
IN MATTER OF SUBPOENA TO:

LAURA RICCIARDI, and
SYNTHESIS FILMS, LLC

Calumet County Sheriff's Dept.
Incident No. 05-157-955

MANITOWOC COUNTY
STATE OF WISCONSIN
FILED
JAN 17 2007

CLERK OF CIRCUIT COURT

REPLY MEMORANDUM IN SUPPORT OF MOTION TO QUASH SUBPOENA

I. Compliance with § 968.135.

The state has not responded to Ricciardi's arguments concerning compliance with § 968.135. Ricciardi relies on her Memorandum in Support of Motion to Quash (Memorandum), pp. 4-13.

II. Ricciardi: documentarian or agent for the defense.

The state asserts that Ricciardi is an arm of Avery's defense team and cannot, therefore, assert the journalist privilege. The state points to the fact that Ricciardi filmed the contents of Avery's 1985 file (85FE118) in the clerk's office, Wiegert's affidavit, and the fact that Avery's attorneys have not complied with reciprocal discovery. For spice, the state adds phrases like "made available" when referring to individuals whom Ricciardi has interviewed, implying that Ricciardi needed the OK from Avery's defense team to interview certain unnamed people, and that Avery's defense team has broad control over those people. The state's assertion is unfounded and borders on recklessness.

Ricciardi wrote a letter to the state explaining the broad scope of her project and inviting their participation. Ricciardi's Affidavit in Support of Motion to Quash, Exh. 2 (Ricciardi Affidavit). The state's affidavit corroborates the fact that Ricciardi's project goes well beyond the current prosecution. Ricciardi's affidavit explains the time and effort put forth, the fact that she has not shared her interviews with any party, and the fact that she does not have the type of information that the state requests. Yet the state clings to a theory that Ricciardi is an arm of the defense working to win Avery's acquittal. The state offers no evidence to support its conspiracy theory.

The fact that Ricciardi filmed the 1985 file does not support the state's allegation. Ricciardi interviewed several people involved in the postconviction process. By filming the file, Ricciardi is able to show the actual document, exhibit, etc. that is being referred to during an interview. Ricciardi Reply Affidavit, ¶ 4 and 9. The contents of the 1985 file are an obvious object of interest. In addition, Ricciardi has shared this footage with no one. (Ricciardi Reply Affidavit, ¶ 11).

The only evidence to suggest that the defense team "made available" individuals for Ricciardi to interview is the state's complaint that several individuals stopped cooperating with the state. From that fact, the state draws the conclusion that family and friends are under the reins of the defense team. A more obvious explanation is that Avery's family and friends distrust the state and local police given their hand in Avery's past wrongful incarceration.

The state offers nothing to substantiate its bald assertion that the willingness of Avery's family and friends to speak with Ricciardi is because Avery's defense team has

made them available – what ever that might mean. The state’s assertion ignores a fact of human nature that draws many people to want to be on TV. It also ignores the less vain human desire to speak out about an 18-year injustice that they or their loved one has endured, and the suffering and confusion that the subsequent allegations of a heinous rape and murder must produce.

The fact that Ricciardi has spoken to Avery in the jail and on the phone adds nothing to the state’s claim. The state has heard and recorded every word of those conversations. The state has produced nothing from those conversations to support a theory that Ricciardi is working for the defense. They have produced nothing from those tapes to rebut Ricciardi’s claim that she has steadfastly steered clear of the facts of the pending case.

Wiegert’s affidavit does not support the state’s conspiracy theory. If anything, the affidavit’s reliance on innuendo, its failure to supply quotes, background, and follow-up, raises questions about what is on the tapes. It is clear from Weigert’s affidavit that the state had access to several of the witnesses, including Barbara Janda (Dassey’s mother), and Jodi Stachowski (Avery’s girlfriend). The state has never asserted that they even tried to talk to Debbie Klemp and Chuck Avery. And most importantly, Ricciardi’s has established that she has not shared information concerning her interviews with anyone for the Avery or Dassey defense teams. Ricciardi’s Affidavit, ¶ 18.

The state asserts that the integrity of a seal on a vial of blood from Avery’s 1985 file has become a relevant issue. The state also asserts that Avery’s defense team has not

complied with its reciprocal discovery obligations. Therefore, Ricciardi's filming of the file is the only source for information concerning the condition of the blood vial.

