

IN THE GENERAL SESSIONS CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE

STATE OF TENNESSEE

VS.

CASE NO: 21016127

GREGORY LIVINGSTON

DIVISION 13

COURT ORDER ON DEFENDANT'S MOTION FOR PROTECTIVE ORDER
AND STATE'S NOTICE OF INTENT TO RELEASE VIDEO EVIDENCE

This matter is before the court on the Defendant's Motion for Protective Order filed on August 26, 2021, and the State's Response to Defendant's Motion For Protective Order And Notice Of Intent To Release Video Evidence, filed on August 30, 2021. On August 31, 2021, this court ordered a temporary prohibition to the State in releasing a copy of video evidence in the State's possession to the victim's family and to the public. On September 3, 2021, the Defendant filed a Defendant's Reply to State's Response To Defendant's Motion For Protective Order And Notice Of Intent To Release Video Evidence. The court took the matter under advisement to review all motions and submissions in order to render a decision.

ANALYSIS

The Defendant has requested a preliminary hearing on the charge of Second Degree Murder, T.C.A. 39-13-210. The court has set a preliminary hearing for September 28, 2021.

The preliminary hearing is a "critical stage" in the prosecution of the Defendant. McKeldin v. State, 516 S.W.2d 82 (Tenn. 1974). See, Coleman v. Alabama, 300 U.S. 1, 90 S. Ct. 1999, 26 L.Ed. 2d 387 (1970). Although a preliminary hearing is not constitutionally required, the defendant in this case was arrested prior to indictment and is therefore entitled to a preliminary hearing by Rule 5 of the Tennessee Rules of Criminal Procedure. The preliminary hearing is a judicial forum for determining whether an offense has

been committed and whether there is reasonable ground to believe that the defendant is guilty of the offense and whether there is evidence sufficient to justify the continued detention of the defendant. With very few exceptions, the usual rules of evidence apply in a preliminary hearing. Mckeldin v. State, 516 S.W. 2d 82 (Tenn. 1974).

The defendant's motion for a protective order preventing the State from allowing "the victim or Victim's representatives" or "the public at large" to have possession or copies of audio or video recordings is to protect the defendant's constitutional right to receive a fair and impartial trial. The defendant argues that the public dissemination of discovery documents to the public can have a prejudicial effect upon the defendant, the defendant's right to a fair trial, and the right to an impartial jury as guaranteed to a defendant by the Sixth Amendment to the United States Constitution. The defendant further argues that the family of a victim in a criminal case does not meet the definition of a "party" in a criminal proceeding and is therefore not entitled to the audio or video recordings. The defendant cites State v. Johnson, 538 S.W.3d 32, 56 (Tenn. Crim. App. 2017). The defendant further cites the case of The Tennessean v. Metropolitan Government of Nashville and Davidson County et. al., 485 S.W.3d 857, 871 (Tenn. 2016) which holds that Rule 16 of the Tennessee Rules of Criminal Procedure, as state law, provides for the disclosure of information by the State or the defendant. Rule 16 does not provide for the release of any information to anyone not a party to the criminal proceeding.

The State's response to the defendant's motion for a protective order and the State's notice of intent to release video evidence is that release of the video to the public is consistent with "the belief that transparency helps to instill faith in our criminal justice system". The State further argues that the issue of whether the defendant can receive a fair trial in Shelby County "is far from being ripe to be decided." The State argues that the mere fact that prospective jurors know something about a case at the time of impaneling is not unusual and such exposure "does not automatically constitute constitutional error." The State cites State v. Hugueley, 185 S.W.3d 356, 390 (Tenn. 2006). The State further argues that the

“mere fact that jurors have been exposed to pre-trial publicity will not warrant a change of venue.” State v. Mann, 959 S.W. 2d 503, 532 (Tenn. 1997). The State cites State v. Hoover, 594 S.W. 2d, 743, (Tenn. Crim. App. 1979), where the court adopted multiple factors for a court to consider when assessing whether pre-trial publicity could cause prejudice amongst a juror pool. The State takes the position that release of the video to the public “will not substantially affect Defendant’s ability to receive a fair trial.” The state argues that “certainly, this Court will not be swayed to prejudice the defendant because the State released the video to the public”.

In the State’s response, the State concedes that Mr. Motley, Sr. “is not a party to this case and there is no statutory requirement that the State give him a copy of evidence.” The State does not cite any legal basis that gives Mr. Motley the right to disclosure of information or evidence by the State. The State argues that allowing Mr. Motley, Sr. “to have a copy of the video evidence” is consistent with his “right to confer with the prosecution.” The State cites Tenn. Const., art. 1 Section 35a. The state further argues that it believes it is necessary to “share the video” with Mr. Motley, Sr. so that “he can assist in our investigation.” Neither Tenn. Const. art. 1 section 35 nor T.C.A. 40-38-301 relative to the Constitutional Rights of Victims provide any legal authority for the State to provide a copy of evidence to anyone not a party to the criminal proceeding. Pursuant to T.C.A. 40-38-114(b), the prosecuting attorney shall confer with the victim before commencement of a trial. Any information received by the victim relating to the substance of the case shall be confidential, unless otherwise authorized by law or required by the courts to be disclosed. It is not stated by the State how not having a copy of video evidence would impair the victim in any meaningful way with his right to confer with the prosecution or assist in in the State’s investigation.

The case is set for a preliminary hearing, not a trial. This court agrees with the State that the issue as to whether the defendant can receive a fair trial is “far from being ripe to decide.” This court will conduct a preliminary hearing and bears the responsibility of protecting the right of the defendant to

a fair and impartial hearing. The right to a fair hearing before an impartial tribunal is a fundamental constitutional right. This court agrees with the State that it is of great importance to instill faith in our criminal justice system. Preserving public confidence in judicial neutrality requires more than ensuring that a judge is impartial in fact. It is just as important that a judge be perceived to be impartial. Bean v. Bailey, 280 S.W.3d 798, 803 (Tenn. 2009); Kinard v. Kinard, 986 S.W.2d 220, 228 (Tenn. Ct. App. 1998). This case is set for a preliminary hearing before this court. There will be no jury at this hearing. This court, as the trier of fact, has a duty and obligation to be as free as possible from of all pre-hearing exposure to information and evidence that may be submitted at the preliminary hearing. In this regard, the prosecuting attorney has a corresponding duty along with the trial court to see that the fundamental right to a fair and impartial trial or hearing is accorded to the accused. Burlison v. State, 501 S.W.2d 801,806 (Tenn. 1973); State v. Griffis, 964 S.W.2d 577 (Tenn. Cr. App. 1997).

CONCLUSION

In order to protect the right of the accused to a fair and impartial preliminary hearing and promote public trust in the integrity of the criminal justice system during the pendency of this case in this court, it is the order of this court that, until the court conducts a preliminary hearing for the defendant, the State is prohibited from releasing to or providing a copy of the audio and video recordings, which are the subject of the Defendant's motion, to the victim's family or to any member of the public.

This 7th day of September, 2021.


Judge Louis J. Montesi, Jr.