

NO. 10-J-701053
12-J-700320
12-J-700321

JEFFERSON DISTRICT COURT
JUVENILE DIVISION

**IN RE: THE INTEREST OF: SAVANNAH DIETRICH, A CHILD
WILLIAM FREY III, A CHILD
AUSTIN ZEHNDER, A CHILD**

OPINION AND ORDER

*** *** ***

This matter comes before the Court on the Motion of The Courier-Journal, Inc. (hereinafter referred to as: "Courier-Journal") to intervene in the above styled cases. The Courier-Journal has also moved the Court to release records relating to a now withdrawn contempt charge against Savannah Dietrich (hereinafter referred to as: "Dietrich") as well as the entire court record relating to criminal charges brought against the two juvenile Defendants, William Frey, III (hereinafter referred to as: "Frey") and Austin Zehnder (hereinafter referred to as: "Zehnder"). The Defendants pled guilty to the charges of Sexual Abuse I and Voyeurism on June 26, 2012. The cases are set for a dispositional hearing (referred to as sentencing in adult court) on September 14, 2012.

BACKGROUND

The facts in this matter involve Frey and Zehnder attending a gathering at the home of Dietrich on or about dates between August 11, 2011, and August 31, 2011. All of the youths consumed alcohol. Dietrich passed out, and Frey and Zehnder penetrated her vagina with their fingers and took pictures with their cell phones. The victim did not give consent. The police were contacted and brought charges against the Defendants. They were arraigned in Juvenile Court, Division 88, on March 16, 2012, where they entered pleas of not guilty and were placed

on House Arrest with Home Supervision. The Defendants were allowed a release with supervision for a previously scheduled college visit.

There were four separate pretrial conferences where the parties and counsel discussed the case. The Defendants remained on House Arrest with Home Supervision. The County Attorney's Office assigned a victim advocate to Dietrich and her family. During this time frame, the police ordered forensic testing of the Defendants' cell phones. On June 26, 2012, the Defendants reached an agreement with the Prosecution whereby both juveniles entered pleas of guilt to Sex Abuse I and Voyeurism, the offenses as charged without amendment. There was also a typed proposed disposition presented to the Court.

This case, as in all cases involving a plea to a sexual offense, was passed seven weeks for a dispositional hearing pursuant to KRS 635.505. This statute requires a sexual offender risk assessment. The assessment is conducted to assist the Court in determining the youth's risk level for reoffending, as well as providing recommendations for treatment. The Department of Juvenile Justice also must prepare a predisposition investigation report for each Defendant. This report includes a school history, mental and physical health examination, study of family functioning and treatment recommendations. Accordingly, Judge Dee McDonald (the other Judge currently assigned to the juvenile division of District Court, Division 99, and covering court that day) passed the case to August 21, 2012. Upon request of the attorneys for the Defendants, Judge McDonald admonished all parties present of the confidentiality requirements of juvenile court.

On June 27, 2012, the attorneys for Frey and Zehnder made a motion in Division 88 to hold Dietrich in contempt of court for violating the law of confidentiality by allegedly posting comments about what her attackers had done and their names on a Twitter account. This Court

heard the motion. The Prosecutor and the Attorneys for the Defendants gave the Court information regarding the events of the preceding day. Dietrich and her parents were not present; therefore, the Court appointed the Louisville Metro Public Defender to appear with and represent Dietrich. Dietrich's parents were notified, and the matter was passed for a hearing June 28, 2012. At the hearing on June 28th, the case was again passed at Dietrich's Public Defender's request in order to review the court tape of the prior proceedings.

On July 5, 2012, Dietrich's Public Defender made a motion to the Supreme Court of Kentucky to disqualify Judge Bisig from the case. This motion was based upon several grounds including: 1) Upon making their motion for contempt, the counsel presented a dialogue in open court about what had transpired the day Judge McDonald took the pleas; 2) Judge Bisig had called some of the facts of the case "allegations" in an on-the-record discourse with the victim explaining what was happening with the case after the pleas and recommended dispositions; 3) The detention worker in charge of the Home Supervision program gave approval for the Defendants to attend their prom contrary to the Court's Order of House Arrest. Dietrich's Public Defender also filed a motion to dismiss the contempt charge. These motions were all passed for response.

