IN THE CRIMINAL COURT FOR KNOX COUNTY, TENNESSEE
DIVISION I

STATE OF TENNESSEE	)	
	)	
V.	)	
	)	CAPITAL CASE
LETALVIS DARNELL COBBINS	)	NO. 86216 A
LEMARCUS DAVIDSON	)	86216 B
GEORGE THOMAS	)	86216 C
VANESSA COLEMAN	)	86216 D

ORDER DENYING MOTIONS TO RESTRICT MEDIA COVERAGE

This matter came before the Court on February 27, 2009, on Defendant Cobbin's motion #115 to exclude further media coverage and/or to withdraw; Defendant Thomas' motion #47 to impose reasonable restrictions to online comments posted on websites published by the print and broadcast media; Defendant Davidson's motion #44 and Defendant Coleman's motion #98 to adopt Defendant George Thomas' motion to impose reasonable restrictions to online comments posted on websites published by the print and broadcast media; and the two motions to intervene on behalf of WBIR-TV and the Knoxville News Sentinel, as well as their respective briefs. At the hearing, Defendant Cobbins orally withdrew his request for total exclusion of media coverage, and also orally adopted the pleadings of co-defendants' Thomas and Davidson on this issue.

At the hearing, this Court GRANTED the two motions to intervene and heard argument from all parties on the issues.

All defendants, at the hearing, requested that this Court order (1) media outlets to

disable a portion of their websites (their internet forums) to prohibit web users from posting comments about any stories related to this case; (2) require media outlet internet users wishing to utilize the internet forums to use their true names and addresses; (3) or that this Court establish guidelines for acceptable comments on the internet forums and employ real-time monitors to ensure compliance. In Defendant Cobbins' written motion, he asserts that the intensive media coverage generated by this case "has fueled hostile threats, accusation, and diatribes by the public ... directed toward [the defendant], his co-defendants, and toward the attorneys who have been appointed by this Court to represent the various defendants." The written motions focus on the internet sites of local media and the public's ability to publish comments anonymously on those cites. Included in Defendant Cobbins' motion are various samples of comments posted by the public which discuss this case, the defendants, and the attorneys involved. Defendant Cobbins argues further in his motion that "[i]f the media cannot responsibly report, and/or monitor the public dissemination of its website content where such failure to monitor affects the effective representation of counsel for one or more defendants, it should not be allowed to further publicly disseminate information about this case." He also asserts that [w]hile the public has a right to be informed about these proceedings, that privilege will always be subservient to the constitutionally guaranteed right to receive effective assistance of counsel where one is charged with a capital crime."

While the state did not file a written response to this motion, the interveners each filed briefs on the issues and argued against the defendants' position at the hearing. Their position is that the defendants are seeking to unconstitutionally restrain the media and

censor public speech and that all the defendants' motions should be denied.

The Sixth Amendment of the United States Constitution includes the long-recognized right of a criminal defendant to the effective assistance of counsel. The First Amendment provides that "Congress shall make no law ... abridging the freedom ... of the press." The prohibitions of the First Amendment extend to the States through the Fourteenth Amendment. Article I, Section 19 of the Tennessee Constitution states

> That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. But in prosecutions for the publication of papers investigating the official conduct of officers, or men in public capacity, the truth thereof may be given in evidence; and in all indictments for libel, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other criminal cases.

Any prior restraint of expression bears a "heavy presumption against its constitutional validity." New York Times Co. v. United States, 403 U.S. 713, 714, 91 S. Ct. 2140, 2141, 29 L. Ed. 2d 822 (1971)(quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70, 83 S. Ct. 631, 639, 9 L. Ed. 2d 584 (1963)). A defendant "carries a heavy burden of showing justification for the imposition of such a restraint." Id. (Quoting Organization for a Better Austin v. Keefe, 402 U.S. 415, 419, 91 S. Ct. 1575, 1578, 29 L. Ed. 2d 1 (1971)).

The Supreme Court has refused to assign established priorities between the First Amendment and the Sixth Amendment. Nebraska Press Ass'n v. Stuart, 427 U.S. 539,

561, 96 S. Ct. 2791, 2803-04, 49 L. Ed. 2d 683 (1976). In Nebraska, the Court stated that "Our analysis ends as it began, with a confrontation between prior restraint imposed to protect one vital constitutional guarantee and the explicit command of another that the freedom to speak and publish shall not be abridged. We reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact."

The Court has also recognized that "[n]o right ranks higher than the right of an accused to a fair trial," Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 508, 104 S. Ct. 819, 823, 78 L. Ed. 2d 629 (1984), and that a defendant's right to a fair trial is "the most fundamental of all freedoms...." Estes v. Texas, 381 U.S. 532, 540, 85 S. Ct. 1628, 1632, 14 L. Ed. 2d 543 (1965). On the other hand, the Court also has repeatedly struck down prior restraints issued against the press, even in one case which dealt with a defendant's right to a fair trial. See Nebraska Press Ass'n v. Stuart, supra. The case now before this Court highlights the tensions between the need to protect the rights of the accused as fully as possible and the need to restrict publication/speech as little as possible.

The United States Supreme Court has continued to apply a case-by-case analysis. In Nebraska Press Ass'n v. Stuart, the Court established a three-part test to be used in determining whether a prior restraint is invalid; a trial court must determine (1) the nature and extent of pretrial publicity, (2) whether alternative measures would be likely to mitigate the effects of unrestrained pretrial publicity, and (3) how effectively a restraining

order would operate to prevent the threatened danger. 427 U.S. at 562, 96 S. Ct. at 2804.

