

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

78656-9

STATE OF WASHINGTON,)
)
Respondent)
)
v.)
)
MICHAEL M. MILES,)
)
Petitioner)
_____)

NO. 56017-4-I

MOTION OF STATE OF
WASHINGTON TO
SUPPLEMENT THE
RECORD

I. Identity of the Moving Party

The State of Washington, Respondent, requests the relief requested in part II below.

II. Relief Requested

The State of Washington moves to supplement the record with the Declaration of Martin Cordell. The Declaration is attached as Attachment A.¹

III. Statement of the Case

¹ It was not clear to the State whether this motion is appropriately filed under RAP 9.10 or 9.11. The Declaration in question has not been filed with the Superior Court pending the resolution of this motion. Because the Declaration is not part of the record at this time, and because RAP 9.10 refers to supplementing the "report of proceedings" it was not clear that RAP 9.10 applied. (Similarly because the Declaration is not, pending the resolution of this motion, currently filed, no supplemental designation of clerk's papers has been filed.)

RAP 9.11 relates to the taking of additional evidence by the trial court. Because this is an interlocutory appeal the trial court has only heard argument and has not taken any evidence. The State does not wish to supplement the record with testimony, merely the attached declaration

The State will discuss the requirements of both RAP 9.10 and 9.11 below.

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The defendant, Michael Miles, moved before trial to suppress evidence. The evidence in question was Miles' bank records, obtained by way of an administrative subpoena issued by the Securities Division of the Washington State Department of Financial Institutions.

The issue was briefed by the parties. The issue of whether the subpoena was validly issued under RCW 21.20.380 was first raised in Miles' reply brief. That brief was received by the State on December 6, 2004. Oral argument was heard three days later, on December 9, 2004. At oral argument the State presented additional factual information relevant to the issue of the validity of the subpoena, received orally from Martin Cordell, the Chief of Enforcement for the Securities Division.

IV. Argument

(An understanding of the issues underlying the appeal in this case is necessary to understand the relevance of the Declaration of Martin Cordell the State wishes added to the record. These issues are complex. The below statement of these issues is, by necessity, a summary of these issues. The reader is referred to the Briefs of Petitioner and Respondent for more information on these issues.)

Because of the short amount of time between receipt of Miles' reply brief and oral argument the State did not have time to obtain a written

affidavit from Mr. Cordell. Judge Armstrong received some, but not all, of these oral representations, relayed to the court in oral argument.²

A) Miles' Arguments Regarding the Subpoena

In his opening Brief Miles advanced two arguments. He argued that a person's bank records were their private affairs and entitled to the protections of art. I, section 7 of the Washington Constitution. ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law.") And he argued that the administrative subpoena issued by the Securities Division was not "authority of law" because obtaining bank records requires a search warrant, and if not a warrant, then a subpoena signed by a neutral magistrate.

The State, in response, argued that the law of administrative subpoenas applied. That standard, that the subpoena be within the agency's authority, be sufficiently precise and seek relevant information, was enunciated by the United States Supreme Court in *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208, 66 S.Ct. 494, 90 L.Ed 614 (1946).

Miles, in reply, reaffirmed the art. I, section 7 arguments advanced in his opening brief. and responded to the administrative subpoena

² Judge Armstrong received the statistical evidence about the number of complaints received, investigations initiated and referrals to prosecution by the Division. She declined to hear the Division's explanation of the reason for the 2002 amendments to RCW 21.20.380 because that information was not on the record.

standard argument raised by the State. He argued that the administrative subpoena in question did not meet the *Oklahoma Press* standard because it was not within the agency's authority to issue. He advanced two arguments in support of this contention.

First, he argued that Miles did not receive notice of the subpoena and such notice is required even under the *Oklahoma Press* standard. Part of Miles' argument on this issue is that the cover letter accompanying the subpoena requested the recipient, Washington Mutual Bank, not to notify the customer, Miles, of the subpoena. Miles argues that the Division did not have the authority to request Miles not be notified because the law authorizing the Division to mandate non-disclosure was not passed until a year after the subpoena was issued.

Second, Miles argued that a cover letter, accompanying the subpoena asked the bank to respond expeditiously because the statute of limitations time for theft was three years, and this language demonstrated that the subpoena was issued for a purpose outside the Division's authority. This was true for two reasons, Miles argued. The reference to the statute of limitations for theft indicated the Division was investigating a crime outside its charter (securities fraud). The language and tone of the letter also showed the Division was conducting a criminal investigation rather

than an administrative investigation and such was also outside its charter.

Miles has raised these same arguments, in more detail, in the Brief of Petitioner.

