

and Kevin Hagler complaint is DISMISSED; in all other respects the motion is denied.

THE MOBILE PRESS REGISTER INC. v. WITT

Florida Circuit Court
Broward County

THE MOBILE PRESS REGISTER INC. and JAY GRELEN v. RICHARD WITT, AS CHIEF OF POLICE OF THE CITY OF HOLLYWOOD, FLORIDA, No. 95-06324 CACE (13), May 21, 1996

NEWSGATHERING

1. Access to records — Law enforcement — Investigative files (§38.1707)

Statutory right of access — State open records acts (§44.17).

Investigative files regarding unsolved 1981 abduction and murder are not exempt from disclosure under Florida public records act, Fla. Stat. ch. 119.07(3)(d), and are open to public, although investigation has been re-activated, since investigation was dormant for many years before it was re-activated, and since no arrest or prosecution has been initiated.

Action by newspapers seeking access to police department investigative files. The Florida Circuit Court, Broward County, entered an order requiring the police chief to produce records for public inspection and copying, and the Broward County state attorney's office and the victims' parents moved to intervene and to vacate the order.

Motions to intervene granted and motions to vacate denied.

Thomas R. Julin, Edward M. Mulins, and Marc J. Heimowitz, of Steel Hector & Davis, Miami, Fla.; and L. Martin Reeder Jr., of Steel Hector & Davis, West Palm Beach, Fla., for plaintiffs Mobile Press Register Inc., Sun-Sentinel Co., and WFTV Inc., d/b/a Palm Beach Newspapers Inc.

Kathleen Pellegrino, Ft. Lauderdale, Fla., for plaintiff The Miami Herald Publishing Co.

Joel Cantor, Hollywood, Fla., for defendant Richard Witt.

Michael Eric Christiansen, Ft. Lauderdale, and George J. Terwilliger III, Washington, D.C., for intervenors John and Reve Walsh.

Ralph J. Ray Jr., chief assistant state attorney, Ft. Lauderdale, for intervenor state of Florida.

Full Text of Opinion

Moe, J.:

This cause came before the Court on Thursday, February 15, 1996, on the emergency motions of the Broward County State Attorney's Office and John Walsh, host of the national television program "America's Most Wanted," to intervene in this action and to vacate the order entered by this Court on October 24, 1995, requiring the defendant, to produce by 12 noon on Friday, February 16, 1996, for public inspection and copying the City of Hollywood Police Department file regarding the abduction and killing of John Walsh's son, Adam Walsh.

Before addressing these motions, a discussion of the background of this case is essential. The original plaintiffs, The Mobile Press Register, Inc. and Jay Grelen, a reporter for *The Mobile Press-Register*, commenced this action on May 18, 1995, asking the Court to enter an order allowing them to have immediate access to the Hollywood Police Department's extensive file regarding its investigation of the murder of Adam Walsh in 1981. The Sun-Sentinel Co. and WFTV, Inc. d/b/a Palm Beach Newspapers, Inc. joined the lawsuit as plaintiffs at the first hearing in the case on June 12, 1995. At that hearing, the Court heard the testimony of Hollywood Police Department Detective Mark Smith. Smith testified that he was a "cold case" specialist who had been assigned to reinvestigate the Walsh murder in August, 1994; that he was looking at the same leads that had been investigated previously by other officers; and that he had "two or three" suspects, including one person who had been a suspect for twelve years and another who had been a suspect for six months. Smith said he knew the location of the more recent suspect and planned to

interview him or her in the near future. Smith testified that he did not know when his re-investigation would conclude, but that he expected to conduct several interviews "within the next few weeks." Smith did not know how long he would be assigned to the case.

Smith admitted, however, that the Department had issued no arrest warrants, that no grand jury was investigating the matter, that the police department had not turned over its case over to the State Attorney's Office, and that the Department had no plans to do so in the foreseeable future.

Plaintiff Jay Grelen testified at the June 12, 1995, hearing that he had interviewed Chief Witt about the status of the investigation for a series of stories about the Adam Walsh case published in early May, 1995, in the *Mobile Press Register*. According to Grelen's testimony, Chief Witt said he had assigned Smith to the Walsh murder at a time when the case already had been considered "cold." Grelen also testified that Chief Witt told him that it would be "strictly speculation" as to whether an arrest was imminent. Chief Witt did not contradict any of this testimony.

At the close of the hearing, the Court concluded that the investigation was in fact a "cold case," but that the case had been reopened through its assignment to Detective Smith and that the reopening of the case permitted the investigation to be considered "active" under Florida's Public Records Law, Fla.Stat. §119, et. seq. The Court cautioned the Department, however, that it would not allow the reactivation of a "cold case" indefinitely to deny the public access to materials that otherwise would fall in the public domain. The Court held that Detective Smith would be allowed a "legitimate opportunity" to pursue the leads he was then pursuing before the file would be released to the public. The Court then denied plaintiffs' motion for immediate access to the records, without prejudice to its renewal.

