IN THE
SUPREME COURT OF FLORIDA

CASE NO. 66,576

THE TRIBUNE COMPANY
and JAMES TUNSTALL,

Appellants,

vs.

THE HONORABLE L. R. HUFFSTETLER, JR.
and THE STATE OF FLORIDA,

Appellees.

ON REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

BRIEF ON JURISDICTION

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GROUNDS UPON WHICH JURISDICTION IS PREDICATED

Tunstall[1] seeks to invoke the discretionary jurisdiction of this Court pursuant to Rule 9.030(2)(a)(ii) and (iv), Florida Rules of Appellate Procedure. The order of the Fifth District Court of Appeal, affirming the reporter's six-month contempt sentence, expressly construed the First Amendment to the United States Constitution and Article I, Section 4 of the Florida Constitution. The order also expressly and directly conflicts on the same question of law with the following cases:

(1) Morgan v. State, 337 So.2d 951 (Fla. 1976);

(2) Tribune Co. v. Green, 440 So.2d 484 (Fla. 2d DCA 1983);

(3) Gadsden County Times, Inc. v. Horne, 426 So.2d 1234 (Fla. 1st DCA 1983);

(4) Laughlin v. State, 323 So.2d 691 (Fla. 3d DCA 1975);

(5) Trushin v. State, 425 So.2d 1126 (Fla. 1982);

(6) Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904 (Fla. 1976).

This Court's acceptance of jurisdiction is essential so that a significant impediment to the newsgathering process can be removed. The reporter's privilege, which the district court refused to recognize, is absolutely necessary to the free flow of information so essential in our democratic society.

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[1] Appellants, The Tribune Company and James Tunstall, will be referred to collectively as "Tunstall." Appellees, the Honorable L. R. Huffstetler, Jr. and the State of Florida, will be referred to collectively as "the State." Citations to the appendix to this brief will be referred to as "App. ___."

FACTUAL BACKGROUND

This controversy concerns an investigative subpoena issued by the State Attorney for the Fifth Judicial Circuit of Florida and served upon James Tunstall, a reporter for the Tampa Tribune. The subpoena sought to compel Tunstall to testify concerning a story co-authored by Tunstall and published in the Tribune (App. 1). The story quoted a confidential source as stating that a complaint had been filed with the Florida State Ethics Commission charging two Hernando County Commissioners with misuse of their offices. The State Attorney was investigating whether that confidential source had violated Section 112.317(6), Florida Statutes (1983), which prohibits disclosure of a person's intent to file an ethics complaint or the existence of a complaint that has been filed.

Tunstall responded to the subpoena, answered preliminary questions, but refused to identify the confidential source quoted in the article. The Circuit Court denied Tunstall's subsequent motion to quash the subpoena and, when he continued to refuse to testify, found him in civil contempt. He was sentenced to an indefinite term of up to six months in the county jail with the provision that he may purge the contempt by agreeing to testify. After spending an afternoon in jail, Tunstall was released on his own recognizance.

On appeal, the Fifth District Court issued an order which ignored controlling Florida precedent and refused to recognize the existence of a reporter's privilege (App. 2). The court also rejected Tunstall's attempt to raise the constitutionality of the

Ethics Commission non-disclosure statute, finding that he lacked standing to do so and that he had waived the right to do so by not making the argument in the trial court. Rehearing and certification were also denied (App. 3).

Important to consideration of this case is the fact that the non-disclosure statute is certainly unconstitutional. An identical statute was voided on First Amendment grounds by the United States Supreme Court in Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978). Accord, Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979). The statute remains on the books only because it has not been used by Florida prosecutors.[2] See also Gardner v. Bradenton Herald, Inc., 413 So.2d 10 (Fla.), cert. denied, 459 U.S. 865 (1982) (invalidating a very similar statute prohibiting publication of the names of wiretap parties).

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[2] An identical statute dealing with complaints against law enforcement officers, § 112.533(3), Florida Statutes (1983), was admittedly copied from the ethics commission non-disclosure statute. In State v. Peterson, Nos. 84-906-MM and 84-933-MO (Bay County, June 22, 1984), the statute was declared facially unconstitutional on the same grounds argued by Tunstall here.

