OA 11-6-85

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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 REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONERS

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September 9, 1985

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PRELIMINARY STATEMENT[1]

Exactly 250 years ago John Peter Zenger, editor of the New York Weekly Journal, refused to disclose the sources of his information regarding the conduct of the British governor in New York. A jury exonerated Zenger of a charge of seditious libel because of the truthfulness of his article. Abrams, After 250 Years Zenger's Editorial Victory Lives On, N.Y. Times (National Ed.), August 5, 1985 at 19, Col 1. Now, 250 years later the State of Florida sees nothing wrong in demanding that a reporter disclose the source of information identical to that protected by Zenger.

James Tunstall published information at the core of the First Amendment protection -- information regarding ethics in government. In an attempt to assure that this sort of information does not again reach the people of Florida, the State now wishes to jail Tunstall for refusing to reveal the source of his story. In the guise of investigating a clearly unconstitutional statute, the State presents Tunstall with a choice he should not have to make -- a choice between the ethics of his profession and the First Amendment on the one hand, or a jail sentence on the other.

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[1] Petitioners The Tribune Company and James Tunstall shall be referred to collectively as "Tunstall." Respondents the Honorable L. R. Huffstetler, Jr. and the State of Florida shall be referred to collectively as "the State." References shall be noted as follows: R. ___ for citations to the record on appeal; I.B. ___ for citations to the initial brief; and A.B. ___ for citations to the answer brief.

Fortunately, a qualified privilege against compelled testimony exists to protect reporters like Tunstall from misguided governmental interference. That privilege was recognized by this Court in Morgan v. State, 337 So.2d 951 (Fla. 1976) in a situation remarkably similar to the instant case. A three-part test for application of that privilege was alluded to in Morgan and later developed in Gadsden County Times, Inc. v. Horne, 426 So.2d 1234 (Fla. 1st DCA), petition denied, 441 So.2d 631 (Fla. 1983) and Tribune Co. v. Green, 440 So.2d 484 (Fla. 2d DCA), petition denied, 447 So.2d 886 (Fla. 1983). This test requires the party seeking to compel a reporter's testimony to demonstrate that the information sought is legally relevant, that no alternative sources of the same information exist, and that there is a compelling need for the information.

Certainly the Gadsden/Green test has not been met here. The legal relevance of the information sought is highly questionable. Alternative sources have not been exhausted. Most importantly, as was true in Morgan, there is no compelling need for Tunstall's testimony.

STATEMENT OF THE CASE AND FACTS

The statement of the case and facts included in the State's answer brief contains two misstatements. Contrary to the State's assertion, Tunstall's counsel did object to the procedure in the lower court whereby the assistant state attorney was permitted to take the stand and summarize, in a hearsay fashion, the results of his investigation to date, rather than being compelled to

present by audio tape or interview notes the fruits of that investigation (R. 81-82). Further, counsel specifically requested that the trial court permit Tunstall to appeal prior to being held in contempt, and raised that issue at the district court below (R. 107-112; Initial Brief to the 5th DCA at 34-35). The State's contentions to the contrary are incorrect.

The State also contends that Tunstall did not raise any due process issue at the trial court hearing. Because Tunstall objected to the procedure for taking testimony and requested leave to appeal prior to a finding of contempt, the due process question was certainly put at issue.

ARGUMENT

I. TUNSTALL HAS A QUALIFIED PRIVILEGE AGAINST COMPELLED TESTIMONY.

The majority of the State's answer brief consists of a discussion of Branzburg v. Hayes, 408 U.S. 665 (1972) (A.B. 3-29). However, as did the district court below, the State ignores both the substantial body of precedent developed since Branzburg and the key factual elements distinguishing the instant case from Branzburg.

The body of First Amendment law regarding the reporters' privilege is presented in detail in Tunstall's initial brief (I.B. 13-23). Although a reiteration of that portion of Tunstall's argument would serve no purpose, several misstatements contained in the State's rebuttal must be addressed.

