

**[J-34-2019] [MO: Dougherty, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT**

IN RE: 2014 ALLEGHENY COUNTY INVESTIGATING GRAND JURY	: No. 30 WAP 2018 : :
APPEAL OF: WPXI, INC.	: Appeal from the Order of the Superior : Court entered March 14, 2018 at No. : 950 WDA 2015, affirming the Order of : the Court of Common Pleas of : Allegheny County entered May 22, : 2015 at No. CP-02-MD-0003179-2015 : : ARGUED: April 11, 2019 : :

DISSENTING OPINION

JUSTICE DONOHUE

DECIDED: OCTOBER 31, 2019

With all due respect to the learned Majority, its opinion is no more than an artifice designed to create a procedural framework for *In re Return of Seized Property of Lackawanna County*, 212 A.3d 1 (Pa. 2019). In that case, over my dissent, the Majority concluded that investigating grand juries may utilize search warrants as an investigative tool to collect evidence, notwithstanding the lack of constitutional, legislative, or common law authority to support this finding. As the newly decided precedent of this Court, I do not contest that *Lackawanna County* is now Pennsylvania law. Nevertheless, I cannot in good conscience join in today's decision, as it effectively rewrites our Rules of Criminal Procedure in an attempt to create the fiction that the execution of search warrants is, in any respect, consistent with the secrecy demands associated with grand jury proceedings.

There is no governmental act more public (and less secret) than the execution of a warrant to search and seize another's property. As currently written, our Rules of Criminal Procedure reflect this obvious fact. Rule 207(A) requires that law enforcement officers knock and announce their presence when executing a search warrant, acts which are obviously conducted in the plain view of the general public, typically through a show of force. Pa.R.Crim.P. 207(A). Rule 208(A) states that a copy of the search warrant be left with the person from whom or whose premises the property was taken. Pa.R.Crim.P. 208(A). Rule 209(A) requires the law enforcement officer executing the search warrant to promptly return the search warrant to the issuing authority, Pa.R.Crim.P. 209(A), and Rule 210 instructs the judicial officer to whom the search warrant was returned to file it with the clerk of the court of common pleas of the judicial district in which the property was seized. Pa.R.Crim.P. 210. The comment to Rule 212 provides that search warrant information may be disseminated to the public after its execution. Pa.R.Crim.P. 212, cmt.

In a misguided effort to preserve some level of secrecy associated with the execution of search warrants in the grand jury context, the Majority proposes two "amendments" to our Rules of Criminal Procedure. First, to eliminate the dissemination of information regarding execution of search warrants to the public, the Majority proposes that we treat search warrants issued in connection with an ongoing grand jury investigation as "more akin to unexecuted search warrants,"¹ Majority Op. at 28 n.8, apparently even after they are executed. After execution of a search warrant, however,

¹ The Majority's support for this contention is limited to a reference to Rule 211(A), which authorizes the Commonwealth to request that a search warrant affidavit be sealed upon good cause shown. In the present case, however, WPXI seeks only the search warrant itself and the order sealing the affidavit of probable cause, not the affidavit of probable cause.

it is plainly no longer “unexecuted,” and any suggestion to the contrary is a pretense. Second, with respect to Rule 210’s requirement that executed search warrants be filed with the clerks of the courts of common pleas (thus making them available to the public), the Majority merely notes that the supervising judges of Pennsylvania grand juries ignore this filing requirement. Majority Op. at 21. In blessing such violations of the express terms of Rule 210 (which includes no such exception), the Majority merely cites to the Commonwealth’s brief, which indicates that, in effect, “this is how it is done.”² *Id.* at 22 (citing Commonwealth’s Brief at 21). Just because the Commonwealth admits that grand jury-related search warrants are routinely maintained by the supervising judge and not publicly filed with the clerks of courts does not justify this practice of ignoring our procedural rules.

