

COPY

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

SCOTT LEE PETERSON,

Petitioner,

v.

THE SUPERIOR COURT OF STANISLAUS
COUNTY,

Respondent;

CONTRA COSTA NEWSPAPERS, INC.,

Real Party in Interest.

F043260

(Super. Ct. Nos. 1045098, 1045188,
1056770)

OPINION

COURT OF APPEAL
FIFTH APPELLATE DISTRICT
FILED

JUL 30 2003

Eve Sproule Court Administrator/Clerk
By _____ Deputy

THE COURT*

ORIGINAL PROCEEDINGS; petition for writ of mandate. Roger M.

Beauchesne, Judge.

Mark Geragos, for Petitioner.

No appearance for Respondent.

Charity Kenyon, for Real Party in Interest, Contra Costa Newspapers, Inc., and
David P. Harris, for The People.

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*Before Dibiaso, A.P.J., Vartabedian, J., and Buckley, J.

In his petition for writ of mandate, petitioner Scott Lee Peterson contends the trial court abused its discretion by authorizing, upon certain conditions, the release to the media of pre-arrest search warrants, affidavits and returns (hereafter Materials) filed in connection with the police investigation into the deaths of Laci Peterson and her unborn son and currently under seal by order of the trial court. We agree and therefore issue the writ.

I.

The Materials were gathered after the victims' disappearance during December 2002. A petition (first petition) to release the Materials to the media was filed in the trial court, as action No. 1045098, by real party in interest McClatchy Newspapers, Inc. Other members of the media, including Contra Costa Newspapers, Inc., another real party in interest in the instant proceeding, joined in the first petition.¹ After an in camera hearing on the first petition, the trial court entered an order (first order) on April 10, 2003, which denied the first petition "in its entirety" but then provided in effect that the Materials would be released on July 9, 2003, or alternatively on the date when "a criminal complaint is filed," whichever was earlier. The first order was accompanied by detailed findings of fact (Findings), which included the following:

"Testimony at the hearing [on the first petition] also established that revelation of confidential information contained in the [Materials] would irreparably harm the investigation. Investigation techniques, clues and focus on future avenues of inquiry by law enforcement personnel would unduly alert any potential suspect. Evidence would likely be destroyed and witnesses would be reluctant to provide information."

"Any information released at this time from any of the [Materials] would harm the reliability of information already gleaned and to be gleaned in the future. Furthermore, any information released to the public

¹ Hereinafter, when referred to collectively, all media real parties will be identified together as CCN.

at this time would adversely impact future tips to law enforcement who must discern whether or not information provided to them by tipsters is based upon public information or independently verifiable." [¶] ... [¶]

"The court also concludes that unsealing any of the [Materials] would likely impair any suspects' rights to a fair trial."

Shortly after the first order was filed, the bodies of Laci Peterson and her unborn son were discovered and identified. Petitioner was arrested and charged with their murders, in Stanislaus County Superior Court action No. 1056770.

On April 18, 2003, real party in interest the People, by the Office of the District Attorney of Stanislaus County, filed a petition for writ of *mandate* (first mandate) in this court (No. F042848) challenging those portions of the first order that authorized release of the Materials upon the stated conditions. While this first mandate petition was pending, another petition (second petition) to release the Materials to the media was filed in the trial court, in the existing action No. 1045188, by CCN. The trial court deferred action on the second petition until disposition by this court in the first mandate proceedings.

On May 5, 2003, this court granted peremptory relief (first opinion) in the first mandate proceeding.² We concluded the trial court's Findings were "thorough, complete and unambiguously establish[ed] that the [trial] court carefully balanced all of the factors relevant under the case law, the provisions of Penal Code section 1534, and the California Rules of Court." We also pointed out that the media petitioners had not challenged the Findings, which manifested a determination by the trial court that both the People and petitioner would be prejudiced by public disclosure of the Materials, and had not, in any opposition papers or in a separate writ petition, put the propriety of any of the Findings in

² Pursuant to requests of the parties, we take judicial notice of this court's file in the first mandate proceeding (No. F042848) and the exhibits attached to the pleadings in this proceeding.

issue. We therefore validated the trial court's Findings as fully supported by the record evidence.³

However, we invalidated those provisions in the first order authorizing release of the materials upon the dates specified. We said in relevant part:

"Though the portion of the trial court's order which sealed the Materials is legally sound, the portion of the order which requires disclosure of the Materials upon the filing of a criminal complaint and, in any event, by July 9, 2003, is so fundamentally inconsistent with the Findings as to constitute a manifest abuse of discretion. [Fn. omitted] A criminal investigation does not automatically cease upon the filing of a complaint or upon the passage of an arbitrary period of time. The Findings themselves implicitly recognize that the investigation would likely continue for a substantial period, certainly more than the 11 days which elapsed before the complaint was filed."

