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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

COLLETON COUNTY
Court of General Sessions
The Honorable Clifton B. Newman, Circuit Judge

Appellate Case No. 2023-000392

Juror #785/Myra Crosby,Petitioner

Of Which

The State..... Respondent,

v.

Richard Alexander Murdaugh Appellant.

STATE OF SOUTH CAROLINA’S RESPONSE IN OPPOSITION
TO PETITION FOR LIMITED INTERVENTION
AND MOTION TO UNSEAL RECORD AND MEMORANDUM IN SUPPORT

The Respondent State of South Carolina makes a Return in opposition to the Petition of Juror 785. In the Petition, the excused juror asserts that she is filing the Petition seeking the right to make the record of her removal public. She bases this request on a general right of the public to know aspects of the criminal trial under the First Amendment. The State is informed that Appellant Murdaugh is taking no position in this matter. The State opposes as Petitioner fails to show why she should not be required to adhere to the terms of the consent order which contains a provision she not “further publish or disseminate the materials.” Order to Unseal Records, November 2, 2023.

I.

Certain facts are undisputed. Juror 785 was removed from the jury on In *State v. Murdaugh*, on March 2, 2023, Judge Newman addressed his determination about the removal of juror 785:

THE COURT: First off this morning, we have to deal with the issue involving the removal of a juror. A few days ago I received a complaint from a member of the public indicating that a juror had engaged in improper conversations with parties not associated with the case. I communicated and provided a copy of the communication to defense counsel. After court we then met with the juror on the record, and the juror denied any – denied discussing the case with anyone not on the jury, or with anyone on the jury. She provided information that led us to -- the Court to contact the persons that she was suspected of having conversations with concerning the case.

Those individuals were interviewed and provided an affidavit regarding the contact that the jury had – juror had with them. We then also brought those two individuals in and had a hearing on it in chambers and on the record in the presence of counsel yesterday, in which both of those individuals waffled on the nature and the extent of the contact. They also provided a recorded interview, or the State provided the Court an interview with the jurors, and I’ve reviewed that interview last night.

So, the juror has had contact or discussions concerning the case with at least three individuals. And though it does not appear that the conversations were that extensive, it did involve the juror offering her opinion regarding evidence received up to that point in the trial that the conversation took place. And in order to preserve the integrity of the process and the interests of both the State and the defense in a fair trial, that juror will be removed and replaced by another juror.

I will make a part of the record, under seal because of maintaining the confidentiality or identity of the jurors, I will place under seal the Court interview, affidavits received, and the -- and both discussions with counsel taking place on the record. And all of that will be made a part of the record in the case. And we will bring the juror out to inform her that she will no longer - her services will no longer be needed. We will then replace her with an alternate juror.

Any additional comments by the State or the defense?

MR. WATERS: Not from the State, Your Honor.

MR. HARPOOTLIAN: Your Honor, we do not except from your ruling. I just sat through everything you sat through, and it's muddled, but we would defer to your

judgment. . . .

Tr. 5737, l. 23-5739, l. 18. (emphasis added)

Judge Newman followed up with the fact that he had not had any discussions with any SLED agents about this juror matter and that his inquiries had been directly with the suspected parties involved and with the juror. After noting there had been intense publicity in the case and a temptation to engage in discussions with others, he stated “but it is improper and contrary to my instruction to the jury daily, multiple times per day, and this juror unfortunately violated my order.” Tr. p. 5740, l. 8-15.

Judge Newman then had Juror 785 brought before the Court. At that point Judge Newman made the additional findings in her presence:

THE COURT: Okay. I have -- as you know we've had some discussions with you over the past couple of days concerning indications of conversations with a few folks not on the jury concerning the case and expressing some opinion about the case. *I have reviewed everything, including statements given by individuals and the recorded interviews, and concluded that despite my order to not discuss the case with anyone, that intentionally or unintentionally you've had some discussions with some folks not on the jury and -- which is going to require me to remove you from the jury.*

You have been, by all accounts, a great juror and smiled consistently, and seemingly been attentive to the case and performed well, and I'm sure that with all of the time you've invested in it, you probably hate not to continue, or maybe you're ready to go, I don't know. But I certainly want to thank you for your service. I'm not suggesting that you intentionally did anything wrong, but that in order to preserve the integrity of the process and in fairness to all of the parties involved, we're going to replace you with one of the other jurors. to remove you from the jury.