It was not, as the Majority now insists, an oversight on the part of the Criminal Procedural Rules Committee that it did not anticipate this eventuality within the procedural rules pertaining to search warrants, Pa.R.Crim.P. 201-212, or the procedural rules specifically pertaining to grand juries, Pa.R.Crim.P. 220-231, 240-244, 556-556.13. It was also not an oversight by this Court, which promulgated these procedural rules. To

² In a footnote, the Majority suggests that the search warrant here was filed, but not publicly. Majority Op. at 23 n.7 (“Notably, the parties have never suggested the search warrant was not filed with the clerk of courts, only that it was not **publicly** filed.”) (emphasis in original). The record in this case, however, contains no evidence, or any suggestion, that the search warrant here was filed at all, either publicly or “non-publicly.” I note that the Commonwealth in its brief supports its position with respect to the lack of filing of search warrants by recognizing the supervising judge’s authority under Rule 229 to control evidence and the official transcript of testimony. Commonwealth’s Brief at 21-22. The Commonwealth’s position here is thus consistent with that of the Superior Court. *In re 2014 Allegheny Cty. Investigating Grand Jury*, 181 A.3d 349, 358, appeal granted, 192 A.3d 1110 (Pa. 2018) (“[G]rand jury documents are not filed with the clerk of courts; rather, the court controls the documents to maintain their secrecy. Pa.R.Crim.P. 229.”).

the contrary, neither the Committee nor this Court contemplated this eventuality because there is no legislative authority for grand juries to utilize search warrants in the first place. The Majority did not identify any such legislative authority in its *Lackawanna County* decision and does not do so here.

A common law right of access clearly applies to the search warrant in this case. The Majority defines public judicial documents as “those that are filed with the court as part of the permanent record of a case and relied on in the course of judicial decision-making.” Majority Op. at 21 (citing, e.g., *Commonwealth v. Fenstermaker*, 530 A.2d 414, 419 (Pa. 1987)). In contrast, the Majority identifies “non-public” judicial documents as records that are inherently private documents seldom if ever available to the public, including “transcripts of bench conferences held in camera and working notes maintained by the prosecutor and defense counsel at trial.” *Id.* (citing *Commonwealth v. Long*, 922 A.2d 892, 898 (Pa. 2007)). Given this distinction, the Majority concludes that an executed search warrant associated with grand jury proceedings is not a public judicial document because they are “maintained by the supervising judge and are not publicly filed with the clerk of courts,” and because there are “some kinds of government operations that would be totally frustrated if conducted openly.” *Id.* at 22-23.

Neither of these arguments holds water in this case. The only reason why the search warrant here was not filed with the clerk of court is because the supervising judge failed to comply with the obligation to do so pursuant to Rule 210, which by its terms requires the judicial officer receiving the search warrant after its execution to file it with the “clerk of the court of common pleas of the judicial district in which the property was

seized.” Pa.R.Crim.P. 210. Neither Rule 210 nor any other procedural rule contains an exception for search warrants issued in connection with ongoing grand jury proceedings.

Likewise, in this case, execution of the search warrant was in fact a “government operation” that was “conducted openly,” and the contents of the search warrant are no longer secret. Service of the search warrant was conducted in the plain view of the general public through a show of force. At least one local news outlet immediately reported on the execution, and the school superintendent conducted a press interview in which he explained the types of items that were seized (“files, images, computer devices and folders”). See <https://pittsburgh.cbslocal.com/2015/05/19/sources-d-a-s-office-serves-search-warrant-at-plum-high-school/> (“Sources tell KDKA that investigators with the Allegheny County District Attorney’s Office were at the high school late Tuesday morning to serve search warrants.”). Moreover, pursuant to Rule 208(A)’s requirement that a copy of the search warrant be left with the person whose premises were searched and property was taken, the search warrant was posted on the internet. Neither the person upon whom the search warrant was served nor the members of the public who witnessed the service has any obligation to maintain the secrecy of the contents of the search warrant or what they witnessed during its execution.

For these reasons, the search warrant here was, without any question, a public judicial document that was not entitled to any grand jury secrecy. After execution of the search warrant, it should have been filed with the local clerk of courts, and its execution was unavoidably public in every respect. The result of the Majority’s Opinion is limited solely to prohibiting WPXI from verifying the authenticity of a search warrant that is already public. The present case clearly reflects why the Investigating Grand Jury Act,

42 Pa.C.S. §§ 4541-4553, provided for investigating grand juries to utilize subpoenas, which may be done in complete secrecy, rather than search warrants, which lack any secrecy, to gather evidence.

For these reasons, I respectfully dissent.