial jury. *Id.* at 1086. Specifically, we concluded the trial court erred by denying the defendant's request "to individually voir dire the jurors on the media coverage" of the case. *Id.* at 1085. We also found the trial court erred by failing to strike the jury panel after one prospective juror openly discussed an allegation that the defendant had attempted to poison the victim – an allegation not charged in the case. *Id.*

In December 2016, at the defendant's second trial, she claimed police misconduct and asserted an objective entrapment defense. During jury selection, a large number of the 200-person jury panel indicated they

previously heard something about the case. While conducting voir dire, the defense filed three separate motions for a change of venue, asserting that the defendant could not receive a fair trial due to pervasive local media coverage of the case. The defendant specifically cited the police department's YouTube videos relating to the case. The trial court denied the motions to change venue, reasoning that, at the same time defense counsel was complaining about media attention, he was commenting about the case on his Twitter account. The second trial ended with the trial court declaring a mistrial due to a hung jury.

In January 2017, following the mistrial, defendant's two defense attorneys issued a press release. Defense counsel said the prosecution against the defendant was "politically motivated" and came at a significant "price tag" for taxpayers. Defense counsel also asserted that, even if the defendant "did the crime," she already had "done the time" by completing nearly eight years of house arrest.

2. The Parties' Arguments to the Trial Court

Following issuance of defense counsels' press release, the State filed a motion for protective order to prevent extrajudicial comments by defense counsel. In the same motion, the State sought the revocation of the lead defense attorney's pro hac vice status. The State alleged that "[r]ecent statements by defense counsel indicate they are intentionally trying to improperly influence the local jury pool" before the defendant's third trial, which is scheduled for June 2, 2017. The State specifically cited defense counsels' press release. The State also referred to the lead defense attorney's "prior pattern and past tactics" of attempting to influence potential jurors. In support of its motion, the State cited Rule 4-3.6(a) of the Rules Regulating the Florida Bar which provides:

A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding due to its creation of an imminent and substantial detrimental effect on that proceeding.

The defendant filed a response arguing that the State was attempting to "impair her attorneys' First Amendment right to free speech." The defendant further argued the State was improperly influencing the jury pool to have a negative view of her by releasing, through the Boynton Beach Police Department, videos relating to her case. The defendant

further noted that the prosecutor from her first trial had written a book about the case called, “Poison Candy: The Murderous Madam: Inside Dalia Dippolito’s Plot to Kill.” Although the book was released after the prosecutor left her job at the State Attorney’s Office, it was published while the defendant’s first appeal was pending, and the former prosecutor is now counsel for the alleged victim in this case. The defendant further argued that defense counsel issued their press release following the mistrial only as a way to counter the State’s own press release, which indicated the defendant would be tried for a third time. The defendant maintained that the “few stray comments” by defense counsel “do not pose a substantial or imminent threat to a fair trial” and did not support a gag order.

The State filed a reply clarifying that it sought a gag order which would apply to “all counsel, including the prosecutors,” and an order that would require counsel “to refrain from extrajudicial comments to the media until the case has been tried to a verdict.”

The trial court held a hearing on the State’s motion for protective order. At the hearing, the defendant argued the State failed to show that defense counsels’ press release violated Rule 4–3.6(a). The defendant also contended that the State’s proposed gag order was a prior restraint on speech, was not narrowly tailored, and was “not substantiated by the sort of evidentiary support that would require the Court to issue a gag order.” According to the defendant, the State failed to show there was any risk that prospective jurors would be tainted by counsel’s extrajudicial statements.

The trial court asked the State what evidence it had that extrajudicial statements threatened a fair trial. The State cited: the January 2017 press release from defense counsel; an unspecified number of press conferences held by defense counsel during the prior trials; and critical comments defense counsel leveled at the trial court in February 2016, which resulted in the trial court’s sua sponte issuance of an order to show cause and its consideration of whether to revoke defense counsel’s pro hac vice status. The State added:

All day long, every day [defense counsel] left this Courtroom and his goal was [to] get on TV so that [he could] influence this jury. That was his goal. Every day demeaning our witnesses, demeaning the Boynton Beach Police Department. Absolutely. That is evidence the Court should consider.

The trial court took the matter under advisement, stating it needed time to draft a detailed order.

3. The Trial Court's Order and Post-Order Proceedings

The trial court entered a well-detailed written order granting the State's motion for protective order but denying the request to revoke defense counsel's pro hac vice status.

The trial court began by finding that, after defense counsel was retained in 2015, he "conducted numerous scheduled press conferences to discuss this case and the defense's version of the facts." The trial court further found that, after defense counsel, in early 2016, filed his motion to dismiss based on entrapment, he "conducted regular press conferences discussing his view of the facts," and "emphasized the defense theory that the police manufactured the alleged crime for the sake of an appearance on *COPS*." In support of this finding, the trial court cited the order to show cause which it issued in response to defense counsel's press conference leveled at the trial court. The trial court explained that, in the prior order, it found defense counsel "violated Bar Rule 4–8.2(a) by making a statement concerning the integrity of the Court that he knows to be false . . . and also violated Bar Rule 4–3.6(a) by making an extrajudicial statement that he knows, or reasonably should know, will have a substantial likelihood of materially prejudicing" the case.

