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IN THE SUPREME COURT OF FLORIDA

CASE NO. 67,482

PALM BEACH NEWSPAPERS, INC., SCRIPPS-HOWARD BROADCASTING COMPANY, THE MIAMI HERALD PUBLISHING COMPANY AND THE NEWS AND SUN SENTINEL COMPANY,

Petitoners,

vs.

THE STATE OF FLORIDA,

Respondent.

ON REVIEW FROM THE DISTRICT COURT
OF APPEAL OF FLORIDA, FOURTH DISTRICT

INITIAL BRIEF OF RESPONDENT THE STATE OF FLORIDA

Pablo Perhacs
Assistant State Attorney
Law Building, 315 Third Street
West Palm Beach, Florida 33401
(305) 837-2450

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STATEMENT OF THE CASE AND FACTS

Two separate briefs have been filed by the media. The brief on behalf of the Miami Herald Publishing Company will be referred to as the Miami Herald. That of Palm Beach Newspapers, Inc., Scripps-Howard Broadcasting Company and the News & Sun Sentinel Company will be referred to as Palm Beach Newspapers.

The State generally accepts the statement of facts presented by both briefs for the media. The State does not accept the editorial comments on those facts nor the conclusions drawn from them.

SUMMARY OF ARGUMENT

There is no constitutional, statutory, procedural or presumptive right to the public or news media to attend discovery depositions.

Showings of compelling interest or of good cause need to be made only if a right of access exists.

There being no right, the State has no burden to meet to prevent the press from attending depositions.

ARGUMENT

Neither the news media nor the public have any right to attend discovery depositions.

The sharp clash on this issue is best portrayed by contrasting the approach presented by the media with that of the State. The media position is that the "State has yet to propose a logical basis for closing the depostions... and has asked the Court to recognize the State's absolute power to close depositions over the public's and defendant's objection." (Palm Beach Newspapers, Inc., pp. 20 - 21) The position of the State is that depositions have never been open proceedings and that the public and the media must demonstrate why they have a right to be present. Absent such a right, the question of closure need not be raised nor answered.

Each media brief posits two reasons why depositions should be open. In shorthand form, the reasons are:

Miami Herald I - Rule 1.280, Fla. R. Civ. P. argument

Miami Herald II - Historical Argument

Palm Beach Newspapers I - Constitutional argument

Palm Beach Newspapers II - Appellate Procedure argument.

The State will respond to each argument in the above order, and will then present arguments showing that the District Court was correct in its ruling.

The Miami Herald wants the opinion in Short v. Gaylord Broadcasting Co., 462 So.2d 591 (Fla. 2d DCA 1985), the decision expressly rejected by the Fourth District in Palm Beach Newspapers, Inc., v. Burk, 471 So.2d 571 (Fla. 4th DCA 1985.), to become the law of Florida. Implicit in the Short decision is the assumption that Rule 1.280(c)(5), Fla. R. Civ. P., grants the public and press a right of access to every deposition. The ruling in Short is nothing more than putting the cart before the horse. The State's argument is that Rule 1.280(c)(5) in no way grants a right of access and that therefore the State need not make any showing of any kind.

Rule 1.280(c) is a general rule delineating the applicability of protective orders in discovery matters. It allows a judge, upon a showing of good cause, to order "that discovery be conducted with no one present except persons designated by the court." 1.280(c)(5), Fla. R. Civ. P.

The rule is nothing more than a recognition of judicial authority to resolve disputes that occur during the discovery process. There is no logical method through which this authority can be construed to have created a right of access. For one thing, subsection (c)(5) uses the word "discovery", not "depositions". A consistent extension of the media's argument would require public access any time the prosecutor or defense counsel conducted discovery. This would include viewing evidence at police department evidence vaults, or the scientific testing of evidence by either party. It would also apply any time either a

prosecutor or defense counsel spoke with a prospective witness for the other side. This certainly is not the intent of the rule.

The second reason that Rule 1.280(c)(5) does not grant a right of access is illustrated by the following scenario. Reduced to its basic elements, the news media argument is:

a. The judge has the authority to exclude any person from attending a deposition;

b. A media reporter is a person;

c. A media reporter, because he is a person, may be excluded from attending a deposition;

d. A media reporter, because he may be excluded, therefore has a right to attend the deposition.

The fallacy of this position is readily apparent in the following rearrangement:

a. A lawyer (or judge) has the right to exclude any person from attending witness (or judicial) conferences in his office;

b. A media reporter is a person;

c. A media reporter, because he is a person, may be excluded from attending the conference;

d. A media reporter, because he may be excluded, therefore has a right to attend the conference.

More directly stated, the existence of a power to exclude persons from being in a particular place, in no way defines the class of persons who have a right to be in that place.

The Miami Herald also relies on the Federal Rule of Civil Procedure that corresponds to Rule 1.280. The judicially created presumption of openness in the federal system arises solely from an interpretation of the Federal Rules.

> In sum, the presumptive openness of discovery materials not used at trial derives only from the Federal Rules of Civil Procedure. No right of access to such materials lies either in the common law or the Constitution. Tavoulareas v. Washington Post Company, 724 F.2d 1010, 1017 (D.C. Cir. 1984).

