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Cross-Examination

SUPREME COURT

QUEENS COUNTY

Sullivan v. Hurley[111]
(decided November 8, 1995)

Defendant claimed that he had overcome plaintiff's news gathering privileges and was entitled to obtain a subpoena to reveal plaintiff's notes, records, and videotape taken at a criminal investigation because they were critical to his defense.[112] Therefore, defendant argued his rights under the United States[113] and New York State[114] Constitutions outweighed plaintiff's privilege.[115] Courtroom Television Network [hereinafter Court TV], on behalf of its correspondent, Timothy Sullivan, moved to quash the subpoena on the grounds that the information sought was protected from disclosure by the First Amendment of the United States Constitution,[116] article I, section 8 of New York Constitution,[117] and the New York Shield Law [hereinafter

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111. 635 N.Y.S.2d 437 (Sup. Ct. Queens County 1995).

112. *Id.* at 438.

113. U.S. CONST. amend. VI. The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." *Id.*

114. N.Y. CONST. art. I, § 6. This provision provides in relevant part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him . . . ." *Id.*

115. *Sullivan*, 635 N.Y.S.2d at 437-38.

116. U.S. CONST. amend. I. The First Amendment provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press." *Id.*

117. N.Y. CONST. art. I, § 8. This section provides: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible

"Shield Law"].[118] The court held that the defendant overcame plaintiff's qualified news gathering privileges and was entitled to a subpoena to obtain the materials.[119] The court found that defendant demonstrated that the information requested was highly material and relevant to his case, that plaintiff's testimony was critical to defendant's case, and that the information sought was not available from an alternative source.[120]

This case originated when two teenage boys and a young girl were shot within the confines of the 101st police precinct on April 3, 1994.[121] Several days later, police detectives arrived at the home of Jonathan Hurley, who subsequently accompanied the detectives to the precinct for questioning and thereafter implicated himself in the shooting of the three children.[122] At issue in Mr. Hurley's case is whether the police afforded him all of his constitutional rights in the course of obtaining his statement and recovering the gun he had disposed of during the shootings.[123] Some of the events which took place at the precinct, on April 9, 1995, were witnessed by Timothy Sullivan, a reporter for Court TV, who was producing a television report on cases that stem from police activity in the 101st Precinct.[124]

The court, in analyzing defendant's contentions, had to determine whether the news gathering privilege asserted by Court TV and Mr. Sullivan, as grounds for quashing the subpoena,

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for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or the press." *Id.*

118. N.Y. CIV. RIGHTS LAW § 79-h(c) (McKinney 1991). Section (c) requires that a litigant seeking testimony from a reporter about his non-confidential news gathering activities, or non-broadcast resource materials, must make a clear and specific showing that the information: "(i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (3) is not obtainable from any alternative source." *Id.*

119. *Sullivan*, 635 N.Y.S.2d at 442.

120. *Id.*

121. *Id.* at 438. The 101st Precinct is located within Queens County. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* The court found that Mr. Sullivan was present in the interrogation room and took notes during some portions of questioning that resulted in Mr. Hurley's controverted statement to the police. *Id.* at 439.

yielded to the defendant's Sixth Amendment rights.[125] The court relied, in part, on the reasoning in *O'Neill v. Oakgrove Construction, Inc.*,[126] which held that reporters should be afforded qualified protection from disclosure of non confidential news material under both the First Amendment of the Federal Constitution and article I, section 8 of the New York Constitution.[127] In *O'Neill*, the New York Court of Appeals adopted a three part balancing test to determine whether a litigant could overcome the qualified privilege. The court stated that "[u]nder the tripartite test, discovery may be ordered only if . . . [it is] demonstrate[d], clearly and specifically, that the items sought are (1) highly material, (2) critical to the . . . claim, and (3) not otherwise available."[128] Subsequently, the test adopted in *O'Neill* was codified by the addition of a new section to the Shield Law.[129]

While the court in *Sullivan* determined that plaintiff's journalistic material was only afforded qualified protection because there was no confidentiality agreement between Mr.

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125. *Id.* at 440. In reconciling the competing interests of press privilege and a criminal defendant's evidentiary needs, the court stated:

> The news gathering privilege reflects the vital and constitutionally protected functioning of an independent and vigorous press. Most importantly, 'without some protection for seeking out the news, freedom of the press could be eviscerated.' However, when, as herein, the newsgatherers choose to be participants in a story, beyond that as witnesses and reporters, then this protection may be eradicated.

Id. (citation omitted).

126. 71 N.Y.2d 521, 528 N.Y.S.2d 1, 523 N.E.2d 277 (1988). In this case, an automobile accident victim sought to compel disclosure of a nonparty journalist's photographs taken in the course of news-gathering activities and kept as a resource. *Id.* at 525, 528 N.Y.S.2d at 2, 523 N.E.2d at 278.

127. *Sullivan*, 635 N.Y.S.2d at 439.

