O/a 9-2-87

IN THE
SUPREME COURT OF THE STATE
OF FLORIDA

Case No. 69,660

FLORIDA FREEDOM NEWSPAPERS, INC.,

Petitioner,

vs.

THE HONORABLE ROBERT L. McCRARY,
Circuit Judge of Jackson County,
Fourteenth Judicial Circuit, State of Florida

Respondent.

Reply Brief of Amici Curiae The Miami Herald Publishing Company, The Florida Press Association, The Florida Society of Newspaper Editors, and The Florida First Amendment Foundation

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SUMMARY OF ARGUMENT

In their Initial Brief, amici curiae The Miami Herald Publishing Company, The Florida Press Association, The Florida Society of Newspaper Editors, and The Florida First Amendment Foundation (collectively "the Miami Herald") argued that (i) documents in the custody of the state attorney's office which are required by court rule to be provided to the defendant are public records which are not exempt from the disclosure requirements of Chapter 119, (ii) as non-exempt public records, such documents cannot be closed to the public unless closure is constitutionally required, and (iii) the party seeking closure must satisfy the test in Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982) in order to prove that closure is a constitutional necessity.

The State does not dispute the first two of these propositions but takes vigorous issue with the third. The State argues that a party seeking closure of these public records need only show "cause" to obtain confidentiality because the records are mere discovery materials. This is certainly wrong. The State gives no weight to the Legislature's judgment that these documents are public records which the public has a presumptive right to inspect. Public records can only be closed when constitutionally necessary, and a showing of "cause" is not the equivalent of constitutional need. As this Court has recognized on numerous occasions, the Lewis test defines when closure of public records is constitutionally mandated.

The courts below should have -- but explicitly declined to -- apply the Lewis test. For this reason and because the evidence introduced in support of closure would not have satisfied the requirements of the Lewis test, the decisions of the trial court and the First District must be reversed.

ARGUMENT

I. The Documents Provided To The Defendant By The State Attorney Are Non-Exempt Public Records Which May Only Be Sealed By The Court On A Showing Which Satisfies The Lewis Test.

A. The Documents Are Public Records Open To Public Inspection Unless Access Would Violate A Constitutional Right.

The State does not dispute that the documents are non-exempt public records generally open to public inspection under Chapter 119:

> Once given to defendants, it appears the witness statements become public records under section 119.011(3)(c)(5).

Ans. Br. 11-12; see also Ans. Br. 9 (same). But the State mistakenly characterizes the access claim made by the press petitioners as absolute:

> [The press petitioners] contend categorically and without exception that a court cannot, even temporarily, deny the press and public access to a Chapter 119 public record.

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Ans. Br. 7. In fact, the Miami Herald never makes this claim.

While the Miami Herald did note that the Legislature has the exclusive authority to create exemptions from the disclosure requirements of the Public Records Law, Init. Br. 10-12, the Herald also acknowledged that courts have the authority to seal public records when their disclosure pursuant to law would be unconstitutional. Init. Br. 16-17. The State does not truly dispute this principle, which is the one actually articulated by the Miami Herald. Ans. Br. 9 ("Chapter 119 is subject to constitutional constraints, as are all statutes.").

B. This Court's Lewis Test Defines When Closure Is Constitutionally Permitted To Protect The Rights Of Criminal Defendants From Harm Caused By Public Access To Public Records.

The State contends that, although the documents are non-exempt public records open to public inspection under Chapter 119, the court properly ordered them closed because "cause" for closure was shown, pursuant to Rule 3.220(h), Florida Rules of Criminal Procedure.

The State is incorrect. As the Miami Herald argued in its Initial Brief, the court may not order the closure of public records unless the Lewis test is satisfied.

Each of the arguments advanced by the State in support of the "cause" test is mistaken. First, although the

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State admits that the documents are non-exempt public records, it treats this essential fact as though it were of no significance. Like the First District Court of Appeal, the State analyzes the documents as if they are only discovery materials, the disposition of which is controlled solely by the rules of procedure. However, as the Herald has previously explained, Init. Br. 8-14, and as this Court noted in Palm Beach Newspapers, Inc. v. Burk, 504 So.2d 378 (Fla. 1987), the documents are more than simple discovery materials, they are public records to which the Legislature has created a specific statutory right of access. The Rule 3.220(h) "cause" test espoused by the State may be appropriate for discovery materials to which the Legislature has not spoken (such as unfiled deposition transcripts) but it cannot, and does not purport to, control public access to the public records of a state agency.