B. State's Response at Oral Argument Using Information Provided Orally by Martin Cordell

The State, at oral argument, sought to rebut this argument in several ways, one of which was to refer to additional information provided by Martin Cordell, the Chief of Enforcement with the Securities Division. The State represented to Judge Armstrong that Mr. Cordell had explained that the statute of limitations language was included to insure timely production of documents. According to Mr. Cordell, while only a small percentage of cases were actually submitted for investigation, that determination was not made until after the investigation was complete and thus they had to keep prosecution in mind every time they issue a subpoena. Mr. Cordell also explained that while the statute of limitations for securities fraud is five years, they know that prosecutors frequently consider theft charges in such cases because of the overlap between the elements of theft and securities fraud. They know the statute of limitations for theft is three years. They have referred cases to prosecutors for securities fraud only to have the prosecutor decline to file securities fraud but

want to file theft charges - but the three year statute of limitations has run. Thus, even though they are investigating and referring securities fraud charges the Division must keep the shorter theft statute of limitations in mind.

Mr. Cordell also explained that, for the previous four years, the Division averaged 490 complaints, initiated 100 investigations, and made six referrals for criminal prosecution.³

The State attempted to offer Mr. Cordell's explanation of why the Division requested the 2002 amendments, giving them the authority to direct that subpoena recipients not notify customers of the subpoena. (Cordell explained that there was no question as to their authority to *request* non-notification but several banks were not complying and the 2002 amendments were intended to make it clear the Division could *require* non-notification. The amendment was not intended to imply that the Division could not *request* non-notification in earlier years. Judge Armstrong declined to accept this information orally from the Prosecutor at oral argument.)

³ The information Mr. Cordell provided orally, and represented to Judge Armstrong, was slightly incorrect. He stated that the number of complaints was 490. The correct number was 400. He also said these were averages for the last four years when they were numbers for 2004. The error is attributed to the quick turnaround time the State put on Mr. Cordell because of the short time between when the State received Miles' brief raising these issues and oral argument. The correct numbers are cited in the Declaration of Martin Cordell the State seeks to add to the record.

C. Relevance of the Proffered Declaration

The purpose of the argument in this motion is not to convince the Commissioner that the State's arguments are the more convincing. That argument is made in the substantive briefs filed with the Court of Appeals and the decision on that issue will be made by the Court. The purpose of this argument is to demonstrate the relevance of Mr. Cordell's declaration to the issues before the court (and show why that declaration was not provided to the trial court.)

The Proffered Declaration contains the following information:

1. Accurate statistics of the complaints received, investigations initiated and criminal referrals made.

This information, showing the small number of criminal referrals (six out of 100 investigations) is relevant to the issue of whether the Division was conducting a criminal investigation at the initial stages of the Miles investigation.

2. Issuance of subpoenas for bank records is a routine part of a securities investigation. The information gathered from such records is used in the preparation of cease and desist orders (administrative/civil remedies)

This information shows that bank subpoenas are routinely issued in furtherance of the Divisions administrative/civil remedies.

3. The Division does not issue subpoenas at the request of the prosecutor's office (or any other law enforcement agency.) Nor does the Division typically consult with the

prosecutor's office during the course of an administrative investigation.

This information shows the independent nature of the Division's administrative investigations and is relevant to the issue of whether the agency was conducting a criminal investigation.

4. Facts about the administrative investigation conducted in the Miles case and the administrative remedies obtained.

This information shows the legitimate administrative purposes of the agency in conducting the Miles investigation including the issuance of the bank subpoena in question.

5. The Division did not have contact with the King County Prosecutor's Office about the Miles case until October 7, 2002 (sixteen months after the subpoena in question was issued.)

Like point 3 above, this information shows the independent nature of the Division's administrative investigations and is relevant to the issue of whether the agency was conducting a criminal investigation.

6. An explanation of the Division's authority prior to the 2002 amendment and the reasons for that amendment.

This information rebuts Miles' claim that the 2002 amendment shows the Division did not have the authority to *request* nondisclosure prior to that amendment.

D. RAP 9.10

RAP 9.10 permits the appellate court, on its own initiative or on

the motion of a party to, *inter alia*, direct the supplementation of the report of proceedings. The standard for such a decision is if "the record is not sufficiently complete to permit a decision on the merits of the issues presented for review". RAP 9.10. The State contends, for the reasons advanced in the argument section of this motion, that this standard has been met.

E. RAP 9.11

RAP 9.11 provides that the appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if six criteria are met.

- (1) Additional proof of facts is needed to fairly resolve the issues on review.

The State contends, for the reasons advanced in the argument section of this motion, that this criterion has been met.

- (2) The additional evidence would probably change the decision being reviewed

If the appellate court accepts Judge Armstrong's ruling that the defendant has a substantially reduced privacy expectation in his bank records by virtue of his participation in a pervasively regulated industry and his deposit into his bank account of proceeds resulting from his participation in that industry, then the decision below will probably not change. If,

however, the appellate court does not accept that argument because of the defendant's arguments concerning the validity of subpoena then they may reverse Judge Armstrong. The supplemental Declaration the State offers will impact the appellate court's view of the validity of that subpoena.

- (3) It is equitable to excuse a party's failure to present the evidence to the trial court.

