

Georgia Court Quashes Subpoena for Unpublished News Footage

Request for In Camera Review an Improper ‘Fishing Expedition’

By Meghan Claiborne & Amy Gross

A Georgia trial court [held](#) that requiring disclosure of raw, unpublished footage of defendant’s arrest filmed during the production of a FOX 5 news report would be tantamount to a “disclosure” under the Georgia Reporter’s Privilege, and thus could not be required absent a showing sufficient to overcome the privilege. *State v. Spurlock*, Case No. 16SC140434 (Fulton Cty. Super. Ct. Aug. 8, 2016) (Brasher, J.).

FOX 5 and the Spurlock Arrest

On January 13, 2016, WAGA-TV FOX 5, a television station belonging to New World Communications of Atlanta, Inc. (“FOX 5”), aired an investigative report concerning drones being used to illegally smuggle contraband into Georgia prisons. During the segment, the reporter stated that a drone had been recovered in a prison yard with fingerprints allegedly belonging to defendant.

The report then showed numerous law enforcement personnel at a staging area preparing to make the “first arrest” of someone using a drone to smuggle contraband into prison, and then footage of defendant in custody being asked by an officer if he did, in fact, try to smuggle contraband into prison via a drone. The FOX 5 news report is [publicly available](#).

Once under arrest, defendant admitted to having drugs stored in a blue bucket in a cabinet in the kitchen of the apartment in which he was arrested. The police report indicated that before entering the apartment where defendant had been staying, consent was obtained from the lease holder of the apartment. The police report further indicated that the police reviewed a copy of the lease to ensure the alleged lease holder had authority to allow them to enter. The police discovered drugs in the spot exactly as described by defendant, and testing on the drugs came back positive as methamphetamines. Defendant was subsequently charged with felony drug trafficking.

The Court held that requiring FOX 5 to submit to an in camera review of the raw footage would be improper.

Motion to Quash

Defendant subpoenaed FOX 5 for “any and all . . . ‘edited’ and ‘unedited’ video recordings of the police activities involving [Defendant].” FOX 5 filed a motion to quash the subpoena on



Screenshot from report. [Click to view.](#)

the grounds that the raw, unpublished footage was protected by Georgia’s Reporter’s Privilege.

This privilege protects from disclosure “any information, document, or item obtained or prepared in the gathering or dissemination of news.” *See In re Paul*, 270 Ga. 680, 684 (1999); O.C.G.A. § 24-5-508. To overcome the privilege, the subpoenaing party must show either that the privilege has been waived, or that that the material sought: “(1) Is material and relevant; (2) Cannot be reasonably obtained by alternative means; and (3) Is necessary to the proper preparation or presentation of the case of a party seeking the information, document, or item.” *Id.*

Defendant argued he was seeking video from two separate events: (1) the pre-arrest staging meeting, and (2) the subsequent search of the apartment. Defendant argued that the pre-arrest staging meeting was of “great interest” because FOX 5 “may have recorded statements from the officers regarding their interest in searching Defendant’s apartment and the lack of a search warrant.” Defendant further argued that the conversations during both events might be useful for subsequent impeachment purposes or might contain exculpatory evidence.

Judge Brasher granted FOX 5’s Motion to Quash. The Court based its decision on defendant’s failure to sufficiently overcome the Georgia Reporter’s Privilege.

The Court held that defendant could not meet his burden as to any footage from the pre-arrest staging meeting because “statements of law enforcement officers before the search are neither material nor relevant in determining whether the search itself was lawful.” *See also*, O.C.G.A. § 24-5-508; *State v. Ladner*, Indictment No. 15-CR-0174 (Cherokee Cty. Super. Ct. June 25, 2015).

The Court found that defendant had not identified any information that would be obtained from the raw footage that he believed would be necessary to the “proper preparation or presentation” of his case that was not already in the Court’s record.

The Court further held that mere “speculation” that the raw video might contain information useful for impeachment is “simply insufficient” to overcome the privilege. A moving party must proffer more than a “possibility” that the footage *might* reveal useful or exculpatory evidence to pierce the Georgia Reporter’s Privilege.

The Court stated that *even if* defendant had identified specifically what raw video footage was material, relevant and necessary, defendant still would not have been able to defeat FOX 5’s privilege because defendant had failed to demonstrate that the information could not “reasonably be obtained” from alternative, non-media sources, as there were other witnesses. Plaintiff failed to show he had exhausted all of his alternative sources.

Most significantly, the Court held that requiring FOX 5 to submit to an *in camera* review of the raw footage, as defendant had requested, would be improper because it would be “tantamount to a ‘disclosure’ under the Georgia Reporter’s Privilege.” Defendant argued that an *in camera* inspection was an alternative way for the Court to balance his Fourth and Sixth Amendment rights with FOX 5’s statutory privilege. However, as explained by the Court, the Georgia Reporter’s Privilege does not make a distinction between “disclosure” to a court for *in camera* review, versus “disclosure” to a subpoenaing party. *See Vance v. Krause*, 1990 WL 272727 at *4 (DeKalb Cty. Sup. Ct. Nov. 21, 1990); *State v. Presley*, Case No. 15SC132914 (Fulton Cty. Sup. Ct. May 11, 2016).

While it is not surprising that a defendant would *like* access to the actual videotape footage to search for anything law enforcement agents *may* have said or observed before the arrest or during the search, the court said that such a fishing expedition is specifically precluded by the Georgia Reporter’s Privilege. *Giddens v. Advantage Mobility Solutions LLC*, 2008 WL 4947726, 36 Med. L. Rptr. 2524, 2526 (DeKalb Cty. State Ct. 2008) (rejecting party’s attempt to obtain “actual tape recording” of a conversation from a news organization just because it is the “best and highest evidence available” because doing so “would eviscerate the statutory privilege”).

As recognized by the Court, neither the fact that it was a criminal case, nor the seriousness of the charges facing defendant seeking the disclosure affect the privilege analysis, and therefore cannot reduce defendant’s burden of proof in demonstrating that disclosure is warranted. *See, e.g., Stripling v. State*, 261 Ga. 1, 9 (1991) (holding the murder defendant failed to meet his burden under the Georgia Reporter’s Privilege); *Presley*, Case No. 15SC132914 (Fulton Cty. Super. Ct. May 11, 2016) (holding capital murder defendant failed to meet burden under the Georgia Reporter’s Privilege). Thus, the Court established that when a defendant cannot otherwise satisfy the elements necessary to pierce the privilege during the evidentiary hearing, defendant similarly fails to justify disclosure via *in camera* review.

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