VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF PORTSMOUTH

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v. Docket No. CR17000428

MARK M. WHITAKER,

Defendant.

In Re: Subpoena Issued to Scott Daugherty

MEMORANDUM IN SUPPORT OF MOTION TO QUASH SUBPOENA

Preliminary Statement

The trial subpoena issued to Mr. Daugherty in this case raises the serious First Amendment concerns. The issue is whether any reporter who interviews a criminal defendant and publishes that defendant's protestations of innocence loses the ability to cover the criminal trial when the reporter has no information that would indicate that the defendant is guilty. The Virginian-Pilot and Mr. Daugherty respectfully assert that a prosecutor must have some factual basis to subpoena a reporter for testimony and there has to be some reasonable expectancy that the reporter would be called as a witness.

It is critically important to the press that its reporters have the factual background and expertise to provide the most accurate coverage possible. (Reece Affidavit ¶ 3). In the vast majority of cases, this laudable goal cannot be achieved. There are simply not enough resources to allow the type of in-depth investigation that would be ideal.

In this case involving as it does the prosecution of a public official for 20 felonies where the public official vigorously protests his innocence and where allegations of a politically-motivated prosecution have been made, Mr. Daugherty has fully investigated and reported on the allegations. Mr. Daugherty has written at least 15 stories on these allegations. (Daugherty

Affidavit ¶ 3). If Mr. Daugherty's subpoena is not quashed, he will be excluded from the courtroom and will not be permitted to even be advised of what is happening. The newspaper will lose virtually all its institutional knowledge concerning one of the most important criminal cases to be tried in the Portsmouth this year. (Reece Affidavit ¶¶ 2 and 3). If Mr. Whitaker is guilty, he should be convicted and the public should know the reasons for the conviction. On the other hand, if the indictments are groundless and were motivated by political considerations, the public is also entitled to the full and complete details.

As Mr. Daugherty's Affidavit establishes, Mr. Whitaker has provided him no information of any kind that would suggest that he is in any way guilty of any criminal offense. (Daugherty Affidavit ¶ 6). On the contrary, Mr. Whitaker has vigorously asserted his innocence, he has claimed that the prosecution is groundless and politically motivated, and he has stated that he expects to be completely vindicated in the trial. He has compared Portsmouth Commonwealth's Attorney Stephanie Morales to Pontius Pilate and the sheriff to Herod. (Exhibit 1 to Daugherty Affidavit).

The newspaper and Mr. Daugherty recognize the discretion possessed by a prosecutor in selecting witnesses, but the notion that the prosecutor is going to call a reporter to testify that Mr. Whitaker told the reporter he was innocent and that the charges were politically motivated is difficult to accept. It would be extraordinarily rare for a prosecutor to call a witness to establish that a defendant vigorously protested his innocence. A prosecutor opening the door to a defendant's statements concerning the inappropriateness of his and the investigator's conduct is hard to accept. The facts raise substantial questions concerning the propriety of this subpoena.

Argument

I. A SUBPOENA SHOULD NOT BE USED TO SUPPRESS NEWS COVERAGE

The idea that a prosecutor intends to call a news reporter to the stand in a criminal case to open the door to a discussion of an interview where the defendant maintained his innocence, said nothing that indicated in any way that he was guilty, stated the prosecution was politically motivated, and stated that he had in no way executed any document that was the basis of the claim raises troubling issues. If the prosecutor asks about the interview, he is opening the door to the full details of the interview including the vigorous, repeated, and forceful assertions by the defendant that he was not guilty and was a victim of an unfair politically motivated prosecution.

Subpoenas to reporters have been quashed regularly in situations where the reporter possesses marginally relevant information. The notion that a reporter can be subpoenaed when he possesses nothing that would appear in any way to be helpful to the prosecution or unavailable from another source raises serious concern.

Mr. Daugherty and The Virginian-Pilot ask the Court to determine that there is a basis for the issuance of the subpoena which means, at the very least, that there is some circumstance that might arise where the reporter would be called as a witness for the prosecution and asked about the interview. The notion that a prosecutor would call a reporter to the witness stand to open the door to 15 minutes of cross-examination relating to the vigorous repeated and consistent protestations of innocence by a defendant raises questions of the most serious nature.

II. A REPORTER SHOULD NOT BE EXCLUDED FROM COVERING A TRIAL SIMPLY BECAUSE HE WROTE ABOUT THE DEFENDANT SAYING HE WAS INNOCENT

In Branzburg v. Hayes, 408 U.S. 665 (1972), the United States Supreme Court recognized that reporters' newsgathering activities qualify for First Amendment protection. Justice Powell said:

> [I]f the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationship without a legitimate need of law enforcement, he will have access to the court on a motion to quash ... .

Id. at 710. The Court stressed that "without some protection for seeking out the news, freedom of the press could be eviscerated." Id. at 681. Although Branzburg held that, under the particular circumstances presented, a reporter who had actually witnessed a crime could be compelled to testify before a grand jury, the Court carefully limited the scope of its holding. In his concurrence, Justice Powell, the fifth member of the Branzburg majority, stated that government authorities are not free to annex the news media as an investigative arm of government. Id. at 709. Justice Powell stated:

> The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

Id. at 710.