Tr.p. 5740, l. 24 – p. 5741, l. 20. (emphasis added).

Judge Newman's November 2, 2023 Conditional Consent Order to Unseal Records

On November 2, 2023, Judge Newman entered a consent order granting counsel for Juror 785 access to copies of court exhibits related to the “juror removal process” which were

sealed. In that Order, the State, through Creighton Waters consented subject to an additional condition that neither counsel nor Juror No. 785 shall further publish or disseminate the materials.” Current counsel McCulloch signed this consent order and condition, as well as counsel for Mr. Murdaugh and Senior Assistant Deputy Attorney General Waters. Order to Unseal Records, dated November 2, 2023.¹

July 22, 2024 Circuit Court Motion to Unseal Records

On July 16, 2024, the Juror 785 file a motion in the Circuit Court a similar motion to unseal the same records. In that motion, counsel for Juror #785 now wished to have the same records unsealed because she claimed she was the only juror affected by the court’s order. Although counsel for Appellant Murdaugh consented,² the State indicated that it could not consent.

In an email to Circuit Court Judge Heath Taylor, the State urged that the proper court since the matter was then pending on appeal in the appellate courts. The State noted that Initial Briefs had not yet been filed so matters related to the removal of the juror and the designation of matter had not been resolved. It is unclear at this stage, based upon the arguments yet to be presented whether the excluded juror issue would be presented and whether the identities of the in camera witnesses would be revealed or sealed. The State pointed to SCACR Rule 205 and

¹ On January 4, 2024, an additional protective order in State v. Murdaugh was entered by former Chief Justice Toal related to the pending motion for new trial, This Order essentially continued and expanded earlier protective orders issued by Judge Newman on August 31, 2022. The Court found the necessity of confidentiality orders given the high profile and media presence in the case and authorized disclosure to witnesses and potential witnesses and their representative and prevents copies from being left with the witnesses or potential witnesses.

² Consent was in the circuit court proceedings. In this Court, Appellant Murdaugh has merely asserted he takes no position. Sept. 16, 2024 Return to Intervenors’ Petition.

whether the better course to send it to the appellate courts. The underlying issue is whether the vacation of an order sealing certain records and in camera testimony by two circuit court judges who had the jurisdiction to act should more appropriately be handled by the appellate courts. The State asserted that those courts have exclusive jurisdiction after the filing of the notices of appeal which will likely address issues related to the removal of the juror during the trial, as matters specifically raised in the circuit court. *See, Ex parte Greenville News*, 326 S.C. 1, 482 S.E.2d 556 (1997) *Cf. Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 6, 8, 630 S.E.2d 464, 467-68, 469 (2006). The motion has not been addressed in the circuit court.

II.

The request by a non-party witness in an appeal to unseal sealed records in a criminal appeal appears to be unprecedented. The correctness of the decision to exclude Juror 758 is likely a matter to be raised in the appeal by the parties, although Appellant Murdaugh's counsel did not except or object to the ruling removing the juror. Tr. p. 5739, l. 15-25. Nevertheless, this Court has consolidated the appeals setting the due date for the Initial Brief of Appellant Designation of Matter in the appeal for December 10, 2024. Once the Initial Brief of Appellant is filed, the parties will have a better idea on how to treat this issue. The Supreme Court has stated:

A party seeking to seal material beyond those personal identifiers listed above must file a motion to seal with the appellate court in which the matter is pending. This is true even if the lower court or administrative tribunal may have issued an order sealing the record. **Until the motion is ruled on, the clerk of the appellate court shall treat the material as if it is sealed.** Parties and counsel are reminded that the standard established in *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006), and *Davis v. Jennings*, 304 S.C. 502, 405 S.E.2d 601 (1991), must be met before any request to seal all or a portion of a record will be granted. Once sealed by order of an appellate court, the materials will remain sealed before the appellate courts unless otherwise ordered by the appellate court in which the matter is pending.

