

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

* * * * *
UNITED STATES OF AMERICA

v.

THOMAS A. SHAY and
ALFRED N. TRENKLER

* * * * *

CASE NO. 92-10369-Z

James J. Dillon
BBO #124660

MEMORANDUM IN SUPPORT OF MOTION TO QUASH SUBPOENA
DIRECTED TO WLVI-TV (CHANNEL 56)

WLVI-TV (Channel 56) conducted an interview with Thomas A. Shay in October, 1992; portions of that interview selected by Channel 56, in its editorial judgment, were aired on November 3, 1992 and on December 16, 1992. The remainder, outtakes maintained by Channel 56, are the subject of the subpoena served by the government, returnable at a detention hearing set for January 12, 1993 at 4:00 p.m.

The principle commanding protection in this case is the fundamental importance of an investigative press, independent of government intrusion and free of partisanship. The press may not be annexed as an investigative arm of government. "[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated." Branzburg v. Hayes, 408 U.S. 665, 681 (1972). The boundaries of the First Amendment must be

protected in each case to preserve the basic principle of press independence for all cases.

Subpoenas to newsgatherers to supply information to the government, or to any litigant, will vitiate press independence in fact and in perception, chilling the ability of the press to gather news. Individuals may choose to address an independent press as a safe haven alternative to addressing government agents. Use of the media as a prosecutorial adjunct may, cumulatively, deter the unpopular or the accused from speaking to the public through the press. That chill would also burden the press with the expensive and unwanted role of routine court witness and would lead, ultimately, to intrusions into the newsgathering and editorial processes themselves. Selections of materials to air, and materials to retain, should remain an editorial judgment unfettered by an eye toward future subpoenas.

These First Amendment concerns find expression in, among other places, the law of the First Circuit and the Department of Justice Guidelines barring subpoenas to the media except on specified showings including that the information sought be essential to the government's case and be unavailable from alternative sources.

In this Circuit, claims of First Amendment privilege must be posed against the interests of the party seeking access to the fruits of newsgathering activity. In Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 595 (1st Cir. 1980), the Court observed:

Whether or not the process of taking First Amendment concerns into consideration can be said to represent recognition by the Court of a "conditional", or "limited" privilege is, we think, largely a question of semantics. The important point for purposes of the present appeal is that courts faced with enforcing requests for the discovery of materials used in the preparation of journalistic reports should be aware of the possibility that the unlimited or unthinking allowance of such requests will impinge upon First Amendment rights.

In that case, a civil case alleging libel, the First Circuit reversed and remanded an order compelling production of the Globe's confidential sources to a party claiming libel against the Globe itself. Even in a civil case, where the newsgatherer's actions were the basis of a claim of malicious libel, the importance of the First Amendment demanded careful balancing of contesting values.

In United States v. The LaRouche Campaign, 841 F.2d 1176 (1st Cir. 1988), the First Circuit considered a subpoena by criminal defendants, one week before trial, for "outtakes" of a television interview. There was no issue of confidential sources. The Court concluded that the criminal defendants carried the threshold burdens of showing the interview outtakes likely would reveal inconsistent statements and bias by a key prosecution witness, evidence that would be relevant and admissible at trial. Id. at 1180. The rights of a criminal defendant to a fair trial and to confront his accusers were balanced against threats to First Amendment interests inherent in subpoenas to newsgatherers, including the annexation of the

media as an investigative arm of the government. Id. at 1182. The balancing of interests in that case led to affirmance of in camera production of tapes immediately before trial to preserve the fair trial rights of criminal defendants.

This Circuit, then, recognizes a qualified privilege, rooted in the First Amendment, to protect both confidential sources and unpublished information. The Third Circuit put this proposition as follows.

We do not think that the privilege can be limited solely to protection of sources. The compelled production of a reporter's resource materials can constitute a significant intrusion into the newsgathering and editorial processes. See Loadholtz v. Fields, 389 F. Supp. 1299, 1303 (M.D. Fla. 1975). Like the compelled disclosure of confidential sources, it may substantially undercut the public policy favoring the free flow of information to the public that is the foundation for the privilege. See Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979). Therefore, we hold that the privilege extends to unpublished materials

United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980).

Once a First Amendment interest is identified, the government has the burden of establishing that the information it seeks is relevant, that it cannot be obtained from other sources, and that need for the information is compelling. In essence, only if the protected information goes to the heart of the claim may production be compelled. See, e.g., Riley v. City of Chester, 612 F.2d 708, 717 (3d Cir. 1979).

As a First Amendment interest has been shown to exist in this case, the government must affirmatively overcome that interest by demonstrating at least a sufficient likelihood that:

1. the interview is relevant to the detention hearing proceeding;
2. the interview is admissible at such a hearing;
3. alternative sources have been exhausted in an unsuccessful effort to obtain the information from non-media sources; and
4. the interview is essential to the proceeding.