Courts have subsequently interpreted Branzburg as granting a qualified First Amendment privilege for reporters that can be overcome only by meeting a three-part test. Specifically, a reporter cannot be compelled to testify or produce information unless the party requesting the subpoena first proves each of the following:

(1) the relevance and materiality of the information in question;

(2) the absence of alternative sources for the information; and

(3) the existence of a particularized state interest in the disclosure of information sufficiently compelling to override the fundamental constitutional right of a free press.

See, e.g., LaRouche v. Nat'l Broad. Co., Inc., 780 F.2d 1134 (4th Cir. 1986); United States v. Caporale, 806 F.2d 1487 (11th Cir. 1986); State v. Smith, 13 Media L. Rep. 1940 (N.C. Super. Ct. 1987).

The First Amendment privilege applies to all information acquired by a reporter in gathering the news, regardless of whether the information is confidential, because the purpose of the privilege is to assure, to the fullest extent possible, the free flow of information to the public. Shoen v. Shoen, 5 F.3d 1289, 1294 (9th Cir. 1993) later appeal, 48 F.3d 412 (9th Cir. 1995); United States v. LaRouche Campaign, 841 F.2d 1176, 1182 (1st Cir. 1988); von Bulow by Auersperg v. von Bulow, 811 F.2d 136, 142 (2d Cir. 1987); United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980).

Following Branzburg, Virginia courts have recognized this constitutionally-based qualified privilege for reporters and have engaged in the balancing of interests mandated by Branzburg. The Supreme Court of Virginia, in Brown v. Commonwealth, 214 Va. 755 (1974), plainly recognized a reporter's First Amendment privilege. In Brown, the criminal defendant argued that the trial court erred in refusing to require a reporter to testify as to the identity of a spokesman whom he had quoted in an article about the crime. The spokesman had summarized certain remarks allegedly made by the prosecution's witness on the night of the murder. The defendant claimed the statements would be useful for impeachment purposes.

In affirming the trial court's decision to uphold the reporter's First Amendment privilege, the Supreme Court of Virginia ruled that the privilege could be overcome only in very limited circumstances. The privilege would yield only when the defendant's need is "essential to a fair trial." Id. at 757. The court defined "essential to a fair trial" as:

> material to proof of any element of a criminal offense, or to proof of the defense asserted by the defendant, or to a reduction in the classification or gradation of the offense charged, or to a mitigation of the penalty attached ... .

Id. The court further held that disclosure was proper only if the information is not otherwise available from other sources. Id. Under these principles, the court concluded that the possibility of prior inconsistent statements to the police by the prosecution's witness lacked sufficient materiality to overcome the First Amendment privilege of the reporter. Id. at 758, 204 S.E.2d at 431.

The privilege protects the press unless each element of the three-pronged test are present. In State v. McKillop, 24 Media L. Rep. 1638, 1639 (N.C. Dist. Ct. 1995), the court found that the prosecution could not compel a reporter to testify to defendant's published statements without showing that information was unavailable from other sources. In United States v. Blanton, 534 F. Supp. 295, 297 (S.D. Fla. 1982), the court ruled the prosecution was not entitled to subpoena a reporter to testify regarding defendant's published statements because it failed to exhaust or make reasonable attempts to exhaust non-media sources for the information sought. In United States v. Hubbard, 493 F. Supp. 202, 205 (D.D.C. 1979), the court found that a criminal defendant could not require a reporter to testify to published information absent a showing that (1) the information is necessary to a fair hearing, and (2) the information was unavailable elsewhere. In State v. Demery, 23 Media L. Rep. 1958, 1959 (N.C. Super. Ct. 1995), the court found that a reporter could not be compelled to testify about the defendant's published statements because it determined as matter of law that the defendant failed to demonstrate that the information sought was essential to the pursuit of his motion or that there existed any other important state interest in compelling the reporters' testimony sufficient to override press freedoms.

The qualified privilege reflects "a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment." United States v. Burke, 700 F.2d 70, 77 (2d Cir. 1983). The West Virginia Supreme Court has recognized that "the news gathering function itself would be substantially hampered and the free flow of information to the public would be impinged if newspersons could be routinely subpoenaed."[1] State ex rel. Hudok v. Henry, 389 S.E.2d 188, 192 (W.Va. 1989).

The fact that some of the information may not be confidential is irrelevant. See, e.g., United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980) ("We do not think that the privilege can be limited solely to protection of sources."); United States v. LaRouche Campaign, 841 F.2d 1176, 1182 (1st Cir. 1988) ("[w]e discern a lurking and subtle threat to journalists and their employers if disclosure of outtakes, notes, and other unused information, even if non-confidential, becomes routine and casually ... compelled"); Shoen v. Shoen, 5 F.3d 1289, 1295 (9th Cir. 1993) ("the journalist's privilege applies to a journalist's resource materials even in the absence of the element of confidentiality"), later appeal, 48 F.3d 412 (9th Cir. 1995). This is because, as one court has noted, lack of confidentiality is "utterly irrelevant to the 'chilling effect' that the enforcement of these subpoenas would have on the flow of information to the press and to the public. The compelled production of a reporter's resource materials is equally as

[1] The compelled production of a reporter's resource materials and testimony can also constitute a significant intrusion into the news gathering and editorial processes and may substantially undercut the public policy favoring the free flow of information to the public that is the foundation for the reporter's qualified privilege. United States v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980). The ability of the press to function mandates that it not be the subject of the story. It is only by preserving the right of the press to avoid being made a part of the controversy merely as a result of its performing its constitutionally favored duties that the press may avoid the "chilling effect" that the enforcement of this subpoena would have on the flow of information to the press and to the public. Loadholtz v. Fields, 389 F. Supp. 1299, 1303 (M.D. Fla. 1975).

