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MAY 28 1993

CLERK, SUPREME COURT

By _____
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IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,726

MICHAEL VASILINDA,
an independent Florida
television journalist,

Petitioner,

vs.

WILLIAM LOZANO and the STATE OF FLORIDA,

Respondents.

ANSWER BRIEF OF RESPONDENT WILLIAM LOZANO

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transferred the appeal to the Fifth District Court of Appeal, which was properly vested with appellate jurisdiction over this matter, [App.4].

The Fifth District Court of Appeal certified the jurisdictional issue to this Court. [App.5], and at the same time denied the relief sought by the Petitioner in the event it was vested with jurisdiction.

The Petitioner has filed an initial brief and Petition in this matter addressing both the jurisdictional issue in the Certified Question, and the merits of the appeal, to wit, that the trial court erred in limiting the media's coverage of the judicial proceedings, by not allowing the filming of the jury and potential jurors.

This Court ordered that no briefs on jurisdiction are to be filed, and ordered the brief on the merits due pursuant to the schedule therein. In an abundance of caution, the Respondent William Lozano, by and through undersigned counsel, hereby answers the initial brief of appellant.

SUMMARY OF ARGUMENT

Florida law provides that once a court transfers venue, it has lost jurisdiction. University Federal Savings and Loan Assoc. of Coral Gables v. Lightbourn, 201 So.2d 568 (Fla. 4th DCA 1967). When the change of venue order was entered, the Ninth Judicial Circuit in and for Orange County became vested with complete jurisdiction over the subject matter of the cause, all of the parties thereto, and all incidents to the matter. Accordingly, the appellate court with jurisdiction to review any and all order stemming from this matter, is the Fifth District Court of Appeal.

The trial court's limitation on media coverage of the jurors and potential jurors was proper. There is no mandate in the Florida Constitution or the United States Constitution, or in the common law, requiring courts to allow the electronic media in all judicial proceedings. A trial court has discretion in determining whether to exclude the media from the proceedings. The media was provided an opportunity to be heard, and was not summarily denied access to all of the judicial proceedings in this matter. Although an evidentiary hearing may be conducted, it is not required. In any event, the trial court did conduct two hearings on this matter, and determined, based on the facts, circumstances, judicial notice, and the law, that the interests of justice were better served if the jurors were not filmed, and their identities were not disclosed. The trial court based its decision on findings, which findings are supported by the record below.

Because there is no first amendment issue in this matter, the Defendant's right to a fair trial outweighs any claims that the media may have to unlimited access to the proceedings. The trial court properly determined that the defendant's right to a fair trial

may be jeopardized if the media is allowed to film the jurors and potential jurors. This determination is well within the province of the trial court and should not be disturbed.

ARGUMENT

I. THE FIFTH DISTRICT COURT OF APPEAL IS THE PROPER COURT TO ASSERT JURISDICTION AND REVIEW THE ORDER ENTERED BY THE CIRCUIT JUDGE AS ACTING JUDGE FOR THE 9TH JUDICIAL CIRCUIT.

It is a well settled principle of law in Florida, that once a court transfers venue, it has lost jurisdiction. See University Federal Savings and Loan Assoc. of Coral Gables v. Lightbourn, 201 So.2d 568 (Fla. 4th DCA 1967). Upon a change of venue the transferee court became vested with complete jurisdiction and "acquired jurisdiction of the subject matter of the cause, all of the parties thereto, and all incidents thereto." Id. at 570. See also Florida Elections Commission v. Smith, 354 So.2d 965 (Fla. 3d DCA 1978). Judge Thomas E. Spencer was assigned as acting judge in and for the Ninth Judicial Circuit, Orange County, Florida, by the Chief Justice, and venue in this matter was transferred to the Ninth Judicial Circuit in and for Orange County, Florida. As such, any and all orders entered by Judge Spencer in the within matter are entered by a Ninth Judicial Circuit Judge, acting within the scope and authority of a Ninth Judicial Circuit Judge, on a matter within the jurisdiction of the Ninth Circuit. Therefore, the appropriate appellate court to review all appellate matters arising in the Ninth Judicial Circuit is the Fifth District Court of Appeal.

