

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-992

Filed: 6 August 2019

Guilford County, Nos. 17-CvS-9423, 17-CvS-9539, 17-CvS-9540, 17-CvS-9673-74

IN THE MATTER OF CUSTODIAL LAW ENFORCEMENT RECORDING SOUGHT
BY CITY OF GREENSBORO

Appeal by Plaintiff from order entered 23 February 2018 by Judge Susan Bray
in Guilford County Superior Court. Heard in the Court of Appeals 8 May 2019.

Fox Rothschild LLP, by Patrick M. Kane and Kip David Nelson, and City of Greensboro Attorney's Office, by Rosetta Davidson Davis, for Petitioner-Appellant City of Greensboro.

Rossabi Reardon Klein Spivey PLLC, by Gavin J. Reardon and Amiel J. Rossabi, for Other-Appellee Involved Greensboro Police Officers.

Julius L. Chambers Center for Civil Rights, by Mark Dorosin and Elizabeth Haddix, ACLU of North Carolina Legal Foundation, by Christopher A. Brook, and Tin, Fulton, Walker & Owen, PLLC, by S. Luke Largess and Cheyenne N. Chambers, for Amici Curiae.

DILLON, Judge.

Petitioner City of Greensboro (the “City”) appeals from the trial court’s order denying its Motion to Modify Restrictions placed on Greensboro city council members, which allowed them to view certain recordings from body cameras (“body-cams”) worn by Greensboro Police Department officers, *but* which limited their ability to discuss the recordings in a public setting. The City contends that the trial court’s restrictions interfere with the city council members’ fundamental responsibilities to their

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constituents and violate council members' First Amendment rights. After careful consideration, we affirm.

I. Background

This case arises from a 10 September 2016 incident in downtown Greensboro, resulting in the arrest of several individuals by Greensboro police officers (the "Officers"). The parties to this action are the City and the Officers.

Video footage of the incident was recorded by the Officers' body-cams. The City petitioned the footage be made available to members of its City council to view.

In January 2018, the trial court entered orders (the "Release Orders") allowing members of the City's governing council and certain other City officials to view the body-cam footage, but subject to a limited gag order, as follows: those City officials choosing to view the footage would not be allowed to discuss the footage except amongst themselves in the performance of their official duties. This Release Order further provided that any violation of the gag order would subject the offender to a fine of up to five hundred dollars (\$500.00) and imprisonment of up to thirty (30) days. The Release Order, though, allowed the City Attorney to seek modification of the gag order in the future.

The following month, in February 2018, the City moved to lift the gag order, to allow its officials to discuss the body-cam footage with their constituents and others.

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After a hearing on the matter, the trial court entered orders denying the City's motions for modification (the "Modification Denial Order").

The City appealed.¹

II. Analysis

On appeal, the City argues that the trial court committed error by refusing to remove the gag order. We disagree.

In conducting our review, we will first assess the initial validity of the restriction in the Release Orders under the First Amendment.

Our General Assembly has provided that police body-cam footage is neither a public nor a personnel record, N.C. Gen. Stat. § 132-1.4A(b) (2016), and that only those depicted in the video and their personal representatives have an absolute right to view the footage, N.C. Gen. Stat. § 132-1.4A(c) (2016). The General Assembly also provided that anyone else wanting to view police body-cam footage may not do so unless that individual obtains a court order. N.C. Gen. Stat. § 132-1.4A(g) (2016). And "[i]n determining whether to order the release of all or a portion of the recording, in addition to any other standards [it] deems relevant," the court must consider the applicability of eight standards in making its decision, as follows:

- (1) Release is necessary to advance a compelling public

¹ The Officers contend that the Modification Denial Order and the initial Release Orders are interlocutory because they left open the possibility of future modification once City officials actually viewed the body-cam footage. However, alongside its appeal, the City has filed a petition for writ of *certiorari*. To the extent that the City has no right to appeal the orders before us, we grant the City's petition for writ of *certiorari* to aid our jurisdiction. See N.C. R. App. P. 21(a)(1).

