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Sheppard v. Maxwell: Free Speech and Press v. Fair Trial

Lloyd Sullenberger

COMMENTS

SHEPPARD v. *MAXWELL:* *FREE SPEECH AND PRESS* v. *FAIR TRIAL*

In an era of highly competitive journalism, increased effort is exerted by newspapers, magazines, radio, and television to capture the attention and patronage of the reader or listener. To achieve this end, sensational, incomplete, biased, and often inaccurate materials pertaining to the commission of crimes, the search for the perpetrator, his arrest, the ensuing pretrial activity, and, finally, the trial itself is sometimes disseminated.

With such overwhelming and increasing opportunity for persons to become acquainted with the many details of the events and personalities involved, the subsequent selection of jurors not already too familiar with what has supposedly occurred becomes difficult and sometimes nearly impossible.

Early in the ninteenth century it was recognized:

> [W]ere it possible to obtain a jury without any prepossessions whatever respecting the guilt or innocence of the accused, it would be extremely desirable to obtain such a jury, but this is perhaps impossible, and therefore will not be required.[1]

With the great technological advances in the communications field since Mr. Chief Justice Marshall made this observation, the problems have multiplied and the chances of selecting a panel from persons without prepossessions are lessened.

Once the jury is selected and sworn, the dangers of extra-judicial influences do not cease. Publicity during and about the trial including television intrusion in the courtroom may preclude a fair hearing and a verdict based solely on evidence admissible in a court of law, properly considered by a jury with opportunity for calm deliberation.

Many of the fundamental problems were brought into sharp focus and rather precise solutions were suggested when the United States Supreme Court ordered the reversal of the denial of a petition for a writ of habeas corpus to Dr. Samuel Sheppard in *Sheppard* v. *Maxwell.*[2]

1. U.S. v. Burr, 25 Fed. Cas. 49, 50-51 (No. 14962g) (C.C.E.D. Va. 1807). (Mr. Chief Justice John Marshall's opinion for the Court).
2. 86 S. Ct. 1507 (1966).

The decision marked the passing of a milestone in the lengthy legal battle of the Ohio physician convicted in 1954 of the slaying of his wife.[3] The Court, in an opinion written by Mr. Justice Clark, recounted in detail the events which occurred from the murder until Dr. Sheppard's conviction about six months later.[4]

During the period from the killing, July 4, until petitioner was arrested, July 30, the Cleveland press ran numerous highly prejudicial news stories and much editorial comment calling for his arrest.

The immediate pretrial and trial period was replete with actions and incidents prejudicial to Sheppard including publication of names and addresses of the veniremen more than three weeks before trial, overwhelming presence of representatives of the news media in the courtroom and courthouse resulting in confusion and deprivation of privacy of the principals in the trial, and continuing and penetrating newspaper and radio commentary during the trial.[5]

The Court concluded that the trial judge's failure to protect Sheppard from inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom constituted a denial of due process of law. With the intention of reducing such prejudicial interference in the future, certain guidelines were set forward.[6]

This case further manifests the Court's recognition that publicity may be of such an inflammatory and a pervasive nature that it is inherently prejudicial to the accused. By accepting this premise, a defendant may obtain a reversal because he has been denied due process as guaranteed by the Fourteenth Amendment without showing specific instances of isolatable prejudice.

While state and federal criminal procedures provide certain safeguards to counterbalance pervasive and prejudicial pretrial and trial publicity,[7]

3. The petitioner was convicted of second degree murder, the conviction being affirmed by the Court of Appeals of Cuyahoga County, 100 Ohio App. 345, 128 N.E. 2d 471 (1955), and the Ohio Supreme Court affirmed, 165 Ohio State 293, 135 N.E. 2d 340 (1956). The United States Supreme Court denied certiorari, 352 U.S. 955 (1956). Subsequently, a petition for a writ of habeas corpus was denied by the Ohio Supreme Court, 170 Ohio State 551, 167 N.E. 2d 94 (1960). In 1964, the United States District Court for the Southern District of Ohio, Eastern Division, granted a writ of habeas corpus, 231 F. Supp. 37 (1964), but the order was reversed, 346 F. 2d 707 (1965), and the United States Supreme Court granted certiorari, 382 U.S. 916 (1965).

4. *Supra* note 2 at 1509-1515.

5. *Id.* at 1512-1513.

