

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND
FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

CASE NO: CIO 00-5358

BEE LINE ENTERTAINMENT
PARTNERS, LTD., et al.,

Defendants.

**ORDER GRANTING MOTION DECLARING THAT THE
INVESTIGATIVE HIDDEN POLICE VIDEOS ARE OBSCENE AND
CLARIFYING THAT THE PUBLIC RECORDS LAW APPLIES**

The Court has before it two motions seeking to deny the public full access to videotapes created by the State in its investigation of the Defendants in the above-captioned case. First, there is the motion of the Office of the Statewide Prosecutor seeking a declaration from this Court that videotapes created by the State in its investigation of the Defendants in the above-captioned case are obscene and should be withheld from the public despite the lack of any precise exemption from the Public Records Act, Chapter 119, Florida Statutes. Second, there is a motion by the Ninth Judicial Circuit State Attorney's Office on behalf of the Metropolitan Bureau of Investigation (MBI) which seeks to prevent copying of the tapes because they might reveal law enforcement surveillance techniques and seeks a protective order directing that this Court control the manner of release of the tapes if they are found to be a public record.

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Having heard oral argument of the parties, having considered the memoranda submitted by the State and the interveners on behalf of the media: Orlando Sentinel Communications Company, publisher of The Orlando Sentinel (the "Sentinel"), Central Florida News 13, and WKMG-TV, and otherwise being duly advised, it is hereby

CONSIDERED, ORDERED and ADJUDGED:

1. Article I, Section 24 of the Florida Constitution guarantees to the citizens of this State the right of access to public records except with respect to records specifically exempted pursuant to Section 24. Chapter 119 of the Florida Statutes also states that it is the policy of the State of Florida that all state, county, and municipal records shall be open for personal inspection by any person. The Public Records Act is to be liberally construed in favor of open government. *Tribune Co. v. Public Records*, 493 So. 2d 480 (Fla. 2d DCA 1986). Exemptions are to be construed narrowly and limited to their stated purposes. *Id.* When in doubt, courts should find in favor of disclosure rather than secrecy. *Id.* These principles are applicable to the Court's analysis.

2. The Statewide Prosecutor's Office has asserted that the videotapes at issue here are obscene and therefore may not be provided to the public because they are subject to the operation of Section 847.011(7), Florida Statutes (1999). In pertinent part, the statute states that the owner of obscene material has no property right to obscene materials seized by the law enforcement and that such seized obscene material shall be destroyed after the prosecution has no further need of the material. The intervenors have brought forward three reasons why this argument is not persuasive.

3. First, the intervenors assert that the videotapes created by the State in the course of its investigation cannot constitute obscene material for the purposes of Section 847.001(7), Florida Statutes. And upon careful consideration, this Court disagrees. Section 847.001 (7), Florida Statutes defines "obscene" as:

the status of material which: (a) [t]he average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest; (b) [d]epicts or describes, in a patently offensive way, sexual conduct as specifically defined herein; and (c) [t]aken as a whole, lacks serious literary, artistic, political, or scientific value.

(emphasis added). This Court has reviewed, in camera, three video tapes that the State contends are obscene. Out of 45 hours of investigative hidden police video tapes, only these three tapes were provided to this Court and they are found by this Court to be obscene. This Court, after reviewing said video tapes, finds that the average person, applying contemporary community standards, would find, taken as a whole, that the tapes do appeal to the prurient interest and depict, in a patently offensive way, sexual conduct, and taken as a whole, the videos lack serious literary, artistic, political or scientific value. Approximately 62 minutes of video tape fall into this classification. The court has only been provided with and viewed the following tapes:

Tape # CCIB-17	June 23, 2000
Tape # MBI - 9 - C	June 1, 2000
Tape # MBI - 8 - B - C	May 22, 2000

4. The investigative hidden police videos were created to prosecute crime and can constitute a product that does appeal to the prurient interest and depicts patently offensive conduct. This Court finds that the underlying conduct is offensive, distasteful, disgusting, and demeaning to women, men and society, but that is not the test. The

material is obscene, if it depicts underlying conduct that is patently offensive. This Court finds that these videos depict sex performances or sex shows and does meet the criteria of the Statute and the Florida and Federal Constitutions, as obscene. This determination rests with the manner in which the underlying conduct is depicted. The videotapes were created by law enforcement to be used by the State as evidence in this civil case and in other criminal cases; the purpose for the creation of the tapes does not negate the question of obscenity nor its status as a public record.

