The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

State of New Hampshire

v.

Carl Gibson

No. 217-2015-CR-00325

ORDER

The Defendant, Carl Gibson, is charged with False Documents, Names, or Endorsements in violation of RSA 666:6, Attempted Voter Suppression in violation of RSA 629:1 and RSA 659:40, and Voter Suppression in violation of RSA 659:40. The Defendant now moves to dismiss all three charges on the ground that RSA 666:6, 629:1, and 659:40 impose overbroad speech restrictions that violate his rights under Part I, Article 22 of the New Hampshire Constitution and the First Amendment to the United States Constitution. The State objects. Additionally, Nick Reid, a newspaper reporter, moves to quash the State's subpoena compelling him to testify against the Defendant. Reid contends the subpoena violates his newsgathering privilege under Part I, Article 22 of the New Hampshire Constitution and the First Amendment to the United States Constitution. The State objects on the ground that the privilege does not apply because the sought testimony concerns only non-confidential information. Based on the pleadings and applicable law and for the reasons stated in this Order, Reid's Motion to Quash is GRANTED. The State represented that it will not proceed if the Motion to Quash is

granted, therefore the Court has not acted on the Defendant's Motion to Dismiss. However, if the State elects to proceed, the Court will entertain a motion for interlocutory appeal to the New Hampshire Supreme Court, because the Court believes the application of RSA 659:40 and 666:6 raises significant constitutional issues.

I

The indictments arise from the following alleged facts. Republican candidate Yvonne Dean-Bailey was running in a May 19, 2015 special election for State Representative from Rockingham County District 32. On May 14, 2015, the Defendant, a volunteer for the opposing Democratic Candidate, allegedly issued a false press release stating that Dean-Bailey was dropping out of the race, thereby leaving the impression that the special election was uncontested. The State alleges Gibson's motive was to induce District 32 voters to refrain from voting in the special election.

The press release was attached to an e-mail with a subject line stating "BREAKING: Yvonne Dean-Bailey concedes Rockingham 32 special election #nh politics." (State's Mem. of Law in Supp. of Obj. to Def.'s Mot. Dismiss Ex. A, ¶ 4.) The e-mail was from the address of "Yvonne.deabailey@gmail.com," though Dean-Bailey's correct address is "Yvonne.deanbailey@gmail.com." (Id.) The press release stated Dean-Bailey was dropping out of the race in order to focus on her studies at Mount Holyoke College. (Id.)

Nick Reid was covering the special election as a reporter for the Concord Monitor, a newspaper of general circulation. (Reid Aff. ¶ 1.) Reid received the e-mail with the attached press release and became suspicious due to the form and content of the e-mail and attached file. He contacted a representative of the New Hampshire Republican Party who indicated he was unaware of Dean-Bailey withdrawing from the race. He then wrote a

short article for the May 15, 2015 issue that reported the press release as a hoax. (Reid Aff. ¶¶ 3–5.)

Reid subsequently investigated the Microsoft Word file attached to the e-mail by selecting "Properties" under the "File" tab, which revealed information about the file. The properties indicated the creator of the file was "Carl Gibson," and the file was created on May 14, 2015, at 19:30:00. Reid then conducted an Internet search to determine how to contact Gibson. (Reid Aff. ¶¶ 6–7.)

On May 15, an attorney from the New Hampshire Attorney General's Office ("AGO") sent Reid a letter regarding Reid's May 15, 2015 article about the e-mail. Reid then contacted the attorney to inquire whether the State was investigating complaints about the hoax. Reid asked whether the AGO was aware Gibson's name was embedded in the attached file and explained how he found the information. (Reid Aff. ¶¶ 8–9.) Later that day, Reid also contacted a man who identified himself as Gibson and other sources. He then wrote another article appearing in the May 16, 2015 issue under the headline, "Man who sent hoax e-mail from GOP candidate had 'too many beers' before 'prank.'" (Reid Aff. ¶ 10.)

