IN THE
SUPREME COURT OF FLORIDA

CASE NO. 66,576

THE TRIBUNE COMPANY
and JAMES TUNSTALL

Petitioners,

vs.

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

Respondents.

ON PETITION FOR REVIEW OF A DECISION OF
THE FIFTH DISTRICT COURT OF APPEAL

BRIEF ON JURISDICTION OF AMICI/INTERVENORS THE MIAMI HERALD PUBLISHING COMPANY, THE TIMES PUBLISHING COMPANY, AND THE FLORIDA PRESS ASSOCIATION

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INTRODUCTION

The Miami Herald Publishing Company, the Times Publishing Company, and the Florida Press Association respectfully request that this Court accept jurisdiction of this case pursuant to Rule 9.030(a)(2)(A)(ii) and (iv), Florida Rules of Appellate Procedure.

FACTUAL AND PROCEDURAL STATEMENT

Petitioners seek review of a contempt citation which would jail a newspaper reporter for six months because he would not reveal his confidential sources in response to an investigative subpoena issued to enforce a facially unconstitutional statute, Section 112.317(6), Florida Statutes.

In July 1983, the Brooksville Sun Journal and the Tampa Tribune published articles stating that a Hernando County resident had filed a complaint with the Florida Ethics Commission against two County Commissioners. Although such complaints are treated as confidential by the Ethics Commission while an investigation is pending, they become public when the Commission completes its investigation. § 112.324(1), (2), Fla. Stat. (1983).

In this case, however, the County Commissioners' alleged ethics violation, filing a lawsuit in their official capacities even though the County Commission had not authorized the suit, had been discussed at a public County Commission meeting prior to the publication of the articles. Because the alleged ethics violation was already public, no reputational interest was ever at issue. On September 28, 1983, the Hernando County resident's complaint was dismissed and the Ethics Commission file, including the complaint, formally became a public record.

Beginning on October 3, 1983, the state attorney served investigative subpoenas on reporters from the Tampa Tribune and the Brooksville Sun Journal, to determine whether there had been a violation of Section 112.317(6), Florida Statutes ("the Statute"). The Statute imposes a criminal penalty on any person who discloses his intention to file an Ethics Commission complaint or who discloses the existence or contents of a complaint which has been filed, but is not yet public. The Statute is found in Appendix A.

The reporters appeared and answered preliminary questions, but based upon their qualified First Amendment privilege, they refused to answer questions concerning the identity of the confidential sources for the articles. The state attorney's subpoenas were initially quashed because he had failed to exhaust alternative sources. After taking several depositions, he again subpoenaed the reporters. The reporters' renewed motions to quash were denied, and the reporters were ordered to testify.[1]

The next day petitioner James Tunstall of the Tampa Tribune and William Aubrey of the Brooksville Sun Journal again invoked their First Amendment privilege and refused to answer the state attorney's questions concerning the confidential sources for the July 1983 stories. Both reporters were held in contempt and sentenced to six months in jail with the proviso that they could purge their contempt by agreeing to testify.

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[1] The sole evidence presented at the hearing was the testimony of the prosecutor himself as to the depositions he took and the statements of the deponents at these depositions. This incompetent hearsay testimony was admitted for its truth, and counsel for the reporters were not able to cross-examine meaningfully such self-serving "evidence."

After spending an afternoon in jail, Aubrey and Tunstall were released on their own recognizance pending appeal. While their separate appeals were pending below, Aubrey died.

The Fifth District affirmed Turnstall's contempt judgment holding "[a] witness to a crime, simply because he happens also to be a news reporter and intends to write about what was told to him, has no greater right to refuse testimony than any other witness." The Court further ruled "a reporter has no right to withhold testimony based on his perception or belief that the law which prohibits the conduct of which he is an active observer is unconstitutional. His rights are in no way impaired by the enforcement of the law and thus he lacks standing to challenge its constitutionality." In short, the District Court held that a judge may imprison reporters to enforce an unconstitutional statute, and that the reporters have no standing to challenge the Statute.

The court was flatly wrong in both holdings. First, this case does not involve the putative "witnessing crime" exception to the reporter's privilege because there was no crime to witness. Since the Statute is unconstitutional, the disclosure of an intent to file an ethics complaint is not a criminal act. Second, the court ignored the holding of Morgan v. State, 337 So.2d 951 (Fla. 1976), that reporters may move to quash a subpoena where there is no underlying crime or the testimony sought otherwise "'implicates confidential source relationships without the legitimate need of law enforcement ....'" Id. at 954 (citation omitted).