Tunstall relies upon a constitutional reporters' privilege based in the First Amendment to the United States Constitution and Article I, Section 4 of the Florida Constitution. Therefore, that portion of the State's argument directed against a common law privilege is irrelevant (A.B. 7-8).[2] Likewise, contrary to the State's claim, Tunstall does not rely in any way upon a shield law or upon precedent developed under a shield law (A.B. 19). Tunstall's initial brief contains no references to shield law cases.

The State further suggests that Tunstall relies only upon civil cases for the proposition that a reporter's privilege has been generally recognized nationwide. However, the initial brief clearly demonstrates that suggestion is simply untrue. Id. at 19, n.8. Rather, as stated by the Florida Second District Court of Appeal,

> There is abundant case law that this test is applicable to criminal as well as civil cases and to confidential and nonconfidential sources of information.

Tribune Co. v. Green, 440 So.2d at 486.

As for the State's contentions that the initial brief proposes an improper interpretation of Branzburg (A.B. 11), that interpretation was not authored by Tunstall, but rather by this

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[2] Tunstall would note, however, the fallacy in the State's declaration that "Since Nugent, no states have established a common law privilege for reporters." (A.B. 8). See Senear v. Daily Journal-American, 641 P.2d 1180 (Wash. 1982) (recognizing a common law reporters' privilege). See also, Commonwealth v. Corsetti, 438 N.E.2d 805 (Mass. 1982) (recognizing the possibility of a common law privilege in a confidential source context).

Court in Morgan v. State, 337 So.2d 951 (Fla. 1976). Further, the interpretation is entirely consistent with the analysis utilized almost exclusively in the ten years since Morgan; Gadsden County Times, 426 So.2d at 1237. Simply put, because of the composition of the court in Branzburg and the makeup of the various decisions, Justice Powell's concurrence represents the minimum constitutional protection afforded for reporters. Morgan, 337 So.2d at 954-55. As extensively detailed in the initial brief, Justice Powell would have this Court perform the precise balancing process proposed by Tunstall.[3]

Beyond the analytical fallacy in the State's argument, the State also fails to appreciate the factual distinctions between this case and Branzburg. At the risk of being repetitive, those distinctions, which were delineated in detail in the initial brief, are:

1. The instant investigation is being conducted by the state attorney, rather than the grand jury. The grand jury involvement was key to the Branzburg decision. See Amicus Brief of Fort Lauderdale Sun Sentinel (I.B. 23).

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[3] The State continually accuses Tunstall of selectively editing cases for presentation in the initial brief. Needless to say, no purpose would be served by incorporating entire cases into appellate briefs. Further, this Court's decision in Morgan v. State clearly demonstrates its ability to precisely and cogently interpret a complicated decision such as Branzburg. Rather than rebut on a case-by-case basis the State's interpretation of the seminal cases, Tunstall will simply rely on this Court's own reading of the cases.

2. As was true in Morgan, the state attorney here is not investigating a crime because the underlying statute is clearly and facially unconstitutional (I.B. 29-34).[4]

3. Reporter Tunstall could not have been a witness to a crime because careful statutory analysis indicates no crime ever occurred (I.B. 39-40). No Ethics Commission complaint had been filed at the time of Tunstall's conversation with his source, and that source did not reveal his intent to file such a complaint. Therefore, the behavior at issue could not fall within the

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[4] This unconstitutionality is a result of the Supreme Court's decision in Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978). See I.B. 29-34. The State's attempt to distinguish Landmark relies upon two misstatements of the holding in that case (A.B. 38-39). The State suggests that Landmark approves of the punishment for violations of confidentiality when there is a temporary delay in access to information, rather than permanent closure of the information. The Landmark opinion simply does not make that distinction, but rather recognizes that many states permit access to information at some point in the process. 435 U.S. at 834. Neither procedure is deemed improper, but rather, it is the punishment for publication of information which is held to be impermissible.

The State also suggests Landmark addresses only liability for the publication of information by the media. This is exactly the distinction which Justice Stewart argues for in his concurring opinion. Id. at 848-49. The majority opinion, however, refuses to make that distinction:

> [T]he narrow and limited question presented, then, is whether the First Amendment permits the criminal punishment of third persons who are strangers to the inquiry, including the news media, for divulging or publishing truthful information regarding confidential proceedings of the Judicial Inquiry and Review Commission.

