

IN RE DISQUALIFICATION OF SCHROEDER.

THE STATE OF OHIO v. JONES.

**[Cite as *In re Disqualification of Schroeder*, 172 Ohio St.3d 1232,
2023-Ohio-3170.]**

Judges—Affidavits of disqualification—Affiant failed to demonstrate that trial court’s gag order in underlying case requires an order sealing entire affidavit of disqualification and its exhibits from public access—Except for report of defendant’s competency evaluation, documents submitted with affidavit of disqualification unsealed because they were not labeled confidential in trial court or otherwise filed under seal or held in camera in trial court—Affiant’s motion to seal granted in part and denied in part.

(No. 23-AP-043—Decided July 7, 2023.)

ON AFFIDAVIT OF DISQUALIFICATION in Ashtabula County Court of Common
Pleas, General Division, Case No. 1997 CR 00221.

KENNEDY, C.J.

{¶ 1} On April 10, 2023, Ashtabula County Prosecuting Attorney Colleen M. O’Toole filed an affidavit of disqualification pursuant to R.C. 2701.03 seeking to disqualify Judge David A. Schroeder of the Ashtabula County Court of Common Pleas, General Division, from a death-penalty case on remand from the United States Court of Appeals for the Sixth Circuit. O’Toole also filed a motion to seal her affidavit of disqualification and the exhibits filed in support of the affidavit. Upon filing, the clerk of this court put the affidavit and its exhibits under seal pending a decision on the motion.

{¶ 2} On May 1, 2023, O’Toole’s affidavit of disqualification was dismissed for failing to comply with the time limit established in R.C. 2701.03(B).

172 Ohio St.3d 1226, 2023-Ohio-2166, 225 N.E.3d 1060. On the same date, O'Toole and Judge Schroeder were asked to brief the issue whether the affidavit of disqualification and its exhibits should remain under seal and the defendant and his appointed counsel were notified that they were also permitted to brief the issue. O'Toole, Judge Schroeder, and the defendant's counsel filed responsive briefs. For the reasons explained below, the motion to seal is granted in part and denied in part. The clerk of this court is ordered to maintain exhibit F under seal and to unseal the affidavit of disqualification and all other exhibits.

Arguments of Judge Schroeder and Counsel

{¶ 3} In her motion to seal and her responsive brief, O'Toole argues that the affidavit of disqualification should be sealed from public access to mitigate bias of the potential-juror pool, to ensure a fair trial for all parties, and “out of respect for the trial court judge.” In the responsive brief, she adds that there is a gag order in place and that caselaw supports the sealing of confidential records in an affidavit-of-disqualification proceeding.

{¶ 4} Both Judge Schroeder and the defendant's counsel argue that the affidavit of disqualification should *not* remain under seal. They assert that (1) O'Toole's motion to seal is moot because she has discussed the contents of the affidavit of disqualification with local media, (2) O'Toole failed to cite any legal authority to counter the presumption that court filings should remain open to the public, and (3) the affidavit does not refer to anything confidential, personal, or privileged.

Analysis

{¶ 5} O'Toole's arguments in her motion to seal and responsive brief address two issues: (1) whether the existence of a gag order in the trial court requires the sealing of an affidavit of disqualification and the exhibits attached to it and (2) whether caselaw that supports the sealing of an exhibit filed in an affidavit-

of-disqualification proceeding that was marked confidential and held in camera in the trial court is applicable here.

Gag Order

{¶ 6} Before addressing O’Toole’s argument that the existence of a gag order in the trial court requires the sealing of an affidavit of disqualification and the attached exhibits, it is important to understand what a gag order is and why a trial court would issue one.

{¶ 7} Historically, criminal trials have been open to the press and the general public. *Globe Newspaper Co. v. Superior Court for Norfolk Cty.*, 457 U.S. 596, 605, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982). Public scrutiny of criminal proceedings “enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole” and “fosters an appearance of fairness, thereby heightening public respect for the judicial process.” *Id.* at 606.

{¶ 8} “The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” *Press-Ent. Co. v. Superior Court of California, Riverside Cty.*, 464 U.S. 501, 510, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984). Therefore, “trial courts have a wide discretion in being able to protect the judicial process from influences that pose a danger to effective justice.” *Journal Publishing Co. v. Mechem*, 801 F.2d 1233, 1236 (10th Cir.1986).

