

DISTRICT COURT, DOUGLAS COUNTY, COLORADO	
Court Address: 4000 Justice Way Castle Rock, CO 80109-7546	
Plaintiffs: THE PEOPLE OF THE STATE OF COLORADO	
Defendant: PERRISH EUGENE COX	Case Number: 10CR661 Ctrm.: Div. 1
ORDER	

THIS COURT, having reviewed the file, the sealed arrest warrant affidavit, the Motion to Unseal filed by the Denver Post and the Associated Press (the media) and having heard from counsel for the Defendant, the People, the victim and the media, hereby issues the following order:

The Defendant was arrested pursuant to an arrest warrant on December 9, 2010 and charged with Sexual Assault, a class three felony, in violation of Section 18-3-402(1)(h) and Sexual Assault, a class four felony, in violation of Section 18-3-402(1)(b). The arrest warrant affidavit, along with other documents, was sealed by the Douglas County Court at the request of the People on December 9, 2010. Certain documents were unsealed by the Douglas County Court on February 6, 2011. The arrest warrant affidavit was not unsealed. On March 10, 2011 the Defendant waived his right to a preliminary hearing and the matter was bound over to Division 1.

The media previously made requests of the Douglas County Court to release the arrest warrant affidavit. Those requests were denied. After the matter was bound over to district court the media renewed its request for the unsealing of the arrest warrant affidavit. The Court has heard argument from counsel for the media, counsel for the Defendant and the People and counsel for the victim. The Court shall now resolve the media's request for unsealing of the arrest warrant affidavit.

## STANDING

The People, joined by the Defendant, object to the efforts of the media to secure the release of the arrest warrant affidavit in this criminal case. Relying on People v. Ham 734 P.2d 623 (Colo. 1987) and Section 24-72-301 *et.seq.* the People and the Defendant argue that the media has no standing to make a request for the release of the affidavit and that any request for the release of this document must be made in accord with the requirements of Section 24-72-308 *et.seq.* These arguments are misplaced.

People v. Ham does not preclude the media from making a request in this criminal action for the release of the arrest warrant affidavit. In Ham the Colorado Department of Corrections sought to intervene in a criminal case. The Department contested the legality of a sentence imposed by the trial court and also sought, pursuant to Colo. R.Crim. Pro 35(a) to correct what the department believed to be an illegal sentence. Neither the Defendant nor the People sought to challenge the sentence imposed by the trial court. Instead, the Department sought to challenge the sentence imposed by the Court by intervening in the litigation. The intervention was linked directly to an effort by the Department to insert itself into this case to change or modify the sentence handed down by the trial court. The Colorado Supreme Court noted that the Colorado Rules of Criminal Procedure made no provision for the intervention by a third party to a criminal prosecution. The intervention sought by the Department was made under color of Colorado Rule of Civil Procedure (C.R.C.P.) 24. The Supreme Court determined that intervention standards of C.R.C.P. 24 did not apply to a criminal prosecution.

"The concept of intervention proceeds from the principle that the efficient resolution of a civil controversy often requires the addition of other persons whose interests might be jeopardized by the resolution of the controversy between the original parties" Ham at p. 625. Employing this standard definition of intervention to the situation in this criminal prosecution, the Court finds that the media is not seeking to intervene in this criminal prosecution. The media is not seeking to insert itself in this

litigation because its interests might be negatively affected by the outcome of this criminal prosecution. Instead, the media wants to report on the proceedings. It does not have an interest in the outcome of this matter nor does it have an interest that must be addressed by the Court or the jury at the same time the Court and the jury are considering the allegations brought by the People against the Defendant. The media wants access to records in order to report on this criminal matter. It does not have an interest in the outcome of the prosecution, other than to report what has occurred. The media is not an intervenor as contemplated by C.R.C.P. 24. The media also has First Amendment rights of access to court proceedings and records. See Star Journal Publishing Corp v. County Court 591 P.2d 1028 (Colo. 1979); Nixon v. Warner Communications 435 U.S. 589 (1978); Richmond Newspapers, Inc., v. Virginia, 448 U.S. 555, 100 S. Ct. 2814, 65 L.Ed. 2d 973 (1980) and P.R. v. District Court, 637 P.2d 346 (Colo. 1981). Any request by the People or the Defendant to preclude the media from seeking access to the arrest warrant affidavit based on Ham is DENIED.

