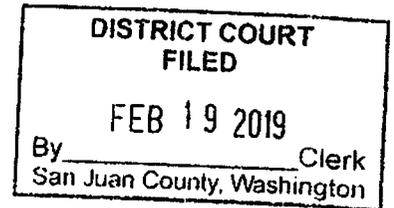


SAN JUAN COUNTY DISTRICT COURT
350 Court Street - P.O. Box 127 - Friday Harbor, WA 98250
360-378-4017 (Tel) - 360-378-4099 (Fax)
dstct@sanjuanco.com



Carolyn M. Jewett
Judge

Melissa I. Derksema
Court Administrator

February 19, 2019

Mr. Randall K. Gaylord
San Juan County Prosecuting Attorney
PO Box 760
Friday Harbor, WA 98250

Ms. Colleen Kenimond
Attorney at Law
PO Box 2143
Anacortes, WA 98221

Mr. Michael T. Kitson
Patterson Buchanan Fobes and Leitch, Inc., PS
2122 Third Avenue, Suite 500
Seattle, WA 98121

Mr. Nicholas Power
Law Office of Nicholas Power
540 Guard St
Friday Harbor, WA 98250

Re: State of Washington v. Dustin Schible, 8Z0773349

Dear Counsel:

This matter was before the Court on February 12, 2019 for hearing on Sheriff Ronald Krebs' GR15 Motion To Seal Security Video. At that time the Court also reviewed the status of the protective order entered on February 2, 2019 that temporarily sealed the USB thumbdrive which contains a copy of the security camera video recording of the proceedings that occurred in this matter on January 31, 2019, the first day of the scheduled jury trial. Sheriff Krebs' Motion seeks an order that would permanently seal the entire video recording on that thumbdrive. At the February 12th hearing the Court heard argument from counsel for Sheriff Krebs, counsel for the State of Washington, and counsel for the Defendant. In recognition of the fact that the requested sealing appeared to implicate the public's right to the open administration of justice mandated by Article 1, Section 10 of the Washington State Constitution, the Court gave everyone present at the February 12th hearing an opportunity to object to the requested sealing. Five individuals took that opportunity, all five of whom expressed their opposition to the Motion and the reasons for their opposition.

Sheriff Krebs' Motion makes four arguments that the Court must address. First, he argues that the USB thumbdrive should not be entered into the record. The thumbdrive was not made an exhibit during the proceedings on February 2nd, even though the Court did identify, mark and admit 6 screenshots that captured certain images depicted at key moments during the security camera recording. The Court concluded during the hearing on February 12th that the thumbdrive should be a part of the record and directed the Clerk to mark and admit it as Exhibit 10. As stated, and as more fully explained below, the Court's decision on February 2nd to grant the Defendant's CrRLJ 8.3 Motion To Dismiss was based in large part on the very particular ways in which the security camera was moved, rather than on what was depicted in the screen shots. The video recording, now being a part of the record, may only be sealed or redacted in accordance with GR 15.

Sheriff Krebs next argues that GR 15 authorizes the permanent sealing of the video recording because unsealing it would create a security threat by revealing the camera's blind spots. He then argues that that threat outweighs the public's interest in viewing the video. This is essentially the same argument as Sheriff Krebs' fourth argument, so both will be addressed last.

Sheriff Krebs' third argument is that a decision to seal the video recording would not implicate the public's constitutional right to observe the administration of justice openly and fully. It is the case that not all court records implicate the public's right under Article 1, Section 10. Records that have no direct relationship to the underlying case do not have constitutional protection, whereas records that do have a direct relationship are protected. Where the information contained in a particular record is part of the basis for a court's decision, there is clearly a direct relationship that requires a constitutional analysis.

As above noted, the Court's decision to grant Defendant's Motion To Dismiss was based in large part on the fact that the video recording clearly indicated that a State actor intentionally manipulated the security camera in a way that unequivocally evidenced an effort to view defense counsel's notes, which are protected work product. That intentionality is not nearly as evident when viewing only the screenshots admitted as Exhibits 4-9. The Court concludes that the video recording contained in the thumbdrive has a direct and substantial relationship to the Court's dispositive decision in this case, the dismissal of all charges against the Defendant. A sealing of

that video therefore implicates the public's right to an open court under Article 1, Section 10 of the Washington State Constitution.

The ultimate question, then, is whether the video recording contained on the thumbdrive should be sealed under GR 15. And because a sealing would implicate the public's constitutional right to an open court, an analysis of the requested sealing must be undertaken in accordance with the five following requirements set forth in Seattle Times Co. v. Ishikawa, 97 Wn2d 30 (1982):

1. The proponent of sealing must make some showing of a need for doing so and where that need is based on a right other than accused's right to a fair trial, the proponent must show a serious and imminent threat to that right;
2. Anyone present when the sealing motion is made must be given an opportunity to object to the sealing;
3. The proposed method of curtailing access must be the least restrictive means available to protect the threatened interest;
4. The court must weigh the competing interests of the proponent of the sealing and of the public; and
5. The order must be no broader in its application or duration than is necessary to serve its purpose.

