Michigan Law Review

Volume 53 | Issue 7

1955

Criminal Procedure - Standing of the Press to Protest Judge's Exclusion of the Public from Criminal Trial

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CRIMINAL PROCEDURE—STANDING OF THE PRESS TO PROTEST JUDGE'S EXCLUSION OF THE PUBLIC FROM CRIMINAL TRIAL—Plaintiff newspapers sent reporters to the trial of Minot Jelke. Defendant judge, exercising his discretion, excluded them as well as the general public from the courtroom when testimony dealing with the sordid details of prostitution and pandering was expected. The family and friends of the accused, along with the officers of the court, witnesses and jury were not excluded. Plaintiffs applied to the Supreme Court, Special Term, of New York County for a writ of prohibition to restrain the defendant from enforcing his order. The application for the writ was based on a statute guaranteeing the accused in a criminal trial the right to a public trial.[1] This mandatory right[2] is qualified by another statute listing specific exceptions to the right of public trial in the interest of protecting public morals and decency.[3] The application was denied on the grounds that the defendant had the power to issue the exclusion order and that the Supreme Court, Special Term, could not substitute its judgment for that of the defendant.[4] On appeal, *held,* affirmed. The guarantee of a public trial is personal to the parties to the trial and is not a right of the public. While the public has an interest in a public trial, it is up to the accused to assert or waive that right, and outsiders have no standing to raise it.[5] No question of freedom of speech or of the press is involved because these rights do not allow the press access to places not open to the general public as well. *United Press Association v. Valente,* 308 N.Y. 71, 123 N.E. (2d) 777 (1954).

[1] 66 N.Y. Consol. Laws (McKinney, 1948) §8.

[2] People v. Miller, 257 N.Y. 54, 177 N.E. 306 (1931).

[3] 29 N.Y. Consol. Laws (McKinney, 1948) §4. The cases in which the trial judge can exclude the public from the courtroom include rape, adultery, sodomy, and similar sexual crimes. The case of People v. Jelke, 308 N.Y. 56, 123 N.E. (2d) 769 (1954), decided the same day as the principal case, held that the statute did not apply. Although evidence of sodomy was to be introduced, the crime charged was not one of the listed crimes.

[4] United Press Association v. Valente, 203 Misc. 220, 120 N.Y.S. (2d) 642 (1953); 281 App. Div. 395, 120 N.Y.S. (2d) 174 (1953). These two decisions were noted in 52 MICH. L. REV. 609 (1954).

[5] It is said that a contrary holding would take control of the courtroom away from the judge. State v. Brooks, 92 Mo. 542, 5 S.W. 257 (1887); 15 UNIV. PITT. L. REV. 385 (1954). This view apparently is based on an unflatteringly low opinion of the trial judge's capability. 49 COL. L. REV. 110 (1949).

The right of the press as a member of the public to protest its exclusion from a criminal trial does not seem to have been litigated before. This is explainable on two grounds: (1) when an exclusionary order is given, the press is not normally included in the order;[6] and (2) litigating the exclusion order is both costly and time consuming, while the news value of the trial is low at the time the issue is finally decided. To maintain a statutory cause of action, a person must show that he is a member of the class for whose interest or protection the statute was enacted. Ever since Cooley stated that the right to a public trial found in various state constitutions and statutes was for the benefit of the accused and not the public,[7] courts have piled up reams of dicta to that effect.[8] Cooley apparently based his statement on history for he cited no cases deciding the question. The prestige of Cooley's name, combined with the passage of time, have given such weight to this view that its reversal is unlikely. However, it is not obvious that Cooley's interpretation of history is correct. Bentham saw the public trial as a public right intended to insure the proper administration of justice,[9] and the English cases treat the right as one belonging to both the defendant and the public.[10] If, as has been stated,[11] the public trial right resulted from a distaste for such abuses of judical power as Star Chamber, the Spanish Inquisition, and the French *lettres de cachet,* regard for the defendant was not the reason for the insertion of the requirement in so many constitutions. The real basis for the right lay in the fear of the judiciary becoming a means to tyranny and despotism, and publicity was believed to be the answer to the evil.[12] Some courts have used this historical background to define the word "public" as meaning the opposite of *in camera,*[13] so that if any disinterested party is present at the trial it is said to be a public trial. However, this definition takes only half the reason for the right. Other courts interpret the word "public" to mean a trial to which members of the public have freedom of access.[14] These courts accept Cooley's statements at face value and deny that there is any right in the public to attend the trial. Along with the historical argument, the courts

[6] The fact that the press was allowed to remain in court to observe the trial after the exclusionary order is emphasized in many cases dealing with the question of whether the defendant actually had a public trial. State v. Hensley, 75 Ohio St. 255, 79 N.E. 462 (1906); State v. Keeler, 52 Mont. 205, 156 P. 1080 (1916); Sullivan, "The Public Interest in Public Trial," 25 PA. B.Q. 253 (1954).

[7] COOLEY, CONSTITUTIONAL LIMITATIONS, 8th ed., 647 (1927).

[8] State v. Smith, 90 Utah 482, 62 P. (2d) 1110 (1936); People v. Hartman, 103 Cal. 242, 37 P. 153 (1894); 52 MICH. L. REV. 128 (1953).

[9] BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827).

[10] Daubney v. Cooper, 10 B. and C. 237, 109 Eng. Rep. 438 (1829).

[11] See Justice Black's opinion in In re Oliver, 333 U.S. 257, 68 S.Ct. 499 (1948).

[12] In re Oliver, note 11 supra; 67 HARV. L. REV. 344 (1953).

[13] State v. Marsh, 126 Wash. 142, 217 P. 705 (1923); United States v. Kobli, (3d Cir. 1949) 172 F. (2d) 919; Keddington v. State, 19 Ariz. 457, 172 P. 273 (1918).

[14] State v. Copp, 15 N.H. 212 (1844); Carter v. State, 99 Miss. 435, 54 S. 734 (1911).

raise a questionable fear for public morals as a makeweight for their decisions.[15] Query if this is not censorship by a few and, in reality, a poor reason for exclusion of the public. Realizing that there is no reason to overcrowd a courtroom, and that there are cases where the possible embarrassment to a witness would call for a limitation of the number of gaping sensation seekers, the public and its press representatives still have a legitimate interest in attending trials. This interest has been denied on the authority of Cooley's name, history, and "protection of public morals," without a close, critical appraisal of the rationale of exclusion. Publicizing a trial is vital to both the defendant and the public, especially in the criminal trial, and when a representative of the public asserts that right it should not be denied solely on the ground that it is not the proper party in interest.

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[15] Wade v. State, 207 Ala. 1, 92 S. 101 (1921); Reagan v. United States, (9th Cir. 1913) 202 F. 488. See 6 WIGMORE, EVIDENCE, 3d ed., §1835 (1940), for exclusionary statutes and decisions based on injury to public morals.