Connecticut Superior Court
Judicial District of New Haven

United Public Service Employees
Cops Local 62,
Plaintiff

No. NNH-CV19-5047513

v.

March 1, 2020

Town of Hamden and the
Hamden Police Commission,
Defendants.

Reply in Further Support of Motion for Access to Court Documents

The town's police commission [# 114.00] and its police employees' union [# 115.00] object to the ACLU's access to Exhibit 9, and tersely contend that it should be sealed on two bases: (1) to preserve the "meaning and effect" of *Garrity v. New Jersey*'s rule that statements such as those allegedly contained within the exhibit may not be introduced against their maker in the criminal prosecution of him,[1] and (2) to avoid "taint[ing] the jury pool" during that prosecution.[2] Neither contention satisfies the police commission and union's burden to prove that sealing is warranted, and neither renders sealing the entirety of Exhibit 9 as the narrowest measure available to the Court. The Court accordingly may not displace the "presumption that documents filed with [it] shall be available to the public." Practice Book § 11-20A(a).

[1] Police Comm'n Opp. 5. *See also* Union Opp. 8 (contending that normal docketing of Exhibit 9 will enable the prosecution "to use [Devin Eaton's] statement against him during the criminal proceedings").
[2] Union Opp. 9; *accord* Police Comm'n Opp. 6.

1. Public access to the compelled statements in Exhibit 9 does not affect the Self-Incrimination Clause's protection against their use in a criminal prosecution.

In their oppositions, the union and the commission both appear to assert that sealing Exhibit 9 in this proceeding is necessary to preserve Devin Eaton's Fifth Amendment right against having the statements in it used against him in a criminal prosecution, citing *Garrity v. New Jersey* and the collective bargaining agreement mandating his statements. The argument is wrong because public revelation of *Garrity* statements does not retroactively render them voluntary.

The Fifth Amendment's Self-Incrimination Clause guarantees that no one (1) "shall be compelled," (2) "in any criminal case," (3) "to be a witness against himself." U.S. Const. am. 5. The Clause prohibits not just live testimony in a criminal proceeding, but also the admission of prior statements if they meet the other two elements, *i.e.*, are self-inculpatory and were compelled. *E.g., Oregon v. Elstad*, 470 U.S. 298, 304 (1985).

Unlike other evidentiary prohibitions, the Self-Incrimination Clause turns on the circumstances of the statement instead of the person to whom it was made or the purpose of its making: compulsion is everything. And compulsion is adjudged by asking whether, at the time the statement was made and in "the totality of the circumstances surrounding it," the statement was "the product of an essentially free and unconstrained choice by the maker." *State v. Smith*, 200 Conn. 465, 477 (1986), overruled on other grounds, *State v. Dickson*, 322 Conn. 410, (2016). For public employees, *Garrity* forever settles the question of compulsion by deeming "statements obtained under threat of removal from office" to be such. 385 U.S. 493, 500 (1967). Once compulsion attaches, the Clause's "own exclusionary rule" kicks in to provide the maker with "an *automatic* protection from the use of their involuntary statements" against them in a

prosecution. *United States v. Patane*, 542 U.S. 630, 640 (2004) (internal quotation omitted) (collecting cases).

Because compulsion is the alpha and omega of the statements' use in a criminal proceeding and it is measured once in time, Eaton's right against being faced with the statements in Exhibit 9 at his criminal trial has no bearing on whether the exhibit should be available to the public as normal in this proceeding. Any self-incriminating statements contained in the exhibit were, *at the time they were made*, compelled, says *Garrity*. Subsequent revelation of the statements—whether via entry into evidence in a civil proceeding, use in a public disciplinary hearing, production in response to a public records request, or other method—do not waive or erase the compulsion that existed at the time of their making and retroactively weaponize them against their maker. Were that not the case, Eaton's union would have already cooked his goose by choosing to offer the statements into evidence in this case instead of just proving the occurrence of the compulsory interview without revealing what Eaton said during it.

