

NO. 03-13-0696

IN THE
APPELLATE COURT OF ILLINOIS
THIRD JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BETHANY McKEE, Defendant-Appellee, and JOSEPH HOSEY, Respondent-Appellant.	Appeal from the Circuit Court of the Twelfth Judicial Circuit, Will County, Illinois 13 CF 100 The Honorable Gerald R. Kinney Judge Presiding
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**BRIEF OF THE PEOPLE OF THE STATE OF ILLINOIS
PLAINTIFF-APPELLEE**

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POINTS AND AUTHORITIES

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THE DIVESTITURE ORDER AND
SUBSEQUENT CONTEMPT ORDERS WERE
IMPROVIDENTLY GRANTED BECAUSE THE
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CONSEQUENTLY, ANY HEARING ON THE
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STATEMENT OF FACTS

The People accept the statement of facts as presented by respondent Hosey, but will supplement the facts as needed in their argument.

ARGUMENT

I.

THE DIVESTITURE ORDER AND SUBSEQUENT CONTEMPT ORDERS WERE IMPROVIDENTLY GRANTED BECAUSE THE DISCLOSURE OF THE POLICE REPORTS, ALTHOUGH REGRETTABLE, WILL HAVE NO IMPACT ON DEFENDANT'S RIGHT TO A FAIR TRIAL BEFORE A FAIR TRIBUNAL. CONSEQUENTLY, ANY HEARING ON THE MATTER WOULD NOT BE PRODUCTIVE.

The Illinois reporter's privilege provides that divestiture shall be granted only if:

1) no state or federal secrets are compromised by disclosure of the information requested; 2) all other available sources of information have been exhausted; and 3) disclosure of the information sought is essential to the protection of the public interest involved. 735 ILCS 5/8-907. The information sought must be relevant to the proceeding. 735 ILCS 5/8-904; 735 ILCS 5/8-906. The person seeking divestiture of the reporter's privilege must prove compliance with the statutory requirements by a preponderance of the evidence. *People v. Arya*, 226 Ill.App.3d 848, 861 (4th Dist. 1992).

On August 29, 2013, the Honorable Judge Gerald Kinney entered an order divesting respondent Joseph Hosey of the reporter's privilege. (C. 271) Respondent, a news reporter, had obtained copies of the police reports in a double homicide with which

Defendant McKee and three others were charged. Respondent then published a series of articles about the homicides and referenced the police reports as his source. (C. 58-67) After respondent filed five articles, the circuit court entered a gag order, prohibiting the parties from speaking with the media and sealing the court files. (C. 68) Thereafter, defendant issued a subpoena to respondent, directing him to turn over the police reports. (C. 71-72) Respondent moved to quash the subpoena, relying on, among other things, the Illinois reporter's privilege and the special witness doctrine. (C. 80-91) The circuit court has not ruled on that motion.

Defendant, however, filed a motion to divest respondent of his reporter's privilege under 735 ILCS 5/8-901, *et seq.* (IC. 466-80) Defendant argued that respondent should be compelled to disclose the source of the released police reports because she was concerned that she would be "unduly prejudiced by pretrial publicity which was generated with the approval and the encouragement of the prosecutor and law enforcement." (C. 52)

The circuit court ordered counsel for the parties, their staffs, and the Joliet Police Department to provide affidavits attesting to whether or not they were the source of the disclosure. (R. 91-92) When the affidavits were returned to the circuit court, the affiants all averred that they were not the source of the disclosure. (Supp. IC, Ex. 1)

In their written pleadings and in argument, the People assured the court that no one from the State's Attorney's Office was responsible for the disclosure of the police reports. (IC. 91; R. 81) Furthermore, on information and belief, the People represented that the Joliet Police Department has no evidence that anyone in their department is responsible for the disclosure. (IC. 91; R. 82) The People believe that the Joliet Police Department took immediate and extraordinary measures to restrict internal access to the

reports by changing the computer codes to the records so that access was limited to Chief Michael Trafton, Commander Brian Benton, and the investigative staff working on the case. (IC. 91; R. 82)

The People further argued that the only relevant issue was the defendant's ability to receive a fair trial before a fair tribunal. (IC. 90, 93-95; R. 81) The disclosure of the police reports, although regrettable, would have no impact on the defendant's ability to receive a fair trial before a fair tribunal. (C. 90, 94-95; R. 81-85)

Thereafter, the circuit court issued an order divesting respondent of his reporter's privilege and ordering him to disclose the source of the police reports. (C. 263-72) On September 20, 2013, when respondent refused to disclose his source, the circuit court held him in direct civil and criminal contempt. (C. 277-79; R. 303-05)

The People respectfully assert that the order divesting respondent of his reporter's privilege was improvidently granted. The information sought must be relevant to the proceedings and there must be a specific public interest which will be adversely affected. 735 ILCS 5/8-904. The court must give due regard to the nature of the proceedings and the relevancy of the source. 735 ILCS 5/8-906. In the case at hand, the identity of respondent's source is entirely irrelevant to the issues central to the trial: whether defendant is responsible for the homicides of Terrance Rankins and Eric Glover.

In *People v. Arya*, 226 Ill.App.3d 848 (4th Dist. 1992), the defendant conceded that the sought after information was essential to protect the public interest involved where the reporter had notes and videotapes pertaining to at least three witnesses with "significant information" about a triple murder and armed robbery. In fact, part of the undisclosed information was an admission by an uncharged participant of his

involvement in the crime. *Id.* at 849, 854. In the case at hand, unlike *Arya*, respondent's source has no information pertinent to guilt or innocence.

