9-3-87

Hohler Editorial

A Miscarriage of Justice

Robert Hohler of the *Concord Monitor* was tried in the Knox County courthouse at Rockland last week for refusing to testify in the murder trial of Richard Steeves last January. He was asked to testify because he interviewed Steeves in 1985 and reported that Steeves said that he was mentally confused; that he could remember seeing someone else commit the crime but could also see himself doing it.

Hohler is the victim of a miscarriage of justice arising from the Maine Attorney General's failure to restrict the subpoena powers of his deputies, from that department's misguided zeal to punish Hohler for disagreeing with the department, from the disregard of the guidelines of newspaper privilege established by the U.S. Department of Justice and adhered to in many jurisdictions, and from a departure from the general practise of Maine prosecutors in the past.

Most courts focus on three factors in determining the privilege of the press not to testify: the relevance of the journalist's information to the case at bar, the availability of the same information from nonjournalistic sources, and the moving party's need for the information in order to prosecute his or her case. Typical of the court findings as to alternative sources is an opinion of the District of Columbia Circuit Court holding that compelled disclosure must be "a last resort after the pursuit of other opportunities has failed."

The cross-examination of former Deputy Attorney General Thomas Goodwin, last Thursday, disclosed that he had obtained an indictment of Steeves from a Grand Jury before he had any knowledge of the Hohler interview, that he was confident of convicting him on the evidence in hand before he knew of the Hohler interview, that one investigator had recorded almost the very same statements by Steeves that appeared in the Hohler interview, that he had commenced the trial of Steeves before getting a subpoena to compel Hohler to testify.

There were, in other words, other sources than the reporter's interview for the information it contained; the prosecutor got an indictment without the reporter's testimony; he was confident then that he had a prosecutable case before he ever heard of Hohler; and he proceeded to trial without Hohler's agreement to testify.

Justice Bruce Chandler restricted the evidence narrowly to the classic version of contempt of court and held the defense to testimony on the validity of the judge's charge and the bare fact of whether Hohler did or did not comply with the request for his testimony.

The jury did not hear any testimony on the broad public issues of newspaper privilege, or the even broader questions of the independence and freedom of the press under the First Amendment to the United States Constitution or the Constitution of the State of Maine. The Court rejected testimony on these matters as irrelevant to the question of whether Hohler did or did not exhibit contempt of court and cause an obstruction to justice by his failure to provide testimony.

Whether these matters were or were not relevant to the trial of Robert Hohler (and we think they were), they are matters that are of relevance to the concerns of the people of Maine who are interested in seeing that they have a system of justice and an administration of law enforcement consistent with the historic independence and freedom of the press of the state as it has been perceived by prior law enforcement agencies and as provided by the state and federal constitutions.

The contribution that newspapers and newspapermen make to the administration of justice derives from their independence of government and government officials. The ability of reporters to elicit information and obtain interviews would not survive undiminished under government ownership of the press, government employment of reporters, or government direction of reporters. Citizens regard the newspapers as separate from government authority and direction. Under that impression, they often communicate things to reporters that they never would tell uniformed policemen or known government representatives. The newspapers, in reporting what happens in the world and what people do, feel, and think about things, gather enormous quantities of information that is useful and helpful to law enforcement agencies. The news is the raw material that can be used in research and inquiry by government agencies. If public officials direct newspaper reporting, control it, or regulate it, the ability of the press to gather the information will be interfered with and obstructed. If newspapermen are showered with subpoenas, and required to testify in courts, under threat of contempt of court prosecutions, reporters will shrink from writing about criminal affairs. Editors and publishers, over time, will grow unwilling to take the risk of writing about law enforcement. Small newspapers, unable and unwilling to have reporters spend time in doing the work that belongs to law enforcement agencies or risk costly contempt cases, will curtail their coverage of high-risk stories, and citizens will be less well informed about law enforcement.

Reporters do not have to give news sources a Miranda warning that the information given in an interview may be used against those who supply news and information. If interviews and stories do find their way into court prosecutions through the testimony of reporters, the rank and file of citizens will lose their confidence in the independence and impartiality of the press. Reporters, under the threat of subpoenas, will be under some moral obligation to give those from whom they seek information a veritable Miranda warning.

Reporters have a higher credibility than law enforcement officials when they testify in the courtroom, so officials sometimes wish to have their testimony. The more they are used to testify the less their credibility will be, in trials immediately at hand or those in the future. They cannot be the agents, representatives, servants, or employees of government without impairment of their credibility inside and outside the courtroom.

Robert Hohler was trying to protect the credibility and the independence of the press when he resisted giving testimony in the Steeves trial. He should not have been required to testify. He should not be punished for conduct in conformity with professional ethics and his own convictions.

The Office of the Attorney General ought to draw up regulations setting forth the limited circumstances under which reporters can be coerced into giving court testimony. They ought to embrace the Department of Justice rules and follow the court rules on newspaper privilege in many other states and jurisdictions. No reporter ought to be hauled into court unless the evidence sought cannot be obtained otherwise, his testimony is relevant to the case at hand, and the prosecution finds it essential to obtain a conviction. The sweeping employment of the subpoena power by the Office of the Attorney General is a threat to the independence and the freedom of the press.