STATE OF WISCONSIN CIRCUIT COURT MANITOWOC COUNTY

IN MATTER OF SUBPOENA TO:

LAURA RICCIARDI, and
SYNTHESIS FILMS

Calumet County Sheriff's Dept.
Related to State v. Avery
Case No. 05 CF 381

DECISION AND ORDER GRANTING MOTION TO QUASH SUBPOENA

Laura Ricciardi and Synthesis Films, Inc. (Ricciardi) have moved to quash a subpoena for the production of documents to the State of Wisconsin related to the case of State of Wisconsin v. Steven Avery, Case No. 05 CF 381. The Court issued the subpoena in November of 2006 commanding Ricciardi to produce the following documents:

1. Any written or electronically recorded statement made by Steven Avery to Laura Ricciardi and/or her associates or employees at Synthesis Films LLC.

2. Any written or electronically recorded statement made by any other person interviewed by Laura Ricciardi and/or employees or associates of Synthesis Films, LLC, who claim to have any knowledge of the involvement of Steven Avery, Brendan Dassey, or any other individual with the homicide of Teresa Halbach.

The subpoena was issued pursuant to an affidavit supplied to the court by Mark Wiegert, investigator with the Calumet County Sheriff's Department. The affidavit recites that Mr. Wiegert is aware Ricciardi is an independent filmmaker currently filming a documentary regarding the Steven Avery case. The affidavit

goes on to state that the sheriff's department has information that Chuck Avery, the defendant's uncle, told Jodi Stachowski, a friend of Steven Avery's, that he spoke with the documentary film makers about evidence that could be useful to Steven Avery. The affidavit further reflects that in a telephone call from the Calumet County jail to a female named Debbie Klemp, Steven Avery informed her that Ricciardi might have more information regarding his case, including proof that might result in the case being thrown out.

Among her other arguments, Ricciardi asserts that the subpoena should be quashed because she is protected by a limited journalist's privilege not to disclose information obtained in the course of her work and that the State has not met its burden to overcome her privilege as a journalist. For its part, the State counters that the evidence sought is relevant, Ricciardi is not entitled to any journalist's privilege, and even if she is, the State has met its burden requiring the information sought in the subpoena.

JOURNALIST'S PRIVILEGE

The briefs of the parties trace the history in both Wisconsin and federal courts of the extent to which journalists are entitled to withhold information which would otherwise be subject to subpoena in both criminal and civil cases. The Court will not retrace that extensive history here. What is known is that in Wisconsin journalists enjoy a limited privilege to withhold information received in

confidence in a criminal case. State v. Knops, 49 Wis. 2d 647 (1971); Zelenka v. State, 83 Wis. 2d 601 (1978); Green Bay Newspaper v. Circuit Court, 113 Wis. 2d 411 (1983). Wisconsin also grants a limited privilege to journalists to withhold information, whether or not received in confidence, in civil proceedings. Kurzynski v. Spaeth, 196 Wis. 2d 182 (Ct. App. 1995). Both parties recognize that to date there has been no Wisconsin case addressing the issue of a journalistic privilege to protect information not received in confidence in the context of a criminal proceeding. The parties acknowledge that the facts in this case fall into this latter category. That is, Ricciardi does not assert that the information being sought by the State was provided to her in confidence.

Although the State points to decisions from other jurisdictions which have come to contrary conclusions, this Court believes that Wisconsin appellate courts would find that journalists are entitled to a limited privilege to protect information obtained from nonconfidential sources in the context of a criminal proceeding. The Wisconsin cases which have addressed the issue of journalistic privilege are consistent in recognizing the need to grant journalists extra protection from "the intrusions and disruptions of having to comply with discovery subpoenas seeking evidence gathered in the course of their work as journalists." Kurzynski, *supra,* at 192. Kurzynski, the most recent Wisconsin reported decision to address journalistic privilege, summarizes the development of the law as follows:

"The *Knops* analysis foreshadowed that of *Branzburg v. Hayes,* 408 U.S. 665 (1972), which held that journalists could be compelled to answer questions posed during a grand-jury investigation of criminal activity. *Id.*, 408 U.S. at 690-692. As noted by *Zelenka v. State*, 83 Wis.2d 601, 618, 266 N.W.2d 279, 286-287 (1978), the majority opinion in *Branzburg* when read together with the concurring opinion of Justice Powell, whose agreement was necessary to achieve that majority, recognized a qualified journalist's privilege the parameters of which are to be determined in a manner 'comparable to the balancing test adopted by [the supreme] court in *Knops* - balancing freedom of the press against a compelling and overriding public interest in the information sought.' *Zelenka*, 83 Wis. 2d at 618, 266 N.W.2d at 287. Indeed, Justice Powell's concurring opinion in *Branzburg* noted, as did *Green Bay Newspaper Co.*, 113 Wis.2d at 422, 335 N.W.2d at 373, that constitutional protections afforded the press militated against using 'the news media as "an investigative arm"' of litigants. *Branzburg*, 408 U.S. at 709 (Powell, J., concurring). The striking similarity between the analysis in *Branzburg* and Knops, which were both decided under the First Amendment, and the analysis in *Green Bay Newspaper Co.*, which was decided under Article I, section 3, leads us to conclude that the scope of the qualified journalist's privilege is the same whether measured under the First Amendment or under Article I, section 3, and that 'the balancing approach of Knops - balancing a privilege of nondisclosure against the societal values favoring disclosure' remains the law in this state. *Zelenka*, 83 Wis.2d at 619, 266 N.W.2d at 287. Accordingly, we look to cases interpreting the journalist's qualified privilege under the First Amendment in civil cases for guidance in determining the scope of that privilege here." Kurzynski, at 194.

Kurzynski concluded that any time discovery is sought from a journalist, a balancing test must be conducted:

"Application of a qualified journalist's privilege in the context of civil litigation requires a balancing between, on the one hand, the need to insulate journalists from undue intrusion into their news-gathering activities and, on the other hand, litigants' need for every person's evidence. *See Schoen*, 48 F.3d at 415-416. This balancing is required irrespective of whether the journalist's information was obtained in

return for a promise of confidentiality. *See Green Bay Newspaper Co.*, 113 Wis.2d at 418, 335 N.W.2d at 371 (confidentiality promised); *Schoen*, 48 F.3d at 416 (confidentiality not promised)." *Kurzynski* at 196.

The court recognizes that the case for denying a journalist's privilege to protect information not received in confidence is arguably stronger in the criminal setting than in a civil case. Civil cases can be important but generally do not involve the potential deprivation of a person's liberty. However, the court is aware of nothing is Wisconsin's case law to suggest that our courts would refuse to recognize a journalistic privilege on the facts in this case. If anything, Wisconsin courts have shown more deference to the journalist's privilege than other courts have. *See, e.g.* McKevitt v. Pallasch, 339 F. 3d 530 (7th Cir. 2003).[1]

The tests devised by the Wisconsin Supreme Court in Green Bay Newspaper for confidential information sought in a criminal case and by the Wisconsin Court of Appeals in Kurzynski for information not confidentially obtained in a civil case are not that far apart. The tests share common elements. Green Bay Newspaper established the following test for confidential information sought from a journalist in a criminal case:

[1] McKevitt is a 7th Circuit Court of Appeals case which declined to apply a journalist's privilege in a civil proceeding involving information that apparently came from a nonconfidential source. McKevitt concluded that in such a setting the first amendment did not require a special privilege for members of the media. Thus, the court came to the opposite conclusion of our Court of Appeals in the Kurzynski case. This may well be a situation in which Wisconsin appeals courts would find that our State constitution goes farther in its protection of journalists than the first amendment.

"For a person to seek to invoke the privilege, there must be an initial showing, by affidavit or otherwise, that the person is one to whom the privilege should extend.

. . . .

