

Volume III- Case Incident File
File 11
Hollywood's Appeal/Judge LEE
11/21/83

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

Case No: 83-1955

SAM D. MARTIN, as Police Chief :
of the City of Hollywood Police :
Department, :

Appellant, :

vs. :

HOLLYWOOD MALL, INC., SEARS :
ROEBUCK AND COMPANY, and :
JOHN E. WALSH, etc., et al., :

Appellees. :

_____ :

APPEAL FROM FINAL ORDER
OF THE SEVENTEENTH JUDICIAL CIRCUIT, BROWARD COUNTY, FLORIDA

J. Cail Lee, Circuit Judge

INITIAL BRIEF OF APPELLANT

Sam D. Martin, Police Chief
of the City of Hollywood Police Department

Geoffrey D. Cohen, Esquire
3250 Hollywood Boulevard
Hollywood, Florida 33021
Telephone: (305) 921-3307
Attorney for Appellant

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PRELIMINARY STATEMENT

In this brief, the Appellant, Sam D. Martin, the Police Chief of the City of Hollywood, Florida, will be referred to as "Martin". Appellee, Hollywood Mall, Inc., Defendant below, will be referred to as "Hollywood Mall". Appellee, Sears Roebuck and Company, Defendant below, will be referred to as "Sears". Appellee, John E. Walsh, etc., et al. Plaintiff below, will be referred to as "Walsh".

References to the transcript of the hearing on August 31, 1983, will be by use of the symbol (T.).

Citations to the Record will be by use of the symbol (R.).

STATEMENT OF THE CASE

On July 22, 1983, Appellee, John E. Walsh, as personal representative of the estate of Adam J. Walsh, a deceased minor child, filed suit against Sears Roebuck and Company and the Hollywood Mall, Inc., for wrongful death, pursuant to the Florida Wrongful Death Act, Sections 768.16-768.27, Florida Statutes (1981) (R. 53-62).

On August 11, 1983, Appellee, Hollywood Mall, Inc., served Appellant, Sam D. Martin, the Chief of Police of the City of Hollywood, Florida, with a subpoena duces tecum, returnable on September 1, 1983, which directed him to produce the entire police investigative file with respect to the abduction and murder of Adam Walsh (R. 71-72).

On August 24, 1983, Appellant filed a motion to quash the subpoena duces tecum and a motion for a protective order (R. 68-70).

On August 31, 1983, a hearing was held with respect to the motion to quash and motion for a protective order (R. 1-52), and on September 7, 1983, the trial court entered an order with respect to said motions (R. 73).

Notice of Appeal from the final order which denied Appellant's motion to quash and motion for a protective order was filed by Appellant September 12, 1983.

STATEMENT OF THE FACTS

On August 11, 1983, Appellee, Hollywood Mall, caused Appellant, Martin, to be served with a subpoena duces tecum, returnable on September 1, 1983, which directed him:

"To produce the entire investigative file, including all photographs and statements of the City of Hollywood Police Department, arising from or relating to the disappearance, abduction and subsequent apparent murder of ADAM J. WALSH, a minor, who disappeared at the Sears, (sic) Roebuck store in the City of Hollywood on or about July 27th, 1981." (R. 71-72).

On August 24, 1983, Appellant filed a motion to quash the subpoena and a motion for a protective order which alleged that the entire police investigative file with respect to the apparent abduction and murder of Adam Walsh was exempt from disclosure pursuant to the Florida Public Records Act, Sections 119.07 (3)(d), 119.07 (3)(e), and 119.07 (3)(f), Florida Statutes (1981), in that the voluminous police investigative file contained "active criminal investigative information", information revealing the identities of confidential informants and sources, and information revealing surveillance techniques and procedures and police personnel engaged therein (R. 68-70). Appellant further alleged in said motions that since July 27, 1981, the day in which Adam Walsh was reported missing, and subsequently determined to have been murdered, until the present time, personnel of the Hollywood Police Department have been engaged

in an intensive on-going investigation with respect to the Walsh murder and, "That the lead police investigators assigned said case have a reasonable basis to believe that the person or persons responsible for said crime will be arrested in the foreseeable future." (R. 68-69).

On August 31, 1983, a hearing was held on Appellant's motion to quash and motion for a protective order.

Present at said hearing was counsel for the Hollywood Mall, Sears, and Walsh (T. 2-3). Also present at said hearing were the lead police investigators assigned the Adam Walsh murder investigation (T. 37) who were in possession of the investigative file (T. 29).