Section 24-72-301 *et seq.* is the Colorado Criminal Justice Records Act (CCJRA). It provides for the inspection, release and sealing of arrest and criminal records information and criminal justice records. The People and the Defendant argue that this criminal prosecution is not the appropriate avenue for the media to obtain the arrest warrant affidavit. Instead, the People and the Defendant argue the media must make application under Section 24-72-304 for the inspection of the affidavit. This argument exalts form over substance.

First, the court notes that the Colorado Supreme Court in People v. Thompson 181 P.3d 1143 (Colo. 2008) considered a motion filed by the media in a pending criminal action to unseal a grand jury indictment. The Supreme Court did not require a separate filing before resolving the motion filed by the media. In oral argument to this Court in the present matter the prosecutor averred that there was no objection made in the Thompson case to the media making such a request in that criminal matter. Here both the People and the Defendant object to the media being permitted to make such a

request and argue that the media must seek relief under the CCJRA for the release of the records.

Second, criminal justice records are defined at Section 24-72-302(4) as all "books, papers, cards, photographs, tapes, recordings or other documentary materials, regardless of form or characteristics, that are made maintained or kept by any criminal justice agency in this state..." The Court finds that the sealed arrest warrant affidavit is a criminal justice record. This Court is a "criminal justice agency" pursuant to Section 24-72-302(3) and is entitled to maintain criminal justice records. Litigation involving criminal justice records and a denial of access to a criminal justice record are to be made in the district court wherein the record is found. See Section 24-72-305(7). Therefore, litigation involving this sealed arrest warrant affidavit would occur in one of the district court divisions here in Douglas County.

This Court has maintained this sealed record since this matter was bound over to district court. The release of all or a portion of the affidavit and its potential affect on the trial in this case are issues that should be resolved, if at all possible, by the trial court. To require separate litigation on the issue of the release of the affidavit is unnecessary, unduly burdensome and an inefficient use of court resources and time. This is particularly so, given the fact that the affidavit is contained in this court file; has been read and considered by this Court; this court has listened to argument of all counsel; and this Court has reviewed all motions and responses on this issue. In determining whether to release all, a portion or none of the affidavit this Court shall apply applicable CCJRA standards and also consider other appropriate case law. The joint request to require the media to file a separate action seeking the release of the arrest warrant affidavit is DENIED.

#### **RELEASE OF THE AFFIDAVIT**

Access to court proceedings and records is guaranteed and protected by the First Amendment. See Star Journal, and United States v. McVeigh 918 F. Supp. 1452

(W.D. Okla. 1996). The court system in Colorado also favors openness and transparency with respect to court proceedings and records. See Colorado Supreme Court Chief Justice Directive 2005-01 and the Media Guide to Colorado Courts (6<sup>th</sup> ed. 1998), published by the Colorado Supreme Court's Committee on Public Education. Indeed, as counsel for the media repeatedly asserted during argument to the Court, the continued sealing of the affidavit can occur only if the People or the Defendant can establish that 1) there is a clear and present danger to a fair trial should the affidavit be released and 2) there are no less restrictive means available short of the continued sealing of the affidavit. Counsel for the media asserted that neither the Defendant nor the People presented any evidence on the issue of clear and present danger. The People and the Defendant, with good reason, rely on the contents of the affidavit in support of their claim that there is a clear and present danger to the right to a fair trial should the affidavit be unsealed. This court has reviewed the affidavit. The media may well determine that the contents of the affidavit should be published. However, the fact that media reports about the contents of the affidavit might and probably will occur as a result of the release of the affidavit is not a sufficient reason, by itself, to continue with the sealing of the affidavit. There can be no presumption that everyone in the jury panel will read, follow and find important the media accounts of this case. Furthermore, there are methods that can be used by the Court to address widespread media coverage and protect the right to a fair trial. These methods include, but are not limited to, the following: extensive voir dire by either the Court, counsel or both; clear and emphatic instructions to the jury with respect to their sworn duty and that they cannot be swayed by prejudice and must rely on the evidence presented in the courtroom; continuing the trial; enlarging the size of the jury panel; increasing the number of preemptory challenges; and potentially changing venue. Whether implementation any of these methods is necessary will be determined by the Court as the trial approaches and after conferring with counsel.