If the defendant has offered sufficient unrebutted proof that a subpoenaed witness' testimony will be competent, relevant, material and exculpatory or will lead to such evidence, normally a subpoena will be allowed to stand and the witness required to testify. *Groppi*, 41 Wis.2d at 323. However, where the witness makes a claim of journalist's privilege, an additional step is necessary before the subpoena will be enforced and the journalist required to disclose his sources in an in camera hearing. That added step is to require the defendant to make a showing to the trial court by a preponderance of the evidence that he has investigated other sources for the kind of information he seeks and there are no reasonable and adequate less intrusive alternative sources where he can obtain the information. Lamberto, 326 N.W.2d at 308. Once the defendant has made such a showing, the person asserting the privilege may rebut this claim." Green Bay Newspaper *at* 420-422.

Kurzynski set forth the following test to be used when determining whether information obtained from nonconfidential sources is available in a civil proceeding:

[W]here information sought is not confidential, a civil litigant is entitled to requested discovery notwithstanding a valid assertion of the journalist's privilege [that is, that the person asserting the privilege is a "journalist"] by a nonparty only upon a showing that the requested material is: (1) unavailable despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an important issue in the case. We note that there must be a showing of actual relevance; a showing of potential relevance will not suffice. *Id.*, 48 F.3d at 416." *Kurzynski* at 196.

APPLICATION OF JOURNALIST'S PRIVILEGE TO THIS CASE

The court concludes at the outset that Laura Ricciardi and Synthesis Films, LLC do meet the definition of a journalist. There is a suggestion in the State's written response that Ricciardi is somehow an "investigative arm" of the Steven Avery defense team. This suggestion is apparently based on the fact that Ricciardi filmed some blood evidence located in the Manitowoc County Clerk of Circuit Court office back in August of 2006 from a 1985 case before the State became aware of the evidence. The court has not been presented with any evidence to suggest that Ricciardi is anything other than an independent film maker. In fact, the affidavit submitted by the State in support of the subpoena contains ample evidence of that fact. Ricciardi's only apparent interest in investigating this case is as an independent film maker and the court is satisfied that she qualifies as a journalist for purposes of applying the privilege.

The next step under the test of Green Bay Newspapers is to determine whether the subpoenaed witnesses' testimony will be competent, relevant, material, and exculpatory or will lead to such evidence. The Kurzynski test asks if such evidence will be noncumulative and clearly relevant to an important issue in the case. One aspect that sets this case apart from Knops and Green Bay Newspapers is that the party requesting the subpoena is not seeking evidence helpful to its own case, but evidence that might be helpful to the other side. That

is, the State is not seeking any additional evidence to support its case, but rather is seeking evidence that has been represented by other persons to be helpful to the defense. The affidavit does not contain a hint as to what such evidence might be or why anyone would have actual knowledge that would assist the defense. For her part, Ricciardi has submitted an affidavit asserting she does not recall any statements by anyone claiming to have knowledge of the involvement of Steven Avery, Brendan Dassey, or any individual in the death of Teresa Halbach. The court concludes that while the information contained by the State in its affidavit does raise suspicions that relevant, material, and exculpatory evidence may exist, the proof is not particularly strong. There is no real suggestion as to what the information might be, who possesses the information, or how the unknown person would have come into such information. This is contrasted to the case in Knops, for example, where the journalist involved claimed to have communicated with the Sterling Hall Bombers, whose identity the State was attempting to establish.

The third part of the test is whether the State has shown that it has investigated other sources for the kind of information sought and there are no reasonable or adequate less intrusive alternative sources where the State can obtain the information. This is similar to the language in Kurzynski which requires the moving party to demonstrate that the requested information is unavailable despite exhaustion of all other reasonable alternative sources. Part of the problem in this

case is that the nature of the precise information sought is so elusive. The affidavit recites that Chuck Avery spoke with Ricciardi about evidence that could be useful to Steven Avery, but Ricciardi denies receiving any such information. Steven Avery's statement to Debbie Klemp that Ricciardi may have more information about the case that could result in the case being thrown out may well be no more than wishful thinking. There is simply no firm reason to believe that the evidence sought by the State exists. Under these circumstances, the court concludes that the State has not met its burden and the subpoena should be quashed.

ORDER

It is hereby order that the motion of Laura Ricciardi and Synthesis Films to quash the subpoena is granted.

Dated this 22nd day of January, 2007.

BY THE COURT:

Patrick L. Willis,
Circuit Judge