Failure by the government to carry its balancing burdens makes the subpoena "unreasonable or oppressive" within the meaning of Fed. R. Crim. P. 17(c).

- I. THE INTERVIEW IS UNLIKELY TO BE RELEVANT TO ANY OF THE FACTORS TO BE CONSIDERED AT A DETENTION HEARING, OR ADMISSIBLE AT SUCH HEARING.

Channel 56 is prepared to offer evidence that the interview in question took place in late October, 1992, at the Plymouth County House of Correction. Mr. Shay was then in the custody of the Commonwealth of Massachusetts; the interview was conducted in the presence of a police officer, Captain William Stone. The interview took place about eight weeks before the indictment of Mr. Shay and Mr. Trenkler was announced, and about one year after the explosion that forms the basis of those indictments.

Under the circumstances, there is no basis to believe that the interview can bear on any of the four factors to be considered at a detention hearing. The nature of the offense

alleged is well known; the grand jury indictments presumptively rely upon substantial evidence against these individuals; and the characteristics of the defendants pertinent to 18 U.S.C. § 3142(g)(3) and (4) are both historical and amenable to investigation independent of any press interview.

The interview, then, is unlikely even to be relevant to this proceeding. Certainly, the interview is most unlikely to be essential to the government's case at the bail hearing.

The tape itself, accompanied by a custodian of the record, is also unlikely to be admissible at the detention hearing for several reasons. While an interview could, conceivably be used to impeach Mr. Shay should he testify, that use could arise only on the unlikely prospect that Mr. Shay testifies at the detention hearing and does so inconsistently with material covered in the interview.

II. THE GOVERNMENT HAS NOT EXHAUSTED OTHER SOURCES OF INFORMATION OR CARRIED ITS BURDEN OF SHOWING THE INTERVIEW IS ESSENTIAL TO THIS PROCEEDING.

For the reasons set out above, the interview cannot reasonably be seen as essential to a detention hearing, where factors such as the nature of the charged offense and the history of the defendants predominate. Further, the government has not shown efforts taken to obtain information about this very interview from Captain Stone, who was present during the interview. Failure to exhaust alternative sources of information about a videotaped interview was the basis for quashing a subpoena in United States v. Lopez (U.S.D.C.,

Northern District of Illinois), No. 86 CR 513, November 20, 1987, 14 Media Law Reporter 2203 (attached).

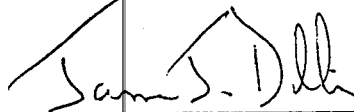
CONCLUSION

WLVI-TV (Channel 56) requests that this Court quash the subpoena directed to WLVI-TV (Channel 56) as unreasonable and oppressive, in the circumstances. Any of the defects cited should suffice; together, the argument is compelling that the subpoena should be quashed.

Respectfully submitted,

WLVI-TV (Channel 56)

By its attorney,



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Dated: January 12, 1993

WP-0983/G

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon (each party appearing pro se and) the attorney of record for each (other) party ~~by mail~~ (by hand) on January 12, 1993



Falsity and actual malice are distinct concepts. It is one thing to publish a false statement and quite another to do so knowingly or recklessly (*see, Bose Corp. v. Consumers Union*, 466 US 485, 511, *supra*). It may be possible, as the United States Supreme Court has suggested, that proof of falsity will support an inference of actual malice "where the alleged libel purports to be an eyewitness or other direct account of events that speak for themselves" (*Time Inc. v. Pape*, 401 US 279, 285 [1 Med.L.Rptr. 1627]). The Appellate Division held that this case presented such an instance. We disagree. The inference depends for its validity on the premise that the eyewitness could not have perceived and understood anything but the truth. Thus, in reporting something else, the observer must have departed from the truth by design. The underlying premise is valid, however, only if the events were unambiguous and the setting was such that the observer could not have misperceived those events. Such conditions, however, cannot simply be assumed; as the proponent of the inference and the bearer of the burden of proof of actual malice, the plaintiff must demonstrate that they exist. No such showing was made here.

The evidence was that Bengston observed the events some 30 feet from where they took place. The exchanges he reported between plaintiff and the quarterback occurred after plaintiff's visiting team had delivered the ball into the hands of the home team, an event likely to excite the home crowd. It is probable, then — at least plaintiff did not show otherwise — that Bengston's opportunity to hear the exchanges was less than ideal.

It is significant that the only witnesses who claimed to know what plaintiff actually said were plaintiff himself, the quarterback to whom he had spoken and the quarterback's father. The other witnesses simply testified that they did not hear plaintiff use profane language. Plaintiff and the quarterback were obviously in a better position than Bengston to know what was said. The quarterback's father sat about the same distance away as Bengston. All of this evidence supports the finding that Bengston's report was inaccurate, but it does not lead to the conclusion that Bengston knew that it was false. There was no evidence to negate the possibility that Bengston simply misunderstood plaintiff. There was not, for example, testimony that plaintiff's words were

clearly audible to anyone in Bengston's location.

