COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

IN RE	§	No. 08-22-00056-CR
CLEVY MUCHETTE NELSON,	§	AN ORIGINAL PROCEEDING
Relator.	§	IN MANDAMUS

OPINION

This is a mandamus action brought by Relator Clevy Muchette Nelson challenging a gag order issued in a criminal case by Respondent, the Honorable Alyssa Perez, Judge of the 210th District Court. We will conditionally grant mandamus relief and direct the Respondent to dissolve the gag order.

I. BACKGROUND

Nelson was indicted on November 18, 2020, and reindicted on September 21, 2021, on one count of murder. The active indictment alleges that Nelson, with intent to cause serious bodily injury to Malcolm Perry, committed an act clearly dangerous to human life that caused Perry's death by pursuing Perry with a motor vehicle and/or striking Perry's motor vehicle with a motor vehicle operated by Richard Sennessie.

On March 30, 2021, the trial court set this case for a jury trial to be held on October 8, 2021. But on September 24, 2021, the State moved for a continuance. In the motion, the State's

attorney represented that he could not locate a necessary witness for trial, but that he believed the witness would be located and available for a trial setting in December. Nelson opposed the continuance request. The continuance was granted, and trial was reset to December 9, 2021.

On November 30, 2021, the trial court sua sponte issued a protective order enjoining multiple persons from discussing this case with the media. We reproduce the entire body of the protective order below verbatim:

ORDER

> The Court after carefully reviewing the status of the above-referenced cause and considering the severity and notoriety of this case, the Court finds it is in the best interest of the public administration of justice to enter a "protective" order.
>
> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that any attorney, employee or representative of: the El Paso District Attorney's Office, the El Paso County Sheriff's Office, the El Paso Police Department, the El Paso County District Clerk's Office, the Office of Criminal Justice Coordination of El Paso County, any representative and/or employee of any SURETY or bail bond company or bondsman that may post bond for the defendant; any victim(s) or any relatives of the victim's family; Defense counsel BROCK BENJAMIN, or any other subsequent attorney employed by the defendant or appointed by the Court to represent the defendant, any employee or representative of the Defense attorney, the Defendant or any relatives of the Defendant's family; any State or Defense witness or prospective witness are hereby enjoined from publicly discussing, making any statements, or answering, either directly or indirectly (by way of a third party), any questions propounded by the media or any representative thereof regarding the facts of this case or regarding any courtroom tactics or procedures involving the case of the STATE OF TEXAS V. CLEVY MUCHETTE NELSON.

That same day, Nelson filed an objection to the trial court's protective order and requested a hearing, alleging that the order violated her right to a public trial. The State's response concurred with the trial court's order, arguing that (1) the public statements, commentary, and opinions by participant will prejudice potential jurors and harm the judge's ability to conduct a fair trial; (2) the public statements, commentary, and opinions set forth in multiple social media platforms referencing Nelson's case are so prejudicial and fact specific that it will be impossible for the

judicial process to "weed out" those potential jurors affected by the content; and (3) the public statements, commentary, and opinions are widespread, inflammatory, and will taint the potential jury pool's impartiality. The State's response lacked references to any specific statements and attached no evidence.

The December 9, 2021 trial setting was continued, with several alternative back-up dates set. On March 24, 2022, the trial court held a hearing on the gag order in which the parties presented argument, but offered no evidence.[1] On March 28, 2022, the trial court overruled Nelson's objection and ordered the protective order to remain in place. The two-sentence order recites that the trial court considered Nelson's objections, and the State's Motion and Response, but makes no fact findings, nor adds explanation for the need for the gag order.

This mandamus action from Nelson followed.

II. DISCUSSION

In two issues, Nelson asserts that the gag order, which was issued more than a year after the case was originally indicted, is an unconstitutional prior restraint on speech that violates Article I, Section 8 of the Texas Constitution (Issue One) and the First Amendment to the United States Constitution (Issue Two). We agree that the gag order is constitutionally improper.

[1] In its response to Nelson's original mandamus petition, the State argued that Nelson had waived mandamus relief by failing to include reporter's records of any hearings related to the gag order in the mandamus appendix. *See* TEX.R.APP.P. 52.7(a)(2)(requiring relator to file with the petition a record containing a "properly authenticated transcript of any relevant testimony from any underlying proceeding . . . "). Nelson subsequently supplemented the appendix to include the March 24, 2022, hearing transcript.

