IN THE SUPREME COURT OF FLORIDA

CLIFTON WINFIELD, NIGEL WINFIELD, NIKKI WINFIELD, a minor, by and through her father and next friend, MALCOLM WINFIELD and FRANK MARANO,

Petitioners,

vs.

DIVISION OF PARI-MUTUEL WAGERING, DEPARTMENT OF BUSINESS REGULATION, ROBERT M. SMITH, JR., and GARY RUTLEDGE,

Respondents.

CASE NO. 64,793

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BRIEF OF PETITIONERS

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PRELIMINARY STATEMENT

Whenever reference to the Appendix is made, the symbol (A) will be used herein.

The Respondents, DEPARTMENT OF BUSINESS REGULATION, DIVISION OF PARI-MUTUEL WAGERING, will be referred to as "DIVISION"; Respondent, ROBERT M. SMITH, JR., will be referred to as "SMITH"; and Respondent, GARY RUTLEDGE, will be referred to as "RUTLEDGE". The Petitioners will be referred to by their full names except where the clarity of the context will best be served by reference to their first names only.

STATEMENT OF THE CASE AND OF THE FACTS

The Respondent, DIVISION, is an agency of the State of Florida. The Respondent, SMITH, is the Director of the DIVISION. The Respondent, RUTLEDGE, was the Director of the DIVISION immediately preceding SMITH and is currently the Secretary of the Department of Business Regulation. All of the records which are the subject matter of this case are part of the DIVISION'S files in Miami, Florida.

On August 17, 1981, the DIVISION issued three (3) investigative subpoenas (A. 9-10, 13-14) under the signature of its then Director, RUTLEDGE, and caused same to be served without notice to Petitioners, upon three (3) banks in Broward County, Florida. The subpoenas requested the production of banking and financial records of NIGEL WINFIELD, MALCOLM WINFIELD, and various corporations. The banks were specifically requested not to disclose the existence of the request for information for a period of ninety (90) days and further admonished that any disclosure to the depositor/customer could "obstruct and impede" the investigation being conducted and thereby "interfere with the enforcement of the law." (A. 14, 15). The records requested by the subpoenas were in fact produced by the banks to the DIVISION, without notice to the depositor/customer, and became a part of the DIVISION'S files (A.5).

On December 18, 1981, the DIVISION issued a fourth (4th) subpoena (A. 11-12) under the signature of its Director, SMITH, and caused same to be served without notice to Petitioners, upon the Custodian of Records of the Transamerican Bank of Florida, Cooper City, Florida. Said subpoena requested the production of certain banking records of Winfield Racing Stables, Inc. The Transamerican Bank complied with said subpoena and produced the documents requested without notice to the depositor/customer. Said documents became a part of the DIVISION'S files (A.5).

On February 28, 1983, Petitioners, CLIFTON WINFIELD, NIGEL WINFIELD and NIKKI WINFIELD filed suit in Broward County Circuit Court seeking, inter alia, a declaratory judgment that the aforementioned subpoenas duces tecum violated Petitioners' constitutional rights of privacy and due process, and an Order commanding the Respondents to immediately turn over to the Petitioners the original and all copies of the banking and financial records received pursuant to said subpoenas (A.1-16). Petitioners' Complaint essentially alleged that the subpoenas were facially invalid, that they violated Petitioners' rights to privacy and due process and, further, that maintaining said records in the DIVISION'S files and making them available to public inspection, as the DIVISION is required under Chapter 119, Florida Statutes (1981), constituted an additional violation of their constitutional rights to privacy (A.1-16).

On the same date that the aforementioned Complaint was filed, Petitioners sought and obtained an ex parte temporary restraining order commanding the Respondents to "hand over to [Petitioners'] counsel the original and all copies of the confidential banking and financial records of [Petitioners] in [Respondent's] possession" (A.17-21). The Respondents were further ordered to

> refrain from taking any action, directly or indirectly, that would cause or permit any person to conceal, copy, inspect, utilize, alter, destroy, disseminate or publish those records or the information contained in them (A.21).

On or about February 21, 1983, Respondents agreed, through counsel, to turn over the records encompassed by the temporary restraining order to the court for safekeeping pending a hearing on the matter (A.24-25). Said records were in fact turned over to the presiding circuit court judge.

