Washington Law Review

Volume 60 | Number 2

4-1-1985

Qualified Common Law Privilege for News Reporters in Criminal Cases—State v. Rinaldo, 102 Wn. 2d 749, 689 P.2d 392 (1984)

Susan Ward

QUALIFIED COMMON LAW PRIVILEGE FOR NEWS REPORTERS IN CRIMINAL CASES—*State v. Rinaldo*, 102 Wn. 2d 749, 689 P.2d 392 (1984).

In *State v. Rinaldo*,[1] the Washington Supreme Court extended the news reporter's qualified common law privilege to criminal cases.[2] This extension will adequately protect most confidential information held by reporters. In some cases, however, defendants will be able to defeat the qualified privilege announced in *Rinaldo*. The Washington courts should then construe article 1, section 5 of the Washington State Constitution[3] to require in camera inspection of the information sought. The trial judge should order disclosure only upon concluding that the defendant's interest in obtaining the information outweighs the news reporter's interest in confidentiality.

I. BACKGROUND

Historically, news reporters were unsuccessful in their attempts to claim a privilege against compelled disclosure of confidential information.[4] Courts typically reasoned that the public's interest in the unrestricted flow of evidence at trial outweighed any interest of reporters in maintaining the confidentiality of their sources.[5] As modern journalists began doing more in-depth, investigative reporting, however, their dependence on confidential sources increased.[6] Courts and legislatures, confronted with the argument that forced disclosure of confidential information would inhibit other potential sources of news and thus significantly restrain the flow of information to the public, began to support a news reporter's privilege.[7]

1. 102 Wn. 2d 749, 689 P.2d 392 (1984).

2. *Id.* at 754, 689 P.2d at 395. The Washington court recognized a qualified common law privilege in civil cases in Senear v. Daily Journal-American, 97 Wn. 2d 148, 157, 641 P.2d 1180, 1184 (1982).

3. *See infra* notes 47–51 and accompanying text.

4. *See, e.g.*, Garland v. Torre, 259 F.2d 545, 549–50 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958) (first amendment argument for reporter's privilege rejected); People v. Durrant, 116 Cal. 179, 48 P. 75, 86 (1897) (defendant's communication to reporter not privileged); Joslyn v. People, 184 P. 375, 377 (Colo. 1919) (reporter held in contempt for refusal to testify); Plunkett v. Hamilton, 136 Ga. 72, 70 S.E. 781, 785–86 (1911) (no reporter's privilege to refuse to disclose confidential source); People *ex rel* Mooney v. Sheriff of New York County, 269 N.Y. 291, 199 N.E. 415, 416 (1936) (court refused to create common law reporter's privilege).

5. *See, e.g., In re* Grunow, 84 N.J.L. 235, 85 A. 1011, 1012 (1913) (reporter's privilege detrimental to the due administration of the law); People *ex rel* Mooney v. Sheriff of New York County, 269 N.Y. 291, 199 N.E. 415, 416 (1936) (interest in administration of justice outweighs the value of the privilege); *see also* 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2286 (J. McNaughton rev. 1961) (confidential communication to a journalist not privileged from disclosure).

6. *See* Blasi, *The Newsmen's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 252–53 (1971).

7. *See, e.g.*, Riley v. City of Chester, 612 F.2d 708, 715 (3d Cir. 1979) (recognizing federal common law privilege for journalists); State v. Knops, 49 Wis. 2d 647, 183 N.W.2d 93, 99 (1970) (qualified

Reporters have based their claim of privilege on one of three legal theories.[8] First, news reporters have argued that the four essential elements of a common law evidentiary privilege[9] are present in the relationship between reporters and their confidential sources and that the privilege should therefore be judicially recognized.[10] Second, news reporters may be protected under state statutes, called shield laws, enacted in more than half of the states.[11] Finally, the first amendment and related state constitutional provisions have been advanced in support of the reporter's privilege.[12]

Washington recognized a news reporter's qualified common law privilege in civil cases prior to the *Rinaldo* decision.[13] Its application depends on a trial court finding that the reporter's interest in nondisclosure is supported by a need to preserve confidentiality.[14] The privilege can be

---

constitutionally-based journalist's privilege recognized). The Maryland General Assembly enacted the first shield law in 1896, MD. CTS. & JUD. PROC. CODE ANN. § 9-112 (Supp. 1978), but it stood alone until 1933 when New Jersey followed. N.J. STAT. ANN. § 2A: 84A-21, 21a (West Supp. 1978).