The trial court proceeded to explain that, during jury selection for the second trial in December 2016, "[s]eventy percent of the 200 jurors summoned for the trial had heard something about the case." The trial court noted that the defendant moved three times in jury selection for a change in venue "asserting that she could not receive a fair trial because of pervasive media coverage." According to the trial court, at the same time defense counsel was expressing concerns about media coverage, he "was commenting about the case on a [T]witter account."

The trial court found that, after the second trial resulted in a mistrial, "[defense counsel] again conducted a press conference to discuss the case." The trial court asserted that defense counsel "continued to discuss the tactics and motivations of the Boynton Beach Police Department and commented on the spiritual nature of the Defendant and her family."

The trial court lastly referred to defense counsels' January 2017 press release, in which they claimed the prosecution was politically motivated and a waste of money.

Based on the foregoing history, the trial court concluded:

The evidence, and the record, in this case support a finding that continued unfettered extrajudicial statements pose a substantial and imminent threat to a fair trial. Jury selection is scheduled to commence on June 2, 2017. The Defendant has chosen to proceed to trial with jurors from Palm Beach County. Potential jurors in Palm Beach County have already been exposed to extraordinary and pervasive media coverage of this case.

. . . .

The extrajudicial statements made by the Defendant's attorneys in this case, whether intended or not, are likely to bias potential jurors by repeated exposure to matters which are completely collateral to this case. The numerous press conferences conducted by [defense counsel] have directly, or indirectly, suggested that this case is a referendum on the police. While certainly the specific actions of the Boynton Beach Police Department are an issue in this case, this case is not a referendum on the police in general, nor can any juror lawfully decide[] this case to send a message to law enforcement.

Statements made recently by defense counsel concerning the Defendant "having served her time" and concerning the State Attorney's Office similarly place collateral matters into the public forum in this publicity charged case. . . . No juror can lawfully consider any of these matters.

. . . .

In most cases, commentary on collateral matters, or on the case itself, would not pose an imminent threat to a fair trial. However, as already discussed, the level of media coverage of this case has been, and continues to be, extraordinary. Every statement made by anyone connected with this case is being reported and re-reported. Speculation runs rampant on irrelevant issues in this case such as when did the Defendant have a child while on house arrest. In a case that has already been tried twice in this county, and in a case exposed to such pervasive media coverage, the impact on potential jurors of continued extrajudicial statements by the attorneys in this case poses a real and imminent threat to the orderly administration of justice and to a fair trial.

(footnote omitted).

As a result, the trial court prohibited “[a]ll counsel in this case . . . from making any extrajudicial statement” reasonably expected to be publicly disseminated which specifically related to the following:

- a. The evidence in this case or any party’s view or opinion of the evidence in this case;
- b. The facts of the case or any party’s interpretation of the facts of the case, including any inferences that could be drawn from the facts;
- c. The motive or motivation of the State in prosecuting the case or the motive or motivation of the Defendant in pursuing any theory of defense;
- d. Sentencing or punishment of the Defendant including any reference to the sentence imposed after the first trial, the Defendant’s score on the Criminal Punishment Code Scoresheet, length of in-house arrest or punishment of the Defendant if found guilty;
- e. Theories of the case by the State or the Defendant;
- f. The first or second trial of this case, including the results of those trials; and
- g. The disparagement of any attorney of record in this case.

Notwithstanding the topics prohibited by the preceding list, the trial court explained that attorneys were allowed to comment “generally on the progress of the case, procedural matters or rulings of the Court, provided the comments are consistent with the Florida Rules of Professional Conduct.” The trial court further provided that its order would “automatically expire upon the swearing of a jury.”

Following entry of the trial court’s order, but before filing the instant petition, the defendant filed two motions asking the trial court to hold the State in contempt for violating the order. In the first motion, the defendant claimed the State ran afoul of the order by allowing the Boynton Beach Police Department, as the State’s agent, to keep videos relating to her case on the department’s YouTube page. The defendant argued that although no new videos had been posted, allowing the videos to remain online despite the gag order would constitute “viewpoint discrimination.” In the second motion, the defendant addressed media reports, citing a “source close to the case,” that the alleged victim would testify in the upcoming trial, as he did in the first trial. The defendant asserted that this “source”

had to be one of the current prosecutors or the former prosecutor who now was counsel for the alleged victim.

The trial court conducted a hearing and clarified that its order applied to counsel only. The trial court further noted that its order did not require “anyone to go back and remove anything from the public domain, nor could I.” Although the trial court denied the requested relief, the court stated that if it saw “someone doing indirectly what they can’t do directly, I will take action, and you can bring it to my attention.”

4. The Parties’ Arguments to This Court

a. The Defendant’s Arguments

The defendant argues that the trial court’s order departs from the essential requirements of law in three respects: (1) the State made no evidentiary showing that any threat to a fair trial was imminent and substantial; (2) the order is an overbroad prohibition of political speech and the trial court failed to consider less restrictive alternatives like individual voir dire and striking of tainted jurors; and (3) the trial court’s selective enforcement of the order amounts to viewpoint discrimination.

On the defendant’s first argument, she contends that the only evidence which the State submitted was defense counsels’ January 2017 press release. According to the defendant, because the press release was issued more than four months before the currently scheduled trial date and because the State did not show that any media outlet published the press release, the State failed to establish an imminent and substantial threat to a fair trial. The defendant further contends that, to the extent the State referenced defense counsel’s other comments and press conferences, such references were presented as argument, not evidence, and do not support the trial court’s order. In support, the defendant relies on *E.I. Du Pont de Nemours & Co. v. Aquamar, S.A.*, 33 So. 3d 839, 841 (Fla. 4th DCA 2010) (“[A] gag order should be supported by evidence . . .”), and *Rodriguez ex rel. Posso-Rodriguez v. Feinstein*, 734 So. 2d 1162, 1164 (Fla. 3d DCA 1999) (finding there was no showing gag order was necessary where “[n]o evidence other than the newspaper advertisement itself was presented to the court.”).

