

IN THE CIRCUIT COURT FOR THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

CASE NO. 22-1250CFA

vs.

JAMES ERIC FOGLESONG,
Defendant.

**ORDER DENYING DEFENDANT'S MOTION FOR SUBPOENA *DUCES TECUM* OF
THE ORLANDO SENTINEL AND MR. JASON GARCIA**

THIS CAUSE comes before the Court on Defendant's "Motion for Subpoena *Duces Tecum* of the Orlando Sentinel and Mr. Jason Garcia," dated November 2, 2022. Having reviewed the motion, the "Opposition to Motion for Subpoena *Duces Tecum* of the Orlando Sentinel and Mr. Jason Garcia" filed on November 29, 2022, and having conducted a hearing, the Court finds as follows:

Defendant is charged with making two or more contributions through or in the name of another in any election (Count 1), commission of a false, fictitious or fraudulent act, statement or representation in a matter within the jurisdiction of the State of Florida, Department of State (Count 2), unlawful use of a two-way communication device (Count 3), making an aggregate cash contribution in excess of \$50 to the same candidate in an election (Count 4), and false reporting or deliberate failure to include information required by Chapter 106, Florida State Statutes (Count 5). He is seeking the issuance of subpoenas to three Orlando Sentinel employees and one former Orlando Sentinel reporter for "[a]ny and all physical document(s), electronic document(s), internal hard drive(s), external hard drive(s), USB drive(s), SD card(s), physical and cloud-based storage devices, and any other electronic device or service capable of storing digital information, and any login information and passwords needed to access any responsive

devices, storage devices, and cloud-based platforms" concerning Matrix LLC, Florida Power and Light ("FPL"), Grow United, and People Over Profits, including any former employees of these entities. A hearing was held on January 10, 2023. In addition to the parties, counsel for the Orlando Sentinel was present. At the hearing, this Court took judicial notice of the information and complaint filed in this case on May 23, 2022, pursuant to the State's request.

Pursuant to Fla. Stat. § 90.5015, professional journalists enjoy "a qualified privilege not to be a witness concerning, and not to disclose the information, including the identity of any source, that the professional journalist has obtained while actively gathering news." Fla. Stat. § 90.5015(2) (2023). The privilege does not apply to physical evidence of crimes, eyewitness observations of crimes, or visual or audio recording of crimes. "[O]nce the privilege attaches, a court must apply the three-prong balancing test ... to determine whether the privilege will act to prevent the disclosure of the reporter's information." State v. Davis, 720 So. 2d 220, 227 (Fla. 1998). The test is set forth in section 90.5015(2):

A party seeking to overcome this privilege must make a clear and specific showing that:

- (a) The information is relevant and material to unresolved issues that have been raised in the proceeding for which the information is sought;
- (b) The information cannot be obtained from alternative sources; and
- (c) A compelling interest exists for requiring disclosure of the information.

As an initial matter, Defendant asserts that the information sought constitutes physical evidence of a crime; and therefore, the reporter's privilege is inapplicable. While "physical evidence of a crime, eyewitness observations of a crime, and visual or audio recording of crimes" is excluded from the privilege, "information concerning crimes obtained by a newspaper reporter, as well as all other information obtained, is subject to the qualified privilege and the

balancing test.” News-Journal Corp. v. Carson, 741 So. 2d 572, 575 (Fla. 5th DCA 1999) (emphasis added). The Fifth District Court of Appeal rejected the “argument that ‘documents’ are ‘physical evidence.’” Recognizing that the term “information” includes “a broad category of tangible things such as memos, notes, letters, papers, and microfiche, not just the reporter's recollections,” the Court noted that if the Legislature did not intend the privilege to include such tangible things, “it would not have been necessary ... to expressly exclude from the term ‘information,’ the tangible items pertaining to crimes.” Id. Defendant failed to present any evidence at the hearing to establish that the items in possession of the Orlando Sentinel constitute physical evidence of a crime and not just information concerning possible crimes. Therefore, the privilege applies and this Court must conduct the balancing test.

Under the first prong, Defendant must make a “clear and specific showing” that the information sought is relevant and material to an unresolved issue in this case. While Defendant asserts that the information in the possession of the Orlando Sentinel purportedly reflects a statewide scheme to put forth ghost candidates in the 2020 election, Defendant fails to allege, much less show, how that is relevant to unresolved issues in this case. Defendant is charged with allegedly making illegal contributions to co-defendant Jistine Iannotti's political campaign, utilizing a two-way communication device to communicate with Ms. Iannotti regarding those contributions, and making false reports regarding those contributions to the Florida Department of State. It is hard to imagine how information regarding the alleged involvement of FPL, Matrix LLC, Grow United, and People Over Profits in a scheme to promote ghost candidates would tend to prove or disprove Defendant’s guilt in this matter. Therefore, Defendant has failed to meet his burden of showing that the information is relevant and material.

Under the second prong, Defendant must make a “clear and specific showing” that the information sought is not available from alternative sources. Defendant has failed to do so. Defense counsel has candidly admitted that no attempts have been made to obtain the information directly from FPL, Matrix LLC, Grow United, or People Over Profits. Defendant has the burden of “exhaust[ing] alternative sources prior to compelling” a reporter to provide the information. Tribune Co. v. Green,¹ 440 So. 2d 484, 486 (Fla. 2d DCA 1983); see also, Muhammad v. State, 132 So. 3d 176, 190 (Fla. 2013). Therefore, Defendant has failed to meet his burden of showing that the information is not available from alternative sources.

Under the third prong, Defendant must make a “clear and specific showing” that there is a compelling interest requiring disclosure. A compelling interest has been described as "information that goes to the heart of the [party's] claim" and "necessary to the proper presentation of the case." Muhammad, 132 So. 3d at 190(internal citations omitted). Given that Defendant has failed to demonstrate that the documents sought are relevant and material to an unresolved issue in this case, Defendant has failed to demonstrate that there is a compelling interest in requiring disclosure.

Accordingly, it is

ORDERED AND ADJUDGED that Defendant’s motion is DENIED.

DONE AND ORDERED in chambers at Sanford, Seminole County, Florida, on
Tuesday, January 17, 2023.

¹ The Court notes that Green has a red flag because subsequent cases recognized that Green was implicitly overruled by CBS, Inc. v. Jackson, 578 So.2d 698, 700 (Fla.1991) on the issue of whether the journalist privilege applied to nonconfidential information. See Tampa Television, Inc. v. Norman, 647 So. 2d 904, 905 (Fla. 2d DCA 1994). However, the Florida Supreme Court subsequently ruled that the qualified reporter's privilege applies to both nonconfidential and confidential information. State v. Davis, 720 So. 2d 220, 222 (Fla. 1998).

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Donna McIntosh, Circuit Judge

59-2022-CF-001250-A 01/17/2023 03:41:29 PM

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59-2022-CF-001250-A 01/18/2023 08:46:06 AM

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Charlotte Legette, Judicial Assistant

59-2022-CF-001250-A 01/18/2023 08:46:06 AM