

IN THE CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
IN AND FOR FLAGLER COUNTY FLORIDA
APPELLATE DIVISION

RICK STALY
As sheriff of Flagler County,
Petitioner

vs.

Case No. 2018 CA 000561
County Court Case No. 18-
MM-867

STATE OF FLORIDA AND ERIC COOLEY,
Respondent.

_____ /

PETITION FOR WRIT OF CERTIORARI

COMES NOW the Petitioner, SHERIFF RICK STALY, by and through undersigned counsel, pursuant to rule 9.100 Fla.R.App.P. and files this Petition for Writ of Certiorari and states:

JURISDICTION

Review of the denial of a non-party's motion to quash a subpoena is reviewed by certiorari petition. Ulrich v. Coast Dental Services, 739 So.2d 142 (Fla. 5th DCA 1999). A subpoena commanding the presence of a nonparty to give testimony is reviewable by certiorari because he has no adequate remedy on appeal. Miami-Dade County v. Dade County Police Benev. Ass'n, 103 So.3d 236, 238 (Fla. 3d DCA 2012).

BRIEF STATEMENT OF THE FACTS

On June 29, 2018, Respondent Eric Cooley was arrested for a charge of misdemeanor domestic battery under Florida Statute § 784.03(1). Since that time Sheriff Rick Staly and the Flagler County Sheriff's Office has issued one press release regarding this case with comment. (Exhibit A) Sheriff Staly has been questioned by various media outlets since the press release. The Sheriff's comments have always been of a general nature in regard to the type of charge alleged in this case (misdemeanor domestic battery) and its impact on society. Sheriff Staly has never used a pejorative adjective to describe Mr. Cooley nor weighed in on the strength of the evidence in this case. Sheriff Staly has championed an on-going initiative to combat domestic violence in our community since mid-2017, but has never singled out Cooley (the defendant) in any remarks on that issue.

On September 17, 2018, the Respondent Eric Cooley filed a Motion for Gag Order to restrict the Petitioner from making public comments regarding this case. (Exhibit B). On September 18, 2018, Petitioner filed a written response to Respondent's Motion for Gag Order. (Exhibit C). This matter is set for hearing on September 27, 2018 at 3:00 PM. (Exhibit D). On September 19, 2018, Defendant's counsel perfected substitute service upon Sheriff Staly with a subpoena to testify on September 27, 2018. (Exhibit E). The subpoena is for personal appearance before

the Honorable Melissa Moore Stens on the date of the hearing to testify in this action.

On September 21, 2018, the undersigned filed a motion to quash the subpoena for the personal appearance directed at the Sheriff and for protective order. (Exhibit F). The same day, counsel for petitioner received permission to cross-notice the Motion to Quash for the hearing on September 27, 2018. (Exhibit G)

Before counsel for Petitioner was able to file a cross notice of hearing the Court issued an order denying the Motion to Quash the Subpoena and for Protective Order on September 24, 2018. (Exhibit H). On September 24, 2018, the undersigned filed a Request for Reconsideration of the denial of the Motion to Quash the Subpoena and for Protective Order. (Exhibit I) That request has been cross noticed for the hearing on September 27, 2018. (Exhibit J).¹

NATURE OF RELIEF SOUGHT

Petitioner seeks for this Court to grant this Petition and set aside the Order Denying the Motion to Quash the Subpoena and for Protective Order, and to quash or direct the lower court to quash the subpoena of the Sheriff.

¹ A motion for stay has been filed in the lower court along with this petition; a hearing is being sought.

STANDARD OF REVIEW

A nonparty witness seeking certiorari review of an order denying its motion to quash a subpoena must show the trial court departed from the essential requirements of the law and that such departure resulted in material injury that cannot be corrected on post judgment appeal. Price v. Hannahs, 954 So.2d 97, 100 (Fla 2d. DCA 2007); Syken v. Elkins, 644 So.2d 539 (Fla. 3d DCA 1994), approved, 672 So.2d 517 (Fla. 1996). A failure to apply the correct law constitutes a departure from the essential requirements of law. Price, 954 So. 2d at 100.

ARGUMENT

THE LOWER COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW AND ABUSED ITS DISCRETION BY DENYING THE MOTION TO QUASH THE SUBPOENA FOR THE PERSONAL APPEARANCE OF THE PETITIONER AND THE REQUEST FOR PROTECTIVE ORDER BECAUSE RESPONDENT COOLEY CANNOT SHOW PETITIONER HAS PARTICULARIZED FIRSTHAND KNOWLEDGE REGARDING THE ISSUE THAT CANNOT BE OBTAINED FROM ANOTHER SOURCE.

Petitioner is a non-party to the proceedings in the lower court. As such, judgment in the matter cannot be entered against him and he has no basis for appeal. Briggs v. Salcines, 392 So.2d 263, 266 (Fla. 2nd DCA 1980). It is clear the material injury Petitioner faces cannot be corrected on appeal.

An agency head should not be forced to testify over objection, unless and until the party seeking the testimony can show the agency head has particularized firsthand knowledge that cannot be obtained from another source. Miami-Dade County, 103 So.3d at 239. The subpoena in question seeks to compel Petitioner, a high ranking government official, to testify to information that is readily available from other sources, such as the press release issued after the Respondent Cooley's arrest and the news articles that have been released with quotes from Petitioner. Further, in Petitioner's Response to the Motion for "Gag" Order, Petitioner does not deny making the statements regarding the criminal case in which Respondent Cooley has been charged.

The lower court denied the Motion to Quash the Subpoena and for Protective Order based on the rules of criminal procedure which petitioner cited. However, Petitioner's motion also cited relevant case law, which the lower court did not address. It is clear the lower court failed to apply the correct law. See, e.g., Id. (holding a mayor should not be called to testify before the Public Employees Relations Commission regarding his motive for a veto of the resolutions of the Miami-Dade Board of County Commissioners because that is available from other sources); Dep't of Agriculture and Consumer Services v. Broward County, 810 So.2d 1056, 1058 (Fla. 1st DCA 2002) (holding that "agency head should not be

subject to deposition, over objection, unless and until the opposing parties have exhausted other discovery and can demonstrate that the agency head is uniquely able to provide relevant information which cannot be obtained from other sources); Horne v. School Bd. Of Miami-Dade County, 901 So.2d 238, 241 (Fla. 1st DCA 2005) (noting that [d]epartment heads and similarly high ranking officials should not ordinarily be compelled to testify unless it has been established that the testimony to be elicited is necessary and relevant and unavailable from a lesser ranking officer”) (quoting Halderman v. Pennhurst State Sch. & Hosp., 559 F.Supp, 153, 157 (E.D. Pa. 1982)).

The material injury Petitioner is facing if this Petition is not granted is a significant aberration of his First Amendment rights to comment on matters of public concern. “Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social or other concern to the community, or when it is subject to legitimate news interest; that is, a subject of general value and concern to the public.” Dun & Bradstreet Inc. v. Greenmoss Builders Inc., 472 U.S. 749, 758-59, 105 S.Ct. 2939, 86 L.Ed. 593 (1989) (plurality opinion). Each week Petitioner addresses the public countless times through press releases, media interviews, and social media. These public comments address matters of great public concern, as the safety of Flagler County residents is the top

priority of Petitioner. If Petitioner faces a subpoena each time he publicly comments on an “attempt to identify²,” BOLO³, an arrest, or asking for the public’s help to find a missing and endangered person⁴ it will have an irreparable chilling effect on his ability to exercise his First Amendment right to publicly comment on matters of public concern affecting the citizens of Flagler County.

Counsel that issued the subpoena has made no attempt to hide his disdain for Petitioner’s exercise of his lawful right to speak in his official capacity as the Sheriff. (Exhibit B p.5) This subpoena is a thinly veiled attempt by counsel to silence Petitioner because he doesn’t like his speech. This is not how we do business as a nation. Further, the material injury that could result if this Petition is not granted, impacts all elected officials. The abridging of the First Amendment rights of Petitioner and other public officials cannot be abided, now or in the future lest our entire Constitution based way of life falls apart.

² An “attempt to identify” is a request to the public to identify someone in a photo, usually the suspect of a crime whose identity is unknown

³ BOLO stands for Be On The Lookout, an acronym asking for members of the public and law enforcement to attempt to locate a person, usually the suspect of a crime. Petitioner takes great pride in his weekly BOLO series called “Fugitive Friday Bingo” wherein each week a person with an outstanding arrest warrant is publicly identified as such and the assistance of the public is requested in locating him or her

⁴ Just this week 17 year old Rickey Wheeler went missing on a Friday evening. Petitioner addressed the public multiple times daily through social media, press releases and other media outlets in an attempt to bring Rickey home. Rickey was found late Tuesday evening, thanks to the valiant effort of all involved and Petitioner’s constant work to keep this matter in the media.

