

IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 22-0182

BROADWATER COUNTY, MONTANA,

Plaintiff and Appellee,

and

HELENA INDEPENDENT RECORD,

Defendant and Appellee,

v.

PERSON WITH AN INTEREST IN THE RELEASE OF CONFIDENTIAL
CRIMINAL JUSTICE INFORMATION PERTAINING TO THE
INVESTIGATION AND PROSECUTION OF JASON ELLSWORTH: JASON
ELLSWORTH,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

On Appeal from the Montana First Judicial District,
In and for the County of Broadwater,
Cause No. DV-2022-02; Honorable Kathy Seeley, Presiding

Appearances:

David M. McLean
McLean & Associates, PLLC
3301 Great Northern Ave., Suite 203
Missoula, MT 59808
(406) 541-4440
dave@mcleanlawmt.com

*Attorneys for Appellant
Jason Ellsworth*

Jania Hatfield
Broadwater County Attorney's Office
515 Broadway Ave.
Townsend, MT 59644
(406) 266-9226
jhatfield@co.broadwater.mt.us

*Attorneys for Appellee
Broadwater County*

Kyle W. Nelson
Jeffrey J. Tierney
Goetz, Geddes & Gardner, P.C.
P.O. Box 6580
Bozeman, MT 59771-6580
(406) 587-0618
knelson@goetzlawfirm.com
jtierney@goetzlawfirm.com

Attorneys for Appellee
Helena Independent Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF RELEVANT FACTS	2
STANDARD OF REVIEW	6
SUMMARY OF ARGUMENT	6
ARGUMENT	7
1. The District Court erred when it ordered dissemination of Ellsworth’s confidential criminal justice information without requiring service on Ellsworth and without allowing Ellsworth the opportunity to brief the matter.....	7
2. The District Court erred when it ordered dissemination of Ellsworth’s confidential criminal justice information without providing appropriate procedural safeguards.....	11
CONCLUSION	13
CERTIFICATE OF COMPLIANCE.....	15

TABLE OF AUTHORITIES

Cases

<i>Jefferson County v. Montana Standard</i> , 2003 MT 304, 318 Mont. 173, 79 P.3d 805	6, 10, 11, 12
<i>Ravalli County v. Erickson</i> , 2004 MT 35, 320 Mont. 31, 85 P.3d 772	8, 9

Statutes

Montana Code Annotated § (5)(a)(iii)(B).....	8
Montana Code Annotated § 44-5-303	3

STATEMENT OF THE ISSUES

1. Did the District Court err in ordering the dissemination of Jason Ellsworth's confidential criminal justice information without requiring service of the Complaint on Mr. Ellsworth and without allowing Mr. Ellsworth the opportunity to brief privacy protection issues?
2. Did the District Court err in ordering the dissemination of Jason Ellsworth's confidential criminal justice information without providing appropriate procedural safeguards?

STATEMENT OF THE CASE

On January 19, 2022, Plaintiff/Appellee Broadwater County ("Broadwater") filed its Complaint for Declaratory Relief. (Doc. 1). The Complaint sought a determination from the Court regarding the dissemination of Defendant/Appellant Jason Ellsworth's ("Ellsworth") confidential criminal justice information ("CCJI"). (Doc. 1). The Complaint was never served on the Defendants.

At the time of filing the Complaint, Broadwater filed a Motion for Leave to Deposit Investigative File Under Seal with the Court. (Doc. 2). This Motion was served by mail on the Defendants. In response, Ellsworth filed his Brief in Opposition to Release of Confidential Criminal Justice Information. (Doc. 5). Ellsworth argued the criminal case was not complete and thus any release of CCJI would be premature. Ellsworth also requested the parties be allowed to brief

Ellsworth's right to privacy versus the public's right to know once the criminal case was complete.

No other filings were made by any parties in the case. On March 17, 2022, the District Court issued its Order Following *in Camera* Review. (Appendix to Appellant's Opening Brief ("App.") A). Therein, it ordered Broadwater to provide to Defendant/Appellee Helena Independent Record ("Helena IR") Ellsworth's CCJI. It is from this Order which Ellsworth appeals.

STATEMENT OF RELEVANT FACTS

Broadwater's Complaint and Motion were precipitated by two requests from Helena IR for the file relating to misdemeanor charges against Ellsworth. (Doc. 1, ¶ 7). Further, Broadwater specifically requested "[a]fter receiving responses from persons interested in the disclosure of the information, the Court make a finding whether the demands of personal privacy outweigh the public's right to know, and the Court order either release of the information or withholding of the information, as appropriate." (Doc. 1, p. 5).

The Complaint was never served on Ellsworth. The Complaint was not served on Helena IR. In fact, Ellsworth did not receive a copy of the Complaint until this appeal was filed. Neither Ellsworth nor Helena IR filed an Answer in the underlying matter.

