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Tattered Cover v. Thornton

Corey Ann Finn

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gained. The officer stressed that they just wanted the information regarding the mail order shipment. I asked the officer what would happen if this did not reveal what they expected it to. He replied that they would then take the next step, which I interpreted to mean that they would seek additional records from the Tattered Cover.

The officers made it clear that they were not investigating the Tattered Cover for illegal activity. I was sure that was the case, because the Tattered Cover is a law-abiding business. I tried to make it clear that the Tattered Cover did not intend to stand in the way of a criminal investigation. As an establishment, we are in agreement with authorities that meth labs are a scourge on the community. We support the police in the difficult job they do. But, for the Tattered Cover, an individual consumer's book purchase has serious First Amendment implications. We also believe that it is incumbent on the police to protect and honor our First Amendment rights. This case requires a balancing of the necessity of the information the government seeks against important constitutional protections.

As the afternoon wore on, I asked one of the officers how having a book in one's possession could play a role in a conviction for illegal activity. He replied that it could be introduced into evidence to establish the suspect's state of mind. Curiously, months later he would say that the information regarding the book purchase was sought to establish residency in the bedroom (the police had residency in the trailer home established). Why then, did the police only focus on the books about methamphetamines? Were there other books in the bedroom? What would have been the outcome if the Tattered Cover had not sold the meth books to this suspect? Would that have freed Suspect A of suspicion? I did not think that was likely. How important exactly was this "piece of the puzzle?" Was a "compelling need" (a higher standard than probable cause) clearly established? Given all of the evidence, would there still have been a case without the books? Conversely, if the whole case hung on the books, was it a viable case?

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Some have asked me why I did not declare victory after the decision of the District Court. Would turning over this information really impact our freedom to read? I believe it would. Therefore, the Tattered Cover decided to appeal the decision of the District Court. Briefs were submitted to the Colorado Supreme Court and the oral arguments were heard on December 5, 2001. I am writing this at the end of February 2002 as we await the decision of the court.

While the Tattered Cover is not arguing that the First Amendment enjoys absolute protection, it is arguing that there should be and is a higher standard of protection. It is, after all, one of the very most important pillars of our government. In the *Kramerbooks* case, a District of Columbia District Court Judge ruled that Kenneth Starr, in his subpoena of Monica Lewinsky's book purchase records, could not have unfettered access to such information in his investigation of President Clinton's activities. She ruled that he must demonstrate a compelling need for the information as it relates to such an investigation, which is a higher standard than probable cause.[3] That case never made it to the next step

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Tattered Cover v. Thornton:

by Corey Ann Finn

The Colorado Supreme Court handed down *Tattered Cover v. Thornton* on April 8, 2002.[1] The court found in favor of Joyce Meskis' bookstore, the Tattered Cover, holding that the search warrant of a bookstore customer's purchase record was unconstitutional.[2]

In 2000, the Drug Enforcement Agency and the North Metro Task Force were monitoring a trailer in Adams County, Colorado, because they suspected that its occupants were manufacturing methamphetamine.[3] Having searched through the trash of the trailer and having executed a search of the trailer pursuant to a warrant, investigators needed to connect one of four occupants of the trailer to the meth lab found in the trailer's bedroom. Suspecting a connection between the books found in the bedroom on the manufacture of methamphetamine and an empty mailer from the Tattered Cover found in the trash, investigators served the Tattered Cover with a DEA administrative subpoena, requiring information about the order sent to Suspect A and all other purchases made by the suspect. About this initial subpoena, the Colorado Supreme Court said that "[u]sing such a subpoena was ordinarily a successful technique for DEA officers, though such a subpoena lacks any force or legal effect."[4] Meskis, through her attorney, informed investigators of her unwillingness to comply because of her concern for the privacy of the bookstore's customers.

Investigators then sought and received a warrant from a Denver County court, which they attempted to execute. Pursuant to Meskis' attorney's request, the district attorney who signed off on the warrant voluntarily stayed its execution so the bookstore could litigate it (in fact, the Tattered Cover did receive a Temporary Restraining Order from the court).

