

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
GALLIA COUNTY

State of Ohio,	:	Case No. 14CA9
Plaintiff-Appellee,	:	
v.	:	<u>ENTRY</u>
Anthony Owens,	:	
Defendant-Appellant.	:	RELEASED: 05/08/2015

McFARLAND, A.J.,

{¶1} Owens filed a motion requesting leave of court to access the transcript of the grand jury proceedings that has been filed under seal as part of the appellate record. He states that there are two issues that will be assigned as errors for review that relate to the grand jury proceedings. The state opposes Owens's motion on the grounds that he has failed to demonstrate a particularized need.

{¶2} After reviewing the memoranda and the relevant law, we hereby **DENY** Owens's motion on the grounds that he must first petition the supervising court, the Common Pleas Court of Gallia County, under Crim R. 6(E).

I.

{¶3} Proceedings before the grand jury may be divided into three categories: testimony of defendant and co-defendants, testimony of other witnesses, and deliberations and votes of the grand jurors. The process of deliberation and voting is cloaked in absolute secrecy, while the testimony of witnesses generally may be disclosed, with appropriate safeguards, upon a showing by the defendant of a particularized need for the testimony. Crim. R. 6(E). Testimony by defendants and codefendants is subject to

different rules of disclosure than other witnesses and is governed by Crim. R. 16(B)(1) rather than Crim. R. 6(E). See Crim. R. 16(J)(2), and *State v. Greer*, 66 Ohio St.2d 139, 150, 420 N.E.2d 982 (1981). Here Owens does not seek his own testimony or the deliberation and voting of the grand jurors, but the portion of the transcript that would show whether unauthorized persons were present before the grand jury and the victim's testimony. Thus, his request falls within Crim.R. 6(E), which provides that matters other than the deliberations of a grand jury or the vote of a grand juror may be disclosed "only when so directed by the court preliminary to or in connection with a judicial proceeding * *

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{¶4} Upon a motion from the defendant, the trial court considers "the basis of the particularized need advanced by the defendant." *Greer* at 150. In considering the basis of the particularized need, the trial court may perform an *in camera* inspection of the grand jury matters assisted by counsel. *Id.* In *Greer*, the Supreme Court of Ohio explained the process to follow after the defendant has shown a particularized need:

[O]nce a particularized need for the grand jury material is shown, the necessity of preserving grand jury secrecy is lessened, largely because the witness, in testifying at trial, has given up any anonymity he might have had and has made public the events which are the subject of the grand jury testimony being sought. Under such circumstances, when there is a balancing of the often minimal need to preserve secrecy against the need for the defendant to review certain portions of the grand jury testimony, we conclude that all relevant portions of the transcript should be produced, with the trial court deleting extraneous matters, and issuing protective orders where necessary.

Greer at 150-151. "Determining whether a particularized need exists is a matter within the trial court's discretion." *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 41, citing *Greer* at paragraph one of the syllabus. As such, the trial court's decision regarding the review and release of grand jury transcripts will not be reversed absent an

abuse of discretion. *State v. Coley*, 93 Ohio St.3d 253, 261, 754 N.E.2d 1129 (2001), citing *State v. Brown*, 38 Ohio St.3d 305, 308, 528 N.E.2d 523 (1988). An abuse of discretion is more than a mere error in judgment; it suggests that a decision is unreasonable, arbitrary, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157–158, 404 N.E.2d 144 (1980).

{¶5} All of the cases cited by the state in its response to Owens’s motion involve motions made by a defendant to the *trial court before or during trial*. The “particularized need” test as formulated in *Laskey, infra, Patterson, infra*, and *Greer, supra*, all involve motions made to the trial court before or during trial. See *State v. Laskey*, 21 Ohio St.2d 187, 257 N.E.2d 65 (1970)(motion made prior to trial to assist with preparation); *State v. Patterson*, 28 Ohio St.2d 181, 277 N.E.2d 201 (1971)(motion made prior to trial as part of discovery). Here, Owens is seeking disclosure of grand jury proceedings from the *court of appeals after the trial* for purposes of more effectively advocating his appeal. Neither the state nor Owens address the question of whether Crim.R. 6(E) and the particularized needs test apply to the court of appeals and motions to disclosure grand jury proceedings after the trial.

