Michigan Law Review

Volume 63 | Issue 1

1964

Prejudicial In11uence on Jury of Newspaper Published During Trial-*People v. Purvis*

Michigan Law Review

Prejudicial Influence on Jury of Newspaper Published During Trial—*People v. Purvis*

Defendant had been paroled after serving four years of a sentence for second degree murder. While on parole, he was tried for another homicide and convicted of murder in the first degree. In separate penalty trials,[1] juries had twice assessed the death sentence, which, on both occasions, had been set aside by the reviewing court. During the third trial, the Sunday newspaper in the local county published a front-page article attacking the leniency of the parole system, attributing the area's high crime rate partly to the recidivist tendencies of parolees, and quoting the county sheriff's opinion that defendant should be sentenced to death. The following day the prosecution began its closing argument and, over defense objections, made reference to the article. The jury adjourned for the evening without receiving instructions to disregard the statements in the newspaper and, the next day, returned a verdict imposing the death penalty. On appeal to the Supreme Court of California, *held*, reversed and remanded for a new trial, two judges dissenting. The making of public statements concerning the pending trial by the

1. California and Pennsylvania provide for separate jury trials, after guilt has been decided, to determine the punishment for first degree murder. See CAL. PEN. CODE § 190.1; PA. STAT. ANN. tit. 18, § 4701 (Supp. 1961).

sheriff, directing the attention of the jury to these statements by the prosecution, and failure of the trial court to instruct the jury to disregard the newspaper article constituted prejudicial misconduct and deprived defendant of a fair and impartial trial. *People v. Purvis*, 60 Cal. 2d 323, 384 P.2d 424 (1963).

In England, newspaper comment that may have a tendency to prejudice a pending criminal trial can subject the newspaper to proceedings for contempt of court.[2] This has resulted in the practical elimination of prejudicial, extraneous influences on the conduct of trials in England.[3] The American press, however, with essential differences in traditions and history,[4] has not been so constrained.[5] As a result, the rights of the accused to confront and cross-examine witnesses, and to have unsworn and irrelevant testimony excluded from the trial, may be jeopardized by newspaper publicity and commentary during trial.[6] In terms of the rights of individual defendants to a fair trial, the consequence has been what Mr. Justice Jackson has termed, in a notable concurring opinion in *Shepherd v. Florida*,[7] "one of the worst menaces to American justice."[8]

There is little authority that holds prejudicial newspaper influence on a trial an unconstitutional denial of due process of law.[9]

2. Reviews of the English authorities are found in Holtzoff, *The Relation Between the Right to a Fair Trial and the Right of Freedom of the Press*, 1 SYRACUSE L. REV. 369, 371-75 (1950), and in Maryland v. Baltimore Radio Show, 338 U.S. 912, 921-36 (1950).

3. Goodhart, *Newspapers and Contempt of Court in English Law*, 48 HARV. L. REV. 885, 909 (1935). The scope of this note encompassed the influence of other forms of mass communication, in addition to newspapers, on jurors.

4. Hall, *Reconciling Fair Trial and Free Press*, 18 ALA. LAW. 404, 406 (1957). *But see* Bridges v. California, 314 U.S. 252, 285-88 (1941) (dissenting opinion).

5. Holtzoff, *supra* note 2, at 375.

6. Rifkind, *When the Press Collides With Justice*, 34 J. AM. JUD. SOC'Y 46, 49 (1950); Stryker, *Only Courts Should Try Cases*, in *Conference on Fair Trial—Free Press*, 11 N.Y. COUNTY LAW. ASS'N BAR BULL. 32 (1953). It is a fundamental rule of criminal law that an accused is entitled to be tried solely on the basis of evidence offered in open court. Briggs v. United States, 221 F.2d 636, 638 (6th Cir. 1955). Absent this, the result might be jury prejudice against defendant and destruction of the presumption of innocence. 38 VA. L. REV. 1057, 1058 (1952). See the examples of the Hiss and Hauptmann trials in Bromley, *Free Press vs. Fair Trial*, Harper's, March 1951, p. 90. The impact is likely to be worse if, as in the principal case, jurors receive the extraneous matter during the trial. Holtzoff, *supra* note 2, at 371. See principal case at 337, 384 P.2d at 430. This problem is somewhat reduced by the fact that defendants, for whom trial by jury was established as a sacred right, are increasingly waiving jury trial in favor of trial by judge. Perry, *The Courts, the Press, and the Public*, 30 MICH. L. REV. 228, 232 (1931).

