THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Gerald C. Smoak, Sr., Circuit Court Judge

Opinion No. 3693 (S.C. Ct. App. filed November 17, 2003)

Evening Post Publishing Co., d/b/a The Post and Courier,
and Ms. Parthinea Snowden, as Personal Representative of the
Estate of Edward Snowden, Deceased, ... Plaintiffs,

of whom Evening Post Publishing Co., d/b/a
The Post and Courier ..... Petitioner,

v.

City of North Charleston ..... Respondent.

BRIEF OF PETITIONER

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QUESTION ACCEPTED FOR REVIEW

Did the Court of Appeals err by deciding that the facts of this case fall squarely within *Turner v. North Charleston Police Department*, 290 S.C. 511, 351 S.E.2d 583 (Ct. App. 1986)?

STATEMENT OF THE CASE

On June 26, 2001, a reporter for *The Post and Courier* ("Newspaper") wrote a letter to the then Chief of Police of the North Charleston Police Department. (R.p.78) The reporter hand delivered a carbon copy of the letter to the attorney for North Charleston. The letter requested copies of police dispatch and 911 tape recordings made in connection with the shooting death of Edward Snowden. Newspaper made the request pursuant to S.C. Code Ann. §30-4-10 *et. seq.* the "Freedom of Information Act" ("FOIA").

On July 6, 2001, North Charleston's attorney denied the request in writing to the Newspaper's attorney. (R.p.80) The attorney based his denial on the exemption found in §30-4-40(a)(3)(B) of the S.C. Code Ann.

On July 9, 2001, the Appellant filed its Complaint for Declaratory Judgment seeking the production of the public documents. (R.p.13)

On July 14, 2001, the attorneys for the Estate of Edward Snowden moved to intervene in the above action seeking copies of the tape recordings.

The Honorable Gerald C. Smoak, Sr. held a hearing on Newspaper's FOIA lawsuit on November 5, 2001.

On December 4, 2001, Judge Smoak signed an Order denying the Newspaper's request for the tape recordings, but permitting the Estate of Edward Snowden to obtain copies. (R.p.1) The alleged attackers of Eric Snowden also received copies of the tape

recordings. Only the public was denied access to the tape recordings. Newspaper filed this appeal on December 10, 2001.

The Court of Appeals affirmed the decision of the lower court by Opinion No. 3693 filed on November 17, 2003. The decision is reported as *Evening Post Publishing Co. v. City of North Charleston*, 357 S.C. 59, 591 S.E.2d 39 (Ct. App. 2003)

The Petitioner filed a Petition for Rehearing on December 2, 2002, which Petition was denied on January 28, 2004.

On February 25, 2004, Petitioner filed a Petition for Writ of Certiorari with the Supreme Court to review two questions.

By Order dated November 4, 2004, the Supreme Court granted the Writ of Certiorari to the question argued in this Brief of Appellant.

ARGUMENT

1. **The Court of Appeals erred by deciding that the facts of this case fall squarely within *Turner*.**

A. Premature release of information.

S.C. Code Ann. § 30-4-40(a)(3)(B) (Supp. 2002), part of the Freedom of Information Act (FOIA) allows an exemption for "...the premature release of information." (emphasis added)

> § 30-4-40. Matters exempt from disclosure.
>
> (a) A public body may but is not required to exempt from disclosure the following information:
>
> (3) Records of law enforcement and public safety agencies not otherwise available by state and federal law that were compiled in the process of detecting and investigating crime if the disclosure of the information would harm the agency by:

(B) the premature release of information to be used in a prospective law enforcement action; (emphasis added)

If the legislature had intended a blanket exemption under the FOIA for all public records which might be used as evidence in a future trial, it could have easily said so – presumably by omitting the word "premature" from subsection 40(a)(3)(B). Instead, the legislature chose to limit the disclosure of such records only where the release would be "premature." If such public records are automatically immune from disclosure merely because they might be used as evidence in a future trial, the legislature's use of the word "premature" is completely superfluous.

Petitioner suggests that the legislature referred to the *premature* release of information for good reason. The legislature obviously concluded that the premature release of information to be used in a prospective law enforcement action was against the public interest. On the other hand, where the release would not be premature, the fact that the information might eventually be used in a law enforcement action does not outweigh the public interest in disclosure.