6. See notes 43-46, *infra*, and accompanying text.

7. *E.g.*, change of venue, continuance, voir dire examination of jurors with challenges

the accused has normally been required to demonstrate more than potential prejudice in order to invoke the safeguards.

As Mr. Justice Holmes cautioned:

> If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day.[8]

In the Supreme Court, the requirement was articulated in 1942 and has been reiterated with regularity, at least until recently.

> [I]t is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside and that it be sustained not as a matter of speculation, but as a demonstrable reality.[9]

The United States Constitution guarantees the accused the right to have his case decided by an impartial jury in the federal courts.[10] The words "impartial jury" appear in the constitutions of forty states,[11] and can be implied from the guarantee of trial by jury in the others.[12] The selection of such an impartial jury is another matter.

An early expression of the idea that publicity had prevented the selec-

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for cause and limited peremptory challenges, trial instructions by judge to jurors to avoid extra-judicial familiarization with materials related to the case, sequestration of jury, mistrial, and new trial. See Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings*, 110 U. PA. L. REV. 1, 12 (1961).

8. Holt v. U.S., 218 U.S. 249, 251 (1879).

9. Adams v. U.S. *ex rel.* McCann, 317 U.S. 269, 281 (1942); *accord*, Buchalter v. N.Y., 319 U.S. 427, 431 (1943); U.S. *ex rel.* Darcy v. Handy, 351 U.S. 454, 462 (1956).

10. U. S. CONST. amend. VI.

11. ALASKA CONST. art. I, § 13; ARIZ. CONST. art. II, § 24; ARK. CONST. art. II, § 10; COLO. CONST. art. II, § 16; DEL. CONST. art. I, § 7; FLA. CONST. Declar. of Rights, § 11; GA. CONST. art. I, § 15; HAWAII CONST. art. I, § 11; ILL. CONST. art. II, § 9; IND. CONST. art. I, § 13; IOWA CONST. art. I, § 10; KAN. CONST. Bill of Rights, § 10; KY. CONST. § 11; ME. CONST. art. I, § 6; MD. CONST. Declar. of Rights, § 21; MICH. CONST. art. II, § 19; MINN. CONST. art. I, § 6; MISS. CONST. art. III, § 26; MO. CONST. art. I, § 18a; MONT. CONST. art. III, § 16; LA. CONST. art. I, § 9; NEB. CONST. art. I, § 11; N.J. CONST. art. I, § 10; N.M. CONST. art. II, § 14; OHIO CONST art. I, § 10; OKLA. CONST. art. II, § 20; ORE. CONST. art. I, § 11; PA. CONST. art. I, § 9; R.I. CONST. art. I, § 10; S.C. CONST. art. I, § 18; S.D. CONST. art VI, § 7; TEX. CONST. art. I, § 10; TENN. CONST. art. I, § 9; UTAH CONST. art. I, § 12; VT. CONST. art. I, § 10; VA. CONST. art. I, § 8; WASH. CONST. art. I, § 22; WYO. CONST. art. I, § 10.

12. See generally, State v. Van Duyne, 43 N.J. 369, 204 A.2d 841 (1964). See also Note, *Community Hostility and the Right to an Impartial Jury*, 60 COLUM. L. REV. 349 (1960).

tion of an impartial jury came in *Shepherd* v. *Florida*.[13] While a state court murder conviction was reversed per curiam on the grounds of racial discrimination in the selection of the jury, Mr. Justice Jackson, in a concurring opinion, indicated he felt pretrial publicity had done more to prejudice the accused and to deprive him of his rights.[14]

In this case witnesses and jurors admitted either having heard of or read an alleged confession of the Negro defendants charged with raping a white girl. The confession was never produced in court.

The concurring opinion noted the desirability of the trial judge controlling press interference with the judicial process.[15] An indictment of newspapers for out-of-court campaigns to convict seemed to augur subsequent decisions. The constitutional rights of newspapers do not include the right to deprive an accused person of a fair trial. Press activity may cause a conviction to transcend any civilized conception of due process of law, thus warranting reversal.[16]

A short time later the Court showed it was not actively seeking a first opportunity to reverse a conviction because of prejudicial publicity without adequate ground work being laid in the trial court. In *Stroble* v. *California*,[17] after noting that no motion for a change of venue had been made nor had any evidence been offered to show prejudice in fact by any juror, the Court said:

> He asks this Court simply to read those stories and then to declare, over the contrary finding of two state courts, that they necessarily deprived him of due process. That we cannot do at least where, as here, the inflammatory newspaper accounts appeared approximately six weeks before the beginning of petitioner's trial, and *there is no affirmative showing that any community prejudice ever existed or in any way affected the deliberation of the jury*.[18] [Emphasis supplied.]