On February 25, 1983, Petitioner, MALCOLM WINFIELD, filed suit in Broward County Circuit Court seeking declaratory and injunctive relief identical to that requested by CLIFTON, NIGEL and NIKKI WINFIELD in the former complaint (A.26-42). However, while the former complaint alleged that CLIFTON, NIGEL and NIKKI WINFIELD "are neither licensed nor seeking licensure pursuant to Chapter 550" (A.6), no such allegation was made regarding MALCOLM WINFIELD (A.27-42). Nevertheless, simultaneous with the filing of his

complaint, MALCOLM WINFIELD sought and obtained an ex parte temporary restraining order substantially similar to the temporary restraining order in the suit filed by CLIFTON, NIGEL and NIKKI WINFIELD (A.43-46), The only significant difference was that the former temporary restraining order commanded the Respondents to turn the records over to Petitioners' counsel while the latter order was altered to provide that said records were to be turned over to the court (A.44).

Petitioner, MALCOLM WINFIELD, moved to consolidate the two cases (A.47-49) and, by Agreed Order dated February 28, 1983, the cases were consolidated by the latter case being transferred to the presiding circuit judge in whose division the initial complaint had been filed.

On March 3, 1983, the DIVISION'S Motion to Dissolve the Temporary Restraining Orders was called up for hearing along with the Motion of the Petitioners for an Order extending the Temporary Restraining Order dated February 18, 1983 (A.52-53, 93).

The Motion to Dissolve presented by the DIVISION contained five (5) exhibits which were attached to the motion (A.56-92). The first exhibit was a certified copy of a 1981 ruling of the New York State Racing and Wagering Board denying an occupational license to NIGEL WINFIELD (A.62-75). The second exhibit was

an Administrative Complaint issued by the DIVISION against MALCOLM WINFIELD (A.76-78). The third exhibit was an Amended Administrative Complaint against MALCOLM WINFIELD (A.79-89). The fourth exhibit was a Motion for Continuance filed by MALCOLM WINFIELD'S counsel in an administrative matter pending before the Division of Administrative Hearings (A.90-91). The fifth exhibit was an Affidavit by Respondent SMITH (A.92).

The Motion to Dissolve stated, essentially, two (2) grounds for dissolving the temporary restraining orders. The first ground was improper venue. The second was the failure of Petitioners' Complaint and Motion for a Temporary Restraining Order to meet the four-pronged test for granting injunctive relief.

In dismissing the DIVISION'S argument that the action had been brought in the wrong county, the presiding circuit court judge ruled that the "sword wielder" doctrine applied and that venue was proper in the county where the subpoenas had been served:

> ...although the Department would be entitled ordinarily to have any action taken against it in...Miami or Tallahassee, I think where the Department has a subpoena which comes into or has the effect of coming into Broward County, securing what records are ordinarily entitled to absolute privacy and takes them down and makes them a part of the public record, no notification, no hearing, nothing else, I think that this, this is so seriously fraught with the potential of abuse that it can't

> constitutionally be tolerated because a person could have all his affairs spread out before the general public who may have not entitlement to them in a matter in which he himself is not in there or is there a possibility he will ever be one of the participants or directly related to or in any practical way actually related; and therefore, since this is attempted in Broward County, I think that the court has to extend a protection against an incursion of this sort (A.112-113).

The trial court then considered the DIVISION'S argument that the Petitioner's Complaint and Motion for Temporary Restraining Order failed to meet the four-pronged test for granting injunctive relief. In rejecting the DIVISION'S argument, the presiding circuit judge relied upon the Petitioners' State and Federal right of privacy as reflected by his written order of March 3, 1983, which stated in pertinent part as follows:

> This Court, having considered said motions and having been fully advised in the premises, finds that the Defendants were acting with probable cause and within the scope of their jurisdiction and authority in obtaining these records by subpoena. The Court further finds, however, that said records, having become a part of the Defendant DIVISION OF PARI-MUTUEL WAGERING'S public files pursuant to Chapter 119, Florida Statutes, are subject to public disclosure, in possible violation of Plaintiff's rights to privacy under the Federal and Florida Constitutions...(A.129-130).

Said order was immediately appealed to the District Court (A.127-128).