invidious as the compelled disclosure of his confidential information." Loadholtz v. Fields, 389 F. Supp. 1299, 1303 (M.D. Fla 1975) (quashing subpoena requesting non-confidential information).[2]

III. VIRGINIA LOWER COURTS HAVE FOLLOWED BROWN v. COMMONWEALTH

Virginia circuit courts have followed and applied the principles set forth in Brown.[3] Courts in other jurisdictions have quashed subpoenas under circumstances similar to this case. In Loadholtz v. Fields, 389 F. Supp. 1299 (N.D. Fla. 1975), the plaintiff in a civil rights action requested a subpoena duces tecum seeking non-confidential information from a reporter. The court quashed the subpoena and held that the reporter's sources and notes, even though not confidential, were entitled to constitutional protection. "The compelled production of a

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[2] Accord Cont'l Cablevision, Inc. v. Storer Broad. Co., 583 F. Supp. 427 (E.D. Mo. 1984); Palandjian v. Pahlavi, 103 F.R.D. 410 (D.D.C. 1984); United States v. Blanton, 534 F. Supp. 295 (S.D. Fla. 1982); Maughan v. NL Indus., 524 F. Supp. 93 (D.D.C. 1981); Altemose Constr. Co. v. Bldg. & Constr. Trades Council, 443 F. Supp. 489 (E.D. Pa. 1977).

[3] See, e.g., Home Care & Remodeling Co. v. Mozell, In Re: Motion to Quash Subpoena issued to Mrs. Ann Smith, Ch. No. C-74-1782 (Norfolk Circuit Court, Oct. 7, 1976) (Ryan, J.) (court quashed subpoena holding that party must "absolutely lose [his] case without" the reporter's testimony before reporter can be compelled to testify) **(Ex. 1)**. See also Commonwealth v. Von Fecht, CR91-1979, Virginia Beach Circuit Court (Oct. 28, 1991) (Hanson, J.) (reporter who obtained confession not required to testify because eyewitness to crime meant there was no compelling need for reporter's testimony) **(Ex. 2)**; Commonwealth v. Swanson, Case No. 91-1729, Virginia Beach Circuit Court (Sep. 23, 1991) (Cromwell, J.) (reporter not compelled to produce notes regarding interview of alleged co-conspirator) **(Ex. 3)**; Commonwealth v. Ford, In Re: Subpoena issued to Sandra Ann Baksys, Record No. 8353 (Virginia Beach Circuit Court, April 12, 1982) (Vakos, J.) (court quashed defendant's subpoena seeking information reporter obtained in interviews with witnesses to crime) **(Ex. 4)**; Commonwealth v. Harrison, In Re: Motion to Quash Subpoena issued to Jim Jennings, Docket No. 939-79 (Newport News General District Court, Criminal Division, February 28, 1979) (Phelps, J.) (court quashed subpoena to photojournalist who had covered steel workers' strike because alternative sources were available as to whether defendants committed acts with which they were charged, even though defendants argued journalist was disinterested and independent party) **(Ex. 5)**; Hirschfeld v. Hirschfeld, In Re: Subpoena issued to Michael D'Orso, Chancery No. C-76-352 (Portsmouth Circuit Court, April 29, 1983) (Whitley, J.) (court quashed subpoena to reporter whose testimony was sought for impeachment purposes) **(Ex. 6)**.

reporter's [nonconfidential] resource materials is equally as invidious as the compelled disclosure of his confidential informants." Id. at 1303.

In Ohio v. Hamilton, 12 Med. L. Rptr. 2135 (1986), the court quashed a criminal defendant's subpoena seeking information from a reporter to aid in the defendant's entrapment defense. The court held that the defendant failed to prove that the information sought was material and relevant, not otherwise obtainable, and that the application was "made in good faith" and "not intended as a general fishing expedition." Id. at 2136. (3d Cir. 1981) (quoting United States v. Criden, 633 F.2d 346, 358-59 (3d Cir. 1980)).

In this case, the Commonwealth already has the story prepared by Mr. Daugherty. Moreover, Mr. Daugherty has no notes from his interview, and has no independent recollection of any relevant details of the interview different or in addition to the information disclosed in the story. Daugherty Affidavit ¶ 10). For whatever reason, however, the Commonwealth has subpoenaed Mr. Daugherty thus eliminating his ability to cover the trial.

Conclusion

If the qualified privilege has any meaning, and the Supreme Court of Virginia has stated that it does, it means that subpoenas cannot be issued to reporters where the reporter knows nothing that would be material to the case and where the only conceivable basis for the issuance of the subpoena would be to prevent the reporter from covering the trial. The idea that the Commonwealth intends to call the reporter to open the door to testimony concerning Mr. Whitaker's repeated consistent and vigorous protestations does not make sense.

WHEREFORE, The Virginian-Pilot and Scott Daugherty respectfully requests that the subpoena issued to him by the Commonwealth be quashed.

THE VIRGINIAN-PILOT and
SCOTT DAUGHERTY

By
Of Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of March, 2018, a true and correct copy of the foregoing was served via electronic transmission on the following:

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Conrad M. Shumadine

1 VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

HOME CARE & REMODELING COMPANY Plaintiff, vs. LELA M. MOZELL, et als. Defendant.	CHANCERY NO. C-74-1782 Motion to Quash Subpoena issued to Mrs. Anne Smith

Stenographic transcript of the proceedings had upon the hearing of the above-entitled Motion in said Court, on October 7, 1976 at 4:00 p.m., before the Honorable Edward L. Ryan, Jr., Judge.