The plaintiffs did renew their motion on September 26, 1995, arguing that Chief Witt and Detective Smith had been allowed more than ample opportunity to complete their reinvestigation of the Walsh case and that their work apparently had not brought them any closer to making an arrest or initiating a prosecution. At the same time, Chief Witt filed a "status advisory" with the Court stating that the investigation was continuing and

that an arrest or prosecution "may result." The Miami Herald Publishing Company also joined with the plaintiffs at this time.

At an October 18, 1995, hearing on the renewed motion, counsel for Chief Witt represented that the Hollywood Police Department was continuing to pursue promising leads in the investigation, and requested an extension of time through February 16, 1996, to make a determination of whether to make an arrest or initiate a prosecution. Counsel for Chief Witt argued that his client continued to believe that the Walsh murder might be solved and that release of the records of the investigation would diminish that possibility. Counsel for the plaintiffs countered that Chief Witt's continued belief that the case "might be solved" could not support a finding that the records of this investigation were at that time protected by the Public Records Law exemption for active criminal investigative records.

In Florida, a criminal investigation is considered "active" and information related to it may be withheld from the public only so long as the investigation is "is continuing with a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future." §119.07(3)(d)(2), Fla. Stat.(1993). Generally, a defendant cannot have a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future once a substantial amount of time has elapsed from the date of the crime. Section 119.07(3)(d) is not a broad exemption for all police investigative records regarding unsolved crimes. Rather, it provides a narrow exemption that exists only where the law enforcement agency that has possession of the records can show that the information in the records is related to an ongoing investigation that is continuing, the investigation is being conducted with a reasonable, good faith anticipation of securing an arrest or prosecution, and the anticipated arrest or prosecution will take place in the foreseeable future. The burden of proof with respect to each of these factors rests squarely on the defendant. *Barfield v. Fort Lauderdale Police Department*, 639 So.2d 1012, 1015 (Fla. 4th DCA 1994).

As of the date of the October 18, 1995, hearing, more than 14 years had elapsed from the date of the crime, the investigation had been dormant for many years before it was re-activated, and no arrest

or prosecution had been initiated despite reinvestigation of the case by a crack detective and his cold case squad. Accordingly, the Court concluded that Chief Witt could not reasonably anticipate beyond February 16, 1996, that he could secure an arrest or prosecution in the foreseeable future and ordered Chief Witt to produce the records by that date.

Although this may be the first order by a Florida court requiring a law enforcement agency to open its files to the public concerning an unsolved murder, the order was necessitated by the fundamental proposition that the Public Records Law is to be construed in favor of "open government to the extent possible in order to preserve our basic freedom, without undermining significant governmental functions." *Bludworth v. Palm Beach Newspaper, Inc.*, 476 So.2d 775, 779 [12 Med.L.Rptr. 1264] (Fla. 4th DCA 1985), *review denied*. 488 So.2d 67 (Fla. 1986). The act "is to be construed liberally in favor of openness, and all exemptions from disclosure construed narrowly and limited to their designated purposes." *Barfield*, 639 So.2d at 1014. Courts, in fact, have a "duty to construe exemptions narrowly." *Id.* at 1017. "[W]hen in doubt the courts should find in favor of disclosure rather than secrecy." *Bludworth*, 476 So.2d at 780 n.1.

The Fourth District's decision in *Barfield* specifically anticipated a case such as this. In affirming an order that certain police records could be kept confidential because an ongoing investigation was continuing, the court observed: "A different situation would be presented if an affirmative decision is made to drop the investigation or put it on indefinite hold." 639 So.2d at 1017. That different situation is this case, notwithstanding Chief Witt's assertion that he had neither decided to drop the case nor to place the case on hold. The continuing reinvestigation could not reasonably anticipate the securing of an arrest or prosecution in the foreseeable future.

The statute cannot be read to mean that police records are exempt from public disclosure as long as any police officer is assigned to a case or as long as any police officer can imagine new steps to take in the investigation or can envision new leads to track down. The Department must have a real anticipation that either an arrest or prosecution will go forward in the foreseeable future. Even at the initial hearing in this case, Detective Smith could not provide the Court

with any indication that he anticipated providing information to the State Attorney's office that would result in an arrest or prosecution. And, there was nothing offered at the October 18, 1995, hearing to indicate that Detective Smith had come any closer to securing an arrest or prosecution, even though he had been afforded more than an additional four months to reinvestigate the case. But, in an excess of caution recognizing that the Department had devoted extraordinary resources to launch and pursue an elaborate reinvestigation of this "cold case," the Court allowed the Department until 12 noon on Friday, February 16, 1996, to make all of the records sought by the plaintiffs available for public inspection and copying.