Petitioner's argument that the Third District Court of Appeal is the proper court to review matters arising in the Eleventh Judicial Circuit completely misses the point. The court order under review did not arise in the Eleventh Judicial Circuit. It arose in the Ninth Judicial Circuit, and as such is reviewable by the Fifth District Court of Appeal. Petitioner

would have this Court believe that once the Eleventh Judicial Circuit lost jurisdiction, Judge Spencer was without authority to enter the order and that the order should be vacated. This argument also, misses the point. The facts and the law are clear and simple. The order under review was entered in this matter after the venue was transferred to the Ninth Circuit. Once the order transferring venue had been entered, the court vested with jurisdiction was the Ninth Circuit in Orange County, **not** the Eleventh Circuit. The order was entered by Judge Spencer, sitting as a Ninth Circuit Judge. The Eleventh Judicial Circuit had lost jurisdiction, but Judge Spencer had not lost jurisdiction over the matter. Therefore, the proper appellate court to review orders in this matter is the Fifth District Court.

**II. THE LIMITATION OR EXCLUSION OF THE MEDIA
FROM THE COURTROOM IS PROPERLY WITHIN THE
DISCRETION OF THE TRIAL COURT.**

The seminal decision in In re Petition of Post-Newsweek stations, Florida, Inc., 370 So.2d 764 (Fla. 1979), amended Canon 3(A)(7) of the Florida Code of Judicial Conduct, and reversed the prior rule **prohibiting** electronic media coverage in the courtroom, except in certain circumstances. The Petitioner's bare assertion that the trial court's order is in contravention of the ruling in Post-Newsweek is entirely without merit. The Petitioner would have this Court read Post-Newsweek as a case **mandating** access by the electronic media of all judicial proceedings. There is no such mandate, the electronic media's presence at judicial proceedings is "desirable, but it is not indispensable." Palm Beach 395 So.2d at 549.

In Post-Newsweek, this Court held that "there is no per se proscription against

electronic media coverage of judicial proceedings [b]y the same token **we reject** the argument of the petitioner that the first and sixth amendments to the United States Constitution **mandate** entry of the electronic media into judicial proceedings." Id. at 774. (emphasis added). Clearly, unlike Petitioner's assertions, there is no requirement that full (or even limited) media coverage be allowed in all judicial proceedings. The trial court's order is in compliance with the decision of this Court in Post-Newsweek.

In fact, the Post-Newsweek Court explicitly vested the trial courts with discretion in determining whether to exclude the media from the proceedings. The Court stated:

[W]e can conceive of situations where it would be legally appropriate to **exclude** the electronic media where the public in general is not excluded we deem it imprudent to compile a laundry list or adopt an absolute rule to deal with these occurrences. Instead, the matter should be left to the sound **discretion** of the presiding judge . . .

Id. at 779. (emphasis added).

This case provides one such situation where it is legally appropriate to exclude the electronic media. Here, there is a history of racial tensions, civil disturbances, and this matter has been reversed and remanded for trial based partly on the fear and intimidation of jurors. See Lozano v. State, 584 So.2d 19, 22 n.4 (Fla. 3d DCA 1991). These factors are weighed in order to determine whether the limitation or exclusion of the media is necessary. In applying the Post-Newsweek standard, the jury is the "particular participant" in the process, and the media coverage of jurors and potential jurors would be qualitatively different in that the potential for juror intimidation and harassment is great. This could result in a biased or coerced verdict. The concerns for justice and a fair verdict, free from fear and intimidation far outweigh the concerns of limiting some of the

media's coverage is warranted in order to grant the defendant a fair trial, and thus, the trial court properly exercised its discretion and limited the media's coverage of the jurors.