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APPEARANCES: Messrs. Kaufman, Oberndorfer & Spainhour
By: Mr. Conrad M. Shumadine, appearing on behalf of Anne Smith and The Virginian-Pi

Messrs. Mason, Moore & Robinson Ltd.
By: Mr. William T. Mason, Jr., appearing on behalf of the defendant.

Mr. John O. Wynne, Corporate Secreta Landmark Communications, observing.

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EXHIBIT
1

civil case, a sound -- it's my feeling that a sound public policy dictates that only under most unusual circumstances should a newspaper reporter or its exhibits ever be involved or required in a civil case and I just don't think this is a case for such involvement of the newspaper.

MR. MASON: May I inquire --

THE COURT: I'm throwing it out to you. I said it may be helpful to you to know what I'm thinking. What are the exceptional circumstances of this case that override the tremendously important First Amendment rights and the other necessities that Mr. Shumadine argued?

I could probably repeat what he said, but I won't because it's in the record there; but what is the overriding necessity that requires that we invade -- I can't think of a better word but invade -- the necessary sanctity that must be accorded the newspaper profession?

MR. MASON: I would suggest --

THE COURT: It's got to be compelling.

MR. MASON: I would suggest to the

1 Court since we're talking about a case-by-case
2 basis --
3 THE COURT: That's the way I feel
4 about it in this case.
5 MR. MASON: I would say to the Court
6 that as far as I have been able to determine,
7 Mrs. Smith may have been the only person who
8 made contemporary notes at the time she
9 observed and heard these people.
10 THE COURT: By "compelling" I
11 mean you absolutely know you lose your case
12 without those notes. That is overriding.
13 MR. MASON: I can't say how the
14 Court is going to decide the case and I would
15 be presumptuous --
16 THE COURT: Let's put it this way,
17 that you don't stand a snowbird's chance in
18 you know where.
19 MR. MASON: I think I can say in
20 all candor and honesty to Your Honor that
21 we're going to have a difficult time because
22 of all the problems and the nature of the
23 case. There is going to be a lot of conflicting
24 evidence as to who said what and when it was
25 said and who did what and that type of thing.

1 VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

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3 COMMONWEALTH OF VIRGINIA)
4 V) RECORD
5 KENT VON FECHT,) CR91-1979
6 Defendant.)

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10 Stenographic transcript of proceedings had upon

11 the trial of the above-entitled cause in said court on

12 October 28, 1991, before the Honorable Edward W. Hanson, Jr.,

13 judge of said court.

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19 APPEARANCES: Mr. Michael J. Cummings, Assistant
20 Commonwealth's Attorney.

21 Willcox and Savage (Mr. Randy D.
22 Singer), attorneys for Landmark
Communications.

23 No appearance on behalf of the
24 defendant.

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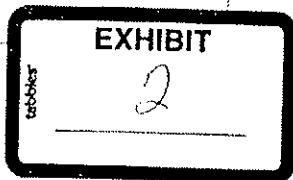

PENGAD CO., BAYONNE, N.J. 07002 · FORM 1094

1 THE COURT: All right. The matter of
2 Commonwealth of Virginia versus Carl Kent Von Fecht, Jr.
3 This is a motion by Landmark Communications represented by
4 Mr. Singer to quash the subpoena for the reporter,
5 Mrs. Lynn Waltz. Is that correct?
6 MR. SINGER: Yes, sir. Thank you.
7 THE COURT: You have filed a memorandum,
8 Mr. Singer.
9 Have you examined it, Mr. Cummings?
10 MR. CUMMINGS: I have, Your Honor.
11 THE COURT: Do you wish to stand on the
12 memorandum?
13 MR. SINGER: If I might, Your Honor, the
14 Commonwealth filed a reply memorandum. I would like to
15 just briefly address some of the issues.
16 THE COURT: I haven't seen that. Is that in
17 here?
18 MR. CUMMINGS: Should be, Your Honor.
19 THE COURT: I mean the response to the motion?
20 MR. SINGER: That's correct, Your Honor.
21 (Pause)
22 THE COURT: All right. I have read it.
23 MR. SINGER: Your Honor, I would like to address
24 the issues raised in the memorandum very briefly. As I
25 read the -- first of all, I back up a little bit. This

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1 motion was actually scheduled for hearing on October 28th of
2 this year, at which time the trial was also scheduled. At
3 that hearing there was some problems between the defendant
4 and his counsel, so the trial was continued. Judge
5 Cromwell decided not to hear the motion at that time because
6 of the fact there was an independent witness up in New York,
7 and the court wanted to see if the Commonwealth could get
8 that witness under subpoena, find out his address prior to
9 ruling on our motion. It's my understanding that that
10 witness has now been located. He was an independent
11 eyewitness to this event, name is Officer Grindstaff, and
12 that the Commonwealth will be able to procure him to testify
13 in this case.
14 THE COURT: Is that right?
15 MR. CUMMINGS: It's suspected that we'll be able
16 to get him to testify, Your Honor. We would submit that's
17 irrelevant to the motion, however.
18 THE COURT: All right, Mr. Singer. Anything
19 further?
20 MR. SINGER: Yes, Your Honor. I think the only
21 two issues before the court today is, one, whether there was
22 a qualified First Amendment protection for newspaper
23 reporters and other reporters in the gathering of news; and,
24 secondly, if there is such a protection, whether the
25 balancing test in this case weighs in favor of the newspaper