CONCLUSION

The court order Petitioner requests this Court overturn departs from the essential requirements of the law and result in direct material injury to Petitioner. This is not a matter of inconvenience to Petitioner's schedule. It sets the precedent that Petitioner can be forced into silence on matters of public importance by the threat or reality of a constant barrage of court appearances and depositions after subpoena. To allow this subpoena to compel the Petitioner's appearance to be queried under oath by criminal defense counsel in a transparent effort to intimidate and silence a state constitutional officer in the performance of his duties, and in the absence of a legitimate legal or factual basis for that extraordinary step, is a matter of great public concern, and justifies the requested relief requested by this petition..

RESPECTFULLY SUBMITTED

BY: s/*Kayla R. Hathaway*

Kayla Hathaway, Esquire

Florida Bar No. 91695

khathaway@flaglersheriff.com

901 E. Moody Boulevard

Bunnell, FL 32110

General Counsel for the Flagler
County Sheriff's Office

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic notice if registered in the Electronic Case Filing System, otherwise via U.S. Mail: Josh Davis, Attorney for the Defendant; The Office of the State Attorney for the Seventh Judicial Circuit, Flagler County, on this 26th day of September, 2018.

BY: s/*Kayla R. Hathaway*
Kayla Hathaway, Esquire
Florida Bar No. 91695
khathaway@flaglersheriff.com
901 E. Moody Boulevard
Bunnell, FL 32110
General Counsel for the Flagler
County Sheriff's Office

I HEREBY CERTIFY this Petition complies with the font requirements of Florida Rules of Appellate Procedure 9.100(l)

BY: s/*Kayla R. Hathaway*
Date: September 26, 2018

}

Appendix

Exhibit A: Press release issued by the Flagler County Sheriff's Office

Exhibit B: Motion for Gag Order

Exhibit C: Response to Motion for Gag Order with exhibits attached

Exhibit D: Notice of Hearing

Exhibit E: Subpoena for personal appearance of petitioner at hearing on September 27, 2018

Exhibit F: Motion to Quash Subpoena and for Protective Order

Exhibit G: Email with permission to cross-notice the Motion to Quash Subpoena and for Protective Order Order Denying Motion to Quash Subpoena and for Protective Order

Exhibit H: Order Denying Motion to Quash Subpoena and for Protective Order Request for Reconsideration of Court's Denial of Motion To Quash Subpoena and for Protective Order

Exhibit I: Request for Reconsideration of Court's Denial of Motion To Quash Subpoena and for Protective Order

Exhibit J: Cross notice of hearing on Request for Reconsideration of Court's Denial of Motion To Quash Subpoena and for Protective Order

Ex A



Rick Staly, Sheriff

FLAGLER COUNTY SHERIFF'S OFFICE

"An honor to serve, a duty to protect."

NEWS RELEASE

Date: Saturday, June 30, 2018

Contact: Brittany Kershaw | (386) 586-2637 | bkershaw@flaglersheriff.com

City of Flagler Beach Commissioner Arrested for Domestic Violence

A City of Flagler Beach Commissioner was arrested on Friday night and charged with Domestic Violence after a concerned witness reported violence between the defendant and his girlfriend. Eric Cooley, 43, was arrested at his home on North Central Avenue in Flagler Beach after an investigation by deputies at the 7-Eleven business that Cooley owns at 408 South Ocean Shore Boulevard.



Eric Cooley in the June 29 booking photo.

A witness reported to officers that Cooley had kicked and grabbed the throat of the victim on two separate occasions in the store. Both incidents were confirmed by the victim and as well as additional reports of violence to the victim by the defendant on numerous occasions.

After determining that the suspect was a City of Flagler Beach Commissioner, Flagler Beach Police requested that the Flagler County Sheriff's Office take over the investigation. The investigation revealed a longtime abusive relationship between Cooley and his girlfriend of twenty years, who also works with him at the 7-Eleven store.

"This is an unfortunate situation but it goes to show you that domestic violence has no boundaries," Sheriff Rick Staly said.

Cooley was booked into the Sheriff Perry Hall Inmate Detention Facility and will be held without bond until a first appearance before a judge.

Proudly Serving the Community for 100 Years – Centennial Anniversary 1917 - 2017

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901 East Moody Blvd, Bunnell, FL 32110 – 386-437-4116 – Fax 386-586-4820 – www.flaglersheriff.com

IN THE COUNTY COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
FLAGLER COUNTY, FLORIDA

STATE OF FLORIDA

CASE NO.: 2018-MM-000867

vs.

ERIC COOLEY,

Defendant.

_____ /

MOTION FOR GAG ORDER

Pursuant to the Sixth Amendment of the United States Constitution and Article 1, Section 16 of the Constitution of the State of Florida (1968 revision), the Defendant, ERIC COOLEY, by and through his undersigned counsel, respectfully requests this Honorable Court to prohibit the extrajudicial comments by Flagler County Sheriff Staly, and members of his department established herein, from discussing in a public setting, i.e. radio programs, news outlets, or other such occasions where the public is the intended recipient of such discourse, "State of Florida v. Eric Cooley, the criminal proceedings herein. As grounds therefore, the Defendant, would allege:

1. The Sixth Amendment of the United States Constitution, in pertinent part, states:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed..." (emphasis added)

2. Article 1, Section 16 of the Florida State Constitution (1968 revision), in pertinent part, states:

"In all criminal prosecutions the accused shall, ... have a speedy and public trial by impartial jury in the county in where the crime was committed..." (emphasis added)

3. In State ex rel. Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904, 909 (Fla. 1976), the Florida Supreme Court has recognized that "a trial court has the inherent power to control the conduct of the proceedings before it, and it is the trial court's responsibility to protect a defendant in a criminal prosecution from inherently prejudicial influences which threaten fairness of his trial in the abrogation of his constitutional rights."

4. Though the public has a right to know all that transpires in a criminal case, what is spoken about upcoming criminal proceedings must be carefully weighed against an accused's right to a fair trial, and a defendant's right to a fair trial should be given paramount consideration over and above a public's right to know.

5. The Florida Supreme Court in McIntosh (supra at p190) has stated that the limitations placed upon lawyers, litigants, and officials directly affected by court proceedings may be made at the court's discretion for a good cause to assure fair trials.

6. To safeguard a defendant's right to receive a fair trial, courts have a constitutional duty to minimize the effects of prejudicial pretrial publicity. Because of the constitution's pervasive concern for these rights, courts often take protective measures even when they are not strictly and inescapably necessary.

7. The Defendant is not seeking this Court's exercise of its judicial discretion to impede or interfere with a media's effort to inform the public, but rather to curtail extrajudicial comments by certain law enforcement officers during the pendency of this pretrial proceeding up to jury selection or until such time as the case is resolved.

8. Muzzling lawyers who may wish to make public statements has long been recognized as within the court's inherent power to control professional conduct. As such, courts also are authorized to limit what police may say when it becomes clear those communications are interfering with an accused's right to a fair trial in front of an impartial jury.

9. Though ours is a society that prides itself on the freedom of speech and expression, that right must coexist with other constitutional rights, and in some instances even be second chair to other rights.

10. The charges herein are misdemeanors and are alleged to have occurred within Flagler Beach, Flagler County, Florida.

11. As misdemeanor offenses, the rules of procedure envision trials within 90 days of arrest. Though that is not always true, comments by the Flagler County Sheriff keep them fresh in the mind of his audience who are potential jurors.

12. This county is served by two websites, The Palm Coast Observer and Flagler Live.

13. At a press conference immediately called by Flagler County Sheriff Staly the night of the arrest herein, Staly referring to the Defendant, Eric Cooley stated, "This is an unfortunate situation but it goes to show you that domestic violence has no boundaries." Continuing, Staly is constantly calling those accused of crimes "dirtbags" and "scumbags".

14. There has been widespread publicity which has been prejudicial to the Defendant, Eric Cooley, hosted by Sheriff Staly, which interferes with Eric Cooley's right to receive a fair trial, free from the outside influences from Sheriff Staly, and Eric Cooley has a right to be tried before an impartial jury in Flagler County, Florida.

15. The extensive print and broadcast media coverage, including the internet, has been generated predominantly because of the efforts of Sheriff Staly and because of the political position held by the Defendant, Eric Cooley in the City of Flagler Beach.

16. It is understood that even in the absence of a Court order both prosecutors and defense lawyers, as officers of the court, are severely restricted from making extrajudicial statements that might prejudice a fair trial. Prosecutors and defense attorneys have a duty of reasonable care to prevent other individuals assisting them, or associated with the case, from making extrajudicial statements that would be prejudicial to a fair trial. This requirement is cemented in rules regulating members of the Florida Bar, specifically Rule 4-3.6.

17. The United States Supreme Court has characterized the right to a fair trial as the most fundamental of all freedoms and that which must be preserved at all costs. (See Estes v. Texas, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed. 2nd 543 (1965)).

18. It is clear from the comments he has made, that Flagler County Sheriff Staly has no appreciation or respect for the criminal justice system, but rather a disdain of a constitutional system that has weathered over 200 years of testing, and though not perfect, admittedly the best in the world.

19. In a position of Sheriff of Flagler County Sheriff's Office, whether soliciting or agreeing to appear to discuss the accusations in this case, and particularly those against the Defendant, Eric Cooley, Staly's abuse of the freedom of speech protected and guaranteed by our constitution, is as abridged as someone yelling "fire" in a crowded building.