5. The statutory provision cited by the State, Section 847.011(7), Florida Statutes, and the case Carlise v. State ex rel Smith, 319 So. 2d 624 (Fla. 4th DCA 1975) are wholly inapplicable. Section 847.011(7) applies to materials seized by the State in the course of an obscenity prosecution. The statute contemplates pornographic movies and other materials sold in commerce. It cannot contemplate police surveillance material that is created by the State and used as evidence to support a civil action. Furthermore, the statute expressly states that there is no property right to these materials. See § 847.011(7), Fla. Stat. (1999). It does not address the Constitutional right of the Public under Article I, Section 24 and Section 119.07, Florida Statutes (1999). As will be explored below, without a direct and specific exemption to the Public Records Act, this Court will not imply one.

6. Second, the intervenors state that even if this Court finds the material to be "obscene," the Constitution and Chapter 119 of the Florida Statutes compel public disclosure of these materials. The Court agrees, under Article I, Section 24 of the Florida Constitution, access to public records and meetings is a fundamental constitutional right.

While there are exceptions to this right, they are limited. As subsection (c) states:

The legislature, however, may provide by general law for the exemption of records from the requirements of subsection (a) . . . provided that such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law.

Art I, § 24(c), Fla. Const. The Court finds there is no constitutional exemption based on content of the public records. Further, the legislature has not provided for the exemption of records that are obscene. Without such an exemption, the records must be disclosed. The same result is compelled by *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979) and *Gadd v. News-Press Publishing Co.*, 412 So. 2d 894 (Fla. 2d DCA 1982). See also *News-Press Publishing Co. v. Gadd*, 388 So. 2d 276, 278 (Fla. 2d DCA 1980) ("Absent a statutory exemption, a court is not free to consider public policy questions regarding the relative significance of the public's interest in disclosure and the damage to an individual or an institution resulting from such disclosure.").

7. An examination of Section 847.011, Florida Statutes reveals no provision exempting obscene materials from the Public Records Act. Any arguments by the State that the policy of the statute compels this Court to find an exemption are the types of arguments that the Florida Supreme Court in *Wait* said should not be considered.

8. Third, the intervenors point to case law contrary to the State's argument that releasing these tapes would be a crime. As the court in *Williams v. City of Minneola*, 575 So. 2d 683, 688 (Fla. 5th DCA 1991) held, custodians of records cannot be liable for having obeyed the Public Records Act. The *Minneola* case is also instructive because it also involves sensitive material of a videotape and photographs of an autopsy. The court found

in *Minneola* that the videotape and photographs were made in connection with official business of the police department to preserve and document physical evidence which might assist in investigation and, therefore, were Public Records. See *id.* It is impossible to distinguish the *Minneola* case from this one.

9. This Court agrees with the intervenors's arguments. In making this determination that these are Public Records subject to the provisions of Section 119.07, Florida Statutes, this Court has a warning for those who might use these records for some conduct that violates State law. There is a difference between conduct and access to Public Records. The violation of laws of the State is no less a violation if the violator uses Public Records to do it. Thus, if a stalker uses Public Records to locate a victim, the act of stalking can be independently punished even though access to Public Records might have assisted the stalker. Similarly, if a person uses the Public Records at issue here in such a way to create an obscene performance, the fact that these records were made by the law enforcement and must be available to the public does not create some immunity against prosecution if the videotapes are used in unlawful conduct.

10. The State, in its request that the Court control the manner in which the tapes are disclosed, contends that the information on the tapes falls within the exemption set forth in Section 119.07(3)(d), Florida Statutes for information revealing surveillance techniques. The intervenors argue that the videotapes do not properly fall within this exemption because the information on the tapes is simply the events recorded by undercover officers using hidden cameras. The Court agrees that the information on the tapes shows the result of the law enforcement's surveillance and not information regarding the method of surveillance. The State has not identified any sensitive surveillance techniques or

procedures that will be revealed by allowing access to these tapes. In fact, the affidavit attached to the Complaint in this matter already reveals that undercover officers and hidden recorders were used. The Court finds that the information on the tapes is not information revealing surveillance techniques within the meaning of Section 119.07(3)(d), Florida Statutes, but rather, is "criminal investigative information" within the meaning of Section 119.011(b), Florida Statutes which information must be disclosed when the investigation, as in the present case, is no longer active.