In January 2016, the AGO informed Reid of its intention to subpoena him to testify against Gibson. Reid expressed his concern that the prospect of having to testify in criminal cases about subjects he investigated as part of his job as a reporter would make it difficult for him to effectively perform his newsgathering duty in the future because of the potential public perception that he is an agent of the prosecution. The AGO served Reid with a subpoena on March 16, 2016. (Reid Aff. ¶¶ 11–13.) The subpoena to Reid provides:

> You are required to appear before the Merrimack County Superior Court at 163 North Main St., Concord, in said county on May 9th through the 20th,

> 2016 at 9:00 a.m. in the forenoon, to testify what you know relating to a criminal matter to be heard and tried between the State of New Hampshire and Carl Gibson subject to notification of exact date and time to be determined upon commencement of trial. You are to remain on call until discharged.

(Reid Aff. Ex. 7.) The State represents that it made no other attempts to obtain the sought evidence from alternative sources, including by serving a search warrant of the Defendant's computer. The information sought by the State is "inculpatory statements that amount to a confession made by the Defendant while interviewed by Mr. Reid." (State's Mem. of Law in Supp. of Obj. to Def.'s Mot. Dismiss, at 6.)

II

Reid contends his press privilege relieves him of the obligation to testify. The State counters that Reid may be compelled to testify about information he published to the public, even if he is privileged from testifying to information not publically disclosed. The Defendant maintains that allowing Reid to testify about published information, but not about confidential information such as his impressions, violates his constitutional right to confrontation.

A

Part I, Article 22 of the New Hampshire State Constitution affords journalists a qualified privilege to protect confidential sources and information in civil and criminal cases. State v. Siel, 122 N.H. 254, 259 (1982). In finding this newsgathering privilege, the Supreme Court observed, "Our constitution quite consciously ties a free press to a free state, for effective self-government cannot succeed unless the people have access to an unimpeded and uncensored flow of reporting. News gathering is an integral part of the process." Opinion of the Justices, 117 N.H. 386, 389 (1977). Accordingly, it has held:

> [A] defendant may overcome a press privilege to withhold a confidential source of news only when he shows: (1) that he has attempted unsuccessfully to obtain the information by all reasonable alternatives; (2) that the information would not be irrelevant to his defense; and (3) that, by a balance of the probabilities, there is a reasonable possibility that the information sought as evidence would affect the verdict in his case.

Siel, 122 N.H. at 259. Although Siel involved a case in which the criminal defendant sought to pierce the privilege, at a minimum the same balancing of interests applies where the State seeks to pierce the privilege, given the societal interest in all citizens giving relevant testimony about criminal conduct. See Branzburg v. Hayes, 408 U.S. 665, 710 (1972) (Powell, J., concurring). Indeed, there are compelling concerns which arise when the State seeks to extract testimony from a journalist; the First Circuit expressly noted that journalists are disadvantaged where they appear to be used as an investigative arm of the judicial system or the State. United States v. LaRouche Campaign, 841 F.2d 1176, 1181–82 (1st Cir. 1988).

The New Hampshire Supreme Court has not addressed whether the scope of the newsgathering privilege's protection includes non-confidential, unpublished information. It has only stated that the press must have the right "to gather news so as to effectuate the policy of our constitution that a free press is essential to the security of freedom in a state." In re Keene Sentinel, 136 N.H. 121, 127 (1992) (quoting Keene Publ'g Corp. v. Keene Dist. Ct., 117 N.H. 959, 961 (1977)) (recognizing the press's right to access judicial proceedings). Some courts have found that non-confidential, unpublished information is not protected. See, e.g., United States v. Smith, 135 F.3d 963, 972 (5th Cir. 1998). Other courts applying similar balancing tests have recognized that such unpublished information is protected by the privilege, but its non-confidentiality is an important factor in balancing the interests of the reporter and the party requesting the information. See, e.g., In re Subpoena to

Goldberg, 693 F. Supp. 2d 81, 85 (D.D.C. 2010); United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980); United States v. Sanusi, 813 F. Supp. 149, 153 (E.D.N.Y. 1992).

