

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.

PERSONS 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.

APPELLEE BROADWATER COUNTY'S ANSWER 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

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STATEMENT OF RELEVANT FACTS

On two separate occasions, the Broadwater County Attorney's office received requests from reporter Seaborne Larson from the Helena Independent Record for the investigative file relating to the prosecution and sentencing of Jason Ellsworth. Dkt. 1, p. 2. Since the information requested constituted Confidential Criminal Justice Information (CCJI) as defined in § 44-5-103(3), Mont. Code Ann., Broadwater County Attorney, Cory Swanson, filed a Complaint for Declaratory Relief on January 18, 2022. Dkt. 1, p. 3. The same day, Mr. Swanson also filed a Motion for Leave to Deposit Investigative File Under Seal with the Court. The Motion for Leave was served on the parties by U.S. mail but the Complaint was not served on the parties.

On January 20, 2022, Judge Kathy Seeley issued an order for Broadwater County to file the Investigative file under seal until further order of the court. *See* Dkt. 3. The CCJI was filed with the court on February 22, 2022. *See* Dkt. 5.

On February 3, 2022, Mr. Ellsworth voluntarily joined the law suit by filing a Brief in Opposition to Release of Confidential Criminal Justice Information. In that brief he stated his position was that due to the type of sentence imposed it was too early to review the release of CCJI, and requesting that this matter be set until after the deferred imposition of sentence had run. Dkt. 4, p.2. Mr. Ellsworth then requested that after that time had run, the court then analyze what information

should be released and should invite Mr. Ellsworth to file a brief with his arguments. *Id.* Mr. Ellsworth concludes his motion by stating that, “The Court should reject the release of any Confidential Criminal Justice Information at this time and should analyze the release only upon completion of the deferred sentence.” *Id.* Other than the title of the motion, at no time in that brief does Mr. Ellsworth discuss his position regarding whether the CCJI should be released or not, he only states that he believes briefing should be done later. *Id.*

After reviewing the CCJI and the filings in the case, Judge Kathy Seeley on March 17, 2022 issued an order in the case. In that order, Judge Seeley states that she disagrees with Mr. Ellsworth’s assertion that the case is not completed under Montana Code Annotated § 44-5-303(5). The Judge finds that the case is complete because there is no prosecution pending and there is a judgement in the file. Dkt. 6, p 5. Next, the court looks at whether there will be additional briefing on the CCJI issue. The Court states, “Ellsworth also contends that further briefing should occur ‘later.’ There will be no additional opportunity for briefing. The law is well-settled and has been discussed in many cases. The facts of the case are not complex and are established by the investigative file itself.” *Id. at 5.*

The court then performed the relevant balancing test and ordered Broadwater County to release the CCJI with the exception of document number 4. *Id. at 8.* The court also ordered that social security numbers, drivers license

numbers and dates of birth be redacted from the information. The costs of reproduction would be the responsibility of the Helena Independent Record or the individual requesting the file. *Id.* A copy of the unredacted investigative file would be filed under seal with the Broadwater County Clerk of District Court. Finally, the court ordered that all parties shall bear their own attorney fees. *Id.* at 9

STANDARD OF REVIEW

The Court reviews the district court's conclusions of law to determine whether the court's interpretation 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 did not err in ordering the dissemination of Ellsworth's confidential criminal justice information because he waived any problems with service of process by voluntarily appearing in the matter and filing a brief. In addition, this argument should not be considered because it was not raised by Ellsworth in the District Court. Ellsworth is not entitled to see the confidential criminal justice information prior to the release of the information because that is not what is entitled by statute. The issue was ready for review by the judge because it was after the 30 days required by statute and Ellsworth had the

opportunity to file a brief stating his position regarding whether the information should be released or not.

ARGUMENT

- 1. The District Court did not err when ordering dissemination of Ellsworth's confidential criminal justice information because Ellsworth voluntarily waived irregularities with respect to service of process and Ellsworth had the opportunity to brief the matter.**

- A. Ellsworth's argument regarding service of process is incorrect and was not preserved in the district court.

In his brief Ellsworth argues that service of process was not done correctly.

There are a few problems with this argument.

First, this argument was waived because he failed to object to service of process in the District Court. It is "well established" that the Court will not consider new arguments or legal theories on appeal. *Milltown Addition Homeowner's Ass'n v. Geery*, 2000 MT 341, 18, 303 Mont. 195, 15 P.3d 458. This restraint is "rooted in fundamental fairness to the parties." *Pilgeram v. GreenPoint Mortg. Fund'g, Inc.*, 2013 MT 354, 21, 373 Mont. 1, 313 P.3d 839. Ellsworth had the opportunity to object to service of process when he filed his brief in the case, and he failed to do so.

Second, Ellsworth voluntarily waived service of process by appearing in the matter and filing a brief, and in that brief, he failed to file a 12(b)(5) motion. The

Court has recognized that the voluntary general appearance by the defendant is a waiver of service and of any defects or irregularities in the service process.

Spencer v. Ukra, 246 Mont. 430, 433, 804 P.2d 380 (1991). “[An] objection to lack of personal jurisdiction must be made at the time of the initial appearance in the District Court.” *Macpheat v. Schauf*, 1998 MT 250, 12, 291 Mont. 182, 969 P.2d 265. Ellsworth voluntarily appeared in this matter by filing his Brief in Opposition to Release of Confidential Criminal Justice Information. As a result of his appearance, Ellsworth has waived any defects in service of process.