SUMMARY OF ARGUMENT

This Court has jurisdiction. First, the district court expressly construed the United States Constitution by finding that the reporter's

qualified First Amendment privilege does not here apply. Second, the district court's decision conflicts with Morgan v. State, supra, and other decisions, by denying petitioners standing to challenge the constitutionality of the Statute. Third, the district court's decision conflicts with Trushin v. State, 425 So.2d 1126 (Fla. 1982), by holding that the constitutionality of the Statute could not be challenged initially on appeal. Fourth, the district court's decision expressly and directly conflicts with Morgan v. State, supra, and its district court progeny, which have affirmed the qualified reporters' privilege on facts indistinguishable from those here.

This Court should exercise its discretion to hear the case because of the great importance of the questions involved, and in order to resolve the decisional conflicts.

ARGUMENT

I.

THE DISTRICT COURT'S DECISION EXPRESSLY CONSTRUES A CONSTITUTIONAL PROVISION.

The Fifth District opinion expressly construes the First Amendment to the United States Constitution in concluding the reporter's privilege did not here bar the subpoenas. This Court has recognized that the "First Amendment is clearly implicated when government moves against a member of the press because of what she has caused to be published." Morgan v. State, 337 So.2d 951, 956 (Fla. 1976). Without doubt, then, the Fifth District has expressly (and incorrectly) construed a provision of the state or federal constitution, thus vesting this Court with jurisdiction.

II.

THE DISTRICT COURT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH MORGAN V. STATE BY DENYING STANDING TO CHALLENGE THE CONSTITUTIONALITY OF SECTION 112.317 (6), FLORIDA STATUTES.

In express and direct conflict with this Court's decision in Morgan v. State, supra, the Fifth District held that the reporter lacks standing to challenge the constitutionality of the Statute.

As set forth in Morgan, a state attorney is permitted to issue a subpoena only to investigate the commission of a crime. If there is no crime, he has no power to investigate. 337 So.2d at 952 n.2. The reporter in Morgan successfully challenged the state attorney's subpoena by demonstrating that there was no criminal penalty for violating the statute the state attorney was investigating. Id. at 952 n.2, 956. The state attorney was thus acting beyond his jurisdiction, and the subpoena was void. Id. The recipient of a subpoena has standing to challenge it on the ground that there is no investigation of the commission of a crime. Id.

In the present case, there is no dispute that the sole basis for the state attorney's inquiry was to investigate a possible violation of Section 112.317(6), Florida Statutes. The United States Supreme Court, however, has twice struck down, as violative of the First Amendment, statutes which are substantively identical to the Statute. Worrell Newspapers v. Westhafer, 739 F.2d 1219 (7th Cir. 1984), aff'd per curiam, No. 84-827 (U.S. Feb. 19, 1985); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978).[2] This Court followed

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[2] The Indiana statute invalidated in Worrell provided, in part, that "no person may disclose the fact that an indictment or information is in [footnote continued on page 6]

Landmark to strike down yet another similar statute in Gardner v. Bradenton Herald Inc., 413 So.2d 10 (Fla. 1982), cert. denied, 103 S.Ct. 143 (1982).[3] Under well settled Florida law, an unconstitutional statute is void ab initio, since the superior force of the Constitution prevents the statute from ever becoming a law. Amos v. Mathews, 99 Fla. 1, 126 So. 308, 315 (1930); accord, Holley v. Adams, 238 So.2d 401, 405 (Fla. 1970). The Statute being void, there is no crime that the state attorney could investigate, and accordingly, the subpoenas should have been quashed.

[footnote 2 continued]

existence or pending until the defendant has been arrested...." 739 F.2d at 1221 (citation omitted).

The Virginia statute invalidated in Landmark provided, in part, that all papers, proceedings, testimony, and other evidence "shall not be divulged by any person to anyone except the Commission, except that any proceeding filed with the Supreme Court shall lose its confidential character." 435 U.S. at 830 n.1, 98 S. Ct. at 1537 n.1, 56 L.Ed. 2d at 5 n.1. See also Smith v. Daily Mail Publishing Co., 443 U.S. 97, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979).

The Statute here prohibits disclosure by any person of "his intention to file a complaint, the existence or contents of a complaint which has been filed with the commission, . . . before such complaint, document, action, or proceeding becomes a public record . . . ." § 112.317(6), Fla. Stat.

Even prior to the Supreme Court action in Landmark, the Florida Attorney General questioned the validity of Section 112.317(6). 1978 Op. Att'y. Gen. Fla. 078-16. An identical statute dealing with complaints against law enforcement officers, Section 112.533(3), Florida Statutes (1983), was declared unconstitutional in State v. Peterson, Nos. 84-906-MM and 84-933-MO (Fla. 14th Cir. Ct. June 22, 1984). But see State v. Collins, 3 Fla. Supp.2d 15 (Fla. 2d Cir. Ct. 1983).

3 The Florida statute struck down in Bradenton provided: "(1) No person shall print, publish, or broadcast, or cause to be printed, published, or broadcasted, ... the name or identity of any person served with, or to be served with, an inventory or notification of interception of wire or oral communications, ... until said person has been indicted or informed against by the appropriate prosecuting authority." 413 So.2d at 11.

