



FIRE

Foundation for Individual
Rights and Expression

November 6, 2023

Tracy D. Evans
Pike County Sheriff
14050 US-23
Waverly, Ohio 45690

Sent via U.S. Mail and Electronic Mail (tevans@pikecountysheriff.oh.gov)

Dear Sheriff Evans:

The Foundation for Individual Rights and Expression (FIRE), a nonpartisan nonprofit dedicated to defending freedom of speech, is concerned that the Pike County Sheriff's Office has not returned journalist Derek Myers' laptop and cell phone, which were seized in connection with Myers' arrest pursuant to an unconstitutional wiretap law.¹ The Pike County Sheriff's Office's seizure of a journalist's devices was improper at the outset by virtue of the First and Fourth Amendments, and your office's continued retention of these devices is contrary to Ohio law. They must be returned without delay.

Myers is editor-in-chief of the *Scioto Valley Guardian*, a newspaper serving southern Ohio. Last year, the *Guardian* was one of many news outlets covering the murder trial of George Wagner IV.² The *Guardian* livestreamed much of the trial under an Ohio court rule stating the court "shall permit" the broadcasting of trials.³ However, the judge presiding over the trial gave witnesses the option to prevent their testimony from being streamed or recorded.

One witness, Jake Wagner, opted to do so. While the *Guardian* published audio of Wagner's testimony on October 28, 2022, its report noted that "the audio was not recorded by a member of the media" and was "submitted to" the *Guardian* by "a courthouse source who is authorized

¹ More information about FIRE's mission and activities is available at thefire.org. We do not represent Myers but write to you in our capacity as advocates for free expression.

² The following narrative reflects our understanding of the pertinent facts, but we appreciate you may have more information and invite you to share it with us.

³ OHIO SUP. R. 12(A).

to have their cell phone in the room.”⁴

The Pike County Sheriff’s Office subsequently obtained an arrest warrant, alleging Myers violated Ohio Revised Code § 2933.52(A)(3), because he “use[d], or attempt[ed] to use, the contents of a wire, oral, or electronic communication, knowing or having reason to know” the recording was made unlawfully.⁵ To our knowledge, there was no allegation or evidence that Myers was involved in making the recording, and his reporting disclaimed that possibility. On November 1, 2022, Sgt. Joshua Carver seized Myers’ laptop pursuant to a search warrant.⁶

The following day, when Myers entered the courthouse, a sheriff’s deputy told him his cell phone was banned from the courtroom. When Myers explained that he was going to a room reserved for journalists reporting on the trial—not the courtroom—the deputy responded that he had a warrant for the phone and seized it. Contrary to the deputy’s claim, however, the search warrant did not authorize the search or seizure of Myers’ cell phone.

The Pike County Prosecuting Attorney ultimately declined to pursue the wiretapping charge and the case was dismissed on August 10, 2023.⁷ But to date, the Office has not returned Myers’ laptop or cell phone.

Under Ohio law, “[a]ny property that has been lost, abandoned, stolen, seized pursuant to a search warrant, or otherwise lawfully seized or forfeited and that is in the custody of a law enforcement agency shall be kept safely by the agency, pending the time it no longer is needed as evidence or for another lawful purpose.”⁸ At that time, the law enforcement agency “shall make a reasonable effort to locate persons entitled to possession of the property, to notify them of when and where it may be claimed, and to return the property to them at the earliest possible time.”⁹ Consequently, “there is an affirmative duty imposed on the law enforcement agency to ensure that the seized property is returned to the lawful owner without unnecessary delay.”¹⁰

Now that the Pike County Court of Common Pleas has dismissed the charge against Myers, the Sheriff’s Office has no need to retain custody of his cell phone or laptop as evidence or for any other lawful purpose. Based on our understanding of the circumstances, in fact, there was no lawful basis for arresting Myers and seizing his property in the first place.

⁴ Derek Myers, *EXCLUSIVE: Listen to Jake Wagner describe how he killed the Rhoden family*, SCIOTO VALLEY GUARDIAN (Oct. 28, 2022), <https://sciotovalleyguardian.com/2022/10/28/exclusive-listen-to-jake-wagner-describe-how-he-killed-the-rhoden-family>.