Second, the State places extensive reliance on the recent decision in Palm Beach Newspapers, Inc v. Burk, supra, (Fla. 1987), in which this Court held that because depositions are part of the discovery process and are not judicial proceedings, the public has no right to attend, or obtain unfiled transcripts of them. Arguing by analogy, the State claims that the public has no right of access to the

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documents because they, like the depositions in Burk, are not judicial records or proceedings to which there is a "tradition" of public access. Ans. Br. 11-16.[1/]

The State's Burk analysis is wholly inapposite. Although the State quotes at length from the decision, it fails to address in any way that portion of Burk which deals explicitly with the precise issue before the Court in this case. At note two of the decision, quoted in the Initial Brief of the Miami Herald, Init. Br. 14, the Court carefully distinguishes between the "narrow and specific situation" in which the Legislature has designated as public records those documents which are in the custody of the State and required by rule to be provided to the criminal defendant, and access to discovery materials in general. Burk, 504 So.2d at 384 n.2. Thus, far from supporting the State's argument, the Court's recent decision in Burk actually mandates its rejection.

Finally, the State contends that the Lewis test should not apply because it was "devised . . . to balance constitutional claims," Ans. Br. 15 (emphasis in original), whereas the access right at issue in this case is statutory. Similarly the State argues that Lewis is inapposite because

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1/ The State simply ignores the fact that while not open by tradition," these documents are open by act of the Florida Legislature.

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it applies only to "the closure of court proceedings . . . or court records," Ans. Br. 11, and the documents at issue in this case are merely discovery materials.

Neither claim has any merit. First, the Lewis test is not restricted to constitutional access claims. In fact, although the State fails to mention it, the access right at issue in Lewis was not constitutional in origin either: it was a common law right which this Court described as a "non-constitutional privilege." Lewis, 426 So.2d at 6. Thus, the Lewis test was specifically created to balance a non-constitutional access right against the "paramount" right of the accused to a fair trial. See Burk, 504 So.2d at 381 ("In Lewis, . . . we recognized a non-constitutional right of access and established a three-pronged test to balance the need for public access . . . against the paramount right of the accused to a fair trial.").[2/]

Second, as has already been pointed out, the documents are not merely discovery materials, they are public records. As legislatively defined public records, they merit

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2/ The State also cites Bundy v. State, 455 So.2d 330 (Fla. 1984), for the proposition that the defendant's rights are "weightier" than the public's right of access. The State fails to note that in Bundy, a case which received and still receives much more widespread publicity than this case, public access was permitted.

the same judicial protection as public judicial records and proceedings. Certainly the State offers no reason why records made public by the Legislature should be treated any differently than records made public by virtue of their role in the judicial process. The Court should take this opportunity to formally adopt the Lewis test for public records cases in which a constitutional interest in closure is asserted.

II. The Evidence Presented To The Trial Court Does Not Satisfy The Lewis Test.

In the alternative, the State argues that the evidence presented in support of closure satisfied the Lewis test. The State contends that the five newspaper articles which were introduced and the witness statements which were the subject of the dispute constituted sufficient evidence to justify closure.

Yet it is clear from the face of the trial court's orders that the court made no attempt to comply with Lewis. Although Lewis permits closure only to prevent a "serious and imminent threat to the administration of justice," 426 So.2d at 3, the trial court held that closure was proper "even when . . . not strictly and inescapably necessary." App. 118. In

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addition, although Lewis requires factual findings in support of closure, the only findings made by the trial court are conclusory and unsupported by any evidence.

It is equally clear that the evidence presented to the trial court could not have satisfied the Lewis test. The defendants introduced five newspaper articles published in January and February, 1986. They presented no testimony and no other evidence. Yet the mere fact of publicity does not prove that a defendant will be unable to obtain a fair trial. The United States Supreme Court has squarely held that "pretrial publicity -- even pervasive adverse publicity -- does not inevitably lead to an unfair trial." Nebraska Press Association v. Stuart, 427 U.S. 539, 554 (1976). Jurors need not begin the trial unaware of news reports regarding the crime with which the defendant is charged, even though those reports contain material inadmissible at trial. See Murphy v. Florida, 421 U.S. 794, 799 (1975). As the Supreme Court has stated, even if pretrial publicity would likely create in the minds of all prospective jurors a "preconceived notion as to the guilt or innocence of an accused," that fact, "without more," is insufficient to demonstrate a violation of the accused's right to a fair trial. Irvin v. Dowd, 366 U.S. 717, 723 (1961). "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented

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in court." Id.[3/] Moreover, in this case, the articles of which defendants complained were published some six months before the defendants went to trial or their cases were otherwise resolved. The likelihood that articles so removed in time from the date of trial would have prejudiced the defendants is minimal.