On the defendant’s second argument, she contends that the trial court’s order is not narrowly tailored to preclude only prejudicial statements made by counsel. The defendant maintains that defense counsel’s criticism of elected officials and comments on matters of public concern like expenditure of public funds is protected political speech. In

support, the defendant cites *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1043 (1991) (“A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in the *court of public opinion* that the client does not deserve to be tried.”) (emphasis added). According to the defendant, the order’s sole exception for statements about procedural matters is insufficient to render it narrowly tailored. The defendant also contends that the trial court should have considered the less restrictive alternative of allowing individual voir dire on jurors’ exposure to media coverage, as the court did at the second trial.

On the defendant’s third argument, she contends that the trial court’s order is prone to discriminatory enforcement, as seen in the trial court’s rulings on her post-order motions directed toward the State. According to the defendant, because the order does not completely incorporate Rule 4–3.6, including subsection (b) which applies to third-party agents of counsel, the order completely restrains the defendant’s speech while allowing the State’s agents to say whatever they wish. For example, the defendant argues, the trial court allowed the Boynton Beach Police Department to continue publishing videos which threaten her right to a fair trial, while ordering defense counsel to stand mute. According to the defendant, she should not be forced to waive her right against self-incrimination in order to respond. *See Gentile*, 501 U.S. at 1056. The defendant also contends that defense counsel’s comments were permissible because they were made in response to, and designed to counter, the prejudicial media environment which the State created. In support, the defendant cites the comment to an ABA model rule recognizing that counsel has the right to reply with extrajudicial statements when “they are made in response to statements made publicly by another party, . . . where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer’s client.” Model Rules of Prof’l Conduct r. 3.6 cmt. [7] (Am. Bar Ass’n 2014).

b. The State’s Response

The State responds generally that the trial court’s order did not depart from the essential requirements of law or result in irreparable harm to the defendant.

On the defendant’s first argument, the State responds that the trial court’s order “took into consideration all of the proceedings in this case and all of the publicity this case has garnered.” The State argues the threat is imminent and substantial because the defendant’s case is set for trial, and any prejudicial comments to the media will affect the prospective

jurors, as shown by the jury selection process in the previous trials. The State distinguishes *Rodriguez* on the grounds that, in *Rodriguez*, no showing of material prejudice existed, the order had no time or scope limitations, and counsel offered to curtail his comments as an alternative. Here, the State argues, defense counsel offered no alternative and indicated he would continue his media strategy. Similarly, the State distinguishes *Aquamar* on the ground that, in *Aquamar*, the court entered an order enjoining counsel's speech without the benefit of a hearing, unlike here where the trial court held a lengthy hearing.

On the defendant's second argument, the State responds that the gag order is narrowly tailored to apply to attorneys only, to exempt comments on procedural matters, and to expire upon the swearing of the jury. The State distinguishes *Gentile* on the ground that, in *Gentile*, the lawyer whose disciplinary finding was reversed held one press conference six months before his client's trial and merely stated that his client was a scapegoat. Here, the State argues, defense counsel's contacts with the media were much more frequent and substantial.

5. Our Standard of Review

Appellate courts review orders prohibiting counsel from making extrajudicial statements by certiorari. *Rodriguez*, 734 So. 2d at 1163; *News-Press Pub. Co., Inc. v. Hayes*, 493 So. 2d 1, 1-2 (Fla. 2d DCA 1986). Alternatively, such orders may be reviewed by non-final appeal because they are "in the nature of an injunction." *Rodriguez*, 734 So. 2d at 1163 n.1 (citing Fla. R. App. P. 9.130(a)(3)(B)); *see also Aquamar*, 33 So. 3d at 841 (reviewing challenge to gag order as non-final appeal but also finding that order at issue was "a departure from the essential requirements of the law," and citing *Rodriguez*).

Contrary to the State's contention that the defendant failed to make a threshold showing of irreparable harm, orders like the one in the instant case "implicate[] a violation of the parties' constitutional rights which cannot be remedied on plenary review." *Rodriguez*, 734 So. 2d at 1163. Thus, in *Gentile*, the United States Supreme Court determined that a gag order can violate a lawyer's First Amendment rights when not properly balanced against the State's interest in ensuring a fair trial. *Gentile*, 501 U.S. at 1075. However, the Court recognized that "the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press" *Id.* at 1074; *see also Fla. Freedom Newspapers, Inc. v. McCrary*, 520 So. 2d 32, 35 (Fla. 1988) (distinguishing between a prohibition on an attorney's comments and a prior restraint on the press).

Given the foregoing, a court must determine whether a restriction on extrajudicial statements is needed on “a case by case basis.” *Rodriguez*, 734 So. 2d at 1164. And “the limitations imposed by the court on communications between the media and lawyers and/or litigants must be for good cause to assure fair trials.” *Id.*; see *Aquamar*, 33 So. 3d at 841; see also *State ex rel. Miami Herald Pub. Co. v. McIntosh*, 340 So. 2d 904, 910 (Fla. 1976) (setting forth the same standard of good cause and adding: “Muzzling lawyers who may wish to make public statements to gain public sentiment for their clients has long been recognized as within the court’s inherent power to control professional conduct.”).