7. 341 U.S. 50 (1951).

8. *Id.* at 55.

9. Montgomery, *The Treatment of Pending Litigation in the Press*, 23 N.Y.S.B.A. BULL. 314 (1951), citing Shepherd v. Florida, 341 U.S. 50 (1951) (concurring opinion) as the only authority. *But cf.* the following cases which were held violative of due process: Smith v. Texas, 311 U.S. 128 (1940) (discriminatory selection of jurors); Tumey v. Ohio, 273 U.S. 510 (1927) (failure to provide disinterested judge); Moore v. Dempsey, 261 U.S. 86 (1923) (bitterly hostile public opinion in the district of venue).

In *Irvin v. Dowd*,[10] the United States Supreme Court did hold that, because of the obviously prejudicial effect on jurors of pretrial publication of *inflammatory* matter, the accused was denied an impartial trial.[11] This is a fairly narrow holding, however, affording no protection to a defendant faced, not with a clearly inflammatory publication, but rather with the publication of incompetent evidence that might influence the jury.[12] Nevertheless, the reasoning of the Court, based largely on the probable bias created in the minds of the jurors, would seem to render the doctrine highly expandable.[13]

Trial court discretion in granting a new trial because of substantial prejudice from extraneous evidence, and appellate review of convictions resulting from alleged misconduct or error are the most usual methods of protecting the rights of an accused.[14] However, resort to appellate review is an expensive procedure.[15] It is

10. 366 U.S. 717 (1961).

11. *Id.* at 723-28. Defendant was accused of six murders and his trial had become the *cause célèbre* of the small community of venue. The Supreme Court found that "a barrage of newspaper headlines, articles, cartoons and pictures was unleashed against him during the six or seven months preceding his trial." *Id.* at 725. These articles described defendant as a confessed slayer, a parole violator, and as remorseless and without conscience. The Court found a pattern of deep and bitter prejudice to be present throughout the community, as clearly reflected in the fact that almost ninety per cent of the veniremen, including eight of the twelve jurors, entertained some opinion as to defendant's guilt. See *id.* at 727.

12. Evidence regarding the deterrent nature of punishment may not be presented to the jury in a first degree murder trial. People v. Love, 56 Cal. 2d 720, 731, 366 P.2d 33, 38 (1961). A sheriff's statements of facts predicated on his personal knowledge is likewise inadmissible. *Cf.* People v. Lyons, 47 Cal. 2d 311, 318-19, 303 P.2d 329, 333-34 (1956). Both of these forms of incompetent evidence probably reached the jury in the principal case through the newspaper article. See principal case at 339, 384 P.2d at 434.

13. Relying heavily upon Irvin v. Dowd, 366 U.S. 717 (1961), a federal district court has recently taken tentative steps in this direction. Sheppard v. Maxwell, 231 F. Supp. 37 (S.D. Ohio 1964). Defendant had been convicted for the murder of his wife, but was released in a habeas corpus proceeding in which the court termed his trial a "perfect example" of "trial by newspaper." *Id.* at 63. The murder and trial had attracted widespread publicity, especially in Cleveland, where the court found that "each of the three Cleveland newspapers repeatedly printed material which strongly suggested and, in fact, urged petitioner's guilt." *Id.* at 57. Although only fourteen of seventy-two veniremen stated that they had prejudged the guilt of defendant, the court found that defendant was denied due process of law because the publicity during trial made it impossible to maintain impartiality of the jurors. The publicity in the *Sheppard* case, *supra*, certainly was prejudicial to the defendant, and much of it incompetent as evidence, but it does not seem to be of the inflammatory nature of the articles in *Irvin*. *Compare* Irvin v. Dowd, *supra*, *with* Sheppard v. Maxwell, *supra*.