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1 or the Commonwealth.
2 I won't rehash all the case law that we put in the
3 memorandum, but I do want to point out some of the cases that
4 the Commonwealth submitted in reply and show Your Honor how
5 those cases do not stand for the proposition that there is
6 not a qualified First Amendment protection for newspaper
7 reporters. Certainly the United States Supreme Court case
8 that we cited, the seminal case, the first case on the issue,
9 Brantzburg v. Hayes, which is a 1978 case, and the follow-up
10 Virginia Supreme Court case, Brown v. Commonwealth, stand
11 for the proposition that there is constitutional protection
12 for a news reporter in the gathering of news.
13 Now, the Commonwealth's position is that that
14 protection only goes to protection of confidential sources,
15 not general protection to as far as compelled testimony goes
16 or to produce notes and other reports. It's our position
17 that the courts throughout this Commonwealth including this
18 court on two prior occasions have recently, both Judge
19 Cromwell and Judge Shadrick recognized the qualified
20 protection that a newspaper reporter has in this -- in this
21 function of news gathering. Judge Cromwell in the -- in a
22 very recent case where Mrs. Waltz's notes were subpoenaed
23 involving an alleged confession of a coconspirator to a
24 person who's being tried, Valerie Swanson -- the court may
25 be familiar with this case. It was the case of a sailor

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1 that returned from the Persian Gulf.
2 THE COURT: Um-hum.
3 MR. SINGER: Judge Cromwell quashed a subpoena of
4 Mrs. Waltz's notes in that case, recognizing the protection
5 of the First Amendment. Also Judge Shadrick in the Kellam
6 case very recently had a similar hearing to the one today,
7 held that the Commonwealth had not shown a compelling need
8 for the reporter's testimony, said that the circumstances
9 may change at trial, but as of that date the Commonwealth
10 had not shown that need; and the reporter was never called
11 to testify at trial.
12 My point in both of those cases, Your Honor, is
13 that in this court as well as other courts throughout the
14 Commonwealth have recognized that qualified privilege under
15 the First Amendment.
16 Now, the cases the Commonwealth has cited in their
17 brief -- they basically cited three cases -- two of them
18 decided by Judge Merhige, one by the United States Court of
19 Appeals for the Fourth Circuit for the proposition that
20 there is no qualified privilege for nonconfidential
21 materials. The cases cited by Merhige I found to be very
22 instructive. The first one is Gilbert v. Allied Chemicals.
23 That's a 1976 case, and it is true in that case, Your Honor,
24 that Judge Merhige found in the subpoena of -- of certain
25 notes or outtakes or photographs that there was no First

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1 Amendment qualified privilege. Later on the Fourth Circuit
2 Court of Appeals addressed this issue in a case involving a
3 wildcat strike by the United Mine Workers, and it has a
4 funny procedural history, but it went up there on a panel of
5 three. The Fourth Circuit Court of Appeals then granted
6 en banc hearing on the case and accepted the minority
7 decision of the panel. The import of that case, however,
8 Your Honor, is that the Fourth Circuit Court of Appeals
9 recognized the qualified privilege. They compelled
10 production of documents, but they recognized that privilege
11 and then Judge Merhige himself had occasion to come back and
12 address this again in the Stickels case.
13 Third case cited by the Commonwealth in their
14 memorandum -- that's a 1990 case. Very recent, November 9,
15 1990, and in that case the language that I wanted to read to
16 the court shows that Judge Merhige now recognized his prior
17 opinion in Gilbert -- that there is no such qualified
18 privilege in light of a recent ruling by the Fourth Circuit,
19 now recognized this as well as other courts throughout the
20 Commonwealth. He wrote, Therefore, to the extent that this
21 court's decision in Gilbert conflicts with Steelhammer, the
22 approach of Gilbert is abandoned, and a qualified privilege
23 for nonconfidential information in materials acquired by the
24 press in the course of the news-gathering process is
25 adopted.

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1 So the only three cases cited by the Commonwealth
2 to go contrary to our proposition, I think one of those
3 cases that stands for our proposition -- two of them do --
4 and the other one has been expressly abandoned by its author.
5 We have set out a plethora of cases in our
6 memorandum which also support this proposition. I will
7 only mention one of them, Your Honor, because it seems to
8 be so much on point. That's the U.S. v. Blanton opinion,
9 which is a circuit court opinion from 1982; and the issue
10 in that opinion was whether or not a reporter could be
11 subpoenaed to testify to the fact that a doctor who was
12 charged with abuse of Quaaludes in distributing Quaaludes in
13 an unauthorized manner who made certain admissions to that
14 reporter, whether that reporter could be qualified to
15 testify as to the admissions that that doctor had made.
16 The Commonwealth or the prosecuting attorney in
17 that case claims that they had a circumstantial case.
18 These admissions were critical to their case, and the court
19 nonetheless quashed the subpoena, recognized the qualified
20 privilege, and did not make the newspaper reporter testify
21 in this case.
22 I think those cases together with the cases I
23 cited from this very court, the Virginia Supreme Court and
24 even the cases cited in the Commonwealth's brief support
25 without dispute the proposition that there is a qualified

