

DOCKET NO. CR09-97102-T : SUPERIOR COURT
STATE OF CONNECTICUT : JUDICIAL DISTRICT OF NEW HAVEN
V. : AT NEW HAVEN
RAYMOND CLARK III : NOVEMBER 6, 2009

MEMORANDUM OF DECISION: MOTIONS TO EXTEND SEALING ORDERS

PROCEDURAL HISTORY

By motions dated September 30, 2009, the defendant moves, pursuant to Section 42-49A of the Practice Book, the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution, and Article I, Section 8 of the Connecticut Constitution, to extend the sealing orders in connection with the nine search warrants and the arrest warrant currently under seal in the above stated matter.

The Hartford Courant Company was granted its Motion To Intervene on October 6, 2009 and filed its objections to the defendant's motions. On October 20, 2009, the New Haven Register, Associated Press and New York Times were granted intervener status and joined in support of the Hartford Courant Company's objections to the defendant's motions. All parties were then heard in argument.

The state filed a brief in support of defendant's position; adding, in oral argument, the request of the family of the alleged victim that the affidavits in question be sealed.

It should be noted that on October 20, 2009, in addition to its brief in support of the defendant's motions filed pursuant to Section 42-49A, the state moved to extend the order sealing

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all search warrant affidavits pursuant to Section 54-33c(b) of the General Statutes. Upon the filing under seal of a detailed affidavit in support, the motion to extend the sealing by operation of law was granted by this court with an extension to November 3, 2009. A further extension was filed on November 3, 2009 and granted to November 17, 2009.

LAW AND ANALYSIS

As the interveners' note and the commentary makes abundantly clear, Section 42-49A of the Practice Book was fashioned to mirror United States Supreme Court precedent and supporting federal and state authorities regarding the public right to access documents filed in connection with criminal cases. The section is specific to "... Documents in Criminal Cases."

Subsection (a) provides in relevant part: "... there shall be a presumption that documents filed with the court shall be available to the public."

Subsection (b) mandates: "... the judicial authority shall not order that any files, affidavits, documents, or other materials on file with the court or filed in connection with a court proceedings be sealed or their disclosure limited."

"Affidavits" on file with the court in criminal cases are, for the most part, police authored, factual recitations constituting probable cause for the arrest of the accused or probable cause in connection with a search incident to a criminal investigation. The intent of the rule is to make affidavits, among other materials, filed in connection with criminal cases, available to the public.

Subsection (c) provides the only exception where the judicial authority may order files sealed or their disclosure limited in criminal cases; that is, to preserve an interest which overrides the public's interest in viewing the materials. The court must articulate the overriding interest;

determine a lack of any alternative to sealing or limiting disclosure of the material and make any such order no broader than necessary.

Clearly, the purpose of the section is to promote openness and transparency in the criminal courts in an effort to foster confidence and understanding with respect to the criminal process, consistent with the rights of the accused. "The bright light cast upon the judicial process by public observation diminishes the possibilities for injustice, incompetence, perjury and fraud. Furthermore, the very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness." (Citations omitted; internal quotation marks omitted.) *Rosado v. Bridgeport Roma Catholic Diocesan Corp.*, 292 Conn. 1, 18 (200).

At the hearing on its motion, the defense offered two binders full of articles, marked Exhibits (A) and (B), in support of its position that, given the enormous media coverage of the case, including local, national, and even international coverage, disclosure of the search and arrest affidavits would deprive this defendant of his constitutional rights to an impartial jury and a fair trial.

However, if the purpose of Section 42-49A is openness and transparency, consistent with First Amendment principles, in order to promote public confidence and understanding with respect to the criminal process, should the courts restrict disclosure in direct proportion to the interest of the public - the more intense the public interest, the greater the restriction?

The defendant notes that the public's First Amendment right to access is not absolute and when counterbalanced with the defendant's right to a fair trial, it's the defendant's right to a fair trial that must prevail, since no right ranks higher. See *Press-Enterprise Co. v. Superior Court of California*, 104 S. Ct 819, 823 (1984).

Additionally, the defendant argues that this court adopt a lesser standard with respect to search warrant affidavits than the "strict scrutiny" standard associated with First Amendment analysis, based on decisions of other jurisdictions, particularly where the state's investigation is on going.

In fact, Connecticut law does acknowledge a degree of difference between search affidavits and arrest affidavits in terms of sealing orders issued by operation of law.

Arrest affidavits may be sealed at the request of the prosecutor for "good cause shown" pursuant to Section 36-1 of the Practice Book for a period "not to exceed two weeks from the date of the arrest." Thereafter, extensions may be sought only pursuant to Section 42-49A of the Practice Book.