14. Hays, *Let Us Beware of Censorship*, in *Conference on Fair Trial—Free Press*, 11 N.Y. COUNTY LAW. ASS'N BAR BULL. 22, 23 (1953). Evidence received out of court by the jury is grounds for a new trial. See ALI CODE OF CRIM. PROCEDURE § 365(b) (1930); CAL. PEN. CODE § 1181(2). Change of venue and the civil action for libel are other possible protective devices. *But see* Rifkind, *supra* note 6, at 51 (change of venue a solution only in the days before modern communication).

15. A good example of this is the principal case, here sent back for the fourth time for a full scale jury trial on the single issue of the penalty to be imposed. See principal case at 353, 384 P.2d at 443.

also unreliable in preventing miscarriages of justice because an appellate court will disturb a conviction only in an extreme case.[16] The almost fictional device of the customary admonition to the jury to disregard certain matter will often satisfy an appellate court that there was no prejudice.[17] It may well be that criminal trials in large metropolitan areas would be virtually impossible without this device.[18] It is clear, nevertheless, that as long as mass communication media are permitted to publish matter pertaining to pending or anticipated litigation, the individual's right to a fair and impartial trial may be jeopardized.

The solution adopted in England, that of a broad contempt power,[19] is barred in the United States on constitutional grounds. In a series of three contempt cases[20] involving publications which could have influenced the trial judge's decision,[21] the Supreme Court has refused to infringe upon freedom of press merely because the commentary has a tendency to interfere with the judicial process.[22] The small area presently left within the contempt power, as limited by the Court's adopted standard of clear and present danger to the administration of justice,[23] is not yet clearly defined. Relying on the circumstance that these Supreme Court cases have all dealt with influences on a judge,[24] Mr. Justice Frankfurter suggested that possibly a different standard would apply in the case of influence on the judgment of a jury.[25] This will probably prove, however, to be merely one of the factors in the determination of a clear and

16. Note, 34 N.Y.U.L. REV. 1278, 1290 (1959). See, *e.g.*, Himmelfarb v. United States, 175 F.2d 924, 944 (1949) (incriminating and prejudicial error); People v. Hamilton, 55 Cal. 2d 881, 900, 362 P.2d 473, 484 (1961) (reasonably possible that error tipped the scales against defendant). *But see* King v. Commonwealth, 253 Ky. 775, 779, 70 S.W.2d 667, 669 (1934) (error had some effect on the verdict). The dissent in the principal case felt that the standard was whether the error was in fact prejudicial. See principal case at 354, 384 P.2d 444 (dissenting opinion).

17. See, *e.g.*, Himmelfarb v. United States, *supra* note 16, at 950-51. This has been called an "unmitigated fiction" in Krulewitch v. United States, 336 U.S. 440, 453 (1949), and said to be no answer to the problem in Holtzoff, *supra* note 2, at 371. The admonition to the jury reminded Judge Jerome Frank of the Mark Twain story of the little boy ordered to stand in a corner and not think of a white elephant. Hays, *supra* note 14, at 23.

18. Holt v. United States, 218 U.S. 245, 251 (1910); Note, 34 N.Y.U.L. REV. 1278, 1291 (1959).

19. See note 2 *supra*.

20. Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941).

21. See Craig v. Harney, *supra* note 20, at 375; Pennekamp v. Florida, *supra* note 20, at 345; Bridges v. California, *supra* note 20, at 272.

22. See, *e.g.*, Craig v. Harney, *supra* note 20, at 376.

23. It has been suggested that almost no contempt conviction against a newspaper would be constitutional. Montgomery, *supra* note 9, at 318. At any rate it seems that all doubt will be resolved in favor of freedom of the press. Holtzoff, *supra* note 2, at 377.

