

Media Coalition Intervenes in George Floyd Prosecutions, Obtains Broad Access to Body-Worn Camera Evidence

By Emmy Parsons

By now, we are all familiar with the tragic May 25, 2020 encounter between Minneapolis Police Department (MPD) officers and George Floyd, which ended when MPD officer Derek Chauvin held his knee on Floyd's neck for approximately eight minutes and Floyd died. Now, four MPD officers are facing criminal charges for their involvement in Floyd's death.

Over the summer, a coalition of media and non-profit organizations intervened in the cases and secured better public access to the proceedings.

Case Background

Several days after Floyd's death, the Minnesota Attorney General's Office took over prosecution of the officers and filed amended complaints in the Hennepin County District Court charging Chauvin with second-degree murder and two lesser charges, and charging three other officers with two counts each of aiding and abetting in Floyd's death.

Trial for the defendants is tentatively anticipated to begin in March 2021, though the court is considering several motions, including motions to dismiss filed on behalf of each defendant, motions to change venue filed on behalf of each defendant, and a motion from the State to combine the four trials.

Over the summer, a coalition of media and non-profit organizations intervened in the cases and secured better public access to the proceedings.

Court Decisions Limiting Press and Public Right of Access

In June, the Court made two decisions that limited the press' and public's right of access to the proceedings, including:

Permitting only in-person, by-appointment viewing of body-worn camera footage filed publicly with the court

On July 7, 2020, one of the defendant officers, Thomas K. Lane, filed a motion to dismiss the charges against him. He attached as exhibits to his public motion copies of body-worn camera ("BWC") videos and corresponding transcripts from two officers on the scene. Members of the press immediately sought access to the BWC footage, but they were told by court staff that the footage would be made available at some future, unspecified date for viewing only and that no recording or copying of the footage would be permitted. Several days later, the court set up an online reservation system whereby members of the press and public who wished to view the

videos could schedule an appointment at the court to view the videos on one of the court's computer terminals.

Gagging all participants and their agents from providing any information or documents to the press or the public "related" to the prosecutions

A few days later, in response to what the court said was "two or more attorneys representing parties" speaking to the press, the court *sua sponte* entered a gag order, prohibiting the parties, their attorneys, and any "employees, agents, or independent contractors" from disclosing directly or indirectly to the press or the public any "information, opinions, strategies, plans or potential evidence that relate" the prosecutions on the basis that "pretrial publicity in this case by the attorneys involved would increase the risk of tainting a potential jury pool and will impair all parties' right to a fair trial."

The Coalition Intervenes

In response to these actions by the court, a coalition of thirteen media and public interest organizations filed motions challenging each order, first seeking the ability to copy and disseminate (not just view) the BWC footage, and second asking the court to vacate its existing gag order and put in place a more narrowly tailored order only upon a proper showing. To briefly summarize the Coalition's arguments:

The Press and Public Have a Presumptive Right of Access to Criminal Proceedings and Documents

In each of its motions, the Coalition argued that the press and the public have a presumptive right of access to criminal court proceedings and records under the common law, the court's rules and the First Amendment.

As the U.S. Supreme Court stated, "[t]he value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed." *Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 508 (1984); *see also Gannett Co. v. DePasquale*, 443 U.S. 368, 429 ("Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view." (Blackmun, J., concurring in part and dissenting in part)).

A Transcript is No Substitute for BWC Footage

With respect to the court's limits on the BWC footage, the Coalition explained that although a written transcript shows what a person *said*, it cannot capture what someone *did*. And in these cases, where the alleged lack of criminal *conduct* is central to the defendants' motions to dismiss, seeing what each officer did or did not do is especially important. *See, e.g., United States v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981) ("Though the transcripts of the videotapes have already provided the public with an opportunity to know what words were spoken, there

remains a legitimate and important interest in affording members of the public their own opportunity to see and hear evidence that records the activities of [government officials].”) (citation omitted).

The Court’s Gag Order is an Invalid Restraint on Speech

The Coalition argued that although Minnesota recognizes the right of courts to impose gag orders, the right is not absolute, and “prior restraints on publication” are disfavored. *See Nw. Public’s, Inc. v. Anderson*, 259 N.W.2d 254, 257 (Minn. 1977); *Minneapolis Star & Tribune Co. v. Lee*, 353 N.W.2d 213 (Minn. Ct. App. 1984).