On January 19, 2022, Broadwater filed its Motion for Leave to Deposit Investigative File Under Seal with the Court. (Doc. 2). The Motion merely requested leave to deposit the Investigative File, which was CCJI, with the District Court, to enable the Court's *in camera* review of the file for possible disclosure. (Doc. 2, p. 2). This Motion was served via U.S. Mail on Ellsworth and Helena IR. (Doc. 2, p. 2). The Motion also noted Ellsworth was opposed to the filing of any motions in the matter because there was no final disposition in the criminal matter. (Doc. 2, p. 2).

On February 8, 2022, in response to being served a copy of Broadwater's Motion, but having not been served or provided with the Complaint, Ellsworth filed his Brief in Opposition to Release of Confidential Criminal Justice Information. (Doc. 5). Therein, Ellsworth set forth his position that the criminal case would not be completed under Montana Code Annotated § 44-5-303 until the deferred sentence ran on August 2, 2022. (Doc. 5, p. 1). Ellsworth also requested once the criminal case was completed, that the parties to the matter be allowed to brief the issue of Ellsworth's right to privacy versus the public's right to know. (Doc. 5, p. 2). In the Response, Ellsworth requested the District Court reject the release of any Confidential Criminal Justice Information and should analyze the release upon completion of the deferred sentence. (Doc. 5, p. 2).

No other filings were made by any other party in the matter. Broadwater only filed its Motion for Leave to Deposit Investigative File Under Seal with the Court. Helena IR never filed any motions, and never appeared in the underlying case.

Despite neither defendant being served, and despite Ellsworth's request for additional briefing, the District Court issued its Order Following *in Camera* Review on March 17, 2022. (App. A). The investigative file which was reviewed *in camera* consisted of the following:

1. A Montana Highway Patrol dashcam video dated January 25, 2021;
2. A Montana Highway Patrol dashcam video dated May 23, 2021;
3. Documents contained in a file labeled Evidence + Dissemination
eDiscovery1, 31 pgs.;
4. Documents contained in a file labeled Evidence + Dissemination
eDiscovery2, 10 pgs.;
5. Documents contained in a file labeled Evidence + Dissemination +
Form+-+Media, 1 pg.;
6. IAJUDGMENTORDERBOOKANDRELEASEMOTIONTOWITHDRA
WPLEA.pdf, 5pgs.¹;

¹ Ellsworth is not certain what this document pertains to as he has never received it, and never sought to withdraw his plea.

7. Motion+to+Dismiss+Charges.pdf, 2 pgs.;

8. Screenshot+2021-05-25+161253.jpg, 1 pg.; and

9. Recording of short voicemail from Jason Ellsworth to Trooper Gifford.

(App. A, p. 2). The District Court indicated it had reviewed the investigative file and concluded that a redacted version of the file should be released to Helena IR.

(App. A, p. 3). The District Court also held “[t]here will be no additional opportunity for briefing,” (App. A, p. 5), while chastising Ellsworth for not addressing the right to know and the right of privacy balancing test despite his request for briefing on the issue. (App. A, p. 4). The District Court also held the criminal case was complete. (App. A, p. 5). Based on its own analysis, without service of the complaint, without answers to the complaint, and without briefing from any of the parties, the District Court ordered, in pertinent part:

1. Broadwater County shall provide to Helena Independent Record or other interested persons, a copy of the file items listed above, **with the**

exception of number 4, “Documents contained in a file labelled Evidence + Dissemination eDiscovery2, 10 pgs.”

2. Broadwater County will also redact any social security numbers, driver license numbers and dates of birth. It appears the social security numbers have already been redacted but driver license numbers and dates of birth

have not been redacted. Broadwater County shall verify that these items are redacted.

(App. A, p. 8).

STANDARD OF REVIEW

This Court reviews a district court's conclusions of law to determine whether the court's interpretations of the law is correct. *Jefferson County v. Montana Standard*, 2003 MT 304, ¶ 9, 318 Mont. 173, 79 P.3d 805.

SUMMARY OF ARGUMENT

The District Court erred when it ordered dissemination of Ellsworth's confidential criminal justice information. Specifically, neither defendant was served with the Complaint in the underlying case. Ellsworth was never provided the same file as the District Court nor given the opportunity to see the totality of the information provided to the Court to address specific privacy issues. Thereafter, the District Court did not allow Ellsworth the opportunity to brief whether the information should be disseminated and did not require Helena IR to show it was entitled to receive Ellsworth's CCJI, despite his request to the contrary.

Additionally, the District Court erred when it did not include procedural safeguards when ordering dissemination of Ellsworth's CCJI. Specifically, the

District Court should have ordered Helena IR it could not copy or publish the information in the CCJI.

ARGUMENT

1. The District Court erred when it ordered dissemination of Ellsworth's confidential criminal justice information without requiring service on Ellsworth and without allowing Ellsworth the opportunity to brief the matter.

