IN THE

SUPREME COURT OF FLORIDA

CASE NUMBER: 69,660

FLORIDA FREEDOM NEWSPAPERS, INC.

Petitioner/Appellant

v.

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

Respondent/Appellee

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

APPELLANT'S REPLY BRIEF

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REPLY BRIEF

Appellee continues to proffer the ipso facto argument that release of the information will lead to publication which will lead to prejudice which will lead to a deprivation of the Defendants'rights. This is, however, unsupported by the evidence. Appellant has not suggested that the Defendants' Sixth Amendment rights are unimportant or undeserving of protection. Florida Freedom Newspapers does contend that any denial of the public's rights, statutory, common law, or constitutional, cannot be based on mere conjecture and supposition.

Appellee contends that Florida Freedom Newspapers ignores the inherent power to the court to protect the Defendants' Sixth Amendment rights, citing State ex rel Times Publishing Company v. Patterson, 451 So.2d 888,891 (Fla. 2d. DCA 1984). In reading this case, it is interesting to note that materials sealed there were much the same as those at issue in the instant case. In Patterson, the court impliedly recognized at 891, that access to records was very similar to access to proceedings and the First Amendment protection afforded that right of access. They went on to hold that denial of access must be judge by balancing the consitutional rights of the respective parties.

Appellee attempts to label the materials as "unfiled discovery materials" so as to deny Florida Freedom's constitutional, statutory, and common law right of access. As noted in the initial brief, the appellant contends the delivery of the documents to the trial court for the in camera inspection was sufficient to constitute a filing. This hollow assertion of "no filing" has been addressed recently in The Sarasota Herald Tribune v. Holtzendorf, 12 FLW 1204 (Fla 2d. DCA, May 8, 1987). There the court held that "the nonfiling of the documents amounted to a sealed file." Denial of access should not be predicated on this basis (nonfiling). Even if this court finds the documents to be "unfiled", they are still public records under Satz v. Blankenship, 407 So.2d 396 (Fla. 4th DCA 1981).

Appellant has not taken the position that Defendant should be deprived of a fair trial or that a court cannot control those proceedings before them. The newspaper does represent to this court that any curtailment of the public's right of access, whether it be a constitutional, common law or statutorily based right, must be substantiated by competent evidence sufficient to meet the three-pronged test.

Appellee states the three-pronged test is to balance constitutional claims. (Answer Brief at 15). In Palm

Beach Newspapers, Inc. v. Burk, 504 So.2d 378 (Fla. 1987), at 381 this Court noted,

> In Lewis, relying on Gannett and Richmond, we held there was no first amendment right "to attend pretrial suppression hearings as distinguished from the right to attend a criminal trial." (Citation omitted). Nevertheless, because of our concern for open government and our belief that public access was an important part of the criminal justice system, we recognized a non-constitutional right of access and established a three-pronged test to balance the need for public access to a pretrial suppression hearing against the paramount right of the accused to a fair trial.

It is clear from this language that the three-pronged test of Lewis has application in non-constitutional right of access cases. Appellant does, however, maintain that constitutional rights are involved.

Appellee affords the holding in Burk, supra, much broader scope than what, on its face, is a very narrow rule. The Court, at 383, simply holds there is no First Amendment right to attend the taking of depositions or to the unfiled depositions in criminal cases. PERIOD.

In arriving at this conclusion, the Court considered that in the facts in Burk there was "no independent right outside the trial process to the information sought." Id. at 382 (emphasis supplied). Here even the appellee confesses an independent statutory right to the

information. (Answer Brief at 12). Florida Freedom additionally maintains there are constitutional and common law rights of access as well.

Assuming, arguendo, that there is nothing more than a statutory right of access, the recognition by this Court that the three-pronged test is applicable in non-constitutional access cases, merits its application in the instant case.