20. Whatever his intended purpose, or his limits, Sheriff Staly's comments about this criminal prosecution undermine the foundation of the criminal justice system, and therefore must be muzzled by a trial court's affirmative constitutional duty to minimize the effects of his prejudicial, sought after pretrial publicity.

21. Though the temptation great and the material voluminous, critiquing Sheriff Staly's comments beyond illustrating his base abrogation effort to abridge the Defendant, Eric Cooley's, right to a fair trial within Flagler Beach, Flagler County, Florida would serve

no useful purpose. Succinctly, they are what they are, and certainly not dressed up, sugar coated, professional or constitutionally permitted any further with regard to the prosecution of this case.

I HEREBY CERTIFY that a true and correct copy of the foregoing notice has been furnished by electronic delivery, to the Office of the State Attorney, eserviceflagler@sao7.org, this 17th day of September, A.D., 2018.

JOSHUA D. DAVIS, ESQUIRE
Florida Bar No. 31027
P.O. Box 1211
Bunnell, Florida 32110
(386) 437-1127

Ex. C

IN THE COUNTY COURT SEVENTH JUDICIAL CIRCUIT
IN AND FOR FLAGLER COUNTY FLORIDA

STATE OF FLORIDA,

vs.

2018-MM-867

ERIC COOLEY,
Defendant.

_____ /

RESPONSE TO DEFENDANT'S MOTION FOR "GAG" ORDER

COMES NOW Rick Staly, in his official capacity as Sheriff of Flagler County, Florida, a non-party to the above captioned case, files this Response to Defendant's Motion for "Gag" Order, docket no. 26. The Motion should be denied for the reasons set forth in the Memorandum of Law, below.

MEMORANDUM OF LAW

1. RELEVANT PROCEDURAL BACKGROUND AND FACTUAL BACKGROUND.

- a. On June 29, 2018, Eric Cooley (hereinafter referred to as "Defendant" was arrested for a charge of misdemeanor domestic battery under Florida Statute § 784.03(1). Since that time Sheriff Rick Staly and the Flagler County Sheriff's Office has issued one press release regarding this case with comment. (Exhibit A). Sheriff Staly has been questioned by various media outlets since the press release. The Sheriff's comments have always been of a general nature in regard to the type of charge alleged in this case (misdemeanor domestic battery) and its lack of boundaries in society. Sheriff Staly has never used a pejorative adjective to describe Mr. Cooley nor weighed in on the strength of the evidence in this case. Sheriff Staly has championed an on-going initiative to combat domestic violence in our community since mid-2017.

2. STANDARD OF REVIEW

- a. A court may take steps to protect against pretrial publicity. See Sheppard v. Maxwell, 384 U.S. 333, 348, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); Sentinel Communications Co. v. Watson, 615 So.2d 768, 769 (Fla. 5th DCA 1993). However, “pretrial publicity even pervasive adverse publicity does not inevitably lead to an unfair trial.” Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 554; 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976). There must be a determination by the court on a case by case basis. See United States v. Lehder-Rivas, 667 F.Supp. 827, 828 (M.D. Fla. 1987). In Florida, the limitations imposed by the court on communications between the media and lawyers and/or litigants must be for good cause to assure fair trials. See State ex. rel. Miami Herald Publ’g Co. v. McIntosh, 340 So.2d 904, 910 (Fla. 1976); see also Florida Freedom Newspapers Inc. v. McCrary, 520 So.2d 32, 35 (Fla. 1988); see also Rodriguez ex rel. Posso-Rodriguez v. Feinstein, 734 So.2d 1162, 1164 (Fla. 3d DCA 1999). Thus an order of the nature requested by the Defendant should be supported by evidence and findings that any extrajudicial statements made by counsel or the parties poses a substantial and imminent threat to a fair trial. Id. at 1165. Moreover, an order must be narrowly tailored both in time and scope to protect the fairness of this particular trial. Id.

3. ARGUMENT

- a. Pretrial publicity does not inevitably lead to an unfair trial
 - i. “Pretrial publicity, even pervasive, adverse publicity does not inevitably lead to an unfair trial.” Nebraska Press Ass’n., 427 U.S. at 554. The pretrial publicity in this case has not risen nearly to the level needed to support a finding by the Court the Defendant is at risk of not receiving a fair trial. The Defendant cites no case law in his motion that supports the contention that the pretrial publicity has reached such a fever pitch in this case that without an order from the court addressing pretrial public comment the Sixth Amendment would be violated. A quick Google search of the Defendant’s name combined with “Flagler Beach” reveals the first page of results are articles mostly related to the arrest that are dated June and July of 2018. The specific media outlets the Defendant complains of have very little

coverage of this case. The Palm Coast Observer has one article regarding this arrest that appears after a Google search of the phrase “Palm Coast Observer Eric Cooley” (Exhibit B) followed by three relatively positive articles regarding the Defendant’s work as an elected official. Flagler Live has 10 articles that appear on its page when the Google search “Flagler Live Eric Cooley” is conducted. Four articles address the arrest of the Defendant in this case. One dated June 29, 2018 details circumstances of the incident that led to the Defendant’s arrest, as detailed in Flagler County Sheriff’s Office documents and a press release. (Exhibit C). One dated July 12, 2018, details the first public comment from the Defendant, where he stated the accusation was based on misinformation. (Exhibit D). One dated August 6, 2018, an article advising the State Attorney’s Office had elected to file charges and detailing some of the footage from law enforcement body cameras that had been released. (Exhibit E). One dated September 13, 2018, detailing the substance of a letter from Suzanne Kenna, the victim in this case, and comments from the Defendant’s attorney. (Exhibit F). The other articles on Flagler Live appear to relate to the Defendant’s time as an elected official. Only one piece on Flagler Live directly mentions a comment from the Sheriff.

- ii. This case can be compared to the case of Dippolito v. State, 225 So.3d 233 (Fla. 4th DCA 2017). In that case the defendant was charged with solicitation to commit murder. The case generated significant pretrial publicity and a video of the defendant talking to the purported hitman was posted on the website of the investigating agency, received coverage on the Today show, Good Morning America, and others. The defendant was facing her third jury trial, the conviction after the first trial being overturned on appeal and the second trial ending with a mistrial because of a hung jury. Jurors knowledge of the case through media coverage as an issue in the *voir dire* of both trials. Before the defendant’s second trial the defense attorneys issued a press release indicating the prosecution was politically motivated and the defendant had already “done the time.” The trial court issued an order restricting all parties from making certain comments relating generally to the merits of the case, to be in effect until a jury could be sworn on the third trial.

- iii. Certainly the media coverage received in the Defendant's case has not reached near the level of coverage received in Dippolito. There has been no national or international coverage. The local coverage received has been brief and has mostly included the positions of both the Defendant and the State. Further, the Flagler County Sheriff's Office has issued exactly one press release regarding this case with one quote from Sheriff Staly, about the crime of domestic battery in general. Other than the press release Sheriff Staly has made public comment about domestic violence in general, when asked for comment on this case by media outlets. Given the juxtaposition of this case with the currently available case law, there is no demonstrable need for any order restricting public statements in this case in order ensure a constitutionally fair trial for the Defendant.
- b. Granting the Defendant's Motion would violate the Sheriff's First Amendment Rights
 - i. The Sheriff is a non-party to this case and an elected official. As such he has the First Amendment right to comment on matters of public concern. He has consistently championed an initiative to combat domestic violence in our community. It is not only lawful but also completely appropriate for the Sheriff to speak out generally any time domestic violence touches our community. "The authors of the Bill of Rights did not undertake to assign priorities between the First Amendment and Sixth Amendment, ranking one as superior to the other." Nebraska Press Ass'n, 427 U.S. at 560. The Defendant asks the Court to rank the First Amendment rights of the Sheriff and the individuals of the Flagler County Sheriff's Office subordinate to the Sixth Amendment rights of the Defendant. "If the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning one priority over another, it is not for us to rewrite the Constitution by undertaking what they declined to do. Id. at 561.
- c. The order requested by the Defendant is overly broad

- i. An order of the nature requested by the Defendant must be narrowly tailored to protect the fairness of this particular trial. Rodriguez, 734 So.2d at 1165. The Defendant requests a blanket order prohibiting any public comment from Sheriff Staly and/or members of the Flagler County Sheriff's Office regarding this case. This type of order cannot be granted because it is not limited in the scope of comment or the time limitations for making such comment. News-Journal Corporation v. Foxman, 559 So.2d 1227, 1228 (1990) (noting the absence of any time or scope limitations on the prohibited extra-judicial statements); see also E.I. Du Pont de Nemours and Co. v. Aquamar, S.A., 33 So.3d 839, 841 (Fla. 4th DCA 2010) (reversing gag order that was "unrestricted in scope and time limit"); compare to Dippolito v. State, 225 So.3d 233, 238 (Fla. 4th DCA 2017) (trial court's order set to expire upon the swearing of a jury, prohibiting counsel for both parties from making extrajudicial comments on specific topics upheld).
- d. Order of this nature, if granted, should restrict all parties over which the court has jurisdiction from making statements to the media.
 - i. When orders of this nature are contemplated, a court issues an order applicable to all parties and case participants rather than just being directed at a singular party or case participant. See Dippolito, 225 So.3d 233 (Fla. 4th DCA 2017) (trial court's order prohibiting all parties from making certain extrajudicial comments regarding the case); E.I. Du Pont de Nemours and Co., 33 So.3d 839 (Fla. 4th DCA 2010) (Order to prevent all parties and their counsel not to participate, encourage assist or abet in the dissemination of any out-of-court publicity in this matter was struck down).