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1 privilege for this type of material. Whether it's
2 confidential or not confidential is not relevant because the
3 policy considerations are the same. I think the court is
4 well aware of those policy considerations. I'm not going
5 to prolong this argument by running through each of them,
6 but just to highlight the main ones that the courts consider
7 in applying their balancing test is, Number 1, whether the
8 press -- whether there will be a chilling effect on the
9 press. If a newspaper reporter is called to testify
10 against and impeach the very sources that provide her with
11 information. The courts have uniformly held that would be
12 the case.
13 Further, the courts have recognized that to the
14 extent that newspaper reporters are compelled to testify in
15 trials where information is otherwise available and makes the
16 press appear in the eyes of the public subjective and not
17 objective and to be taking sides in the dispute.
18 This also has a chilling effect on the press, and
19 I think -- just to sum up the policy, which is contained and
20 set forth in all the cases, Justice Powell's quote in the
21 United States Supreme Court case of Brantzburg v. Hayes
22 really sums it up when he says the press is not to be
23 annexed as the investigative arm of the government.
24 I think we all know that newspaper reporters
25 investigate cases that are high profile cases. If the

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1 court is to allow their compelled testimony, to allow
2 production of notes, then it seems that the first subpoena
3 that would go out in these cases either from the defense
4 counsel or the Commonwealth's Attorney would be to the
5 newspaper reporter. This would create a serious burden on
6 the press. Courts have recognized that, so the courts have
7 quashed similar subpoenas.
8 Now, once the court recognizes the qualified First
9 Amendment privilege, the only decision left for the defendant
10 is this balancing approach. We have before us a First
11 Amendment concern on the one hand which can only be
12 outweighed when there is a compelling need and there are no
13 alternative sources for such information.
14 Here, Your Honor, we have the statements, the
15 eyewitness testimony of the victim himself. We have the
16 eyewitness testimony of an auxiliary police officer who was
17 no more than a few feet away from this. Officer Grindstaff
18 who is up in New York saw the whole thing happen. He
19 apparently reported it to Internal Affairs. Based on that,
20 they took disciplinary action.
21 He's been consistent in his eyewitness accounts of
22 what happened.
23 There's a third eyewitness as well, and that's
24 Officer Kensil -- I believe her name is -- who was out there
25 with the defendant at the time that this occurred.

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1 The long and short of it, Your Honor, is there is
2 -- there are three eyewitnesses to this alleged event. The
3 testimony that the Commonwealth seeks to procure through
4 Mrs. Waltz is to put her on the stand and allow her to
5 recite alleged admissions by the defendant such as, "I
6 slapped him on the face and said why did you run? That was
7 kind of stupid," or, "I kicked him even though I didn't kick
8 him very hard when my officer was helping to handcuff him."
9 Your Honor, the issue in this case is not whether
10 there was -- whether someone got slapped or might have
11 gotten roughed up a little bit in the course of an arrest.
12 The issue is whether the amount of force used was excessive
13 in the arrest of the suspect. The people that know that
14 are the eyewitnesses that were there that saw it happen, and
15 that's the other alternative sources that provide the same
16 information that the Commonwealth seeks through the subpoena
17 of Mrs. Waltz.
18 Based on that, based on the balancing test and the
19 prior cases that we have cited, it's our position that the
20 subpoena should be quashed at this time.
21 THE COURT: All right. Thank you, Mr. Singer.
22 Mr. Cummings.
23 MR. CUMMINGS: Your Honor, the Commonwealth
24 submits that is balderdash. First of all, the Commonwealth
25 would submit that the -- Mr. Singer's characterization of

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1 the case law in this case again continues to grossly
2 overstate the cases, and we would invite the court's
3 attention to reading them. Mr. Singer cites, offers for
4 dicta as having some kind of force of law, and his
5 speculation as to Judge Merhige we submit is totally
6 inappropriate. We ask the court to look at the precise
7 language in -- which he cites from Judge Merhige which is,
8 to the extent that this court's decision in Gilbert
9 conflicts with Steelhammer, the approach of Gilbert is
10 abandoned. If you look at the hearing en banc, Your Honor,
11 there is nothing to support the -- Mr. Singer's proposition
12 here in that decision en banc.
13 We would submit to the court there is no
14 qualified privilege to a newspaper reporter to be compelled
15 to testify by subpoena where there is no source qualified or
16 unqualified alleged. We're not talking about source of
17 information, Your Honor. We're talking about this witness
18 testifying as to the defendant's confession. Mr. Singer
19 would like to dictate how the Commonwealth tries its case
20 by submitting that there is no other alternative evidence
21 available upon which the Commonwealth can rely. Yes, there
22 is other evidence, Your Honor; but there is no other
23 evidence of a confession; and confession is the strongest
24 form of proof known to the law. Clearly it's material
25 evidence that's available to the Commonwealth. The

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1 Commonwealth is prepared to call Lieutenant Blevins and
2 Sergeant VanderHeiden to establish for the record that
3 there is no other admission or confession by the defendant.
4 Your Honor, we would submit that the court never
5 reaches the threshold question here, the balancing test
6 here, because the threshold question is, Is there a
7 privilege? And we would submit that just as in the
8 Supreme Court case that began this, the Brantzburg v. Hayes,
9 the press is trying to put a burden on the Commonwealth
10 that it doesn't have here. You don't even reach it. If
11 you do reach it, Your Honor, we would submit that applying
12 that threshold test isn't relevant. It's a confession.
13 It's absolutely material, it's outcome determinative. Is
14 there any other source or alternative to that evidence?
15 No, there is not. There is no other evidence of that
16 confession; and lastly when you apply the balancing test,
17 where there is no confidential source, the balance goes in
18 favor of the Commonwealth.
19 Clearly, Your Honor, that's the law. We submit
20 you never reach it; but if you do, the Commonwealth wins.
21 For the record we would state, Your Honor, the
22 Commonwealth believes that without that confession, that the
23 Commonwealth cannot prove its case.
24 (Pause)
25 THE COURT: All right. We are going to issue an

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1 order to quash the subpoena.