Petitioner does not advocate or request the premature release of information to be used in a legitimate law enforcement action. While there is no definition of what constitutes a "premature release of information" in the FOIA, the words are susceptible to a reasonable interpretation.

One such reasonable interpretation of the "premature release of information" is found in *Turner v. North Charleston Police Department*, 290 S.C. 511, 351 S.E.2d 583 (Ct. App. 1986), relied on by the Court of Appeals in deciding this FOIA decision under review. The information request made under the factual situation in *Turner* is an example of a "premature release of information" under the FOIA. However, the facts in

Turner are easily distinguishable from the present case. Some of the major distinctions between the two cases are:

- *Turner*: The chief of police advised the city council that the tapes requested by Turner contained "very sensitive police communications," "calls from regular informants" and "Crimestopper calls from citizens." *Turner*, 351 S.E.2d at 583

- This case: There was no sensitive information contained in the 911 tape recording requested by Petitioner. See transcript of 911 tape recording. Tr. p. 67.

- *Turner*: The information requested by Turner was overly broad, *i.e.* "copies of transcripts of or access to the original tapes of telephone complaints or reports received ...documents, including incident reports, police logs, or any written material whatsoever...any files with regard to prior call-ins or prior investigations of Mr. Fair, not concerning the November 9, 1984 shooting..." *Turner*, 351 S.E.2d at 583, 584.

- This case: Petitioner's request covered one 911 tape recording. Tr. p. 67.

- *Turner*: Because of Turner's overly broad information request, the request would necessarily have included materials the Court of Appeals has previously concluded are not discoverable by criminal defendants under the FOIA. See, *State v. Robinson*, 305 S.C. 469, 409 S.E.2d 404 (1991).

- This case: The 911 tape recording was discoverable by the criminal defendants in this case. The criminal defendants were allowed access pursuant to Rule 5, SCRCrimP. *State v. Robinson, infra.*

- *Turner*: A fair reading of *Turner* leads to the conclusion that the accused in *Turner* did not have access to the broad information requested by the victim/wife. *Turner v. North Charleston Police Department, infra,*

- This case: The accused criminal defendants in the lynching trial had access to the 911 tape recording requested by Petitioner. *Evening Post Publishing Co. v. City of North Charleston,* 357 S.C. 59, 61, 591 S.E.2d 39, 41 (footnote 1)(Ct. App. 2003).

- *Turner:* The victim was denied access to all materials requested under the FOIA, with the exception of the incident reports. *Turner*, 351 S.E.2d at 584.

- This case: The victim's estate was given access to the 911 tape recording requested by Petitioner. *Evening Post,* 591 S.E.2d at 41 (footnote 1).

- *Turner*: In deciding the FOIA request, the city council was informed that the November shooting of Turner was "presently pending for indictment and prosecution in the next few weeks." *Turner,* 351 S.E.2d at 584 (emphasis added)

- This case: Petitioner requested the 911 tape recording by letter dated June 26, 2001. Tr. p. 68. Petitioner was not provided access until the transcript was produced at the trial of the accused on February 26, 2002. *Evening Post,* 591 S.E.2d at 584. The period between the Petitioner's FOIA request and the trial of the criminal defendants was eight months.

Petitioner agrees the production of the requested information in *Turner* easily came within the exemption for the "premature release of information." Here, on the other hand, the accused and the victim's estate both had access to the 911 tape recording requested by the Petitioner. The prosecutor's case could not have been weakened by giving the same information to the public since it had already handed that information over to the criminal defendants and their attorneys. The fact that the prosecution had already released the 911 tape recording to the defense, and to representatives of the

victim, establishes that its release to the public could not have been "premature." Any other understanding would imply that all records are exempt from public disclosure until the final conclusion of all conceivable law enforcement actions, including appeals. The legislature cannot have intended so severe a limitation on the FOIA. It is difficult to discern the reason for denying access to the 911 tape recording under the circumstances and facts of this case.

B. Dangerous precedent.

Law enforcement officials have enormous power and control over the lives of citizens. Until the day that all citizens are law abiding, that is how it must be if we are to remain a free and safe society.

To balance this power, it is not too much to ask that those who lawfully carry and use pistols, rifles, shotguns, tasers, mace, tear gas, attack dogs, billie clubs and handcuffs submit to reasonable public scrutiny. The public scrutiny must occur in a timely manner if it is to curb and expose those abuses which follow enormous power as night follows day.