In this case, the publicity has been extensive, detailed, and arguably misleading at times from a legal perspective. The relief sought currently is not the complete bar of media coverage of the proceedings, but rather a bar to the sharing of ideas between citizens who read or listen to the local media reports concerning this case, who wish to make anonymous public comment on the same in the media internet forums. This Court has already granted alternative measures to mitigate the effects of unrestrained pretrial publicity by granting a change of venire to those defendants who have made the request; therefore, the juries who will hear and decide the charges will not be from the local media coverage area. The relief sought also would not necessarily effectively operate to prevent the threatened danger. Counsel asserts that the restraint is necessary to ensure the effective representation of the defendants. Only two media outlets intervened in these proceedings. The internet is not restricted to use by the media alone. Private citizens have access to and utilize the internet everyday to freely discuss and exchange ideas whether on the internet forums of the two media outlets or otherwise.

Considering all the factors, this Court cannot find that disabling the internet forums of the media internet sites would be an appropriate restraint.

In addition to and in the center of the issue of restraint and freedom of speech in this case is the issue of whether anonymous speech on these internet forums is protected and whether it should be restricted. The Supreme Court has recognized that the First Amendment protects anonymous speech. Watchtower Bible & Tract Soc. Of N.Y. v. Vill. of Stratton, 536 U.S. 150 (2002); Buckley v. American Constitutional Law Found., 525

U.S. 182, 200 (1999); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995). In Reno v. ACLU, 521 U.S. 844, 870 (1997), the Court stated that there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to [the internet]." Cases have discussed this nation's history of anonymous speech and its importance in the establishment of this country and its constitution. E.g. McIntyre v. Ohio Election Comm'm, at 341-42; Doe v. 2TheMart.com Inc., 140 F. Supp. 2d 1088, 1092-93 (W.D. Wash. 2001). The court in Doe v. 2TheMart.com Inc. stated that:

> The right to speak anonymously was of fundamental importance to the establishment of our Constitution. Throughout the revolutionary and early federal period in American history, anonymous speech and the use of pseudonyms were powerful tools of political debate. The Federalist Papers (authored by Madison, Hamilton, and Jay) were written anonymously under the name "Publius." The anti-federalists responded with anonymous articles of their own, authored by "Cato" and "Brutus," among others. See generally *McIntyre, 514 U.S. at 341-42*. Anonymous speech is a great tradition that is woven into the fabric of this nation's history.
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> The right to speak anonymously extends to speech via the Internet. Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas. The "ability to speak one's mind" on the Internet "without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate." *Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal. 1999)*. People who have committed no wrongdoing should be free to participate in online forums without fear that their identity will be exposed under the authority of the court. Id.

140 F. Supp. 2d. at 1092-93.

This Court agrees with the court in Doe v. 2TheMart.com Inc.. So long as people are not committing any wrongdoing, they should be free to anonymously participate in the online forums.[1] Accordingly, this Court does not find that any restraint on the internet forums would be appropriate in this case.

In addition to the request by all four defendants discussed above, Defendant Cobbins' motion includes an alternative motion to allow counsel to withdraw due to the threatening nature of the comments made anonymously in the media. As correctly stated in Defendant Cobbins' motion, "our system of justice guarantees that each [defendant] receive the effective assistance of counsel. An attorney learns early in each person's professional career that he/she may be called upon to undertake an unpopular cause(s). Each [attorney] took an oath, as a condition precedent to receiving a licence to practice law, that he/she will zealously defend the interest of the client irrespective of the public favor or disfavor associated with such representation."

In this capital case, this Court has called upon some of this area's finest defense attorneys to represent the named defendants. At this court's request, the attorneys have graciously, and at great personal sacrifice, accepted these appointments and are zealously representing their clients as they are required to do by law. As pointed out by counsel, fees paid in appointed cases do not compare with the fees received by most attorneys in non-appointed cases. This Court greatly appreciates the sacrifices made by the members of the bar, on both sides of the courtroom, who accept this Court's appointments and who

[1]Stated otherwise, people who engage in unlawful conduct on the internet, as in any other forum, may be subject to any appropriate legal consequences of their unlawful conduct.

assist in the pursuit of justice. Without the dedication of these attorneys, our criminal justice system could not function.

At the hearing, Assistant District Attorney Leland Price announced that the State stands ready to investigate and/or prosecute anyone who anonymously or otherwise engages in criminal conduct toward any person, be it attorney, victim's family member, court personnel or otherwise. While this court understands counsel's concerns with the various general comments in the media concerning attorneys in this case, this court does not find that any of the comments rise to a level which would require allowing counsel to withdraw at this time.

Accordingly, Defendant Cobbin's motion #115 to exclude further media coverage and/or to withdraw, and Defendant Thomas' motion #47, Defendant Davidson's motion #44, and Defendant Coleman's motion #98 to impose reasonable restrictions to online comments posted on websites published by the print and broadcast media are DENIED.

ENTER THIS _____ DAY OF APRIL, 2009.

_____

Richard R. Baumgartner
Criminal Court Judge, Div.I

CERTIFICATE OF SERVICE

I, _____, Clerk, hereby certify that I have mailed a true and exact copy of same to all Counsel of Record for the Defendant, all co-defendants, and the State this the _____ day of _____, 2009.

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