On the other hand, search affidavits may be sealed pursuant to Section 54-33c of the General Statutes under three sets of exigent circumstances: (1) where the safety of a confidential informant would be jeopardized; (2) where a continuing investigation would be adversely affected; and (3) where disclosure of information is prohibited pursuant to the wiretapping statute. Initial sealing may be for no longer than two weeks. Extensions may be granted, ex parte, under the same circumstances, for no longer than reasonably necessary to deal with the exigency that warrants the issuance. As previously indicated, the state has moved and been granted extensions with respect to search affidavits in this matter, to November 6, 2009 pursuant to Section 54-33c.

Once the exigencies expire, however, further extensions by the prosecutor or any other party are filed pursuant to 42-49A.

Clearly, in most cases, Connecticut courts do not seal or limit disclosure of arrest and search affidavits beyond the investigative stages. The defense argues that if this court is not willing to order a blanket sealing of the affidavits in question that it, alternatively, consider redacting portions of the affidavits in accord with its particularized claims submitted under seal.

The defense cites *State v. Davis*, 48 Conn. Supp. 147 (2003) as state authority for its proposed continued sealing of affidavits in this high profile case. *Davis* involved a state representative charged with sexual assault and risk of injury to a minor child. The arrest affidavit included seventeen paragraphs that constituted, virtually, the entire substance of the charges in graphic, explicit, sexual detail. The court noted, "A properly redacted affidavit would fully eviscerate the thrust of the allegations leaving only a skeleton of the present allegations." *Id.*, 156. In granting the sealing request, the *Davis* court appropriately preserved the defendant's overriding interest in a fair trial given the inflammatory nature of the affidavit material in that case.

The content of the affidavits in this case differ dramatically from *Davis*. A review of the material reveals, for the most part, the unembellished investigative steps of the various police agencies that, ultimately, culminated in the arrest of the accused. Much of the material, as the interveners note, is already in the public domain and much of the material is consistent with the purported purpose of fostering the public's confidence in and understanding of the criminal process. Clearly a blanket sealing of the affidavits, under the circumstances here, would not be appropriate.

However, in this court's view, consistent with the *Davis* analysis, there are limited portions of the arrest and search warrant affidavits that support a finding of an overriding interest in non-disclosure for reasons that will be specified under seal. These materials can be removed without

eviscerating the substance of the affidavits. The overriding interest with respect to each non-disclosure, in most instances, is the defendant's right to an impartial jury and a fair trial.

Redaction of the specific, offending material is appropriate in the interest of securing no broader a limitation of disclosure than is necessary and there is no other reasonable alternative. The redactions affect material that is inflammatory; material of significant import that is unfairly prejudicial to the defendant; and material that constitutes an invasion of privacy unnecessary to the public's understanding of the criminal process.

Material in the affidavits that may or may not be construed by the public as strong evidence against the accused has not been redacted unless it is unfairly prejudicial; nor is it redacted because it may or may not be challenged at trial. If the standard for redaction/sealing were, simply, material suggesting the guilt of the accused or that could or would be challenged at trial, then all arrest warrants and search warrants would be sealed since their very purpose is to establish probable cause for the arrest or the search and most evidence offered against an accused is challenged at trial. Furthermore, it would make no sense to release dramatically altered affidavits that promote a public misconception that the arrest and/or search warrants were issued under the flimsiest of circumstances.

Likewise, several sentences containing police speculation and/or opinion are not redacted. These affidavits are police documents and the sentences in question are of little consequence. For the most part, the affidavits show restraint in this regard.

Though courts have found jury voir dire to be the most effective means of insuring the defendant's right to a fair trial; see *In re National Broadcasting Co., Inc.*, 653 F. 2d 609, 617 (D.C.

Cir. 1981); and, in fact, Connecticut assures an accused the constitutional right to individual voir dire; this court is mindful of its responsibility to issue a decision that appropriately weighs the competing rights and interests of the parties and not rely on available remedies that can be applied after the fact.

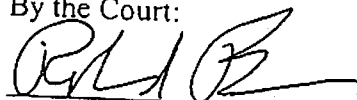
For the purpose of this memorandum, the court has marked the arrest affidavit as Exhibit (A) and the search affidavits, in chronological order, as Exhibits (B) through (J). This court has determined that (6) separate segments of material, repeated throughout the court's exhibits, warrant redaction.

The public filing of this memorandum will not include the Conclusion which will outline the specific redactions and the court's reasoning with respect to each, since the substance of the redactions would, thereby, be disclosed.

This court orders that the redacted material not be disclosed to the public throughout the pendency of this case.

This date, copies of the un-redacted materials will be placed under seal and marked Court's Exhibit (1). The court's memorandum of decision including its Conclusion will be placed under seal and marked Court's Exhibit (2). The proposed redacted version of the materials will be marked Court's Exhibit (3). The contents of Court's Exhibit (3) shall remain under seal for seventy-two hours (three business days) from the date of issuance of this decision for purposes of any petition for appellate review filed pursuant to Section 42-49A, subsection (g).

By the Court:



Roland D. Fasano, Judge