A significant developmental decision was rendered in 1959 when the Supreme Court exercised its supervisory power over the federal court

13. 341 U.S. 50 (1951).

14. He stated:

> To me, the technical question of discrimination in the jury selection has only theoretical importance. The case presents one of the best examples of one of the worst menaces to American justice. *Id.* at 55.

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

16. Shepherd v. Florida, 341 U.S. 50, 53 (1951) (concurring opinion).

17. 343 U.S. 181 (1952).

18. *Id.* at 195.

system by granting a new trial to a federal defendant because some of the jurors had read of the accused's previous criminal convictions.[19]

The Court, acknowledging the trial judge's large discretion,[20] concluded that each case must turn on its special facts. It recognized that evidence not admissible in court but reaching the jury by extralegal processes may have a great impact.

An important decision holding prejudicial publicity sufficient to infect the geographical area so that an impartial jury was not selected was rendered in 1961.[21] Here, petitioner, who had been unsuccessful in an attempt to obtain direct review by the Supreme Court, sought a writ of habeas corpus.

Six murders in the area of Evansville, Indiana had the population in a frenzy. Shortly after petitioner was arrested, police officials began to release statements, the most damaging of which was that petitioner had confessed. Later at trial only a single change of venue to an adjoining county was granted. During voir dire further motions for change of venue and motions for continuances were made but denied.

The Supreme Court restated the general rule concerning the presumption of impartiality of jurors and the burden on the accused of showing actual prejudice resulting from publicity. After reviewing the publicity surrounding the arrest and subsequent events, the Court determined that the build-up of prejudice was clear and convincing.[22]

A large percentage of the veniremen had to be excused because of their preconceived notions of the guilt of the accused derived from what they had read and heard. Of the twelve jurors finally selected, eight admitted feeling to some degree that the petitioner was guilty before they heard any evidence.

The Court decided that in a capital case, such as the one at bar, taking into account the frailties of human nature, the circumstances prevented the trial court's finding of impartiality from meeting a constitutional standard.[23]

In a concurring opinion, Mr. Justice Frankfurter offered a scathing criticism of irresponsible journalism by questioning:

19. Marshall v. U. S., 360 U.S. 310 (1959) (per curiam).

20. The trial judge had examined the jurors, seven of whom admitted reading the article, but indicated they felt no prejudice toward the defendant. The trial judge denied a motion for a mistrial.

21. Irvin v. Dowd, 366 U.S. 717 (1961).

22. *Id.* at 725.

23. *Id.* at 727, 728.

> How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused. A conviction so secured obviously constitutes a denial of due process of law in its most rudimentary conception.[24]

A major breakthrough for those who argued that publicity may be so inherently prejudicial to an accused that it infects the jury precluding the possibility of a fair hearing came in the first of the three major decisions[25] in this area of the law. The Supreme Court, on direct review, reversed a Louisiana state conviction because a filmed "interview," wherein the accused made admissions of his guilt, was repeatedly shown on a local television station.[26]

Rideau v. *Louisiana* is a case showing the insidious effects of television when it saturates the community with publicity prejudicial to the accused. The twenty minute filmed episode photographed in the jail with Rideau flanked by police officers permitted hundreds of potential jurors in the case to hear and see him admit to a bank robbery, a kidnapping, and a murder.

The Court held that Rideau was denied due process when the trial court refused to grant a change of venue after the television publicity. Without examining a particularized transcript of the voir dire examination of the members of the jury, the Court held that due process in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised "interview." [27]

Even under the extreme circumstances presented by the facts of the case, Mr. Justice Clark dissented, arguing that no substantial nexus between the "interview" and the trial was shown. While characterizing the circumstances of *Irvin* v. *Dowd*,[28] as unusually compelling, the dissent felt the burden of showing essential unfairness had not been met by the petitioner.[29]

Although most of the problems relating to pretrial and trial publicity deal with descriptions of the events and personalities involved, a slightly

24. *Id.* at 729, 730.