This issues seems to more relevant to the state's need for the evidence than to its claim of complicity with the defense. In any event, Counsel contacted attorney Dean Strang concerning the lack of compliance with reciprocal discovery. Strang advised counsel that the defense had photographed the relevant material from the 1985 file in July 2006 (prior to Ricciardi's access to the file) and has sent a CD containing its photos to the state in a manner that guaranteed delivery by the end of December 2006. (Reply Affidavit of Counsel, attached to this Reply and incorporated in the Motion to Quash). Therefore, Ricciardi's film of the file is cumulative and is rendered irrelevant by the prior access to and photographing by the defense.

The state's allegation of collusion with the defense borders on recklessness. However, if the court finds that Ricciardi is an "arm of the defense," Ricciardi requests that the court give the defense an opportunity to object to disclosure. Avery's defense team will likely want to assert various defenses to disclosure such as work product, and attorney-client privilege.

III. The Journalist Privilege in Wisconsin.

A. The applicability of *McKevitt*.

The state argues that the journalist privilege recognized under Article I, section 3 of the Wisconsin Constitution should be construed consistently with a 7th Circuit decision interpreting the First Amendment to the United States Constitution. It urges

the court to follow the holding in *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003), *reh. denied*, which scraps any special criteria for journalists in favor of the general reasonableness test for subpoenas under Fed. R. Crim. P. 17(c). *Id.*, at 533.

The state is asking the court to overrule existing state law. This court does not have that authority. *Cook v. Cook*, 208 Wis.2d 166, 189-90, 560 N.W.2d 246, 256 (1997); *State v. Bolden*, 265 Wis.2d 853, 858-59, 667 N.W.2d 364, 366-67 (2003), *rev. denied*. This court is obligated to apply existing Wisconsin precedent.

The state's argument also ignores our Supreme Court's recent willingness to interpret the Wisconsin Constitution as providing broader protections than parallel provisions of the United States Constitution. *State v. Eason*, 2001 WI 98, ¶ 63, 245 Wis.2d 206, 629 N.W.2d 625; *State v. Knapp*, 2005 WI 127, ¶¶ 1-2, 285 Wis.2d 86, 700 N.W.2d 899; *State v. Dubose*, 2005 WI 126, ¶¶ 39-41, 285 Wis.2d 206, 629 N.W.2d 625.

The state's argument is inconsistent with its position in *State v. Zelenka*, 83 Wis.2d 601, 266 N.W.2d 279 (1978). There, the defendant subpoenaed a newsman for information concerning a story because it might provide an entrapment defense. The defense argued that the decision in *State v. Knops*, 49 Wis.2d 647, 183 N.W.2d 93 (1971) was no longer controlling because of the intervening Supreme Court decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972). *Zelenka*, 83 Wis.2d at 616-17, 266 N.W.2d at 286. The state accepted the defense contention that *Branzburg* removes the First Amendment basis for a newsman's privilege but argued for retaining the privilege under Article I, section 3 of the Wisconsin Constitution. *Id.*, 83 Wis.2d at 617, 266 N.W.2d at 286. The state should be careful what it wishes for.

The Silha Center for the Study of Media Ethics and Law (Silha Center) has submitted an amicus brief. Ricciardi adopts their arguments and will not repeat them.

B. The journalist privilege applies irrespective of confidentiality.

The Wisconsin Supreme Court has determined that there is a qualified journalist's privilege based on Article I section 3 of the Wisconsin Constitution. *Green Bay Newspaper Co. v. Circuit Court*, 113 Wis.2d 411, 419, 335 N.W.2d 367, 372 (1983). In recognizing the privilege, the Court addressed its concern for the impact on the "free flow of ideas" when the state or a defendant subpoenas a journalist. *State v. Knops*, 49 Wis.2d 647, 658, 183 N.W.2d 93, 99 (1971). This concern was further articulated in *Kurzynski v. Spaeth*, 196 Wis.2d 182, 196, 538 N.W.2d 554, 559 (1995). By adopting the privilege, the Court is seeking to protect the values inherent in a free press from:

the threat of administrative and judicial intrusion into the newsgathering and editorial process; the disadvantage of a journalist appearing to be an investigative arm of the judicial system or a research tool of the government or of a private party; the disincentive to compile and preserve non-broadcast material; and the burden on journalists' time and resources in responding to subpoenas.