To that end, Rule 4–3.6(a) of the Rules Regulating the Florida Bar provides:

A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding due to its creation of an imminent and substantial detrimental effect on that proceeding.

R. Regulating Fla. Bar 4–3.6(a); see also *The Florida Bar re: Amendments to Rules Regulating The Florida Bar*, 644 So. 2d 282, 283 (Fla. 1994) (incorporating into Rule 4–3.6 the “substantial likelihood of material prejudice” standard approved by the United States Supreme Court in *Gentile*).

With these standards of review in mind, we analyze the defendant’s three arguments in turn.

6. Our Analysis of the Defendant’s Three Arguments

a. The Defendant’s First Argument

On the defendant’s first argument, we conclude the trial court did not depart from the essential requirements of the law in finding that the State met its evidentiary showing that a threat to a fair trial was imminent and substantial.

We recognize that the State neither presented testimony nor formally sought to introduce exhibits such as defense counsels’ January 2017 press release into evidence. However, the press release was attached to

the State's motion for protective order, and the press release was extensively discussed among the parties at the hearing without objection. Other extrajudicial statements, such as numerous press conferences which defense counsel held, were discussed without objection as well.

Notably, the defendant does not dispute that defense counsel issued the January 2017 press release. Instead, the defendant argues the State did not prove that the media disseminated the press release, and she argues that her attorneys were permitted to issue the press release. However, Rule 4–3.6 requires only that the extrajudicial statement be one that “a reasonable person *would expect to be disseminated* by means of public communication.” (emphasis added.) A press release certainly satisfies this test.

Thus, on this record, the defendant has not shown it was improper for the trial court to consider defense counsels' extrajudicial statements in the press release. Furthermore, absent any objection, the trial court properly considered prior court proceedings and matters of record such as the defendant's two prior trials, the media exposure experienced by prospective jurors in those trials, motions filed by the defense seeking a change of venue based on pre-trial publicity, and prior court orders, including the February 2016 order to show cause directed at defense counsel for making prejudicial extrajudicial comments.

As a result, evidentiary support existed for the trial court's order, and good cause for the trial court's order was shown. See *R.J. Reynolds Tobacco Co. v. Engle*, 750 So. 2d 781, 781-82 (Fla. 3d DCA 2000) (distinguishing *Rodriguez* and finding good cause for gag order based on the “record evidence” and the court's “specific finding” that such an order was necessary).

b. The Defendant's Second Argument

On the defendant's second argument, we conclude the trial court did not depart from the essential requirements of the law in crafting the scope of the order, including the consideration of less restrictive alternatives.

The defendant is correct that a gag order must be narrowly tailored to achieve the objective sought, namely, a fair trial. *Rodriguez*, 734 So. 2d at 1165. To determine whether a restraint on extrajudicial statements is narrowly tailored, courts look to whether less restrictive alternatives were considered and whether the subject order contains “any time or scope limitations.” *Id.* (noting “the absence of any time or scope limitations on the prohibited extra-judicial communications”); see also *Aquamar*, 33 So.

3d at 841 (reversing gag order that was “unrestricted in scope and time limit”).

However, unlike counsel in *Rodriguez*, defense counsel here did not propose an alternative which was less restrictive than a gag order. *Rodriguez*, 734 So. 2d at 1164 (“At the hearing, counsel for the petitioners offered to the court that no further advertisements would run and that petitioners would limit any future media communications”). Here, defense counsel actually proposed the gag order as a less restrictive alternative to the revocation of his pro hac vice status, which would have resulted in his removal from the case.

Moreover, the trial court’s order permits counsel to make extrajudicial statements on matters not likely to prejudice the case such as procedural matters, and the speech prohibitions within the order expire upon the swearing of a jury. Accordingly, the order is narrowly tailored.

c. The Defendant’s Third Argument

On the defendant’s third argument, we conclude the trial court did not depart from the essential requirements of the law in balancing the viewpoints of the State and the defense. The trial court’s order, on its face, applies equally to counsel for the State and the defense (“All counsel in this case are prohibited”). While the defendant argued the State violated the order through the actions of the Boynton Beach Police Department, the trial court cannot undo the prior publication of information like the police department’s videos on YouTube. In any event, the trial court’s order indicates that the court would be alert to any future attempt by the State to flout the order indirectly.

Conclusion

Based on the foregoing, we deny the defendant’s petition, because the trial court’s well-reasoned order does not depart from the essential requirements of the law. The order demonstrates that extrajudicial statements pose an imminent and substantial threat to a fair trial; is narrowly tailored in both substance and duration; and is viewpoint neutral as it applies to extrajudicial comments by both parties’ counsel.

Petition denied.

CONNER, J., concurs.

WARNER, J., dissents with opinion.

WARNER, J., dissenting.

I would grant the petition because the State did not present *evidence* to support the necessity of a gag order on the attorneys in this case. We have held that such an order must be supported by evidence. See *E.I. Du Pont de Nemours & Co. v. Aquamar, S.A.*, 33 So. 3d 839, 841 (Fla. 4th DCA 2010) (“[A] gag order should be supported by evidence”); *Rodriguez ex rel. Posso-Rodriguez v. Feinstein*, 734 So. 2d 1162, 1164-65 (Fla. 3d DCA 1999) (reversing a gag order because it was not supported by evidence). Here, despite the objection by petitioners, the court ruled without requiring the State to present evidence to support its contention that the gag order on attorneys was needed to prevent an imminent threat to the fairness of the trial. I do not consider the January press release attached to the state’s motion—the only “evidence” presented—as sufficient, particularly because there was no evidence regarding the extent of its dissemination.