Id. at 847 (emphasis supplied).

The State's attempt to manufacture a distinction merely underlines the fact that the statute at issue in Landmark and the Ethics Commission non-disclosure statute here are indistinguishable.

proscription of section 112.317(6), Florida Statutes (1981), the Ethics Commission non-disclosure statute.[5]

4. Because of the unconstitutionality of the non-disclosure statute, Tunstall's source could not have committed a crime, and Tunstall could not have been a witness to a crime. No conviction based upon a violation of the non-disclosure statute could ever stand.

In summary, Branzburg does not require, or even suggest, that this Court should ignore its own precedent and that promulgated throughout the state and the nation by holding that Tunstall does not have a qualified privilege against compelled testimony. As in all situations, that privilege is essential here to prevent substantial interference with the free flow of information.

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[5] The State argues, after the fact, that other crimes may have been under investigation. This simply ignores reality. In the October 7, 1983 hearing, the state attorney said:

> [T]he information received from the press and these two reporters would go to identify the potential defendant did violate Florida Statute 112, subpart 317, subparagraph 6, dealing with confidentiality of complaining to the State Ethics Commission; that there is a compelling interest on behalf of the State notwithstanding the fact that the information is now more or less of public knowledge. We do have a misdemeanor offense. A first degree misdemeanor has been breached in this case...(R. 52).

Later, at the November 9, 1983 hearing, the state attorney reiterated that the investigation focused on an alleged leak of a confidential report to the Ethics Commission (R. 80). Thus, at no time was there any suggestion that the State was investigating anything other than an alleged violation of section 112.317(6).

II. THE FLOODGATES ARGUMENT IS NOT PERSUASIVE.

Perhaps the only practical argument raised by the State is the floodgates argument. The State suggests that recognition of Tunstall's reporters' privilege would open the gates to similar claims from everyone with a typewriter. This question of defining the limitations is not a new one, but rather has been addressed at great length by courts and commentators alike.

The First Amendment to the United States Constitution and Article I, Section 4 of the Florida Constitution protect both freedom of speech and of the press, in separate distinct statements. Clearly these constitutional clauses provide some degree of additional protection for the press not afforded under the free speech clause:

> That the First Amendment speaks separately of freedom of speech and freedom of the press is no constitutional accident, but an acknowledgment of the critical role played by the press in American society.

Houchins v. KQED, Inc., 438 U.S. 1, 17 (1978) (Stewart, J. concurring). See also Abrams, The Press Is Different: Reflections on Justice Stewart and The Autonomous Press, 7 Hofstra L. Rev. 559, 576-80 (1979) (hereinafter, "The Press Is Different").

Justice Stewart's remark was soundly based in history. As initially introduced by James Madison in 1789, the proposed First Amendment read:

> The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.

1 Annals of Congress 451 (Gales & Seaton Eds. 1789). Later, in stating his opposition to the Alien and Sedition Acts, Madison emphasized the importance of the press clause in the First Amendment:

> Among those rights, the freedom of the press, in most instances, is particularly and emphatically mentioned.

6 The Writings of James Madison 390-91 (G. Hunt Ed. 1906). History makes clear, therefore, that the press clause of the First Amendment was neither an afterthought nor a mere appendage to the speech clause. Abrams, The Press Is Different at 579.

If meaning is to be given to the press's constitutional protection, the body of those qualified for such protection must be defined. However, the necesssity of enumerating those eligible for the protection afforded by the reporters' privilege is not at issue in this case. Reporter Tunstall clearly is one of those for whom protection should be afforded. Indeed, as is true here, in the great preponderance of cases, courts have had little difficulty knowing a journalist when they see one. Abrams, The Press Is Different at 580.

