

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

STATE OF FLORIDA,

Case No.: 2009CF009771AMB

Division: W

vs.

DALIA A. DIPPOLITO,
Defendant.

_____ /

**ORDER ON STATE'S MOTION FOR PROTECTIVE
AND FOR REVOCATION OF PRO HAC VICE STATUS**

This matter came before the Court on the State of Florida's Motion for Protective Order and for Revocation of Pro Hac Vice Status (DE #1174), filed February 1, 2017. A hearing was conducted on the State's Motion on March 3, 2017. The Court has heard and reviewed the evidence presented and the submissions of the parties, including the argument of counsel. The Court has also reviewed the court file and the record in this matter. Upon consideration, the Court makes the legal and factual findings that follow.

The State's Motion seeks two remedies. First, the State seeks a prohibition, or limitation, on extrajudicial statements by defense counsel. This is often referred to as a "gag order." Second, the State seeks to revoke Brian Claypool's ability to appear in this case *pro hac vice*. In other words, the State wants Mr. Claypool removed from this case.

The relief sought by the State is squarely rooted in the extraordinary publicity this case has received and, from the State's perspective, in Mr. Claypool's involvement in that publicity.¹ Consideration of the State's Motion requires review of the history of media

¹ As will be discussed, the State's request to remove Mr. Claypool from this case is based on more than extrajudicial statements. The State also relies on misrepresentations to the jury during trial and on clearly improper statements made during closing argument.

coverage in this case, Mr. Claypool's involvement in extrajudicial statements to the media, the media coverage of the second trial of this case, and events which have transpired since the declaration of a mistrial in December of 2016.

History of Media Coverage

From the time of the Defendant's arrest, this case has garnered extensive media coverage. The initial media attention was, in no small measure, the result of the Boynton Beach Police Department's decision to involve the television show *COPS* in the filming of a staged crime scene and in the Defendant's subsequent arrest.

Videos relating to this case were immediately posted on the internet. *COPS* aired a story on this case with interviews featuring various members of the Boynton Beach Police Department. Videos from the case were broadcast nationally during the airing of the story. In addition to this broadcast, members of the Boynton Beach Police Department participated in a POD cast to discuss the case.

This case was first tried in April and May of 2011. There was extensive media coverage of the first trial, particularly at a local level. The verdict in the first trial was widely reported as was the Defendant's sentence. Sometime after the first trial, Elizabeth Parker, Esq., one of the prosecutors in the case, wrote a book about the case entitled *Poison Candy: The Murderous Madam: Inside Dalia Dippolito's Plot to Kill*.

All of this resulted in heightened media interest in, and attention to, this case. This publicity pre-dates Mr. Claypool's involvement in the case and cannot be attributed to Mr. Claypool, or for that matter to anyone connected with the representation of the Defendant.

Mr. Claypool's Involvement In Pre-Trial Publicity

On September 12, 2014, the Fourth District Court of Appeal issued its mandate reversing the Defendant's conviction. After the mandate, the Defendant retained, and then discharged, several attorneys for the retrial. Mr. Claypool first appeared in this case in July of 2015 when he was granted leave to appear *pro hac vice* for the Defendant. While this case was always the focus of media attention, Mr. Claypool's participation in this case took the publicity to a new level.

The State essentially argues that Mr. Claypool's strategy, from the beginning, was to effect and influence potential jurors in Palm Beach County through extrajudicial statements to the media. While Mr. Claypool's motive in engaging in extrajudicial statements concerning this case is subject to debate, his participation in an extraordinary level of such statements cannot be debated.

Leading up to the retrial of this case in December of 2016, Mr. Claypool conducted numerous scheduled press conferences to discuss this case and the defense's version of the facts. The Defendant, apparently at the recommendation of Mr. Claypool, travelled to Miami for an interview with the television show "20/20."² The interview aired on national television in December of 2015.

