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May 20, 1994, 9 A.M.
Dep't 53
Est. time: 1 hour

Def. is in custody

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF FRESNO
CENTRAL DIVISION

The People of the State of California, Plaintiff, Marcus Delon Wesson, Defendant	Case No.: F04901785–6 **Defendant Wesson's Opposition to Unsealing the Search Warrant Records.**

To: 1. The Honorable Judge of the Above–Entitled Court,
2. The Fresno County District Attorney,
3. The McClatchy Company, d.b.a. *The Fresno Bee*,
4. **The Fresno Police Department**

At the outset, notice that no California or U.S. Supreme Court case holds that the public generally, or the media in particular, has a Free Speech, or Free Press, U.S. or California Constitutional right to search warrant records.

Nor does *The Fresno Bee* cite any such authority. Indeed, the closest *The Bee* comes is to cite stating that it is not deciding the question.

In its Memorandum, page 4, line 12, *The Bee* cites *Times Mirror Company v. U.S.* (9th Cir.) 83 [sic: should be 873] F.2d 1210. In that case, the Times Mirror Company claimed a First Amendment right "to search warrant materials associated with … a[n] FBI investigation …." The 9th Circuit Court of Appeal held otherwise, stating "members of the public have no right of access to search warrant materials while a pre-indictment investigation is under way."[1]

The *Times Mirror* court also "d[id] not decide … the question whether the public has a First Amendment right of access to warrant materials after an investigation is concluded or after indictments have been returned."[2]

But even if *The Fresno Bee* does have such a First Amendment right, Wesson's interest in a fair trial outweighs it.[3]

We start with a general principle. It is well–established that a criminal defendant's right to a fair trial outweighs the public's, or the media's right of access to pretrial access to public records. See, e.g., *Craemer v. Superior Court* (1968) 265 Cal.App.2d 216, 223, 226 – 227 (access to transcripts of grand jury witnesses, although statutorily allowed after indictment, restricted to preserve the defendant's right to a fair trial.)

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[1] *Times Mirror Company v. U.S., supra,* 873 F.2d at 1211.

[2] *Times Mirror Company v. U.S., supra,* 873 F.2d at 1211.

[3] The defense does not suggest in any way, by its representations in this motion, that Mr. Wesson could receive a fair trial in the present venue, under any circumstances.

Specifically when the First Amendment and court processes are involved, the U.S. Supreme Court, in *Press–Enterprise Co. v. Superior Court* (1986) 478 U.S. 1, 8 – 9, teaches that "the Court has traditionally considered whether public access plays a significant positive role in the functioning of the particular process in question."

There is serious doubt that "public access [to the search warrant records here would] play[ ] a significant positive role in the functioning of the particular process in question" here, namely providing Mr. Wesson with a fair trial.

It is common knowledge, that affidavits in support of the search warrants often contain (1) hearsay that is often inadmissible at trial, (2) bare bones information that often turns out to have been misleading, and (3) facts proffered in good faith that often later turn out to be inaccurate. Without disclosing sealed material, we can say that there is no reason to think these affidavits are any different. Surely, also, the same can be said for the affidavits supporting the sealing of these warrants.

Obviously, public access to (1) inadmissible hearsay, (2) incomplete information or (3) inaccurate facts would "play[ ] [no] significant positive role in the functioning of the particular process in question," namely, a fair trial. On the contrary, that would play a significant negative role.

As to questionable material like this, the rule is well–established that "[t]he public generally has no right to pretrial disclosure of questionable evidence, a disclosure which might well deny to the accused the fair and impartial trial which is his due." See, e.g., *Allegrezza v. Superior Court* (1975) 47 Cal.App.3d 948, 951 (public and media barred from a pretrial hearing on the voluntariness of a minor's purported confession, because that purported confession may never come into evidence.)

Thus, even if *The Bee* has a First Amendment interest in the search warrant records, this court should still not grant it access to the affidavits in support of the search warrants, nor to the affidavits in support of sealing those warrants.

As to the returns on the search warrants, the rule is also well–established that the court has authority to preclude access to evidence and to exhibits until the parties can litigate the admissibility of any prejudicial information. See, e.g., *Oziel v. Superior Court* (1990) 223 Cal.App.3d 1284, 1302, and 1302 fn 10 (psychiatrist's office searched for records of two criminal defendants; search videotaped; *held*: the trial court abused its discretion in ordering media access to the videotape before it was offered or admitted into evidence at trial, and before the psychiatrist's claim could be litigated).

Much, maybe even all, of the material returned from the searches may never be offered in evidence, either because of a successful Penal Code section 1538.5 motion, or because the prosecution simply doesn't use it, or the court rules it inadmissible on traditional evidentiary grounds. Accordingly, the court should not release material until its admissibility at trial is fully litigated.

IV. Conclusion

The court should deny *The Bee*'s motion to unseal the search warrant records.

Respectfully Submitted,

5/14/08
Date

Peter M. Jones

Garrick Byers

PROOF OF SERVICE BY MAIL AND FACSIMILE
(1013a, 2015.5 C.C.P.)

State of California)
)
County of Fresno)

I am a citizen of the United States of America and am employed in the county aforesaid; I am over the age of eighteen years and not a party to the within above-entitled action; my business address is 2220 Tulare Street, Suite 300, Fresno, California 93721.

On the 14th day of MAY, 2004, I served the attached DEFENDANT WESSON'S OPPOSITION TO UNSEALING THE SEARCH WARRANT RECORDS, by placing a true copy thereof in sealed envelopes with postage thereon fully prepaid in the United States Post Office mailbox in the City of Fresno, County of Fresno, State of California, addressed as follows:

Bruce A. Owdom
Dietrich, Glasrud, Mallek & Aune
An Association Including Law Corporations
5250 North Palm Avenue, Suite 402
Fresno, California 93704
Facsimile: (559) 435-8776

Larry A. Donaldson, Esquire
Police Legal Advisor
Fresno City Attorney's Office
2600 Fresno Street
Fresno, CA 93721-3602
Facsimile: (559) 488-1084

Lisa Gamoian, Chief Deputy District Attorney
Fresno County District Attorney's Office
2220 Tulare Street, Suite 1000
Fresno, California 93721
Facsimile: (559) 488-1867

That there is delivery service by United States mail at the places so addressed or that there is a regular communication by mail between the place of mailing and the places so addressed. A copy was also sent by facsimile to each party noted above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: May 14, 2004.

Sandra Perkins

RECEIPT OF A COPY OF THE FOREGOING DOCUMENT IS ACKNOWLEDGED.

DATE: _____

BY: _____

RECEIPT OF A COPY OF THE FOREGOING DOCUMENT IS ACKNOWLEDGED.

DATE: _____

BY: _____

RECEIPT OF A COPY OF THE FOREGOING DOCUMENT IS ACKNOWLEDGED.

DATE: _____

BY: _____