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Courts--Powers--Newspaper Reporter's Right to Attend Trial

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Comments

COURTS—POWERS—NEWSPAPER REPORTER'S RIGHT TO ATTEND TRIAL.—Reporters for a local newspaper, brought a mandamus proceeding to prohibit the county judge from excluding them from a trial involving juveniles at which other members of the public, including other members of the press, were permitted to be present. The judge excluded the reporters because their newspaper printed names of juvenile witnesses in violation of his directive. The trial was in the adult-division of juvenile court and the accused was charged with contributing to the delinquency of a minor. The circuit court entered a judgment against the judge, and he appealed. *Held*: Affirmed. A county judge may not condition a reporter's presence at the public trial of an adult on the reporter's agreement not to publish names of juveniles involved. *Johnson v. Simpson*, 433 S.W.2d 644 (Ky. 1968).

The *Johnson* case raises a broad issue concerning the discretionary power of a juvenile judge to exclude persons, namely a segment of the press, from a public trial.[1] The case further raises the significant issue of the propriety of publishing names of juveniles involved in an adult trial in which the juvenile is a witness or victim.

Turning to the broader issue of exclusion, does the press as members of the public have a legitimate interest in court proceedings[2] and, further, an enforceable right to attend them?

Historically, judges have had the power to use discretion in regulating attendance at least to the extent necessary to assure the security and orderly progress of a trial.[3] Instances where a judge has, by his own discretion, invoked the power to exclude persons for such reasons are numerous.[4] For the most part, courts have held that any order of exclusion should expressly exempt representatives of the bar,[5]

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[1] U.S. CONST. amend. VI. Also the constitutions of forty-one states specifically provide for a public trial. *See e.g.*, KY. CONST. § 11.

[2] Beauchamp v. Cahill, 297 Ky. 505, 180 S.W.2d 423 (1944). In this case an attorney who had been excluded was said to have a legitimate interest in the proceedings and allowed to remain.

[3] R. BOWERS, JUDICIAL DISCRETION OF TRIAL COURTS § 262, at 296-97 (1931).

[4] United States v. Kobli, 172 F.2d 919 (3d Cir. 1949) (to prevent undue crowding); Beauchamp v. Cahill, 297 Ky. 505, 180 S.W.2d 423 (1944) (to spare young witnesses from embarrassment); State v. Genese, 102 N.J. 32, 130 A. 642 (1925) (to preserve courtroom decorum); People v. Miller, 257 N.Y. 54, 177 N.E. 306 (1931) (to preserve public health); Commonwealth v. Principatti, 260 Pa. 587, 104 A. 53 (1918) (to prevent violence against witness).

[5] Reagan v. United States, 202 F. 488 (9th Cir. 1913); Beauchamp v. Cahill, 297 Ky. 505, 180 S.W.2d 423 (1944).

representatives of the press,[6] and friends of the accused.[7] In *Keddington v. State*,[8] it was held that the importance of the presence of the press assured a just trial even more certainly than the presence of many spectators.

Although historically the public trial did not develop out of any particular solicitude for the person on trial, the popular conception today is that the right to a public trial exists primarily for the benefit of the accused and the incidental observer attends not as a matter of right but as a matter of courtesy.[9] However, Bentham's viewpoint differs from this particular interpretation of history. He saw the public trial as a public right intended to insure the proper administration of justice.[10] English[11] and American[12] cases have treated the right as one belonging to both the defendant and the public. The real basis for the public's right to attend trials has stemmed from fear that the judiciary might become a means to tyranny and despotism. Publicity has been deemed the answer to this potential evil.[13] As Continental experience has demonstrated, judicial laxity and venality increase in the absence of critical scrutiny.[14] Unless the necessity of excluding the public in the interest of a fair trial outweighs the advantages to be gained from publicity,[15] the judge is not entitled to make this decision

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[6] Benedict v. People, 23 Colo. 126, 46 P. 637 (1896); State v. Keeler, 52 Mont. 205, 156 P. 1080 (1916).

[7] *In re* Oliver, 333 U.S. 257 (1948).

[8] 19 Ariz. 457, 172 P. 273 (1918). All except those necessary to the conduct of the trial and newspaper reporters were excluded because of an embarrassed female witness. For further discussion, *see Comment*, 35 MICH. L. REV. 474, 477, wherein it is stated, "The *Keddington* case further quite correctly points out that the number in the courtroom is not the acid test and that the presence of the press tends to make the trial more public than a house full of idlers."

