Michigan Law Review

Volume 52 | Issue 4

1954

Criminal Procedure - Standing of the Press to Protest Exclusion of Public from Criminal Trial by Order of the Trial Judge

M. Fred Mallender, II
University of Michigan Law School

CRIMINAL PROCEDURE—STANDING OF THE PRESS TO PROTEST EXCLUSION OF PUBLIC FROM CRIMINAL TRIAL BY ORDER OF THE TRIAL JUDGE—Defendant judge, believing that great harm to public morals and decency was to be apprehended from the testimony in the vice trial of Minot F. Jelke,[1] exercised his discretion to exclude the general public including plaintiff newspapers from the court room during the state's case.[2] The family and friends of the accused along with officers of the court, witnesses, and jury were not excluded. The plaintiffs applied for a writ of prohibition to restrain the defendant from enforcing his order. The court denied the application on the grounds that the defendant judge had the power to make the exclusion order and that the Supreme Court, Special Term of New York County, could not substitute its judgment for that of the defendant.[3] On appeal, *held,* affirmed. Newspapers as members of the public lack any standing to raise the question of the denial of a public trial. The question is one which has to be decided on proper appeal from the judgment in the original criminal action. *United Press Assns. v. Valente,* 281 App. Div. 395, 120 N.Y.S. (2d) 174 (1953).

Generally, a statutory cause of action cannot be maintained by a person unless he is a member of the class for whose interest or protection the statute was enacted.[4] The court in the present case was of the opinion that the statute providing for a public trial was intended to benefit only the defendant in a criminal action.[5] This theory has gained in force and popularity ever since it was first definitively stated by Judge Cooley.[6] Support for it can be

[1] Jelke was charged with the crimes of (1) conspiracy to commit acts injurious to the public morals; (2) living on the proceeds of prostitution; and (3) compulsory prostitution of women.

[2] Under New York statutory provisions a defendant in a criminal action has a right to a public trial. 66 N.Y. Consol. Laws (McKinney, 1945) §8. The New York Court of Appeals declared in People v. Miller, 257 N.Y. 54, 177 N.E. 306 (1931), that this statute had to be read in conjunction with another statute which lists eight classes of cases as exceptions to the mandatory requirement of a public trial. 29 N.Y. Consol. Laws (McKinney, 1948) §4. The cases so excepted include, inter alia, sodomy, bastardy, divorce, rape, and seduction.

[3] United Press Assns. v. Valente, 203 Misc. 220, 120 N.Y.S. (2d) 642 (1953).

[4] Annotation, 104 A.L.R. 450 at 462 (1936).

[5] Principal case at 182.

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

found in the growing tendency to allow waiver by the defendant of the public trial guarantee.[7] The courts assume that if they allow the defendant to waive his right to a public trial, then the general public should not be heard to insist that the trial be public. This argument is questionable.[8] Although there are statutes allowing for discretionary exclusion, they have not all met with favor at the hands of the courts.[9] Furthermore, those states which in the absence of a statute recognize the judge's right to exclude a part of the public during the trial, if he deems it in the public interest to so do, have placed severe limitations on his power.[10] Basically the difference existing among the various state interpretations stems from the meaning placed upon the word "public" in the phrase "public trial." "Public" can be defined as the opposite of "*in camera*" and some states have adopted this definition.[11] If this view is followed, the exclusionary power of the trial judge would naturally seem to be broader, since if a few people outside of those necessary for the actual trial were allowed to be present, an appellate court would not be justified in saying that the trial was not public.[12] However, other courts have felt that the word public was intended to mean that the public was free to attend the sessions of the court with certain limitations as to space and conduct.[13] This view leads to the conclusion that the public has a definite interest in seeing that the trial is open to disinterested parties so that greater security is

[7] State v. Keeler, 52 Mont. 205, 156 P. 1080 (1916); State v. Hensley, 75 Ohio St. 255, 79 N.E. 462 (1906); People v. Miller, note 1 supra; State v. Smith, 90 Utah 482, 62 P. (2d) 1110 (1936).

