

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2833-09T2

IN THE MATTER OF SEVEN STATE
TROOPERS.

Argued: January 13, 2010 - Decided: February 25, 2010

On Motion for Leave to Appeal and Stay.

Before Judges Cuff and Payne.

On appeal from an Interlocutory Order of the Superintendent of the Division of the State Police, Docket No. 2007-1024.

Robert A. Ebberup argued the cause for appellant Trooper #3.

Jeffrey Catrambone argued the cause for appellant Trooper #1 (Sciarra & Catrambone, L.L.C., attorneys, join in the motion of Trooper #3).

Patrick J. Caserta argued the cause for appellant Trooper #2 (Patrick J. Caserta, L.L.C., attorneys, join in the motion of Trooper #3 and filed a supplemental brief).

Katherine Hartman argued the cause for appellant Trooper #4 (Law Offices of Attorneys Hartman, attorneys, join in the motion of Trooper #3).

James J. Uliano argued the cause for appellant Trooper #5 (Chamlin, Rosen, Uliano & Witherington, attorneys, join in the motion of Trooper #3).

Patricia M. Prezioso argued the cause for appellant Trooper #6 (McCusker, Anselmi, Rosen & Carvelli, P.C., attorneys, join in the motion of Trooper #3).

Emad Iskaros argued the cause for appellant Trooper #7 (Fahy Choi, L.L.C., attorneys, join in the motion of Trooper #3).

Victor DiFrancesco, Deputy Attorney General, argued the cause for respondent State of New Jersey (Anne Milgram, Attorney General, attorney; Mr. DiFrancesco, of counsel and on the brief; Phillip Dowdell, Deputy Attorney General, on the brief).

PER CURIAM

On December 7, 2007, a young woman reported to the emergency room of a hospital for treatment following a night of sexual activity with several men. She acknowledged that some of the activity was consensual; she equivocated whether all of it was consensual. Accordingly, the local police were notified. Following an extensive investigation, the county prosecutor determined not to present the matter to a grand jury but referred the matter to the State Police for consideration of disciplinary charges.

On October 9, 2009, the State Police issued disciplinary charges and specifications to the seven troopers involved in the December 7, 2007, incident. Each trooper has been charged with four charges, three of which relate to the events of December 7, 2007, at the home of one of the seven troopers. It is these

three charges that are the basis for the application to prevent identification of the charged troopers and to close the administrative hearing. Each trooper contests the charges and the matter has been referred to the Office of Administrative Law (OAL) for hearing. N.J.S.A. 52:14B-9; N.J.A.C. 1:1-8.2. On October 29, 2009, counsel for Trooper #4,¹ filed a motion in the OAL to close the administrative hearings to the public. On November 5, 2009, Administrative Law Judge (ALJ) Masin denied the request.

In his written opinion, the ALJ referred to the general rule that "[a]ll evidentiary hearings, proceedings on motions and other applications shall be conducted as public hearings unless otherwise provided by statute, rule or regulation, or on order of a judge for good cause shown." N.J.A.C. 1:1-14.1(a). He acknowledged the sensitivity of the situation and recognized that discipline may not be warranted following a full exposition of the facts. Nevertheless, he found that the public interest in the integrity of the State Police outweighed the purely private interests of the individual troopers to avoid embarrassment. The ALJ permitted the troopers to appeal his

¹ Since the matter was referred to the OAL, the identity of the charged troopers has not been revealed. During the investigation, the practice arose to assign numbers to the troopers; we have continued that practice.

interlocutory decision to the Superintendent of the State Police.

In his December 23, 2009, decision, the Superintendent upheld the ALJ's decision. He found that the troopers had not established good cause to close the proceeding. He said:

Here, good cause does not exist to close the hearing or seal the record. Having considered the requirements of due process, the applicable legal standards, matters of public policy, and the stated need to protect parties or witnesses from undue embarrassment or deprivation of privacy, the balance weighs in favor of the proceedings being conducted as public hearings. Accordingly, the decision below giving rise to this interlocutory review is affirmed.

Counsel for Trooper #3 requested the ALJ to stay the order to open the proceedings pending a motion for leave to appeal to this court. Counsel for all other troopers joined the request. The request was denied and by order dated December 31, 2009, this court entered a stay pending disposition of the motion for leave to appeal. Following the submission of briefs, as well as the discovery,² oral argument was conducted on January 13, 2010. We have been informed that the troopers have been suspended without pay since October 2009.

² We requested the submission of the discovery under seal.