In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), the Supreme Court noted that appellate courts have an independent duty with regard to cases involving restrictions on First Amendment rights: “[I]n cases raising First Amendment issues . . . an appellate court has an obligation to ‘make an independent examination of the whole record’ in order to make sure that ‘the judgment does not constitute a forbidden intrusion on the field of free expression.’” *Id.* at 1038 (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984)). Given this heightened review standard, without an evidentiary record I cannot make the “independent examination” required in this case.

* * *

Not final until disposition of timely filed motion for rehearing.

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

STATE OF FLORIDA,

Case No.: 2009CF009771AMB

Division: W

vs.

DALIA A. DIPPOLITO,
Defendant.

_____ /

**ORDER ON STATE'S MOTION FOR PROTECTIVE
AND FOR REVOCATION OF PRO HAC VICE STATUS**

This matter came before the Court on the State of Florida's Motion for Protective Order and for Revocation of Pro Hac Vice Status (DE #1174), filed February 1, 2017. A hearing was conducted on the State's Motion on March 3, 2017. The Court has heard and reviewed the evidence presented and the submissions of the parties, including the argument of counsel. The Court has also reviewed the court file and the record in this matter. Upon consideration, the Court makes the legal and factual findings that follow.

The State's Motion seeks two remedies. First, the State seeks a prohibition, or limitation, on extrajudicial statements by defense counsel. This is often referred to as a "gag order." Second, the State seeks to revoke Brian Claypool's ability to appear in this case *pro hac vice*. In other words, the State wants Mr. Claypool removed from this case.

The relief sought by the State is squarely rooted in the extraordinary publicity this case has received and, from the State's perspective, in Mr. Claypool's involvement in that publicity.¹ Consideration of the State's Motion requires review of the history of media

¹ As will be discussed, the State's request to remove Mr. Claypool from this case is based on more than extrajudicial statements. The State also relies on misrepresentations to the jury during trial and on clearly improper statements made during closing argument.

coverage in this case, Mr. Claypool's involvement in extrajudicial statements to the media, the media coverage of the second trial of this case, and events which have transpired since the declaration of a mistrial in December of 2016.

History of Media Coverage

From the time of the Defendant's arrest, this case has garnered extensive media coverage. The initial media attention was, in no small measure, the result of the Boynton Beach Police Department's decision to involve the television show *COPS* in the filming of a staged crime scene and in the Defendant's subsequent arrest.

Videos relating to this case were immediately posted on the internet. *COPS* aired a story on this case with interviews featuring various members of the Boynton Beach Police Department. Videos from the case were broadcast nationally during the airing of the story. In addition to this broadcast, members of the Boynton Beach Police Department participated in a POD cast to discuss the case.

This case was first tried in April and May of 2011. There was extensive media coverage of the first trial, particularly at a local level. The verdict in the first trial was widely reported as was the Defendant's sentence. Sometime after the first trial, Elizabeth Parker, Esq., one of the prosecutors in the case, wrote a book about the case entitled *Poison Candy: The Murderous Madam: Inside Dalia Dippolito's Plot to Kill*.

All of this resulted in heightened media interest in, and attention to, this case. This publicity pre-dates Mr. Claypool's involvement in the case and cannot be attributed to Mr. Claypool, or for that matter to anyone connected with the representation of the Defendant.

Mr. Claypool's Involvement In Pre-Trial Publicity

On September 12, 2014, the Fourth District Court of Appeal issued its mandate reversing the Defendant's conviction. After the mandate, the Defendant retained, and then discharged, several attorneys for the retrial. Mr. Claypool first appeared in this case in July of 2015 when he was granted leave to appear *pro hac vice* for the Defendant. While this case was always the focus of media attention, Mr. Claypool's participation in this case took the publicity to a new level.

The State essentially argues that Mr. Claypool's strategy, from the beginning, was to effect and influence potential jurors in Palm Beach County through extrajudicial statements to the media. While Mr. Claypool's motive in engaging in extrajudicial statements concerning this case is subject to debate, his participation in an extraordinary level of such statements cannot be debated.

Leading up to the retrial of this case in December of 2016, Mr. Claypool conducted numerous scheduled press conferences to discuss this case and the defense's version of the facts. The Defendant, apparently at the recommendation of Mr. Claypool, travelled to Miami for an interview with the television show "20/20."² The interview aired on national television in December of 2015.

In early 2016, the Court was required to hear and decide a motion filed by the Defendant seeking to dismiss this case based on objective entrapment. During this time period, Mr. Claypool conducted regular press conferences discussing his view of the facts of the case and the significance of those facts. Most of his comments to the media

² Travelling to Miami for a television interview was a violation of the terms of the Defendant's pretrial release and was the subject of a motion to revoke bond filed by the State (DE # 832).

focused on the Boynton Beach Police Department and emphasized the defense theory that the police manufactured the alleged crime for the sake of an appearance on *COPS*.³

One of the press conferences conducted by Mr. Claypool resulted in this Court issuing an Order to Show Cause (DE #826). The press conference occurred on February 23, 2016, immediately following an evidentiary hearing on the Defendant's motion to dismiss. The Court concluded that Mr. Claypool's extrajudicial statements violated Bar Rule 4-8.2(a) by making a statement concerning the integrity of the Court that he knows to be false, or that was made with reckless disregard as to its truth or falsity and also violated Bar Rule 4-3.6(a) by making an extrajudicial statement that he knows, or reasonably should know, will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

The purpose of the Order to Show Cause was to determine whether to permit Mr. Claypool to continue to appear *pro hac vice*. After a hearing, the Court decided against revoking Mr. Claypool's privilege to appear in this case.