Counsel for Appellant, Martin, requested the court to conduct an in camera inspection of the investigative file (T. 7-8, 40) and, additionally, requested the court to examine, in camera, the lead police investigators (T. 8, 37), for the purpose of determining whether the investigative file contained active criminal investigative information, information revealing the identity of confidential informants and sources, and information revealing surveillance techniques and procedures and police personnel engaged therein.

Counsel for Appellant asserted that the entire Adam Walsh investigative file was not subject to disclosure to any of the parties in that the file contains all of the above-mentioned information which is exempt from disclosure pursuant

to the Florida Public Records Act (T. 4-5, 38), that the investigation is on-going and active (T. 9), and, that even the disclosure of the investigative file to the parties would compromise the murder investigation (T. 7, 14-15, 36-38).

Appellant's counsel requested the court to examine, in camera, the lead police investigators with respect to Appellant's contention that the investigation would be compromised were the court to permit a disclosure of the investigative file to the parties even with the court mandating confidentiality within the parties (T. 14, 36-37).

Counsel for the Hollywood Mall asserted that the Florida Public Records Act was not applicable to litigants (T. 11, 27-28), and that the court should order disclosure of portions of the investigative file prior to an in camera inspection (T. 19).

The court denied objections to the sufficiency of Appellant's motion to quash and motion for a protective order (T. 35-36).

Without conducting either an in camera inspection of the investigative file or an in camera examination of the lead police investigators, the Court denied Appellant's motion to quash and motion for a protective order. Said motions were denied based on the court's determination that "fairness" to the parties required an initial disclosure of the file (T. 13, 43).

The court ordered Appellant to comply with the subpoena duces tecum and ordered the disclosure of the investigative file, with the condition that Appellant could initially withhold from disclosure information with respect to the identities of confidential informants that could create a safety hazard to them, information relating to the current aspects of the on-going investigation that might be reasonably calculated to bear upon the possibility of arrest, and sensitive personal information that may invade the privacy of individuals (T. 43-44) (R. 73). The court further ordered that any materials withheld from disclosure shall be submitted for in camera inspection by the court in the presence of counsel for the parties (T. 44-45)(R. 73). The court stated that the parties to the wrongful death action would be involved in the determination of what portions of the investigative file were to be disclosed (T. 24-25, 45).

ISSUES PRESENTED FOR REVIEW

- I. ARE THE CONTENTS OF THE ADAM WALSH HOMICIDE INVESTIGATIVE FILE, COMPILED BY THE CITY OF HOLLYWOOD POLICE DEPARTMENT IN CONNECTION WITH THE POLICE DEPARTMENT'S INVESTIGATION OF THE MURDER OF ADAM WALSH, "PUBLIC RECORDS" WITHIN THE SCOPE OF CHAPTER 119?
- II. ARE THE CONTENTS OF THE ADAM WALSH HOMICIDE INVESTIGATIVE FILE EXEMPT FROM DISCLOSURE PURSUANT TO SECTION 119.07 (3)(d), SECTION 119.07 (3)(e), AND SECTION 119.07 (3)(f) IF FOUND TO CONTAIN "ACTIVE CRIMINAL INVESTIGATIVE INFORMATION", INFORMATION REVEALING THE IDENTITIES OF CONFIDENTIAL INFORMANTS AND SOURCES, AND SURVEILLANCE TECHNIQUES AND PROCEDURES?
- III. SHOULD THE TRIAL COURT HAVE LIMITED THE STATUTORY EXEMPTIONS FOR ACTIVE CRIMINAL INVESTIGATIVE INFORMATION, CONFIDENTIAL INFORMANTS AND SOURCES, AND FOR SURVEILLANCE TECHNIQUES AND PROCEDURES BASED ON "FAIRNESS" TO THE PARTIES?
- IV. SHOULD THE TRIAL COURT HAVE CONDUCTED AN IN CAMERA INSPECTION OF THE ADAM WALSH HOMICIDE INVESTIGATIVE FILE PRIOR TO ORDERING A PARTIAL DISCLOSURE OF THE FILE WHEN STATUTORY EXEMPTIONS TO DISCLOSURE WERE ASSERTED?

- I. ARE THE CONTENTS OF THE ADAM WALSH HOMICIDE INVESTIGATIVE FILE, COMPILED BY THE CITY OF HOLLYWOOD POLICE DEPARTMENT IN CONNECTION WITH THE POLICE DEPARTMENT'S INVESTIGATION OF THE MURDER OF ADAM WALSH, "PUBLIC RECORDS" WITHIN THE SCOPE OF CHAPTER 119?