On July 6, 2012, although stating on the record she believed there was no basis to disqualify her from the case, in an effort to allow the parties to be heard expeditiously, this Court stepped aside to allow Judge McDonald to hear the contempt motion. It was Judge McDonald who accepted the Defendants' pleas and admonished the parties regarding the confidentiality of juvenile court. (On July 13, 2012, the Kentucky Supreme Court entered a written ruling that there was not a basis to disqualify Judge Bisig from hearing the case.)

It was at this point that information regarding the Defendants' pleas of guilt and the motion for contempt against Dietrich were leaked to the media. There was significant public outrage at reports that a sexual assault victim could face sanctions. This generated substantial media attention in this case. Dietrich's Public Defender requested to have the hearing involving the contempt motion opened to the public and to the local paper, the Courier-Journal. Dietrich's Public Defender also tendered a signed waiver of her confidentiality for the media to cover the hearing. On July 9, 2012, the Courier-Journal also moved the Court to intervene in the case, to open the contempt hearing, and to lift restrictions on the parties' freedom of speech. Dietrich's Public Defender also filed a motion to lift a "gag order" on the victim. On July 23, 2012, a joint motion was filed by the Defendants to withdraw the contempt motion. Judge McDonald sustained the motion to withdraw.

The Courier-Journal then moved for access to the juvenile records of Frey and Zehnder. On July 26, 2012, private counsel entered and appearance for Dietrich. On July 27, 2012, Dietrich's Attorney made a motion to recuse the Prosecutor and the County Attorney's Office from the case. Faced with the motions outlined above, and the contempt charge being withdrawn, on July 30, 2012, Judge McDonald entered a written Order reassigning the case to Division 88 (Bisig). Judge McDonald further ruled in her Order that she would grant a motion allowing the proceedings to be open if there was a tendered agreement by all parties, parents and counsel to open the file. Judge McDonald ruled that there was no "gag order" in place and that her admonishment had been to comply with the law of confidentiality required by Kentucky Statutes. The Order also removed the Office of the Public Defender from the case, as Dietrich now had a private attorney. She passed all remaining motions for a hearing. Since this date, the Defendants' attorneys also made a motion to strike the appearance of Dietrich's private attorney.

On August 21, 2012, all parties and all counsel appeared before this Court for a hearing on the Courier-Journal's motion to open the files of Dietrich, Frey and Zehnder. Each party also submitted Briefs. The Courier-Journal filed a motion to have the hearing concerning accessing the record open to the public. The Court denied this motion on the record stating: 1) To open the proceedings prior to argument was tantamount to deciding the access issue without the opportunity to hear arguments of counsel; 2) It would be difficult to properly argue the motions to open the files without mentioning confidential information. The parties each presented oral arguments regarding opening the juvenile files.

OPINION

The specific issues brought before the court are: a) Does the Courier-Journal have standing to intervene and move for access to the file; b) Under Kentucky law, does the Court have the authority to release the record of these juvenile proceedings; c) If the Court has the authority to open a juvenile record, does good cause exist to release the three files in this case.

I. Motion to intervene/standing

The parties have acknowledged in open court that the Courier-Journal's motion to intervene must be addressed prior to an analysis of whether to open the record. It is worth noting that the Prosecutor had no objection to the motion, and there has not been significant objection raised in pleadings by the Defendants. In his response to the Courier-Journal's motion for access, the Attorney for Frey argues that the case of Courier-Journal & Louisville Times Co. v. Peers, Ky., 747 S.W.2d 125 (1988), deals with exclusively with Circuit Court civil cases. As this Court has ruled previously, Kentucky law recognizes that a member of the news media may intervene in a court action in order to demand access to court proceedings or records. Courier-Journal & Louisville Times Co. v. Peers, Ky., 747 S.W.2d 125, 127-8 (Ky., 1988). The