24. See cases cited note 21 *supra*.

25. Maryland v. Baltimore Radio Show, 338 U.S. 912, 921 (1950).

present danger,[26] the Court's sensitivity to censorship seemingly eliminating the contempt power as an effective deterrent to news media interference even with jurors.[27]

The conflict between the need for efficient judicial administration and the necessity of a fair trial, which is inherent in a system that attempts to remedy prejudicial newspaper influence on jurors through trial court discretion and appellate review, necessarily must result in a compromise of individual rights.[28] A responsible press that is sensitive to the protection of the right to a fair trial would, of course, alleviate much of the problem.[29] Similarly, the legal profession can do much to eliminate trial by newspaper.[30] The prosecution, whose primary duty is to see that justice is done,[31] is often chargeable with collaboration in the publication of inflammatory material or with exploiting it at the trial.[32] Canon 20 of the Canons of Professional Ethics generally condemns newspaper publication by a lawyer concerning pending litigation,[33] but the generality of,

26. See Doyle, *Free Speech and Fair Trials*, 22 NEB. L. REV. 1, 15 (1943); Rifkind, *supra* note 6, at 50. This was the approach of the court in Baltimore Radio Show v. State, 193 Md. 300, 67 A.2d 497 (1949), *cert. denied*, 338 U.S. 912 (1950).

27. See Rifkind, *supra* note 6, at 47, 50.

28. See notes 15-18 *supra* and accompanying text.

29. Rifkind, *supra* note 6, at 51. There is, however, a great deal to be said for the freedom from contempt afforded the American press. The press may correct other outside influences, bring corruption to light, and in any event, is unlikely to influence hardened judges. Nelles & King, *Contempt by Publication in the United States*, 28 COLUM. L. REV. 525, 552 (1928). The forceful example of the *Scottsboro* case [Powell v. Alabama, 287 U.S. 45 (1932)] is used to argue that the publicity of a trial is a necessary protection. Hays, *supra* note 14, at 23. Moreover, in light of pressures for high circulation, it has been suggested that no voluntary abstention from sensational news would prove practical. Bromley, *supra* note 6, at 95.

30. One very practical remedy would seem to be discipline by the court of its officers, including the prosecuting attorney and the police. Bromley, *supra* note 6, at 95. There is at least one case where action has been taken against a police officer for discussing with newspapers matters relating to a pending trial. See report of proceedings in *Courts Have Power To Defend Themselves From Harmful Publicity*, 10 J. AM. JUD. SOC'Y 133, 138-47 (1927). It is unlikely that there is any case in which an attorney has been held in contempt for similar actions. See 20 WASH. & LEE L. REV. 178, 179 (1963). There is some thought that the evil of trial by newspaper derives from the fear of courts to take measures against the powerful newspapers. Perry, *supra* note 6, at 233, 236. This thought led Mr. Justice Jackson to call for the judiciary to demonstrate its fortitude. Craig v. Harney, 331 U.S. 367, 397 (1947).

31. Note, 54 COLUM. L. REV. 946, 947 (1954). Canon 5 of the Canons of Professional Ethics reads in part: "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done."

32. Perry, *supra* note 6, at 233; Wechsler, *Conscience of Press vs. Conscience of Bar*, in *Conference on Fair Trial—Free Press*, 11 N.Y. COUNTY LAW. ASS'N BAR BULL. 25, 26-27 (1953). Presumably the prosecuting attorney has more influence on the jury than the defense attorney. Note, 54 COLUM. L. REV. 946, 947 (1954). A good illustration of the use of prejudicial newspaper comment at a trial is provided by the principal case. See principal case at 334-37, 384 P.2d at 431-33.

33. "Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned."

and consequent difficulty in enforcing, this canon have caused it to be widely disregarded.[34] Effective enforcement of even the most specific canon, however, must depend upon the insistence of the whole Bar on adherence to the standard embodied therein.[35] It has been suggested that watch-dog committees be established by the Bar to deal with this single problem of enforcement.[36] The legal profession, in conjunction with the press, has the task of protecting due process of law from deterioration through trial by newspaper. The task is hardly new or strange, but the evil is unlikely to be corrected without leadership from, and discipline within, the legal profession.

34. See PHILLIPS & MCCOY, CONDUCT OF JUDGES AND LAWYERS 161-67 (1952).

35. *Id.* at 179.

36. This suggestion was made by Judge Rifkind. Rifkind, *supra* note 6, at 51. The enforcement by means of the present disbarment, suspension, and contempt proceedings is probably too lax and diverse from state to state. See PHILLIPS & MCCOY, *op. cit. supra* note 34, at 85-129. This problem is, of course, not peculiar to the Canons involved with trial by newspaper.