Section 119.011 (1), Florida Statutes (1981), defines as "public records":

"(A)ll documents, papers, letters, maps, books, tapes, photographs, films, sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."

Appellant, a municipal officer, and the City of Hollywood Police Department, a municipal police department, come within the statutory definition of "agency" set forth in Section 119.011 (2), Florida Statutes (1981).¹

Clearly, the records subpoenaed by the Hollywood Mall and the subject of the trial court's order, the Adam Walsh homicide investigative file, compiled by personnel of the Hollywood Police Department in connection with the police department's investigation of the murder of Adam Walsh, are "public records" within the scope of Chapter 119, Florida Statutes (1981),

1. Section 119.011 (2), Fla. Stat. (1981) provides:

" 'Agency' means any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency."

and broadly defined in Shevin v. Byron, Harless, Schaffer, etc.,
379 So. 2d 633 (Fla. 1980).²

2. City of Tampa v. Harold, 352 So. 2d 944 (Fla. 2 D.C.A. 1977) held that police reports are not public records within the meaning of Chapter 119, Florida Statutes (1975). The Court based its decision on Wisher v. News-Press Publishing Co., 310 So. 2d 345 (Fla. 2 D.C.A. 1975) and certain public policy considerations. The decision of the Second District Court of Appeal in Wisher was overruled by the Florida Supreme Court in 1977. The Florida Supreme Court found that the records in question were in fact public records. The decision in City of Tampa v. Harold, supra, based on public policy considerations, directly conflicts with the later decisions of the Florida Supreme Court in Rose v. D'Alessandro, 380 So. 2d 419 (Fla. 1980), Wait v. Florida Power and Light Co., 372 So. 2d 420 (Fla. 1979) and News-Press Publishing Co. v. Wisner, 345 So. 2d 646 (Fla. 1977).

II. ARE THE CONTENTS OF THE ADAM WALSH HOMICIDE INVESTIGATIVE FILE EXEMPT FROM DISCLOSURE PURSUANT TO SECTION 119.07 (3)(d), SECTION 119.07 (3)(e), AND SECTION 119.07 (3)(f) IF FOUND TO CONTAIN "ACTIVE CRIMINAL INVESTIGATIVE INFORMATION", INFORMATION REVEALING THE IDENTITIES OF CONFIDENTIAL INFORMANTS AND SOURCES, AND SURVEILLANCE TECHNIQUES AND PROCEDURES?

The Florida Public Records Act exempts from disclosure active criminal investigative information³, information revealing the identity of confidential informants and sources⁴, and information revealing surveillance techniques, procedures and personnel engaged therein⁵.

The Florida legislature desired an open policy with respect to state, county and municipal records. Section 119.01, Florida Statutes (1981). However, in certain instances, public records are privileged or exempt from disclosure even where such public records would serve private litigants. Getter v. Yanks, 290 So. 2d 543 (Fla. 3 D.C.A. 1974); Widener v. Croft, 184 So. 2d 444 (Fla. 4 D.C.A. 1966). The Public Records Act does not address the motives of persons seeking public records. Warden v. Bennett, 340 So. 2d 977 (Fla. 2 D.C.A. 1976).

Although a liberal construction is to be given the requirement of relevancy in the discovery provisions of Rule

3. Section 119.07 (3) (d), Fla. Stat. (1981).

4. Section 119.07 (3)(e), Fla. Stat. (1981).

5. Section 119.07 (3)(f), Fla. Stat. (1981).

1.280 (b) of the Florida Rules of Civil Procedure and particularly in the rule governing the use of subpoena duces tecum (Kennedy v. Kennedy, 298 So. 2d 525 (Fla. 2 D.C.A. 1974), certain matters are not subject to discovery.

"Florida Rules of Civil Procedure 1.280 and 1.350 generally provide for broad discovery in a civil trial. However, this discovery is not unlimited. Initially, it must be relevant to the subject matter of the case and be admissible or reasonably calculated to lead to admissible evidence in the case. Even after these conditions are satisfied, the particular items or information sought to be discovered may be privileged and therefore beyond permissible discovery." East Coast Colonial Refuse Service, Inc. v. Velocci, 416 So. 2d 1276 (Fla. 5 D.C.A. 1982).

Appellant would stipulate that there is indeed much information contained within the Adam Walsh homicide investigative file that is either relevant to the subject matter of the pending wrongful death action or reasonably calculated to lead to the discovery of admissible evidence. Notwithstanding this, it is Appellant's position that the entire homicide investigative file is not subject to disclosure to any of the parties in that the file contains not only information revealing the identities of confidential informants and information with respect to surveillance, but the entire investigative file contains "active criminal investigative information".