25. Sheppard v. Maxwell, *supra* note 2; Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963).

26. Rideau v. Louisiana, *supra* note 25.

27. *Id.* at 727.

28. 366 U.S. 717 (1961).

29. 373 U.S. 725, 733 (dissenting opinion).

different situation was presented in *Estes* v. *Texas*,[30] where the petitioner contended that televising and broadcasting his trial amounted to a denial of due process.

Estes, charged in a celebrated case with swindling, had obtained a change of venue because of the notoriety of the events. At a hearing on a motion to prevent live broadcasting of his trial and for a continuance, live radio and television coverage was permitted. During the actual trial, live broadcasts were limited; but television filming cameras, at least, were always present.[31]

The Supreme Court strongly rejected the contention by the state of Texas that isolatable prejudice traceable to the publicity must be shown in any case. Relying on *Rideau*[32] and *Turner* v. *Louisiana*,[33] the Court found the use of television in this case inherently prejudicial, without a careful scrutiny of all the factual elements.[34] Mr. Justice Clark, writing for the majority, enumerated some of the specific objections to televising the proceedings:

1. The potential impact of television on the jurors.[35]
2. The impairment of the quality of testimony.[36]
3. The additional responsibility placed on the trial judge.[37]
4. The impact on the defendant.[38]

The full precedent value and significance of the decision must await other decisions about television in the courtroom because Mr. Justice Harlan, voting with the majority of five favoring reversal,[39] concurred only to a limited extent.[40]

30. 381 U.S. 532 (1965).

31. See *id.* at 537-538 for a description of the procedure followed.

32. Rideau v. Louisiana, *supra* note 25.

33. 379 U.S. 466 (1965) (deputy sheriffs who were witnesses in the case also served as shepherds for the jury).

34. Compare Irvin v. Dowd, *supra* note 21.

35. Estes v. Texas, *supra* note 25 at 545-547.

36. *Id.* at 547, 548.

37. *Id.* at 548, 549.

38. *Id.* at 549, 550.

39. Clark, Warren, Douglas, Goldberg, and Harlan to the extent set forth in his concurring opinion, see *supra* note 25 at 587-601, for reversal. Sewart, Black, Brennan, and White dissenting.

40. He phrased the question presented:

> (W)hether the Fourteenth Amendment prohibits a State, over the objection of defendant, from employing television in the courtroom to televise contemporaneously or subsequently by means of video tape, the courtroom proceedings of a criminal trial of widespread public interest.

He then concluded:

Sheppard v. *Maxwell*,[41] did not involve any actual telecasting or broadcasting from within the courtroom, but the appellate courts had to contend with diverse materials and events either directly or inferentially prejudicial to the petitioner. Included was the unfavorable radio, television, and newspaper commentary, the trial judge's refusal to grant motions for a change of venue, continuances, a mistrial, and his refusal to interrogate the jurors about their exposure to publicity during the trial, the press occupation of areas of the courtroom normally reserved for the principals, and a general confusion existent during the entire proceeding.

Again acknowledging the basic requirement of a showing of identifiable prejudice by the accused, the Court held that at times the state procedure involves such a probability that prejudice will result that it is deemed inherently lacking in due process.[42]

During the trial, the carnival atmosphere could have been avoided since the courtroom and courthouse are subject to the control of the court.[43] The witnesses should have been insulated from the press.[44] Also, the court should have made some effort to control the release of leads, information and gossip to the press by the police witnesses and counsel for both sides.[45]

When pretrial publicity creates reasonable likelihood that a fair trial will be presented, the judge should grant a continuance or transfer the trial to another locality where the threat is reduced.[46]

While again in *Sheppard* an extreme and deplorable situation was presented to the Court, it seems clear that a long look will be taken at the totality of the situation. If a reasonable conclusion is that a probability of prejudice exists, some severe remedial steps should be taken at the trial level or they will be taken by the reviewing court.

(There) is no constitutional requirement that television be allowed in the courtroom, and, at least, as to notorious criminal trials such as this one, the considerations against allowing television in the courtroom so far outweigh the countervailing factors advanced in its support as to require a holding that what was done in this case infringed the fundamental right to a fair trial assured by the Due Process Clause of the Fourteenth Amendment. Estes v. