

No. A07-0678

STATE OF MINNESOTA
IN COURT OF APPEALS

In Re: Death Investigation of Jeffrey Alan Skjervold

Ross E. Arneson, in his capacity as
Blue Earth County Attorney,
Respondent,

vs.

Daniel Edward Nienaber, Joseph Francis Spear,
Nicholas John Hanson, and *The Free Press*,

Appellants,

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
LEGAL ISSUES.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS.....	2
ARGUMENT.....	4
I. The Information is Clearly Relevant to a Crime.....	5
II. The Information Cannot be Obtained by Any Alternative Means or Remedies.....	6
III. There us a Compelling and Overriding Interest Requiring the Disclosure of the Information Where the Disclosure is Necessary to Prevent Injustice...7	7
CONCLUSION.....	9

TABLE OF AUTHORITIES

Statutes

Minn. Stat. §§ 595.021-.025 (2006).....	4
Minn. Stat. § 595.022 (2006).....	8
Minn. Stat. § 595.0234 (2006).....	4
Minn. Stat. § 595.024 (2006).....	1,2,4-7,9
Minn. Stat. § 609.066 (2006).....	7
Minn. Stat. § 609.221 (2006).....	5
Minn. Stat. § 609.495 (2006).....	7

Caselaw

<i>Weinberger v. Maplewood Rev.</i> , 668 N.W.2d 667 (Minn. 2003).....	4,5
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LEGAL ISSUE

Did the district court err in compelling Appellants to divulge all information regarding the death investigation of Jeffrey Alan Skjervold?

The district court held that Respondent had met the conditions requiring disclosure under Minn. Stat. § 595.024, subd. 2 (2006).

Apposite Authority:

Minn. Stat. § 595.024 (2006)

STATEMENT OF THE CASE

On or about January 16, 2007, Respondent applied to the Blue Earth County District Court for an Order requiring Appellants Daniel Edward Nienaber, Joseph Francis Spear, and Nicholas John Hanson, *The Free Press* employees, to (1) provide oral testimony regarding any information they have that may refer or relate to the death investigation of Jeffrey Alan Skjervold and (2) produce any and all documents, recordings in any form, and unpublished information that may refer or relate to the investigation. (Appellant's Appendix at A-8)¹ In an order filed February 13, 2007, the Blue Earth County District Court, Judge Norbert P. Smith presiding, granted the application. (AA-16) The district court determined Respondent had met the conditions under Minn. Stat. § 595.024, subd. 2 (2006), by clear and convincing evidence and granted Respondent's motion. (AA-19-22) Appellants appeal that decision.

STATEMENT OF FACTS²

On December 23, 2006, Jeffrey Alan Skjervold became involved in a domestic dispute at this home in Blue Earth County. (AA-17) Law enforcement

¹ References to documents contained in Appellants' Appendix will hereinafter be cited as "AA-page number."

² Appellants fail to include citations to the record in their Statement of the Case and Facts. Respondent disputes those facts contained in Appellants' Brief that are not found in the February 13, 2007 Court Order or elsewhere in the record.

was called and a standoff ensued with Skjervold barricading himself in his home. (AA-17) During the standoff, Skjervold shot two law enforcement officers, and an officer or officers shot and injured Skjervold. (AA-17) Skjervold eventually took his own life. (AA-18)

Negotiators from law enforcement contacted Skjervold by telephone. (AA-17) During these negotiations, they learned that reporters from *The Free Press*, a Mankato, Minnesota daily newspaper, had contacted Skjervold. (AA-17) BCA agent Robert Nance talked with Joe Spear, editor for *The Free Press*, and requested the newspaper terminate its efforts to contact Skjervold. (AA-17) Initially, Spear refused, asserting reporters would continue to call Skjervold because they needed the truth. (AA-17) Spear eventually agreed to terminate further efforts to contact Skjervold. (AA-17) In a December 24, 2006 article, *The Free Press* used some of the information obtained during the conversation or conversations with Skjervold. (AA-18)

The Free Press claimed its reporter accidentally called Skjervold while investigating the story. (AA-19) The district court found, however, that “it was no accident that once connected with Skjervold, the reporter remained on the line to engage him in a conversation.” (AA-19) Moreover, the district court found:

In the process, the reporter contributed to undermining the efforts of police negotiators to coax the man out of his barricaded home. Agent Nance was told that Skjervold was upset by the call. Moreover, it is safe to infer that the call

exacerbated Skjervold's mental state which in turn contributed to his taking his own life.

(AA-19) The district court then went to conclude that each prong of the three-prong test for disclosure under Minn. Stat. § 595.024, subd. 2, had been met by clear and convincing evidence.

ARGUMENT

Statutory construction is a question of law reviewed de novo on appeal. *Weinberger v. Maplewood Rev.*, 668 N.W.2d 667, 671-72 (Minn. 2003). Absent ambiguity, the words and phrases of a statute shall be construed according to their plain and ordinary meaning language. *Id.* at 672.