8. A related argument, invoked only rarely, involves the fifth amendment as the justification for a refusal to testify. Such a claim occurs when a news reporter, as a result of a confidential relationship with a source, witnesses or acquires direct knowledge of criminal activity. *See, e.g.*, Burdick v. United States, 236 U.S. 79, 85 (1915).

9. As outlined by Professor Wigmore, these conditions are:

(1)The communications must originate in a *confidence* that they will not be disclosed.

(2)This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.

(3)The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.

(4)The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

8J. WIGMORE, *supra* note 5, § 2285.

10. Almost all such arguments have failed. *See* Annot., 99 A.L.R.3d 37 (1980); Annot., 7 A.L.R.3d 591 (1966) and cases cited therein.

11. *See* Comment, *The Fallacy of* Farber: *Failure to Acknowledge the Constitutional Newsman's Privilege in Criminal Cases*, 70 J. CRIM. L. & CRIMINOLOGY 299, 302–10 (1979) (thorough analysis of state shield laws).

12. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 685 (1972) (first amendment does not protect news reporters from compelled testimony before grand jury); Gulliver's Periodicals, Ltd. v. Chas. Levy Circulating Co., 455 F. Supp. 1197, 1202 (N.D. Ill. 1978) (civil litigant must show compelling need before news reporter's first amendment right will be infringed); *In re* Farber, 78 N.J. 259, 394 A.2d 330, 334 *cert. denied*, 439 U.S. 997 (1978) (news reporter does not have first amendment privilege to withhold information subpoenaed by criminal defendant). The constitutional argument is discussed in Beaver, *The Newsman's Code, The Claim of Privilege and Everyman's Right to Evidence*, 47 OR. L. REV. 243 (1968); D'Alemberte, *Journalists Under the Axe: Protection of Confidential Sources of Information*, 6 HARV. J. ON LEGIS. 307 (1969); Eckhardt & McKey, *Reporter's Privilege: An Update*, 12 CONN. L. REV. 435 (1980); Guest & Stanzler, *The Constitutional Argument for Newsmen Concealing Their Sources*, 64 NW. U.L. REV. 18 (1969); Comment, *The Newsperson's Privilege and the Right to Compulsory Process—Establishing an Equilibrium*, 48 FORDHAM L. REV. 694 (1980); Note, *The Rights of Sources—The Critical Element in the Clash Over Reporter's Privilege*, 88 YALE L.J. 1202 (1979); Note, *Reporters and Their Sources: The Constitutional Right to a Confidential Relationship*, 80 YALE L.J. 317 (1970).

13. Senear v. Daily Journal-American, 97 Wn. 2d 148, 157, 641 P.2d 1180, 1184 (1982).

14. *Id.* at 156, 641 P.2d at 1184; *see also* Clampitt v. Thurston County, 98 Wn. 2d 638, 642, 658 P.2d

defeated if the contesting party demonstrates that (1) its claim is meritorious,[15] (2) the information sought is necessary or critical to the cause of action or the defense pleaded,[16] and (3) a reasonable effort has been made to acquire the information by other means.[17]

II. THE *RINALDO* DECISION

In 1979 a reporter for the *Everett Herald* wrote six articles about cult activities allegedly occurring at a place called Eden Farms.[18] To obtain material for the article, he promised his sources he would keep their identities confidential.[19] Subsequently, Theodore Rinaldo, who was part owner and operator of Eden Farms, was charged with statutory rape, indecent liberties, assault, coercion, and intimidating a witness.[20] He was tried and convicted of some of the offenses.[21] Later, several defense witnesses contacted the county sheriff and stated that they had committed perjury at trial because Rinaldo had threatened them.[22] Rinaldo was then charged with perjury, intimidating witnesses, tampering with witnesses, and statutory rape.[23]