Other differences between the federal and Florida rules of procedure show that media reliance on federal law is misplaced. The main difference is that Federal Rule 30(f)(1), Fed. R. Civ. P. requires the immediate filing of depositions with the clerk of court. The Florida rule is the opposite, and allows the filing of depositions only if the content is necessary for consideration by the court for determining any matter. Rule 1.310(f)(2), Fla. R. Civ. P. Once filed, any document is presumed to be open to the public, either in Florida or federal courts. Because they must be filed, federal depositions start out with a presumption of openness that does not exist for Florida depositions.

Miami Herald II

The gut level issue facing this Court is whether to allow the public and press to attend depositions in both civil and criminal cases. No amount of historical interpretation can decide the question facing today's courts. In any event, the State disagrees with the historical interpretation presented by the Miami Herald. Even the cases cited by the Miami Herald deal with an era in which a magistrate conducted the pretrial questioning.

Palm Beach Newspapers I

There is no doubt that the press and the public have a qualified First Amendment right to attend criminal trials, including voir dire. Glove Newspaper Co. v. Superior Court, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); Richmond Newspapers, Inc., v. Virginia, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980); Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984); Waller v. Georgia, _____ U.S. _____, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984). While this Court has expressly held that there is no First Amendment right to attend pretrial suppression hearings, Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla 1982), the State acknowleges that the public and press have a qualified right to attend all pretrial hearings. Yet with equal force, the State disagrees with the media that there is any extension of this body of law that provides or should provide access to any portions of the criminal process that are not judicial proceedings. Such a leap is not only unwarranted, but unwise.

Palm Beach Newspapers II

In this argument the media puts forth the notion that the State should not be allowed to seek appellate review of a pretrial order without showing a miscarriage of justice. The miscarriage of justice occured when Judge Mounts receded from his previous decision that depositions were judicial proceedings, and then ordered the State to conduct depositions as if they were judicial proceedings. The incorrect,

judicially authorized interference of the media with the discovery process in the prosecution of State of Florida v. John Freund and John Trent meets any legal test for appellate review.

CONCLUSION

Advocates for access view the situation as one in which the State is arbitrarily excluding the public and reporters from gathering information. In their eyes, being against access is as untenable as being for totalitarianism or cancer. On the other side, the situation is seen as one in which prosecutors and defense counsel should be allowed to perform their sworn duties to their clients in the best manner with the least interference. To this group, advocates of access are akin to interlopers and obstructionists.

The decision in this case will extend far beyond these emotional trappings. It could drastically modify the discovery process in all cases. The scheduling and locating of depositions could revolve around the desire of the public or press to attend. The "airing of laundry" (Palm Beach Newspapers, p. 7), which is the function of a trial, would take place without regard to the rules of evidence, and would alter the very nature of deposition taking. Lawyers could conduct pretrial press conferences under the guise of discovery. Our system of justice deserves better.

Depositions are not judicial proceedings in commonly and legally recognized meanings. Therefore, there is no presumptive or Constitutional right of access. If access is granted on the basis that the Rules of Civil Procedure grant such access, then access must be

granted to all depositions in civil cases. Trial courts, already overburdened, will have the additional load of refereeing disputes concerning location, time and numbers of people and cameras at depositions. If access is granted on the basis that the public has the right to be present whenever a public official is present during the course of performing his or her duties, then the same logic would grant public and press access anytime a public official interviewed a witness or made a phone call. On the same theory, access could be granted to law enforcement investigations, and to the serving of search and arrest warrants, and to the questioning of witnesses. It could even extend access to conversations between judges.

The present system works well in the balancing of competing interests in society. Trials and pretrial hearings are presumed to be open to the public. Pretrial investigations and preparation are not. In criminal cases, once the case has ended, the entire prosecution file is open to the public and the press. The only complaint the news media can have under the present system is that they must wait until the trial, or the case is over, to have access to all the material. This delay in no way detracts from the public's awareness of how the system functions, nor of the media's ability to monitor the performance of public officials. Whatever delay occurs is a small price to pay for the smooth functioning of the judicial system.

For these reasons the State requests that the decision of the Fourth District Court of Appeal be affirmed.

RESPECTFULLY SUBMITTED this 3RD day of April, 1986.

Pablo Perhacs
Assistant State Attorney
Law Building, 315 Third Street
West Palm Beach, Florida 33401
§9305) 837-2450

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Respondent The State of Florida was served by mail this 3rd day of April, 1986, upon the following:

Richard J. Ovelman, Esquire
General Counsel
The Miami Herald Publishing Company
One Herald Plaza
Miami, Florida 33101

Laura Besvinick, Esquire
SHARPSTEIN & SHARPSTEIN, P.A.
3043 Grand Avenue, Penthouse One
Coconut Grove, Florida 33133

ARKY, FREED, STEARNS, WATSON,
GREER & WEAVER, P.A.
One Biscayne Tower, Suite 2800
Miami, Florida 33131

Ray Ferrero, Jr., Esquire
FERRERO, MIDDLEBROOKS, STRICKLAND
& FISCHER, P.A.
P. O. Box 14604
Fort Lauderdale, Florida 33302

L. Martin Reeder, Jr., Esquire
Joan H. Lowenstein, Esquire
STEEL HECTOR & DAVIS
4000 Southeast Finanical Center
Miami, Florida 33131-2398

PABLO PERHACS
Assistant State Attorney