

SUPERIOR COURT, STATE OF CALIFORNIA, COUNTY OF STANISLAUS

THE PEOPLE OF THE STATE OF CALIFORNIA VS. SCOTT LEE PETERSON

NATURE OF HEARING: PROTECTIVE ORDER/DECISION

NO: 1056770

JUDGE: A. GIROLAMI

Bailiff: Larry Sweatman

Date: June 12, 2003

Clerk: J. Carvalho

Reporter: none

Modesto, California

Appearances: none

On May 27, 2003 the Court informed the parties that it was concerned about the tremendous amount of pre-trial publicity in this case and the fact that there had been dissemination of information currently under seal. The Court noted that the Rules of Professional Conduct 5-120 were not specific enough and that they only applied to the attorneys and not to other individuals. The Court indicated it would have a hearing on the subject of a Protective Order on June 6, 2003 and suggested written comments from the parties.

For the hearing of June 6, the Court had received the following filings: Opposition to a Protective "Gag" Order from the Media represented by Charity Kenyon, Esq.; Opposition of Potential Witness Amber Frey to Proposed Gag Order filed by Gloria Allred, Esq.; Points and Authorities In Support of Limited Protective Order from the Prosecution; and Memorandum in Response to Courts Inquiry regarding "Gag" or Protective Order from the Defense. All were filed on June 4, 2003.

On June 6, 2003 the Court heard arguments of counsel and also received a proposed order from the Prosecution. Having considered the oral comments of counsel and the Points and Authorities submitted, the Court hereby finds as follows:

That the amount and nature of the pre-trial publicity has been massive. The local print media rarely does not have a daily front page article on this matter. Besides extensive local television and radio coverage, the national television media has embraced this case with a passion providing frequent commentaries from notables like Larry King, Geraldo Rivera, and Katie Couric. In addition, there have been a number of national programs where professionals involved in the criminal justice system have opined their views on the evidence and possible trial strategy. Even Defense Counsel was a regular commentator prior to the Defendant's arrest and his being retained on the case. Also, Second Counsel gave a lengthy televised interview prior to the arrest. During the investigation, the Modesto Police Department made a number of press releases covering various aspects of the investigation. Not only the families of both the Defendant and the Decedent but even the Defendant, prior to his arrest, was involved in a lengthy nationally televised interview with Diane Sawyer. The families also recently gained national attention over a dispute regarding the possession of personal belongings of the Decedent.

Following the filing of the Complaint, the Clerk's office of the Superior Court was inundated with calls and visits from the Media requesting copies of the complaint and all other documents in the file. This problem, which impacted staff resources, was significantly reduced with a creation of a website specifically for the Media where representatives can easily obtain copies of any unsealed paper filed in this action. From April 30, 2003 to the present date, there have been over 12,000 hits. In order to foster accuracy in reporting, the Court allowed cameras in the courtroom pursuant to Rules of Court 980.

The nature of the publicity is especially troubling as it often involves leaks of information that could be considered favorable for one side or the other. For example, even though the autopsy report had been sealed along with a specific protective order, information was publicized regarding facts contained only in that document. Periodically, there have been reports of defense theories of a possible serial killer or a satanic cult being responsible in this case. On the prosecution side, there have been comments by the Attorney General regarding the weight of the evidence and by the District Attorney comparing his capital case record against that of the original defense attorney. When the Defense fielded a comment regarding a brown van being possibly involved in the killing, the Prosecution subsequently made a public announcement that the investigation had cleared that van of any involvement in the killings.

Pre-complaint, there were a number of comments in the media that certain specific items had been found in searches of Defendant's property even though the search warrants had been sealed by Court order. Also, pre-complaint, there were reports regarding the amount of cooperation or lack of cooperation on the part of the Defendant during the investigation. Post filing, there have been reports of information gleaned from an examination of the Defendant's computer.

Even though the main purpose of a Protective Order is to allow the Defendant to have a fair trial, and at this time the Defense is opposing such an order, the Court is mindful of the directions from Sheppard v. Maxwell (1966) 384 US 333, 359:

"[t]he Court should have made some effort to control the release of leads, information, and gossip to the press by the police officers, witnesses, and counsel for both sides. Much of the information thus disclosed was inaccurate, leading to groundless rumors and confusion."

The Court has reviewed the sealed documents and the wiretap evidence and much contained therein would likely be determined to be irrelevant and/or inadmissible. The Sheppard case gave further direction at page 360:

"[i]t is obvious that the judge should have further sought to alleviate this problem by imposing control over the statements made to the news media by counsel, witnesses and especially the Coroner and police officers. The prosecution repeatedly made evidence available to the news media, which was never offered in the trial. Much of the "evidence" disseminated in this fashion was clearly inadmissible. The exclusion of such evidence in court is rendered meaningless when news media make it available to the public."