Counsel for Rinaldo filed a motion for a subpoena duces tecum directing the *Herald* to disclose or deliver for in camera review the material it had gathered about Rinaldo, Eden Farms, Ellogos (a nonprofit corporation associated with Eden Farms) and thirty-eight past or current members of the two organizations.[24] In an affidavit in support of this motion, counsel argued that the *Herald's* records would contain information that could be used to impeach the prosecution's witnesses.[25]

The *Herald* moved to quash the subpoena duces tecum on the grounds that the information was privileged and not subject to disclosure.[26] The trial court held that although the newspaper had a qualified privilege under the first amendment, it had to give way to Rinaldo's constitutional right to a fair trial and the right of the public to have the truth ascertained.[27] The trial court

641, 643 (1983) (right to claim privilege arises only if interest of reporter in nondisclosure is supported by need to preserve confidentiality).

15. 97 Wn. 2d at 155, 641 P.2d at 1183.
16. *Id.*
17. *Id.*
18. State v. Rinaldo, 102 Wn. 2d 749, 750, 689 P.2d 392, 393 (1984).
19. *Id.*
20. *Id.* at 750–51, 689 P.2d at 393.
21. *Id.* at 750, 689 P.2d at 393.
22. *Id.* at 750–51, 689 P.2d at 393.
23. *Id.* at 751, 689 P.2d at 393.
24. *Id.*
25. *Id.* at 751, 689 P.2d at 394.
26. *Id.*
27. *Id.* at 751–52, 689 P.2d at 394.

concluded that the material should be turned over for in camera review.[28] The court of appeals reversed.[29]

The Washington Supreme Court affirmed the decision of the court of appeals vacating the discovery order.[30] In so doing it expressly extended the qualified common law privilege, formerly recognized in civil cases, to criminal cases.[31]

III. ANALYSIS

A free press is an essential element of any representative democracy.[32] In a society where citizens are asked to make informed decisions on a multitude of complex issues, the press must be able not only to gather and report the news that is readily available, but also to engage in in-depth investigations of potentially newsworthy areas. Confidential sources play an important role in the success of such investigative reporting.[33] Without them, it is likely reporters would lose many controversial news leads and thus be unable to maintain the flow of necessary information to the public.[34] By extending the news reporter's qualified common law privilege to criminal cases, the Washington Supreme Court has helped protect press access to these sources of vital information. Further protection will be necessary, however, to ensure that confidential information will not be unnecessarily revealed.

A. *Protection Under* Rinaldo

In most situations, the qualified common law privilege created in civil cases and extended to criminal cases in *Rinaldo* will be adequate to protect confidential information held by a news reporter. The privilege arises when the reporter shows a need to preserve confidentiality.[35] In making this

28. *Id.* at 752, 689 P.2d at 394.

29. *Id.*

30. *Id.* at 755, 689 P.2d at 396.

31. *Id.*

32. *See* Z. CHAFFEE, FREE SPEECH IN THE UNITED STATES 16–22 (1941); A. MEIKLEJOHN, POLITICAL FREEDOM 26 (1960).

33. Blasi, *supra* note 6, at 245–46.

34. The undisclosed informant's importance was emphasized in the stories following the Watergate investigation. "To the President's other men and women—in the White House and elsewhere—who took risks to provide us with confidential information. Without them there would have been no Watergate story told by the Washington Post." C. BERNSTEIN & B. WOODWARD, *Dedication* in ALL THE PRESIDENT'S MEN 7 (1974); *see also* Blasi, *supra* note 6, at 245–46; Guest & Stanzler, *supra* note 12, at 57–61; Murasky, *The Journalist's Privilege:* Branzburg *and Its Aftermath*, 52 TEX. L. REV. 829, 858 (1974).