[9] The view seems to stem from a statement by Judge Cooley referring only to constitutional provisions and not considering common law customs. T. COOLEY, CONSTITUTIONAL LIMITATIONS 647 (8th ed. 1927).

[10] J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827). *See also* Sheppard v. Maxwell, 384 U.S. 333 (1966) and Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950), which contain excellent discussions of this view. For an enumeration and discussion of the benefits accruing to the public from a public trial see 6 J. WIGMORE, EVIDENCE, § 1834 (3d ed. 1940).

[11] Daubney v. Cooper, 109 Eng. Rep. 438 (Ex. 1829).

[12] In *State v. White*, 97 Ariz. 196, 398 P.2d 903, 904 (1965), the Arizona court stated, "The community is deeply interested in the right to observe the administration of justice and we feel the presence of its members at a public trial is as basic as that of a defendant."

[13] *See* Justice Black's opinion in *In re* Oliver, 333 U.S. 257 (1948). For more discussion on this point see 67 HARV. L. REV. 344 (1953).

[14] A. ESMEIN, HISTORY OF CONTINENTAL CRIMINAL PROCEDURE 145-64, 166-72, 397, 439, 442 (1913). It was not the secret procedure that was so objectionable; it was the practices accompanying it.

[15] The characteristic of the "publicity" is significant in *Johnson*. It seems that the publication of the names of juveniles involved in adult proceedings is quite unrelated to the insurance of justice. The Wisconsin state legislature reflected this view by enacting a statute forbidding publishing the names of female rape

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on either his own motion or in concurrence with the desires of the parties.[16]

The specific issue as to the right of the press as members of the public to protest their exclusion from a criminal trial was litigated in the New York case of *United Press Associations v. Valente*.[17] There the defendant judge, exercising his discretion, had excluded the press as well as the general public from a criminal trial when testimony dealing with the sordid details of prostitution and pandering was expected. In the appeal of the criminal trial itself,[18] it was held that the defendant had been denied his right to a public trial in order to grant a lesser protection, that of preserving public morals and decency. However, *Valente* held that the order of exclusion did not deprive the press associations and newspaper publishers of any right of which they could complain.[19]

The *Valente* case can be distinguished from *Johnson* in that the judge excluded everyone in the former and only a segment of the public, one part of the press, in the latter. Further, the former acted in order to protect public morals and decency while the latter acted to protect juveniles involved in the trial from having their names published. Kentucky has no statute or law prohibiting this type of publication,[20] and the Court appealed to the legislature to enact such a statute.[21]

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victims. WIS. STAT. § 348.412 (1945). This statute has been upheld by their courts in *State v. Evjue*, 253 Wis. 146, 33 N.W.2d 305 (1948).

[16] Comment, *Constitutional Law—Public Trial in Criminal Cases*, 52 MICH. L. REV. 128 (1953).

[17] 308 N.Y. 71, 123 N.E.2d 777 (1954).

[18] People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769 (1954).

[19] 308 N.Y. at 71, 123 N.E.2d at 777.

[20] OP. ATT'Y GEN. 42095 (1958).

[21] Although the Court adopted a restrained view on the issue regarding the publication of the names of juveniles, its language urges the enactment of a statute similar to the Wisconsin statute discussed in note 15, *supra*.

Sociological studies reveal the harmful and unnecessary effects from such publication. Social scientists familiar with the juvenile courts and its problems in the main agree that one of the great unwanted consequences of juvenile involvement is the imposition of stigma. Such stigma gets translated into effective handicaps by lowered receptivity and tolerance by school officials, rejections of youths by prospective employers, and degradation in general by those who know of the involvement. Large numbers of youths appearing in juvenile court have lower class status or that of disadvantaged minorities, whose limited commitments to education already create difficulties for them in a society where education is increasingly a condition precedent to access to economic opportunity.

Proposals, laws, and administrative action to preserve the anonymity of juvenile court proceedings through closed hearings, sealing case records, and expunging records are probably worthy moves, but it is vain to expect them to eliminate the stigma of "contact" with the juvenile court.