WHEREFORE, based on the facts and legal support cited above, Sheriff Rick Staly requests this Honorable Court deny the Defendant's Motion for "Gag" Order. If the Court feels it must issue an order as requested by the Defense in this case, Sheriff Rick Staly requests the court issue an order sufficiently narrow in scope that is applicable to all parties of this case and the non-party investigating law enforcement agency.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic notice if registered in the Electronic Case Filing System, otherwise via U.S. Mail: Josh Davis, Attorney for the Defendant; The Office of the State Attorney for the Seventh Judicial Circuit, Flagler County, on this 18th day of September, 2018.

BY: s/Kayla R. Hathaway
Kayla Hathaway, Esquire
Florida Bar No. 91695
khathaway@flaglersheriff.com
901 E. Moody Boulevard
Bunnell, FL 32110
General Counsel for the Flagler
County Sheriff's Office



Ex A
of response
Rick Staly, Sheriff

FLAGLER COUNTY SHERIFF'S OFFICE

"An honor to serve, a duty to protect."

NEWS RELEASE

Date: Saturday, June 30, 2018

Contact: Brittany Kershaw | (386) 586-2637 | bkershaw@flaglersheriff.com

City of Flagler Beach Commissioner Arrested for Domestic Violence

A City of Flagler Beach Commissioner was arrested on Friday night and charged with Domestic Violence after a concerned witness reported violence between the defendant and his girlfriend. Eric Cooley, 43, was arrested at his home on North Central Avenue in Flagler Beach after an investigation by deputies at the 7-Eleven business that Cooley owns at 408 South Ocean Shore Boulevard.



Eric Cooley in the June 29 booking photo.

A witness reported to officers that Cooley had kicked and grabbed the throat of the victim on two separate occasions in the store. Both incidents were confirmed by the victim and as well as additional reports of violence to the victim by the defendant on numerous occasions.

After determining that the suspect was a City of Flagler Beach Commissioner, Flagler Beach Police requested that the Flagler County Sheriff's Office take over the investigation. The investigation revealed a longtime abusive relationship between Cooley and his girlfriend of twenty years, who also works with him at the 7-Eleven store.

"This is an unfortunate situation but it goes to show you that domestic violence has no boundaries," Sheriff Rick Staly said.

Cooley was booked into the Sheriff Perry Hall Inmate Detention Facility and will be held without bond until a first appearance before a judge.

Proudly Serving the Community for 100 Years – Centennial Anniversary 1917 - 2017
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901 East Moody Blvd, Bunnell, FL 32110 – 386-437-4116 – Fax 386-586-4820 – www.flaglersheriff.com

by: Jonathan Simmons News Editor

Flagler Beach City Commissioner Eric Cooley was arrested the evening of June 29 after a witness reported seeing Cooley kick his girlfriend and grab her by the throat at the 7-Eleven store Cooley owns at 408 S. Oceanshore Blvd., according to an arrest affidavit.

Eric Cooley (Photo courtesy of the FCSO)

The witness told law enforcement officers that he'd seen the abuse on two separate occasions, the latest being the weekend of June 22-24. The victim also worked at the store.

Cooley, speaking with law enforcement, denied the charges.

Flagler Beach Police Department officers and Flagler County Sheriff's Office deputies — who took over the case at FBPD's request after officers realized their suspect was a city commissioner — spoke with the victim outside the 7-Eleven store June 29 after being contacted by the witness.

The victim spoke with law enforcement in the parking lot "due to concerns of Eric observing the conversation on security cameras," according to the arrest affidavit.

She said that at about 6 a.m. the morning of June 22, she and Cooley were doing inventory at the store when they began to argue.

She "stated anything that goes wrong with the store is blamed on her, causing Eric to become upset," according to a the arrest affidavit. "(She) stated that Eric kicked her in both shins with her steel toed shoes, grabbed her around the chin with his right hand inside the store cooler and punched her in the back of her right shoulder on Friday June 22 while she was at work at 7-Eleven within a 15-minute period."

She said he'd also punched her in the shoulder without stating a reason June 28 after arriving home from work and that he smacked her across the face the morning of June 29 after she got out of the shower to get soap, because "he became upset (she) let cold air in," according to the affidavit.

She hit her forehead against the wall when he smacked her, she said. A deputy noted "minor discoloration and swelling" on her forehead, according to the affidavit, and photographed her injuries for evidence.

She told the deputy that the instances of abuse would be captured on the store's security cameras. Cooley was the only one with access to the local footage and could delete it, she said, but 7-Eleven's corporate security contractor maintains original copies.

She said she and Cooley had been dating for about 20 years and that "approximately the last 10 has had instances of domestic violence that have not been reported," according to the arrest affidavit.

Deputies spoke with Cooley at his home on North Central Avenue, and he said he'd been arguing with his girlfriend but hadn't hit her.

When a deputy told him of her bruising, Cooley replied, "That's interesting," according to the arrest affidavit. Then he said that "absolutely nothing" happened that morning, that he did not punch her in the shoulder and that she "would not be bruised."

"She is entitled to say that," Cooley told a deputy, according to the affidavit. "We have been arguing a lot and we have been getting in each others' faces; we don't cross lines."

Sheriff's Office deputies arrested Cooley and booked him at the county jail at 11 p.m. He was held overnight on no bond. The domestic battery charge is a misdemeanor.

"This is an unfortunate situation, but it goes to show you that domestic violence has no boundaries," Sheriff Rick Staly said in a news release.

Cooley was elected without opposition in January 2018 to the City Commission seat previously held by Joy McGrew, who did not run for re-election.

Ex C
of response

Flagler Beach Commissioner Eric Cooley Arrested on Domestic Violence Charge

FLAGLERLIVE | JUNE 29, 2018



Eric Cooley won a seat on the Flagler Beach City Commission in January, without opposition. (c FlaglerLive)

Last Updated: Saturday, 10:10 a.m.

Flagler Beach City Commissioner Eric Cooley was arrested on a domestic violence charge Friday evening (June 29) following allegations by his girlfriend of 20 years that he'd struck her several times at their home and at the 7-Eleven store he owns on South Oceanshore Boulevard between June 22 and 29.

Few details of the arrest are available so far.

A store employee called police Friday at 5:28 p.m., alleging that Cooley was seen kicking Suzanne Kenna in the legs and grabbing her by the throat at the 7-Eleven, according to Cooley's arrest report. Flagler Beach police initially responded. At some point, realizing who the parties involved were, and following up on a request by the alleged victim or the witness, Flagler Beach Police Chief Matt Doughney contacted Flagler County Sheriff Rick Staly this evening—as Staly was on one of his regular Friday evening patrols—and requested that, since a city commissioner was involved, the Sheriff's Office take over the case.

Doughney had another reason to request the outside agency: Cooley for a few years before he was commissioner hosted Donuts With Doughney at the 7-Eleven, a periodic morning event where residents could have coffee and donuts with the police chief and discuss civil issues in a relaxed environment.

After the call from Doughney to the sheriff, the sheriff's watch commander responded to the scene with deputies, who then determined the arrest was warranted, Sheriff's spokesman Mark Strobbridge said late this evening. Cooley was booked at the county jail at 11 p.m. He was

expected to spend the night there, as is the norm on domestic assault-related arrests and before their first appearance before a judge.



Eric Cooley's booking photo.

Kenna, 47, said she and Cooley were conducting inventory at the store the morning of June 22 when an argument developed. She said "anything that goes wrong with the store is blamed on her," according to the arrest report, "causing Eric to become upset." She alleged he kicked her in both shins with his steel-toed shoes, "grabbed her around the chin with his right hand inside the store cooler, and punched her in the back of her shoulder" in an incident that stretched over 15 minutes.

Kenna said Cooley punched her in the right shoulder Thursday night when she came home and "smacked her in the face" Friday morning with enough force that she allegedly struck the wall with her forehead. She cautioned authorities that while incidents would have been captured on surveillance video, only Cooley has access to the footage. The store's copy of footage may be deleted at any time, she said, but not the version fed to the company's corporate security contractor, which is kept for six months.

Deputies met with Cooley at his home. He acknowledged having arguments with Kenna, but no violent physical contact. "That's interesting," he said when told of the bruising deputies observed on the alleged victim. "She is entitled to say that. We have been arguing a lot and we have not been getting along. We get in each other's faces, we don't cross lines," he told deputies.

According to the report, Kenna said she's been in a relationship with Cooley for 20 years "and approximately the last 10 has had instances of domestic violence that have not been reported."

Cooley, 43, was elected to the Flagler Beach City Commission last January when he was the only candidate to announce for the seat held by Joy McGrew, who had decided not to run again. As the only candidate, he was seated without an election. McGrew had endorsed his candidacy.