In early 2016, the Court was required to hear and decide a motion filed by the Defendant seeking to dismiss this case based on objective entrapment. During this time period, Mr. Claypool conducted regular press conferences discussing his view of the facts of the case and the significance of those facts. Most of his comments to the media

² Travelling to Miami for a television interview was a violation of the terms of the Defendant's pretrial release and was the subject of a motion to revoke bond filed by the State (DE # 832).

focused on the Boynton Beach Police Department and emphasized the defense theory that the police manufactured the alleged crime for the sake of an appearance on *COPS*.³

One of the press conferences conducted by Mr. Claypool resulted in this Court issuing an Order to Show Cause (DE #826). The press conference occurred on February 23, 2016, immediately following an evidentiary hearing on the Defendant's motion to dismiss. The Court concluded that Mr. Claypool's extrajudicial statements violated Bar Rule 4-8.2(a) by making a statement concerning the integrity of the Court that he knows to be false, or that was made with reckless disregard as to its truth or falsity and also violated Bar Rule 4-3.6(a) by making an extrajudicial statement that he knows, or reasonably should know, will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

The purpose of the Order to Show Cause was to determine whether to permit Mr. Claypool to continue to appear *pro hac vice*. After a hearing, the Court decided against revoking Mr. Claypool's privilege to appear in this case.

Media Coverage Second Trial

The retrial of this case commenced on December 1, 2016. Media coverage of the trial was extensive and pervasive. Stories appeared regularly in the printed press, including the *Palm Beach Post* and the *Sun Sentinel*. All of the local television stations covered the case. National news teams including NBC's *Dateline* were present in the courtroom. The case was discussed on nationally broadcast news programs like ABC's

³ There is, of course, nothing wrong with pursuing this defense theory. It was consistent with motion to dismiss before the Court and is, candidly, the Defendant's theory of the case. The issue here is not the right of the Defendant to pursue her theory of defense, rather the issue presented is the impact of extrajudicial statements on a pending trial.

Good Morning America. The trial was live streamed and could be viewed nationally over the internet.

The impact of the news coverage on the retrial cannot be overstated or ignored. From the beginning, jury selection was affected by the pervasive media attention to the case. Seventy percent of the 200 jurors summoned for the trial had heard something about the case. Jury selection, which included individual questioning of potential jurors, lasted four days.

During jury selection, the Defendant repeatedly moved for a change in venue asserting that she could not receive a fair trial because of pervasive media coverage. Ironically, during this time Mr. Claypool was commenting about the case on a twitter account. In total, the Defendant filed three separate motions to change venue during *voir dire*.⁴

In the various motions, and renewed motions, for change of venue in this case the Defendant made references to the existence of YouTube videos relating to the case and to the number of “hits” (views) each of these videos had received. For example, a search of “Dalia Dippolito” produced 454,523 hits versus 16,121 hits for “John Goodman trial.” The Defendant asserted that from November of 2016 to December of 2016 there had been 120 television programs relating to the Defendant’s case and 150 local news articles within 30 days of the trial. The Defendant also emphasized the national media attention relating to the case.⁵

⁴ The Defendant did not file a timely motion to change venue within 10 of trial as required by Fla. R. Crim. P. 3.240.

⁵ The Defendant’s own filings establish record evidence of the extraordinary and pervasive media coverage of this case. The Court has considered this evidence in connection with the State’s Motion.

While the Court acknowledged the extensive news coverage of the trial, the Defendant's motions for change of venue were denied. A 200 person venire had been summoned for the case and before resorting to a change of venue the Court chose to continue with jury selection to determine if an impartial jury could be seated. Ultimately, an impartial jury was selected and sworn. Even after the jury was sworn, media coverage continued to be an issue in the trial.

During the trial, the Defendant moved for a mistrial based on the pervasive media coverage alleging that the jury would be influenced by community pressure. While the jury was deliberating, the Defendant asserted – without evidence – that a juror had been speaking to the media and the jury was deadlocked 5 to 1. These assertions were without merit, but serve to illustrate the atmosphere that surrounded the trial.

Events Since Declaration of Mistrial

The second trial in this case ended in a hung jury with the jury split 3 to 3. After a mistrial was declared, Mr. Claypool again conducted a press conference to discuss the case. He continued to discuss the tactics and motivations of the Boynton Beach Police Department and commented on the spiritual nature of the Defendant and her family. The case has continued to receive extensive news coverage at times featuring comments by Mr. Claypool or by co-counsel, Greg Rosenfeld, relating to the case.