While the successful management of stigma by individuals is not impossible, the necessary insights and social skills are not given to many people, least of all

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The Court in *Johnson* relied heavily on a prior Kentucky case, *Beauchamp v. Cahill*,[22] and an Arizona decision, *Phoenix Newspapers, Inc. v. Superior Court In and For Maricopa County*.[23] In *Beauchamp*, an attorney was excluded from the trial of a defendant accused of contributing to the delinquency of a minor. The attorney represented a client who was charged with the same offense by the same prosecutrix.[24] The Court held that the attorney had a legitimate interest in the proceedings and was entitled to remain as a matter of right.[25] In the *Phoenix Newspapers* case, the Supreme Court of Arizona held that courts were prohibited from limiting by court order the right of newspapers to print news and inform the public of that which transpired in open court.[26] The Court in *Johnson* further followed dictum of the Arizona court in stating that: "Courts are public institutions. . . . To permit a hearing held in open court to be kept secret . . . would take from the public its right to be informed of a proceeding to which it is an interested party."[27] The Court has, in essence, considered that an attorney is to his client much the same as the press is to the public in having a legitimate right to be present at court proceedings.

It seems clear that the Court's reasoning, analysis, and application of the law in this case were justifiable. Since it was an adult trial and open, and since no Kentucky statutes prohibited the publication of juveniles' names, the county judge had little with which to support his position.

The importance of this twofold decision on the exclusion issue and on the issue regarding publication of the names of juveniles will lie in

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to immature youths or those struggling with other status handicaps. A number of social psychologists believe that social rejections provoked by such stigma may reinforce an individual's self-image that he is no good or that he can't make it on the outside. They may further feed some brooding sense of injustice which finds expression in delinquency; or they may support, strengthen, and perpetuate ideological aspects of delinquent subcultures. In this sense the court, because of this stigma attached to the juvenile, may become a connecting link causing delinquency. *See generally*, THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME, at 91-106 (1967).

[22] 297 Ky. 505, 180 S.W.2d 423 (1944).

[23] 101 Ariz. 257, 418 P.2d 594 (1966).

[24] 297 Ky. at 507, 180 S.W.2d at 424.

[25] *Id.* at 507, 180 S.W.2d at 425.

[26] 101 Ariz. at —, 418 P.2d at 594.

[27] *Id.* at —, 418 P.2d at 595. It is well to remember that the Arizona court protected the community's interest in criminal trials and felt that the public's right to attend trials is as basic as the right of the defendant. Further, the Kentucky Court's language explains that the news media should be accorded some priority in protecting the rights of the public because they have the facilities to disseminate information regarding what transpires in court to a much broader audience than those who can gather in a crowded courtroom.

its effect on, first, subsequent case holdings and, second, subsequent statutes enacted by the legislature. On the broader issue of exclusion, the Court has apparently rejected the New York view as expressed in *Valente*[28] by holding that the press, as members of the public, do have an enforceable right to attend court proceedings (or at least public trials). This aspect of the decision could be abused. However, if newspapers do not seek to control the course of court proceedings, but only report what they are entitled to "see, behold, and hear,"[29] then the public's right to be in attendance at court proceedings as an interested party will be protected and the public will have gained a needed right in order to promote and preserve proper administration of justice. Concerning the issue regarding publication of the names of juveniles involved in trials, the Court has taken a stand which hopefully will bring about enactment of a statute by the legislature which will serve to protect witnesses and victims from the unnecessary consequences of social degradation.

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TORTS—SOVEREIGN IMMUNITY—MUNICIPAL LIABILITY.—In March, 1964, the Ohio River was rising toward flood stage at Louisville. Representatives of the Louisville Seed Company contacted the City of Louisville and received assurances from the flood control department, the mayor and other city officials that gates in the municipal flood wall system would be in place in time to prevent damage to the company's property and merchandise. The flood wall gates were not installed in time and the company's property and inventory were damaged by the resulting flood. The Louisville Seed Co. brought suit against the City of Louisville for damages based on the city's negligence in failing to install the gates. The plaintiff was awarded a judgment on a jury verdict in the amount of $86,771.43. The City of Louisville appealed. *Held*: Reversed. A municipal corporation may not be held liable in tort for the negligent performance of a function which is inherently part of the carrying on of government and where the performance of this function affects all members of the general public alike. *City of Louisville v. Louisville Seed Company*, 433 S.W.2d 638 (Ky. 1968).

One of the most difficult and confusing problems which the Kentucky Court and other courts throughout the nation have had to face

[28] United Press Ass'ns v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954).
[29] LeViness, *Crime News*, 66 U.S. L. REV. 370 (1932).