"Moreover, the Findings expressly recognize that the disclosure of the '[i]nvestigation techniques, clues and focus on the future avenues of inquiry by law enforcement personnel would unduly alert any potential suspect. Evidence would likely be destroyed and witnesses would be reluctant to provide information.' These considerations would conceivably disappear only if the complaint was filed against the *actual* perpetrator or perpetrators, but an accurate identification of a perpetrator has yet to be made and legally will not be made by the filing of a complaint against a particular suspect. As we see it, the portion of the trial court's order requiring disclosure upon the filing of a complaint or the arrival of a specific date in the future is based upon an erroneous assumption – that an arrest or the lapse of time would remove the possibility, among others, that a 'potential suspect' would be alerted, that evidence would be destroyed, or that witnesses would be discouraged." (Emphasis added.)

A petition (third petition) to seal post-arrest warrant materials, wiretaps and an autopsy report (hereafter Materials II) was filed in the trial court, as action No. 1056770,

³ After our first opinion was filed, the media petitioners neither asked this court to rehear or reconsider our opinion nor sought its review by the Supreme Court. The first opinion is now final in all the courts in this state.

by petitioner. On May 30, 2003, the trial court entered an order (second order) sealing the Materials II. On June 12, 2003, the trial court entered an order (gag order) restricting the parties to the criminal action against petitioner from making public comments about the case. Findings of fact accompanied the gag order.

Also on June 12, 2003, the trial court entered an order (third order) granting the second petition for release of the Materials, based upon the evidence presented during in camera hearings previously held in connection with the first petition and with the third petition. Among other things, the court noted that "the entire thrust of the People's evidence presented [at the hearing on the first petition] was directed toward preserving the integrity of the investigation before an arrest was made in order to avoid alerting any suspect," "[n]o evidence was presented at the in-camera hearing held on [the second petition], and "The People have not produced any evidence since [defendant's] arrest to indicate they are investigating other suspects." The trial court therefore directed release of the Materials based upon the court's findings that certain circumstances had changed. The changed circumstances identified by the court were the discovery and identification of the victim's bodies, the arrest of petitioner and the charges of murder filed against him, and the representation of petitioner "by multiple and able defense counsel who can muster all available, legitimate means to assist the trial judge in ensuring their client receives a fair trial." The court also concluded that the parties opposing the release of the Materials had not demonstrated a good reason to retain the Materials under seal.

The present petition for writ of mandate (second mandate) was filed on June 17, 2003.

II.

In this second mandate proceeding CCN has not challenged the trial court's Findings contained in the first order or raised any issue about this court's first opinion. It follows then that good cause to maintain the Materials under seal existed when the trial court considered the second petition unless the circumstances upon which those Findings

and that first opinion were based were shown to have materially changed since the entry of the first order.⁴ The record discloses no such material change of circumstances.

First, that petitioner was represented by competent counsel is irrelevant to the concerns addressed by the Findings. While counsel may have courtroom control over the presentation of the defense, counsel has no control over the use to which the Materials may be put by the media and therefore no power to avoid the possible prejudice to the investigation and to the rights of suspects, as described in the Findings.

Second, the arrest of petitioner and the filing of the complaint against him are likewise irrelevant to the concerns addressed by the Findings. Our first opinion found that the filing of a complaint would not support an order unsealing the Materials, given the trial court's Findings about the practical realities of the investigation. If the filing of a complaint does not sanction release of the Materials, the fact that an arrest has been made provides no further justification, because the filing of a complaint virtually assures that an arrest of the subject of the complaint has been or ultimately will be made.

Third, so far as we are aware, the presumption of innocence is still a fundamental constitutional right available to all criminal defendants. The criminal action against petitioner is yet in its early stages. A preliminary examination has not been held. When held it will not determine whether petitioner is guilty or not guilty; it will only determine whether probable cause exists to try petitioner under the complaint. The investigation will continue during the likely substantial period of time between the preliminary hearing and any trial, should probable cause be found, and beyond the preliminary hearing, should probable cause not be found. If, at the time of the hearing on the first petition, it was unrealistic and speculative to assume that there could not be any other potential suspects, that all evidence had been developed and preserved, that all potential witnesses

⁴ There is no conflict or dispute among the parties about the identity or nature of the specific changed circumstances relied upon by the trial court.

and informants had come forward, and that the investigation would not be compromised by the disclosure of the Materials, it is no less unrealistic and speculative to make the same assumptions now. Put conversely, if, at the time of the hearing on the first petition, it was reasonable to conclude that disclosure of the Materials might compromise the investigation and the search for the perpetrator, it is no less reasonable to come to the same conclusion now.