Even if the "marginal reporter case" should make its way to this Court in the future, there is no reason to believe that the Court will not be prepared to rise to the occasion. Courts are in the business of wrestling with words and definitions.[6]

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[6] By way of analogy, the courts have been able to place workable definitions upon that most amorphous of concepts: religion. E.g., Davis v. Beason, 133 U.S. 333 (1890); Berman v. United States, 156 F.2d 377 (9th Cir.), cert. denied 329 U.S. 795 (1946). Imagine if courts approaching the (footnote cont)

Indeed, this Court recently faced the issue of defining an element of the press, that is, a newspaper. In Campus Communications, Inc. v. Department of Revenue, 10 F.L.W. 371 (Fla. July 11, 1985), this Court was called upon to determine whether the Independent Florida Alligator is a "newspaper" for taxation purposes. The Court did not shy from that responsibility, but rather determined that the Florida Alligator is a newspaper. Id. at 373. See also Green v. Home News Publishing Co., 90 So.2d 295 (Fla. 1956); Gasson v. Gay, 49 So.2d 525 (Fla. 1950).[7]

Perhaps the State's floodgates argument is best disspelled by the following quote from Floyd Abrams' law review article:

> In a legal world in which lawyers make tolerably acceptable livings disputing what is and is not "unreasonable" restraint of trade or "unfair" competition, it is simply unacceptable to say that because a word in the Constitution is difficult to define, it should be afforded no meaning at all.

Abrams, The Press Is Different at 583.

III. THE STATE FAILS TO ADDRESS TUNSTALL'S DUE PROCESS ARGUMENT.

Tunstall claims a lack of due process below on two grounds. First, the trial court failed to require the assistant state attorney to come forward with the fruits of his investigation,

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[6](cont) question "what is religion?" had adopted the view espoused by the State here. Rather than attempt the definition, they would have merely done away with freedom to worship.

[7] The definition issue is also addressed by Professor Nimmer in his treatise on the First Amendment. Nimmer suggests that "at the very least in order to qualify as part of the press there must be a publication." Nimmer on Freedom of Speech § 208[d] (1984).

and thus to demonstrate, in an evidentiary manner, whether the burden upon one seeking to overcome the reporters' qualified privilege had been met. Second, the trial court failed to permit appellate review of its denial of Tunstall's motion to quash the subpoena prior to finding Tunstall in contempt. The State sidesteps these issues by contending they were not raised at the trial court. This contention is false and misleading.

On page 1a of its answer brief, the State contends Tunstall did not "object to procedures" utilized below. However, pages 81 and 82 of the record indicate otherwise:

> [Mr. Hendry]: At this time I would ask the court to swear me so that I could present evidence as to the additional witnesses we have talked to, and why we feel that exhausts our investigation but for the reporters.
>
> [Mr. Thomas]: Your honor, I would object to that procedure, because although Mr. Hendry is sworn and I can cross-examine him, there may be questions that I want answered or to see the totality of the testimony from those individuals.
>
> * * *
>
> [The court]: I will direct the clerk to swear the witness, if you will proceed to the witness stand. I will overrule the objection.

On page 40 of its answer brief the State contends Tunstall did not request a stay pending appeal of the court's denial of his motion to quash. Pages 107-112 of the record indicated otherwise:

> [Mr. Thomas]: Before we reach the contempt citation, we would like to assert our appellate rights with the Fifth District Court of Appeal and challenge your honor's ruling....We would just like your honor to permit us to assert our appellate rights

> prior to being placed in a situation where we may be in contempt of your honor's order if the reporters refuse to testify.
>
> [The court then attempted to elicit a promise from the reporters that they would testify if the Fifth District Court of Appeal affirmed the trial court's order. The reporters would not agree to surrender their right of appeal to this Court in that manner.]
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> * * *
>
> [The court]: I think it would be an imposition upon the appellate court to require them to address almost the identical issue twice. So let's proceed.

When the facts are correctly presented and examined, it is obvious that due process issues were raised, but that due process was not afforded. This is especially egregious in a situation where First Amendment rights are impacted, because due process is to be scrupulously afforded in that setting. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 560-62 (1975). The procedure below failed to provide such due process and so reversal is proper (I.B. 42-47).[8]

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[8] The State also contends Tunstall lacks standing to challenge the constitutionality of the non-disclosure statute. With the single caveat that the State misrepresents the arguments in the initial brief, Tunstall is content to rely upon the initial brief on those issues (I.B. 25-28). Likewise, there is no need to reiterate that, pursuant to Trushin v. State, 425 So.2d 1126 (Fla. 1982) the facial constitutionality of a statute may be raised for the first time on appeal, as occurred in the District Court of Appeal below (I.B. 28).

