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Freedom of Speech and the Press

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Petitioner also asserted that there should be a right of access under the broader protections afforded by the New York State Constitution, article I section 8.⁷¹¹ The Court noted that although the court of appeals has, in some cases, found the state constitution to be more protective of expressional freedoms than the United States Constitution,⁷¹² “there is no such precedent with respect to the right of access.”⁷¹³

Finding that Johnson offered no persuasive argument to extend the right at this time, the court declined to do so. Thus, the result was the same under the state constitution as under the federal constitution.

COUNTY COURT

ST. LAWRENCE COUNTY

People v. Doe⁷¹⁴
(decided August 21, 1990)

A newspaper brought a motion to quash a subpoena served on its employee, the defendant Richard Roe.⁷¹⁵ The newspaper grounded its motion in the qualified news reporter’s privilege under the state constitution. It also contended that the privilege existed under the Federal Constitution and brought its motion under both the state⁷¹⁶ and federal⁷¹⁷ constitutions.

563 N.Y.S.2d at 383 (quoting *Press-Enterprise Co. v. Superior Ct.*, 478 U.S. 1 (1986)).

711. *Id.* at 8, 564 N.E.2d at 1049, 563 N.Y.S.2d at 383.

712. *Id.* (citing *O’Neill v. Oakgrove Constr., Inc.*, 71 N.Y.2d 521, 528-29, 523 N.E.2d 277, 280-81, 528 N.Y.S.2d 1, 4-5 (1988)).

713. *Johnson Newspaper Corp.*, 77 N.Y.2d at 8, 564 N.E.2d at 1049, 563 N.Y.S.2d at 383.

714. 148 Misc. 2d 286, 560 N.Y.S.2d 177 (Sup. Ct. Lawrence County 1990).

715. Richard Roe is a fictitious name. Pursuant to section 190.50 of the state’s Criminal Procedure Law, the name of the party subpoenaed before a grand jury can be changed to avoid disclosure. *See* N.Y. CRIM. PROC. LAW § 190.50(7) (McKinney 1982).

716. N.Y. CONST. art. I, § 8.

717. U.S. CONST. amend. I.

The County Court of St. Lawrence County held that the news reporter is directed to comply with the subpoena for testimony.⁷¹⁸ The court found no right of qualified immunity under the Federal Constitution and reached its decision under the New York State Constitution, determining that the qualified immunity does not serve to release one from the obligation to testify.⁷¹⁹ The court reserved for further consideration the news reporter's right to raise the qualified privilege in response to a particular question.⁷²⁰

Factually, reporter Richard Roe, working for newspaper A, covered a Department of Environmental Conservation hearing. At the beginning of the hearing, the administrative law judge advised media representatives that no tape recording would be allowed. A spectator who was present at the hearing complained to the administrative judge that she observed Roe using a tape recorder. A grand jury inquiry ensued, the focus being "whether or not Newspaper A violated various provisions of the law by allegedly allowing or directing its reporter to tape record [the] proceeding in apparent violation of a direction by the Administrative Law Judge not to do so."⁷²¹ Roe was subpoenaed to testify. Newspaper B, Roe's current employer, sought to protect him by this motion to quash the subpoena.

The court looked at this as a question of "whether the qualified privilege recognized by the New York Court of Appeals in the civil context . . . and by the lower federal courts, . . . protects a news reporter from an obligation to appear and testify before a Grand Jury when the avowed purpose of the investigation concerns the news gathering procedures of the reporter's employer, rather than news obtained from a third-party source, confidential or otherwise."⁷²²

Newspaper B, in asserting that Roe need not testify, grounded

718. *Doe*, 148 Misc. 2d at 292, 560 N.Y.S.2d at 181.

719. *Id.* at 291, 560 N.Y.S.2d at 180-81.

720. *Id.* at 292, 560 N.Y.S.2d at 181.

721. *Id.* at 287-88, 560 N.Y.S.2d at 178.

722. *Doe*, 148 Misc. 2d at 290, 560 N.Y.S.2d at 180. Although some lower federal courts have recognized this qualified privilege, the United States Supreme Court has not. *Id.*

its argument primarily in *O'Neill*, in which the New York State Court of Appeals found that article I, section 8 of the New York State Constitution “provides an independent ground for recognition of a qualified reporter’s privilege”⁷²³ This privilege attaches, “regardless of whether the material sought was confidential or non-confidential[] and . . . is only overcome when the party seeking disclosure can show that the items or information sought are (1) highly material, (2) critical to the litigant’s claim, and (3) not otherwise available.”⁷²⁴

In concluding that the news reporter be directed to comply with the subpoena, the court stated that it needed to “balance the competing interests of recognizing the qualified news reporter’s privilege under appropriate circumstances against the government’s interest in an unimpeded Grand Jury investigation of legitimate subjects of inquiry.”⁷²⁵ In balancing the interests, the court determined that there was an insufficient showing to justify quashing the subpoena.⁷²⁶

The court recognized that New York courts have found that under article I, section 8 of the state constitution, a qualified privilege exists, even in the grand jury context.⁷²⁷ It also noted, however, that this “does not undermine a Grand Jury’s power to issue a subpoena and the initial responsibility of a subpoenaed reporter-witness to attend.”⁷²⁸ As a result, the court held that the reporter must comply with the subpoena. This did not preclude the reporter’s right to claim the qualified immunity in response to a particular question. The court reserved its right to further consideration of the issue when raised.

The right of qualified privilege, however, has not been recognized by the United States Supreme Court. The Supreme Court has found that requiring a news reporter to appear and testify before state or federal grand juries does not abridge the freedom

723. *Id.* at 288, 560 N.Y.S.2d at 179.

724. *Id.*

725. *Id.* at 290, 560 N.Y.S.2d at 180.

726. *Id.* at 291-92, 560 N.Y.S.2d at 181.

727. *Id.* at 291, 560 N.Y.S.2d at 180.

728. *Id.*

of speech and press guaranteed by the first amendment.⁷²⁹ In *Doe*, the court acknowledged that the Supreme Court has said:

[T]he sole issue . . . is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime. Citizens generally are not constitutionally immune from grand jury subpoenas; and neither the First Amendment nor any other constitutional provision protects the average citizen from disclosing to a grand jury information that he has received in confidence.⁷³⁰

Thus, although the case was brought under both the federal and state constitutions, it seems clear that the defendant's only cognizable claim was under the state constitution.

729. *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972).

730. *Doe*, 148 Misc. 2d 286, 291, 560 N.Y.S.2d 177, 180 (citing *Branzburg*, 408 U.S. at 682).