On January 11, 1984, the District Court of Appeal, Fourth District, reversed, upholding the authority of Respondents to issue and serve the four (4) subpoenas without notice to Petitioners. However, the District Court was concerned with the impact that Article I Section 23 had, if any, upon the Petitioners' expectations of privacy in their banking records and therefore certified to this court the following questions to be of great public importance:

1. Does Article I Section 23 of the Florida Constitution prevent the Division of Pari-Mutuel Wagering from subpoenaing a Florida citizen's bank records without notice?

2. Does the subpoenaing of <u>all</u> of a citizen's bank records under the facts of this case constitute an impermissible and unbridled exercise of legislative power?

POINT I

DOES ARTICLE I SECTION 23 OF THE FLORIDA CONSTITUTION PREVENT THE DIVISION OF PARI-MUTUEL WAGERING FROM SUBPOENAING A FLORIDA CITIZEN'S BANK RECORDS WITHOUT NOTICE?

Implicit within the question of whether Article I Section 23 of the Florida Constitution prevents the Division of Pari-Mutuel Wagering from subpoenaing a Florida citizen's banking records without notice, is the threshold question of whether Florida law recognizes an individual's legitimate expectation of privacy in financial institution records.

In addressing this threshold question, the Petitioners submit that there is evolving case law and statutory authority supporting the emergence of such a privacy interest and that the prevailing trend is to recognize the existence of such a right in private, non-governmental relationships.

It is difficult to imagine that in this day and age a bank would consider itself at liberty to indiscriminately disclose the intimate details of its depositor/customers' accounts and records to private, non-governmental third parties. However, prior to Milohnich v. First National Bank of Miami Springs, 224 So2d 759 (Fla. 3rd DCA, 1969), no reported case in this state addressed a

bank's duty of non-disclosure regarding its customer's records.

In Milohnich, the question presented was whether a bank was under an implied contractual duty not to disclose information concerning a depositor's account to private, non-governmental, third persons unless authorized by law or with the consent of the depositor. In finding that such a duty existed, the court relied in part upon Peterson v. Idaho First National Bank, 83 Idaho 578, 367 P2d 284 (1961), wherein it was stated, "Inviolate secrecy is one of the inherent and fundamental precepts of the relationship of the bank and its customers or depositors." The court in Milohnich went on to note that the banking industry has long recognized a self-imposed duty of non-disclosure, 224 So2d at 761, and that a general banking policy of non-disclosure was recognized nearly forty (40) years ago in United States v. First National Bank of Mobile, 67 F.Supp. 616, at 624 (S.D. Ala. 1946).

In addition to Milohnich, it should be observed that §665.042, Fla. Stats, recognizes a limited right of confidentiality in customers' books, records, and accounts maintained by institutions governed under Chapter 665, Banks and Banking, Florida Statutes.

The court in Milohnich has not been alone in its recognition of a depositor's right of confidentiality in his banking records.

Without any explicit privacy provision in their state constitutions, courts in Pennsylvania, Colorado and Oklahoma have held that an individual has a legitimate expectation of privacy in his financial records. See Commonwealth v. De John, 403 A2d 1283 (Pa. 1979); Charnes v. DiGiacomo, 612 P2d 1117 (Col. 1980); and Djowhartzadeh v. City National Bank and Trust Company, 646 P2d 616 (Ok. App. 1982).

Thus, between private, non-governmental parties, it is recognized in this state and others that an expectation of privacy exists within the banker/depositor relationship.

Assuming this Court answers the penultimate question in the affirmative, the Petitioners submit that the recently enacted privacy amendment compels similar recognition of this heretofore private right between private parties when a state agency, rather than a private, non-governmental third party, secretly seeks to obtain an individual's banking records.

On November 4, 1980, the voters of this state approved the creation of a new and independent state right of privacy to be added to the Declaration of Rights in the Florida Constitution. In approving this Amendment, Florida became the fourth (4th) state -- after California, Montana and Alaska -- to adopt a "strong right of privacy"

as part of its state constitution. See Cope, A Quick Look at Florida's New Right of Privacy, 55 Fla. Bar J. 12 (Jan. 1981)

Prior to the privacy amendment's enactment, the status of an individual's right of privacy in Florida, as against governmental intrusion, was best illustrated by Shevin v. Byron, Harless, Schaffer, Reid & Associates, Ltd.,379 So2d 633 (1980), wherein this Court noted that the state and federal right of privacy had been strictly limited to three (3) protected interests:

> ...an individual's interest in being secure from unwarranted governmental surveillance and intrusion into his private affairs; a person's interest in decisional autonomy on personally intimate matters; and an individual's interest in protecting against disclosure of personal matters. 379 So2d at 636.