Furthermore, the similarity between Bengston's account ("get your head out of your &!(!(&") and plaintiff's account ("get your head up") suggests that the falsity was more the product of misperception than fabrication. In sum, we conclude that plaintiff failed to establish that the situation was sufficiently unambiguous to support the inference that the false statement was published with actual malice.

The absence of clear and convincing evidence of actual malice is fatal to plaintiff's complaint. The question whether the award of punitive damages was properly stricken is, therefore, academic. Thus, we have no occasion to consider whether plaintiff's proof of common-law malice was sufficient to sustain such an award or whether punitive damages are ever recoverable in libel actions involving matters of public concern (*see, Dun & Bradstreet v. Greenmoss Bldrs.*, 472 US 749, 761; *supra*; *Gertz v. Robert Welch*, 418 U.S. 323, 349; *supra*; *see, generally, Committee Report, Punitive Damages in Libel Actions*, 42 Record of Assn of Bar of City of NY 20 [1987]).

Accordingly, plaintiff's cross appeal should be dismissed as academic and the Appellate Division order, insofar as appealed from, should be reversed and the complaint dismissed.

Simons, Kaye, Alexander, Titone, Hancock, and Bellacosa, JJ., concur.

U.S. v. LOPEZ

U.S. District Court
Northern District of Illinois

UNITED STATES OF AMERICA
v. OSCAR LOPEZ, et al., No. 86 CR
513, November 20, 1987

NEWSGATHERING

Forced disclosure of information—
Disclosure of unpublished information (§60.10)

Forced disclosure of information—
Common-law privilege (§60.20)

Television reporter has qualified privilege against disclosure of videotape "out-

takes" of interview with criminal defendant, since such privilege is not limited to confidential sources and since privilege applies in criminal as well as civil cases, and thus defendant's failure to overcome such privilege by demonstrating that outtakes provide information not available from alternative sources, and by demonstrating specifically how outtakes are "highly material" to defense, warrants quashing of subpoena.

Action by broadcasting company to quash subpoena served on it by defendant in criminal action. On company's motion to quash.

Granted.

A. Daniel Feldman, Samuel Fifer, and Kenneth E. Kraus, of Isham, Lincoln & Beale, Chicago, Ill., for movant.

Full Text of Opinion

Hart, J.:

Presently before the court is the motion of NBC to quash the subpoena served on it by defendant Garcia seeking the videotape out-takes from an interview given by Garcia to a WMAQ-TV reporter on August 19, 1986. NBC contends that enforcement of the subpoena would violate the federal common law and First Amendment privileges against compelled disclosure of a reporter's work product. Garcia argues that the reporter's qualified privilege has never been explicitly recognized in the Seventh Circuit, that the privilege protects only confidential sources, and that the privilege should not apply in criminal cases. For the reasons stated below, this court rejects Garcia's arguments and grants the motion to quash.

DISCUSSION

In *Branzburg v. Hayes*, 408 U.S. 665 [1 Med.L.Rptr. 2617] (1972), the Supreme Court, while refusing to create an absolute constitutional privilege for journalists, nevertheless recognized that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.* at 681. Since *Branzburg*, federal courts have with near uniformity recognized a qualified privilege for the protection of reporters' notes and other source materials. See, e.g., *LaRouche v. Nat'l Broadcasting Co.*, 780 F.2d 1134 [12 Med.L.Rptr.

1585] (4th Cir.), *cert. denied*, 107 S.Ct. 79 (1986); *United States v. Burke*, 700 F.2d 70 (3d Cir. 1983); *Zerilli v. Smith*, 656 F.2d 705 [7 Med.L.Rptr. 1121] (D.C. Cir. 1981); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 [6 Med.L.Rptr. 1598] (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Baker v. F. & F. Investments*, 470 F.2d 778 [1 Med.L.Rptr. 2551] (2d Cir. 1978); *Farr v. Pitchess*, 522 F.2d 464 [1 Med.L.Rptr. 2557] (9th Cir. 1975). But see *In re Grand Jury Proceedings*, 810 F.2d 580 [13 Med.L.Rptr. 2049] (6th Cir. 1987) (rejecting reporter's qualified privilege in the context of grand jury proceedings).

