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SUPREME COURT, STATE OF COLORADO

Case No. 83 SA 134

APPEAL FROM THE DISTRICT COURT, JEFFERSON COUNTY

FILED IN THE
SUPREME COURT
OF THE STATE OF COLORADO

JUL 21 1983

OPENING BRIEF

David W. Brezina, Clerk

KRISTEN BENSON,

Petitioner-Appellant,

vs.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent-Appellee.

Dennis W. Hartley, Reg. #0788
HARTLEY, OBERNESSER & OLSON
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ATTORNEYS FOR PETITIONER-APPELLANT

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ISSUES

A. Whether the Petitioner has a Fourth and Fifth Amendment protection pursuant to the civil investigative demand filed December 13, 1982 and whether it is necessary for the District Attorney to show probable cause and documents are relevant and there is a connection between the documents requested and the target of the investigation.

B. Whether the District Attorney's Office complied with provisions of 18-17-107 (2) (a) and whether the civil investigative demand of December 13, 1982, contains an adequate advisement of rights pursuant to C.R.S. 18-17-107, 1973, as amended.

C. Whether the civil investigative demand violated Petitioner's rights under the First, Fourth, Fifth, and Fourteenth Amendments of the United States Constitution and Article 2, Section 6, 7, 16, and 25 of the Colorado Constitution in failing to give notice to the target of the investigation.

D. Whether the civil investigative demand of December 13, 1982, is overbroad in its requests.

STATEMENT OF THE CASE

The Jefferson County District Attorney issued a civil investigative demand on December 13, 1982, which was served on Kristen Benson, an officer and agent for service of process of MSSSI on December 14, 1982. Appellant moved to quash this demand. The District Court for the First Judicial District set a briefing schedule and on March 14, 1983, issued an order denying the Appellant's Motion to Quash. The Appellant filed a Motion to Reconsider that was denied on March 25, 1983, and this appeal was taken.

ARGUMENT

The Colorado Legislature has seen fit to adopt a statute that is almost identical to the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. (1961), which was enacted by the Federal Government a few years ago. In the case before this Court, we address only a specific portion of the Colorado Act dealing with civil investigative demands, C.R.S. 18-17-107, (1973), as amended. This section of the act gives District Attorneys and/or the Attorney General, without notice to the target of the investigation, unless demand is made upon that individual, power to obtain records without showing: (1) That there is probable or reasonable cause that the records are relevant to the investigation and (2) That records are related in some way to the target of the investigation.

In the case before this Court, the District Attorney's Office for Jefferson County made demand upon MSSSI for its books and records, management agreements, contracts, bank accounts, accounts receivable, accounts payable, and corporate minutes. It further made demand on any and all records, documents, and papers in the possession or control of Management Security Services Inc. (MSSSI) pertaining to any and all businesses managed by MSSSI, including but not limited to, bank accounts, accounts payable, accounts receivable, management agreements, or contracts, profit and loss statements, and corporate minutes. A Petition to Quash the civil investigative demand was made, however, (1) No hearing was held to determine if probable cause existed as to whether the records were relevant to the investigation and (2) No hearing was held to determine whether the documents requested, or MSSSI

in particular, was related in any way to the target of the investigation.

It is clear from the prior decisions of this Court that an individual has a reasonable expectation of privacy in his bank account and, further, asserts a Fifth Amendment right with regard to his personal account, which is also a subject of the civil investigative demand. The test that has been adopted in the State of Colorado is the test set forth in Katz v. U.S., 389 US 347, 88 S. Ct., 507, 19 L. Ed., P. 2d 576, (1967). This test has been adopted in Charnes v. DiGiacomo, ___ Colo. ___, 612, P. 2d, 1117, (1980). In DiGiacomo, supra, the Court held that the Defendant has a reasonable expectation of privacy in his bank records or bank records which involve him. This right has been extended to corporations. People Ex Rel McFarland v. American Banco, ___ Colo. ___, 570 P. 2d, 825 (1977). In the test in Katz, supra, has been applied in the Colorado Courts to reasonably limit government searches and seizures. People v. Weisenberger, 183 Colo. 353, 516 P. 2d, 1128, (1973), Seymour v. People, 175 Colo. 344, 487 P. 2d, 1116, (1971). This has been extended to bank records, See, DiGiacomo, supra. The District Attorney has never alleged or made a showing that there is any relationship between MSSSI and the target of the investigation or how the records from MSSSI would be relevant to their investigation.