{¶6} In *Petition for Disclosure of Evidence Presented to Franklin County Grand Juries in 1970*, 63 Ohio St.2d 212, 407 N.E.2d 513 (1980), the Supreme Court of Ohio addressed the procedure to be used when the disclosure of grand jury transcripts is sought outside of the context of a pending criminal trial. *Petition for Disclosure* involved a civil lawsuit pending in the United States District Court for Colorado. A defendant sought the production of grand jury materials from an Ohio criminal case that was tried prior to the commencement of the Colorado civil action first by filing a request with the Colorado

federal court. The Colorado federal court denied the request on the grounds that it did not have authority to make orders regarding Ohio grand jury transcripts. The defendant then filed a petition with the Court of Common Pleas, which denied the request. The Supreme Court of Ohio held that “the court which supervises a grand jury” may order the disclosure of grand jury materials in civil cases as well as criminal actions:

We hold that a petition to the court which supervised a grand jury is the proper means of obtaining release of grand jury materials. The supervisory court is in the best position to assess the need to preserve secrecy over the proceedings. We also recognize that the supervisory court may not be in the best position to decide the extent of need for the information. The supervisory court’s ability to make such a decision must be resolved in a case-by-case manner. Initially, this decision should be made by the trial court, subject to review.

Petition for Disclosure at 218-219. The Court went on to state that trial courts must consider their ability to place protective limitations on any disclosure ordered when weighing the petitioner’s needs with the need to preserve secrecy, and to consider whether it is in a position to effectively decide the extent of the petitioner’s needs. If the trial court is not in a position to weight the needs, then it should engage in a cooperative effort with the other court in order to properly balance them. *Id.* at 220, citing *Douglas Oil Co v. Petrol Stops Northwest*, 441 U.C.211, 99 S.Ct. 1667, 60 L.E.2d 156 (1979).

{¶7} In *State ex rel. Collins v. O’Farrell*, 61 Ohio St.3d 142, 573 N.E.2d 113 (1991), the Supreme Court of Ohio held that a municipal court did not have authority under Crim.R. 6(E) to order the prosecutor to disclose grand jury materials. In *Collins*, the municipal court determined that it was “the trial court” for purposes of determining whether a defendant showed a particularized need for the disclosure of the county’s grand jury materials under Crim.R. 6(E). The Supreme Court of Ohio held that *Petition for Disclosure, supra*, controlled the case, “The municipal court has no supervising authority

over the grand jury; rather, ‘the grand jury * * * is under the control and direction of the court of common pleas * * *.’ Thus, ‘the Court which supervised * * * [the] grand jury,’ *Petition for Disclosure, supra*, is the common pleas court, and any petition for disclosure must be filed there.” *Collins* at 144.

{¶8} The Supreme Court of Ohio elaborated more on the cooperative procedure it envisioned, recognizing that the supervising court may make a written evaluation of the need for secrecy to the court in which the party seeks to use the materials and then that court would weigh that evaluation when making a determination concerning disclosure. *Collins* at 145.

Thus, if the supervising court first finds that it cannot assess the movant’s need for the material, it may call upon the municipal court to take part in the decision. See *Petition for Disclosure, supra*. But in no case may a municipal court simply order disclosure on its own; therefore, the municipal court could not order relator to produce the transcripts for possible disclosure.

Collins at 146; See also *State ex rel. Shoop v. Mitrovich*, 4 Ohio St.3d 220, 221, 448 N.E.2d 800 (1983)(“The grand jury itself is under the control and direction of the court of common pleas. *State v. Schwab* (1924), 109 Ohio St. 532, 143 N.E. 29. The court of common pleas is charged with certain duties and responsibilities in a supervisory capacity. R.C. 2939.01 *et seq.*; Crim.R. 6.”).