35. State v. Rinaldo, 102 Wn. 2d 749, 755, 689 P.2d 392, 396 (1984); Senear v. Daily Journal-American, 97 Wn. 2d 148, 156, 641 P.2d 1180, 1184 (1982).

determination the trial court must consider how the reporter obtained the information and whether the source had a reasonable expectation of confidentiality.[36] A news reporter should be able to satisfy this threshold requirement if there was an express or implied understanding between the reporter and the source that the information itself or the source's identity would remain confidential, and if the circumstances under which the communication was made support the existence of such an understanding.[37] Upon this showing, the burden of defeating the privilege should shift to the contesting party.[38]

To defeat the common law privilege, the party seeking discovery must show three things. First, the cause of action or defense asserted must be meritorious; i.e., not frivolous or raised for the purpose of harassing the reporter.[39] To satisfy this requirement in civil cases, the party must "'establish jury issues on the essential elements of [his or her] case not the subject of the contested discovery.'"[40] This burden should fall on the defendant in a criminal proceeding only with respect to those defenses on which the defendant has the burden of producing evidence. No useful purpose would be served by forcing the disclosure of confidential information to a defendant who could not, even when in possession of it, create a jury question with regard to the defense raised. However, where the prosecution bears the burden of production on a particular issue, and the defendant can create a jury question on that issue simply by pleading not guilty, the defense should automatically be recognized as meritorious. Thus, this standard will not bar many criminal defendants' attempts to defeat the privilege.

36. Clampitt v. Thurston County, 98 Wn. 2d 638, 642, 658 P.2d 641, 643 (1983); *Senear*, 97 Wn. 2d at 156, 641 P.2d at 1184. It is unclear if a news reporter must show that the source continues to have a reasonable expectation of confidentiality, *see Senear*, 97 Wn. 2d at 156, 641 P.2d at 1184 ("[t]he Court . . . should look to . . . whether the source *has* reasonable expectation of confidentiality") (emphasis added), or if it is sufficient to show that such an expectation existed at the time the communication was made, *see Clampitt*, 98 Wn. 2d 638, 642, 658 P.2d 641, 643 ("[t]his question . . . depends upon whether the source *had* a reasonable expectation of confidentiality") (emphasis added). The better view would allow the claim of privilege if the reporter establishes that the source had a reasonable expectation of confidentiality at the time of the communication. Any other approach would usually necessitate the testimony of the source and thereby undermine the privilege sought.

37. *See, e.g.*, Bruno & Stillman, Inc., v. Globe Newspaper Co., 633 F.2d 583, 597–98 (1st Cir. 1980) (court should look at source's expression of need for confidentiality); Andrews v. Andreoli, 92 Misc. 2d 410, 400 N.Y.S.2d 442, 447 (Sup. Ct. 1977) (privilege did not arise because news reporter had not expressly or implicitly promised confidentiality to the source).

38. *See* Clampitt v. Thurston County, 98 Wn. 2d 638, 642, 658 P.2d 641, 643–44 (1983) (privilege arises upon showing of need to preserve confidentiality but may be defeated by opposing party).

39. State v. Rinaldo, 102 Wn. 2d 749, 755, 689 P.2d 392, 395 (1984); Clampitt v. Thurston County, 98 Wn. 2d 638, 642, 658 P.2d 641, 644–45 (1983); Senear v. Daily Journal-American, 97 Wn. 2d 148, 155, 641 P.2d 1180, 1183 (1982).

40. *Clampitt*, 98 Wn. 2d at 646, 658 P.2d at 646 (quoting Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 597 (1st Cir. 1980)).

The second standard requires the party contesting a news reporter's privilege to show that the information sought is necessary or critical to the cause of action or the defense asserted.[41] Proper evaluation of a criminal defendant's claim under this standard should focus on the effect the information could have on the outcome of the trial.[42] Where the testimony of prosecution witnesses is essential to the state's case, the defendant's conviction depends on the fact finders' perception of their credibility. In such cases, impeachment evidence would be "necessary or critical" to an effective defense and the trial court should find the second standard satisfied.