Further, the existence of the injunction does nothing to satisfy the sealing burden. The union's Self-Incrimination Clause concern over Eaton choosing to testify at a disciplinary hearing was not that it would render Exhibit 9 fair game for use against Eaton in the criminal division of this Court. It was that, because his testimony at a disciplinary hearing is optional, "anything . . . Eaton were to say, if he did elect to testify . . . would be waiving his 5th Amendment right" not to have that testimony used against him.[3] The union's analysis is correct: any statements Eaton made, or makes, that are

[3] Tr. of Preliminary Inj. Hrg. 12:14-18. To paraphrase, the injunction did no more than spare Eaton from "the cruel trilemma" of self-accusation, perjury, or a negative inference at the disciplinary hearing. *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964). *See Olin Corp. v. Castells*, 180 Conn. 49, 53 (1980) ("The privilege does not . . . forbid the drawing of adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.").

not compulsory fall outside of the Clause's protection. But no such statements are at issue in the sealing motion here, because the sole document that the objectors wish to be sealed are statements that *Garrity* conclusively deems to have been compulsory. Exhibit 9 cannot be sealed.

2. No prosecutor wants to see the contents of Exhibit 9 because use of its contents in the investigation or prosecution is prohibited, and a sealing order would not stop them from obtaining it anyhow.

The objectors also appear to argue that hiding Exhibit 9 from the world is necessary in order to prevent prosecutors from reading it. Because it behooves prosecutors to actively avoid the contents of Exhibit 9, and because a sealing order by this Court could not forestall prosecutors obtaining it anyway, the argument fails to satisfy the objectors' sealing burden.

Contrary to the objectors' supposition, prosecutors have a strong interest in never knowing the contents of Exhibit 9. Compulsory interviews triggering the Self-Incrimination Clause—such as *Garrity* statements—are viewed as a form of immunity: the government forces the statement in exchange for giving up the right to use it against its maker. *See, e.g., United States v. Allen*, 864 F.3d 63, 91 (2d Cir. 2017) ("[T]he scope of the constitutional privilege and use and derivative use immunity are two sides of the same coin, and we therefore seek guidance from cases interpreting either."). Once the government has forced the statement, proceeding against the witness who made it becomes delicate. In such cases, "the government bears the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources" other than the compelled statement, which may not be used "as an investigatory lead." *Kastigar v. United States*, 406 U.S. 441, 460 (1972). Hence, no

prosecutor would want exposure to the contents of Exhibit 9 for themselves or their investigators, because they would then either have to be walled off from *State v. Eaton* or risk having the prosecution imperiled by a fight over an alleged *Kastigar* violation.

In terms of the narrow tailoring analysis that the Court must do here, the force of the governing case law means that sealing is far too blunt a device to satisfy the Practice Book or First Amendment. It is prosecutors' burden to keep themselves and their agents away from the contents of Exhibit 9, not the rest of the world's. Happily, however, the narrowly tailored remedy already exists, in the form of the dual prohibitions against use of the contents for investigative leads (*Kastigar*) and against introduction of the statements in the criminal prosecution (*Garrity*). This Court need not globally restrict the public's right to Exhibit 9 when controlling case law already addresses the specific harm summoned by the objectors here.

Even if a prosecutor tossed caution to the wind and obtained a search warrant for, say, Hamden's copy of the Eaton interview transcript, a sealing order based on the Self-Incrimination Clause in this matter does nothing to prevent execution of that warrant. The sealing standard is irrelevant to whether probable cause exists to believe that the disputed transcript "constitutes evidence of an offense." Conn. Gen. Stat. § 54-33a(b). And, the Clause only prohibits the *use* of compelled, self-incriminating statements in criminal proceedings, not their obtainment: "Statements compelled by police interrogations of course may not be used against a defendant at trial, but it is not until their use in a criminal case that a violation of the Self-Incrimination Clause occurs." *Chavez v. Martinez*, 538 U.S. 760, 767 (2003) (plurality) (holding Clause not violated where police shot a man, interrogated him during his emergency room treatment, but never charged him with a crime).