Cooley by then had owned the 7-Eleven for four years, and had already been heavily involved in volunteering initiatives, many of them with Flagler Beach Mayor Linda Provencher and Flagler Beach resident Carla Cline—a trio that calls itself the Flagler Beach All Stars.

Cooley was known before and after his election as a deliberate, calm, fact-based analyst, a pro-business advocate who grounds his points in evidence. But residents in Flagler Beach have also spoken of seeing his temper flare at the store, with customers or co-workers.

When Cooley is released, it won't be as simple as resuming routines while awaiting the next step in the court case: judges typically impose a no-contact order on individuals arrested on a domestic violence charge: no contact with their alleged victim means they may not be sharing living or working space. Cooley and Kenna share both. (He was released on his own recognizance at 9:34 a.m. Saturday.)

“This is an unfortunate situation but it goes to show you that domestic violence has no boundaries,” Sheriff Rick Staly was quoted as saying in a release issued Saturday morning with the arrest report. “Unfortunate” is also the word Flagler Beach Commission Chairman Rick Belhumeur used when asked for a comment. Belhumeur and Cooley have often worked together on civic issues going back to before Cooley was elected: on Friday, Belhumeur had been in contact with Cooley about an old guard tower Cooley was buying from the city to donate to Tortugas, the restaurant. The two of them had painted new guard towers together last year.

Ex D
of response

Flagler Beach Commissioner Eric Cooley on His Arrest: 'There Is Only an Accusation Made'

FLAGLERLIVE | JULY 12, 2018



Flagler Beach Commissioner Eric Cooley. (© FlaglerLive)

Flagler Beach Commissioner Eric Cooley hadn't been seated more than a few minutes at the beginning of this evening's meeting—his first commission appearance since his arrest on a domestic battery charge almost two weeks ago—when David Frank, a resident of South Central Avenue posed a question.

"What are your plans as a group in light of the charge brought against Mr. Cooley as far as disciplinary action or what's going to go on with this," David Frank asked.

"This isn't the venue for that," Commission Chairman Rick Belhumeur said, stumbling over a couple of sentences before saying he'd defer to the city attorney, who said he knew "very little about it except that it exists as a charge."

The attorney specified it was a misdemeanor charge. "The reason that's significant is because if action were to be taken officially it would be through the governor's office, and that only happens if there's a felony issue," the attorney said. "That's not the case. I don't think it will be, but you're free to write to the governor and ask what you'd like." As a body, the commission is "limited" as to what it can do, the attorney continued, with either the charter or a recall signaling the potential steps. Other attorneys would have to advise Frank, the city attorney said. But commissioners don't have authority "to discipline one another."

In 2015 Commissioner Marshall Shupe publicly upbraided a fellow-commissioner during a commission meeting over a controversy unrelated to commission business. "We must realize that what we say and do reflects on the city as a whole," Shupe said at the time, referring to statements the other commissioner had spoken outside the commission chambers, related to an

ongoing criminal case then. "Maybe we as an elective body needs to censure any positions so that it doesn't portray the city or any residents in a negative light," he'd said.

Supervisor of Elections Kaiti Lenhart said late last week that she'd received "a couple" of calls from residents inquiring about the recall process in Flagler Beach. She referred them to the city clerk.

Cooley was arrested on June 29 when a store employee alleged he'd kicked and grabbed Suzanne Kenna, a store employee who shared a house with Cooley. Cooley was released from the county jail on his own recognizance.

Cooley, for his part, took the occasion to make his first public statement since the arrest. "Just for clarification, there has been no charge filed as of this point, so that is all misinformation," he said. Cooley was referring to the State Attorney not filing a charging information. The Flagler County Sheriff's Office has, in fact, filed a charging affidavit, though it would have to be followed by the charging information for the prosecution phase of the case to go forward: domestic violence charges are often dropped when the party pressing the charge decides against it, or when the State Attorney finds insufficient evidence to pursue.

But the arrest is not erased, nor are the conditions pursuant to the arrest pending arraignment on July 31, including a no-contact order with the alleged victim. Cooley intends to enter a written not-guilty plea at the arraignment. He's asked not to appear in person.

"There is only an accusation made," Cooley continued, "and the other thing is that, you know, just informally, should charges get brought, and should the outcome of those charges be unfavorable, I'll be more than willing to entertain anything that you all as commissioners would like to do. But I'm not going to make any other statements other than that I don't see that happening."

Frank then, speaking directly to Cooley, referred to a "class-action lawsuit" being brought against 7-Eleven by Cooley's employees (Cooley owns the 7-Eleven on South Oceanshore Boulevard). Belhumeur stopped Frank, telling him to direct his comments to the chair. Frank then immediately moved to a different issue.

Cooley has retained Josh Davis, a former assistant state attorney and now a scrapping defense lawyer, as his counsel. Davis immediately moved to amend the no-contact order, as it would have prevented Cooley from working if Kenna was there, or living at the house: County Judge Melissa Moore-Stens granted the amended order on July 5, allowing Cooley to return home and work at Seven-Eleven, since Kenna "has left the area and is no longer employed at the 7-Eleven," according to Davis's motion. All other conditions of the court's pre-trial release order remain in effect.

At Thursday's meeting, which lasted less than an hour, Cooley spoke on two other occasions, once regarding sea turtles, and once to commend July 4 festivity organizers. The commission took no action on anything other than routine matters.

EOE
of response

State Attorney Files Battery Charge On Flagler Beach Commissioner Eric Cooley, Ending Speculation

FLAGLERLIVE | AUGUST 6, 2018



A still from the body cam video of one of two sheriff's deputies the afternoon of Flagler Beach Commissioner's arrest on June 29. The state attorney formalized a battery charge against Cooley last Friday.

Sitting through his first City Commission meeting two weeks after his June 29 arrest on a battery charge, Flagler Beach City Commissioner Eric Cooley made the only public statement about the incident: "There has been no charge filed as of this point, so that is all misinformation," he said. He was at the time facing a charging affidavit from the Sheriff's Office, which made the arrest. "Should charges get brought, and should the outcome of those charges be unfavorable, I'll be more than willing to entertain anything that you all as commissioners would like to do. But I'm not going to make any other statements other than that I don't see that happening."

Cooley, elected to the commission earlier this year, has gone on to participate in all regularly scheduled commission meetings, missing one special meeting because of a prior engagement. He resumed managing his store soon after his arrest and release from the county jail on his own recognizance.

Last week, the State Attorney filed the charge, technically called a charging "information": a first-degree misdemeanor battery count resulting from allegedly striking Suzanne Kenna, his partner of many years at home and at work. Cooley owns the 7-Eleven on Ocean Shore Boulevard in Flagler Beach. The highest penalty for a first-degree misdemeanor is a year at the county jail, though that penalty is rarely levied even on multiple offenders. If convicted, Cooley would be a first-time offender, eligible for diversionary pre-trial intervention with conditions that, if fulfilled, could lead the charges to be dropped. But that assumes an initial assumption of responsibility for the charge. Cooley has pleaded not guilty.

A battery charge would not normally command much attention from press or public. It is doing so in this case because of Cooley's prominent position on Flagler Beach's political and business scene.

For the same reason, the case is being handled by Assistant State Prosecutor Jason Lewis, who usually prosecutes the State Attorney's Office's higher-profile cases: he was the prosecutor in the recent jury conviction on several felony counts of Kimberle Weeks, the former Supervisor of Elections. Whatever the charge, Lewis is known as a gloveless, unsparing prosecutor and a skilled tactician. There had been rumors last week that the charge could be dropped since Kenna, according to a court filing by Cooley's attorney, had left town and was no longer working at 7-Eleven (she is from Richwood, W.Va.), and an arraignment scheduled for last week had been continued. Lewis ended that speculation.

Cooley on his attorney's advice declined to publicly make a statement regarding the filing of the information. His attorney, Josh Davis, said: "Mr. Cooley is a pillar of this community and has always been there for those in need whether it be flooding due to a hurricane or serving on the Flagler Beach City Commission. We steadfastly maintain his innocence and look forward to his vindication in this matter."

FlaglerLive obtained the body-cam video of Cooley's arrest the afternoon of June 29 at his home, after Flagler Beach police received a complaint of the alleged battery. The Sheriff's Office said there was no 911 call.

"We're conducting an investigation about what's going on with Sue," one of two sheriff's deputies carrying out the arrest at Cooley's house at 1617 Central Avenue tells him.

"OK," Cooley says.

"So what happened over the weekend?" the deputy asks.

Cooley, standing barefoot in black pants and a black t-shirt on his house's steps, appears perplexed, gesturing with his hand as if to say, *what do you mean*.

"With the kicking and all that, grabbing her by the chin," the deputy continues.

Cooley looks surprised. "I had cameras," he says.

"Would you be willing to show us?" The deputy asks him.

"I'd entertain it," he says. "Where's all this coming from?"

The deputy speaks of the allegations from other people, who'd reported altercations going on at the store, and of bruising seen on Kenna that's consistent with abuse.

