

IN THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI,

PLAINTIFF

v.

CAUSE NO. 16-110

BENJAMIN ALLEN

DEFENDANT

MOTION OF JERRY MITCHELL TO QUASH TRIAL SUBPOENA

Jerry Mitchell, by and through his attorneys, moves this Court to quash the trial subpoena served on him and in support of this motion would state the following:

SUMMARY

1. The subpoena was issued on Wednesday, January 25, 2017, to Jerry Mitchell, investigative reporter for *The Clarion Ledger*, purportedly under Miss. Code Ann. § 99-9-11, and it requires him to appear before the Court on Monday, January 30, 2017, at 9 a.m. This subpoena should be quashed because it is repugnant to the First Amendment of the United States Constitution as it threatens the freedom of the press by forcing Mr. Mitchell to testify about matters he has reported on behalf of *The Clarion Ledger* and because the State cannot show that the information is not obtainable through any other source. This subpoena should be quashed because the information sought from Mr. Mitchell is not the Best Evidence. Finally, this subpoena should be quashed because it fails to allow a reasonable time for compliance.

PERTINENT FACTS

2. Mr. Mitchell is employed as a professional journalist for *The Clarion Ledger*, with offices located in Jackson, Mississippi, where he is as investigative reporter.

3. On Wednesday, January 25, 2017, Honorable Randy Harris, Assistant District Attorney, caused a subpoena to be issued to Mr. Mitchell requiring him to appear at trial on

Monday, January 30, 2017, and to give testimony in this case. A copy of the subpoena is attached as Exhibit A.

ARGUMENT

I. The Subpoena Must Be Quashed As It Is Repugnant to the First Amendment of the United States Constitution.

4. The subpoena is void under the First and Fourteenth Amendments to the United States Constitution as well as Section 13 of the Constitution of the State of Mississippi as the State of Mississippi has other sources for the information sought, and it has not exhausted those sources.

5. Subpoenas threaten the freedom of the press when they require journalists to testify concerning matters they have written. Journalists should be free to write about controversial matters without the burden of subpoenas requiring them to give testimony not necessary to a case. Without constitutional protection, reporters would be subjected to burdensome and harassing subpoenas and would be harmed in their ability to collect material for controversial stories.

6. For these reasons, the courts have adopted a three-part test for determining the constitutionality of a subpoena issued to a journalist:

- a. Is the information relevant?
- b. Can the information be obtained by alternative means?
- c. Is there a compelling interest in the information?

Miller v. Transamerican Press, Inc., 621 F.2d 721, 726 (5th Cir. 1980), followed in *In re Selcraig*, 705 F.2d 789, 792 (5th Cir. 1983).

7. Here, the information sought from Mr. Mitchell can be obtained by alternative means, and there is no compelling need for his testimony.

II. The Subpoena Should Be Quashed As It Is Not the Best Evidence.

8. Mr. Mitchell interviewed witnesses who are identified in his new articles, and their knowledge cannot be verified for trial purposes through Mr. Mitchell's testimony because it is inadmissible hearsay.

9. Additionally, to the extent the State seeks to obtain information contained in his article - published more than two and one-half years ago - about the ownership of the 1988 pickup truck, the information can be obtained through various public records and witnesses with first-hand knowledge. Specifically, information regarding ownership, payment of taxes, and payment for repairs can be obtained through public records or through a subpoena to the repair shop that performed the work. Ironically, the sources for much of this information are found in the news article, and the State should not be permitted to treat Mr. Mitchell, who does not have any notes or papers related to the article published in 2014, as a funnel for this information, or to "annex" him as "an investigative arm of government." *Branzburg v. Hayes*, 408 U.S. 665, 709 (1972) (Powell, J., concurring).

10. Finally, Mr. Mitchell has conducted hundreds of interviews and written about a myriad of other subjects since the publication of the 2014 article, he has no independent recollection of his work other than what appears in the article.

11. Mr. Mitchell should not be required to appear and testify because any information he has would be inadmissible because it is not the Best Evidence or because it is hearsay. Requiring him to testify about his news sources for stories will interfere with his ability to perform the duties of his job as a reporter and will have a chilling effect on his ability to report the news.

III. The Subpoena Should Be Quashed Because It Fails To Allow Reasonable Time for Compliance.

12. Mr. Mitchell was served on January 25, 2017, with a subpoena to appear on Monday, January 30, 2017. This does not provide a reasonable time for compliance.

13. The subpoena – served three business days before Mr. Mitchell is required to appear – is unreasonable as it does not provide timely notice. It was issued in violation of Rule 2.01 of the Uniform Circuit and County Court Rules and Rule 45 of the Mississippi Rules of Civil Procedure which provides:

On timely motion, the court from which a subpoena was issued shall quash or modify the subpoena if it (i) fails to allow reasonable time for compliance; (ii) requires disclosure of privileged or other protected matter and no exception or waiver applies, (iii) designates an improper place for examination, or (iv) subjects a person to undue burden or expense.

Miss. R. Civ. P. 45(d)(1)(A).

14. A subpoena which is not timely issued is void. *See Bowman Dairy Co. v. United States*, 341 U.S. 215 (1951); *see also* AM. JUR. 2D Process § 81.

15. Clearly, a subpoena requiring Mr. Mitchell to appear and testify with less than three business days' notice is not reasonable and subjects Mr. Mitchell to an undue burden of having to scramble and stop his regular work and appear for a trial in less than a week. The subpoena is completely void of any description of the subject matter which Mr. Mitchell is expected to testify.

16. Mr. Mitchell should be released from the subpoena because news articles are self-authenticating under Miss. R. Evid. 902(6).

17. The subpoena should be quashed as it is unreasonable and unduly burdensome because it does not provide timely notice to Mr. Mitchell.

IV. The Subpoena Should Be Quashed Because It Does Not Comport With the Mississippi Constitution or the Rules of Procedure.

18. The subpoena should be quashed because the docket does not reflect that it has been issued by the Clerk of Court.

19. Rules 4 and 45 of the Mississippi Rules of Civil Procedure require that all summonses and subpoenas be issued by the clerk under the seal of the court.

20. Article 3 Section 24 of the Mississippi Constitution mandates that “[a]ll courts shall be open,” which implicitly requires that the subpoena once issued should have been filed in the court record.

21. Because the subpoena is not filed in the docket of this action, it should be quashed.

WHEREFORE, PREMISES CONSIDERED, Jerry Mitchell prays that the Court will quash the subpoena wrongfully issued to him.

THIS, the 27th day of January, 2017.

Respectfully submitted,

BUTLER SNOW LLP

/s/ Haley F. Gregory

Luther T. Munford (MB # 3653)

Haley F. Gregory (MB # 104532)

Butler Snow LLP

1020 Highland Colony Parkway

Suite 1400

Ridgeland, Mississippi 39157

Telephone: (601) 948-5711

Facsimile: (601) 985-4500

E-mail: luther.munford@butlersnow.com

haley.gregory@butlersnow.com

**ATTORNEYS FOR MOVANT
JERRY MITCHELL**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing is being electronically filed through the Court's electronic filing system, which has provided notice of such filing to all counsel of record.

/s/ Haley F. Gregory
Haley F. Gregory

35100955v1