Kurzynski v. Spaeth, 196 Wis.2d 182, 196, 538 N.W.2d 554, 559 (1995). These policy reasons apply irrespective of whether the journalist's information was obtained in return for an express promise of confidentiality. *Id.*

These policies are implicated in this case even though the persons interviewed are not a confidential source in the conventional sense. Distrust of police and prosecutors by the Avery family and friends is a fact in this case given the history of

Avery's wrongful conviction. *See*, Ricciardi Affidavit, Exhibit 3. It is, therefore, reasonable to expect that Ricciardi would not get the interviews, or at least the quality of the interviews, if the person's interviewed saw Ricciardi as an arm of the state, even if an unwilling functionary.

The burden on Ricciardi in complying with this subpoena will be devastating. Without the protection of the privilege, the state will be able to shut Ricciardi down based solely on a request for information that they already have. *See*, *Green Bay Newspaper Co.*, 113 Wis.2d at 422, 335 N.W.2d 373 (The journalist privilege adds a layer of protection beyond that available to any person subpoenaed. The party serving the subpoena must also demonstrate by a preponderance of the evidence that "he has investigated other sources for the kind of information he seeks and there is no reasonable and adequate less intrusive alternative sources where he can obtain the information").

Ricciardi explained to persons being interviewed that she was making a film or documentary about Steven Avery's journey through the criminal justice system. She explained that the film would not be finished until long after the trial of both Avery and Dassey. There was at least an implicit understanding that Ricciardi was acting independently, and that people were free to talk without fear that Ricciardi would disclose the conversation to either party. (Reply Affidavit, ¶ 16). This might not make them confidential sources, but the effect is the same.

The policy reasons for preserving the privilege remain strong even in the case where there is no informant. The test provides a framework to evaluate the competing

interests peculiar to the press and takes into consideration the importance of a free press to a democracy.

Ricciardi adopts the arguments of the Silha Center in its amicus brief.

IV. The balance of interests favors quashing the subpoena.

Ricciardi does not accept the state's assertion that it is neither acting in bad faith nor to harass Ricciardi. In spite of Ricciardi's affidavit, the state has made reckless assertions about Ricciardi's complicity with the Avery defense team. It has subpoenaed information that the state already has. And its affidavit is incomplete and relies on innuendo. To counsel's knowledge, the state has not subpoenaed other news agencies that have spoken to Avery's family. *See, Ricciardi Affidavit, Exhibit 3.*

Ricciardi has no direct evidence. The state already has Avery's statements, and Ricciardi never spoke to Brendan Dassey.

The state's hope that it "might" find evidence useful in cross-examination or for impeachment is speculative. *See, State v. Green, 2002 WI 68, ¶ 37, 253 Wis. 2d 356, 646 N.W.2d 298* (Assertion that medical records might provide information useful for cross-examination or impeachment are not sufficient to require an *in camera* review.) Ricciardi denies having such information. Ricciardi Affidavit, ¶ 17. In any event, such evidence will likely be of no consequence to the outcome of the trial given the strength of the state's case. *Zelenka, 83 Wis.2d at 620, 266 N.W.2d at 287; State ex rel. Green Bay Newspapers, 113 Wis.2d at 425-27, 335 N.W.2d at 375.*

The state is trying to co-opt Ricciardi into being an investigatory arm for the state when it has failed to demonstrate that it has exhausted efforts to obtain the evidence. It is simply fishing.

The cost to Ricciardi and the public is high. The time and expense required to comply with the subpoena will likely shut down Ricciardi's project. The public will be denied a unique view of 25 years of history involving the criminal justice system in Wisconsin and an extraordinary cast of characters. It is a story of a man wrongfully convicted, how its government responded, and of a subsequent heinous rape-murder. It is a story that explores the range of human nature, from Cormac McCarthy-like characters, to victims, lawyers, judges, and legislatures. From the depraved to those trying to do the right thing.

The balance here favors Ricciardi.

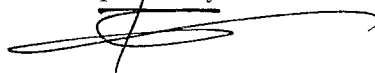
CONCLUSION

The court should quash the subpoena and not order an *in camera* review.

In the alternative, the court should order the production of the items requested in the Motion to Quash and allow Ricciardi time to review them and prepare other arguments prior to ruling on the decision to seek an *in camera* review.

Dated: January 12, 2007.

Respectfully submitted,



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