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The government argued that the information sought was only a business record, that they could not care less what the suspect read, and that it could be used to establish a state of mind. They contended that a book purchase is no different than a hardware purchase record when it comes to a criminal investigation. I fundamentally disagree.

Entering books into evidence that are found at a crime scene is one thing. Seeking out who bought what from a bookstore is another. Purchasing, borrowing or "reading a book is not a crime."[4] To edge closer to using a customer's book purchase records as an acceptable way of determining criminal behavior is disquieting at best, and downright frightening at worst. Whether as a reporter seeking information, an iconoclast harmlessly pushing the envelope of societal acceptance, or even someone potentially contemplating illegal behavior, reading is not a crime.

The Tattered Cover is appreciative of the thoughtful consideration Judge Phillips gave to his decision. While we are in disagreement with part of that decision, we could not agree more with the chilling effect that he addressed when speech is thwarted. Judge Philips stated: "It is clear that the First Amendment of the Constitution protects the right to receive information and ideas, regardless of social worth, and to receive such information without government intrusion or observation." [5] He went on to quote the late Supreme Court Justice Douglas on the necessity for such protection:

> Once the government can demand of a publisher the names of the purchasers of his publications, the free press as we know it disappears. Then the spectre of a government agent will look over the shoulder of everyone who reads. The purchase of a book or pamphlet today may result in a subpoena tomorrow. Fear of criticism goes with every person into the bookstall. The subtle, imponderable pressures of the orthodox lay hold. Some will fear to read what is unpopular, what the powers-that-be dislike. When the light of publicity may reach any student, any teacher, inquiry will be discouraged. The books and pamphlets that are critical of the administration, that preach an unpopular policy in domestic or foreign affairs, that are in disrepute in the orthodox school of thought will be suspect and subject to investigation. The press and its readers will pay a heavy price in harassment. But that will be minor in comparison with the menace of the shadow which government will cast over literature that does not follow the dominant party line. If the lady from Toledo can be required to disclose what she read yesterday and what she will read tomorrow, fear will take the place of freedom in the libraries, bookstores, and homes of the land. Through the harassment of hearings, investigation, reports, and subpoenas government will hold a club over speech and over the press.[6]

When they heard about this case, hundreds of our customers took the time to call or write to us in support of our stand, underscoring this message and raising their own concerns about privacy and the chilling effect on the First Amendment of requiring bookstores to turn over to the police information regarding the purchases of customers.

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When the trial court held that officers could seize the record of the purchase that was delivered in the mailer, but denied them the right to confiscate other records of the same customer, the Tattered Cover appealed.

In its decision, the Colorado Supreme Court explained "how the First Amendment and Article II, Section 10 of the Colorado Constitution safeguard the right of the public to buy and read books anonymously, free from governmental intrusion."[5] Accordingly, the court developed a test for whether law enforcement officials may seek to seize the book purchase records of an innocent, third-party bookstore in order to gather evidence against a customer. The test requires the government to demonstrate a compelling need for the information sought. "The court must then balance the law enforcement officials' need for the bookstore record against the harm caused to constitutional interests by execution of the search warrant."[6] The court also held that "an innocent, third-party bookstore must be afforded an opportunity for a hearing prior to the execution of any search warrant that seeks to obtain its customers' book-purchasing records."[7] In this hearing, the court is to apply the test created by the Colorado Supreme Court.

In applying this test to the Tattered Cover search warrant, the court looked at the government's three justifications for wanting the record of the suspect's purchase: (1) to prove that the suspect had the necessary mens rea to be prosecuted for the manufacture of methamphetamine, (2) to prove that the suspect lived in the bedroom where the meth lab and books were found and (3) to connect the suspect to the crime. Analyzing each one separately, the court held that the government showed no sufficiently compelling interest to outweigh the potential chilling effect on the right to buy books anonymously.