The argument that the "temporary" nature of the denial of access somehow lessens the impact is without merit. This Court in State ex rel Miami Herald Publishing Co., v. McIntosh, 340 So.2d 904 (Fla. 1977), at 910 stated:

> News delayed is news denied. To be useful to the public, news events must be reported when they occur.

Additionally in Tribune Co. v. Cannella, 458 So.2d 1075 (Fla. 1984), this Court held that only those delays attendant to the retrieval/deletion process were acceptable.

Appellee contends that the criminal discovery rules also support this temporary denial. In furtherance of this argument appellee again relies on the Burk decision. Florida Freedom again feels this reliance is misplaced.

The access sought in Burk was to material in the "conception" (the taking of depositions) or the "gestation" (unfiled and maybe untranscribed depositions) stage. The material in the instant case was complete (borne if you would) and was delivered to another's (the Defendants') care. This material was in existence and denial of access would not have that beneficial impact claimed by appellee. (Answer Brief, page 16.)

The contention that the trial court's orders had a sufficient evidentiary base simply is not supported by the record. Appellee states the Court reviewed in excess of 1,000 pages of witness statements and this review and the newspaper articles introduced at the first hearing support the order. The mere review of these documents without any additional evidence proves nothing. A "cause" may have been shown but the "results" have not and cannot be inferred.

The "evidence" in this case closely parallels that in Sentinel Star Co., v. Booth, 372, So.2d 100 (Fla. 2d DCA 1979). There a few newspaper articles were used to support a claim of potential adverse publicity. In remanding the case to the trial court, the Second District noted that there must be "an immediate, not merely likely, threat to the administration of justice. The danger must not be remote or even probable; it must immediately

imperil." Id. at 102. (Emphasis supplied). Even the appellee, in their brief, cannot go beyond asserting a "probable effect." (Answer Brief at page 19.)

The very words of the orders entered by the trial court below reveal that the definiteness was not shown. The orders of March 13, 1986 (Appendix to Initial Brief, Exhibits 6 and 7) state in Paragraph 1 "that there may have been prejudicial pretrial publicity;" and "there may be more such publicity." The orders of April 16, 1986, (Appendix to Initial Brief, Exhibits 8 and 9) also confess this weakness in Paragraph 3 saying "it may influence public opinion: and in Paragraph 6, noting if publication occurred "it could be difficult, if not impossible to select an impartial jury...". (Emphasis added.) Additionally, in Paragraph 3, the court acknowledges the difficulty in measuring the adverse impact of such publicity.

The of "magic words" used in the orders cannot, by themselves, establish the required threat. The press' "right of access cannot be overcome by the conclusory assertion that publicity might deprive the Defendant of (a fair trial)." Press Enterprise Co. v. Superior Court, __U.S.__, 106 S.Ct. 2735, 92 L Ed.2d 1 (1986). The fact it may be "difficult" to protect Florida Freedom's and the

Defendants' rights does not justify curtailment of either's rights.

The proffer of information and argument without showing that the Defendants would be deprived of a fair trial and the causal relationship between the two is insufficient to merit denial of access. There must be an evidentiary basis. Miami Herald Publishing Company v. Morphonios, 467 So.2d 1026 (Fla. 3rd DCA 1985) and Ocala Star Banner Corporation v. Sturgis, 388 So.2d 1367 (Fla. 5th DCA 1980).

Appellee attempts to shift the burden to the press at page 19 of their brief noting the press has not "attempted to demonstrate that the trial court misstated the content and misperceived the probable effect of the witness statements." The burden rests with those seeking closure. Miami Herald Publishing Company v. Lewis., 426 So.2d 1 (Fla. 1982), Morphonios, supra, and McIntosh, supra.