{¶ 9} “Pervasive, unfair, and prejudicial media coverage of a criminal trial” may jeopardize the accused’s right to a fair trial guaranteed by the Sixth Amendment to the United State Constitution and Article I, Section 10 of the Ohio Constitution. *State ex rel. Toledo Blade Co. v. Henry Cty. Court of Common Pleas*, 125 Ohio St.3d 149, 2010-Ohio-1533, 926 N.E.2d 634, ¶ 23. Therefore, “[t]rial courts have a ‘duty to protect’ criminal defendants from ‘inherently prejudicial publicity’ that renders a jury’s deliberation unfair.” *State v. Clinton*, 153 Ohio St.3d

422, 2017-Ohio-9423, 108 N.E.3d 1, ¶ 59, quoting *Sheppard v. Maxwell*, 384 U.S. 333, 363, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966).

{¶ 10} A gag order based on the need to protect an accused's right to a fair trial "may issue only if 'specific findings are made demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that * * * [the gag order] would prevent and, second, reasonable alternatives * * * cannot adequately protect the defendant's fair trial rights.' " (Ellipses and brackets sic.) *State ex rel. Natl. Broadcasting Co., Inc. v. Lake Cty. Court of Common Pleas*, 52 Ohio St.3d 104, 108, 556 N.E.2d 1120 (1990), *overruled in part on other grounds by State v. Schlee*, 117 Ohio St.3d 153, 2008-Ohio-545, 882 N.E.2d 431, ¶ 10, quoting *Press-Ent. Co. v. Superior Court of California for Riverside Cty.*, 478 U.S. 1, 14, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986).

{¶ 11} On December 2, 2022, Judge Marianne Sezon issued the following gag order in the underlying case:

The Court finds, given the publicity thus far, that any statements made to media by the Prosecutor's Office or Defense Counsel would create a reasonable likelihood of prejudicial pretrial publicity which may impact the ability to impanel an impartial jury. The Court finds the following least restrictive and reasonable constraints are necessary to avoid any potential prejudice, whether real or perceived to protect the judicial process.

Therefore, in the administration of justice and to protect the rights of the Defendant from prejudice during the resentencing/penalty phase proceeding, and interests of the State, the Court hereby prohibits all parties to this action, any attorneys and respective staff connected with this case in any manner, all court personnel and any public official from disseminating information

and/or commenting; discussing; or otherwise opining on the merits, defenses, facts, or any other matters relating to this case outside of the hearings in this matter and/or pleadings to be filed in this matter.

{¶ 12} O'Toole's third basis for requesting that the affidavit of disqualification and its exhibits be sealed—"respect for the trial judge"—is not a reason to issue a gag order or to seal an affidavit of disqualification and its exhibits. Public scrutiny of criminal proceedings and the work of the trial judge enhances confidence in the judicial system. So that argument is without merit.

{¶ 13} The other two reasons O'Toole cites to support her request that her affidavit of disqualification and its exhibits be sealed—the needs to mitigate bias of the potential-juror pool and to ensure a fair trial for all parties—are reasons why a trial court would issue a gag order and are the reasons why Judge Sezon issued the gag order in the underlying case. Therefore, these two reasons are discussed below—both in general and as applied to the underlying case.

{¶ 14} In response to these two reasons cited by O'Toole, Judge Schroeder and defendant's counsel argue that because O'Toole has spoken to local media about the affidavit of disqualification and because the affidavit and its exhibits now exist in the public domain, the motion to seal is moot.

{¶ 15} Whether the motion to seal is moot is a preliminary issue that must first be addressed. Ohio courts have long recognized that a case that no longer presents a live controversy does not merit judicial review. *See Tschantz v. Ferguson*, 57 Ohio St.3d 131, 133, 566 N.E.2d 655 (1991).

{¶ 16} While there is evidence in the record suggesting that O'Toole has spoken to local media about the affidavit of disqualification and that *some* of the exhibits are in the public domain, there is insufficient evidence to establish that *all* the exhibits are in the public domain. Neither O'Toole, the judge, nor defense counsel have addressed the exhibits individually. Because a review of the exhibits

does not support broadly finding that all the exhibits are in the public domain, the mootness doctrine is not applicable. The issue remains whether the gag order itself requires that the affidavit of disqualification and its exhibits remain under seal.

{¶ 17} As stated above, a gag order exists to protect the potential-juror pool from bias and to ensure that the defendant receives a fair trial. The argument that an affidavit of disqualification and its exhibits should be sealed because the trial court issued a gag order might have some merit, but O’Toole has addressed her affidavit and its exhibits collectively, not individually. The evidence supports a finding that at least some of the affidavit’s content has been released to the media and that some exhibits are already in the public domain. Therefore, O’Toole has failed to demonstrate that the gag order requires an order sealing the entire affidavit of disqualification and its exhibits from public access.