As it relates to the first interest, "in being secure from unwarranted governmental surveillance and intrusion into his private affairs", this Court pointed out that:

> ...The parameters of this interest have been repeatedly delineated over the years by the Supreme Court, and, as a result, governmental intrusion upon activity safeguarded by this interest can be readily identified and remedied by this court. 379 So2d at 636.

Under the United States Constitution, the issue of whether banking records may be subpoenaed by the government without notice to the depositors was laid to rest in United States v. Miller, 425 US 435 (1976). In Miller, the court held that banking records did not fall within a protected screen of privacy and were not "private papers" protected by the Fourth Amendment. 425 US at 440.

While no pre-privacy amendment Florida case addressed the precise question now presented, it seems likely from the language contained in Shevin that prior to November 4, 1980, the courts of this state would not recognize a state right of privacy which provided any more protection than the federal constitution regarding an individual's expectation of privacy in banking records.

However, by adopting Article I Section 23, the people of this state have exercised their perogative and opted for a state created right of privacy, independent of federal constitutional protection in this area. It is a state right that logic dictates is broader in scope than that protected by federal constitutional law.

> ...since the citizens...enacted an Amendment to the...Constitution expressly providing for a right of privacy not found in the United States Constitution, it can only be concluded that the right is broader in scope than that of a Federal Constitution. Ravin v. State, 537 P2d 494, 514-15 (Ak. 1975).

Merely because the courts of this state may have previously deferred to federal precedent in delineating its citizens' rights of privacy, the United States Supreme Court has made it clear that the state, not the federal courts, are responsible for the protection of its citizens' general rights of privacy. Katz v. United States, 389 US 347, 350-51 (1967). In this regard, this Court has recognized that the concept of federalism permits the state to provide its citizens greater individual protection than exists under the federal constitution.

> ...surely the citizens of Florida, through their state constitution, may provide themselves with more protection from governmental intrusion that that afforded by the United States Constitution. A fundamental task of the judiciary is to safeguard the constitutional rights of the citizenry. State v. Sarmiento, 397 So2d 643, 645 (1981).

In interpreting the impact of Article I Section 23 upon the issue under consideration, the Petitioners submit that decisions

in other states which have enacted similar constitutional protection may prove helpful.

In Valley Bank of Nevada v. Superior Court of San Joaquin County, 542 P2d 977 (Cal. 1975), the court mandated predisclosure notification to bank customers when a financial institution received a civil subpoena so that the customer could, if he choose, assert his privacy interest. This holding was based upon a recognition of the reasonable expectation of privacy which a bank customer entertains with respect to financial information disclosed to his bank.

In Valley Bank, the court reached this position by adopting a balancing approach between the competing considerations of the customer's right of privacy and the interests of the one seeking disclosure. Noting that protection of a bank customer's or depositor's privacy interests should not be left entirely to the election of third persons who may have their personal reasons for permitting or resisting disclosure, the court required the banks to notify a customer whose records had been subpoenaed. 542 P2d at 979.

Although Valley Bank applied to disclosure in the court of civil discovery proceedings, subsequent California cases have recognized

the concerns that motivated that court in Valley Bank and have extended protected privacy interests against demands during administrative agency investigations; Board of Medical Quality Assurance v. Gherardini, 93 Cal. App. 3d 669, 156 Cal. Rptr. 55 (App. 1979); and attorney disciplinary proceeding brought by the state bar, Doyle v. State Bar of California, 648 P2d 944 (Cal. 1982).

Doyle is particularly significant since attorney disciplinary proceedings in California, like in this state, are conducted in strict confidence. Yet, the state bar was required to give predisclosure notification to third parties whose records were being sought even though those records would never be made public. No such guarantee of confidentiality exists in connection with the investigation brought by the Respondents.

Under Chapter 119, Public Records, Florida Statutes, and the express provisions of Article I Section 23 of the Florida Constitution (the right of privacy "shall not be construed to limit the public's right of access to public records") it is certain that the Petitioners banking and account records obtained in connection with this investigation will become "public records" subject to disclosure to any individual simply upon request.