In ordering the release of the records, the Court did not question the propriety of the actions of the Hollywood Police Department in devoting its resources to attempting to solve a murder that remains unsolved. Indeed, Chief Witt perhaps should be applauded for asking one of his detectives to devote more than a year of valuable police time to reexamining this important case. But the fact that a detective is continuing to look at and reevaluate a case on an indefinite basis cannot create a reasonable anticipation of securing an arrest nor prosecution in the foreseeable future. The longer an investigation goes on, the less likely it seems that the investigation ever could result in an arrest or prosecution. Witnesses lose their memories. Suspects die. Evidence decays or disappears. As the investigation goes on and on, it becomes less, not more, likely that even if the case were "solved" in some abstract sense, there would be adequate evidence upon which the state attorney could be persuaded that he should file charges and devote resources to a prosecution in which he would be required to show that the person charged was guilty beyond a reasonable doubt.

The time clearly had come allow the public and the press to review this file. Public access to an investigative file holds out the hope that widespread dissemination of information about the case will turn up new leads that could not be found in any other manner. The Fourth District Court of Appeal court specifically observed in *Barfield* that the public and the press have a legitimate and important interest in reviewing police files.

In those cases where the courts have held that a criminal investigation remained "active," either prosecutorial ac-

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tion was imminent or the time from the date of the incident to the date of the request for access had been very brief. For example, in *Barfield*, at the time that request for access to the records was made the initial police investigation of the police shooting at issue was still underway and findings were scheduled to be forwarded to the state attorney's office for review and subsequent investigation by the grand jury within a matter of three weeks. In *Florida Freedom Newspaper, Inc. v. Dempsey*, 478 So.2d 1128 (Fla. 1st DCA 1985), the First District held that access to investigative records could be denied where the investigation had been "in progress only four and a half months." In *News-Press Publishing Co. v. Sapp*, 464 So.2d 1335 (Fla. 2d DCA 1985), access to investigative information was denied because the grand jury was scheduled to consider the incident just four days after the hearing on the public records complaint.

By contrast, in the instant case, at the time that the Court's disclosure order was entered in October there was no imminent consideration of this case by a grand jury, the state attorney, or any other law enforcement entity that could make an arrest or commence a prosecution.

Then, from the date of the October order, until the date that the State Attorney's Office and John Walsh sought to intervene to vacate the disclosure order, just days before the records were to be released, no apparent progress had been made on the investigation. The intervenor's motions stated that the Hollywood Police Department had turned over its files to the State Attorney's office for its review on January 26, 1996; that the review itself had not been completed by the date of the hearing on the intervenors' motions; and that the State Attorney had been unable to determine an imminent arrest or prosecution in the foreseeable future was reasonably anticipated. The State represented that if the Court would stay its disclosure order, it would present the matter to the grand jury in the spring. Such an offer does not, however, show a good faith anticipation that a prosecution will be commenced in the foreseeable future. Rather, it simply reflects a desire to maintain the confidentiality of investigative records.

Mr. Walsh's interest in ensuring that the efforts of law enforcement officials are not impaired by a premature release of investigative files is certainly under-

standable, but his concerns do not supply the evidence that the Court requires to conclude that the records at issue are part of an active criminal investigation.

[1] The motions to intervene in this case are granted but the intervenors' request that the order requiring the release of the Hollywood Police Department's records of its investigation of the murder of Adam Walsh are denied. The records shall be released to the public and the press on February 16, 1996, as previously ordered. Done and ordered in chambers Fort Lauderdale, Broward County, Florida, this 21 day of May, 1996, nunc pro tunc.

KUMARAN v. BROTMAN

Illinois Circuit Court
Cook County

SAMPATH KUMARAN v. BARBARA BROTMAN, ANDREW KOCHANOWSKI, JAMES J. ROCHE, and THE CHICAGO TRIBUNE CO., No. 94 L 16279, May 24, 1996

REGULATION OF MEDIA CONTENT

1. Defamation — Libel per se (§11.01)

Defamation — Truth — In general (§11.4001)

Defamation — Related causes of action — In general (§11.5801)

Summary judgment for newspaper defendants is warranted in defamation *per se* action based on statements in article that plaintiff's "full-time profession" is filing lawsuits and that he was "working a scam," since no genuine issues of material fact exist as to truthfulness of statements; summary judgment is also warranted on count alleging intentional interference with prospective economic advantage, since there is no evidence plaintiff had reasonable expectation of receiving teaching position that was affected by article.

Libel action against newspaper. The Illinois Appellate Court, First District, reversed and remanded (21 Med.L.Rptr. 1833) the decision of the Illinois Circuit Court, Cook County, dismissing the ac-