procedure set forth in Peers requires a motion to intervene, proper notice to the affected parties, and a request for a hearing. Id. at 30. The Kentucky Supreme Court reaffirmed Peers, supra, in Lexington Herald-Leader Co., Inc. v Meigs, 660 S.W. 2d 658 (Ky., 1983). Although this case is not a civil proceeding, the Court finds the procedural steps should outlined in Peers instructive. In this matter, the Courier-Journal has followed these steps. Based upon this reasoning, the Court will sustain the Courier-Journal's motion to intervene in this action for the purpose of its motion to access the files.

II. Confidentiality of Juvenile Court/Discretion to Release Juvenile Files

Under Kentucky Law, there are three statutes that provide guidance as to the confidentiality of juvenile court. These statutes deal with "Hearings" (KRS. 610.070), "Juvenile record and docket" (KRS 610.320), and "Juvenile court records" (KRS 610.340).

KRS 610.070

- (3) The general public shall be excluded and only the immediate families or guardians of the parties before the court, witnesses necessary for the prosecution and defense of the case, the probation worker with direct interest in the case, a representative from the Department of Juvenile Justice, the victim his parent or legal guardian, or if emancipated, his spouse, or a legal representative of either, such persons admitted as the judge shall find have a direct interest in the case or in the work of the court, and such other persons as agreed to by the child and his attorney may be admitted to the hearing. [Emphasis added]

KRS 610.340(1)(a)

- (a) Unless a specific provision of KRS Chapters 600 to 645 specifies otherwise, all juvenile court records of any nature generated pursuant to KRS Chapters 600 to 645 by any agency or instrumentality, public or private, shall be deemed to be confidential and shall not be disclosed except to the child, parent, victims, or other persons authorized to attend a juvenile court hearing pursuant to KRS 610.070 unless ordered by the court for good cause. [Emphasis added]

KRS610.320(3)

- (3) All law enforcement and court records regarding children who have not reached their eighteenth birthday shall not be opened to scrutiny by the public, except that a separate public record shall be kept by the clerk of the court which shall be accessible to the public for court records, limited to the petition, order of the adjudication, and disposition in juvenile delinquency proceedings concerning a child who is fourteen (14) years of age or older at the time of the commission of the offense, and who is adjudicated a juvenile delinquent for the commission of an offense that would constitute a capital offense or a Class A, B, or C felony if the juvenile were an adult or any offense involving a deadly weapon, or an offense wherein a deadly weapon is used or displayed.

The above statutes outline the Kentucky Legislature's intent that cases involving juveniles be closed to the public. There is still little precedent regarding the opening of juvenile cases in this Commonwealth. In the 2008 matter of In re: Kenneth Eastridge, Case No. 96FJ-1963, this Court reviewed the statutes above and found that the legislature had left open a window of judicial discretion in the otherwise closed protection of juvenile proceedings. The Jefferson Circuit Court affirmed this Court's findings regarding the exception to the general veil of confidentiality. There is direct language in the statute allowing a court to authorize others to attend a juvenile proceeding when the court finds there is "good cause." KRS 610.340. There is also clear language creating an exception when the court determines that persons seeking to be admitted have "direct interest in the work of the court." KRS 610.070.

There is some guidance offered on this issue by federal courts. The United States Court of Appeals for the Sixth Circuit examined the Kentucky Statutes in question the case of Kentucky Press Ass'n v. Commonwealth of Kentucky, 454 F.3rd 505 (6th Cir. 2006). In that case, the Sixth Circuit considered a different issue than the one before this court. In Kentucky Press Ass'n, the Federal Court found a claim by the Press Association challenging the constitutionality of closed juvenile proceedings was not ripe. Id. 510. However, it is instructive

that in its reasoning the Sixth Circuit cites the same provisions of the Uniform Juvenile Code and opines, “that Kentucky Courts would deny the KPA the access it seeks is far from certain.” *Id.* at 509. “The Kentucky courts could reasonably interpret these provisions to allow for limited access to juvenile proceedings by the media, which arguably has a “direct interest in the ...work of the court.” *Id.* While this dictum is not binding precedent, it is clear that the court believed that current Kentucky law arguably allowed for a judicial determination concerning media access to juvenile court proceedings.