The State also does not challenge Tunstall's argument that the contempt citation must rise or fall with that of the underlying denial of the motion to quash. If this Court determines the subpoena was improper, then the contempt citation must be reversed.

IV. THE STATE DEMONSTRATES A DISTURBING LACK OF REGARD FOR FIRST AMENDMENT VALUES.

Perhaps the most disappointing element of the State's brief is the mind set regarding First Amendment values which it demonstrates. The State suggests rather scornfully that Tunstall has only two interests in this proceeding: (1) to sell more newspapers and (2) to obstruct justice. Hopefully, the incredible fallacy inherent in those assumptions is obvious to this Court.

As Justice Boyd eloquently wrote in Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904, 910 (Fla. 1976):

> [Freedom of the press] is a cherished, almost sacred right of every citizen to be informed about current events on a timely basis so each can exercise his discretion in determining the destiny and security of himself, other people, and the nation.

In Morgan v. State, this Court also recognized the value of the confidential source relationship:

> [I]mportant public interest, as well as private interest, may be served by publication of information the press receives from confidential informants.

337 So.2d at 953.

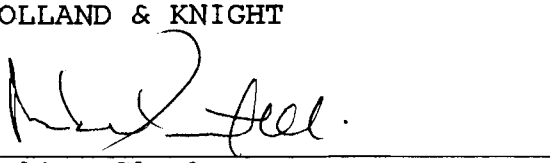
In short, notwithstanding the State's cynical view of press freedoms, this Court has recognized the "cherished" values inherent in the First Amendment and vigilantly protected those values from assault. It would be entirely inconsistent with that position to send James Tunstall to jail for six months for refusing to reveal his source when the underlying investigation could never result in a constitutional conviction. That result would be abhorrent, not only to the Constitution, but also to common sense.

CONCLUSION

The State seeks to jail a reporter for failing to testify before a state attorney's investigation which could never lead to a constitutional conviction. Further, it wishes to do so despite the fact that the reporter was not afforded due process. No conceivable set of circumstances could have a greater chilling effect upon the free flow of information.

For all of the reasons enumerated in the initial brief and in this reply brief, this Court should reverse the contempt citation and hold that Tunstall cannot be compelled to reveal his source.

HOLLAND & KNIGHT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished by United States Mail this 9th day of September, 1985, to: Honorable L. R. Huffsteler, Jr., Circuit Judge, Hernando County, Post Office Box 1660, Brooksville, Florida 33512; S. Ray Gill, State Attorney, 19 N.W. Pine Avenue, Ocala, Florida 32670; Harry O. Hendry, Assistant State Attorney, Hernando County Courthouse, Brooksville, Florida 33512; Honorable Jim Smith, Attorney General, Mark C. Menser, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301; Richard J. Ovelman, Esquire, The Miami Herald Publishing Co., One Herald Plaza, Miami, Florida 33101; George K. Rahdert, Esquire, Post Office Box 960, St. Petersburg, Florida 33731, Paul J. Levine, Esquire, and Sonia M. Pawluc, Esquire, Suite 3200, Miami Center, 100 Chopin Plaza, Miami, Florida 33131; Sanford Bohrer, Esquire, Thomson, Zeder, Bohrer, Werth, Adorno & Razook, 1000 Southeast Bank Building, 100 South Biscayne Boulevard, Miami, Florida 33131; Bruce W. Greer, Esquire, Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A., One Biscayne Tower, Suite 2800, Miami, Florida 33131; Ricki Tanner, Esquire, Ferrero, Middlebrooks & Strickland, Post Office Box 14604, Fort Lauderdale, Florida 33302; and Florence Beth Snyder, Esquire, 1201 - 2100 Ponce de Leon, Miami, Florida 33134.

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