Media Coverage Second Trial

The retrial of this case commenced on December 1, 2016. Media coverage of the trial was extensive and pervasive. Stories appeared regularly in the printed press, including the *Palm Beach Post* and the *Sun Sentinel*. All of the local television stations covered the case. National news teams including NBC's *Dateline* were present in the courtroom. The case was discussed on nationally broadcast news programs like ABC's

³ There is, of course, nothing wrong with pursuing this defense theory. It was consistent with motion to dismiss before the Court and is, candidly, the Defendant's theory of the case. The issue here is not the right of the Defendant to pursue her theory of defense, rather the issue presented is the impact of extrajudicial statements on a pending trial.

Good Morning America. The trial was live streamed and could be viewed nationally over the internet.

The impact of the news coverage on the retrial cannot be overstated or ignored. From the beginning, jury selection was affected by the pervasive media attention to the case. Seventy percent of the 200 jurors summoned for the trial had heard something about the case. Jury selection, which included individual questioning of potential jurors, lasted four days.

During jury selection, the Defendant repeatedly moved for a change in venue asserting that she could not receive a fair trial because of pervasive media coverage. Ironically, during this time Mr. Claypool was commenting about the case on a twitter account. In total, the Defendant filed three separate motions to change venue during *voir dire*.⁴

In the various motions, and renewed motions, for change of venue in this case the Defendant made references to the existence of YouTube videos relating to the case and to the number of “hits” (views) each of these videos had received. For example, a search of “Dalia Dippolito” produced 454,523 hits versus 16,121 hits for “John Goodman trial.” The Defendant asserted that from November of 2016 to December of 2016 there had been 120 television programs relating to the Defendant’s case and 150 local news articles within 30 days of the trial. The Defendant also emphasized the national media attention relating to the case.⁵

⁴ The Defendant did not file a timely motion to change venue within 10 of trial as required by Fla. R. Crim. P. 3.240.

⁵ The Defendant’s own filings establish record evidence of the extraordinary and pervasive media coverage of this case. The Court has considered this evidence in connection with the State’s Motion.

While the Court acknowledged the extensive news coverage of the trial, the Defendant's motions for change of venue were denied. A 200 person venire had been summoned for the case and before resorting to a change of venue the Court chose to continue with jury selection to determine if an impartial jury could be seated. Ultimately, an impartial jury was selected and sworn. Even after the jury was sworn, media coverage continued to be an issue in the trial.

During the trial, the Defendant moved for a mistrial based on the pervasive media coverage alleging that the jury would be influenced by community pressure. While the jury was deliberating, the Defendant asserted – without evidence – that a juror had been speaking to the media and the jury was deadlocked 5 to 1. These assertions were without merit, but serve to illustrate the atmosphere that surrounded the trial.

Events Since Declaration of Mistrial

The second trial in this case ended in a hung jury with the jury split 3 to 3. After a mistrial was declared, Mr. Claypool again conducted a press conference to discuss the case. He continued to discuss the tactics and motivations of the Boynton Beach Police Department and commented on the spiritual nature of the Defendant and her family. The case has continued to receive extensive news coverage at times featuring comments by Mr. Claypool or by co-counsel, Greg Rosenfeld, relating to the case.

The tenor of the most recent comments by defense counsel has moved to criticism of the State Attorney's Office. The State has pointed to a press release by the PR News Channel in which the Defendant's attorneys are quoted as saying that this a politically motivated prosecution and that the taxpayers should not have to bear the costs associated with the prosecutors trying to save face. The same article makes reference to the

sentencing guidelines and asserts that the Defendant has already done her time based on the nearly eight years she has been on in-house arrest.

In this charged atmosphere, this case is now scheduled for a third trial which is set to commence on June 2, 2017. The Defendant has abandoned her request for a change of venue and a jury must, therefore, be selected in Palm Beach County.⁶ The Court must now decide based not only on the most recent extrajudicial statements by the Defendant's counsel, but also based on the history of the case, whether Mr. Claypool's *pro hac vice* status should be revoked and/or whether counsel should be prohibited from continuing to make extrajudicial statements concerning this case.

Analysis

Removal of Mr. Claypool

The Court will first address the State's request for revocation of Mr. Claypool's privilege to appear *pro hac vice*. Attorneys licensed to practice law in the State of Florida may appear in Florida courts as a matter of right. This right does not extend to out-of-state attorneys appearing in Florida *pro hac vice*. *State Industries, Inc. v. Jernigan*, 751 So. 2d 680 (Fla. 5th DCA 2000). Out-of-state attorneys may appear in Florida at the grace of the Court.