GR 15 authorizes the sealing of a court record only if, after a hearing, the court finds that a sealing is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record. Because Sheriff Krebs must satisfy the Ishikawa requirements, as well as those in GR 15, the Court will focus on the Ishikawa requirements because they essentially subsume the GR 15 requirements.

As noted, Sheriff Krebs argues that the video recording needs to be sealed because making it public would compromise the primary method of security in the District Court Courtroom by revealing the camera's blind spots. And that, he argues, would be a serious and imminent security threat that outweighs what he asserts is the public's minimal interest in viewing the video. He characterizes the public's interest as "minimal" because, in his view, the relevant

moments in the video are already captured by the screenshots that are in the record and therefore available to the public.

Sheriff Krebs' view misunderstands the basis of the Court's ruling on the dismissal motion, which is perhaps understandable because the Court, in retrospect, recognizes that it did not make sufficiently clear, in its oral ruling on February 2nd, that one of the two dispositive factors was the very movement of the camera, the other factor being the absence of any credible explanations for who exactly moved the camera and why it was moved. It was those two factors that left the Court with a reasonable doubt as to whether or not the presumed prejudice to the Defendant had been rebutted.¹ In fact, the Court stated that the screenshots by themselves did not appear to have actually compromised defense counsel's work product, as only a few non-substantive words were legible.

In sum, it was not the moments captured on the screenshots that were relevant to the Court's decision to dismiss the charges, but the movements of the camera. Unless the public has an opportunity to view at least the portions of the video recording that include the clearly deliberate movements of the camera, and to consider those movements in light of the testimony given by Sheriff Krebs and Sheriff's Office Dispatcher Nicholas Wainwright regarding those movements, the public cannot reasonably be expected to have a full understanding of the basis for the Court's dismissal of the charges against Mr. Schible.

The Court recognizes the Sheriff's need for security cameras in the District Court Courtroom as an important part of his responsibility for the safety of all who enter the Courtroom. The Court also recognizes that compromising or reducing the efficacy of those cameras would be a serious matter. But the Court does not agree that releasing at least some, if not all, portions of the video would constitute an imminent threat to the Sheriff's ability to provide Courtroom security at its current level. His assertions that releasing the video would reveal the camera's blind spots are not persuasive. As the Court stated during oral argument on the Motion To Seal, the video only

¹ The Court finds the evaluation of the adequacy of the State's rebuttal evidence in both State v. Pena Fuentes, 179 Wn2d 808 (2014) and State v. Irby, 3 WnApp2nd 247(2018) to be instructive regarding the adequacy of the rebuttal evidence provided by the State in its response to Defendant's dismissal motion.

reveals what was seen, and in no way shows what, if anything, can't be seen. To the extent certain areas of the Courtroom are not seen in the video, there is nothing in the video to suggest that those areas are not capable of being seen by the cameras. By raising the issue of blind spots the Sheriff has suggested that there may be blind spots. But if there are blind spots, the Court cannot, on the basis of the evidence now before it, understand how the video recording reveals where they are or how extensive they may be.

The Court concludes that the public's interest in viewing at least those portions of the video that were relevant to the Court's decision to grant Defendant's Motion to Dismiss outweighs Sheriff Krebs' need to have the entire video sealed. To the extent the Court can be persuaded that other portions of the video might in some way actually compromise the efficacy of the cameras, the Court would consider redacting those particular identified portions from the recording.

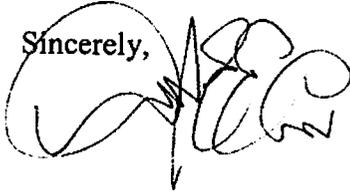
However, under Ishikawa, the Court is obliged to curtail open access in the least restrictive manner available for protecting the threatened interests. The Court will therefore afford Sheriff Krebs an opportunity to provide a proposed redacted copy of the video, eliminating only those specific and limited portions that he believes would actually compromise his ability to provide security in the Courtroom. In doing so, he may also provide additional evidence and argument to support his assertion that the proposed redacted portions reveal blind spots.

However, the portions of the video during which the camera is manipulated to zoom in on what is depicted in Exhibits 4-10 may not be redacted. In addition, those unredacted portions must include some time just before each manipulation begins and some time after each ends, in order to provide adequate context for each manipulation. The Court will determine the duration of each unredacted portion of the video. And in light of the presumption of openness, the Court will only approve redactions, if any, for those limited portions that the Court is persuaded would constitute such a serious and imminent threat to Sheriff Krebs' need to provide security in the Courtroom that his interest outweighs the public's interest under Article 1, Section 10 of the Washington State Constitution. Should the Court remain unpersuaded, the entire video will be unsealed.

Unless Sheriff Krebs avails himself of the opportunity to provide a proposed redacted copy of the video before February 26, 2019, the Court requests that he prepare a proper order to

formalize this ruling and note it for presentation on February 26th at 2:00 p.m. In the meantime, the protective order entered on February 2nd remains in effect.

Sincerely,

A handwritten signature in black ink, appearing to be "Donald E. Eaton", written in a cursive style.

Donald E. Eaton, Judge Pro Temp

DEE: dee