As set forth above, the Complaint in this matter was never served on either defendant in the underlying matter. Neither defendant filed an Answer or other responsive pleading to the Complaint. The issue was not ripe for the District Court to act.

The Motion to for Leave to Deposit Investigative File Under Seal with the Court was mailed to both defendants. Helena IR did not respond or acknowledge the motion. Ellsworth did appear and responded to the motion, as an effort to make sure he did not waive any future arguments. In his response, Ellsworth requested once the criminal case was completed, that the parties to the matter be allowed to brief the issue of Ellsworth's right to privacy versus the public's right to know. (Doc. 5, p. 2).

The District Court's docket reflected neither defendant had been served, but it nonetheless issued its Order Following *in Camera* Review on March 17, 2022. (App. A). It did so without either defendant briefing the issue. It did so without Broadwater briefing the issue – Broadwater only filed a motion to deposit the CCJI

with the District Court, it did not move the Court to make a decision regarding dissemination. Essentially, the District Court acted on its own accord, without either interested party being served, without any party moving for the information to be released, and without Ellsworth being allowed to review the entire file provided to the Court to identify with specificity those items which needed protection and redaction. At no time has Ellsworth suggested that the entire file is protected from release. Instead, he sought the opportunity to protect his individual privacy rights.

Additionally, the District Court held the criminal case was complete, contrary to Ellsworth's opinion. (App. A, pp. 4-5). Since the District Court held the criminal case was complete, it should have ordered Broadwater to serve the Complaint on the parties, and the parties could have then appropriately responded and addressed dissemination versus privacy issues. Montana Code Annotated § (5)(a)(iii)(B) specifically requires notice be given to a person with a protected privacy interest "that the person may file an objection to disclosure with the district court if the person believes a privacy interest that they possess exceeds the merits of public disclosure." Instead, the District Court held "[t]here will be no additional opportunity for briefing." (App. A, p. 5).

This Court addressed a similar situation where there was no briefing done in *Ravalli County v. Erickson*, 2004 MT 35, 320 Mont. 31, 85 P.3d 772. Therein, the

parties stipulated to submit the matter without briefing or oral argument. *Ravalli County*, ¶ 6. This Court then reversed and remanded, ordering the district court to make a determination after any briefing and fact-finding it deemed appropriate. *Ravalli County*, ¶ 19. Justice John Warner provided further explanation in his concurrence as to why not having briefing by the parties was inappropriate. He noted after the complaint and a response, the parties did nothing. *Ravalli County*, ¶ 22 (J. Warner concurring). “There was no briefing, no argument, and to paraphrase the county attorney, ‘we’ll just let the judge handle it from here.’” *Id.* He went on to point out if this type of procedure was allowed to stand, the adversary system would be bypassed in the district courts. *Ravalli County*, ¶ 23 (J. Warner concurring). Specifically, Justice Warner stated:

It is then probable that one side or the other would be dissatisfied and appeal to this Court. The appellant's brief would merely state, “I think the order should be reversed.” The response brief would merely state, “I don't,” and the decision would be left to this Court. Of course, if the appellate court were to follow the rule that judgments will not be reversed based on arguments that were not made in the district court, the decision could not be reviewed because no arguments were made.

Id. Here, the parties are in a similar situation. Ellsworth and Helena IR never responded to the Complaint and certainly did not stipulate to waiving briefing. However, just as in *Ravalli County*, since there was no appropriate briefing before the District Court, the case should be reversed and remanded. *See Ravalli County*, ¶ 19.

Regarding cases involving CCJI, this Court has held “in cases involving confidential criminal justice information, an inevitable conflict exists between the public’s right to know and an individual’s right to privacy.” *Jefferson County*, ¶ 14. In order to deal with the conflict, the party requesting the information is *required* to make a showing that it is entitled to receive such information. *Id.* (emphasis added). Here, Helena IR was the party requesting the information, yet the District Court relieved Helena IR of making the requisite required showing. Without appearing in the case, and without appropriate briefing, Helena IR never met this requirement. Accordingly, the District Court erred when issuing its Order without first having Helena IR meet its burden.

Additionally, once the party requesting the information makes a showing of entitlement, the request must be balanced against the privacy interest of the individual in question. *Jefferson County*, ¶ 15. Again, the parties would need to actually brief the issue for the District Court to make this determination. Instead, it acted on its own accord when issuing its Order and disregarded Ellsworth’s request for the issue to be briefed. This constitutes reversible error and this Court should remand the case to the District Court. Broadwater could then serve the Complaint and an appropriate briefing schedule should be ordered.

//

//

2. The District Court erred when it ordered dissemination of Ellsworth's confidential criminal justice information without providing appropriate procedural safeguards.