Morgan clearly establishes that the reporters have standing to assert the unconstitutionality of the Statute:

> "Indeed, if the newsman . . . has . . . reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court . . . ."

337 So.2d at 954 (citation omitted). Since there is no legitimate need to enforce an invalid statute, the reporter has standing to quash the subpoena under Morgan.[4]

III.

THE DISTRICT COURT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISIONS REGARDING THE DOCTRINE OF FUNDAMENTAL ERROR.

The Fifth District refused to consider the unconstitutionality of the Statute, holding that "appellants cannot raise this constitutional

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[4] While Morgan confers standing for the reporter to vindicate his own rights, the reporter would have standing in any event under this Court's overbreadth decisions. "Standing to challenge a law for overbreadth on first amendment grounds 'does not depend upon whether [one's] own activity is shown to be constitutionally privileged.' . . . This principle is an exception to the usual rules governing standing . . . ." Pace v. State, 368 So.2d 340, 342 (Fla. 1979) (citations omitted). Laws like Section 112.317(6) suffer from overbreadth. Worrell Newspapers v. Westhafer, supra, 739 F.2d at 1224.

The reporter also has standing under Florida's three-part test for a litigant asserting the constitutional rights of a third party. Higdon v. Metropolitan Dade County, 446 So.2d 203, 207 (Fla. 3d DCA 1984). The relationship between a reporter and a confidential source is "substantial"; the confidential source cannot come forward to assert his right to confidentiality without exposing his identity; and the forced disclosure of the source's identity by the reporter would violate the source's right to engage in anonymous speech. The Fifth District's unexplained citation to Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed. 2d 397 (1976) is inexplicable. Craig, holding that beer distributors could raise the rights of underage drinkers, supports the reporter's standing here.

question for the first time on appeal." That ruling squarely conflicts with this Court's decision in Trushin v. State, 425 S.2d 1126, 1129-30 (Fla. 1982), which held: "The facial validity of a statute, including an assertion that the statute infirm because of overbreadth, can be raised for the first time on appeal." Id. at 1129.

The district court relied on Sanford v. Rubin, 237 So.2d 134 (Fla. 1970), a decision adverse to the position of the court below. Sanford states that "'Fundamental error,' which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action." Id. at 137. Suffice it to say that the error below "is error which goes to the foundation of the case." Quite clearly, this Court has jurisdiction.

IV.

THE DISTRICT COURT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISIONS, AND DECISIONS OF THE OTHER DISTRICT COURTS OF APPEAL, REGARDING THE REPORTER PRIVILEGE.

The Fifth District held that the reporters had no privilege to refuse to testify notwithstanding this Court's contrary decision in Morgan v. State, supra, and the contrary decisions in Tribune Co. v. Green, 440 So.2d 484 (Fla. 2d DCA 1983), cert. denied, 447 So. 2d 886 (Fla. 1984), and Gadsden County Times, Inc. v. Horne, 426 So.2d 1234 (Fla. 1st DCA), cert. denied, 441 So.2d 631 (Fla. 1983).

The district court mistakenly relied on the plurality opinion in Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, (1972), without referring to Justice Powell's controlling concurring opinion. See this Court's analysis in Morgan v. State, 337 So.2d at 954.

In Morgan, which the Fifth District below was bound to follow but did not even consider, this Court carefully analyzed Branzburg and concluded that five Justices -- a majority -- "agreed ... that a reportorial privilege should be recognized in some circumstances." Id. To the same effect are Tribune Co. and Gadsden County Times. The conflict between these decisions and the Fifth District's decision clearly confers jurisdiction on this Court.

REASONS FOR GRANTING THE WRIT

One reporter faces six months in jail, and another goes to his grave with an unjustified, stigma because they properly exercised rights conferred by the Constitution and this Court.

This Court has recognized "newsgathering as an essential pre-condition to dissemination of news, and ... 'without some protection for seeking out the news, freedom of the press could be eviscerated.'" Morgan v. State, 337 So.2d at 954. Morgan expressly acknowledges the importance of "assuring public access to information that comes to the press from confidential informants." Id. at 955. This is especially true where news gathering involves public officials who have the ability to cause the full force of government to be exercised against informants and reporters. Nothing comes closer to the core of the First Amendment.

James Tunstall would be sent to jail despite the absence of any competent evidence to overcome the qualified privilege. The district court justifies his imprisonment on the fiction that his "rights are in no way impaired" by an attempt to enforce a facially unconstitutional statute. That is manifestly untrue and unjust. If a reporter may be jailed under these circumstances, there is no protection in this state for news-gathering.

CONCLUSION

This Court has jurisdiction to review the decision of the Fifth District and should exercise that jurisdiction to reverse the contempt order and jail sentence.

Respectfully submitted,

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