Were Appellant to have asserted only the statutory exemptions with respect to confidential informants (Section 119.07 (3)(e), Florida Statutes (1981), and surveillance information (Section 119.07 (3)(f), Florida Statutes (1981), Appellant would have produced the investigative file after having removed the above-said information pursuant to Section 119.07 (2)(a), Florida Statutes (1981).⁶

However, Appellant also asserted the exemption with respect to active criminal investigative information. Section 119.011 (3)(b), Florida Statutes (1981) defines such information:

" 'Criminal investigative information' means information with respect to an identifiable person or group of persons compiled by a criminal justice agency in the course of conducting a criminal investigation of a specific act or omission, including but not limited to, information derived from laboratory tests, reports of investigators or informants, or any type of surveillance."

6. Section 119.07 (2)(a), Fla. Stat. (1981) provides:

"Any person who has custody of public records and who asserts an exemption provided in subsection (3) or in general or special law applies to a particular record shall delete or excise from the record only that portion of the record for which an exemption is asserted and shall produce for inspection and examination the remainder of such record."

Section 119.07 (2)(b), Florida Statutes (1981)⁷ provides that if there is no basis for the asserted exemption of active criminal investigative information, the records shall be disclosed. It is axiomatic that, if there is a basis for the asserted exemption, the records shall not be disclosed. Investigative police reports are exempt from disclosure. Rose v. D'Allesandro, 380 So. 2d 419 (Fla. 1980); Satz v. Blankenship, 407 So. 2d 396 (Fla. 4 D.C.A. 1981); Satz v. Gore Newspapers Company, 395 So. 2d 1274 (Fla. 4 D.C.A. 1981); 1980 Op. Att'y. Gen. 80-96 (Dec. 5, 1980).

The entire investigative file contains "criminal investigative information" because it was compiled by a criminal justice agency with respect to a specific act, a murder, and with respect to "an identifiable person or group of persons".

The Appellees would have Appellant disclose statements secured by police investigators from parents, friends, and family members of the murder victim with respect to the events

7. Section 119.07 (2)(b), Fla. Stat. (1981) provides in pertinent part:

" . . . In the case of an exemption asserted pursuant to paragraph (d) of subsection (3), an in camera inspection shall be discretionary with the court. If the court finds no basis for the assertion of the exemption, it shall order the records to be disclosed."

of the first few days after his reported disappearance and argue that this information is either not exempt from disclosure or that the disclosure of such information would not impede the criminal investigation.

Appellant would assert that the latter position of Appellees is immaterial to the issue at hand, although Appellant would strongly disagree with this conclusion.

It is the position of the Appellant that, because this information came from identifiable persons and is with respect to other identifiable persons and was compiled pursuant to a criminal investigation of a homicide, this information is "criminal investigative information" and, if found to be "active" ((Section 119.011 (3)(d), Florida Statutes (1981)), is exempt from disclosure.

The trial court erred in ordering the disclosure of surveillance techniques and procedures and personnel engaged therein, and in failing to protect against the disclosure of any information with respect to the identity of confidential informants and sources.

Although the trial court permitted Appellant to initially withhold "information relating to the current aspects of the on-going investigation that might be reasonably considered to bear upon the possibility of arrest and/or apprehension and arrest" said information does not correspond with the definition

criminal investigative information and the statutory exemption
for active criminal investigative information.

III. SHOULD THE TRIAL COURT HAVE LIMITED THE STATUTORY EXEMPTIONS FOR ACTIVE CRIMINAL INVESTIGATIVE INFORMATION, CONFIDENTIAL INFORMANTS AND SOURCES, AND FOR SURVEILLANCE TECHNIQUES AND PROCEDURES BASED ON "FAIRNESS" TO THE PARTIES?

As first recognized by the Fourth District Court of Appeal in State ex rel. Veale v. City of Boca Raton, 353 So. 2d 1194 (Fla. 4 D.C.A. 1977), the rule that any exception to the Public Records Act must originate in the legislature and not by judicial decision was adopted by the Supreme Court of Florida in Wait v. Florida Power and Light Co., 372 So. 2d 420 (Fla. 1979).