2 MR. CUMMINGS: Your Honor, may the Commonwealth

3 note its appeal since it's on constitutional grounds?

4 THE COURT: You may.

5 Mr. Singer, prepare the order, please.

6 MR. SINGER: I will, Your Honor. Thank you.

7 MR. CUMMINGS: Your Honor, I will contact

8 Mr. Slipow. The Commonwealth does intend to pursue the

9 appeal, so it will affect the trial date.

10 THE COURT: Okay.

11 (The hearing was concluded at 12:23 p.m.)

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PENGAD CO., BAYONNE, N.J. 07002 · FORM 2094

1 REPORTER'S CERTIFICATE

2

3 STATE OF VIRGINIA,

4 CITY OF VIRGINIA BEACH, to-wit:

5

6 I, Ronald Graham, court reporter, certify that the

7 foregoing is a correct transcript of the proceedings had

8 before the said court on the date aforementioned.

9 Given under my hand this 19th day of December,

10 1991.

11

12 Ronald Graham
Court Reporter

13

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VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH

COMMONWEALTH OF VIRGINIA,

Plaintiff

v. CASE NO. 91-1729

VALERIE O. SWANSON,

Defendant

IN RE: SUBPOENA DUCES TECUM ISSUED TO LYNN WALTZ
REPORTER FOR THE VIRGINIAN-PILOT AND THE LEDGER-STAR

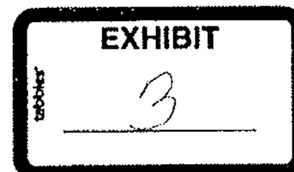
ORDER

THIS DAY came all parties, by counsel, on motion of Lynn Waltz, pursuant to her qualified First Amendment privilege as a journalist, to quash the subpoena *duces tecum* issued to her on behalf of the defendant in the above-captioned matter;

WHEREFORE, having heard the arguments of counsel and having considered the Memoranda and authorities submitted by the parties;

The Court is of the opinion that the subpoena *duces tecum* requiring Ms. Waltz to produce her notes and records regarding an interview of an alleged co-conspirator of defendant does not meet the criteria set forth in *Brown v. Commonwealth*, 214 Va. 755, 204 S.E.2d 429 (1974) for those rare cases when the reporter's qualified First Amendment newsgathering privilege must yield to the defendant's due process right to compel disclosure of such information; the issue of whether the testimony of Lynn Waltz concerning the substance of her interview with co-defendant, Alan Marcotte, can be compelled at trial is reserved for later decision of the court.

HARA & HUBBARD
YS AT LAW
W. BUTE STREET
RFOLK, VA. 23510
(804) 622-2675



RBC

It is therefore ORDERED, ADJUDGED and DECREED that the Motion to Quash the subpoena duces tecum shall be and the same hereby is granted for the reasons set forth by this Court at the hearing in the above-captioned matter on September 4, 1991.

ENTER this 23rd day of September, 1991.

Robert B. Cromwell Jr.
Judge

WE ASK FOR THIS:

Randy Sergo
Of counsel, Lynn Waltz

SEEN ~~AND OBJECTED~~ TO:

Of counsel, ~~defendant~~

Commonwealth's Attorney

Certified to be a TRUE COPY
of record in my custody.
J. Curtis Fruit, Clerk
Circuit Court, Virginia Beach, Va.
BY: [signature]
Deputy Clerk

& HUBBARD
ATTORNEYS AT LAW
4 W. BUTE STREET
NORFOLK, VA. 23510
(804) 622-2675

1 VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF VIRGINIA BEACH

2

3 COMMONWEALTH OF VIRGINIA)

4 v.) RECORD 8353

5 CHARLES EDWARD FORD, III,)

6 Defendant.)

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10 Stenographic transcript of proceedings had in the

11 above-entitled cause before Hon. George Vakos, Judge, on

12 April 12, 1982.

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20 APPEARANCES: Mr. Robert J. Seidel, Jr., Assistant Commonwealth's Attorney.

21 Mr. Ashton H. Pully, Jr., attorney for the defendant.

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EXHIBIT 4

1 Commonwealth.

2 THE COURT: There must not be any.

3 MR. PULLY: I point out that I have received

4 nothing from the Commonwealth.

5 THE COURT: Have you put it on for hearing so that

6 the Court, by order, can direct the Commonwealth to provide

7 this information?

8 MR. PULLY: This morning.

9 THE COURT: I think you have got the cart in front

10 of the horse as far as the motion for production is concerned.

11 MR. PULLY: All right, sir.

12 THE COURT: From what you are telling me, it is a

13 matter of witnesses that the Commonwealth has. If the

14 reporter merely interviewed those witnesses, I don't see

15 anything there that would be compelling as far as the need

16 for this information over and above her right to report these

17 matters without being required to divulge the sources or any

18 other information.