More problematic is the right to privacy raised by counsel for the victim. There are privacy interests at issue here that go beyond the facts of the alleged sexual assault

and the results of any rape kit. These privacy interests are significant, personal and sensitive to the victim and others and are, in part, related to medical and other concerns. These interests are particularly concerning given the fact that the victim, by making a report to the police concerning this sexual assault, certainly did not authorize or seek the broadcast of these interests to the media or the general public. In addition there certainly are relevancy issues with respect to these sensitive personal matters that may preclude the admissibility of these matters at trial. This is an issue that would need to be addressed by the court in advance of trial. If the Court were to permit access by the media to these personal issues, only to determine later that these matters were not relevant and not admissible, it would be more than mere disservice to a victim. Certainly the ability to obtain a fair trial could be impacted. The Court has recognized that methods can be employed by the Court to safeguard the guarantee of a fair trial. However, the combination of the private and sensitive nature of a portion of the affidavit, along with the uncertain admissibility of this information coupled with the harm to the privacy of the victim and the potential harm to a fair trial lead the Court to address this privacy issue prior to any release of the affidavit. In doing so the Court is guided by the requirements of the CCJRA.

According to Section 24-72-301(2) it is the public policy of the State of Colorado to maintain records of official actions and that such records shall be open to inspection. As our Supreme Court noted in People v. Thompson court documents in criminal cases fall into one of two categories: 1) records of official actions (Section 24-72-302(7)) and 2) criminal justice records (Section 24-72-302 (4)). The Court has already determined that the arrest warrant affidavit is a criminal justice record:

Records of official actions are to be maintained and released by the appropriate criminal justice agency. While the release of records of official actions is mandatory, the release of criminal justice records is discretionary. See Section 24-72-304(1). However, the denial of the release or inspection of criminal justice records must be based on one of the following: 1) release or inspection would be contrary to state statute; 2) release or inspection is prohibited by rules promulgated by the Colorado

Supreme Court or by the order of any court; 3) release of results of biological testing pursuant to Sections 16-11-102.4 and 16-23-104; and 4) release of the records would be contrary to the public interest. See Section 24-72-305. If there is a denial of the release or inspection, the custodian of the records may be required to provide an explanation for said denial within 72 hours of the denial. See Section 24-72-305(6).

In applying these criteria to the case at hand the Court notes that release of the affidavit would not be contrary to any state statute or any rule promulgated by the Colorado Supreme Court. Furthermore, information obtained pursuant to Sections 16-11-102.4 and 16-23-104 is not contained within the affidavit. Therefore, the only basis for the continued sealing of these records is that it would be contrary to the public interest to release the affidavit.

In analyzing this public interest issue the Court is cognizant, as noted in previous paragraphs, there is a strong preference, both from the constitution and our statutes, to access to hearings and documents in the criminal justice system. Concerns about the potential harm to the right of the Defendant and the People to obtain a fair trial, should the affidavit be released, can be addressed through certain preventive measures taken during the trial process. Public policy weighs in favor of access to and the release of the record as opposed to the continued sealing of the document.

However, this access is not unfettered. Section 24-72-304(4)(a) directs that the **name and any other information that would identify any victim of sexual assault** ... shall be deleted from a criminal justice record prior to its release. Furthermore, while the Court has found that public policy favors access to records, the Court finds that it must take into consideration the following: the sensitive and private nature of a portion of the affidavit; the uncertain admissibility of this information; the harm to the privacy of the victim; and the potential harm to a fair trial. Therefore the Court will redact from the affidavit the following:

1. The victim's name, date of birth, place of employment
2. Personal information of the victim and limited medical information.

3. The name of a friend of the victim associated with personal information of the victim and limited medical information of the victim.

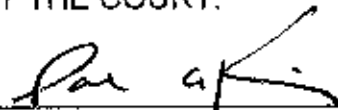
The Court finds that this redaction relates directly to limiting information that would identify the victim or preclude information related to the personal issue previously discussed in this Order.

By this Order the Court is attempting to give life to the provisions of the statute that protect the identity of the victim and also attempting to protect certain privacy interests. While the Court has maintained control over the affidavit pending the resolution of this issue, the release of the redacted version ends the Court's supervision over the redacted affidavit. The parties may certainly disagree with the Court's order and seek appellate review. In light of that distinct fact the Court DIRECTS the following with respect to the dissemination of this Order and the redacted affidavit:

This order and copies of the redacted version of the arrest warrant affidavit shall be provided to counsel for the People, the Defendant and the victim. A copy of this order shall be provided to counsel for the media. The Court shall, absent any order from any appellate court, release the redacted affidavit to counsel for the media seven (7) days from the date of this order. Furthermore, if appellate review is taken of this Court's order the original sealed arrest warrant affidavit shall be made available to any reviewing court. The original sealed arrest warrant affidavit is **not to be** released to the media subject to further order of this Court or any reviewing Court.

Dated and signed this 22 day of June, 2011.

BY THE COURT:

  
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PAUL A. KING  
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a true, accurate and complete copy of said Order was emailed this 22 day of June, 2011, to the following:

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