In his brief Ellsworth also argues that he was never provided a copy of the investigative file that was filed with the court for review. The statute requires that the County Attorney request to be allowed to deposit the investigative file with the court. §44-5-303(5)(iv), Mont. Code Ann. It also states that the Court will conduct an in camera review of the information and make a determination regarding the release of the information. §44-5-303(5)(v)(A), Mont. Code Ann. No where in the statute does it state that either party to the action would receive a copy of the file for review. This would defeat the purpose of this process in that it would release the confidential information prior to an order by the Judge. In addition, the majority of the information released to the judge was released to Mr. Ellsworth as a part of discovery in the underlying criminal matter. As a result,

Ellsworth was not entitled to see a copy of the confidential criminal justice information as a part of this process.

B. The process for declaratory actions regarding confidential criminal justice information was followed.

In his brief, Ellsworth adds an additional step to the process for the release of CCJI. The process for filing a declaratory judgment action regarding CCJI is detailed in § 44-5-303(5), Mont. Code Ann. To start, the prosecutor receives a request for CCJI relating to a criminal investigation that has been terminated either due to declining to prosecute or because the case is completed by entry of judgement, dismissal or acquittal. The prosecutor may file a declaratory action in district court to receive an order from the court to release the information. The statute lists out different requirements for what must be in the filing, and for noticing the parties. Of note, it requires that no later than the time of filing the declaratory action the prosecutor must provide notice to the person with an interest in protecting the information that the declaratory action will be filed, and that they may file an objection to the disclosure with the district court. § 44-5-303(5)(iii)(A) & (B), Mont. Code Ann.

The prosecutor is required to request that they be able to file the investigative file and any other edited version of the file with the court. § 44-5-303(5)(iv), Mont. Code Ann. The prosecutor is to then requires that the court conduct an in

camera review no sooner than 30 days following the filing of the declaratory judgement to allow time for comment from any interested parties. The prosecutor also requests the court determine whether the demands of individual privacy do not clearly exceed the merits of public disclosure, and order what information should be released. § 44-5-303(5)(v)(A), Mont. Code Ann.

In this case, the above process was followed. Ellsworth seems to add an additional step to the process that once the District Court decided that the issue was ripe for review there needed to be additional notice of the ability to object. That is just not the case on a plain reading § 44-5-303(5), Mont. Code Ann.

C. Ellsworth had the opportunity to file a brief and failed to do so.

The issue was ripe for review of the court. The statute requires that the Judge wait 30 days before issuing an opinion “to ensure an opportunity for a person seeking to protect a privacy interest.” § 44-5-303(5)(v)(A), Mont. Code Ann. The statute does not require that the Judge wait for the parties to file a response to the action to complete the in camera review and perform the balancing test. § 44-5-303(5)(v)(A), Mont. Code Ann.

In this case, Ellsworth filed a non-responsive brief. In that brief he had the opportunity to state his position regarding whether or not the CCJI should be released. He failed to take that opportunity and did not state a position. The Judge waited fifty-eight days to issue her order. This was more than the 30 days that the

statute requires the prosecutor to request to allow time for the parties to respond. Ellsworth had the time to file a brief with the court expressing his opinion regarding the CCJI and failed to do so.

2. The District Court ordered dissemination of Ellsworth's confidential criminal justice information.

This case arises out of a Complaint for Declaratory Relief filed in Broadwater County due to a request received for the investigative file, including patrol car video, for the prosecution of Jason Ellsworth in Broadwater County Justice Court. The information requested is Confidential Criminal Justice information as defined by § 44-5-103(3), Mont. Code Ann. "Dissemination of confidential criminal justice information is restricted to criminal justice agencies, to those authorized to receive it, and to those authorized to receive it by a district court upon a written finding that the demands of individual privacy do not clearly exceed the merits of public disclosure." § 44-5-303(1), Mont Code Ann.

The public's right to know is addressed in Article II Section 9 of the Montana Constitution, and states, "No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." In addition, Article II Section 10 of the Montana Constitution states, "The right of individual

privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.”

In cases where Confidential Criminal Justice Information is requested under the Right to Know provisions of the Montana Constitution (as extended to media outlets) requires that a balancing test be performed by the court. “The right of individual privacy is essential to the well-being of a free society and shall not be infringed on without a compelling state interest.” *Jefferson County v. Mont. Std.*, 2003 MT 304, 13, 2003 Mont. LEXIS 763, 79 P.3d 805. The Helena Independent Record’s right to know must be balanced by Jason Ellsworth’s constitutional right to privacy. The District Court performed this balancing test and issued an order that took into account the relevant case law and statutes.

The role of the County Attorney in these cases as required by § 44-5-303(5) is to notify the parties, file the declaratory action with the Court and then abide by the order of the court. In Broadwater County, it is uncommon for the County Attorney to make arguments regarding whether the information should or should not be released. Rather, we notify the court of the law and rely on the court to make that determination. Both interested parties have filed briefs with the Court stating their positions on the release of the information. The County respectfully requests that the Court review that information and make a determination as to whether the District Court erred or not in their order.

CONCLUSION

The arguments Ellsworth makes regarding service of process and how the Court handled the declaratory action are either meritless or were not preserved in the district court. The Court should affirm.

Dated this 12 day of October, 2022



Jania Hatfield, Acting County Attorney

CERTIFICATE OF COMPLIANCE

Pursuant to M.R.App.P.11, the undersigned certifies that this brief is set in a proportionally spaced font and contains fewer than 10,000 words (2,748).

Certificate of Service

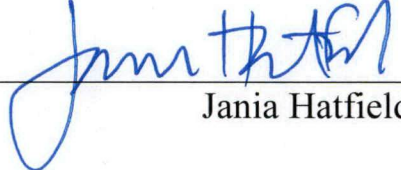
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