The Third Circuit reasoned the privilege must extend to unpublished resource material, regardless of confidentiality, because such an intrusion into the editorial process and the possibility of self-censorship created by compelled disclosure "would substantially undercut the public policy favoring the free flow of information to the public that is the foundation for the privilege." Cuthbertson, 630 F.2d at 147. Similarly, in describing the interests of journalists in protecting their confidential and non-confidential information, the First Circuit observed:

> We discern a lurking and subtle threat to journalists and their employers if disclosure of outtakes, notes, and other unused information, even if nonconfidential, becomes routine and casually, if not cavalierly, compelled. To the extent that compelled disclosure becomes commonplace, it seems likely indeed that internal policies of destruction of materials may be devised and choices as to subject matter made, which could be keyed to avoiding disclosure requires or compliance therewith rather than to the basic function of providing news and comment.

LaRouche Campaign, 841 F.2d at 1182.

Adopting this reasoning, the Court finds that the newsgathering privilege guaranteed by Part I, Article 22 of the New Hampshire State Constitution must extend to protect unpublished work product of journalists in order to ensure unimpeded and uncensored flow of reporting that is essential to a free state. Here, Reid states in his affidavit that he wrote the article identifying Gibson after he "spoke with Gibson and other sources." (Reid Aff. ¶ 10.) The reasons supporting the privilege are especially apparent in this case. Requiring him to testify about his unpublished work product, and potentially identify his confidential sources, despite the State's complete lack of effort to obtain the information from an alternative source—like a search warrant—would have a chilling

effect on the free flow of information because journalists would appear to be an investigative arm of the State, thereby reducing sources' willingness to talk and diminishing journalists' incentive to investigate and report. Accordingly, because the State concedes it did not even attempt to serve a search warrant to obtain evidence of the Defendant's alleged criminal conduct, the State fails to satisfy the first prong of the Siel test requiring the State to show it has attempted "unsuccessfully to obtain the information by all reasonable alternatives." Siel, 122 N.H. at 259.

B

The fulcrum of the State's argument is that it does not intend to obtain any confidential information from Reid because it intends to limit its questioning of Reid to the statements made by the man who identified himself as Gibson. But Part I, Article 15 of the New Hampshire Constitution guarantees criminal defendants the right to cross-examine and impeach the credibility of adverse witnesses, which includes "the right to expose the possible biases and prejudices of witnesses." State v. Durgin, 165 N.H. 725, 732 (2013). Gibson is entitled to cross-examine Reid—the State's primary witness—and a full and fair cross-examination would necessarily require the Court to allow the Defendant to inquire about unpublished information, such as Reid's mental impressions and investigative process. Moreover, Reid's affidavit specifically states, and the State does not dispute, that information he received came from Gibson and other sources. (Reid Aff. ¶ 10.) While the State may limit its examination to material in the public record, the Defendant may not, and the court cannot limit the Defendant's cross-examination of Reid.

The State cites Maine v. Hohler, 543 A.2d 364 (Me. 1988), for the proposition that the newsgathering privilege does not extend to protect Reid in this case. But the State

reads Hohler too broadly. In Hohler, the Maine Supreme Judicial Court noted with approval that many courts hold that a qualified privilege allows a reporter to refuse to testify regarding confidential sources or confidential information and that some courts recognize that nonconfidential, unpublished information is protected by a qualified privilege. Hohler stated:

> In recognizing a qualified privilege, the opinions of these courts have emphasized that if such a privilege is not recognized, the reporter's duty to gather news and disseminate it to the public is hindered in at least two respects: 1) potential sources will refuse to give interviews for fear their names will be revealed if the reporter is called to testify before a grand jury or in a criminal or civil proceeding; 2) in addition, those in the media will choose not to publish information that could potentially result in employees spending substantial amounts of time testifying in criminal or civil proceedings, as well as before commissions, legislative committees or grand jurors.

Id. at 365.

Unlike this case, which involves information from a person who identified himself as Gibson and other confidential sources, Hohler involved an article that contained the name of the source, and the reporter apparently admitted that everything that the source revealed to him in the interview was included in the article. Thus, the Maine Supreme Judicial Court stated:

> [W]e find necessary to emphasize the narrow scope of the question we have answered today: we refuse to recognize a qualified privilege for a reporter not to testify concerning *non-confidential, published information obtained from an identified source*. We intimate no opinion as to whether there is a qualified privilege for a reporter to refuse to reveal confidential sources; confidential, unpublished information; or non-confidential, unpublished information.

Id. at 365 (emphasis added).