128. *O'Neill*, 71 N.Y.2d at 527, 528 N.Y.S.2d at 3, 523 N.E.2d at 279. The court did not develop the tripartite test but adopted this qualified privileges test from both prior New York cases as well as prior federal court rulings. *Id.* *See, e.g.*, United States v. Burke, 700 F.2d 70 (2d Cir. 1983) (holding that disclosure may be ordered only upon a clear and specific showing that the information is highly material and relevant and necessary or critical to the maintenance of the claim and not obtainable from other available sources).

129. 1992 N.Y. Laws Ch. 33 § 2.

Sullivan and Mr. Hurley or the police detectives regarding the interrogation he viewed, the burden was still on defendant to overcome the qualified privilege by satisfying the test adopted by the court of appeals in *O'Neill*.[130] The first prong, the requirement that defendant make a specific showing that the material sought is "highly material and relevant," was found by the court to have been satisfied because the contents of Mr. Sullivan's observations contained portions of the interrogation which were "highly material and relevant to one of the primary issues at the pending suppression hearing."[131] Furthermore, since "the personal observations and notes of Mr. Sullivan may [have] provide[d] the defendant with an opportunity through which he could clearly demonstrate that he was not afforded all the rights which he is entitled," the court found that prong two of the test, the requirement that defendant make a clear and specific showing that the information sought is critical or necessary to his defense, was satisfied.[132] Finally, since the information sought was not available from an alternative source, the court found that prong three of the test was also satisfied.[133]

The court clearly acknowledged that "[t]he Sixth Amendment guarantees the right of every criminal defendant, in both Federal and State courts, to be confronted with witnesses against him, including the right of cross-examination."[134] However, there are certain situations where "a reporter's privilege may yield to the defendant's Sixth Amendment rights."[135] In *People v.*

130. *Sullivan*, 625 N.Y.S.2d at 440.

131. *Id.* at 441.

132. *Id.* at 442.

133. *Id.* The court stated that plaintiff's argument that two detectives and the defendant himself were alternative sources of information was not acceptable because the two detectives were in an adversarial position to the defendant. *Id.* Furthermore, defendant would not be able to rely on the court to accept his testimony as being the alternative source. *Id.*

134. *Id.* at 441 (citing Chambers v. Mississippi, 410 U.S. 284 (1973); Douglas v. Alabama, 380 U.S. 415 (1965)).

135. *Id.* (citing People v. Troiano, 127 Misc. 2d 738, 741, 486 N.Y.S.2d 991 (County Ct. Suffolk County 1985) (holding that defendant's Sixth Amendment rights did not outweigh media's First Amendment Rights so as to compel disclosure of certain information because defendant did not make a

Troiano,[136] the court weighed the defendant's Sixth Amendment rights against New York's Shield Law.[137] In balancing a constitutionally claimed privilege of non-disclosure against a defendant's constitutional right to a fair trial and the right to confront witnesses, the court applied the three-pronged test, later adopted by the New York Court of Appeals, in *O'Neill* and applied in *Sullivan*.[138] The court stated that "[d]isclosure may be ordered *only* upon a clear and specific showing that the information" meets the three prongs of the test previously stated.[139]

Just as cases have weighed Sixth Amendment rights against New York's Shield Law, a defendant's Sixth Amendment rights may similarly be weighed against the rights afforded under the First Amendment.

> The protections afforded under the First Amendment to the United States Constitution and section 8 of article I of the New York State Constitution provide an independent basis for quashing subpoenas.
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> The right to a free and independent press, unburdened by prior restraint, is part of the bedrock of our society. The cases are legion that subpoenas issued to the press invoke First

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clear and specific showing that the information in question was relevant and material to homicide case)). *See also* People v. Sal "Vinny" Iacono, 112 Misc. 2d 1057, 447 N.Y.S.2d 996 (Sup. Ct. New York County 1982) (holding that a subpoena duces tecum be quashed under the Shield Law where a reporter compiled confidential and non confidential material and no publication or disclosure of any information compiled had been made and the defense was a broad and general request for notes dealing with a trumped-up gambling charge).

136. 127 Misc. 2d 738, 486 N.Y.S.2d 991 (County Ct. Suffolk County 1985). In this case, Steven Pepe, the editor and a reporter of ROLLING STONE MAGAZINE moved to quash three subpoenas duces tecum, served upon them by the defendant, in the case which sought disclosure of notes, tapes and records made by the reporter in connection with an article published where friends of the defendant were interviewed. *Id.* at 739, 486 N.Y.S.2d at 993.

137. *Id.* at 743, 486 N.Y.S.2d at 995.

138. *Id.* at 743, 486 N.Y.S.2d at 995-96 (citation omitted).

139. *Id.* (emphasis added). *See supra* note 128.

> Amendment protections of the press to gather, write, edit, and disseminate news.[140]

In order for a defendant to show that his privilege under the Sixth Amendment outweighs the privileges conferred to a reporter under the Shield Law or those that exist simultaneously under the First Amendment, the defendant must meet the requirements of New York's aforementioned three prong test. Similarly, in Federal court, when a litigant seeks to subpoena documents that have been prepared by a reporter in connection with a news story, the courts set forth a test that mirrors New York's Shield Law.

140. People v. Bova, 118 Misc. 2d 14, 19-20, 460 N.Y.S.2d 230 (Sup. Ct. Kings County 1983).