11. Further legal support for this Court's interpretation can be illustrated by a recent case from the district court in Georgia which is helpful. See *Van Etten v. Bridgestone/Firestone, Inc.*, --- F. Supp. 2d ---, No. Civ.A.CV298069, 2000 WL 1475816 (S.D. Ga. Sept. 27, 2000). *Van Etten* obviously dealt with the recent controversy over the Firestone tires. Several media outlets including the Chicago Tribune, CBS Broadcasting and the Los Angeles Times brought motions to intervene in a civil case involving negligence and wrongful death against Bridgestone/Firestone and Ford, as a result of an accident involving a blown out tire. The Media sought to unseal many of the filings in the case which normally would have been public record. Much of the case file was sealed in order to protect trade secrets of the tire companies.

12. After granting the media's motion to intervene, the court also granted the motion to unseal the court records. The court stated:

The starting point in such a discussion is the proposition that, absent some exceptional circumstances, trials are public proceedings. There is a strong common law presumption in favor of public access to records filed with the Court in conjunction with any case, civil or criminal. The United States Supreme Court has noted that it is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents. The Eleventh Circuit has been equally clear that there is no question that the press and the public jointly possess a common law right to inspect and copy judicial records and public documents. The strong common law presumption in favor of public access to court records comes from the firmly held view that once a matter is brought

before a court for resolution, it is no longer solely the parties' case, but also the public's case. Furthermore, the presumption in favor of openness serves an important purpose for the legitimacy of both the judiciary and our nation's system of self government. The Eleventh Circuit explained that keeping court records open preserves the public's right to monitor the functioning of our courts.

Id. at *5 (citations and internal quotations omitted).

13. The court went on to state that because such a strong common law presumption in favor of access exists, a heavy burden must be overcome by parties who wish to keep court records closed. *Id.* at *5. "In the Eleventh Circuit, '[a]bsent a showing of extraordinary circumstances ..., the court file must remain accessible to the public.'" *Id.* at *5 (quoting *Brown v. Advantage Eng'g, Inc.*, 960 F. 2d 1013, 1016 (11th Cir.1992)).

Specifically, to deny access to court records in order to inhibit the disclosure of sensitive information, the party wishing to close those public records must show that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to that interest.

Id. at *5 (citations and internal quotations omitted).

14. After analysis of Bridgestone/Firestone's argument, the court in *Van Etten* found that they had not met their burden necessary to keep the court records sealed away from public view and access. The court also stated that its conclusion is strengthened by the fact that there was a substantial amount of public interest in the case because of the revelations about the problems with the defective tires.

15. While the Rachel's tapes are obviously not in the same life and death category as the Firestone tire issue, the opinion in the *Bridgestone/Firestone* case is applicable to this case especially since it is the State and the law enforcement itself that is seeking to seal the records from the public. The situation at hand is precisely one to which a strong presumption in favor of access should be applied. This is especially true considering the issues raised by the intervenors in this case concerning the public's interest in the work done and money spent. As stated in *Van Etten*, "the presumption in favor of

openness serves an important purpose for the legitimacy of both the judiciary and our nation's system of self government." *Id.* at *5 (citing *Wilson v. American Motors Corp.*, 759 F. 2d 1568, 1570 (11th Cir.1985)).

16. The State's Motion declaring that the investigative hidden police videos are obscene is granted and the State's Motion to Seal is denied. The State shall comply with the Public Records Law consistent with this Order and release the tapes under previous schedule ordered by this Court.

DONE AND ORDERED in Chambers, at Orlando, Orange County, Florida, this 25th day of October, 2000.

/S/ LAWRENCE R. KIRKWOOD

LAWRENCE R. KIRKWOOD
CIRCUIT COURT JUDGE

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