The revocation of an attorney's privilege to appear *pro hac vice* is generally left to the discretion of the trial court. *See, e.g. Prewitt Enterprises, LLC v. Tommy Constantine Racing, LLC*, 185 So. 3d 566 (Fla. 4th DCA 2016). An attorney's *pro hac vice* status may be revoked for conduct which adversely impacts the administration of justice and

⁶ The Defendant, essentially, controls venue in this case. The Defendant has a right under the Florida Constitution to be tried in the county where the crime was committed. *See*, Art. I, § 16(a), Fla. Const. Moving venue over a defendant's objection, or without a request by the defendant, would not likely survive appellate review.

that conduct need not rise to the level of a violation of the Florida Rules of Professional Conduct. *State Industries, Inc.*, *id* at 682.

The State asserts that Mr. Claypool's conduct in this case is unprofessional and warrants revocation of his right to appear *pro hac vice*. The State emphasizes the following:

- Mr. Claypool's continuous extrajudicial statements to the media designed to influence the pool of potential jurors available to try this case.
- Mr. Claypool's comments to the media calling into question the integrity of the Court resulting in the entry of the Order to Show Cause.
- Mr. Claypool's improper comment in closing argument that the jury should send the Defendant home to her child.
- Mr. Claypool knowingly in opening statement misrepresented the existence of 500 plus phone calls between the Defendant and Mohamed Shihadeh.
- Mr. Claypool's unprofessional comments to the media attacking the State Attorney's Office for pursuing a politically motivated prosecution wasting taxpayers' money.

The State's assertions raise legitimate concerns which must be considered and weighed.

As previously discussed, the volume and frequency of Mr. Claypool's extrajudicial statements to the press have been extraordinary. He has: 1) conducted regular press conferences during the course of the case; 2) commented on the case on a twitter account; 3) placed his client on a nationally televised program to discuss the case

in advance of trial; and 4) regularly commented on the case to multiple and numerous media outlets.

The Court has already concluded that some of Mr. Claypool's comments crossed the line between mere commentary on the case to comments giving rise to a potential violation of the Rules of Professional Conduct. The press conference of February 23, 2016, which resulted in an Order to Show Cause, serves as an example of improper extrajudicial commentary. Many of Mr. Claypool's recent statements attacking the prosecution approach a similar line.

The comment in closing argument referenced by the State also clearly crossed a line. Asking a jury to return a criminal defendant to her family is a direct appeal to sympathy. Such a comment invites the jury to decide the case based on emotion and not on the evidence, lack of evidence or the law. Mr. Claypool, as an experienced trial attorney, clearly knew that such a comment was improper.

While the State raises legitimate concerns relating to Mr. Claypool's appearance in this case, the removal of a party's chosen counsel is a drastic remedy which must be used sparingly. *Alexander v. Tandem Staffing Solutions, Inc.*, 881 So. 2d 607, 608 (Fla. 4th DCA 2004); *Caruso v. Knight*, 124 So. 3d 962, 963-64 (Fla. 4th DCA 2013). Removal of chosen counsel should be avoided if lesser alternatives are available to alleviate any harm. *Caruso, id.* at 964; *Esquire Care, Inc., v. Maguire*, 532 So. 2d 740, 741 (Fla. 2nd DCA 1988).

The Defendant has chosen Mr. Claypool as her lead attorney in this case. If found guilty in a third trial, the Defendant faces up to 20 years in prison. Mr. Claypool is intimately familiar with this case. He knows the witnesses and he knows the evidence. It

also cannot be denied that Mr. Claypool is an effective, knowledgeable and skilled advocate for the Defendant.

The Court must weigh and consider the impact of depriving the Defendant of Mr. Claypool's representation versus the concerns raised by the State. The Court must also consider whether the concerns raised by the State can be alleviated by a remedy that does not require the revocation Mr. Claypool's right to appear in this case *pro hac vice*.

After balancing the competing concerns and rights of the parties, the Court concludes that revocation of Mr. Claypool's *pro hac vice* status is not required in this case. This is particularly true because there are other, less drastic, remedies that can address the issues raised by the State.

As will be discussed below, reasonable restrictions on extrajudicial statements by all counsel in the case can address the potential tainting of the jury pool and eliminate any unprofessional personal attacks. Improper arguments at trial can be addressed with a timely contemporaneous objection or by a motion *in limine* filed in advance of trial.

Protective Order – Extrajudicial Statements

The Court will next address the State's request for a protective order prohibiting counsel from making extrajudicial statements to the media. As with all citizens, attorneys enjoy the rights enumerated in the First Amendment, including freedom of speech. However, attorneys must exercise the right of free speech consistent with, and constrained by, the requirements of the Florida Rules of Professional Conduct.

Rule 4-3.6 governs extrajudicial statements by attorneys. The rule provides, in pertinent part, as follows:

(a) Prejudicial Extrajudicial Statements Prohibited. A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by

means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding due to its creation of an imminent and substantial detrimental effect on that proceeding.

See, R. Regulating Fla. Bar 4-3.6 (Trial Publicity). Rule 4-3.6 strikes a balance between free speech and extrajudicial statements which are likely to prejudice a judicial proceeding.

Trial courts have the inherent power to issue orders prohibiting extrajudicial comments by attorneys. *Florida Freedom Newspapers, Inc.*, 497 So. 2d 652, 657 (Fla. 1986); *State ex rel Miami Herald Publishing Co. v. McIntosh*, 340 So. 2d 904, 910 (Fla. 1977)(muzzling lawyers who may wish to make public statements has long been recognized as within the court's inherent power to control professional conduct.) Limitations on communications between lawyers and the media must be for good cause to assure a fair trial and must be supported by evidence that extrajudicial statements pose a substantial or imminent threat to a fair trial. *E.I. Du Pont De Nemours and Company v. Aquamar, S.A.*, 33 So. 3d 839, 841 (Fla. 4th DCA 2010); *Rodriguez ex rel. Posso-Rodriguez v. Feinstein*, 734 So. 2d 1162, 1164 (Fla. 3rd DCA 1999).