[8] In the principal case at 180 et seq. the court states that having a public trial is no more fundamental than having a jury trial. Because N.Y. Const., art. I, §2, allows waiver of a jury trial, the court states that public trial can be waived, and if the court allows it the public cannot complain. However, this is not completely correct. Some states allow the state as representative of the people to demand a jury trial on the grounds that it has an interest in the preservation of the lives and liberties of its citizens and that it would be highly dangerous to permit a waiver. See People v. Scornavache, 347 Ill. 403, 179 N.E. 909 (1931), 79 A.L.R. 553 at 563 (1932).

[9] People v. Yeager, 113 Mich. 228, 71 N.W. 491 (1897), declared unconstitutional Mich. Local Acts (1893) No. 408, §18, which allowed exclusion from a trial wherein evidence of lascivious, licentious, degrading or peculiarly immoral acts would be given.

[10] The policy of these courts is to leave the door open to the public whenever possible. But there will be taken into account the size of the court room, the convenience of the court, and the right to exclude objectionable characters and youths and to do other things which may facilitate the proper conduct of the trial. People v. Byrnes, 84 Cal. App. (2d) 72, 190 P. (2d) 290 (1948).

[11] Keddington v. State, 19 Ariz. 457, 172 P. 273 (1918). A case is heard in camera when the court doors are closed and only persons concerned in the trial are admitted. 1 BOUVIER, LAW DICTIONARY, 3d rev. ed., 1518 (1914).

[12] This appears to be the view of the New York courts. People v. Hall, 51 App. Div. 57, 64 N.Y.S. 433 (1900).

[13] People v. Hartman, 103 Cal. 242, 37 P. 153 (1894); Davis v. United States, (8th Cir. 1917) 247 F. 394. Professor Wigmore is of the opinion that the public has a right to attend the trial. He bases his opinion on the aid given by a public trial in securing evidence, the scrutiny of judges it provides, and the public trust of the system of law which results from it. "The same advantage is gained, and much relied on, in more modern times, when the publicity given by newspaper reports of trials is often the means of securing useful testimony." 6 WIGMORE, EVIDENCE, 3d ed., §1834 (1940).

given for the proper administration of justice.[14] The courts that follow the former view place great stress on the fact that the family and friends of the defendant and the witnesses are allowed to stay. To say that these individuals are interested in the general administration of justice is rather shortsighted. Any opinion they have on the conduct of the trial is likely to be greatly colored by other circumstances. The press, on the other hand, is much more likely to be objective in its view of the proceeding and to see that the public interest is protected. In this connection the motive of the press in attending the trial should be of no weight. Many courts have placed emphasis on the fact that in excluding a portion of the public from the trial, the trial judge has not extended this order to the representatives of the press.[15] The fear expressed that public morals will be immeasurably injured by a report of particularly vile details of human depravity seems unwarranted.[16] Also, too much space in the opinions is wasted in dealing with the fear that the public would overload the court dockets with suits demanding that trial court doors remain open.[17] The fact remains that the public has a definite interest at stake. The issue of public trial should not be left to be decided on an appeal by the defendant but should be open to attack by the public or its representatives. The press as a part of the public has an interest which too many courts have overlooked, and ought to be allowed to assert it.

M. Fred Mallender, II

[14] Federal decisions mirror this view. Justice Black states in In re Oliver, 333 U.S. 257 at 270, 68 S.Ct. 499 (1948): "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." See also United States v. Kobli, (3d Cir. 1949) 172 F. (2d) 919. This case indicates that the federal courts would not allow the press to be removed.

[15] Benedict v. People, 23 Colo. 126, 46 P. 637 (1896). One New York decision, while following the view that the public trial is for a defendant's benefit and reaffirming that the public generally may not attend the sittings of the courts, states that the public may be kept informed of what transpires in court by the press. Lee v. Brooklyn Union Publishing Co., 209 N.Y. 245, 103 N.E. 155 (1913). But see People v. Hall, note 12 supra, and State v. Callahan, 100 Minn. 63, 110 N.W. 342 (1907).

[16] 52 MICH. L. REV. 128 at 137 (1953).

[17] Principal case at 181 et seq.