Similarly, there is no evidence to suggest that no alternative short of complete closure would have been effective in safeguarding the defendants' fair trial rights.

3/ Empirical research reinforces the Court's traditional skepticism concerning the prejudicial impact of pretrial publicity. These studies "indicate that for the most part juries are able and willing to put aside extraneous information and base their decisions on the evidence." R. Simon, The Jury: Its Role in American Society 117 (1980). Accord J. Buddenbaum, D. Weaver, R. Holsinger & C. Brown, Pretrial Publicity and Juries: A Review of Research 2 (1981). For example, an experiment at the University of Minnesota identified no difference in the verdict patterns of jurors who were not so exposed. See Kline & Jess, Prejudicial Publicity: Its Effect on Law School Mock Juries, Journalism Q., Spring 1966, at 113-16. Another study utilizing subjects drawn from local voter registration lists found that, to the extent jurors are influenced by sensational news stories before the trial, the trial process virtually eliminates any influence of the stories and leads to a verdict based solely on the trial evidence. See Simon, Murder, Juries, and the Press, Trans-Action, May-June 1966, at 40. "The results show that when ordinary citizens become jurors, they assume a special role in which they apply different standards of proof, more vigorous reasoning, and greater detachment." R. Simon, supra, at 117. Other studies have produced similar findings. Moreover, research indicates that prospective jurors exposed to pretrial media coverage of a criminal case are less likely to prejudge the case than those who learned about it from other second-hand accounts. See Riley, Pretrial Publicity: A Field Study, Journalism Q., Spring 1973, at 17.

Although the trial court rehearsed the list of alternatives to closure suggested in Lewis, it failed to consider any of the facts relevant to determining whether any one of the alternatives would have been sufficient. The State argues that "[w]e may presume [the court] took into account the relatively small population of Jackson County," Ans. Br. 19, but the population of Jackson County, where the trials were to be held, is over 40,000 people. Careful voir dire in a county of this size would clearly have been sufficient to secure the defendants a fair trial.[4/]

Other alternatives to closure the court simply declined to consider, contrary to the mandate of Lewis. For example, Lewis requires the court to consider continuing the trial as a cure for prejudicial publicity. 426 So.2d at 8. Nonetheless, the trial court specifically refused to contemplate this alternative. The court reasoned that a continuance might threaten defendants' speedy trial rights,

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4/ The State complains that the press petitioners do not explain how "empirical proof" of the need for closure could be developed. Ans. Br. 18. At a minimum, such proof should include evidence relating to whether the allegedly prejudicial articles were widely read. Such evidence would have revealed that the articles placed before the court were not. Four of the articles were published by The Tallahassee Democrat and The Panama City News-Herald, neither of which is located in Jackson County. The ABC Audit Reports of those publications show that their estimated paid circulation in Jackson County is 1510 and 435, respectively. Sunday circulation is slightly higher. One article was published by the Jackson County Floridan, which has an estimated paid circulation of 4500 in Jackson County.

although nothing in the record before the court suggested that any delay would have such an effect. App. 119. In so holding, the trial court effectively ruled out the possibility that a continuance could ever be an effective alternative to closure, thus directly contravening this Court's holding in Lewis.

The closure of the documents served no legitimate purpose in this case.[5/] Indeed, the cases of Gordon Hartley and Dale Sims only serve to illustrate why public access to the criminal justice system is so important. Both defendants were charged with crimes involving the racially motivated torture of prisoners in their custody. Dale Sims never went to trial. As a result of a plea bargain with the State, Sims was required to pay a fine and adjudication was withheld. Gordon Hartley was tried and convicted by the jury and sentenced to probation by the trial court. Neither defendant received any jail time.

Hartley and Sims were charged with very serious crimes. The trial court withheld from the public over a thousand pages of witness statements purportedly in order to safeguard their fair trial rights. Ultimately only one defendant went to trial; and neither received any jail time.

5/ The State argues that the closure was harmless because it was only "temporary." This Court has held to the contrary: "News delayed is news denied." State ex rel. Miami Herald Publishing Co. v. McIntosh, 340 So.2d 904, 910 (Fla. 1977).

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If the public is to understand and accept such an outcome, it is essential that public access be permitted. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

CONCLUSION

Amici curiae respectfully request that the decisions of the First District Court of Appeal be reversed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail this 20th day of July, 1987 to the following addressees:

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