We start with the premise that all administrative proceedings are open to the public "unless otherwise provided by statute, rule or regulation, or on order of a judge for good cause shown." N.J.A.C. 1:1-14.1(a). This rule mirrors Rule 1:2-1, which directs that all trials, hearings of every sort, pretrial conferences, arraignments, sentencing conferences and appeals shall be conducted "in open court," unless otherwise provided by rule or statute. Open proceedings are mandated by the federal and state constitutions. U.S. Const. amend. XIV; N.J. Const. art. I, ¶ 10. In addition, our traditional abhorrence of secret trials informs our public policy to require open proceedings. See, e.g., Sheppard v. Maxwell, 384 U.S. 333, 349-50, 86 S. Ct. 1507, 1515, 16 L. Ed. 2d 600, 613 (1966); In re Oliver, 333 U.S. 257, 267-68, 68 S. Ct. 499, 504-05, 92 L. Ed. 682, 691 (1948); Smith v. Smith, 379 N.J. Super. 447, 451 (Ch. Div. 2004). Public trials are considered essential to maintaining public confidence in our administrative and judicial systems.

The right and the obligation to assure a public hearing is not absolute. The rules governing closure of a hearing in the OAL require an ALJ to consider the requirements of due process of law, other constitutional and statutory standards, matters of public policy, and the need to protect persons from undue

embarrassment or to protect other interests. N.J.A.C. 1:1-

14.1(b) provides:

In considering whether to close a hearing and/or seal a record, the judge shall consider the requirements of due process of law, other constitutional and statutory standards and matters of public policy. The judge shall consider the need to protect against unwarranted disclosure of sensitive financial information or trade secrets, to protect parties or witnesses from undue embarrassment or deprivations of privacy, or to promote or protect other equally important rights or interests.

In this case, the seven charged troopers assert that an open hearing will cause undue embarrassment to them and their families, as well as a deprivation of privacy. They assert that their conduct occurred in a private place among consenting adults while they were off-duty. Thus, their conduct is not of interest or concern to their employer or to anyone else. Moreover, the current disciplinary charges constitute an unconstitutional invasion of their wholly justified right to privacy. They emphasize that no element of their conduct, as individuals or in concert, occurred in any place or manner that would discredit their employer.

The Superintendent concedes that there is no basis for discipline, if the behavior among the men and the complaining witness was consensual. Nevertheless, the Superintendent suggests that there remains some question whether the

complaining witness consented to each and every sexual act with each man.³ The Superintendent also argues that the need to avoid scandal and to promptly address untoward behavior by individual troopers requires an open hearing in order to preserve public confidence in the integrity of each State Police officer and the entire force.

The troopers argue that sexual acts performed in private are beyond the scope of inquiry of their employer. There are some matters that fall within a zone of privacy which bars inquiry by the government or an employer. Those matters usually relate to personal decisions concerning marriage, procreation, contraception, and family relationships. Griswold v. Conn., 381 U.S. 479, 484-86, 85 S. Ct. 1678, 1681-82, 14 L. Ed. 2d 510, 514-16 (1965); Roe v. Wade, 410 U.S. 113, 152-53, 93 S. Ct. 705, 726, 35 L. Ed. 2d 147, 176-77 (1963). These matters are protected from public inquiry because the decision or the action does not adversely affect anyone other than the actor and possibly a consenting partner. Shuman v. City of Phila., 470 F.

³In the federal proceeding initiated by the troopers to bar the disciplinary proceeding, State Trooper Fraternal Association v. State of New Jersey, Civil Action No. 08-3820(MLC) (D.N.J. 2009), the Superintendent acknowledged that the alleged victim stated that her sexual relations with Trooper #3 were consensual. Moreover, in one of the statements given by the alleged victim, she stated that she had consensual sexual relations with two troopers.

Supp. 449, 458-59 (E.D. Pa. 1979). This zone of protected private activity is not absolute.

Society has proscribed certain conduct of a sexual nature. Thus, although the action may have occurred in private, society does not condone sexual acts performed on children, e.g., N.J.S.A. 2C:14-2a(1) (actor commits aggravated sexual assault if he commits an act of sexual penetration with another person less than thirteen years of age), or performed on a person of appropriate age but without the consent of the partner, e.g., N.J.S.A. 2C:14-2a(6) (actor commits aggravated sexual assault if the actor commits an act of sexual penetration using physical force or coercion and severe personal injury is sustained by the victim).