The supplemental appendix shows the hearing was non-evidentiary. Since there is no allegation from the State that another evidentiary hearing took place for which we are missing a transcript, and since the gag order contains errors on its face, the presence or absence of this reporter's record does not materially affect our resolution of this mandamus action. *Cf. Michiana Easy Livin' Country, Inc. v. Holten*, 168 S.W.3d 777, 781-82 (Tex. 2005) (holding that pretrial hearings are presumptively non-evidentiary absent contrary evidence, and a reporter's record is "superfluous" for non-evidentiary hearings and need only be in the record if evidence is introduced in open court).

A. Standard of Review

To be entitled to mandamus relief, a relator must show both that the trial court clearly abused its discretion, and that the relator has no adequate remedy by appeal. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 134-36 (Tex. 2004) (orig. proceeding). The trial court abuses its discretion if it reaches a decision so arbitrary and unreasonable as to constitute a clear and prejudicial error of law. *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex.1992) (orig. proceeding). The burden is on the relator to show entitlement to mandamus relief. *See In re Ford Motor Company*, 165 S.W.3d 315, 317 (Tex. 2005) (orig. proceeding). A relator may challenge a trial court's gag order in mandamus proceedings because there is no other adequate remedy. *See In re Benton*, 238 S.W.3d 587, 592 (Tex.App.--Houston [14th Dist.] 2007, orig. proceeding); *San Antonio Express-News v. Roman*, 861 S.W.2d 265, 266 (Tex.App.--San Antonio 1993, orig. proceeding).

B. Limitations on Prior Restraint

Because they implicate free speech concerns, gag orders are subject to baseline constitutional restrictions under both the First Amendment to the United States Constitution and under Article I, Section 8 of the Texas Constitution. *See Davenport v. Garcia*, 834 S.W.2d 4, 8-9 (Tex. 1992) (orig. proceeding). "As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear." *Ashcroft v. Free Speech Coal.,* 535 U.S. 234, 245, 122 S.Ct. 1389, 1399, 152 L.Ed.2d 403 (2002); *see also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559, 96 S.Ct. 2791, 2803, 49 L.Ed.2d 683 (1976) ("[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."). Thus, "[a]ny prior restraint on expression comes . . . with a heavy presumption against its constitutional validity." *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419, 91 S.Ct. 1575, 1578,

29 L.Ed.2d 1 (1971) (internal quotation omitted).

At the same time, "[f]ew, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075, 111 S.Ct. 2720, 2745, 115 L.Ed.2d 888 (1991); *see also United States v. Brown*, 218 F.3d 415, 423 (5th Cir. 2000) ("Intense publicity surrounding a criminal proceeding—what Justice Frankfurter referred to as 'trial by newspaper'—poses significant and well-known dangers to a fair trial.") *quoting Pennekamp v. Florida*, 328 U.S. 331, 359, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946) (Frankfurter, J., concurring).

To balance these sometimes conflicting interests, a gag order under the federal constitutional standard must meet three requirements. First, it must be narrowly tailored. *In re Benton*, 238 S.W.3d at 593 (applying and citing authority for federal constitutional challenge to gag order). Second, the gag order must be the least restrictive means of preventing harm and no less burdensome alternatives would achieve the same governmental objectives. *Id.* Finally, the proponent of the gag order must meet the "threshold standard for imposing a prior restraint[.]" *Id*., *quoting United States v. Carmichael*, 326 F.Supp.2d 1267, 1293 (M.D. Ala. 2004) (collecting cases). The test for meeting the last element is the subject of a circuit split, but in the Fifth Circuit, the standard is the existence of a "substantial likelihood of material prejudice" to a party's right to a fair trial with no gag order. *Brown*, 218 F.3d at 427-28 (also discussing the more stringent standard of "clear and present danger" from the Sixth, Seventh, and Ninth Circuits).

The restrictions imposed on gag orders by Article I, Section 8 of the Texas Constitution are more stringent that those under the First Amendment to the federal constitution, in line with the broader breadth of the Texas Constitution's free speech clause. *See Davenport*, 834 S.W.2d at

7-9 (recounting constitutional history of Article I, Section 8). The Texas Supreme Court has held that under the Texas Constitution's free speech provision, prior restraints on speech—including gag orders—are presumptively unconstitutional. *Id.* at 9-10. Thus, a gag order in civil judicial proceedings will withstand constitutional scrutiny only where there are specific findings supported by evidence that (1) an imminent and irreparable harm to the judicial process will deprive litigants of a just resolution of their dispute, and (2) the judicial action represents the least restrictive means to prevent that harm. *Id*. at 10. The first requirement of the *Davenport* standard ensures "that only an imminent, severe harm can justify prior restraint, and in the context of gag orders, that harm must be to the judicial process." *Id.* at 10. "The second part of the test is intended to ensure that no alternative exists to treat the specific threat to the judicial process which would be less restrictive of state speech rights." *Id*.