Cooley acknowledges arguments about inventory and job performance. "It's all business,"

Cooley says, shaking his head no when the deputy asks him if he'd at any time struck Kenna. He gives the same answer about that morning or the night before. The deputy asks him about the bruising on Kenna.

"And she's saying that from me?" Cooley asks.

"That's correct."

"She's entitled to say that," Cooley says. "We have been arguing a lot. We have not been getting along. We get in each other's faces. We don't cross lines." He speaks of living with her off and on over the years, but repeats that there's just been "a lot of arguing."

At that point the deputy tells him he's being placed under arrest for battery. The deputies allow him to go back inside to collect a few things and care for the dogs, who had been barking all the while. Before Cooley goes in, one of the deputies asks him about a mark on his neck. "That's from the dog," Cooley says.

Moments later—according to Florida law body cam footage may be censored inside an individual's residence absent the individual's permission for the footage to be released—Cooley is walking toward the deputy's car, where he is soon handcuffed behind his back and placed in back of the patrol car. The deputy tells him he'll be out of the jail by morning: all individuals facing a domestic battery charge must spend the night in jail awaiting first appearance before a judge, done by video link to the courthouse. Cooley is fully cooperative and courteous, the tone of his voice identical to the even, controlled tone he uses when he used to address the County

Commission before his election—and since his election, when he speaks on any topic from the dais.

Cooley is aware that he won't be able to have contact with Kenna. He speaks with the deputies about trying to figure out how to deal with the no-contact order and still be able to work the next day. "She's the key to the operation" he says of Kenna at the store. He wants to make sure he can make calls to "at least keep the business open."

The second deputy explains to him the process of getting booked and how to set aside the phone numbers he needs to call, suggesting to him to wait until his first appearance before a judge before making contact with people, "because you only get one free phone call to each number," the deputy tells him.

"The problem is we have a volatile situation where I don't know what to expect from her," Cooley says. "And she's the gatekeeper to everything. I know I'm not supposed to talk to her and I respect that, it's—I hate saying it but it's almost essential because I have to get some questions answered about the business and everything."

"You've got a business to run, I got you."

"The personal stuff, I'm not concerned about that, it's just I've got the dogs and the household, and I don't know what to expect from her because they're her own unpredictable behavior," Cooley says.

The video ends.

A pre-trial conference is scheduled before County Judge Melissa Moore-Stens on Aug. 29.

BA F
of response

Flagler Beach Commissioner Eric Cooley's Victim of Alleged Battery Wants Case Dropped

FLAGLERLIVE | SEPTEMBER 13, 2018



Eric Cooley, second from right, getting ready to take his commission seat for the first time after being sworn-in on March 8.

(© FlaglerLive)

Saying she feels “more of a prisoner now” because of media attention and public “stalking” of her on social media, the alleged victim in the battery case against Flagler Beach business owner and Commissioner Eric Cooley is asking the State Attorney’s Office to drop the case against her one-time business and life partner.

Cooley was before County Court Judge Melissa Moore-Stens today for a scheduled docket sounding—the last step before trial is scheduled—but Assistant State Prosecutor Jason Lewis asked and was granted a continuance to late September, the last possible continuance as the defense is refusing to waive the 90-day speedy trial clock dating from the day of Cooley’s arrest. By law a trial must be scheduled within that 90-day clock, which expires around Sept. 29. But without the alleged victim, there is no case against Cooley.

“I cannot allow any more of my past life [to] become part of the media frenzy that this has already started,” Suzanne Kenna, 47, wrote Assistant State Attorney Jason Lewis, who is prosecuting the case. “I again, do not want my life details spread for all to see. I also do not want all the things that I went through to be given to perfect strangers to judge and ridicule. My life has been painful enough and I want it to end now.”

Kenna’s letter is the first look at her own thinking, in her own words, since the case broke two and a half months ago.

Cooley owns the 7-11 on Ocean Shore Boulevard in Flagler Beach, and was elected to the city commission unopposed earlier this year. On June 29, a store employee called police to report that Cooley had allegedly kicked Suzanne Kenna and grabbed her by the throat at the store. Kenna and Cooley worked and lived together for years. He was charged with a misdemeanor battery count. He has pleaded not guilty and denied any allegations of physical violence toward Kenna.

Kenna states in the Aug. 16 email obtained by FlaglerLive that she was “under no corrosion but my own conscience” (she likely meant coercion). But while she appears to have some sympathy for the damage to Cooley’s reputation and to his business, she also appears not to be denying that there had been serious issues between them.

“I do not want to inflict any more pain to him, even though I have every earthly right to.”

“From what I understand from a couple of trusted friends,” Kenna wrote, “Mr Cooley has also suffered much from the media frenzy and has already lost much of his business and possibly will have to move from Flagler as his reputation continues to spiral downward. I feel that God and Karma are already catching up with him. I do not want to inflict any more pain to him, even though I have every earthly right to.”

Josh Davis, Cooley’s attorney, said if the prosecution had a “slam-dunk” case, it would have gone to trial already.

“The victim has dodged them, as in, she doesn’t want to go forward with it,” Davis said today.

“So the only person that can prove their case is for whatever reason not wanting this thing to go any further. Whether she has recanted, whether she is sick of it, whether it was blown out of proportion, I don’t know, but she has no interest in going any further with this thing, so they’re going to try to drag her down there.”

Lewis doesn’t disagree with the facts of the case as it’s developed, but he doesn’t abide Davis’s characterization. “She sent us a letter that she doesn’t want to go forward,” Lewis said. “It’s affected her life very much, it’s stressful and traumatic. We don’t necessarily want to drop the case, we’re trying to contact the victim to see if she wants to cooperate, and she has not recanted in any way.” Lewis added: “I think she feels like the newspaper and the news media is infringing too much on her personal life and it’s affecting her in a negative way, and she just feel people are getting too much in her personal life.”

Kenna’s letter repeatedly cites media and social media intrusion “and the continued lack of intrusion that they cause,” in her words, as reasons for her decision not to go forward. “People that I have never even met have made nasty, rude, and uncalled for comments about things they know nothing about,” she wrote. “I am done with this and want to close this long and horrible chapter of my life and move on. I cannot as long as this case goes on.”

She described numerous physical ailments as a result of the stress of the case and the consequences of her own attempts to refer to the case online. “I cannot comment on family posts to social media without others stalking and asking me questions, I almost feel more of a prisoner now,” Kenna wrote.

Davis is eager to run out the clock. Once speedy trial it’s over, it’s forever barred from prosecution after that,” he said. “The defense can waive speedy trial. The prosecution cannot.”

Lewis conceded that absent Kenna, it would be difficult to make a case. “I can’t speculate, but it’d be safe to assume the victim would need to cooperate for us to go forward,” he said.

Davis intends to make a few motions next week to “change a few things,” including the no-contact order now in effect between Cooley and Kenna. Meanwhile, Davis intended to be at tonight’s Flagler Beach Commission meeting in case any member of the public were to address the issue. He said he would speak in defense of his client, essentially handling public opinion as

if he were in court. "I hope that whoever makes the comment when something like this happens to them that people show them more grace and fairness than have been shown to Mr. Cooley," Davis said, stressing the innocent-until-proven-guilty standard.

EX D

IN THE COUNTY COURT, OF THE
SEVENTH JUDICIAL CIRCUIT, IN
AND FOR FLAGLER COUNTY,
FLORIDA.

CASE NO.: 2018-MM-000867

STATE OF FLORIDA,

vs.

ERIC COOLEY,
Defendant.

_____/

AMENDED NOTICE OF HEARING

TO: Office of the State Attorney
Assistant State Attorney
1769 East Moody Boulevard
Building Two
Third Floor
Bunnell, FL 32110

PLEASE TAKE NOTICE that on **Thursday, September 27, 2018 at 3:00 pm**, or as soon thereafter as counsel may be heard, the undersigned counsel and the above-named Defendant will be have a Motion for Gag Order before the Honorable Melissa Moore Stens, County Court Judge, 1769 E. Moody Blvd, Bldg. 2, Courtroom 401, Bunnell, FL 32110.

PLEASE GOVERN YOURSELVES ACCORDINGLY.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to the Clerk of Court, and to the Office of the State Attorney, eserviceflagler@sao7.org this 18th day of September, 2018.

____ s/ Joshua D. Davis _____

JOSHUA DAVIS, ESQ.
joshuadavisesq@yahoo.com
Florida Bar # 0031027
Attorney for Defendant
DAVIS LAW
P.O. Box 1211

Bunnell, FL 32110
(386) 437-1127

JK-CA 09/19 234ph
Ex E

IN THE COUNTY COURT, SEVENTH JUDICIAL CIRCUIT IN
AND FOR FLAGLER COUNTY, FLORIDA

CASE NO: 2018-MM-000867

STATE OF FLORIDA,

vs.

ERIC COOLEY,

Defendant.