In *In re Special Grand Jury Investigation of Alleged Violation of the Juvenile Court Act*, 104 Ill.2d 419 (1984), a reporter published an article chastising a judge for using inappropriate language during a juvenile proceeding. *Id.* at 421-22. The Illinois Supreme Court held that there was a compelling public interest in ascertaining who had violated the confidentiality provisions of the Juvenile Court Act. *Id.* at 425.

The compelling public interest in the case at hand is defendant's right to get a fair trial before a fair tribunal. *People v. Taylor*, 101 Ill.2d 377, 396 (1984) (R. 81) *People v. Yonder*, 44 Ill.2d 376, 388 (1969) (rev'd on other grounds in *Wilson v. Clark*, 84 Ill.2d 186 (1981)) (when the underlying case is criminal and the issue is pre-trial publicity, the only relevant issue is whether the defendant can be afforded a fair trial before a fair tribunal). However, disclosure of respondent's source would not improve defendant's ability to receive a fair trial since the information from the police reports has already been disseminated and disclosure would not "un-ring" that bell.

Rather than disclosure, in the face of unwanted pre-trial publicity, defendant's constitutional right to an impartial jury can be fully protected by the pre-trial procedures that have already been put in place by the legislature and the common law. For instance, questioning during *voir dire* is the best tool to ensure that the potential jurors are impartial. *People v. Sims*, 244 Ill.App.3d 966, 984-85 (5th Dist. 1993) (conviction affirmed where, despite extensive pre-trial publicity, the jurors indicated they had not formed an opinion about guilt or innocence, they had read or heard very little about the case, and they could be fair and impartial). Other tools available to the court include extra

peremptory challenges and careful, judicious rulings on challenges for cause. *Taylor*, 101 Ill.2d at 395-96 (new trial granted where the court refused five challenges for cause and six sitting jurors had been exposed to prejudicial pre-trial publicity). As a last resort, the court could grant a change of venue pursuant to 725 ILCS 5/114-6. Thus, the law already provides many layers of protection to ensure that defendant receives a fair trial before a fair tribunal.

The People, however, are not in complete agreement with respondent. On appeal, respondent argues that the circuit court did not exhaust all other available sources before ordering respondent to disclose his source. Respondent suggests that, in order to exhaust all other available sources, further investigation or a hearing might be appropriate. (Resp. Br. 17-18) The People disagree. The People understand that respondent's argument is made in the context of the divestiture order. But that does not change the fact that continued investigation or a hearing will do nothing to further the defendant's right to a fair trial before a fair tribunal. If the source of the disclosure is revealed, it will shed no light on defendant's guilt or innocence. Nor will it contribute in any way to the protection of defendant's constitutional rights.

In conclusion, the People respectfully assert that the order divesting respondent of his reporter's privilege was improvidently granted and that, consequently, a hearing would not be productive.

II.

THE CIRCUIT COURT'S DIVESTITURE ORDER CONTAINS GRATUITOUS LANGUAGE THAT POSES SOME HARM TO THE STATE'S ABILITY TO RECEIVE A FAIR TRIAL.

The People respectfully express concern about some of the language in the circuit court's order divesting respondent of the reporter's privilege. The People believe this language may interject unfounded issues into the trial and so may compromise their ability to successfully prosecute the defendant. The state has a right to a fair trial, a right that is equally important to a defendant's right, and a right that is often forgotten or neglected. *People v. Roy*, 172 Ill.App.3d 16, 24-25 (4th Dist. 1988); *People v. Lake*, 61 Ill.App.3d 428, 431 (4th Dist. 1978), citing *United States v. Tateo*, 377 U.S. 463, 466 (1964) (corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial).

In the case at hand, the circuit court suggested that the secrecy of the grand jury may have been compromised (C. 268), that a discovery violation may have occurred (C. 267), and that there could be "no dispute" that the disclosure of the police reports would be an issue on appeal or post-conviction. (C. 270). In the circuit court, the People argued that these "issues" are nothing more than speculation because there is absolutely no evidence to support them. (R. 297-98) There was not one shred of evidence – or even conversation – about the grand jury or discovery or an appeal. A circuit court order that is based on conjecture and speculation should not stand. *Davis v. City of Chicago*, 2014 IL App (1st) 122427, ¶¶99-100.

The People have one additional concern about the divestiture order. There was a

dispute among the parties about a conversation held in the hallway of the courthouse. Mr. Charles Bretz, counsel for defendant McKee, represented in a pleading that Chief Deputy State's Attorney Ken Grey told him that it was the understanding of the Will County State's Attorney's Office that the Joliet Police Department leaked the reports to the media and that the State's Attorney's Office was very disappointed. (C. 51) The People filed a notarized response asserting that Chief Deputy Grey said that he did *not know* if someone from the Joliet Police Department disclosed the reports, but that he was very disappointed that there had been a disclosure. (IC. 93) In defendant's reply, Mr. Bretz asserted that he stood by his original statement. (C. 140) Despite this factual dispute, and without benefit of a hearing or even an affidavit, the circuit court order made a wholesale adoption of Mr. Bretz's assertion. After the order was issued, the People disputed this finding. (R. 297) The People continue to dispute this finding. When the circuit court makes a factual determination without benefit of a hearing, that determination is not entitled to deference. *People v. Wright*, 403 Ill.App.3d 654, 659 (4th Dist. 2010). Moreover, this finding was entirely gratuitous, and had no bearing on the merits of either the criminal case or the divestiture order.

CONCLUSION

For the reasons stated herein, the People of the State of Illinois respectfully request that this Honorable Court find that the divestiture order was improvidently granted, that no hearing is required on the matter of the disclosure of the police reports, and that there is no basis to find there was a breach of the grand jury proceedings or a discovery violation.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341 (a) and (b). The length of this brief, excluding the pages containing the Rule 341 (d) cover, the Rule 341 (h)(1) statement of points and authorities, the Rule 341 (c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 8 pages.

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