The appellant in discussing the "proof" of the three-pronged test confirms that no "results" were shown to the Court but justifies the decision by stacking inference upon inference. Appellant takes issue with the assertion that the "approach and analysis (was) in accord with that approved in Cooksey... (Answer Brief at Page 20). State ex rel Tallahassee Democrat, Inc., v. Cooksey, 371 So.2d 207,210 (Fla. 1st DCA 1979) held that closure of a file

could occur only "under the most compelling reasons and provided the court (made) a full exploration of all relevant facts, opposing views and possible alternatives...". (Emphasis supplied). The record clearly demonstrates no such inquiry was made. This is an abuse of discretion at best and the process used more likely constituted error as a matter of law.

Appellee acknowledges that the press had the right to interview witnesses (Answer Brief at page 20) and yet claims the order would be effective in its stated purpose. (The third prong of the Lewis test). The identity of the witnesses had been made public by Dunning's letter of March 17, 1986. (Appendix to Initial Brief, Exhibit 10). With their identity known, could not the press obtain basically the same statements straight from the horses's mouth? The orders merely put an added burden on the press to accomplish the end result by indirect, rather than direct means. The "end-run" possibility shows how flawed the orders were. If anything, this indirect method would be potentially more prejudicial to the Defendants. Nebraska Press Association v. Stuart, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), 427 U.S. at 567.

Gag orders are without doubt an abridgement of First Amendment rights whether they limit publication or speech.

Appellant does not contend that gag orders may never be used but the burden which must be met to sustain such orders is of the highest order. The "hyperbole" describing these order and attributed to the Democrat (Answer Brief at page 22) is a paraphrase of that description used by the U. S. Supreme Court in Nebraska Press Association, supra, 427 U. S. at 559.

Appellee disparages the press for seeking to insure that First Amendment values are protected saying they protest too much.

Chief Justice Burger in Nebraska Press Association, supra, noted the instant problem had been with us for years and recognized the importance of the press and the First Amendment in protecting all liberties. Burger noted that Thomas Jefferson acknowledged when he wrote on the publicity surrounding John Jay that: "Our liberty depends on freedom of the press, and that cannot be limited without being lost." 427 U. S. at 548.

Respondent's assertion that the press protests too much also brings to mind a quote from Martin Niemoeller:

> "In Germany they came first for the Communists, and I didn't speak up because I wasn't a Communist. Then they came for the Jews, and I didn't speak up because I wasn't a Jew. Then they came for the trade unionists, and I didn't

> speak up because I wasn't a trade unionist. Then they came for the Catholics, and I didn't speak up because I was a Protestant. Then they came for me, and by that time, no one was left to speak up."

The press and others hopefully will continue to protest when such liberties are at stake.

Appellee would have this Court accept the premise that prejudice would flow to the Defendant merely by virtue of the pretrial media coverage. The U. S. Supreme Court recognized in Nebraska Press Association, supra that "pretrial publicity--even pervasive, adverse publicity--does not inevitably lead to an unfair trial." 427 U.S. at 554. See also Irvin v. Dowd, 366 U. S. 717, 81 S.Ct. 1639 (1961), 366 U.S. at 722, 723.

The Defendants failed to show by competent evidence that they would be deprived of a fair trial absent a denial of access or the entry of a gag order. While the orders used those "magic words," the record is lacking in evidence to support such drastic measures. Nebraska Press Assn. 427 U. S. at 565. Appellant urges reversal.

CONCLUSION

As the record clearly shows an absence of evidence to support the trial court's actions, Florida Freedom Newspapers, Inc., urges reversal of the First District Court of Appeal. Additionally, Florida Freedom urges a holding that the three-pronged test must be met in all cases in which access to court files is denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief has been furnished to the following this 17th day of July, 1987:

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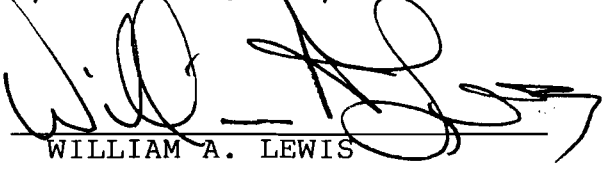
By 
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