SUBPOENA FOR PERSONAL APPEARANCE AND TESTIMONY

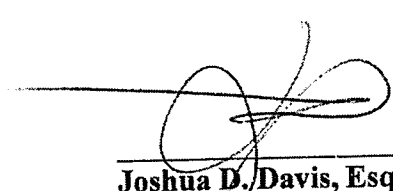
FLAGLER COUNTY SHERIFF'S OFFICE:

TO: SHERIFF RICK STALY
901 EAST MOODY BLVD.
BUNNELL, FL 32110

YOU ARE COMMANDED to appear to give testimony in the above referenced case at Kim C. Hammond Justice Center, 1769 East Moody Boulevard, Fourth Floor, Courtroom 404, Bunnell, Florida, 32110 before the Honorable D. Melissa Moore Stens on September 27, 2018 at 3:00 p.m.

IF YOU FAIL TO: (a) fail to appear; or (b) object to this Subpoena, you may be in contempt of Court. You are subpoenaed by the following attorney and, unless excused from this Subpoena by this attorney or the Court, you shall respond to this Subpoena as directed.

DATED this 18th day of September, 2018.



Joshua D. Davis, Esquire
Florida Bar Number: 31027
Davis Law, P.A.
P.O. Box 1211
Bunnell, Florida 32110
Telephone: 386/437-1127
joshuadavisesq@yahoo.com
Attorney for Defendant

IN THE COUNTY COURT SEVENTH JUDICIAL CIRCUIT
IN AND FOR FLAGLER COUNTY FLORIDA

STATE OF FLORIDA,

vs.

2018-MM-867

ERIC COOLEY,
Defendant.

MOTION TO QUASH SUBPOENA AND FOR PROTECTIVE ORDER

COMES NOW Rick Staly, in his official capacity as Sheriff of Flagler County, Florida, a non-party to the above captioned case, pursuant to the Florida Rules of Criminal Procedure 3.220 and 3.361, by and through undersigned counsel, and respectfully requests this Court issue an order quashing the subpoena directed to the Flagler County Sheriff, Rick Staly, issued by counsel for the Defendant for a hearing set for September 27, 2018, and a protective order preventing further subpoena for the personal appearance of Sheriff Staly. The subpoena should be quashed and a protective order issued for the reasons set forth in the Memorandum of Law, below.

MEMORANDUM OF LAW

1. RELEVANT PROCEDURAL BACKGROUND AND FACTUAL BACKGROUND.
 - a. On June 29, 2018, Eric Cooley (hereinafter referred to as "Defendant" was arrested for a charge of misdemeanor domestic battery under Florida Statute § 784.03(1).
 - b. The Defendant has filed a motion to restrict public pretrial statements regarding this case. (Docket. No. 23). The motion is set for hearing on September 27, 2018. (Docket No. 28).
 - c. On September 19, 2018, Defendant's counsel perfected substitute service upon Sheriff Staly with a subpoena to testify on September 27, 2018. (Exhibit A). The subpoena is for personal appearance before the Honorable Melissa Moore Stens on the date of the hearing to testify in this action.

2. STANDARD OF REVIEW

- a. A witness to whom a subpoena is directed has standing to question the subpoena. State Dep't of Highway Safety & Motor Vehicles v. State Career Serv. Comm'n, 322 So.2d 64 (Fla. 1st DCA 1975). Because high-level public officials are an easy target for abusive discovery, courts routinely prohibit or limit depositions of such officials absent a showing the official has unique, personal knowledge of the underlying facts at issue that cannot be obtained from any other source. Horne v. School Bd. Of Miami-Dade County, 901 So.2d 238, 241 (Fla. 1st DCA 2005); Dep't of Agriculture and Consumer Services v. Broward County, 810 So.2d 1056, 1058 (Fla. 1st DCA 2002). The undersigned acknowledges the case law cited addresses discovery depositions and not subpoenas for trial and/or hearing testimony. However, the purpose of the subpoena at issue is to annoy, harass, oppress, and cause an undue burden on Sheriff Staly, and not to illicit any testimony about which he has knowledge relevant to this matter that is not available from another source. As such, the Court should apply the same standard as would be applied to a deposition for discovery in this matter.
- b. Further, The Florida Rules of Criminal Procedure clearly contemplate this Court's authority to quash a subpoena for the attendance of witnesses and compulsion of documents for court proceedings, not just depositions. Florida Rule of Criminal Procedure 3.361 governing Witness Attendance and Subpoenas states:

If a subpoena commands a person to or entity to produce books, papers, documents, or tangible things, the person or entity may move the court to quash or modify the subpoena before the time specified for subpoena compliance. (2) The court may (A) quash or modify the subpoena if it is unreasonable and oppressive...

3. ARGUMENT

- a. The Defendant cannot establish Sheriff Staly has unique personal knowledge of the underlying facts that cannot be obtained from another source.
- b. The issue at hand is the Defendant's request for an order prohibiting pre-trial public comments regarding this case. The response filed on behalf of the Flagler County Sheriff's Office (Docket No. 29) makes it clear Sheriff Staly has made public comments regarding this case and that there has been press coverage of those comments.
- c. The facts are not in dispute. Indeed, it is clear this matter concerns a purely *legal* issue - namely, whether the publicity of this case has reached a level that any further public comment would violate the Defendant's right to a fair trial.
- d. The public comments made by Sheriff Staly regarding this case are all readily available through the media outlets to which those statements have been made. Sheriff Staly does not dispute making those public comments.
- e. Thus, any personal appearance of Sheriff Staly is completely needless and requiring his personal appearance at a hearing would only serve to harass him and cause an undue burden on his time. Further, the subpoena for his personal appearance in this matter is unreasonable and oppressive without showing he has particularized firsthand knowledge that cannot be obtained from another source.

WHEREFORE, based on the facts and legal support cited above, Sheriff Rick Staly requests this Honorable Court quash the subpoena that has been issued for his personal appearance for September 27, 2018, and enter a protective order prohibiting any further subpoena for his personal appearance at any live court proceedings in this case on the grounds stated above.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic notice if registered in the Electronic Case Filing System, otherwise via U.S. Mail: Josh Davis, Attorney for the Defendant; The Office of the State Attorney for the Seventh Judicial Circuit, Flagler County, on this 21st day of September, 2018.

BY: s/*Kayla R. Hathaway*
Kayla Hathaway, Esquire
Florida Bar No. 91695
khathaway@flaglersheriff.com
901 E. Moody Boulevard
Bunnell, FL 32110
General Counsel for the Flagler
County Sheriff's Office

Hathaway, Kayla

From: Kelly, Nadine <nkelly@circuit7.org>
Sent: Friday, September 21, 2018 4:07 PM
To: Hathaway, Kayla
Subject: RE: 2018-MM-867 SOF v. Eric Cooley

Hello. Please cross-notice this. Thank you

From: Hathaway, Kayla <KHathaway@flaglersheriff.com>
Sent: Friday, September 21, 2018 2:07 PM
To: Kelly, Nadine <nkelly@circuit7.org>
Subject: 2018-MM-867 SOF v. Eric Cooley

Good afternoon,

I hope this email finds you doing well. We haven't had the opportunity to meet in person so I apologize for starting this conversation via an impersonal email. I have filed the attached motion to quash and for protective order in this case. If the judge would like me to submit a proposed order granting the motion, I would be happy to do so. Otherwise, I'd like to cross notice the hearing set for 9/27/18 at 3 PM by Attorney Davis to hear this motion.

Please feel free to call me with any questions or concerns. My direct contact information can be found below my signature.

Kayla R. Hathaway, Esquire
General Counsel
Flagler County Sheriff's Office
901 E. Moody Blvd.
Bunnell, FL 32110
Office Direct: 386-586-4829
Fax: 386-586-4812
Cell: 386-262-5008
Florida Bar No. 91695
Email: khathaway@flaglersheriff.com
www.flaglersheriff.com



"An honor to serve, a duty to protect."

PLEASE NOTE: Florida has a very broad public records law per Fla. Statute 119. Most written communications to or from the Flagler County Sheriff's Office regarding public business are public records available to the public and media upon request. Your e-mail communications may be subject to public disclosure. If you do not want your e-mail address released, do not send electronic mail to this agency. Instead, contact this office by phone..

Ex. H

IN THE COUNTY COURT OF THE
SEVENTH JUDICIAL CIRCUIT IN AND
FOR FLAGLER COUNTY, FLORIDA

STATE OF FLORIDA

Case No.: 2018-MM-867

vs.

ERIC COOLEY,
Defendant,

_____ /

**ORDER DENYING NON-PARTY'S MOTION TO QUASH SUBPOENA
AND FOR PROTECTIVE ORDER**

This Cause came before the Court on a Motion to Quash Subpoena and for Protective Order filed by a non-party, Sheriff Rick Staly in his official capacity as Flagler County Sheriff. Having reviewed the Motion and court file, and being otherwise advised in the premises, the Court hereby ORDERS AND ADJUDGES as follows:

The requested relief is denied for the reasons set forth herein. As authority for the Court to quash the subpoena, the Sheriff first cites Florida Rule of Criminal Procedure 3.220, relating to Discovery in a criminal case. The subpoena issued in this case is for personal appearance and testimony at a hearing on the Defendant's Motion for Gag Order. This is not a discovery matter, and therefore Rule 3.220 is not applicable.