The tenor of the most recent comments by defense counsel has moved to criticism of the State Attorney's Office. The State has pointed to a press release by the PR News Channel in which the Defendant's attorneys are quoted as saying that this a politically motivated prosecution and that the taxpayers should not have to bear the costs associated with the prosecutors trying to save face. The same article makes reference to the

sentencing guidelines and asserts that the Defendant has already done her time based on the nearly eight years she has been on in-house arrest.

In this charged atmosphere, this case is now scheduled for a third trial which is set to commence on June 2, 2017. The Defendant has abandoned her request for a change of venue and a jury must, therefore, be selected in Palm Beach County.⁶ The Court must now decide based not only on the most recent extrajudicial statements by the Defendant's counsel, but also based on the history of the case, whether Mr. Claypool's *pro hac vice* status should be revoked and/or whether counsel should be prohibited from continuing to make extrajudicial statements concerning this case.

Analysis

Removal of Mr. Claypool

The Court will first address the State's request for revocation of Mr. Claypool's privilege to appear *pro hac vice*. Attorneys licensed to practice law in the State of Florida may appear in Florida courts as a matter of right. This right does not extend to out-of-state attorneys appearing in Florida *pro hac vice*. *State Industries, Inc. v. Jernigan*, 751 So. 2d 680 (Fla. 5th DCA 2000). Out-of-state attorneys may appear in Florida at the grace of the Court.

The revocation of an attorney's privilege to appear *pro hac vice* is generally left to the discretion of the trial court. *See, e.g. Prewitt Enterprises, LLC v. Tommy Constantine Racing, LLC*, 185 So. 3d 566 (Fla. 4th DCA 2016). An attorney's *pro hac vice* status may be revoked for conduct which adversely impacts the administration of justice and

⁶ The Defendant, essentially, controls venue in this case. The Defendant has a right under the Florida Constitution to be tried in the county where the crime was committed. *See*, Art. I, § 16(a), Fla. Const. Moving venue over a defendant's objection, or without a request by the defendant, would not likely survive appellate review.

that conduct need not rise to the level of a violation of the Florida Rules of Professional Conduct. *State Industries, Inc., id* at 682.

The State asserts that Mr. Claypool's conduct in this case is unprofessional and warrants revocation of his right to appear *pro hac vice*. The State emphasizes the following:

- Mr. Claypool's continuous extrajudicial statements to the media designed to influence the pool of potential jurors available to try this case.
- Mr. Claypool's comments to the media calling into question the integrity of the Court resulting in the entry of the Order to Show Cause.
- Mr. Claypool's improper comment in closing argument that the jury should send the Defendant home to her child.
- Mr. Claypool knowingly in opening statement misrepresented the existence of 500 plus phone calls between the Defendant and Mohamed Shihadeh.
- Mr. Claypool's unprofessional comments to the media attacking the State Attorney's Office for pursuing a politically motivated prosecution wasting taxpayers' money.

The State's assertions raise legitimate concerns which must be considered and weighed.

As previously discussed, the volume and frequency of Mr. Claypool's extrajudicial statements to the press have been extraordinary. He has: 1) conducted regular press conferences during the course of the case; 2) commented on the case on a twitter account; 3) placed his client on a nationally televised program to discuss the case

in advance of trial; and 4) regularly commented on the case to multiple and numerous media outlets.

The Court has already concluded that some of Mr. Claypool's comments crossed the line between mere commentary on the case to comments giving rise to a potential violation of the Rules of Professional Conduct. The press conference of February 23, 2016, which resulted in an Order to Show Cause, serves as an example of improper extrajudicial commentary. Many of Mr. Claypool's recent statements attacking the prosecution approach a similar line.

The comment in closing argument referenced by the State also clearly crossed a line. Asking a jury to return a criminal defendant to her family is a direct appeal to sympathy. Such a comment invites the jury to decide the case based on emotion and not on the evidence, lack of evidence or the law. Mr. Claypool, as an experienced trial attorney, clearly knew that such a comment was improper.