For these reasons, the court finds that the Kentucky Juvenile Code gives this Court the discretion to determine if good cause exists to open the court records involving Dietrich, Frey and Zehnder.

III. Good Cause Examination of these Facts

Public Confidence

Public confidence in government is perhaps the most critical in its institution of justice. Courts are established to enforce our laws and resolve disputes. The very idea that a young victim of a sexual assault would find the courage to tell her story and come to court, only to have no one listen to her, explain to her what is happening, and then to have the parties reach some type of deal without her input is abhorrent. The public would and should cry “foul.” This type of allegation against the criminal justice system is serious and is impossible to address without reviewing what happened in this case. The community must have faith in its institution created to hold offenders accountable for wrongful deeds. Victims of sexual assaults should know that the criminal justice system is trained and equipped to handle their special needs.

It is not surprising that a minor child feeling she was subjected to this kind of treatment would cause the media to have great interest in the case. The protections outlined in the Juvenile

Court Statute are not a cloak to cover the activities of the judges, lawyers and court personal in the juvenile justice process. The purpose of confidentiality in juvenile proceedings is to encourage the reform of offending youth by keeping them from being forever identified by the offenses they committed prior to adulthood. F.T.P. v. Courier-Journal, 774 S.W.2d 444 (Ky.,1989). The intent section of the Unified Juvenile Code provides that juvenile proceedings should promote the best interests of the child by providing treatment and sanctions to reduce recidivism and assist in making a child become a productive citizen. KRS 600.010 (e). The news media represents the eyes and ears of the public and the Court must balance the public's right to know with the litigants' right to privacy. Peers, supra, 747 S.W.2d at 127. Opening the records concerning this incident would further the goal of public confidence in the justice system.

The victim requests the case be opened

A victim before the court who suffered an assault of a sexual nature is in a very sensitive and difficult situation. If Dietrich did not want this file to be open due to the nature of the assault and the underlying facts, this would weigh very heavily in the favor of maintaining the records' confidentiality. It was the Dietrich's Public Defender, contrary to that offices' general position to keep juvenile matters closed, who originally tendered a confidentiality waiver dated June 27, 2012. The Public Defender sought to open her contempt file and the information it contains about this case. It is also important to note that this request was also approved by her parents in writing. At the hearing on August 21, 2012, Dietrich's current private attorney also argued to open all three of the juvenile files. In analyzing the good cause exception contemplated by the Statute, the Court must take the crime victim's position into account and give it serious consideration. Here, the victim supports the Court opening the record.

The Prosecution has no objection to the case being open

The Jefferson County Attorney's Office stated several times during the oral arguments in court that they had no objection to the Courier-Journal's motion to open the files in these juvenile matters. As the entity charged with protecting our community and promoting offender accountability, if the office believed these goals would be somehow thwarted by the public release of the court files, one would think the Jefferson County Attorney would file motions seeking to have the confidentiality enforced with in this case. Instead, as the court considers the reasons underlying the good cause analysis, it has kept in mind that the County Attorney has no objection.

Confidentiality in the Computer/Internet Age

Since the Unified Juvenile Code was enacted in 1986, the landscape of information distribution has changed significantly. While all of the principles underlying the need for protection of juveniles have remained the same, the manner in which the public receives its information has changed greatly. In today's lightening fast world of immediate dissemination of news via the internet and social media, the concept that a matter can be reasonably kept secret from a community is more daunting. In this case, the story told by Dietrich reached a national and even global audience in a matter of days. This has cast an immediate and far reaching suspicion on the States' criminal justice system. All of the minors involved in this case-- Dietrich, Frey and Zehnder-- have accused each other of posting comments about what happened on the internet.

