

IN THE DISTRICT COURT OF FORD COUNTY, KANSAS
SIXTEENTH JUDICIAL DISTRICT

IN THE MATTER OF AN INQUISITION)
TO INQUIRE INTO CERTAIN ALLEGED)
VIOLATIONS OF THE LAWS OF THE)
STATE OF KANSAS)

CASE NO. 09 MR 163

FILED
2009 DEC -9 PM 3:13

MEMORANDUM ORDER

The above-captioned matter comes on for hearing on the 1st day of December, 2009. The State of Kansas appears through Ford County Attorney, Terry J. Malone, and Assistant Ford County Attorney, J. Scott James; Claire O'Brien, subject of the subpoena, appears in person and with her attorneys, William A. Hurst of HISCOCK AND BARCLAY, LLP, Albany, New York, who appears via telephone, and Michael Giardine of the CAMPBELL LAW FIRM, Cimarron, Kansas.

WHEREUPON, after reviewing all submitted materials, hearing arguments of counsel and reviewing applicable law, the Court finds as follows:

1. The First Amendment to the United States Constitution concerns freedoms we all hold particularly dear, which include freedom of religion, freedom of speech, freedom of the press, right to peaceably assemble, and right to petition the government concerning grievances.
2. While these freedoms are held in the highest of esteem, none come without limitations. For example, we would not allow human sacrifices in the name of religion; freedom of speech and of the press are limited when obscenity

Inquisition
Case No. 09 MR 163
Page 2

becomes an issue; the right to peaceably assemble can be controlled and regulated when it hinders safety or governmental functions; all of which becomes clear when one reviews any of the thousands of cases which have been heard by state and federal courts concerning this amendment.

3. In this situation, there is no limitation directed toward what was published and no efforts are being made to limit what the Dodge City Daily Globe will publish in the future. The subpoena concerns an attempt by the State to obtain information that they believe:

- a) Would aid them in the prosecution of an individual charged with Second Degree Murder and Attempted Second-Degree Murder; and
- b) Would protect the public from what is perceived as a threat or possible danger, both which could be crimes, to members of our community.

4. Case law, both state and federal, has weighed in on this issue through various court cases. It is of major importance to note these cases, when dealing with *criminal investigations*, have been unequivocal with their holdings when reviewing the majority, not dissenting, opinions.

5. The case of *In re Pennington* 224 Kan. 573 (1978) involved a reporter not wanting to disclose the identity of an informant in a criminal trial. The Court stated, "We believe a newsperson has a **limited** privilege of confidentiality of information and identity of news sources, although such does not exist by statute or common law." (Emphasis added.) At p. 574. Note the case

indicates a newsperson's privilege of confidentiality is limited, which will be next discussed.

6. The Court goes on to state, "...a news reporter's privilege is more tenuous in a criminal proceeding than in a civil case, that fact in and of itself does not automatically require disclosure in a criminal case." *Pennington* p. 576. It is clear in this instance we are dealing with a criminal case; thus, a news reporter's privilege is more tenuous.
7. The test used to determine whether a privilege exists with a reporter whereby he/she would not have to disclose his/her sources is this, "The proper test enunciated by the *Branzburg* majority is whether the information sought is **relevant** to the issues before the tribunal." (Emphasis added.) According to the concurring (not the majority) opinion of Justice Powell in the *Branzburg* case, the test used to determine whether the information should be considered privileged or not is a "balancing test". In both the *Pennington* and *Branzburg* cases, the courts find: "The trial court in this case stated that if the balancing test were applied, the need for the information outweighed the news reporter's privilege of confidentiality." See also *Branzburg v. Hayes*, 408 U.S. 665 (1972).
8. In this case involving information and notes Ms. O'Brien may possess, defendant Samuel Bonilla is facing criminal charges that include Second Degree Murder and Attempted Second Degree Murder. Bonilla has asserted self-defense as his reasons for the shootings. Clearly, evidence relating to why he felt threatened, what his perceptions were and why he acted as he

Inquisition
Case No. 09 MR 163
Page 4

did are relevant to the State in such a prosecution. Additionally, the newspaper makes reference to one of the victims having "a base of support that is well-known for its anti-Hispanic beliefs," and "the same source stated he has seen evidence that Brunson's support base has a supply of semi-automatic weapons."

9. These statements must be taken in context with each other and, logically, would lead a person to the conclusion that violence against Hispanics is a possibility. Under those circumstances, law enforcement has an obligation to protect the citizens of this community which, without question, makes information that Claire O'Brien has pertaining to this situation **relevant**. Similarly, any evidence concerning the shooting and, in this case particularly, thoughts of Bonilla as to why he felt self-defense was appropriate is relevant to a prosecutor.
10. As stated in the *Pennington* case, "As a general rule, disclosure has been required only in those criminal cases where it is shown the information in possession of the news reporter is material to prove an element of the events... . When the information sought has a bearing in one of these areas, the newsperson's privilege must yield to the defendant's right to due process and a fair trial." p. 576.

In this case, when applying the balancing test, it is clear to the Court that the need for this information outweighs the news reporter's privilege of confidentiality. However, the *Pennington* and *Branzburg* cases involve criminal charges and indicate the information held by the news reporter only must be **relevant** to be discovered in a criminal case.

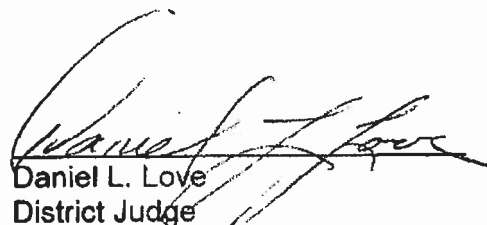
Inquisition
Case No. 09 MR 163
Page 5

Under either analysis, the information must be divulged.

WHEREFORE, the subpoena is not ordered quashed, the inquisition is to proceed,
and the State is to set a date to have the inquisition heard.

IT IS SO ORDERED.

DATED: 12-9-09



Daniel L. Love
District Judge

- c. Terry J. Malone
- William A. Hurst
- Michael Giardine