The evidence, and the record, in this case support a finding that continued unfettered extrajudicial statements pose a substantial and imminent threat to a fair trial. Jury selection is scheduled to commence on June 2, 2017. The Defendant has chosen to proceed to trial with jurors from Palm Beach County. Potential jurors in Palm Beach County have already been exposed to extraordinary and pervasive media coverage of this case.

A fair trial for both the Defendant and the State requires the selection of jurors that have not been tainted by pretrial publicity. Restricting extrajudicial statements by the attorneys in this case will not end pretrial publicity. The news media can, and will, continue to report on this case and many of the issues faced in the second retrial will be present in the third retrial. However, the nature, extent and tenor of the statements of counsel in this case pose a special risk to the selection of a fair and impartial jury.

The extrajudicial statements made by the Defendant's attorneys in this case, whether intended or not, are likely to bias potential jurors by repeated exposure to matters which are completely collateral to this case. The numerous press conferences conducted by Mr. Claypool have directly, or indirectly, suggested that this case is a referendum on the police. While certainly the specific actions of the Boynton Beach Police Department are an issue in this case, this case is not a referendum on the police in general, nor can any juror lawfully decide this case to send a message to law enforcement.

Statements made recently by defense counsel concerning the Defendant "having served her time" and concerning the State Attorney's Office similarly place collateral matters into the public forum in this publicity charged case. Counsel has: 1) commented on the Defendant's guideline score sheet and her time served on house arrest; 2) described the prosecution as politically motivated to save face; and 3) condemned the prosecution as a waste of taxpayer money. No juror can lawfully consider any of these matters.

Further, collateral matters aside, continued extrajudicial statements concerning the case itself presents a special risk to a fair trial. The Defendant has correctly argued that publication of videos, POD casts and television shows like *COPS* threaten a fair trial by

poisoning or tainting the jury pool in Palm Beach County. Extrajudicial statements by counsel discussing the case and advancing in the public arena defense theories of the case pose the same threat.

In most cases, commentary on collateral matters, or on the case itself, would not pose an imminent threat to a fair trial. However, as already discussed, the level of media coverage of this case has been, and continues to be, extraordinary. Every statement made by anyone connected with this case is being reported and re-reported. Speculation runs rampant on irrelevant issues in this case such as when did the Defendant have a child while on house arrest.⁷ In a case that has already been tried twice in this county, and in a case exposed to such pervasive media coverage, the impact on potential jurors of continued extrajudicial statements by the attorneys in this case poses a real and imminent threat to the orderly administration of justice and to a fair trial.

Based on the foregoing, it is hereby,

ORDERED AND ADJUDGED as follows:

1. The State's Motion to revoke Brian Claypool, Esq.'s *pro hac vice* status is DENIED.
2. The State's Motion for Protective Order is GRANTED. All counsel in this case are prohibited from making any extrajudicial statements that a reasonable person would expect to be disseminated by means of public communication, concerning or relating to, the following:

⁷ This issue was thrust into the public forum by Mr. Claypool's improper plea to the jury to send the Defendant home to her child.

- a. The evidence in this case or any party's view or opinion of the evidence in this case;
- b. The facts of the case or any party's interpretation of the facts of the case, including any inferences that could be drawn from the facts;
- c. The motive or motivation of the State in prosecuting the case or the motive or motivation of the Defendant in pursuing any theory of defense;
- d. Sentencing or punishment of the Defendant including any reference to the sentence imposed after the first trial, the Defendant's score on the Criminal Punishment Code Scoresheet, length of in-house arrest or punishment of the Defendant if found guilty.
- e. Theories of the case by the State or the Defendant.
- f. The first or second trial of this case, including the results of those trials.
- g. The disparagement of any attorney of record in this case.

Nothing in this Order shall prohibit the attorneys from commenting generally on the progress of the case, procedural matters or rulings of the Court, provided the comments are consistent with the Florida Rules of Professional Conduct. Unless specifically renewed by the Court, the prohibitions contained in this Order shall automatically expire upon the swearing of a jury to hear and decide this case.

DONE AND ORDERED in Chambers, at West Palm Beach, Palm Beach County, Florida this 17th day of March, 2017.



JUDGE GLENN D. KELLEY
CIRCUIT COURT JUDGE

See Attached Counsel List

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 1525 PALM BEACH LAKES BLVD., WEST PALM BEACH, FL 33401

August 16, 2017

CASE NO.: 4D17-1145

L.T. No.: 502009CF009771A

DALIA A. DIPPOLITO

v. STATE OF FLORIDA

Appellant / Petitioner(s)

Appellee / Respondent(s)

BY ORDER OF THE COURT:

ORDERED that the appellant's July 10, 2017 motion for rehearing or rehearing en banc and for certification of question of great public importance is denied.

Served:

cc: Attorney General-W. P. B.
Elba Caridad Martin-
Schomaker

Andrew B. Greenlee

Gregory C. Rosenfeld

II



LONN WEISSBLUM, Clerk
Fourth District Court of Appeal