Ultimately, the federal and state tests largely mirror each other on whether the order is narrowly tailored and the least restrictive means to achieve the desired aim. They differ substantively only as to whether a gag order applicant must establish a "substantial likelihood of material prejudice" to a party's right to a fair trial (the 5th circuit federal standard) or "imminent and irreparable harm to the judicial process" (the state standard under *Davenport*).

As a threshold matter, we must determine whether *Davenport* is the appropriate standard to use to measure this gag order's constitutionality. The State correctly points out that although the Texas Supreme Court in *Davenport* has definitively set the standard for when a gag order is improper in civil proceedings, the Texas Court of Criminal Appeals has not definitively ruled on whether the *Davenport* standard applies to gag orders in criminal proceedings.[2] Thus, the State

[2] *See In re State ex rel. Reyna*, No. WR-83,719-01, 2015 WL 4880411 (Tex.Crim.App. Aug. 13, 2015)(not designated for publication)(order staying a court of appeals mandamus decision dissolving a trial court gag order and ordering briefing on, among other things, whether *Davenport* applied to gag orders in criminal cases); *State ex rel. Reyna v. Court of Appeals for the Tenth Dist.*, No. WR-83,719-01, 2016 WL 9000796, at *1 (Tex.Crim.App. June 15,

asserts that it would be inappropriate for us to apply the *Davenport* standard in reviewing a criminal trial gag order.

It is true that the Texas Court of Criminal Appeals has not addressed the standard applicable to gag orders in criminal proceedings. "Even so, silence from one high court does not mean we are free to disregard the other high court's ruling . . . until both courts have ruled on this issue." *Ex parte Barrientez*, No. 08-14-00004-CR, 2015 WL 3505248, at *2 (Tex.App.--El Paso June 3, 2015, no pet.)(not designated for publication). We are bound by *Davenport* under principles of vertical stare decisis because it is a decision from one of our two supervisory courts, and nothing suggests the two high courts are in conflict on this issue. *Id*. Additionally, although *Davenport* dealt with a gag order issued in a civil case, our sister courts have routinely applied the *Davenport* standard in reviewing gag orders in criminal cases as well. *See, e.g.*, *In re Benton*, 238 S.W.3d at 594; *In re Graves*, 217 S.W.3d 744, 753 (Tex.App.--Waco 2007, orig. proceeding); *San Antonio Express-News*, 861 S.W.2d at 268.

As a result, we, too, will apply the *Davenport* standard in reviewing this case. Under that standard, we find that this gag order is deficient for two overarching reasons.

1. *The trial court's gag order failed to find that pretrial publicity would cause imminent and irreparable harm to the judicial process that will deprive litigants of a just resolution*

First, *Davenport* requires the trial court to make detailed findings that an imminent and irreparable harm to the judicial process will deprive litigants of a just resolution of their dispute absent entry of the gag order. *See Davenport*, 834 S.W.2d at 10. Here, the trial court's only finding related to that point was a single sentence stating that "considering the severity and notoriety of

2016)(lifting stay and denying mandamus relief against court of appeals by summary opinion)(not designated for publication). Under TEX.R.APP.P. 77.3, unpublished opinions of the Texas Court of Criminal Appeals have no precedential value and must not be cited as authority by counsel or by a court. We cite these cases not as precedent, but only to demonstrate the Texas Court of Criminal Appeals has yet to rule on the question in a precedential decision.

this case" it is in the "best interest of the public administration of justice" to issue a gag order. But this publicity finding is conclusory on its face and falls well below the standard needed to constitutionally justify a prior restraint on speech.

When a gag order is based on pretrial publicity concerns, the order must "make specific findings detailing the nature or extent of the pretrial publicity" and show how that publicity "will impact the right to a fair and impartial jury." *In re Graves*, 217 S.W.3d at 752-53. Our sister courts have struck down gag orders with publicity findings much more detailed and specific than the generalized finding in the gag order at bar. For example, *In re Benton* involved a gag order issued during criminal proceedings related to a murder charge. *See* 238 S.W.3d at 588-90. The State had tried a 16-year-old defendant for murder in connection with a gang fight in Houston. Before trial, the State moved for a gag order, asking the trial judge to take notice of "(1) the unusually emotional nature of the issues involved in this case; (2) the extensive local media coverage this case has already generated; and (3) the various and numerous media interviews with the defendant and counsel for the defendant that have been published and broadcast by local media." *Id*. at 588. The trial court first declined to issue a gag order. *Id*. The case was tried to a jury approximately two weeks later, but the trial judge ordered a mistrial after the jury deadlocked and failed to reach a verdict. *Id*.