Thus, the potential of disclosure to the world, not just the agency involved, is a further consideration suggesting the necessity of affording an individual the timely opportunity to object to the wholesale disclosure of his financial affairs prior to that material being obtained by a state agency during a non-criminal investigation.

Several timely articles have appeared in the Florida Bar Journal addressing the state's newly enacted privacy amendment in general and financial privacy in particular. See, Cope, A Quick Look at Florida's New Right of Privacy, supra; Weatherly, Confidentiality of Financial Institution Customer Relation in Florida, 58 Fla. Bar J. 33 (Jan. 84). Both articles convincingly argue that the courts of this state should extend this new individual right to protection of a person's banking records against secret governmental intrusion. Furthermore, on the federal level, recent legislation, 26 U.S.C. §7609 (1983) has superceded the effect of Miller and requires that even the IRS give notice prior to seizure of bank records.

Thus, it can be justifiably claimed that the prevailing modern trend regarding an individual's bank records vis-a-vis secret governmental inquiry, is to require the requesting agency to give the depositor/customer pre-seizure notice.

POINT II

DOES THE SUBPOENAING OF ALL OF A CITIZEN'S BANK RECORDS UNDER THE FACTS OF THIS CASE CONSTITUTE AN IMPERMISSIBLE AND UNBRIDLED EXERCISE OF LEGISLATIVE POWER?

The subpoenas issued by the DIVISION upon the Petitioners' banks were not limited in any manner other than time, i.e., any and all documents from a given date to and including a later given date. The subpoenas requested complete disclosure of banking records of MALCOLM WINFIELD, who was a person under licensure by the DIVISION, as well as NIGEL WINFIELD, CLIFTON WINFIELD and NIKKI WINFIELD, the sons and minor grandaughter of MALCOLM WINFIELD, persons who were not under licensure by the DIVISION, nor whom had ever held or applied for a license to race in the state of Florida.

In its opinion, the Fourth District Court of Appeal was concerned that the broadly worded subpoenas addressed all banking statements and accounts over a stated period which in no manner were limited to transactions affecting horses. In this regard, the court noted that in Johnston v. Gallen, 217 So2d 319, 321 (Fla. 1969), the Florida Supreme Court said:

> ...the power of investigation is a necessary adjunct to the exercise of the power to legislate. But the

> power is not an unbridled one. It must be circumscribed by reasonable limitations and should never be used to "hunt witches."

If this Court should uphold the authority of the DIVISION to issue the unlimited subpoenas which were served upon the Petitioners' banks, then not only Petitioners, but anyone's private banking affairs, whether or not that individual has any business with a state regulated industry such as the DIVISION, will be subject to secret seizure and subsequent public records, subject only to the unfettered discretion of the Director of the DIVISION.

CONCLUSION

The court of this state already recognize an individual's expectation of privacy in banking records between his bank and non-governmental third persons. By enactment of Article I Section 23, the people of this state have provided greater individual protection than afforded under the United States Constitution. The prevailing modern trend is to recognize an individual's legitimate expectation of privacy in banking records even against secret government intrusion. That pre-seizure notice is the only effective means by which a citizen may prevent his financial affairs from becoming public record. That the subpoenas are overly broad and seek banking information of persons not seeking licensure by the DIVISION and that the only restraint upon the power of the DIVISION to subpoena any person's banking records whether or not that person has business with the DIVISION, is the unbridled discretion of the Director. Accordingly, Petitioners request this Court reverse the appellate court's decision and reinstate the trial court's order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was this 21 day of March, 1984, forwarded to ELLIOT H. HENSLOVITZ, ESQ., Department of Business Regulations, Division of Pari-Mutuel Wagering, 1350 N.W. 12 Avenue, Room 332, Miami, Florida, 33136; to JIM SMITH, ESQ., Attorney General, c/o GARY CONOVER, Assistant Attorney General, and JOHN MILLER, Assistant Attorney General, Department of Legal Affairs, RICO Section, The Capitol, Tallahassee, Florida 32301; and to ERIC B. MEYERS, ESQ., and SALLY M. RICHARDSON, ESQ., Attorneys for ATLANTIC NATIONAL BANK, 1500 Edward Ball Building, Miami Center, 100 Chopin Plaza, Miami, Florida, 33131.

Respectfully submitted,

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