Furthermore, the Sheriff cites Florida Rule of Criminal Procedure 3.361, which sets forth rules relating to subpoenas, compulsory witness attendance, and document disclosure via subpoena. The section cited verbatim by the Sheriff in his Motion, Florida Rule of Criminal Procedure 3.361(c), pertains only to production of tangible evidence. The subpoena issued in this case is not for the production of "books, papers, documents or tangible things"; therefore, the cited language of Florida Rule of Criminal Procedure 3.361(c) does not apply. The Court's authority to quash or modify an unreasonable and oppressive subpoena for records or to require advanced payment of reasonable costs for such unreasonable and oppressive subpoena is not applicable to a subpoena for which only testimony is sought.

Therefore, the Motion to Quash Subpoena is DENIED and the request to enter a Protective Order prohibiting further subpoena is likewise DENIED.

DONE and ORDERED in chambers at the Flagler County Courthouse in Bunnell, Florida

this 24th day of September, 2018.

9/24/2018 11:35 AM 2018 MM
Stens 000867



e-Signed 9/24/2018 11:35 AM 2018 MM 000867

D. Melissa Moore Stens
County Court Judge

Copies To:

Jason Lewis, ASA, Office of the State Attorney

Josh Davis, Esq., Attorney for Defendant

Kayla Hathaway, Esq., Attorney for Flagler County Sheriff's Office

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IN THE COUNTY COURT SEVENTH JUDICIAL CIRCUIT
IN AND FOR FLAGLER COUNTY FLORIDA

STATE OF FLORIDA,

vs.

2018-MM-867

ERIC COOLEY,
Defendant.

**AMENDED REQUEST FOR RECONSIDERATION OF COURT'S ORDER
ON MOTION TO QUASH SUBPOENA AND FOR PROTECTIVE ORDER
WITH ADDITIONAL GROUNDS**

COMES NOW Rick Staly, in his official capacity as Sheriff of Flagler County, Florida, a non-party to the above captioned case, by and through undersigned counsel, respectfully requests this Court reconsider the denial of a motion to quash the subpoena directed to the Flagler County Sheriff, Rick Staly, issued by counsel for the Defendant for a hearing set for September 27, 2018, and a protective order preventing further subpoena for the personal appearance of Sheriff Staly. The subpoena should be quashed and a protective order issued for the reasons set forth below.

1. RELEVANT PROCEDURAL BACKGROUND AND FACTUAL BACKGROUND.

- a. The undersigned adopts items a.-c. of the corresponding section of Docket No. in to this Request for Reconsideration.
- b. On September 21, 2018, the undersigned filed a motion to quash the subpoena for the personal appearance directed at the Sheriff and for protective order. (Docket No. 33)
- c. On September 24, 2018 the Court issued an order denying the Motion to Quash the Subpoena and for Protective Order. (Docket No. 34).

ADDITIONAL GROUNDS FOR RECONSIDERATION

1. Enforcing the subpoena infringes on the victim's rights.
 - a. In the State of Florida, victims of crimes are entitled to be... heard when relevant, at all crucial stages of criminal proceedings... Art I, (16)(b), Fla. Const.
 - b. Someone who has been discussed very little in the pleadings surrounding the issue as to whether the Court should issue a pre-trial order preventing further public comment in this case is Suzanne Kenna, which is an absolute travesty.
 - c. Ms. Kenna has been identified by the State Attorney's Office as a victim of the crime of domestic battery in this case.
 - d. Sadly, Ms. Kenna has written the State Attorney's Office indicating the media intrusion in to her life after this incident has made her feel like "more of a prisoner now." Further, she asks the State to drop the case to "Allow the media to focus on someone else so I can have a life finally."
 - e. Ms. Kenna has clearly been through quite an ordeal, regardless of the outcome of this case. The public scrutiny of this issue has exacerbated the difficulty of this matter.
 - f. Ms. Kenna has rights under the Florida Constitution that allow for her to be heard when relevant throughout this case. She has clearly asked that the media attention in this case stop. To enforce the subpoena for the sheriff's appearance would only bring more media attention to this case and cause more hardship for Ms. Kenna. **This Court should not abide Ms. Kenna's rights being violated in this case any further.**
2. The Court should quash the subpoena and issue a protective order to prevent a **chilling effect** on elected officials making public comments about important matters affecting their community
 - a. Sheriff Rick Staly is a constitutional officer elected by the voters of this county. Art. VIII, (1)(d), Fla. Const.
 - b. When matters of public concern happen in our community the citizens that elected Sheriff Staly demand that he keeps them informed, a duty he takes great pride in.
 - c. When the Defendant was arrested in this case Sheriff Staly did just that, with a press release informing the public an arrest was made. Further, when asked by the media regarding this case the sheriff's comments reflect his general views on domestic violence as a scourge in our

community. The fact that public comments were made and the nature of those public comments in regard to this case are not in dispute.

- d. The Defendant cannot produce a single scintilla of evidence the Sheriff made any comment in regard to the strength of the case. Any other public statements made by Sheriff Staly in regards to other cases are completely irrelevant to this matter.
- e. Sheriff Staly's personal appearance for this hearing is completely unnecessary and will have a **substantial and irreparable chilling effect** on our elected officials.
- f. If our elected officials are called to court under subpoena each time he or she speaks out on a matter affecting their community, their ability to perform their duties on behalf of the people that elected them is in grave danger.
- g. The purpose of subpoena power is not to muzzle elected officials about matters affecting their community or face constant subpoenas for court and/or depositions to discuss a matter about which they have no personal knowledge. This decision is much further reaching than this case alone.
- h. The court must quash this subpoena and issue a protective order to prevent such a substantial chilling effect on the duties of the officials elected by this community.

WHEREFORE, based on the facts and legal support cited above and in Docket No. 33, Sheriff Rick Staly renews his request this Honorable Court quash the subpoena that has been issued for his personal appearance for September 27, 2018 and enter a protective order prohibiting any further subpoena for his personal appearance at any live court proceedings in this case on the grounds stated above.

Further, the Sheriff is requesting a hearing on the matter before the subpoena is enforced in order for all parties to present their argument to the Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic notice if registered in the Electronic Case Filing System, otherwise via U.S. Mail: Josh Davis, Attorney for the Defendant; The Office of the State Attorney for the Seventh Judicial Circuit, Flagler County, on this 25th day of September, 2018.

BY: s/*Kayla R. Hathaway*
Kayla Hathaway, Esquire
Florida Bar No. 91695
khathaway@flaglersheriff.com
901 E. Moody Boulevard
Bunnell, FL 32110
General Counsel for the Flagler
County Sheriff's Office

Ex J

IN THE COUNTY COURT, SEVENTH JUDICIAL CIRCUIT
IN AND FOR FLAGLER COUNTY, FLORIDA

STATE OF FLORIDA,

CASE NO.: 2018-MM-867

vs.

ERIC COOLEY,

Defendant.

_____ /

CROSS NOTICE OF HEARING

PLEASE TAKE NOTICE that a hearing on the Request for Reconsideration of the Court's Denial of the Motion to Quash Subpoena and Issue Protective Order filed by the non-party law enforcement agency, Flagler County Sheriff's Office has been scheduled in the above matter for the following date and time:

September 27, 2018 at 3:00 p.m.

**Kim C. Hammond Justice Center
1769 E. Moody Blvd., Bldg. 1
Bunnell, Florida 32110
Courtroom 404**

PLEASE GOVERN YOURSELVES ACCORDINGLY.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic notice if registered in the Electronic Case Filing System, otherwise via U.S. Mail: Josh Davis, Attorney for the Defendant; The Office of the State Attorney for the Seventh Judicial Circuit, Flagler County, on this 25th day of September, 2018.

BY: s/Kayla R. Hathaway
Kayla Hathaway, Esquire
Florida Bar No. 91695
khathaway@flaglersheriff.com
901 E. Moody Boulevard
Bunnell, FL 32110
General Counsel for the Flagler
County Sheriff's Office



REQUESTS FOR ACCOMMODATIONS BY PERSONS WITH DISABILITIES

If you are a person with a disability who needs an accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact Court Administration, 125 E. Orange Ave., Ste. 300, Daytona Beach, FL 32114, (386) 257-6096, at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time before the appearance is less than 7 days; if you are hearing or voice impaired, call 711.

THESE ARE NOT COURT INFORMATION NUMBERS



SOLICITUD DE ADAPTACIONES PARA PERSONAS CON DISCAPACIDADES

Si usted es una persona con discapacidad que necesita una adaptación para poder participar en este procedimiento, usted tiene el derecho a que se le proporcione cierta asistencia, sin incurrir en gastos. Comuníquese con la Oficina de Administración Judicial (Court Administration), 125 E. Orange Ave., Ste. 300, Daytona Beach, FL 32114, (386) 257-6096, con no menos de 7 días de antelación de su cita de comparecencia ante el juez, o de inmediato al recibir esta notificación si la cita de comparecencia está dentro de un plazo menos de 7 días; si usted tiene una discapacidad del habla o del oído, llame al 711.

ESTOS NUMEROS TELEFONICOS NO SON PARA OBTENER INFORMACION JUDICIAL