

STATE OF NEW HAMPSHIRE

**HILLSBOROUGH, SS.
NORTHERN DISTRICT**

SUPERIOR COURT

State of New Hampshire

v.

Adam Montgomery

Docket No. 216-2022-CR-02372

ORDER ON WMUR-TV'S MOTION TO UNSEAL

The defendant is charged with second degree murder, abuse of a corpse, falsifying physical evidence, and witness tampering in connection with the death of his daughter, Harmony Montgomery. Presently before the Court is a motion from WMUR-TV to unseal a probable cause statement filed early on in this case by the New Hampshire Attorney General's Office in support of a warrant for the defendant's arrest. The defendant objects. The State takes no position, asking only for twenty-four hours' notice before the document is unsealed to comply with the Victim's Bill of Rights. For the reasons set forth below, WMUR-TV's motion to unseal is GRANTED.

The defendant first argues that the probable cause affidavit is not one of the documents required to be made public pursuant to New Hampshire Rule of Criminal Procedure 50(a)(1). That rule provides in pertinent part that "[e]xcept as otherwise provided by statute or court rule, all pleadings, attachments to pleadings, exhibits submitted at hearings or trials, and other docket entries . . . shall be available for public inspection." Even assuming the defendant is correct that the probable cause affidavit

does not constitute either a pleading or an “other docket entry,” Rule 50 is only one means by which the public has access to court proceedings.

“The right to open courtrooms and access to court records related to court proceedings is firmly supported by New Hampshire practice and common law principles, Part I, Articles 8 and 22 of our State Constitution and our guidelines for public access.” Associated Press v. State, 153 N.H. 120, 129 (2005). “Such access is critical to ensure that court proceedings are conducted fairly and impartially and that the judicial process is open and accountable.” Id. (citations omitted). Nonetheless, “[t]he constitutional right of access to judicial proceedings and records, under either the State or Federal Constitution, is not absolute.” Id. “In New Hampshire, the right of access may be overcome when a sufficiently compelling interest for nondisclosure is identified.” Id.

“There is a presumption that court records are public and the burden of proof rests with the party seeking closure or nondisclosure of court records to demonstrate with specificity that there is some overriding consideration or special circumstance, that is, a sufficiently compelling interest which outweighs the public’s right of access to those records.” State v. Kibby, 170 N.H. 255, 258 (2017). “Where no special circumstances exist, however, those things which are filed in court in connection with a pending case are accessible to the public.” Id. The Court undertakes a two-step analysis in balancing these interests. “First, the party opposing disclosure of the document must demonstrate that there is a sufficiently compelling reason that would justify preventing public access to that document.” Id. “Second, the court must determine that no reasonable alternative to nondisclosure exists and use the least restrictive means available to accomplish the purposes sought to be achieved.” Id.

One well-established justification for keeping documents like the probable cause affidavit at issue sealed is where disclosure would compromise an ongoing criminal investigation. See In re State (Bowman Search Warrants), 146 N.H. 621, 629 (2001) (finding that ongoing criminal investigation provides overriding consideration or special circumstance justifying prevention of public access to search warrants and related investigation materials). In fact, this was the justification for sealing the affidavit in the first instance. (See State's Mot. Seal, Doc. 7.) However, now that the investigation has culminated in the currently pending charges and the State does not assert that disclosure will compromise any ongoing investigation, this is no longer a viable reason to keep the affidavit under seal.

The defendant argues that the affidavit is an unfairly one-sided recitation of the State's allegations against him, and was created as part of an ex parte process to which the public has no right of access. The defendant appears to argue that because there is no rule requiring the filing of the affidavit with the Court, its inclusion in the Court docket is inappropriate. The defendant, however, cites no law in support of this proposition. To the contrary, "[i]t cannot be that pretrial publication of affidavits in support of search warrants is altogether forbidden as a matter of law." In re Application and Affidavit for a Search Warrant, 923 F.2d 324, 329 (4th Cir. 1991). Affidavits in support of warrants are frequently filed in criminal cases in connection with motions to suppress and thus made available for public inspection. The fact that the probable cause affidavit is one-sided, without more, does not constitute a sufficiently compelling reason to prevent public access.

The defendant also argues that public disclosure of the probable cause affidavit would taint the jury pool in connection with the instant case and result in an “insurmountable prejudice” in connection with his upcoming trial in Docket No. 216-2022-CR-577, in which he is charged with theft by unauthorized taking, receiving stolen property, felon in possession, and armed career criminal. The defendant argues that the resulting prejudice would deny him his rights to due process and a fair trial as guaranteed by the Fifth and Sixth Amendments to the United States Constitution and Part 1, Article 15 of the New Hampshire Constitution. The defendant’s trial in 216-2022-CR-577 is scheduled for jury selection on May 31, 2023.