Finally, for whatever the objectors' concerns over the admissibility of Eaton's statements in some other forum, they cannot use a sealing motion in this action to dictate or collaterally attack the availability of a record under the state's Freedom of Information Act, or a decision in a matter before a different judge or division of this Court. Sealing only applies to "documents . . . on file or lodged with the court," and pertains solely to whether the public's normal access to a filing is restricted. Practice Book § 11-20A(c). And the Court lacks subject matter jurisdiction to decide the availability of a document in a different dispute. *See Mendillo v. Tinley, Renehan & Dost, LLC*, 329 Conn. 515, 527 (2018) (holding that a separate declaratory judgment action is nonjusticiable where the complaint's "allegations . . . demonstrate that it is nothing more than a collateral attack on the protective order imposed" in a different case); *Valvo v. Freedom of Information Comm'n*, 294 Conn. 534, 545 (2010) (same where second action attempted to have a sealing order in a different case set aside, and explaining that "[i]t would wreak havoc on the judicial system to allow a trial court . . . to second-guess the judgment of another trial court in a separate proceeding involving different parties"); *Chemmarappally v. State*, No. HHD-CV17-6075204-S, 2017 WL 3625460, at *7 (Conn. Super. Ct. July 17, 2017) (denying motion to seal record that had not been filed with the court but was the subject of a Freedom of Information Act proceeding, and explaining that "[t]he legislature has vested the commission with the authority to investigate and adjudicate whether, under the act, a record is subject to public disclosure"). If, for whatever reason they cite, some stranger to this litigation attempts to introduce Eaton's interview statements into evidence in a different proceeding, it will be a question for that tribunal to decide based on the arguments presented and facts in front of it. Exhibit 9 may not be sealed.

3. Given the existing methods of ensuring impartial juries, sealing Exhibit 9 from the public is unnecessary.

The objectors' second and final basis for sealing could be found in a pair of one-sentence mentions of pretrial publicity.[4] Neither objector supports the suggestion with an explanation of why sealing is necessary in spite of the existing, narrowly tailored measures against taint available to ensure an impartial jury.

To prevail, the objectors must prove that the possibility of jury taint is so specific that sealing "is essential to preserve higher values and is narrowly tailored to serve that interest." *In re New York Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987) (internal quotation omitted). *Accord* Practice Book § 11-20A(c) (sealing may not occur unless the Court "concludes that such order is necessary to preserve an interest which is determined to override the public's interest in viewing such materials," and an order "shall be no broader than necessary to protect such overriding interest."). It is not enough for the objectors here to offer "the conclusory assertion that publicity might deprive [a person of] the right to a fair trial." *New York Times*, 828 F.2d 116 (internal quotation omitted); *see also* Practice Book § 11-20A(d) (requiring the Court to "specify its findings underlying" a sealing order). Instead, they must identify the portions of Exhibit 9 that support sealing, and explain precisely how those portions pose the dangers identified. In particular, the objectors devote no argument explaining why the contents of Exhibit 9 should be treated differently from the materials already docketed normally in this litigation but which contain material strongly unfavorable to Devin Eaton, such as the information in *State v. Eaton* (Exhibit 2 to the plaintiff's motion for

[4] "The Court can also enter the requested sealing order to fulfill its constitutional duty to minimize the effects of prejudicial pretrial publicity." Police Comm'n Opp. 6. "[P]ublic access may also taint the jury pool." Union Opp. 8-9.

an injunction) or the State's Attorney's report finding grounds to charge Eaton (Exhibit 1 to the same).

Finally, the narrowly tailored remedies for the jury-tainting supposed by the objectors lies in the criminal division of this Court. It has two: careful voir dire of jurors to gauge their exposure to information about the case and ability to impartially weigh facts, and, control of the evidence. *Garrity* teaches that the contents of Exhibit 9 are inadmissible in *State v. Eaton*; the proper implementation of that constitutional principle is for that sitting of the Court to adjudicate arguments for and against that principle. It would not be narrow at all for this Court to anticipate those arguments and that ruling by instead deeming Exhibit 9 permanently off-limits to the public. Accordingly, the Court should decline to seal it.

4. Conclusion

Because no one's right against self-incrimination in a criminal proceeding is affects by normal docketing of Exhibit 9, and because the existing protections against jury tainting are sufficient to guard against a partial fact-finder, the objectors have failed to carry their burden to seal the exhibit.

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Certificate of Service

I certify that a copy of the above, and any exhibits, was emailed on March 1, 2020 to all counsel of record, all of whom have filed written consent for electronic delivery:

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