As explained above the defendant's argument regarding the validity of the subpoena, was made only three days before oral argument. The State did not have sufficient time to obtain a written statement from Mr. Cordell before that oral argument. Furthermore, because Judge Armstrong's opinion was in the State's favor, the State did not move to admit this declaration prior to the appeal. For the medical reasons stated in the State's Motion for a Continuance of the due date of Respondent's Brief, the State was unable to work on this brief until the middle of January and the need for the declaration only became apparent at that time.

- (4) The remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive.

This is not applicable in this interlocutory appeal.

- (5) The appellate court remedy of granting a new trial is inadequate or unnecessarily expensive.

This is not applicable in this interlocutory appeal.

- (6) It would be inequitable to decide the case solely on the

evidence already taken in the trial court.

The State contends, for the reasons advanced in the argument section of this motion, that this criterion has been met.

Conclusion

The information the State wishes to add to the record is directly relevant to issues raised by the defense. There are valid reasons why the State did not make this Declaration a part of the record in the trial court. Miles is not prejudiced by the addition of this information in that much of it was presented at oral argument below and Miles will be able to respond to any new information in his reply brief.

If the Commissioner rules in the State's favor, the State requests the Commissioner to instruct the State regarding procedurally how this Declaration is to be made a part of the record (i.e., should the Declaration be filed with the Superior Court and designated as supplemental clerk's papers?)

RESPECTFULLY SUBMITTED

NORM MALENG
KING COUNTY PROSECUTING ATTORNEY

BY:



IVAN ORTON, WSBA No. 7723
Sr. Deputy Prosecuting Attorney
Fraud Division
King County Prosecuting Attorney
Attorney for Respondent State of Washington

Attachment A

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**STATE OF WASHINGTON
DEPARTMENT OF FINANCIAL INSTITUTIONS
SECURITIES DIVISION**

**IN THE MATTER OF
MICHAEL M. MILES**

**DECLARATION
OF
MARTIN CORDELL**

I, Martin Cordell, am over the age of twenty one and am the Chief of Enforcement for the State of Washington Department of Financial Institutions-Securities Division (the Division). I have been employed by the Division for twenty four years and currently manage the unit responsible for investigating potential violations of the State's securities laws.

As of December 2004, the Securities Division had received approximately 400 complaints over the prior twelve months and of that number had opened approximately 100 securities investigations, taken approximately 65 administrative actions and referred six of those investigations to prosecutors.

It is a routine procedure, particularly where an issuer of a security is located in the state of Washington, for the Securities Division to issue a subpoena to a bank in order to identify potential investment transactions, investors, and instances where it appears that may have been misuse or misappropriation of investors' money. This information is used in the preparation of an administrative cease and desist order or statement of charges in which the Division enjoins or provides notice that it intends to enjoin a Respondent from violations of the Securities Act registration and anti-fraud provisions. The Securities Division does not issue administrative

1 subpoenas at the request or direction of the Prosecutor's Office, any other prosecutor or law
2 enforcement agency. To the extent that the Securities Division works at the direction of the
3 Prosecutor's Office in the investigation of a criminal matter, the Prosecutor's Office obtains bank
4 records through an inquiry judge subpoena and provides them to the Division. The Securities
5 Division does not typically consult with the Prosecutor's Office during the course of an
6 administrative investigation as to its investigative steps and findings. In a small number of cases,
7 the Securities Division may refer its administrative investigative findings to the Prosecutor's
8 Office for possible criminal prosecution.

9 In the matter of Michael M. Miles (Miles), the Division continued its administrative
10 investigation after a subpoena was issued to Washington Mutual in June 2001. Based on
11 information received from Washington Mutual, the Division issued other subpoenas and
12 interviewed numerous witnesses. The Division subpoenaed Miles for documents and testimony
13 in December 2001 and again in May 2002, but he did not respond. A Summary Order to Cease
14 and Desist against Miles was entered on November 4, 2002. A Final Order to Cease and Desist
15 was entered on December 21, 2002. Cease and Desist Orders are civil/administrative remedies
16 available to the Division under RCW 21.20.390.

17 The Division did not have contact with the King County Prosecuting Attorney (or any
18 other prosecuting agency) about this case until the case was referred to the Fraud Division of the
19 King County Prosecutor's Office on October 7, 2002. No subpoenas were issued by the Division
20 after this contact with the King County Prosecuting Attorney.

21 Prior to 2002, the Securities Division appropriately requested that a bank not notify the
22 owner of the account of the issuance of a subpoena for that account. In order to make non-

1 disclosure compulsory, DFI obtained a statutory amendment to RCW 21.20.380 in 2002 that
2 permits the Division to compel a bank to not disclose to the account holder or third parties that
3 are not affiliated with the bank, other than to the bank's legal counsel, the existence or content of
4 the subpoena.

5 I declare under penalty of perjury, under the laws of the State of Washington, that the
6 above information is true and correct.

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15/
MARTIN CORDELL

2-9-06
Date signed

OLYMPIA, WASHINGTON