The instant case differs from Hohler. First, Reid conducted only a telephone interview with Gibson, who he had never met before. The information in his article, and

presumably his conclusion that Gibson is the defendant in this case may well depend upon the "other sources" referred to in his affidavit. This distinction alone makes Hohler inapposite. Second, because Reid engaged in investigative work and utilized other sources in doing so, defense counsel may well have the obligation and right to cross-examine Reid on his investigation, which may result in Reid being compelled to produce information about his confidential sources.

Finally, even assuming that the information sought could be limited to non-confidential statements made by Gibson to be without any confidential or non-confidential, unpublished information being extracted from the journalist, the subpoena still runs afoul of the New Hampshire Constitution. Illustrative is United States v. Blanton, 534 F. Supp. 295, 297 (S.D. Fla. 1982), in which the court quashed a subpoena requiring a journalist to testify regarding his work product in a criminal case because the government failed to show that it had made reasonable attempts to get the information from alternative sources. In that case, the subpoenaed journalist wrote an article including information and quotations attributable to the Defendant. Id. at 296. The government charged the Defendant and asserted the Defendant's statements in the article were essential to its proof, and it therefore subpoenaed the journalist to verify the statements. Id. All of the information sought was gathered and developed by the journalist in his newsgathering capacity, even though no confidential information was sought. Id. Critically, the government had failed to make any efforts to obtain alternative sources for the information. Id. The court reasoned, "Although no confidential source or information is involved, this distinction is irrelevant to the chilling effect enforcement of the subpoena would have on the flow of information to the press and public." Id. at 297. This reasoning

applies with equal force to the present case, which presents similar facts and interests and is consistent with the analysis of these issues by the New Hampshire Supreme Court.

Based on the foregoing, the Court finds that the State has failed to satisfy the Siel test to overcome Reid's newsgathering privilege. Accordingly, Reid's Motion to Quash Subpoena is GRANTED.

III

Defendant has also moved to dismiss on the grounds that RSA 666:6 and 659:40, III (b) are substantially overbroad and therefore invalid. At oral argument, the State asserted that it would likely not proceed if the motion to quash were granted.

The allegations against Gibson are serious, and his conduct, if true, strikes at the very heart of our system of elected representative government. On the other hand, the statutes by their terms raise overbreadth concerns. RSA 666:6 provides, for example, that a person who uses a "fictious name" on a "means of communication" for the "purpose of influencing votes" shall be guilty of a misdemeanor. Under the statute as written, Alexander Hamilton, James Madison, and John Jay, authors of the Federalist Papers under the pseudonym of "Publius," would be guilty of a misdemeanor. Similarly, RSA 659:40 III (b) provides that it is a misdemeanor to attempt "to induce another person . . . from voting by providing that person with information that he or she knows to be false or misleading." It is simply a fact that political candidates in our Republic routinely accuse each other of making false and misleading statements.

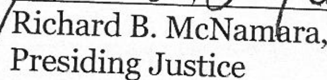
Free speech and liberty of the press are essential to the security of freedom in the State and must be inviolably preserved. State v. Zidel, 156 N.H. 684, 686 (2008). A "statute is void for overbreadth if it attempts to control conduct by means which invades

areas to protect freedom." State v. Hynes, 159 N.H. 187, 202 (2009). "The purpose of the overbreadth doctrine is to protect those persons who, although their speech or conduct is constitutionally protected, may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression." State v. Gubitosi, 157 N.H. 720, 726-27 (2008). "If a statute is found to be substantially overbroad, the statute must be invalidated unless the court can supply a limiting instruction or partial invalidation that narrows the scope of the statute to constitutionally acceptable applications." Hynes, 159 N.H. at 686; see also State v. Brobst, 151 N.H. 420, 422 (2004).

The Court believes that the issue will be constitutionality of RSA 666:6 and RSA 659:40 present difficult issues that should be considered by the New Hampshire Supreme Court if this case proceeds. Accordingly, if the State intends to proceed with this prosecution, the Court directs the parties to prepare an interlocutory appeal statement to consider the issue of the constitutionality of RSA 666:6 and RSA 659:40.

SO ORDERED.

7/22/16
DATE



Richard B. McNamara,
Presiding Justice

RBM/