While the State raises legitimate concerns relating to Mr. Claypool's appearance in this case, the removal of a party's chosen counsel is a drastic remedy which must be used sparingly. *Alexander v. Tandem Staffing Solutions, Inc.*, 881 So. 2d 607, 608 (Fla. 4th DCA 2004); *Caruso v. Knight*, 124 So. 3d 962, 963-64 (Fla. 4th DCA 2013). Removal of chosen counsel should be avoided if lesser alternatives are available to alleviate any harm. *Caruso, id.* at 964; *Esquire Care, Inc., v. Maguire*, 532 So. 2d 740, 741 (Fla. 2nd DCA 1988).

The Defendant has chosen Mr. Claypool as her lead attorney in this case. If found guilty in a third trial, the Defendant faces up to 20 years in prison. Mr. Claypool is intimately familiar with this case. He knows the witnesses and he knows the evidence. It

also cannot be denied that Mr. Claypool is an effective, knowledgeable and skilled advocate for the Defendant.

The Court must weigh and consider the impact of depriving the Defendant of Mr. Claypool's representation versus the concerns raised by the State. The Court must also consider whether the concerns raised by the State can be alleviated by a remedy that does not require the revocation Mr. Claypool's right to appear in this case *pro hac vice*.

After balancing the competing concerns and rights of the parties, the Court concludes that revocation of Mr. Claypool's *pro hac vice* status is not required in this case. This is particularly true because there are other, less drastic, remedies that can address the issues raised by the State.

As will be discussed below, reasonable restrictions on extrajudicial statements by all counsel in the case can address the potential tainting of the jury pool and eliminate any unprofessional personal attacks. Improper arguments at trial can be addressed with a timely contemporaneous objection or by a motion *in limine* filed in advance of trial.

Protective Order – Extrajudicial Statements

The Court will next address the State's request for a protective order prohibiting counsel from making extrajudicial statements to the media. As with all citizens, attorneys enjoy the rights enumerated in the First Amendment, including freedom of speech. However, attorneys must exercise the right of free speech consistent with, and constrained by, the requirements of the Florida Rules of Professional Conduct.

Rule 4-3.6 governs extrajudicial statements by attorneys. The rule provides, in pertinent part, as follows:

(a) Prejudicial Extrajudicial Statements Prohibited. A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by

means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding due to its creation of an imminent and substantial detrimental effect on that proceeding.

See, R. Regulating Fla. Bar 4-3.6 (Trial Publicity). Rule 4-3.6 strikes a balance between free speech and extrajudicial statements which are likely to prejudice a judicial proceeding.

Trial courts have the inherent power to issue orders prohibiting extrajudicial comments by attorneys. *Florida Freedom Newspapers, Inc.*, 497 So. 2d 652, 657 (Fla. 1986); *State ex rel Miami Herald Publishing Co. v. McIntosh*, 340 So. 2d 904, 910 (Fla. 1977)(muzzling lawyers who may wish to make public statements has long been recognized as within the court's inherent power to control professional conduct.) Limitations on communications between lawyers and the media must be for good cause to assure a fair trial and must be supported by evidence that extrajudicial statements pose a substantial or imminent threat to a fair trial. *E.I. Du Pont De Nemours and Company v. Aquamar, S.A.*, 33 So. 3d 839, 841 (Fla. 4th DCA 2010); *Rodriguez ex rel. Posso-Rodriguez v. Feinstein*, 734 So. 2d 1162, 1164 (Fla. 3rd DCA 1999).

The evidence, and the record, in this case support a finding that continued unfettered extrajudicial statements pose a substantial and imminent threat to a fair trial. Jury selection is scheduled to commence on June 2, 2017. The Defendant has chosen to proceed to trial with jurors from Palm Beach County. Potential jurors in Palm Beach County have already been exposed to extraordinary and pervasive media coverage of this case.