In accordance with the decision in DiGiacomo, supra, the Appellant, Kristen Benson, states that the civil investigative demand should be set aside in that it is clearly a violation of the Appellant's constitutional rights as previously stated, and that the civil

investigative demand does not meet the warrant requirements of probable cause for a search and seizure. This is not solved by the filing of an affidavit untested by cross-examination or other testimony which is, at best, third hand, hearsay statements. A hearing should be required to test the sufficiency of any affidavits and allegations made therein. However, in the case before this Court, no affidavit or testimony was ever offered by the District Attorney's Office to support their contentions in the civil investigative demand.

If this Court rules that the civil investigative demand is a civil subpoena for investigation, the civil investigative demands would still fail under the test set forth in People Ex Rel McFarland v. American Banco, supra. Under American Banco, this Court adopted a test for civil subpoenas found in Oklahoma Press Publishing Company v. Walling, 327 US, 186, (1947). Under these cases, the District Attorney's Office needs to establish probable cause for the Court to order the production of the documents requested. This is satisfied if the Court determines that: (1) The investigation is authorized by the legislature; (2) It is for a purpose that the legislature can order; and (3) The documents are relevant to the inquiry. In addition, the District Attorney must specify the documents to be produced with adequate definition and the documents must be found to be not excessive for the purpose of relevant inquiry.

In the recent case of Pignatiello v. the District Court, ____ Colo. ____, ____ P. 2d, (1983), this Court set forth certain requirements for Grand Jury subpoenas that essentially follow these guidelines. In Pignatiello, the Petitioner, Pignatiello, requested an

in camera hearing as to each and every document subpoenaed. In the case before this Court, no such request was made. The request made was that the Court determine whether the documents were relevant to the investigation and whether a relationship existed between the target of the investigation and the documents. No affidavit testimony or evidence of any kind was ever introduced by the District Attorney's Office to support their conclusionary statements in the civil investigative demand. It should be noted that this Court has held that "the relevancy requirements is met by a 'showing that a relationship exists between the documents which must be produced and the purposes of the inquiry'" (Pignatiello v. the District Court, supra).

The authority in the civil investigative demand is so broad that it can compel production of materials not relevant to the purposes sought to be accomplished by the relative enactment. The civil investigative demand gives the Attorney General and the District Attorney's of the state unbridled power to demand documents on any individual without conforming to any standard that would protect that individual or business from constitutional violation. It goes so far that there is no notice requirement that enables the target of the investigation to protect his constitutional and statutory rights. The civil investigative demand is therefore overbroad and demands made under 18-17-101 ed sec, should quashed as being violative of the due process law of the Fifth and Fourteenth Amendments of the United States Constitution and Article II, Section 25 of the Colorado Constitution.

Under the Colorado Organized Crime Control Act, for a civil investigative demand to be valid, it must comply with the provisions

of C.R.S. 18-17-107 to 1973, as amended. Under this section of the act, the civil investigation must "(a) State the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto and (e) state an advisement of rights available under provisions of this article, in addition to any appropriate constitutional rights advisement".

The civil investigative demand of December 13, 1982, does not conform to the requirements of the statute because, in order to issue a civil investigative demand C.R.S. 18-17-107 (2) (a) requires that the demand state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto. The civil investigative demand which is before this Court does not advise any reader of the document as to the nature of the conduct constituting the alleged racketeering violation. It merely recites that there is an investigation into racketeering activity and then alleges subsections and sections of the Colorado Revised Statutes which are supposedly being violated. This clearly does not conform to the requirements of the statute.

In order to conform to the statute regarding the civil investigative demands, the demands must set forth with specificity the nature of the conduct constituting the alleged racketeering violation. This would be analogous to a bill of particulars with regard to the activity engaged in by the Appellant which is allegedly in violation of the law. Broad sweeping statements or citations to the Colorado Revised Statutes are simply not enough under the Colorado Organized Crime

Control Act to allow the civil investigative demand before this Court to stand.

Further, the civil investigative demand must advise a person of their constitutional statutory rights. This is demanded by the statute. 18-17-107 (2) (e), 1973, as amended. No where in the civil investigative demand are the constitutional rights of Kristen Benson or the target of the investigation adequately addressed. The constitutional rights to the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and Article II, Section 7 and 25 of the Colorado Constitution are merely mentioned. No language of the constitutional requirements is set forth and no mention is made of a Fifth Amendment privilege against self-incrimination which is necessary to be addressed when fully advising a person of their constitutional rights in the situation faced here.

CONCLUSION

For the above reasons, the Trial Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing this 21st day of July, 1983, in the U.S. Mail, postage prepaid, addressed to:

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Carrie M. Robins