“It is well established that due process requires that an accused must receive a trial by a fair and impartial jury.” State v. Addison, 165 N.H. 381, 425 (2013). “The theory of our trial system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.” Id. at 427. “Publicity about a case can result in two types of prejudice with regard to the accused’s right to a fair trial: inherent prejudice and actual prejudice.” State v. Webster, 166 N.H. 783, 793 (2014). “Inherent prejudice exists when the publicity by its nature has so tainted the trial atmosphere that it will necessarily result in lack of due process. In such cases the defendant need not show actual identifiable prejudice.” Id. Because the probable cause affidavit has not yet been unsealed, the defendant can only argue inherent prejudice at this stage.

“[P]resumptive, or inherent, prejudice may arise when a barrage of inflammatory publicity immediately prior to trial amounts to a huge wave of public passion.” Addison,

165 N.H. at 427. “Prejudice may properly be presumed where prejudicial, inflammatory publicity about a case so saturated the community from which the defendant’s jury was drawn as to render it virtually impossible to obtain an impartial jury.” Id. “A presumption of prejudice because of adverse publicity attends only the extreme cases.” Id.

“It is the adverse nature of the publicity, not merely its quantity, that is critical in finding presumptive prejudice.” Addison, 165 N.H. at 428. “Distinguishing between straightforward factual publicity about a celebrated case and inflammatory, adverse press is crucial.” Id. “To ignore these real differences in the potential for prejudice would not advance the cause of fundamental fairness, but only make impossible the timely prosecution of persons who are well known in the community, whether they be notorious or merely prominent.” Id. The established case law “cannot be made to stand for the proposition that juror exposure . . . to news accounts of the crime with which [the defendant] is charged alone presumptively deprives the defendant of due process.” Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 565 (1976). “[P]retrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial.” Id.

The New Hampshire Supreme Court has never found inherent prejudice in a case such that a change of venue was compelled, even in cases involving extensive media coverage on particularly newsworthy and heinous crimes. Webster, 166 N.H. at 793. For example, in State v. Gribble:

[C]o-conspirator Spader’s trial and sentencing in November 2010, approximately four months before the defendant’s trial, engendered numerous newspaper articles and editorials as well as daily television coverage. Many of those articles identified Spader and the defendant as being accused of [the victim’s] murder and the attempted murder of her daughter. One article described the start of Spader’s trial under the

headline, “Jurors slated to visit site of grisly murder.” Several articles quoted the prosecutor’s opening argument, which included a graphic description of the attack and the defendant’s involvement.

165 N.H. 1, 15 (2013). Other articles included graphic testimony from witnesses at Spader’s trial. Id. Despite the foregoing, the Supreme Court found that although “some of the news reports were accusatory in content and included graphic descriptions of the crimes, . . . an overwhelming amount of the material submitted consist[ed] of straightforward, factual accounts of the crimes.” Id. at 21. “Simply showing that most of the potential jurors knew about the case and that there was extensive pretrial publicity will not suffice to demonstrate that an irrepressibly hostile attitude pervaded the community.” Id. at 27. “Indeed, given the nature of the crimes in this case, the defendant could not reasonably have expected to remain anonymous.” Id. Ultimately, the Supreme Court found that the defendant “failed to establish that a presumption of prejudice arose from the pretrial publicity or that the publicity infected the jurors to such an extent that he was unable to receive a fair and impartial jury trial.” Id. at 28.


Here, it is impossible to assess the nature of media coverage that has not yet occurred. However, the information contained within the probable cause affidavit at issue, which will be available to the public, is graphic in nature as it was in Gribble. Therefore, assuming coverage of those facts remains straightforward and factual, the Court finds there is no basis on which to find inherent prejudice in this case. To the extent a significant number of jurors are exposed to any forthcoming publicity about the underlying facts of the defendant’s case, the Court may take a number of steps during jury selection that would ensure an impartial jury, such as enlarging the pool of summoned jurors, conducting thorough individual *voir dire* where necessary, and/or permitting additional

time for panel *voir dire*. See Addison, 165 N.H. at 431; see Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 15 (1986) (“Through *voir dire*, cumbersome as it is in some circumstances, a court can identify those jurors whose prior knowledge of the case would disable them from rendering an impartial verdict.”).

Based on the foregoing, the Court finds that the safeguards in place in the ordinary course of jury selection are sufficient to address any potential concerns about juror impartiality. Therefore, the defendant has failed to articulate a compelling reason to prevent public disclosure of the probable cause affidavit. Accordingly, WMUR-TV’s motion to unseal is GRANTED. Pursuant to New Hampshire Rule of Criminal Procedure 50(d)(8), the parties shall have ten (10) days to file a motion for reconsideration, and the affidavit shall remain under seal pending a ruling on that motion. If no motion is filed within the time allowed, the clerk’s office shall place the affidavit in the public file.

SO ORDERED.

April 20, 2023
Date



Amy B. Messer
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 04/21/2023