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interest.

(2) The recording contains information that is otherwise confidential or exempt from disclosure or release under State or federal law.

(3) The person requesting release is seeking to obtain evidence to determine legal issues in a current or potential court proceeding.

...

(5) Release may harm the reputation or jeopardize the safety of a person.

(6) Release would create a serious threat to the fair, impartial, and orderly administration of justice.

(7) Confidentiality is necessary to protect either an active or inactive internal or criminal investigation or potential internal or criminal investigation.

(8) There is good cause shown to release all portions of a recording.

Id. If a court is inclined to grant a request to release the footage, the court “may place any conditions or restrictions on the release of the recording that the court, *in its discretion*, deems appropriate.” *Id.* (emphasis added).

Here, the trial court, in its discretion, deemed it appropriate to place a “condition or restriction” on the release of the body-cam footage to the City officials; namely, that the City officials could only discuss the footage amongst themselves in their official capacities. To support the imposition of this gag order, the trial court determined that statutory standards #1, 2, 3, 5, 6, 7 and 8 were all applicable.

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Specifically, standards #2, 5, 6 and 7 all support the imposition of the gag order. And in its Modification Denial Order, the trial court, in its discretion, denied the City's motion to lift the gag order.

In its principal brief to our Court, though, the City made no argument that the trial court abused its discretion in the manner it considered or weighed the statutory standards. And it is the City's burden on appeal to show how the trial court abused its discretion.² Rather, the City argues that the gag order impermissibly violates the First Amendment rights of its council members and, otherwise, impairs their ability to engage in open government.³ For the following reasons, we disagree.

The gag order does not violate the City's First Amendment rights⁴ because the gag order only restricts the council's speech about matters that the council, otherwise,

² The City does note in its factual summation that the criminal cases of the two individuals depicted in the video were no longer pending. And this statement does suggest that standard #7, that a court must consider whether denying a request for the release of body-cam footage would be "necessary to protect either an active or inactive internal or criminal investigation[.]" was no longer applicable. N.C. Gen. Stat. § 132-1.4A(g)(7) (2016). But the City makes no argument that the other statutory standards supporting the gag order were no longer present. For instance, the City makes no argument that standard #5, that a public disclosure of the information "may harm the reputation or jeopardize the safety of [the officers,]" was no longer applicable.

³ Briefly, for clarity, we elaborate that the City does not challenge the constitutionality of Section 132-1.4A itself. The City makes no arguments regarding the constitutional validity of keeping body-cam footage private, requiring court orders for release of the footage, or allowing the imposition of restrictions for viewing the footage based upon the trial court's discretion. Rather, the City challenges the constitutionality of the particular restriction placed on its access to the footage in this case: an order limiting the city council members' speech under threat of punishment.

⁴ The Officers contend that whether the restriction is unconstitutional under the First Amendment is not preserved for appeal because the issue was not argued during the trial court's hearing on the motions for modification. *State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal."). Indeed, our Courts have a policy of not undertaking constitutional questions "except on a

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had no right to discover except by the grace of the legislature through a judicial order. Indeed, our General Assembly chose not to make body-cam footage a public record. See N.C. Gen. Stat. § 132-1.4A(b). In so holding, we are guided by the United States Supreme Court's opinion in *Seattle Times Co. v. Rhinehart*, in which that Court held that a protective order preventing public disclosure of information learned through discovery in a civil case did not violate the First Amendment. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32-37 (1984). In that case, a newspaper was involved in litigation and sought discovery of financial documents from the other party. The trial court allowed the discovery, deeming it relevant to the litigation, but otherwise granted the other party a protective order preventing the newspaper from publishing the information to the public. The newspaper challenged the protective order, contending that it had a First Amendment right to publish the information learned during discovery.

ground definitely drawn into focus by [the movant's] pleadings." *Hudson v. Atl. Coast Line R. Co.*, 242 N.C. 650, 667, 89 S.E.2d 441, 453 (1955).

