

Seattle Media Challenges Blanket Police Department Subpoenas for Unpublished News Footage

In re Subpoena Duces Tecum to Seattle News Media

By Caesar Kalinowski IV and Eric M. Stahl

Seattle's five largest news media outlets are appealing a King County (WA) Superior Court order compelling them to assist in a criminal investigation by providing the Seattle Police Department ("SPD") with unpublished news photographs and video of recent civil unrest. The matter will be the first significant appellate test of Washington's 2007 shield statute, RCW 5.68.010, and its 1980 "subpoena first" law, RCW 10.79.015(3).

SPD has pursued the newsroom subpoenas in connection with lawlessness that broke out in downtown Seattle on May 30, 2020, following a day of peaceful protests of George Floyd's murder in Minneapolis. That afternoon, six SPD vehicles allegedly were set on fire and five firearms were stolen from inside the parked vehicles (two of which have not been recovered). The incidents, which occurred in a four-block area of Seattle's retail core, were covered by a number of reporters. Footage of the event, recorded by the press and many others in attendance, is widely available online. SPD has identified five individuals suspected of playing a role in either the arson or the gun thefts, based on images published in the press or elsewhere. SPD has claimed that these images are either incomplete or too unclear to identify the individuals.

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An off-duty SPD detective – who later became the lead investigator of the vehicle arson and gun thefts – watched the events unfold live on television, courtesy of the same news outlets subsequently targeted in the subpoena. In an affidavit later filed with the court, he declared that based on his live viewing and subsequent review of published images, "the vast majority of coverage" by Seattle's major news outlets occurred in the same four-block area as the arson and thefts, and thus that "there is probable cause to believe that those media sources captured images of the suspects in the footage/photographs taken" that "have not yet been published."

By statute, Washington generally prohibits search warrants directed to newsrooms. Unless the party possessing the news material "may be involved in the crime under investigation" or is likely to destroy evidence, the material "shall be secured only through a subpoena duces tecum." RCW 10.79.015(3). Enacted in 1980, this "subpoena first" statute is intended to protect newsrooms from overreaching law enforcement demands, such as the newsroom search described in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978). See Laws of 1980, ch. 52 § 1; *J.O. v. Bedminster*, 77 A.3d 1242, 1245 (N.J. App. 2013) (describing RCW 10.79.015(3) and other

“subpoena-first” statutes). The statute has achieved its intended effect: in its 40 years of existence, police have rarely invoked the law, and it has not been cited in a single Washington appellate decision.

On June 18, 2020, SPD filed an *ex parte* petition on the King County Superior Court’s special search warrant docket, supported by a detective’s “probable cause” affidavit. A judge issued the subpoenas and set a hearing to consider any objections. The subpoenas named the state’s leading daily newspaper, *The Seattle Times*, and Seattle’s four local television news stations, KOMO-4 (Sinclair), KING-5 (TEGNA), KIRO-7 (Cox) and KCPQ-13 (Fox) (“News Media”). Unlike a typical newsroom subpoena requesting outtakes or other material from a specific journalist or particular story, the SPD subpoenas made a blanket demand for “[a]ny and all video footage or photographs, including but not limited to all unedited and/or raw video footage, taken on Saturday, May 30, 2020, from 1530 hours to 1700 hours” in the four-block area in question.

The News Media filed objections, primarily under the state shield law. That statute provides an absolute privilege for confidential sources, but a qualified privilege for other newsgathering material, regardless of whether it was published or unpublished. RCW 5.68.010(1). The News Media argued that SPD had failed to overcome the qualified privilege, which requires proof “clear and convincing evidence” that the news materials are “highly material and relevant” and “critical or necessary” to a material issue; that the party seeking disclosure has “exhausted all reasonable and available means to obtain it from alternative sources,” and that “[t]here is a compelling public interest in the disclosure.” RCW 5.68.010(2).

The News Media argued that SPD failed to show a heightened need for the unpublished footage because, among other things, it is entirely speculative whether the unpublished footage contains any better image of the arson/theft suspect than the numerous published images SPD already possesses. The News Media also contend that SPD has failed to exhaust obvious alternatives to seeking additional information from the press. For example, SPD has failed to make any public appeal for assistance in identifying the five suspects – something it could easily do based on the images it already has.

The News Media – along with the Reporters Committee for Freedom of the Press, which submitted a trial court amicus brief – also emphasized that the subpoena imperils journalists’ physical safety and their ability to cover news events, particularly in the context of demonstrations. (At least one of the television stations targeted by SPD had hired a private security contractor to protect its news crew during the May 30 protests; that contractor was involved in recovering two of the stolen police weapons while SPD was nowhere in sight.) The News Media and RCFP cited instances in which reporters faced assault – including while

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covering the incidents in question – as well as suspicion from news sources that they would share information with the police.

They argued that the compelled disclosure of reporters’ outtakes “harms the press’ ability to gather information by ... ‘converting the press in the public’s mind into an investigative arm of prosecutors and the courts,’” and that this perception can lead to journalists being “shunned by persons who might otherwise give them information ... or even physically harassed if, for example, observed taking notes or photographs at a public rally.” *Shoen v. Shoen*, 5 F.3d 1289, 1295 (9th Cir. 1993) (*Shoen I*) (citation omitted).

Judge Nelson K.H. Lee held several hearings on the matter, which included live testimony from the SPD detective leading the investigation. On July 31, 2020, the court entered a 35-page order rejecting the News Media objections and holding the subpoena generally enforceable. The court found that SPD had shown a reasonable probability that the News Media’s unpublished outtakes contained additional information about the arson and theft suspects. The court credited SPD’s claims that it had exhausted reasonable alternatives, and that a public appeal was not required. It also found that the public’s interest in solving the felonies and recovering the two missing police firearms was sufficient to overcome the qualified shield law privilege.

Judge Lee restricted SPD’s request in several respects, purportedly to make the demand less burdensome. He held that SPD could use the images only for the purpose of pursuing the arson and gun theft felonies, and prohibited SPD from using the News Media material to pursue any other matters. He also ordered the newsgathering material to be produced to the court in the first instance, for *in camera* review, and stated that he would only provide SPD images related to the arson and gun thefts. He ordered the News Media to produce its material to the court by August 21, 2020.

The News Media appealed and on August 20, a Commissioner of that court entered an emergency stay of the trial court’s July 31 order, finding the appeal raised colorable issues and that the equities favored a stay to preserve the fruits of the appeal. On September 9, the Washington Supreme Court granted the News Media’s request for direct review, expediting final resolution of the case to address the important issues presented by the News Media regarding Washington’s free press.

The five Seattle News Media entities were jointly represented by Eric M. Stahl and Caesar Kalinowski IV of Davis Wright Tremaine. The Seattle Police Department was represented by Brian W. Esler and Nicholas A. Valera of Miller Nash Graham & Dunn LLP and Gary Ernsdorff of the King County Prosecuting Attorney’s Office. Madeline Lamo appeared on behalf of amicus curiae Reporters Committee for Freedom of the Press.