To satisfy the third standard, the defendant must show that a reasonable effort has been made to acquire the desired information by other means.[43] The interest of news reporters in maintaining the confidentiality of their sources is so compelling that their files should be used only as a last resort. Moreover, if the defendant can obtain the information by a less intrusive means, the defense effort is hampered very little by the unavailability of press documents. In evaluating the efforts made by the defense under this standard, the trial court should consider the purpose for which the desired evidence is intended. Where, for example, a letter written by a prosecution witness is sought for the purpose of discovering factual information contained therein, the number of possible alternative sources will be great and the required showing therefore substantial. If, however, the same letter is to be used to contradict the testimony offered by its author at trial, it may be so uniquely valuable that no alternative of equal worth could be found.[44] Thus, despite the "very substantial" obligation[45] imposed by this standard, there will be situations in which a criminal defendant can show that the news reporter is the only available source.

41. *Rinaldo*, 102 Wn. 2d at 755, 689 P.2d at 395; *Clampitt*, 98 Wn. 2d at 642, 658 P.2d at 644; *Senear*, 97 Wn. 2d at 155, 641 P.2d at 1183.

42. *See* Comment, *Sixth Amendment Limitations on the Newsperson's Privilege: A Breach in the Shield*, 13 RUTGERS L.J. 361, 392 (1982). Denying the defendant access to impeachment evidence could infringe the right of compulsory process and undermine the effective cross examination guaranteed by the confrontation clause. *See* Palermo v. United States, 360 U.S. 343, 362 (Brennan, J., concurring), *reh'g denied*, 361 U.S. 855 (1959); United States v. Liddy, 354 F. Supp. 208, 215 (1972); People v. Le Grand, 67 A.D.2d 446, 415 N.Y.S.2d 252, 257 (1979). *Cf.* United States v. Augenblick, 393 U.S. 348, 356 (1969) (suggesting that denial of production of prior recorded statement of witness might be denial of sixth amendment right). *But see* Barber v. Page, 390 U.S. 719, 725 (1968) (right of confrontation is a trial right and does not entitle defendant to prior statements of prosecution witnesses).

43. State v. Rinaldo, 102 Wn. 2d at 755, 689 P.2d at 395–96; Clampitt v. Thurston County, 98 Wn. 2d at 642, 644–46, 658 P.2d at 644–45; Senear v. Daily Journal-American, 97 Wn. 2d at 155–56, 641 P.2d at 1183–84.

44. *See* State v. Boiardo, 83 N.J. 350, 416 A.2d 793, 799 (1980) (Schreiber, J., dissenting).

45. *Clampitt*, 98 Wn. 2d at 644, 658 P.2d at 645 (quoting Zerilli v. Smith, 656 F.2d 705, 714 (D.C. Cir. 1981)).

B. Protection Under Article 1, Section 5

Criminal defendants who meet the three standards outlined in *Rinaldo* should not be automatically entitled to confidential information held by a news reporter. Rather, article 1, section 5 of the Washington State Constitution[46] should be construed to require in camera review before disclosure is ordered. Only by actually examining the materials sought can the trial court be certain that their importance to the defendant's case warrants abrogation of the news reporter's privilege.

After reviewing the materials held by the news reporter, the trial court should weigh the interests of the defendant in obtaining the information against those of the news reporter in protecting its confidentiality.[47] More weight should be given to the defendant's interests where the information sought is of great value to the defense effort and is not available elsewhere. The defendant's interests should also receive greater weight as the seriousness of the potential sanction for the crime charged increases.[48]

On the other side, the interest of the news reporter in maintaining confidentiality should be given greater weight where forced disclosure would exert a chilling effect on other potential news sources.[49] Additional weight should also be assigned to the reporter's interests if the information sought is of the type necessary for effective citizen participation in the political process.[50] Only if the trial court determines that the interests of the defendant in the materials before it outweigh the interests of the news reporter should the information be disclosed.

Susan Ward

46. Article 1, § 5 provides: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."

47. Such a balancing approach has been adopted by many state courts confronted with a request for confidential information from a news reporter. *See, e.g., In re* McAuley, 63 Ohio App. 2d 5, 408 N.E.2d 697 (1979); *see also* Branzburg v. Hayes, 408 U.S. 665, 710 (1972) (Powell, J., concurring).

48. *See* Comment, *supra* note 42, at 392–93.

49. The chilling effect would be greatest in well-publicized cases where revelation of the source's identity might subject the source to reprisal.

50. *See* Comment, *supra* note 12, at 714–15.