Following the mistrial, the State and the defendant began plea negotiations, details of which appeared in two separate articles in the Houston Chronicle. *Id*. at 589. More than six weeks after the details had been reported, the trial court held an evidentiary hearing on the State's motion for entry of a gag order. *Id*. at 589-90. The trial court then issued a gag order, finding among other things that: (1) "the Court has admonished trial counsel to try the case in court and not in the media," (2) that "counsel for the Defendant exhibited an extraordinary willingness to grant

interviews to the media," (3) that the trial court believed counsel had violated the Texas Disciplinary Rules of Professional conduct by speaking to the press about plea negotiation details, (4) that the gag order was necessary to preserve the defendant's rights from being prejudiced, and (5) that the gag order was the least restrictive means of accomplishing that goal. *Id*. at 590-91. The gag order restricted the defendant, all attorneys, and "all attorney's staff, employees and/or agents associated with or participating in this case" from making any statement to the media about nine different legal topics and pieces of evidence, though the order permitted matter-of-fact discussions about certain court proceedings "without elaboration or characterization." *Id*. at 591-92.

The Houston Fourteenth Court of Appeals granted mandamus relief and dissolved the gag order, finding that even under the more lenient federal standard, the gag order failed to pass constitutional muster. The Court recognized that occasionally "there may be cases in which the record shows that material prejudice from extrajudicial statements is so likely that the trial court could act within its discretion in imposing prior restraint on the speech of trial participants," but it ultimately held that the trial court's generalized finding that publicity surrounding the case might jeopardize the court's ability to seat an impartial jury in the case could not justify the gag order, since there had been "no showing that such publicity is materially prejudicial" and "[e]ven pervasive and concentrated publicity is not prejudicial per se." *Id*. at 598, *citing Stuart*, 427 U.S. at 565; *see also In re Graves*, 217 S.W.3d at 752-53 (granting mandamus where gag order taking judicial notice of "local and national newspaper coverage" of criminal case did not satisfy *Davenport* standard because there were no specific findings explaining why pretrial publicity would "impact the right to a fair and impartial jury").

Here, the trial court's findings on pretrial publicity are much sparser than the detailed

findings found to be insufficient in both *In re Benton* and *In re Graves*. As a result, the gag order cannot satisfy the first step of the *Davenport* test. The trial court did not establish how the nature of pretrial publicity so differed from ordinary pretrial publicity that absent any gag order, there was the danger of imminent and irreparable harm to the judicial process in the form of jury pool taint.

2 The trial court's gag order, which broadly encompasses parties and non-parties, does not show how the order was the least restrictive means of harm mitigation

There is a second major problem with the trial court's gag order under *Davenport*: the trial court's gag order—which enjoins speech not only by counsel, the parties, and witnesses, but also by bail bondsmen and non-party relatives of victims and witnesses—does not indicate that it was the least restrictive means of accomplishing the goal of harm mitigation. *Davenport*, 834 S.W.2d at 10.

On the contrary, both the original sua sponte gag order and the order overruling Nelson's objection contain no written findings at all on the question of tailoring. Without this finding, the gag order is defective ab initio and fails to rebut the presumption of unconstitutionality. *See Grigsby v. Coker*, 904 S.W.2d 619, 621 (Tex. 1995)(orig. proceeding)(mandamus granted where gag order, entered after "no formal motion, no prior notice, and no formal hearing", was invalid on its face for failure to contain specific findings under *Davenport*). Thus, because the order fails to contain finding on whether it is narrowly tailored, the gag order is also constitutionally defective on this independent ground.

III. CONCLUSION

Neither the trial court's initial sua sponte order nor the subsequent order perpetuating the original gag order contained findings necessary to show the prior restraint on speech was constitutional. As a result, we sustain Nelson's issues and find that mandamus relief is warranted.

We conditionally grant the writ of mandamus. We direct the trial court to vacate the gag order. The writ will only issue if the trial court fails to vacate the gag order within a reasonable time period.

JEFF ALLEY, Justice

April 29, 2022

Before Rodriguez, C.J., Palafox, and Alley, JJ.

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