III. THE MEDIA WAS NOT SUMMARILY EXCLUDED FROM THE PROCEEDINGS, BUT WAS AFFORDED AN OPPORTUNITY TO BE HEARD, AND THE RECORD ADEQUATELY REFLECTS THE COURT'S FINDINGS.

This Court in State v. Palm Beach Newspapers, Inc., 395 So.2d 544 (Fla. 1981), dispelled the incorrect assumption that an evidentiary hearing must be conducted whenever a court seeks to limit or exclude media coverage of a judicial proceeding, "[a]n evidentiary hearing should be allowed in all cases to elicit relevant facts if these points are made an issue, **provided** demands for time or proof do not unreasonably disrupt the main trial proceeding." 395 So.2d at 548. (emphasis added). First, this is not a case where the trial court **summarily excluded** the media from complete coverage of the trial. The order in question simply circumscribes media coverage of the jurors, during voir dire and trial and from disclosure of information concerning the jurors for a period of six months after the trial while allowing the jurors to voluntarily approach the media after trial. The trial court allowed **all** interested parties, including the petitioner herein, to appear at two different hearings, present evidence and argue their position. This was not a summarily ordered exclusion of the media. As such, the court order should be allowed to stand.

Furthermore, the trial court's order conforms to the requirement of findings enunciated in Palm Beach Newspapers, in which this Court explained its holding of Post-Newsweek, as it related to the standard adopted therein, and the requirement of a finding by the trial court in order to exclude cameras from the courtroom, as follows:

we reject any suggestion that a 'finding' within the contemplation of our Post-Newsweek decision requires a written order which separately identifies and labels a paragraph or sentence as "finding of fact". What is contemplated is a finding on the record, whether that be in a written order or in a transcript of the hearing Indeed, a ruling can be supported by matters within the judicial knowledge of the trial judge, provided they are identified on the record and counsel given an opportunity to refute or challenge them.

395 So.2d at 547.

Moreover, the trial of a criminal defendant cannot be postponed in order to hold mini-trials on such matters, which are easily determined in a more expeditious and efficient manner, "[m]ini-trials which disrupt the timing, procedures or sequence of the main trial are to be avoided at all costs." Palm Beach Newspapers, 395 So.2d at 549. Here, the trial court conducted two hearings on this matter. The trial court's findings are contained in the record below. Accordingly, based upon all of the foregoing, it is evident that the trial court's ruling was proper, and should not be disturbed.

IV. THE TRIAL COURT PROPERLY TOOK JUDICIAL NOTICE OF THE FACTS AND CIRCUMSTANCES IN THIS MATTER IN SUPPORT OF ITS RULING LIMITING THE MEDIA'S FILMING OF THE JURY.

Both common law and statutory law allow for a trial court to take judicial notice of certain facts and circumstances. In Mitchum v. State, 251 So.2d 298 (Fla. 1st DCA 1971), the First District defined judicial notice to be "the cognizance of certain facts which judges and jurors may properly take and act upon without proof, because they already know them [c]ourts are presumed to know what everyone knows ..." Id. at 300. (citations

omitted). The trial court properly took judicial notice of the violent history of this matter¹, the likelihood that the jurors fear of racial unrest will not afford the defendant a fair trial², that the jurors would be unduly harassed by the press³ and that a change of venue was mandated in order to afford the defendant a fair trial.

Additionally, Sec. 90.202, Florida Statutes (1991), provides that a court may take judicial notice of certain facts, circumstances, and events. In interpreting Sec. 90.202(6), the Fourth District in Allstate v. Greyhound Rent-A-Car, Inc., 586 So.2d 482 (Fla. 4th DCA 1991), held that it is proper to take judicial notice of all judicial records. There is factual evidence in the record below concerning all of the factors enumerated above. The record supports the trial court's order limiting media coverage of the jurors.