Fourth, the potential for prejudice from the release of the Materials is enhanced rather than diminished by the arrest of petitioner and the filing of the complaint against him. The relationship of petitioner to the victims only serves to stimulate the public's appetite for the case, an appetite we would expect the media to satisfy. Release of the Materials would undoubtedly be followed by their widespread dissemination and dissection in every sort of media medium, including daily television with parades of "experts" endlessly commenting about likely prosecution and defense strategies, opining about the strengths, weaknesses and admissibility of the various factual tidbits disclosed by the Materials, and venturing predictions about the probable outcome of the trial against petitioner. How a fair trial for both parties -- and particularly how an untainted jury could be found anywhere -- in the aftermath of such a frenzy escapes us.

CCN impliedly acknowledges the heightened degree of prolonged news coverage generated by this case but studiously ignores the potential for prejudice to the parties that might accompany release of the Materials. Instead, CCN addresses two other topics. First, CCN claims that petitioner has not provided an adequate record for review. We find the record satisfactory. No new evidence was presented at the in camera hearing on the second petition; the third order was based in part on the evidence presented at the hearing on the first petition which resulted in the first order, the order that included the critical Findings. As we have already pointed out, the third order on its face is inherently inconsistent with the import of the Findings. The third order was also based on evidence presented at the hearing on the third petition, which evidence led the trial court, in ruling

on the third petition, to reach conclusions substantially equivalent to the conclusions reflected by the Findings.

Second, CCN argues that the prior disclosure of the Materials to petitioner and his counsel should have been considered by the trial court to be an additional changed circumstance warranting release of the Materials to the media.⁵ Even if CCN is correct that the particular event constitutes a changed circumstance, we would not find it a material one sufficient to unseal the Materials. The first order retained the Materials under seal because "...unsealing any of the documents in issue would likely impair any suspects' rights to a fair trial." Petitioner's position was then, as it is now, that the Materials should continue to be restricted. We will not entertain the unreasonable assumption that petitioner will act against his own expressed interest in a fair trial by breaching the confidentiality of the Materials.⁶

We recognize that evidence described in the Materials may be introduced, and perhaps made available to the public, during the preliminary hearing. But the extent and nature of the evidence presented at the hearing will be controlled by the parties, based upon their respective assessments of their own best interests and their pre-trial and trial plans. The right of each party to a fair trial is one of the concerns around which the issue of disclosure revolves. Once the courts have determined that, under the relevant circumstances, that right prevails over any countervailing public right to disclosure, it is the parties who are entitled to decide whether to make a particular revelation and, by doing so, potentially work a change in the situation from which the then prevailing order

⁵ The third order expressly states that "The change in circumstances is discussed in Sections II and III above." "Sections II and III" articulate in detail the changed circumstances relied upon by the trial court, all of which we have already considered and none of which include the release of the Materials to petitioner. In fact, neither section II or section III even mentions that the Materials were made available to petitioner.

⁶ We also reiterate that all parties, including petitioner and his counsel, are subject to the gag order.

of confidentiality derives and thus to likely invite a new challenge to all or part of that order.

III.

CCN opposes peremptory relief, on a number of grounds. CCN argues there is no "temporal urgency" for peremptory relief. We disagree. A decision by this court without the delay that necessarily accompanies issuance of an order to show cause serves the interest of all parties, including CCN, which may now immediately seek review of this decision by the Supreme Court.

CCN also contends that petitioner's entitlement to relief is not "so obvious that no purpose could reasonably be served by plenary consideration of the issue..." (*Ng v. Superior Court* (1992) 4 Cal.4th 29, 35.) We have come to the opposite conclusion. This opinion is not based upon any disputed or questionable facts; it is based instead upon the Findings of the trial court in its first order and the conclusions reached in our first opinion, neither of which have ever been questioned by any party to this proceeding, CCN included, and both of which, as a matter of law, compel issuance of the relief sought by petitioner.

Finally, CCN had adequate notice of the current pendency before this court of the question whether the third order was improper in light of the unchallenged Findings underlying the first order, the conclusions expressed in the trial court's second order, and the rationale and disposition of our first opinion. The People's brief raised this precise issue. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180-181.)

IV.

For the reasons expressed above, Petitioner is entitled to appropriate relief. (Code of Civ. Proc. Sec. 1085; see *Whitney's at the Beach v. Superior Court* (1970) 3 Cal.App.3d 258, 266.) A peremptory writ of mandate is proper and should issue. (Code Civ. Proc. Sec. 1088; *Palma v. U.S. Industrial Fasteners, Inc.*, *supra*, 36 Cal.3d at pp.

Therefore, let a peremptory writ of mandate issue directing the trial court to vacate its order filed on June 12, 2003, in Stanislaus County Superior Court action No. 1045188, and to enter a new and different order denying the petition of CCN, et al. for disclosure of the Materials.

The order filed in this proceeding on June 27, 2003, staying the order filed on June 12, 2003, in action No. 1045188 of the Stanislaus County Superior Court shall remain in effect only until this opinion is final in all the courts of this state, the superior court complies with this disposition, or the Supreme Court grants a hearing herein, whichever shall first occur; thereafter the stay is dissolved.

Insofar as petitioner requests relief in addition to that granted above, the request is denied.