ARGUMENT

By refusing to recognize the reporter's qualified testimonial privilege, the Fifth District Court of Appeal has differed with this Court, three District Courts of Appeal and practically every circuit court in Florida. As a result, a Florida reporter has been sentenced to six months in jail for refusing to reveal a source to an investigating State Attorney, despite the fact that the investigation could never result in a constitutional conviction.

I. CONFLICT REGARDING EXISTENCE OF REPORTER'S PRIVILEGE.

The District Court of Appeal, relying exclusively upon the plurality opinion in the United States Supreme Court's decision in Branzburg v. Hayes, 408 U.S. 665 (1972), held that no reporter's privilege protected Tunstall from revealing his source. For that reason, the court declined to balance the state's interest in the reporter's testimony against First Amendment concerns and summarily affirmed the order of the circuit court below. In doing so, the district court overlooked both the determinative concurring opinion in Branzburg and the substantial body of Florida law which has developed thereafter.

A. Morgan v. State

Morgan v. State provides this Court's detailed analysis of the existence and scope of the reporter's privilege in light of Branzburg. It is difficult to conceive how the district court below could have made its determination without so much as citing

Morgan, especially because the factual predicate underlying Morgan is highly analogous to the instant situation.

Morgan concerned a newspaper reporter who had refused to disclose a confidential source of information involving a grand jury proceeding. In that case, as is true here, the state contended that the reporter had witnessed a crime by receiving information from a source who could not legally disseminate that information. This Court, in considering whether the state's need for the reporter's testimony outweighed First Amendment considerations, determined that the grand jury which had subpoenaed the reporter was not actually investigating a crime because the statute underlying the grand jury investigation was invalid for failure to contain a criminal penalty.

Similarly, here, the State Attorney is not investigating a crime because the underlying statute is invalid as facially unconstitutional. In both situations, therefore, the balancing process required that the courts look beyond the confrontation between the reporter and the subpoenaing party to the rationale underlying the subpoena. This Court did just that, found the underlying statute invalid, and quashed the subpoena. To be consistent with Morgan, that same analysis should have been undertaken in the instant case, but it was not. In fact, the district court never reached the threshold balancing stage.

In reaching its determination in Morgan, this Court performed an in-depth analysis of Branzburg, and held that the concurring opinion of Justice Powell, taken with the positions of the four dissenting justices, represents the true holding of the

case as to the existence of a reportorial privilege. 337 So.2d at 954. Thus, this Court recognized the existence of the reporter's privilege in general, and its specific applicability in a factual situation remarkably similar to that of the instant case. Yet, despite the clear teaching of Morgan, the district court ignored Justice Powell's opinion, refused to accept the existence and applicability of the privilege, and therefore gave no weight to Tunstall's First Amendment protection.

When the factual similarities are totalled, and the analytical differences reviewed, it becomes apparent that the district court opinion here simply cannot be reconciled with this Court's opinion in Morgan. Rather, Morgan requires two conclusions contrary to those reached by the district court: (1) that the reporter's privilege be recognized and applied, and (2) that investigative subpoenaes be quashed when the statute supporting the investigation is invalid and inapplicable.

B. Gadsden/Green/Laughlin.

Following this Court's decision in Morgan, three Florida District Courts of Appeal have recognized the existence of the reporter's privilege and two have adopted a three-part balancing test as the proper standard for applying that privilege.[3] Tribune Co. v. Green, 440 So.2d 484 (Fla. 2d DCA 1983); Gadsden County

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[3] This test asks (1) whether the information sought is relevant, (2) whether there are alternative sources of the same information and (3) whether there is a compelling need for the information. Tribune Co. v. Green, 440 So.2d 484 (Fla. 2d DCA 1983).

Times v. Horne, 426 So.2d 1234 (Fla. 1st DCA 1983); Laughlin v. State, 323 So.2d 691 (Fla. 3d DCA 1975). Those decisions expressly and directly conflict with the decision of the District Court here.