A fair trial for both the Defendant and the State requires the selection of jurors that have not been tainted by pretrial publicity. Restricting extrajudicial statements by the attorneys in this case will not end pretrial publicity. The news media can, and will, continue to report on this case and many of the issues faced in the second retrial will be present in the third retrial. However, the nature, extent and tenor of the statements of counsel in this case pose a special risk to the selection of a fair and impartial jury.

The extrajudicial statements made by the Defendant's attorneys in this case, whether intended or not, are likely to bias potential jurors by repeated exposure to matters which are completely collateral to this case. The numerous press conferences conducted by Mr. Claypool have directly, or indirectly, suggested that this case is a referendum on the police. While certainly the specific actions of the Boynton Beach Police Department are an issue in this case, this case is not a referendum on the police in general, nor can any juror lawfully decide this case to send a message to law enforcement.

Statements made recently by defense counsel concerning the Defendant "having served her time" and concerning the State Attorney's Office similarly place collateral matters into the public forum in this publicity charged case. Counsel has: 1) commented on the Defendant's guideline score sheet and her time served on house arrest; 2) described the prosecution as politically motivated to save face; and 3) condemned the prosecution as a waste of taxpayer money. No juror can lawfully consider any of these matters.

Further, collateral matters aside, continued extrajudicial statements concerning the case itself presents a special risk to a fair trial. The Defendant has correctly argued that publication of videos, POD casts and television shows like *COPS* threaten a fair trial by

poisoning or tainting the jury pool in Palm Beach County. Extrajudicial statements by counsel discussing the case and advancing in the public arena defense theories of the case pose the same threat.

In most cases, commentary on collateral matters, or on the case itself, would not pose an imminent threat to a fair trial. However, as already discussed, the level of media coverage of this case has been, and continues to be, extraordinary. Every statement made by anyone connected with this case is being reported and re-reported. Speculation runs rampant on irrelevant issues in this case such as when did the Defendant have a child while on house arrest.⁷ In a case that has already been tried twice in this county, and in a case exposed to such pervasive media coverage, the impact on potential jurors of continued extrajudicial statements by the attorneys in this case poses a real and imminent threat to the orderly administration of justice and to a fair trial.

Based on the foregoing, it is hereby,

ORDERED AND ADJUDGED as follows:

1. The State's Motion to revoke Brian Claypool, Esq.'s *pro hac vice* status is DENIED.
2. The State's Motion for Protective Order is GRANTED. All counsel in this case are prohibited from making any extrajudicial statements that a reasonable person would expect to be disseminated by means of public communication, concerning or relating to, the following:

⁷ This issue was thrust into the public forum by Mr. Claypool's improper plea to the jury to send the Defendant home to her child.

- a. The evidence in this case or any party's view or opinion of the evidence in this case;
- b. The facts of the case or any party's interpretation of the facts of the case, including any inferences that could be drawn from the facts;
- c. The motive or motivation of the State in prosecuting the case or the motive or motivation of the Defendant in pursuing any theory of defense;
- d. Sentencing or punishment of the Defendant including any reference to the sentence imposed after the first trial, the Defendant's score on the Criminal Punishment Code Scoresheet, length of in-house arrest or punishment of the Defendant if found guilty.
- e. Theories of the case by the State or the Defendant.
- f. The first or second trial of this case, including the results of those trials.
- g. The disparagement of any attorney of record in this case.

Nothing in this Order shall prohibit the attorneys from commenting generally on the progress of the case, procedural matters or rulings of the Court, provided the comments are consistent with the Florida Rules of Professional Conduct. Unless specifically renewed by the Court, the prohibitions contained in this Order shall automatically expire upon the swearing of a jury to hear and decide this case.

DONE AND ORDERED in Chambers, at West Palm Beach, Palm Beach

County, Florida this 17th day of March, 2017.



The signature of Glenn D. Kelley is written in black ink over a circular seal. The seal contains the text 'THE 17TH JUDICIAL CIRCUIT OF FLORIDA' and 'ADMINISTRATIVE OFFICE OF THE COURT'.

JUDGE GLENN D. KELLEY
CIRCUIT COURT JUDGE

See Attached Counsel List

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