A public employer, such as the Superintendent, also has an interest and may investigate some areas of the personal, sexual activities of his troopers when those activities impact the job performance of a trooper. Shuman, supra, 470 F. Supp. at 459. Troopers, as all law enforcement officers, are also charged with a higher standard of behavior due to their responsibility to uphold the law. In re Disciplinary Procedures of Phillips, 117 N.J. 567, 576-77 (1990). However, a supervisor has no basis to inquire, much less discipline, a police officer estranged from

his wife for initiating a sexual relationship with another woman. Shuman, supra, 470 F. Supp. at 461.

Similarly, moral disapproval of group sexual activities cannot form the basis of discipline when that activity occurs off-duty in a private place among consenting adults. It is now well-established that the privacy concerns first identified in Griswold are not confined to married adults. See Lawrence v. Texas, 539 U.S. 558, 566, 123 S. Ct. 2472, 2477, 156 L. Ed. 2d 508, 517-18 (2003). Notably, Justice Kennedy recognized that adults are entitled to conduct their private lives in private. Id. at 578, 123 S. Ct. at 2484, 156 L. Ed. 2d at 525. In the context of a statute that made criminal a sexual act between homosexual adults, Justice Kennedy wrote:

The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives.

[Ibid.]

In her concurrence, Justice O'Connor stated that moral disapproval or dislike of a group is not a legitimate government

interest to justify the creation of legal classifications. Id. at 583, 123 S. Ct. at 2486, 156 L. Ed. 2d at 528-29. The Superintendent's recognition that he cannot discipline the troopers for off-duty private sexual behavior among consenting adults, no matter how distasteful it may be to him and the force as a whole, is no doubt informed by these principles.

We are confronted, therefore, with a need to balance the legitimate and serious interests of both parties. The Superintendent argues that the conduct cannot be considered purely private, off-duty behavior. He emphasizes that within hours, the woman filed a complaint with the police and a criminal investigation ensued. That fact and the unresolved question of whether all of the sexual conduct was consensual during that evening removes this disciplinary action from the veil of protected private sexual activity.

None of the troopers argue that their identities would not have been revealed if criminal charges had been filed against them. None of the troopers argue that the ensuing trial could have proceeded in private. None of the troopers argue that they are not subject to discipline, if a finding is made that any of the sexual acts were not consensual. They emphasize, however, that the prosecutor failed to even present the case to a grand jury despite an exhaustive investigation. They also emphasize

that the voluminous discovery in this matter raises very substantial questions concerning the credibility of the putative victim, and those questions lead to the inevitable conclusion that the charges will not be sustained. Therefore, they argue that there is a substantial likelihood that any fact-finder will not be able to find by the preponderance of the evidence that any act occurred without the consent of the putative victim. In fact, they argue that the overwhelming evidence will support a finding that each and every act was consensual.

Ordinarily, such an argument would fall on deaf ears. The troopers acknowledge this. They argue, however, that the nature of the charges and the evidence that will be adduced to support and to refute those charges will cause undue embarrassment not only to them individually but to their families. Furthermore, they emphasize that when the charges are found to be without merit, incalculable harm will nonetheless have been done not only to their reputations but also to their familial relationships. Finally, once the actions are found to be consensual, the disciplinary predicate vanishes.

The troopers urge that their identities remain concealed. They recognize that this relief requires a closed proceeding. Admittedly, the relief urged by the troopers is extraordinary. Two factors, however, counsel in favor of their position.

First, the Superintendent agrees that no discipline would be in order based on the facts of this case but for the complaint made by the young woman. He recognizes that the sexual activity that occurred at the home of one trooper while all present were off-duty would not allow him to initiate disciplinary charges as long as the activity was consensual.

Second, we required submission of the discovery, and we have reviewed that discovery. We comment on the discovery because it is critical to our effort to balance the competing interests in this case. Having reviewed the discovery, it is clear why this matter was never presented to a grand jury. We need not relate every detail of the investigation. It is sufficient that we note that much of the information provided by the alleged victim about the location and circumstances of the events was roundly discredited. The discovery raises very substantial doubt that any fact-finder will find that some or all of the activities were without the consent of the woman.

As previously noted, if the acts that form the basis of the disciplinary charges are found to be consensual, the factual predicate for the charges dissipates. If the identities of the individual troopers are revealed and the details of the evening are made public, the harm to their familial relationships may be incalculable and forever impaired. On this unique record, the

privacy interests of individual troopers should prevail, at least until a fact-finder finds that there is a basis for the charges following a full evidentiary hearing.

We, therefore, grant leave to appeal, reverse the December 23, 2009, order of the Superintendent, and order the charged troopers to remain unidentified and the hearing to proceed as a closed proceeding.

**I hereby certify that the foregoing
is a true copy of the original on
file in my office.**



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