⁵ A copy of the arrest warrant is available at <https://www.thefire.org/research-learn/derek-myers-arrest-warrant-redacted-october-31-2022>.

⁶ A copy of the search warrant is available at <https://www.thefire.org/research-learn/derek-myers-search-warrant-redacted-october-28-2022>.

⁷ Dismissal Entry, *Ohio v. Myers*, No. 2022CR000092 (Court of Common Pleas, Pike County, Ohio, Aug. 10, 2023).

⁸ OHIO REV. CODE § 2981.11(A)(1).

⁹ OHIO REV. CODE § 2981.11(C).

¹⁰ *State v. Freeman*, 2022 Ohio 2364, ¶ 3 (Ohio Ct. App. 2022).

The seizure (and any subsequent search) of Myers’ journalistic tools was unlawful for multiple independent reasons. First, the search warrant expired before it was executed. The warrant, issued on October 28, 2022, ordered you or your designee to execute it within three days. But your office seized Myers’ laptop and cell phone on November 1 and November 2, respectively. Second, the seizure of Myers’ cell phone was unlawful because the search warrant authorized a search of only Myers’ laptop and its components and accessories.¹¹

Even setting aside issues concerning the timing and scope of the warrant, the arrest and seizure were unlawful because Myers’ publication of the recording of Wager’s testimony was expressive activity protected by the First Amendment, the federal Privacy Protection Act of 1980 (“PPA”), and state law.

The First Amendment broadly protects the right to publish materials and information someone else obtained unlawfully, even if the publisher knew the source broke the law. In *Bartnicki v. Vopper*, the Supreme Court held the First Amendment protected a radio host who broadcast an illegally intercepted phone call between union officials.¹² Although the host allegedly knew someone else unlawfully made the recording, the First Amendment protected the broadcast because the host had not himself participated in intercepting the call. The Court explained that “a stranger’s illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.”¹³ *Bartnicki* invalidated enforcement of a statute virtually identical to that Pike County applied to Myers and, notably, the dissent listed Ohio Revised Code § 2933.52(A)(3) as among the statutes affected by the decision.¹⁴ As the seizure of Myers’ devices was premised on an unconstitutional statute, it was unconstitutional at the outset.

That seizure was not only unconstitutional, but also prohibited by statute. The seizure (and any subsequent search) of Myers’ laptop and cell phone—devices which he uses to engage in journalism—violates the PPA, which prohibits the search or seizure of any work product or documentary materials “possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, ... broadcast, or other similar form of public communication.”¹⁵ Although there is an exception when law enforcement has “probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate,” that exception does not apply if the “offense to which the materials relate consists of the receipt, possession, communication, or withholding of such materials or the information contained therein.”¹⁶ As there is nothing in the public record to

¹¹ See *United States v. Willoughby*, 742 F.3d 229, 233 (6th Cir. 2014) (“Items to be seized pursuant to a search warrant must be described with particularity”); *United States v. 1328 N. Main St.*, 634 F. Supp. 1069, 1075 (S.D. Ohio 1986) (remedy for seizure of items outside scope of warrant is suppression of evidence).

¹² 532 U.S. 514 (2001).

¹³ *Id.* at 535.

¹⁴ *Id.* at 542 n.1 (Rehnquist, C.J., dissenting).

¹⁵ 42 U.S.C. § 2000aa(a), (b). Ohio law similarly protects journalistic source material. See OHIO REV. CODE § 2739.12.


¹⁶ 42 U.S.C. § 2000aa(a)(1).

suggest Myers did anything more than receive, possess, or communicate the audio recording, the PPA barred seizure of his devices.

In any event, with the dismissal of Myers' case and charges, there is no legitimate basis for continuing to withhold his cell phone and laptop, which presumptively contain protected work product and are essential to his journalistic activities. Each day they remain in state custody burdens his rights under the First Amendment's Free Speech and Free Press Clauses.

For the foregoing reasons, FIRE calls on the Pike County Sheriff's Office to return Myers' seized property to him without delay. We respectfully request a substantive response no later than November 20, 2023.

Sincerely,

A handwritten signature in black ink, appearing to read "A. Terr", written in a cursive style.

Aaron Terr
Director of Public Advocacy

Cc: Michael A. Davis, Pike County Prosecuting Attorney