

STATE OF NEW YORK
COUNTY COURT : COUNTY OF MONROE

THE PEOPLE OF THE STATE OF NEW YORK

-vs-

DECISION AND
ORDER

KEVIN VICKERS,
Defendant

Ind. No. 2007-0398F

Monroe County District Attorney
Timothy Prosperi, Esq., Assistant District Attorney
For the People

Monroe County Public Defender
Donald Scalia, Esq., Assistant Public Defender
For the Defendant

Christopher Thomas, Esq.
For the Democrat and Chronicle

The People have subpoenaed Steven Orr, a newspaper reporter employed by the Democrat and Chronicle to testify as a witness in the above referenced criminal trial, in regard to certain articles which appeared in the February 23, 2006 and February 24, 2006 editions of the Democrat and Chronicle. The articles make reference to certain conversations between Mr. Orr and the Defendant regarding the circumstances surrounding the pending criminal charges which are the subject of this trial.

In response, counsel for the Defendant seeks production by Mr. Orr

of all his notes pertaining to the subject of the articles for purposes of cross-examination. Counsel for the Defendant maintains that he is entitled to utilize said notes in order to protect the Defendant's rights under both the United States and New York State constitutions.

Counsel for the Democrat and Chronicle has moved to quash the subpoena, maintaining that the reporter is entitled to refuse to testify or to produce any notes. He relies on Civil Rights Law §79-h (c), known as the "Reporter Shield Law", as well as the First Amendment.

After extensive oral argument by all counsel, the Court has determined that, while the reporter may enjoy a qualified privilege regarding non-confidential material constituting the fruits of his investigation, that statutory privilege only applies when the party issuing the subpoena seeks disclosure of unpublished materials. In this case, the People seek the testimony of Mr. Orr only as to the material set forth in the four corners of the published newspaper article. The Court further finds that the qualified privilege has been waived as to the published material. Civil Rights Law §79-h (g) recognizes the possibility of a waiver of the exemption by a reporter.

As to the reporter's notes, the Court has determined that the

Defendant is entitled to receive a redacted copy of said notes for use during cross-examination. While the qualified privilege extends to any unpublished information obtained by Mr. Orr which was not the subject of the newspaper article, that privilege has likewise been waived as to any material which appears within the four corners of the article. Since the privilege has been waived to that extent, neither party need meet the three-pronged test recognized by the Court of Appeals in O'Neill v. Oakgrove Constr. Inc., 71 NY2d 521 (1988), now codified in Civil Rights Law §79-h (c).

The application to quash the People's subpoena is denied. Mr. Orr is hereby ordered to testify at trial, and to produce his notes for in camera review by the Court to determine which portions relate to the published material and are therefore not protected by the qualified privilege.

This Constitutes the Decision and Order of the Court.

Dated: July 27, 2009
Lyons, New York



Honorable Dennis M. Kehoe
Acting Supreme Court Justice