

N.H. Court Rules Some Records Can Remain in Annulled Cases

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Concord — The New Hampshire Supreme Court on Tuesday ruled that police and prosecution records are not categorically exempted from the state's Right-to-Know law when defendants have their cases annulled.

The 5-0 ruling means Liz Canner, a Norwich-based documentary filmmaker, may still gain access to records from Hanover police and the Grafton County Attorney's Office related to the case of Parker Gilbert, a former Dartmouth College student who was acquitted of raping another student in her dorm room in a high-profile trial in March 2014.

Under New Hampshire law, any person who has been acquitted or had a case dismissed "may petition for annulment of the arrest record or court record, or both, at any time."

People who have been convicted — except for violent crimes, felony obstruction of justice, and other offenses with an extended prison term — can also petition for annulment, with the timing depending in part on the underlying crime.

Gilbert's court case was annulled a couple of months after his acquittal, and his attorney, Cabot Teachout, argued that files related to Gilbert's case maintained by prosecutors and police also should be removed from public record.

The state Supreme Court sided with the argument from Canner's lawyer, Robert Bertsche, who asserted that the annulment statute should be read narrowly, given New Hampshire's commitment to open records. While one clause of the annulment statute says the court's records relating to an arrest, conviction or sentence shall be sealed, he argued that doesn't mean that law enforcement agency records themselves have to be sealed.

In the March 3 Supreme Court hearing and in Tuesday's ruling, Gilbert was referred to only as "John Doe."

The Supreme Court file itself remains sealed, but the oral arguments and ruling are public.

"The public has a substantial interest in understanding how investigations of alleged crimes are conducted, and how prosecutors exercise their discretion when deciding whether to prosecute, reach a plea agreement, or try cases," the court ruled.

"Allowing the public to access the records related to Doe's arrest and prosecution will facilitate a more informed public discussion about the decisions made by law enforcement officials and prosecutors. If records of arresting and prosecuting agencies pertaining to an annulled arrest, conviction, or sentence were categorically exempt from public inspection, any citizen wishing to assess or comment upon the actions of the police or the prosecutor in a given case would be unable to examine the primary sources of information — agency records — and, instead, would have to rely upon media accounts."

The justices also appeared to be wary of letting an annulment obscure completely what actually occurred.

"As we recently observed, the purpose of an annulment is to limit the legal effect of a prior arrest rather than to conceal the fact that it occurred," the ruling said.

Gilbert was charged with raping a fellow Dartmouth student in May 2013, with the prosecution contending he entered her unlocked dorm room and began assaulting her while she slept. His defense, however, argued the sexual encounter was consensual, "clumsy, awkward, drunk college sex."

A jury in March 2014 found Gilbert not guilty of five counts of aggravated felonious sexual assault and a misdemeanor criminal trespassing charge.

Canner is working on a documentary film, *Silent U*, that focuses on college campus issues such as sexual assault and hazing. She filmed Gilbert's trial, and then sought the prosecution case file from Grafton County Attorney Lara Saffo because she had questions about the way the Gilbert case was handled and how courts and police handle allegations of sexual assault in general.

Because Gilbert's petition for annulment was ultimately granted, Saffo and Hanover police sought a ruling from a Superior Court judge about whether the records Canner requested under the Right-to-Know law were exempt from public inspection.

The Superior Court judge ruled that records maintained by arresting and prosecuting agencies "are not categorically exempt," but left unresolved whether the Gilbert records might still be withheld under privacy grounds.

Gilbert appealed the lower court ruling relating to annulment, and the court this week sided with Canner.

The case now goes back to the Superior Court, which will decide if the various records should be disclosed or might be exempt for other reasons, such as privacy grounds.

Bertsche, Canner's Boston-based First Amendment attorney, said the ruling was based on New Hampshire law but "has national significance."

"The performance of police and prosecutors, and the effectiveness of the judicial system in dealing with issues of sexual assault, are issues that are being discussed in communities all across the country. Today's decision helps to ensure that those conversations can continue," he said via email. "That's not just a victory for Liz Canner, it's a victory for all Americans."

Teachout, Gilbert's attorney, said he could not comment, saying by email, "Unfortunately, we are unable to comment on the Supreme Court's decision in this case because of future proceedings in the Superior Court."

Saffo, the Grafton County attorney, also indicated she was limited in what she could say.

"The matter was remanded for further proceedings, so at this time I cannot comment further other than to note that we appreciate the guidance from the (New Hampshire) Supreme Court," Saffo said via email.

Canner said she will continue to pursue access to the records to help "better understand" how decisions were made in the trial and to better understand the outcome.

"We want to keep pursuing the records because we feel we have the right to know and fully investigate how the full (proceeding) unfolded," she said.

A LinkedIn profile with Gilbert's name and photo indicates he is now majoring in public policy analysis at Duke University; serving as assistant coach of the Duke men's rugby team; and worked as a paralegal in 2014, after his acquittal, for the Mid-Atlantic Innocence Project.

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