A gag order may only be entered if it is necessary to ensure a fair trial, is narrowly tailored, and is based on an articulated, specific harm. *See Geske v. Marcolina*, 642 N.W.2d 62, 69-10 (Minn Ct. App. 2002); *Austin Daily Herald v. Mork*, 507 N.W.2d 854, 957 (Minn. Ct. App. 1993). In this case, however, the gag order was not narrowly tailored as to either the persons or the topics it covered. The Coalition was especially concerned that it theoretically gagged every employee of the State of Minnesota and every employee of four law firms and companies whose attorneys are providing pro bono assistance to the prosecution from speaking to the press about any issue “relating” to the prosecutions. The Coalition believed that the court could address its concerns about potential harms through *voir dire* of prospective jury members, instructions to the seated jury, and a change of venue for the trials.

The Floyd case highlights the “tension between two fundamental rights” in high-profile proceedings: defendants’ right to a fair trial, and the press’ and public’s right to attend criminal trials.

Concerns about a Fair Trial Are Not Served by Selectively Releasing Information

Finally, the Coalition stressed that the public already had access to much information, including videos of Floyd’s arrest and death from bystanders, the transcripts that the court authorized to be released, and narrative descriptions of the BWC footage itself provided by those who were actually able to schedule an appointment with the court and watch the videos. (At the time the Coalition’s motion was pending, *The Daily Mail* also published a leaked excerpt from the BWC footage, apparently captured during an appointment to view the footage at the court.)

The Coalition argued that, to the extent the court was concerned about preserving a fair trial for the defendants, selectively disclosing information, by limiting access to the BWC footage and gagging trial participants and their representatives, did not serve that interest.

The Court’s Response

The court reversed both decisions, finding that the Coalition had standing to intervene and that the press and the public the right to copy and disseminate the BWC footage. Without addressing the media coalition’s arguments on the prior restraint issue, the Court also lifted the gag order.

In an opinion granting the Coalition’s motion regarding the BWC videos, the court said: the Floyd case highlights the “tension between two fundamental rights” in high-profile proceedings: defendants’ right to a fair trial, and the press’ and public’s right to attend criminal trials. Slip. Op. at 4.

The court recognized “the multitude of societally-important, deeply-felt, and highly-contentious issues involving social and public policy, community safety, law enforcement conduct, tactics, and techniques, and civil rights . . . unleashed” by Floyd’s death. *Id.* at 6. At the same time, the court made clear that the defendants’ have a right “to a fair trial, before an objective and impartial jury, applying the evidence that will be presented in open court during a trial governed by the rules of evidence to the laws applicable to the crimes with which they are charged.” *Id.* In that respect, the court noted its “affirmative constitutional duty . . . to safeguard a criminal defendant’s due process rights.” *Gannet*, 443 U.S. at 378.

The court, however, agreed with the Coalition that “secrecy in connection with public aspects of criminal case proceedings serves no useful purpose.” *Id.* at 8-9. Although it declined to reach the question of whether the First Amendment provides a right of access, it found that under the common law and the court’s rules, the press and the public have a right of access to the BWC videos. Accordingly, the court allowed the press and the public to obtain copies of the BWC that they could publicly disseminate.

Subsequent Developments

On September 11, the court held an omnibus hearing regarding various motions filed by the parties. Prior to the hearing, the court agreed to a press pooling arrangement that included press representatives from local and national outlets, as well as print, television and radio. The court also provided an overflow room for credentialed members of the media that was separate, and in addition to, overflow rooms for the Floyd family and members of the public.

There also remain some outstanding questions about access going forward, including:

The defendants each filed a motion for a change of venue. For now the court has taken those under advisement. It agreed to send jury questionnaires to a prospective pool of jurors, review those answers, and then determine whether a change of venue is necessary;

The impact of Covid-19 on the proceedings remains to be seen. The court is currently adhering to social distancing guidelines, which, given the tremendous interest in these prosecutions, could make it difficult for all members of the press and the public who wish to attend the trial able to attend; and

Under Minnesota Court Rule 4.02(d), in a criminal trial prior to a guilty plea or entry of a verdict, both parties must consent to video and audio recording of the proceedings. Currently the defendants support allowing cameras in the courtroom, but the Attorney General’s Office opposes cameras.

Emmy Parsons is an associate with Ballard Spahr LLP. Emmy represents the media coalition in this matter with Leita Walker, also of Ballard Spahr LLP. Coalition members include American Public Media Group (which owns Minnesota Public Radio); The Associated Press; Cable News Network, Inc.; CBS Broadcasting Inc. (on behalf of WCCO-TV); Court TV Media LLC; Dow Jones & Company (which publishes The Wall Street Journal); Fox/UTV Holdings, LLC (which owns KSMP-TV; Hubbard Broadcasting, Inc. (on behalf of its broadcast stations, KSTP-TV, WDIO-DT, KAAL, KOB, WNYT, WHEC-TV and WTOP-FM); Minnesota Coalition on Government Information; The New York Times Company; The Silha Center for the Study of Media Ethics and Law; TEGNA Inc. (which owns KARE-TV); and Star Tribune Media Company LLC.