The Court has considered two different standards applicable to imposing a Protective Order. Specifically, there is the "clear and present danger of serious imminent threat to a protected competing interest", Hurvitz v. Hoefflin (2000) 84 Cal App. 4th 1232, or the "reasonable likelihood of prejudicial news which would make difficult the impaneling of an impartial jury and tend to prevent a fair trial " standard, Younger v. Smith (1973) 30 Cal App. 3rd 138. Even though Hurvitz is more recent and mentions the federal cases, it ignores the Younger case which the Court finds is more applicable in a criminal case.

If this case were to proceed to trial without a Protective Order in place until shortly before jury selection, all the statements by the witnesses, all of the rumors and gossip would be rehashed shortly before trial thereby making it extremely difficult to select a fair and impartial jury. Even though the Court is applying the Younger standard, in the unique facts of this case, there is a clear and present danger because of the modern media's capability easily to store and recall bits of information in order to relate them at any time including during jury selection. Further compounded in this case is the fact that the publicity is nationwide and cannot be automatically cured by a change of venue or extensive voir dire. If witnesses are allowed to discuss publicly their expected testimony or if trial counsel or their staff are allowed to comment on strategy or on the weight of the evidence, even if jurors can be found that are willing to be fair and impartial, it may never be known if a juror were to rely consciously or subconsciously on the out-of-court information.

Although the Court is extremely concerned with the due process and fair trial rights in this case, it is also keenly aware of the public's right of access to the proceedings herein and the right of free speech of the participants. However, after balancing these rights, and in order to protect against the disruption of the proper administration of justice, the Court finds that good cause exists for the issuance of a pre-trial Protective Order.

The Court has considered less restrictive alternatives. First, a change of venue and extensive voir dire are not especially helpful in this case because of the exceptional amount of publicity which has been broadcast throughout this state and country. Secondly, the Court has previously reminded the parties of the Rules of Professional Conduct, but the problem has persisted.

Being mindful of the necessity of narrowly tailoring such an order, the Court hereby orders:

ORDER

It is the Order of this Court that no attorney connected with this case as Prosecutor or Defense Counsel, nor any other attorney working in those offices, nor their agent's, staff, or experts, nor any judicial officer or court employee, nor any law enforcement employee of any agency involved in this case, nor any persons subpoenaed or expected to testify in this matter, shall do any of the following:

1. Release or authorize the release for public dissemination of any purported extrajudicial statement of either the defendant or witnesses relating to this case;

2. Release or authorize the release of any documents, exhibits, photographs, or any evidence, the admissibility of which may have to be determined by the Court;

3. Make any statement for public dissemination as to the existence or possible existence of any document, exhibit, photograph or any other evidence, the admissibility of which may have to be determined by the Court;

4. Express outside of court an opinion or make any comment for public dissemination as to the weight, value, or effect of any evidence as tending to establish guilt or innocence;

5. Make any statement outside of court as to the nature, substance, or effect of any statements or testimony that have been given;

6. Issue any statement as to the identity of any prospective witness, or the witness's probable testimony, or the effect thereof;

7. Make any out-of-court statement as to the nature, source, or effect of any purported evidence alleged to have been accumulated as a result of the investigation of this matter.

8. Make any statement as to the content, nature, substance, or effect of any testimony which may be given in any proceeding related to this matter.

Any violation of this order will result in a contempt action for any offender within the jurisdiction of this Court.

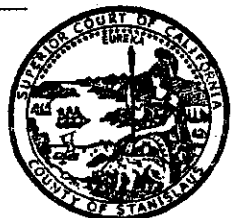
This order does not include any of the following:

1. Factual statements of the accused persons name, age, residence, occupation and family status.
2. The circumstances of the arrest, namely, the time and place of the arrest, the identity of the arresting and investigating officers and agencies, and the length of the investigation.
3. The nature, substance, and text of the charge, including a brief description of the offenses charged.
4. Quotations from, or any reference without comment to, public records of the Court in the case, or to other public records or communications heretofore disseminated to the public.
5. The scheduling and result of any stage of the prejudicial proceedings held in open court in an open or public session.
6. A request for assistance in obtaining evidence.
7. Any information as to any person not in custody who is sought as a possible suspect or witness, nor any statement aimed at warning the public of any possible danger as to such person not in custody.
8. A request for assistance in obtaining of evidence or the names of possible witnesses.
9. Any witness may discuss any matter with any Prosecution or Defense Attorney in this action, or any agent thereof; and if represented may discuss any matter with his/her own attorney.

A copy of this order shall be provided to any prospective witness which a party intends to call for any proceeding in this action. If held to answer at the preliminary hearing, the Court will consider at the arraignment whether this order should be modified or terminated pending jury selection. Any objections or suggested modifications to the continuation of this order should be filed in writing five days prior to the arraignment.

Dated: 6/12/03


A. Girolami
Judge of Stanislaus Superior Court



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