19 MR. PULLY: All right, sir.

20 THE COURT: Maybe that should be put on the back

21 burner at this point. I just can't conceive of any

22 situation where you have the names of everyone that she

23 interviewed and it is all hearsay since she was not a witness.

24 I just can't conceive of any situation where you have the

25 right to require her to produce such names. You can go out

1 and interview them. If they don't want to talk to you, that
2 is one of the problems we run into in all cases.
3 At this point, I don't think I need to hear from
4 anyone else. The motion to summons the reporter and her
5 records and interviews, if they are recorded, is to be
6 denied.
7 MR. PULLY: I note my exception on the record.
8 THE COURT: I don't know if Mr. Seidel is prepared
9 to --
10 MR. SEIDEL: In reference to the motion to quash
11 the indictment and discovery, I think Mr. Sciortino could best
12 handle that.
13 THE COURT: We will have to wait for him to come
14 along.
15 MR. SHUMADINE: I note that Landmark seems to do
16 better when I don't say anything, Your Honor.
17 THE COURT: You filed a very long memorandum
18 concerning your opposition to the motion. I read through
19 most of it.
20 MR. SHUMADINE: I understand that.
21 THE COURT: I agree with what you say. That is
22 the law. There must be a compelling reason whereby there
23 is no other source and there would be a denial of due process
24 and a fair and impartial trial.
25 MR. SHUMADINE: Thank you.

1 VIRGINIA: IN THE GENERAL DISTRICT COURT OF THE CITY OF NEWPORT NEWS

COMMONWEALTH	
vs.	PROCEEDINGS
BRAD WILLIAM HARRISON	

Before The Honorable W. Robert Phelps, Jr., Judge

Newport News, Virginia

February 28, 1979.

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APPEARANCES: Messrs. Hudgins & Neale
By: Mr. Richard W. Hudgins, appearing on behalf of the defendant.

Messrs. Kaufman & Oberndorfer
By: Mr. Conrad M. Shumadine, appearing in re: Subpoena issued to Jim Jennings.

(No Appearance on behalf of the Commonwealth.)

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EXHIBIT 5

1 afterward relative to the facts. He does have an
2 interest once he does that. It's the exercise
3 of his duty, it's the exercise of his judgment
4 and discretion there on the spot. We have an
5 independent person who is not involved in that
6 exercise of judgment and who is purely disinterested.
7 We have no other way from that category
8 to present a witness with that impartiality.
9 THE COURT: All right, sir.
10 It seems to me the issue is whether or not
11 he is an alternative source within the meaning of
12 the law. I think that really is what I have to
13 decide and I think even counsel for Mr. Jennings
14 can concede there are circumstances under which the
15 newspaper people may be required to testify, which
16 means they may be required to testify. I don't
17 believe he is the only proper source from which to
18 obtain the information which you seek. And while
19 the condition before and after may be relevant I
20 don't see that that is a determining factor in
21 whether or not the defendants may have committed
22 the acts with which they are charged.
23 Under those circumstances I feel compelled
24 to quash the process and to relieve the witness
25 from the necessity of remaining to testify in this

1 case.

2 MR. HUDGINS: Would you consider

3 suspending that judgment and after hearing the

4 case make that decision in face of those facts

5 that we develop at that point? I don't think we

6 can project our entire case here at this posture

7 and have it tried in the abstract and I think that

8 after you heard the evidence I would hope that you

9 would see the cogency of our position.

10 THE COURT: If I understand it correctly

11 what you would anticipate he would testify to is

12 that he saw tacks in the road before and tacks in

13 the road after the arrest?

14 MR. HUDGINS: Yes, sir.

15 THE COURT: That really is the one fact

16 that you anticipate that he would be able to

17 testify?

18 MR. HUDGINS: I do, yes, sir. And that

19 would be in contradictory evidence to other evidence

20 that will be presented and that's his position -

21 what he saw on the scene. We're not going into his

22 journalistic privileges at all in developing that

23 fact. It's in the act of his employment that he was

24 there.

25 THE COURT: Mr. Hudgins, let me say this:

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

KAREN LYNNE BANGEL HIRSCHFELD,

Plaintiff,

v. C-76-352

RICHARD MARSHALL HIRSCHFELD,

Defendant.

IN RE: SUBPOENA ISSUED TO MICHAEL D'ORSO

ORDER

THIS DAY came Michael D'Orso, by counsel, and moved this Honorable Court to enter an Order, pursuant to his qualified First Amendment privilege as a journalist, quashing the subpoena issued on behalf of the plaintiff in the above-captioned matter.

WHEREUPON, after hearing the arguments of counsel and the Court being otherwise duly advised in the premises, it is hereby

ORDERED, ADJUDGED and DECREED that the Motion to Quash Subpoena Issued to Michael D'Orso be, and the same hereby is, granted and Michael D'Orso shall not be required to testify at the hearing in the above-captioned matter before this Honorable Court on Friday, April 29, 1983 at 10:00 a.m., for the reasons that the purported information is not necessary for the disposition of the issues before the court and upon the authorities cited in support ~~Enter this~~ motion ~~day of~~

April 29, 1983.

George [illegible] Whitley Jr.
Judge

WE ASK FOR THIS:

[illegible signature]
Counsel for Michael D'Orso

Seen & excepted: Henry M [illegible], Jr.

A COPY, TESTE: WALTER M. EDMONDS, CLERK
BY [illegible signature] D.C.