

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

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SUPERIOR COURT
CRIMINAL ACTION
NO. 2009-0385

COMMONWEALTH

vs.

NGA TROUNG

MEMORANDUM OF DECISION AND ORDER ON WBUR'S MOTION TO
PERMIT COPYING OF EXHIBITS ENTERED AT SUPPRESSION HEARING

INTRODUCTION

"Energy and persistence conquer all things." Benjamin Franklin, Maxims
Prefixed to Poor Richard's Almanac (1757). Today, the court rewards WBUR's
persistence and allows its motion to make copies of a DVD recording of the defendant's
interrogation by Worcester police officers. This motion is WBUR's third attempt to
make copies of this evidence, and reflects its enduring commitment to informing the
public about the events of this trial. For the reasons that follow, WBUR's Motion to
Permit Copying of Exhibits Entered at Suppression Hearing will be ALLOWED.

BACKGROUND

On March 17, 2009, the grand jury returned an indictment against the defendant
for murder in violation of G. L. c. 265, § 1. On September 17, 2010, the defendant filed a
Motion to Suppress pertaining to certain inculpatory statements she made during a police
interrogation. On November 1, 2010, and December 29, 2010, this court held an
evidentiary hearing on that motion in open court. A DVD recording of the interrogation
that produced the disputed statements ("the DVD") was entered into evidence and played

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copy to DA
+ C. Sullivan Esq.
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at the hearing on November 1, 2010. On February 25, 2011, the court allowed the Motion to Suppress.

On May 11, 2011, David Boeri ("Boeri"), a reporter with WBUR,¹ Boston's National Public Radio station, filed his first motion ("the first motion") seeking to make copies of certain exhibits entered into evidence at the hearing on the defendant's Motion to Suppress, including the DVD. On May 16, 2011, acknowledging the public's right of access to court documents, this court allowed WBUR access to the DVD for the purposes of viewing its contents, listening to its contents, taking notes on its contents, or broadcasting a story based on those observations. In the interest of preserving the defendant's right to a fair trial, however, the court did not permit WBUR to make a copy of the DVD or broadcast its contents directly. See United States v. McVeigh, 119 F.3d 806, 811 (10th Cir. 1997), citing Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978); United States v. Houlihan, 926 F. Supp. 14, 16 (D. Mass. 1996).

On May 27, 2011, WBUR filed a Motion for Reconsideration ("the second motion") pertaining to this court's decision on the first motion. Because there had been no change in circumstances that would warrant reexamination of this court's ruling on the first motion, the court likewise denied WBUR's second motion. See Hingham Mut. Fire Ins. Co. v. Travelers Ins. Co., Civil Action No. 04-0594, 2006 WL 4114610 at *1, (Norfolk Super. Ct. Nov. 20, 2006) (Sikora, J.) ("This court's opinions are not intended to be mere first drafts, subject to revision and reconsideration at a litigant's pleasure.") (citation omitted).

¹ For ease of reference, the court will refer to both Boeri and WBUR as "WBUR."

On August 22, 2011, the District Attorney filed a declaration of *nolle prosequi*. Accordingly, the present prosecution was terminated and the defendant was released. On August 25, 2011, WBUR filed the present third motion to make copies of the DVD.

DISCUSSION

While court documents are presumptively available to the public, McVeigh, 119 F.3d at 811, “a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial publicity.” Gannett Co. v. DePasquale, 443 U.S. 368, 378 (1979). In other words, “[w]hen the rights of the accused and those of the public come irreconcilably into conflict, the accused’s Sixth Amendment right to a fair trial must . . . take precedence over the public’s . . . right of access to pretrial proceedings.” In re Globe Newspaper Co., 729 F.2d 47, 53 (1st Cir. 1994).

Here, the District Attorney’s exercise of its executive branch prerogative to file a *nolle prosequi* has, for the moment at least, obviated concerns related to the defendant’s Sixth Amendment right to a fair trial, since no trial is pending. Therefore, only the public’s right of access to court documents remains at issue, and the court must honor WBUR’s right of access to the DVD.

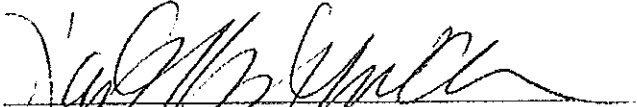
Consequently, WBUR will have the opportunity to broadcast statements by the defendant serving to implicate her in the death of her son – statements this court concluded were involuntary, having been the product of police coercion, and, therefore, inadmissible at the defendant’s then-pending trial. If the court had not suppressed those statements prior to trial, the defendant would have had the opportunity to challenge those statements at a trial. Mostly importantly, she would have had the right to a jury trial in which an impartial cross-section of her own community would have determined whether

or not the Commonwealth had proved her guilt beyond a reasonable doubt. See also Carlos Baker, Ernest Hemingway: Selected Letters 1917-1961 (1981) (“The best ammunition against lies is the truth. There is no ammunition against gossip.”).

Instead, the suppressed inculpatory statements will be preserved permanently in the vast informational archive known as the internet. They will be broadcast to the public and available to anyone who performs computer searches for the defendant, for the rest of her life and beyond. The defendant will most likely have no opportunity to present competing evidence of her innocence on a comparably prominent stage, and faces the rest of her life under the shadow of public opprobrium based on a crime for which she was not convicted. Compare R. Marc Kantrowitz, The Trials of Roscoe “Fatty” Arbuckle (Massachusetts Lawyers Weekly Mar. 28, 2011).

CONCLUSION AND ORDER

For the foregoing reasons, WBUR’s Motion to Permit Copying of Exhibits Entered at Suppression Hearing is **ALLOWED**. In order to preserve the evidence, the Clerk will make copies of the DVD’s that WBUR is seeking. WBUR will be responsible for all costs associated with the copying.


Janet Kenton-Walker
Justice of the Superior Court

DATED: September 27, 2011.