The scope of the reporter's privilege is best defined in Green, which factually differs from the instant case only in that the state attorney subpoenaed the reporter there for trial rather than for an investigation as occured here. Holding that the three part test, and consequently the privilege, are applicable to "criminal as well as civil cases and to confidential and nonconfidential sources of information," the court quashed the subpoena. 440 So.2d at 486. In short, Green held the privilege and test to be applicable in all possible situations, including the instant one. Gadsden County Times mirrored Green in a civil setting. Laughlin recognized the privilege without utilizing the test.[4]

The broad holdings of Green, Gadsden County Times and Laughlin simply cannot be reconciled with the Fifth District Court's refusal to so much as recognize the existence of the privilege. Therefore, jurisdiction based upon a conflict of the districts is appropriate.

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[4] The Gadsden County Times and Green decisions adopt at the district court level the analysis which has been continually utilized by Florida circuit courts. E.g., Hendrix v. Liberty Mutual Insurance Company, 43 Fla. Supp. 137 (Fla. 17th Cir. 1975); State v. Roman, 9 Med.L.Rptr. 1733 (Fla. 5th Cir. 1983). Further, all federal circuits to address the question have also adopted the three-part test. See Gadsden County Times, 426 So.2d at 1236-1240.

II. FUNDAMENTAL ERROR CONFLICT.

The district court held that Tunstall could not raise the question of the constitutionality of the Ethics Commission non-disclosure statute for the first time on appeal. This holding expressly and directly conflicts with a decision of this Court.[5]

In Trushin v. State, 425 So.2d 1126 (Fla. 1982), this Court established that the facial validity of a statute can be raised for the first time on appeal, while the constitutionality of applying a statute to a particular set of facts must be raised at the trial level. Id. at 1129-30. Like this case, Trushin involved a First Amendment-based challenge of a statute. Although the statute's constitutionality had not been raised at trial, this Court nevertheless considered the issue because fundamental error was involved.

As was true in Trushin, facial invalidity, and therefore fundamental error, are at issue here. The non-disclosure statute, on its face and without reference to a particular situation, violates the First Amendment. That fact has been definitively established by the United States Supreme Court in Landmark Communications, and has been recognized by the Florida Attorney General. 1978 Op. Att'y Gen. Fla. 078-16. There could

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[5] The issue of the application of the statute was raised in the circuit court in the context of Tunstall's argument concerning the compelling need arm of the three-part test. Although constitutionality was not explicitly discussed, the general ability of the statute to outweigh First Amendment protections was vigorously argued.

be no more blatant example of facial invalidity. Therefore, under Trushin, Tunstall had the right to raise the issue of the constitutionality of the statute for the first time on appeal. The district court's holding to the contrary conflicts with this Court's previous holding in Trushin, and gives rise to jurisdiction.

III. STANDING CONFLICT.

Contrary to the district court's holding, Tunstall does have standing to challenge the constitutionality of the non-disclosure statute. As stated in Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904, 908 (Fla. 1976):

> It has been recognized in Florida and elsewhere that the news media, even though not a party to litigation below, has standing to question the validity of an order because its ability to gather news is directly impaired or curtailed.

By attempting to silence potential sources, the non-disclosure statute presents a direct restraint on Tunstall's news gathering ability. The district court's holding that Tunstall lacks standing to challenge the statute expressly and directly conflicts with McIntosh and provides a further ground for jurisdiction.

IV. CONSTITUTIONAL QUESTION JURISDICTION.

The reporter's privilege in Florida is not statutory, but rather is based completely upon interpretation of the First Amendment to the United States Constitution and Article I, Section 4 of the Florida Constitution. Morgan, 337 So.2d at 952;

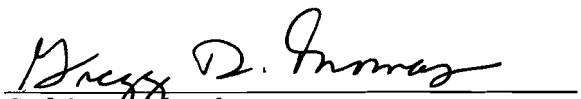
Hendrix v. Liberty Mutual Insurance Company, 43 Fla. Supp. 137 (Fla. 17th Cir. Ct. 1975). Therefore, the claim of privilege made by Tunstall was purely one based in the constitution and the district court necessarily construed provisions of the state and federal constitutions in reaching its determination. The decision reflects the District Court of Appeals' construction that the federal and Florida constitutions do not provide any protection from testimony for reporters. Jurisdiction to test the propriety of that constitutional construction is appropriate.

CONCLUSION

For the above stated reasons, this Court should accept jurisdiction and review this important issue which has serious ramifications upon First Amendment concerns.

Respectfully submitted,

HOLLAND & KNIGHT



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