Furthermore, in State v. Reyes, 581 So.2d 932 (Fla. 3d DCA 1991), the Third District held that a court could take judicial notice of the fact that drug-rip-offs are violent, and common-place in Miami. Id. at 934. Likewise, it is proper for the trial court in this matter to take judicial notice of the racial unrest produced by the facts surrounding a case. The presence of the cameras filming the jurors will compound any fear or intimidation that they may already feel, and possibly prejudice or sway the deliberations and verdict. Beyond doubt, this intimidation of the jurors would deny the defendant a fair trial. It was proper for the trial court to analyze these factors in making its determination, and the trial court's order meets the requirements enunciated in Palm Beach Newspapers,

¹ The facts surrounding this case sparked several days of rioting in Overtown in 1989.

² See Lozano v. State, 584 So.2d 19, 22 n.4 (Fla. 3d DCA 1992).

³ See New York Times article which is Exhibit A to Pretrial Order I [App.].

395 So.2d Accordingly, the trial court's ruling was proper and should not be disturbed.

**V. THE DEFENDANT'S RIGHT TO A FAIR TRIAL IS
PARAMOUNT TO THE MEDIA'S RIGHT OF ACCESS TO
COURT PROCEEDINGS.**

The crucial determinant in deciding to limit or exclude the electronic media is whether the defendant will be afforded a fair and speedy trial. This is why the trial court is allowed discretion in determining these matters on a case by case basis. In Palm Beach Newspapers, this Court stated "the issue in these hearings is collateral to the rights of the state and the defendant to a fair trial [w]here there is no competing first amendment claim, as here, the issue must of necessity be tipped in favor of exclusion ..." 395 So.2d at 548. There is no competing first amendment claim in this matter, and the Defendant's right to a fair trial must prevail. The constitutional dimensions which a defendant must show in order to have cameras **excluded** from the courtroom, are met by the defendant's Sixth Amendment right to a fair trial by a jury of his peers. The Defendant here has been able to demonstrate that he will be prejudiced by a contrary holding. See Jent v. State, 408 So.2d 1024 (Fla. 1981).

Moreover, the limitation on the media is limited and minute in comparison to the possible prejudice that the Defendant may suffer. In this matter, the cameras were **not excluded** from the courtroom - they were limited to not filming the jury or potential jurors. Clearly, the scales must be tipped in favor of defendant's right to a fair trial, and not to the media's whimsy that they be allowed to cover **every** aspect of the trial. The public's right to be informed is more than satisfied by the media's coverage of the testimony of the witnesses. The essence of the trial, as far as the public is concerned, is the

witnesses' testimony. Here, the coverage of the State's case and the defense's case is not limited or excluded from media coverage. The Petitioner's assertion that the inability of the public to see the jury may result in the public's misapprehension that the jury is biased is spurious and illogical. The public is informed. In fact, the composition of the jury - which Petitioner stresses as the "crux" of this case - is known to the public through media coverage. There is no need for the public to be "informed" as to who the jurors are, or what they look like.

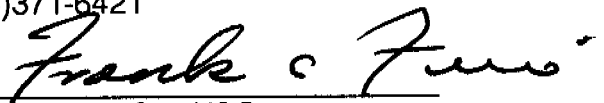
This trial court has not abused its discretion, its ruling is supported by findings in the record, and the defendant has amply demonstrated the potential for undue prejudice which could result in the violation of the Defendant's sixth amendment right. Accordingly, this Court should affirm the trial court's order limiting media coverage of jurors, and dismiss the Petitioner's Petition herein.

CONCLUSION

As stated by this Court in Palm Beach Newspapers, media coverage is "desirable, but it is not indispensable." 395 So.2d at 549. Here, the media has been allowed access to the courtroom, but has been properly limited in its access by the trial judge, in the interest of granting the defendant a fair trial. As such, the trial court's order should not be disturbed, and the Petitioner's Petition should be dismissed.

Respectfully submitted,

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