In re Revised Ord. Concerning Pers. Identifying Info. & Other Sensitive Info. in App. Ct. Filings, 407 S.C. 607, 608–09, 757 S.E.2d 421, 422 (2014).

The focus of the Petitioner position is to rescind a consent order that she entered into in November 2023. Because a consent decree embodies the agreement of the parties, it is contractual in nature and generally cannot subsequently be opened, changed, or set aside in the absence of fraud, mutual mistake, accident, actual absence of consent, or other grounds adequate to justify the rescission of a contract, such as coercion, incompetence of one of the parties, gross disparity in the bargaining positions of the parties, or newly discovered evidence. None of those are claimed to exist here. The Petitioner generally claims that she wants to make matters public that she originally agreed that she would not disclose. However, a change in desire to abide by its terms does not ordinarily warrant modification of consent decree if it was actually anticipated at the time the consent decree was entered into, or if the change of circumstance was deliberately brought about by the moving party.³ Moreover, a consent decree is not subject to modification simply when it is no longer convenient to live with its terms:

Ordinarily, where an order is entered by consent, it is binding and conclusive and cannot be attacked by the parties either by direct appeal or in a collateral proceeding. *Johnson v. Johnson*, 310 S.C. 44, 46–47, 425 S.E.2d 46, 48 (Ct. App. 1992); *Jones & Parker v. Webb*, 8 S.C. 202 (1876). However, a consent order is an agreement of the parties, under the sanction of the court, and is to be interpreted as an agreement. *Id.* It can be rescinded by mutual consent in a subsequent court action. *See In re Pendergrass' Will*,

³ Petitioner claims a broad public right to the information under the First Amendment – information that she only gained under a consent order agreeing to its non-disclosure. To the extent that she is relying on the First Amendment as a basis to attempt to alter that consent, such an argument was abandoned when she, with counsel, agreed to the condition. It has also been abandoned here by failure to fully argue standing. A review of the petition shows that she makes no argument that she has third party standing to assert an interest on behalf of unnamed members of the general public. *See generally State v. Brockmeyer*, 406 S.C. 324, 336, 751 S.E.2d 645, 651 n. 7 (2013) (noting a failure to address standing but recognizing some persuasive authority that a news station may have standing to assert protective claims arising from certain anonymous postings).

251 N.C. 737, 112 S.E.2d 562 (1960); *State ex rel. North Carolina State Board of Registration for Professional Engineers & Land Surveyors v. Testing Laboratories, Inc.*, 52 N.C.App. 344, 278 S.E.2d 564 (1981). It cannot, however, be set aside in part so that one party is absolved from the duty imposed by it, while the same party retains the benefit it confers. *Jones & Parker v. Webb, supra*.

Johnson v. Johnson, 310 S.C. 44, 46–47, 425 S.E.2d 46, 48 (Ct. App. 1992).

Here, the State has not agreed, at this point, to agree to unseal the records that Judge Newman sealed. Although the Petitioner asserts that she has changed her mind about the agreement she entered into with the Court in November 2023, the State has not changed its position. As Judge Newman noted, the proceedings related to her removal, not only included her, but also involved an interview with the Court with two individuals *in camera*, as well as Juror 785.

CONCLUSION

WHEREFORE, having made its Response to the petition to unseal, the State of South Carolina requests the petition be denied. In the alternative, the State requests that the petition be held in abeyance until the briefing on the merits in the direct appeal has been submitted.

Respectfully submitted,

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