Although the Seventh Circuit has not yet addressed the question of a reporter's qualified privilege, this court has previously recognized the privilege, and has stated that, at least in civil cases, it extends to all underlying, unpublished material gathered in preparation for a news story or broadcast regardless of whether the source of the material is confidential. *Gulliver's Periodicals, Ltd. v. Chas. Levy Cir. Co.*, 455 F.Supp. 1197 [4 Med.L.Rptr. 1342] (N.D. Ill. 1978). Thus, Garcia's contention that the reporter's qualified privilege, if recognizable at all, protects only confidential sources, is without merit. See also *Burke, supra*; *United States v. Blanton*, 534 F.Supp. 295 [8 Med.L.Rptr. 1106] (D. Fla. 1982); *Altemose Const. Co. v. Building & Const. Trades Council*, 443 F.Supp. 489 [2 Med.L.Rptr. 1879] (D. Pa. 1977); *Loadholtz v. Fields*, 389 F.Supp. 1299 (D. Fla. 1975).

Garcia's next argument, that a reporter's qualified privilege does not apply in criminal cases, is also without merit. Since it is grounded in federal common law, the privilege applies to federal criminal cases through Fed. R. Evid. 501. It is true that *Gulliver's Periodicals*, the only case of this court to discuss the privilege, was a civil case, but those courts which have addressed this issue have not differentiated between civil and criminal proceedings for purposes of applying the privilege. See, e.g., *United States v. Criden*, 633 F.2d 346 [6 Med.L.Rptr. 1993] (3d Cir.); *cert. denied*, 449 U.S. 1113 (1981); *Blanton, supra*. In fact, as the court noted in *Burke, supra*, the important social interests in the free flow of information that are protected by the reporter's qualified privilege are particularly compelling in criminal cases, since reporters are to be encouraged to investigate and expose evidence of criminal wrongdoing. *Id.* at 77. Garcia cites *In re Grand Jury Proceedings, supra*, where the

IT IS THEREFORE ORDERED that the motion of NBC to quash the subpoena of defendant Dora Garcia seeking video out-takes is granted.

PAINTING INDUSTRY OF HAWAII v. ALM

Hawaii Supreme Court

PAINTING INDUSTRY OF HAWAII MARKET RECOVERY FUND v. ROBERT A. ALM, DIRECTOR OF COMMERCE AND CONSUMER AFFAIRS; and THE STATE OF HAWAII, No. 12094, December 3, 1987

NEWSGATHERING

Access to records—Administrative (§38.14)

Statutory right of access—State open records acts (§44.17)

Settlement agreement between state commerce department and licensed contractor, which resolved contractor's alleged violations of wage and hour laws and which includes name of corporation's manager and states that manager holds contractor's license and agrees to comply with labor laws in future is not personal record exempt from disclosure under Hawaii public records act, H.R.S. 92-51.

Action seeking disclosure of government agency's settlement agreement. The Hawaii Circuit Court, First Circuit, ordered disclosure after an *in camera* examination and subsequently, on reconsideration, vacated the order and precluded disclosure. On plaintiff's appeal.

Reversed.

Michael A. Lilly, for plaintiff.

Nathan J. Sult, of the Department of Commerce & Consumer Affairs, and Grant Tanimoto, deputy attorney general, for defendants.

Full Text of Opinion

Before Lum, C.J., and Nakamura, Padgett, Hayashi, and Wakatsuki, JJ.

Lum, C.J.:

The issue in this appeal is whether a settlement agreement between the Department of Commerce and Consumer Affairs (DCCA) and a corporate public works contractor regarding license law violations by the contractor must be disclosed to the public. The answer to this issue turns on whether the settlement agreement is a personal record under Hawaii Revised Statutes (HRS) §§92-50 and 92E-1. The Circuit Court of the First Circuit ruled the agreement to be a personal record, and precluded disclosure. We reverse.

I.

On October 17, 1985, a complaint was filed with the Regulated Industries Complaint Office (RICO) of the DCCA alleging violations of the wage and hour laws by Metropolitan Maintenance (Metropolitan), a licensed contractor. RICO investigated the complaint and subsequently entered into a settlement of the alleged violations with Metropolitan and Donald Tagawa, Metropolitan's responsible managing employee.

The Plaintiff, Painting Industry of Hawaii Market Recovery Fund, requested disclosure of the settlement agreement by the DCCA pursuant to HRS §92-51. The DCCA refused on the ground that the settlement was not a public record. Plaintiff then filed the instant suit to compel public disclosure of the agreement.

On January 5, 1987, the Circuit Court of the First Circuit ordered disclosure of the settlement after examination *in camera*. The document was sealed to permit the DCCA an opportunity to appeal. On reconsideration, the court on March 6, 1987, vacated the order and precluded disclosure of the settlement on the ground that it was a personal record under HRS §92E-1.

II.

A public record is defined under HRS §92-50 as:

[A]ny written or printed report, book or paper, map or plan of the State or of a county and their respective subdivisions and boards, which is the property thereof, and in or on which an entry has been made or is required to be made by