In the event this Court agrees it was appropriate for the District Court to issue its Order without the defendants being served or briefing the issue, it must consider whether the District Court provided appropriate procedural safeguards for dissemination. Ellsworth does not believe it did.

This matter is similar to *Jefferson County*. Therein a County Commissioner was arrested for DUI and driving with an expired license. *Jefferson County*, ¶ 4. A newspaper requested Jefferson County provide it with information regarding the arrest. *Jefferson County*, ¶ 5. Jefferson County filed a complaint for declaratory relief. *Jefferson County*, ¶ 6. Thereafter, the newspaper filed a motion for summary judgment and the district court conducted a hearing on the motion. *Id.* After the hearing, the District Court requested the information be submitted for an *in camera* inspection. *Id.* The information consisted of a police officer's report and two video tapes. *Jefferson County*, ¶ 7. Following *in camera* review, the District Court ordered release of the information. *Id.* "However, the order stated that while Montana Standard could report on the contents of the information, it could not copy or publish the video tapes." *Id.* Additional documents were submitted for review. *Jefferson County*, ¶ 8. Again, the documents were released, but under the condition the newspaper was prohibited from copying or publishing

the documents. *Id.* The supplement order also required the Commissioner's social security number and driver's license number be removed from the documents before they were released. *Id.*

This Court held such conditions were proper to be included by the District Court. *Jefferson County*, ¶ 20 (“Thus, it was proper for the District Court to shield information that was not relevant to [the Commissioner’s] status as a public official from public scrutiny.”). Thus, while the Commissioner did not have a protected privacy interest in her arrest information, she did retain a privacy interest in other types of personal information not relevant to her status as a public official. *Id.*

In the underlying case, the only condition the District Court placed on dissemination of Ellsworth's was for Broadwater to redact any social security numbers, driver license numbers and dates of birth. (App. A, p. 8). Thus, the District Court only put in place one of the two conditions this Court held appropriately protected a public official's privacy. *See Jefferson County*, ¶ 20 (“[T]he District Court ordered that [the Commissioner’s] information be released to [the newspaper] under the following conditions: (1) [The newspaper] was prohibited from copying or publishing the information; and (2) [The Commissioner’s] social security number and driver’s license number would be removed from the information before it was released”).

Here, the District Court should have followed through with the conditions this Court had already approved of in *Jefferson County*. Namely, the District Court should have prohibited Helena IR from copying or publishing Ellsworth's CCJI. The District Court did not do so, despite citing to *Jefferson County* in its Order. (App. A, pp. 6-7). Accordingly, this Court should remand the matter to the District Court and instruct it to include in its order regarding dissemination that Helena IR is prohibited from copying or publishing Ellsworth's CCJI.

CONCLUSION

The District Court erred when issuing its Order Following *In Camera* Review. (App. A). The District Court ordered dissemination of Ellsworth's confidential justice information without the Complaint ever being served. The District Court never provided Ellsworth the opportunity to review the CCJI submitted for *in camera* review. Most importantly, the District Court did not allow Ellsworth the opportunity to brief whether the information should be disseminated and did not require Helena IR to show it was entitled to receive Ellsworth's CCJI. The District Court should not have reached the merits of the case without briefing by the interested parties.

Further, the District Court erred when it did not include appropriate procedural safeguards regarding dissemination of Ellsworth's CCJI. Namely, the

District Court did not require Helena IR to not copy or publish the information in the CCJI.

For the reasons set forth herein, Defendant/Appellant Jason Ellsworth respectfully requests this Court hold the District Court erred when issuing its Order Following *In Camera* Review. (App. A). Further, this case should be reversed and remanded, with the requirement the Complaint be served on Defendants and the parties be given the opportunity to brief the issue of appropriate dissemination of Ellsworth's CCJI.

DATED this 12th day of August, 2022.

By /s/ David M. McLean

David M. McLean

McLEAN & ASSOCIATES, PLLC

Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4), Mont.R.App.P., I certify that Appellant's Opening Brief, is double spaced, is a proportionately spaced 14 point Times New Roman typeface, and contains 2,901 words.

/s/ David M. McLean

McLEAN & ASSOCIATES, PLLC

CERTIFICATE OF SERVICE

I, David Matthew McLean, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 08-12-2022:

Kyle W. Nelson (Attorney)
PO Box 6580
Bozeman MT 59771
Representing: Helena Independent Record
Service Method: eService

Jeffrey J. Tierney (Attorney)
35 N. Grand
P.O. Box 6580
Bozeman MT 59715
Representing: Helena Independent Record
Service Method: eService

Jania Briana Hatfield (Attorney)
515 Broadwater St.
Townsend MT 59644
Representing: Broadwater County, Montana
Service Method: E-mail Delivery

Electronically signed by Cecelia Hamilton on behalf of David Matthew McLean
Dated: 08-12-2022