As importantly, public scrutiny can also serve as a positive force for the community. In this case, a timely release of the 911 tape recordings could have explained the bedlam and confusion almost always associated with a tragic shooting accident that takes an innocent life. The public can forgive an accident. The public should never forgive corruption, the appearance of corruption, or a cover up. Operating behind a veil of secrecy gives off such an odor.

The Court of Appeals opinion in this case cloaks law enforcement officials with a level of secrecy not intended by the FOIA. It is not inconceivable that public officials will

seize on this Court of Appeals decision to conceal future public corruption or prosecutorial misconduct. The opinion will allow legitimate requests for public documents, aimed at investigating possible corruption or misconduct, to be refused on the pretext that a law enforcement action might some day ensue and that immediate disclosure is therefore "premature." Officials will have enormous, unintended power to conceal information from the public, merely by invoking the possibility of a future trial. While some of these denials will be motivated by genuine law enforcement concerns, the Court of Appeal's opinion in this case gives citizens little hope of relief where denials are made for the purpose of obstructing the public's legitimate right to be informed about government activity

The better course, and one that strikes the proper balance between law enforcement interests and the public's right to information, is for this Court to recognize the importance of the word "premature" in S.C. Code Ann. § 30-4-40(a)(3)(B). If this adjective is to be given anything other than lip service, the only reasonable conclusion is the Petitioner's request was not premature in light of the previous disclosures. More importantly, by giving "premature" its common sense meaning, it will give citizens the right to contest future denials of access to public records under proper circumstances.

C. Quotation from *State v. Robinson*

The Court's quotation from *State v. Robinson*, 305 S.C. 469, 476, 477, 409 S.E.2d 404, 409 (1991)[1] is out of context. The quotation leaves out the first sentence, which

[1] "[t]he specific exemption under § 30-4-40(a)(B) for 'the premature release of information to be used in a prospective law enforcement action' *clearly exempts information regarding pending criminal prosecutions.* No specific showing of harm is required by the State in the request involves such material." [emphasis added by Court of Appeals in its published opinion]

happens to be the holding on the FOIA appeal at issue in *Robinson*.

In *Robinson*, the appellant requested pretrial discovery of prosecution witness statements and police investigative reports. The trial court ruled that police investigative reports were not discoverable under Rule 5(a)(2), SCRCrimP; and that witnesses statements became available only after the witness testified. On appeal, the appellant contended that the requested materials should have been given to him under the FOIA. The Court disagreed, holding "the South Carolina FOIA exempts discovery of material that is not otherwise discoverable under Rule 5(a)(2)." *State v. Robinson*, 409 S.E.2d at 409.

There followed the two sentences quoted by the Court of Appeals in this case:

> The specific exemption under § 30-4-40(a)(3)(B) for "the premature release of information to be used in a prospective law enforcement action" clearly exempts information regarding pending criminal prosecutions. No specific showing of harm is required by the State if the request involves such material.

Clearly, the second and third sentences above refer to the material in the first sentence that was exempt under the FOIA because it was exempt from discovery under Rule 5(a)(2). A release of witness statements prior to trial testimony was not allowed under Rule 5(a)(2), and thus the release was "premature" under the FOIA. The Court in *State v. Robinson* was simply pointing out the source of the exemption in the FOIA.

By contrast, the 911 tape recording in this case was not exempt from discovery by the criminal defendants under Rule 5(a)(2) and, therefore, would not

come within material covered in *Robinson*. *Robinson* is simply not applicable to the 911 tape recording at issue in this case. Given the clear emphasis of that case on material exempt from discovery under the criminal rules, any suggestion that all "information regarding criminal prosecutions" is somehow inherently exempt from FOIA disclosure should be regarded as *dicta*. The Supreme Court was not presented in *Robinson* with a blanket refusal to disclose any and all information regarding a criminal prosecution, and a single sentence lifted from that opinion should not be the basis for such a sweeping limitation on the FOIA.

Under a remarkably similar factual situation, the Supreme Court of New Jersey found the public had a right to the release of a 911 tape recording following a deadly shooting incident. See, *Courier News v. Hunterdon County Prosecutor's Office,* 358 N. J. Super. 373, 817 A.2d 1017 (2003).

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that the Supreme Court reverse the decision of the Court of Appeals and conclude that Petitioner was entitled to the 911 tape recording pursuant to the FOIA, as there could be no "premature" release of the requested public document under the facts of this case.

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