{¶ 18} The next consideration is whether there is any other legal authority to support O’Toole’s motion to seal.

Authority Applicable to the Motion to Seal

{¶ 19} In her responsive brief, O’Toole cited one case in support of her motion to seal: *In re Disqualification of Sheward*, 136 Ohio St.3d 1256, 2013-Ohio-3643, 994 N.E.2d 452. The case was cited in support of the argument that the existence of a gag order requires the sealing of an affidavit of disqualification and the exhibits attached to it, but that reliance is misplaced. *Sheward* is not a case about a gag order; it is a case about an exhibit attached to a response to an affidavit of disqualification that was sealed pursuant to a superintendence rule because the exhibit was marked confidential and held in the trial court in camera. *Id.* at ¶ 16.

{¶ 20} “ ‘Open access to government papers is an integral entitlement of the people, to be preserved with vigilance and vigor.’ ” *State ex rel. Cincinnati Enquirer v. Forsthoefel*, 170 Ohio St.3d 292, 2022-Ohio-3580, 212 N.E.3d 859, ¶ 48 (Kennedy, J., concurring in judgment only), quoting *Kish v. Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811, ¶ 17. “Section 16, Article I of the

Ohio Constitution guarantees the public’s right to open courts,” and “[t]his right of access * * * includes records and transcripts that document the proceedings.” *State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St.3d 382, 2004-Ohio-1581, 805 N.E.2d 1094, ¶ 8, *superseded by rule on other grounds as stated in State ex rel. Parisi v. Dayton Bar Assn. Certified Grievance Comm.*, 159 Ohio St.3d 211, 2019-Ohio-5157, 150 N.E.3d 43.

{¶ 21} This general right of access “is not absolute,” *id.* at ¶ 9, but “unless sealed, affidavit-of-disqualification files are public records,” *In re Disqualification of Paschke*, 165 Ohio St.3d 1207, 2021-Ohio-3236, 175 N.E.3d 590, ¶ 6. In the absence of a justification that would warrant sealing an affidavit of disqualification, a motion to seal an affidavit of disqualification will be denied. *See In re Disqualification of Holbrook*, 167 Ohio St.3d 1244, 2022-Ohio-2141, 194 N.E.3d 387, ¶ 13.

{¶ 22} When a document that is under seal or is otherwise confidential in the trial court is submitted with an affidavit of disqualification or a response to an affidavit of disqualification, the document will generally remain under seal in this court. *See Paschke* at ¶ 6; *In re Disqualification of Selmon*, 170 Ohio St.3d 1220, 2022-Ohio-3999, 209 N.E.3d 740, ¶ 4; *In re Disqualification of Maloney*, 88 Ohio St.3d 1215, 1216, 723 N.E.2d 1102 (1999); *Sheward*, 136 Ohio St.3d 1256, 2013-Ohio-3643, 994 N.E.2d 452, at ¶ 16.

{¶ 23} Here, O’Toole has not demonstrated that the documents submitted with her affidavit of disqualification were labeled confidential in the trial court or otherwise filed under seal or held in camera in the trial court.

{¶ 24} All the responsive briefs address the affidavit of disqualification and the exhibits collectively. But a careful review of each exhibit reveals that exhibit F attached to the affidavit of disqualification is a copy of the report of the defendant’s competency evaluation. The appearance docket for the death-penalty case indicates that the report, which was filed on March 7, 2023, is “confidential.”

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In addition, during a March 13, 2023 status conference in the underlying case, defense counsel noted that the report is confidential.

{¶ 25} As noted above, when a document filed in an affidavit-of-disqualification proceeding is under seal or confidential in the trial court, “it shall remain under seal in this court,” *Selmon*, 170 Ohio St.3d 1220, 2022-Ohio-3999, 209 N.E.3d 740, at ¶ 4; *see also Paschke*, 165 Ohio St.3d 1207, 2021-Ohio-3236, 175 N.E.3d 590, at ¶ 6; *In re Disqualification of Baronzzi*, 138 Ohio St.3d 1210, 2013-Ohio-5899, 3 N.E.3d 1196, ¶ 11. Because the report of the defendant’s competency evaluation is a confidential record, that exhibit will remain under seal in this court.

Conclusion

{¶ 26} The motion to seal is granted in part and denied in part. The clerk of this court is ordered to maintain exhibit F under seal and to unseal the affidavit of disqualification and all other exhibits.