{¶9} In *In the Matter of Coleman*, 4th Dist. Scioto App. No. 01CA2773, 2002-Ohio-2195, we held that the juvenile court lacked authority to unilaterally order the disclosure of grand jury testimony because only the court that supervised the grand jury proceedings has authority to order the disclosure. “The term ‘the court,’ as used in Crim.R. 6(E), specifically refers to the common pleas court that supervised the grand jury proceedings.” *Id.* at *3; see also *State ex rel. Parisi v. Heck*, 2nd Dist. Montgomery App. No. 25709, 2013-Ohio-4948 (dismissing a petition for writ of mandamus seeking the court of appeals to

order the disclosure of grand jury materials because petitioner's remedy was to seek disclosure under Crim. R. 6(E) in the supervising court).

{¶10} Additionally, the courts do not have inherent authority to order the disclosure of grand jury proceedings. The Supreme Court of Ohio specifically rejected any argument that the courts have inherent authority to issue orders concerning the disclosure of grand jury material in the context of a public records request lawsuit. *State ex rel. Beacon Journal Publishing Co v. Waters*, 67 Ohio St.3d 321, 326-327, 1993-Ohio-77, 617 N.E.2d 1110. The Court held that a court's powers over grand jury proceedings are derivative in nature and come from the powers given under R.C. 2939.01 et seq. and Crim R. 6. *Id.* at 327. Thus, outside of the context of Crim.R. 6(E), we have no authority to address Owens's motion seeking the disclosure of the grand jury materials.

II.

{¶11} Based upon our review of the case law, we find that we do not have the authority to unilaterally address Owens's motion at this time. The proper procedure is for Owens to file a separate petition with the Court of Common Pleas of Gallia County, as the supervising court under Crim R. 6(E), seeking the disclosure of the desired materials. If that court should decline to address Owens' petition because it cannot adequately assess Owens's need for the materials in the context of effective appellate advocacy, then it may send a written evaluation to this court and we may then address the merits of Owens's motion. *See also Craig v. Lima City Schools Bd. of Edn.*, 384 F.Supp.2d 1136, 1144 (2005)(the court of common pleas issued an order permitting the disclosure of grand jury testimony for use as the federal district court deemed proper thereby allowing the federal court to address the party's motion for disclosure of grand jury testimony).

{¶12} We recognize that the general rule is that when an appeal is taken, the trial

court is divested of jurisdiction, except to take action in aid of the appeal. *State ex rel. Special Prosecutors v. Judges*, 55 Ohio St.2d 94, 97, 378 N.E.2d 162 (1978). The trial court however does retain jurisdiction over issues not inconsistent with the power and jurisdiction of the appeal court to review, affirm, modify or reverse. *Id.*; *In re Kurtzhalz*, 141 Ohio St. 432, 48 N.E.2d 657 (1942); Whiteside, Ohio Appellate Practice (1991) 19, T 1.09. Here, Owens filed a motion with the trial court prior to trial seeking disclosure of grand jury materials, which the trial court denied. Any alleged assignments of error concerning that ruling will be considered on appeal and our review of it would not be affected by the trial court's decision on a separate post-trial petition for disclosure. A trial court's analysis of a particularized need at the pretrial stages of a criminal case is an entirely separate analysis and would give different weight to the various factors than its analysis at the post-trial stage. *See Petition for Disclosure*, 63 Ohio St.2d 212, 219 407 N.E.2d 513 (1980)(finding that the trial court's use of the *Rose* factors in deciding whether to release grand jury materials was correct however, the trial court abused its discretion in applying them). Thus, a trial court's consideration of a separate petition for disclosure of grand jury materials would not be inconsistent with our power and jurisdiction to review the trial court's earlier determination of a prior petition or motion. Therefore, we **DENY** Owens's motion on procedural grounds as we have not addressed the substantive merits of his legal arguments concerning a particularized need.

III.

{¶13} We do not have authority to unilaterally order the disclosure of grand jury materials. Owens must first petition the supervising court pursuant to Crim R. 6(E). Therefore, we **DENY** Owens's motion.

MOTION DENIED. IT IS SO ORDERED.

Harsha, J. & Abele, J.: Concur.

FOR THE COURT

Matthew W. McFarland
Administrative Judge