However, this Court has stated that specific language invoking the constitution is not required where a constitutional issue is "apparent from the context." *State v. Spence*, 237 N.C. App. 367, 371, 764 S.E.2d 670, 674-75 (2014) (holding criminal defendant properly preserved constitutional issue by making a request that "directly implicate[d]" a constitutional right). In its motion to modify restrictions, the City repeatedly references the city council members' inability to properly engage in discussion and political discourse with their constituents. The City argued the same during the trial court's hearing on the matter. And the United States Supreme Court has acknowledged that an elected representative's speech to their constituency is guarded by the First Amendment. See *Bond v. Floyd*, 385 U.S. 116, 136-37 (1966). The issue of the First Amendment's affirmative grant of freedom of speech was "definitely drawn into focus" by the City's arguments, which "directly implicate" a government official's need to speak openly with his or her constituency.

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The *Seattle Times* Court disagreed, holding that the protective order did not violate the newspaper's First Amendment rights. Essentially, the Court held that where a person only learns of information through judicial compulsion, the court compelling disclosure can place restrictions on the further dissemination of that information, but otherwise cannot generally place restrictions on the dissemination of information learned by other means:

As in all civil litigation, petitioners gained the information they wish to disseminate only by virtue of the trial court's discovery processes. As the [Civil Procedure] Rules authorizing discovery were adopted by the state legislature, the processes thereunder are a matter of legislative grace. A litigant [otherwise] has no First Amendment right of access to [the] information.

...

[I]t is significant to note that an order prohibiting dissemination of . . . information [that was only learned about through discovery during civil litigation] is not the kind of classic prior restraint that requires exacting First Amendment scrutiny. As in this case, such a protective order prevents a party from disseminating only that information obtained through use of the discovery process. Thus, the party may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's process.

Id. at 32-34 (internal citation omitted).

The present case is similar to *Seattle Times*. Specifically, here, the City has no First Amendment right to the body-cam footage, but has been given the right to access

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the information through a court order. The gag order only prevents the City from disseminating information that it has only learned through the court order. The gag order does not otherwise restrain the City officials from discussing the subject police encounter generally, only from discussing the body-cam footage specifically. Therefore, we conclude that the gag order does not impermissibly infringe on the City's First Amendment rights.

In the same way, we conclude that the gag order does not impermissibly impair the City council's ability to perform its official duties. Indeed, the City council members have no right to the information in the first place. The trial court could have denied the request to view the body-cam footage altogether. The City council members are still free to discuss any information about the police encounter learned from other sources with their constituents. Accordingly, we conclude that the trial court did not exceed its authority in imposing the gag order as a condition of access to the body-cam footage.

III. Conclusion

We conclude that, though the restriction does limit the City council members' speech, the trial court did not abuse its discretion in initially placing and later refusing to modify a restriction on release of body-cam footage, as the City officials otherwise had no right to the information. Much like a protective order under Rule 26(c), the discretionary restrictions allowed by Section 132-1.4A seek to protect the

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interests of those depicted in the information being released. In this case, protecting the reputation and safety of those individuals, as well as safeguarding the administration of justice, presents a substantial government interest for which the trial court's restrictions are no greater than necessary. The City has failed to meet its burden of showing that the trial court abused its discretion in determining that this protection is still not warranted. Therefore, we affirm.

AFFIRMED.

Judge ZACHARY concurs.

Judge BERGER concurs by separate opinion.

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BERGER, Judge, concurring in separate opinion.

I concur with the majority's analysis. However, appellant's constitutional argument was not raised in the trial court. Because appellant presents its First Amendment argument for the first time on appeal, this matter should be dismissed. *See Powell v. N.C. Dep't of Transp.*, 209 N.C. App. 284, 296, 704 S.E.2d 547, 555 (2011) ("A constitutional issue not raised at trial will generally not be considered for the first time on appeal.").