

IN THE SUPREME COURT
OF
STATE OF SOUTH DAKOTA

RAPID CITY JOURNAL,

Applicant,

v.

VERIFIED APPLICATION
FOR ALTERNATIVE WRIT OF MANDAMUS

THE HONORABLE CHAD R. CALLAHAN,
South Dakota Fourth Circuit Court Magistrate Judge,

Respondent.

This Application for an Alternative Writ of Mandamus is submitted on the information and belief of Jon E. Arneson, attorney for Applicant, *Rapid City Journal* [“Journal”], in accordance with SDCL Ch. 21-29 and SDCL Ch. 21-30.

Journal’s causes of action stem from the grant of a suspended imposition of sentence [SIS] in *State of South Dakota v. Gary Lynn Cammack*¹ by Respondent, South Dakota Fourth Circuit Magistrate Judge Chad R. Callahan [Judge Callahan], on June 29, 2021. The first cause is predicated on Callahan’s premature order sealing the defendant’s file on October 1, 2021. Journal maintains that the file should not have been sealed until December 29, 2021, at the earliest and, therefore, asks for a writ of mandamus compelling Callahan to rescind his sealing order and make the file publicly accessible.

¹ 46CR120-000031, Meade County, Fourth Circuit.

FACTS

1. On January 18, 2020, Gary Lynn Cammack was arrested in Meade County.
2. Cammack was subsequently charged with speeding and Driving Under the Influence 1st Offense and his case filed and docketed as 46CR-120-000031 in Meade County on January 21, 2020.
3. Because of a conflict of interest, the prosecution of Cammack was handled by the Pennington County States Attorney's Office.²
4. Nathaniel Nelson, Sturgis, represented Cammack.
5. Cammack made his initial appearance on February 4, 2020, and pled not guilty.
6. A status hearing was held on May 7, 2020.
7. A pretrial conference was held on November 19, 2020.
8. A jury trial was scheduled for July 1, 2021.
9. A second pretrial conference was held on June 10, 2021.
10. A plea agreement was reached between Weiss and Nelson.
11. Cammack entered a plea of guilty to speeding and careless driving on June 29, 2021, in Deadwood.
12. Magistrate Judge Callahan³ granted Cammack a Suspended Imposition of Sentence.
13. The dispositional document recording and reporting the sentencing in Cammack's case on June 29, 2021, shows that the Suspended Imposition of Sentences had two conditions: "1) THAT THE DEFENDANT PAY FINE AND COSTS TODAY; 2) THAT THE DEFENDANT VIOLATE NO LAWS FOR A PERIOD OF 6 MONTHS." [A copy of the dispositional record is attached as Exhibit 1.]

² Mark Vargo is the Pennington County States Attorney. Deputy States Attorney Alexandra Weiss represented the State of South Dakota.

³ Although Journal has not received confirmation that Callahan presided over the June 29, 2021, hearing, his later involvement makes it a reasonable assumption.

14. On October 1, 2021, several emails were sent between and among the Cammack's attorney⁴, the Pennington County State's attorneys, the Meade County clerk of court and Judge Callahan. [A copy of the emails is attached as Exhibit 2.]
15. The email exchange resulted in Judge Callahan signing an order sealing the Cammack file on October 1, 2021. [A copy of the order is attached as Exhibit 3.]
16. The October 1, 2021, sealing order, in turn, had to be grounded in the supposition that Cammack was to have been granted an SIS with no probation condition in the first instance on June 29, 2021.
17. On October 15, 2021, Journal's attorney sent a letter to Nelson, Vargo and Weiss, in an attempt to determine the facts and circumstances that allowed a six-month probation period from June 29, 2021, to abruptly terminate in a sealed file on October 1, 2021.
18. After receiving responsive letter from Nelson, Journal's counsel expressed more concerns in an October 18, 2021, email, to which Nelson replied: "The intent of the plea agreement at the time of sentencing was that there would be no obey all laws condition ordered, and the matter would be done and sealed at the time of sentencing. Judge Callahan amended the order via email to remove the obey all laws provision so the case was resolved in the way it was intended in the plea agreement. The agreement was that the matter should have never had an obey all laws provision to begin with."⁵ [A copy of this email is attached as Exhibit 4.]
19. Although Nelson provided Journal with a copy of the arrest documents, the October 1 emails and the Judge Callahan's October 1 sealing order on October 18, subsequent efforts by Journal's attorney to have the participants help him understand the process that led to the *ex post facto* sealing order or what transpired on June 29, 2021, that created this snafu.

⁴ In one of the emails, Nelson sought Weiss's consent to having his client's file sealed, writing: "In the 4th circuit there is an option [to] seal with a suspended imposition of sentence at the time of sentencing and also the wait one year or six months options like in the 7th...."

⁵ This begs several questions. Was there a written record of the plea agreement? Why would Nelson need to explain the purported 4th circuit option to Weiss 3 ½ months after the sentencing hearing? And why do the clerk's notes "show it was just a suspended imposition—no immediate seal" and why does "Odyssey show[] a seal date of 12/29/21." When did Judge Callahan's send an "order via email" and is there a record of it?