Under the Minnesota Free Flow of Information Act, Minn. Stat. §§ 595.021-.025 (2006), the press is afforded the privilege of withholding sources and unpublished information. Minn. Stat. § 595.0234 (2006). This privilege is not without exception, however, and disclosure is required when a three-prong test is met. Under this test, the applicant for disclosure must establish:

(1) that there is probable cause to believe that the specific information sought (i) is clearly relevant to a gross misdemeanor or felony or (ii) is clearly relevant to a misdemeanor so long as the information would not tend to identify the source of the information or the means through which it was obtained,

(2) that the information cannot be obtained by any alternative means or remedies less destructive of first amendment rights, and

(3) that there is a compelling and overriding interest requiring the disclosure of their information where the disclosure is necessary to prevent injustice.

Minn. Stat. § 595.024, subd. 2 (2006). As correctly determined by the district court, Respondent met all three prongs of this test.

I. The Information is Clearly Relevant to a Crime.

There is probable cause to believe that the specific information sought by Respondent is clearly relevant to felonies. *See* Minn. Stat. § 595.024, subd. 2(1) (requiring applicant for disclosure establish there is probable cause to believe specific information sought is clearly relevant to crime). It is undisputed that Skjervold shot two law enforcement officers in the course of this incident. Assault on a peace officer by using or attempting to use deadly force against the officer while the officer is performing his or her duties constitutes first-degree assault, a felony. Minn. Stat. § 609.221, subd. 2 (2006).

Appellants assert that Skjervold's actions would not trigger the statutory exception because Skjervold is dead. Appellants are essentially arguing that the district court erred by not looking beyond the plain meaning of Minn. Stat. § 595.024, subd. 2(1). This argument is contrary to the rules of statutory interpretation. *See Weinberger*, 668 N.W.2d at 672 (stating absent ambiguity words and phrases of statute shall be construed according to their plain and ordinary meaning language). Nowhere in the statute does it require that the crime

be prosecutable.

Further, Appellants' argument that the information being sought is not clearly relevant to the felonies is without merit. The information being sought is information *The Free Press* staff obtained while having one or more telephone conversations with Skjervold after Skjervold shot the officers. Of course Respondent does not know the precise details of these conversations; this is the information Respondent seeks to obtain. It is undeniable, however, that these conversations related to the standoff and shootings. The December 24, 2006 article in *The Free Press* describes a portion of the conversations with Skjervold, including the fact that "Skjervold said he shot an officer in a tactical uniform in the face." (AA-13)

Based upon the plain meaning of the statute, there is clear and convincing evidence that the first prong of the statutory test has been met.

II. The Information Cannot be Obtained by Any Alternative Means or Remedies.

Respondent has further met the second prong of the test requiring disclosure. *See* Minn. Stat. § 595.024, subd. 2(2) (requiring information cannot be obtained by alternative means or remedies less destructive of first amendment rights). There are no other means through which Respondent could obtain the information being sought. Appellants do not actually dispute that this prong has been met and assert only that district court used a poor choice of words in concluding that this prong

had been established.

A reporter from the *The Free Press* had one or more telephone conversations with a man who is now deceased. There appear to have been no other witnesses to these conversations. It would thus be impossible to obtain information regarding them from any other source. The second prong of the disclosure test has therefore been met by clear and convincing evidence.

III. There is a Compelling and Overriding Interest Requiring the Disclosure of the Information Where the Disclosure is Necessary to Prevent Injustice.

The final prong in the disclosure test has also been met in this case. There is a compelling and overriding interest requiring disclosure, and the disclosure is necessary to prevent injustice. *See* Minn. Stat. § 595.024, subd. 2(3) (stating there must be compelling and overriding interest requiring disclosure of information where disclosure necessary to prevent injustice). This case began as a domestic dispute and evolved into an armed standoff, during which Skjervold shot two police officers, an officer or officers shot Skjervold, and Skjervold committed suicide. Such a case requires a thorough investigation of these events, including analysis of the actions of everyone involved. *See* Minn. Stat. §§ 609.066 (outlining justifications for use of deadly force by peace officer), 609.495 (2006) (defining crime of obstructing investigation).

Appellants are obstructing this investigation to the detriment of law enforcement, Skjervold's family, and the public at large. As determined by the district court, injustice can only be prevented if *The Free Press* and its staff are required to disclose all of the information they obtained in conversations with Skjervold during the standoff.

The contents of the reporter's conversations with Skjervold may provide information that will provide insight into what caused these events and help prevent such tragedies in the future. These interests are compelling and override Appellants' interest in withholding information. Withholding the information protects no one. Skjervold is dead. Appellants cannot argue that they need to withhold the information to protect their source. *See* Minn. Stat. § 595.022 (2006) (stating purpose of the Minnesota Free Flow of Information Act "is to insure and perpetuate, consistent with the public interest, the confidential relationship between the news media and its sources"). As Appellant Joe Spear informed BCA Agent Nance, *The Free Press* was seeking the "truth" by contacting Skjervold. Respondent now seeks the truth.

The interest of protecting law enforcement and the public from similar tragic events in the future overrides Appellants' interests in this case. The district court correctly determined that the third prong of the disclosure test has been met by clear and convincing evidence.

CONCLUSION

The district court correctly determined that Respondent met the three-prong test under Minn. Stat. § 595.024, subd. 2 (2006). Appellants must therefore disclose the information sought by Respondent.

Dated: June 1, 2007

Respectfully Submitted:

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