As a result of so much information about the underlying incident being so quickly and widely distributed, it is considerably more difficult to find that the community has no interest in the conduct of this case. It is clear purview of the legislature, and not the courts, to address the

realism of confidentiality in a digital age. The Court must follow the law. However, the legislature in its wisdom did leave room for the courts to exercise discretion in considering the question of access to a court proceeding on a case by case basis. Here, the broad based community interest brought about by the rapid information age cannot be overlooked.

The Defendants/Best Interests

The overriding consideration for this court must be the best interests of the juveniles involved in the case. It is a most difficult and complex consideration when the juvenile Victim is advocating full disclosure and the juvenile Defendants are requesting the court maintain confidentiality. The two Defendants in this case were 16 years old at the time of the offenses. Neither have any prior violations of the law, and yet, they have pled guilty to serious acts against the Victim. Juvenile law requires that the court examine all issues with the interests of the minor children involved as the first priority.

Both Attorneys for Frey and Zehnder have filed briefs arguing the law requires these proceedings to remain confidential and that good cause does not exist in this case. The Defendants believe it is unfair to even consider releasing the record just because of all of the media attention. They also raise the issue that the case involving these minors is still ongoing, unlike the facts in Eastridge, where the file opened by the court involved a man who no longer needed the protection of a confidential proceeding. These arguments are persuasive in that the public's simple desire to know cannot be a sufficient reason to open a juvenile proceeding. These minor children are profoundly affected by this process, and it is this fact that weighs most heavily in favor of keeping the record confidential.

The Defendant's lawyers further believe that the victim's actions in talking about her experience brought about the need for explanation of the circumstances. Dietrich's lawyers

argue it was an attempt to hold their client in contempt that caused the intense public scrutiny. Whatever the root cause, the situation now has escalated because no one can discuss the decisions made in the case. It is unfortunate for all of the youth involved that they have been thrust into more protracted litigation than is found in a normal juvenile case. While Frey and Zehnder's counsel argue that disclosure will ruin their lives, it seems that the antiseptic of the truth and openness would benefit all of the parties to this matter. The adversarial system that is one of the foundations to our legal system can be fully realized. In the best interest analysis before this Court, there is more in favor of opening the record than the mere public's desire to know.

For all of these reasons, there is good cause contemplated under Kentucky law to review the record in this case. Therefore, the Courier-Journal's motion for access to the record is sustained. In light of the additional motions before this Court, and the pending dispositional hearing, the Court further holds that in order to insure proper decorum that only one camera will be allowed and no photographs or filming of the minors involved in these proceedings in the courtroom. No photographing any of the minor children involved in the courtroom environment or waiting area without the permission of the parties and their parents.

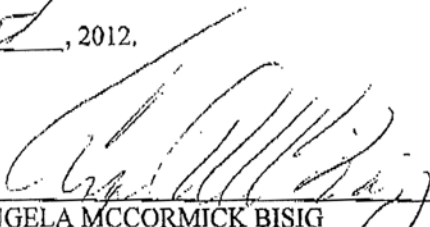
ORDER

Upon the motion of the Courier-Journal, Inc, to intervene in this case and be allowed access to the files relating to the cases of Dietrich, Frey and Zehender, and the Court being otherwise sufficiently advised,

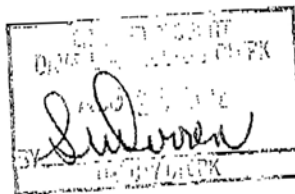
IT IS HEREBY ORDERED AND ADJUDGED that the Courier-Journal is granted leave to intervene in this case. The Court further finds that there is good cause to provide access to the court records in this case, and the Courier-Journal's motion is GRANTED.

This is a final and appealable Order and there is no just cause for delay in its entry or execution.

Entered this 28 day August, 2012.


ANGELA MCCORMICK BISIG
CHIEF JUDGE, JEFFERSON DISTRICT COURT

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