20. Journals' attorney's question regarding the existence of the order amending the original dispositional order—of which he was notified by Nelson in the email on October 18, 2021—has also gone unanswered by attorneys for Callahan, the prosecution and Judge Callahan.

ARGUMENT

The sealing of a defendant's case file prior to the expiration of the probation period upon which a grant of Suspended Imposition of Sentence was conditioned unlawfully precludes the public from its right of access to a court record, and mandamus is the appropriate remedy to compel the unsealing of the file.

The dispositional record of the June 29, 2021, plea hearing in State v. Cammack discloses a grant of a Suspended Imposition of Sentence conditioned on a 6-month probationary term ending December 29, 2021, making it necessary to compel the rescission of the premature October 1, 2021, order sealing defendant's file, and allowance of public access to that file.

The only official dispositional record in State v. Cammack, to which the public and Journal have been privy, indicates that on June 29, 2021, Cammack pled guilty to the reduced charge of careless driving and was granted a Suspended Imposition of Sentence that specifically attached a six-month "obey all laws" probation that would not have expired until December 29, 2021. Until that date, his offense could not be expunged, he could not be discharged and his record could not be sealed.

However, as of October 1, 2021, when Judge Callahan entered a sealing order, that record has been sealed in contravention of the original disposition. Lacking access, Journal is unable to ascertain whether the State v. Cammack file contains an amended *nunc pro tunc* dispositional order that expressly eliminated probation as a condition of Cammack's SIS.

Absent convincing proof of a superseding order, it is clear the file should be unsealed until December 29, 2021. And even if proof is produced that there was a subsequent order that "corrected" the original disposition, it is unavailing. For reasons set forth below, any such

modification would result in an invalid sentence beyond the court's authority. Therefore, any modification order removing probation as a condition should be rescinded along with the sealing order of October 1, 2021.

The factual context, naturally, is incomplete because of the secrecy. Nevertheless, the October 1, 2021, email exchanges furnish reasonable cause for concern. Frankly, not all of it is consistent. On the one hand, Nelson insinuates in the 1:25 p.m. email to Weiss and the clerk of courts that his law associate covered the June 29, 2021, hearing for him might not have understood the plea bargain. ["I'm assuming it was me [sic] who dropped the ball by not clarifying with Kelly who covered the hearing for me, but the client thought this matter would be sealed immediately...."] Yet, on the other hand, he begins that same email with an explanation to Weiss—footnote 6, above—of the circuit's supposed no-probation SIS option.

There are a couple of other problems, as well. First there seems to be no recorded evidence of the plea agreement. Nobody other than Nelson seems to have had any understanding of the agreement that he now describes as an immediate sealing agreement. The clerk emphasized that her notes contradict the entry of a no-probation SIS. Both Nelson's stand-in and the prosecutor seem to have been unaware. And, most significantly, Judge Callahan⁶ seems to have missed the "no probation condition" that Nelson claims to have been the objective.

Second, with respect to the existence of an amended order, said to have been sent by email, the only possible evidence is the clerk's 2:17 p.m. email cautioning Nelson, Weiss and Judge Callahan that "as of today's date, it appears that a judgment was not filed in this matter."

⁶ It is also a mystery whether a later order was filed and made part of the record. Journal's counsel asked both Judge Callahan and all the attorneys when such an order was made and if it was filed, but none of them bothered to answer.

Although it is uncertain what the clerk meant by “judgment,” it is quite conceivable that she referred to an SIS order from original hearing on June 29, 2021, or one from some later date.

REQUEST FOR RELIEF

Applicant, *Rapid City Journal*, requests the Court to issue an alternative writ of mandamus to Magistrate Judge Chad Callahan, Respondent, directing him to unseal the record in *State of South Dakota v. Gary Lynn Cammack* [46CR120-000031, Meade County, Fourth Circuit] and rescind any order to the contrary, immediately, or to show cause why the current sealing of that file is legally permissible.

Dated this 1st day of November, 2021.

/s/ JON E. ARNESON
Jon E. Arneson
1305 S. Elmwood Ave.
Sioux Falls, SD 57105
Telephone: 605-359-0827
Attorney for Applicant

STATE OF SOUTH DAKOTA))
)SS
COUNTY OF MINNEHAHA)

Jon E. Arneson, being first duly sworn on oath, deposes and states that he is the attorney for the Applicant, that he has been authorized to execute the foregoing document on behalf of the Applicant, that he has read the foregoing application, that he knows the contents thereof, and that the same is true of his own knowledge, except as to those matters stated upon information and belief, which matters he believes to be true.

/s/ JON E. ARNESON
Jon E. Arneson
Attorney for Applicant

Subscribed and sworn to before me this 1st day of November, 2021.

/s/ JOEL T. HAGEN
Notary Public – South Dakota
My Commission expires: 6/4/23

CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing Application for Alternative Writ of Mandamus and/or Writ of Prohibition and Application for Permission to Commence Original Mandamus and/or Prohibition Proceeding were served on Judge Chad R. Callahan by e-mailing the same to chad.callahan@uj.s.state.sd.us.

Dated this 1st day of November, 2021.

/s/ JON E. ARNESON
Jon E. Arneson