It is well-settled that only the Legislature can create exceptions to the Public Records Act and that judicially created exceptions based on public policy considerations are precluded. Rose v. D'Allesandro, 380 So. 2d 419 (Fla. 1980); Wait v. Florida Power and Light Co., supra; Douglas v. Michel, 410 So 2d 936 (Fla. 5 D.C.A. 1982); Gadd v. News-Press Publishing Company, 412 So. 2d 894 (Fla. 2 D.C.A. 1982); Morgan v. State ex rel. Shevin, 383 So. 2d 744 (Fla. 4 D.C.A. 1980).

It is apparent that the trial court erred and limited the statutory exemptions set forth in the Public Records Act for active criminal investigative information, confidential informants and sources, and for surveillance techniques and procedures based on its determination of what fairness to the parties required.

While it is clear that non-statutory public policy

considerations may not restrict public access to government documents deemed "public records", it is axiomatic that the reverse ought to be true as well. That is, non-statutory policy considerations may not limit the statutory exemptions of the Public Records Act.

IV. SHOULD THE TRIAL COURT HAVE CONDUCTED AN IN CAMERA INSPECTION OF THE ADAM WALSH HOMICIDE INVESTIGATIVE FILE PRIOR TO ORDERING A PARTIAL DISCLOSURE OF THE FILE WHEN STATUTORY EXEMPTIONS TO DISCLOSURE WERE ASSERTED?

Section 119.07 (2)(b), Florida Statutes (1981)⁸, mandates an in camera inspection of records when exemptions for confidential informants and surveillance information are asserted. The same section provides that an in camera inspection of the records is discretionary when the exemption for active criminal investigative information is asserted. However, the records shall not be disclosed if the court finds a basis for the asserted exemption.

Clearly, the trial court erred in ordering the disclosure of the records prior to conducting an in camera inspection of the records.

That although the trial court made no specific finding with respect to whether the criminal investigative information

8. Section 119.07 (2)(b), Fla. Stat. (1981) provides:

"In any action in which an exemption is asserted pursuant to paragraph (e), paragraph (f), or paragraph (g) of subsection (3), the record or records shall be submitted in camera to the court for a de novo inspection. In the case of an exemption asserted pursuant to paragraph (d) of subsection (3), an in camera inspection shall be discretionary with the court. If the court finds no basis for the assertion of the exemption, it shall order the records to be disclosed."

was "active" ((Section 119.011 (3)(d), Florida Statutes (1981)) its order did permit Appellant to initially withhold "(I)nformation relating to the current aspects of the ongoing investigation . . ." (R. 73). If the trial court was of the opinion that the investigation was indeed "ongoing" or active, no disclosure of the investigative file should have been permitted. The trial court, at the very least, should have reviewed the entire investigative file in camera.⁹


Subsequent to an in camera review of the records, the court alone is to make a determination as to whether the records are to be disclosed. The parties to the wrongful death action are not to become involved in the review of the records or in making the determination with respect to disclosure.

9. The Fourth District Court of Appeal in Satz v. Gore Newspapers Company, 395 So. 2d 1274 (Fla. 4 D.C.A. 1981), criticized prosecutors for requesting the trial court to conduct an in camera inspection of voluminous records where the State Attorney conceded that some of the records were subject to disclosure. In the instant case, it is Appellant's position that none of the records are properly subject to disclosure.

CONCLUSION

WHEREFORE, based upon the foregoing facts and citation of authority, Appellant believes that the order of the trial court should be quashed and the cause remanded with the instruction that the trial court is to conduct an in camera review of the homicide investigative file prior to ordering the disclosure of any portion of said records.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Geoffrey D. Cohen", written over a horizontal line.

Geoffrey D. Cohen, Esquire

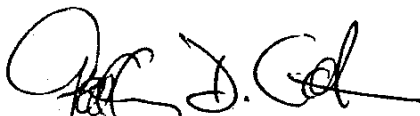
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant was furnished by mail this 21st day of November, 1983, to:

REX CONRAD, ESQUIRE
Attorney for Appellee, Hollywood Mall, Inc.
Post Office Box 14723
5th Floor, Blackstone Building
707 S.E. 3rd Avenue
Fort Lauderdale, FL 33302

W. SAM HOLLAND, ESQUIRE
Attorney for Appellee, Walsh
Kimbrell, Hamann, Jennings, Womack,
Carlston & Kniskern, P.A.
Suite 900
Brickell Plaza
Miami, FL 33131

RICHARD GORDON, ESQUIRE
Attorney for Appellee, Sears Roebuck
Post Office Box 14636
25 South Andrews Avenue
6th Floor, Sun Bank Building
Fort Lauderdale, FL 33302



Geoffrey D. Cohen, Esquire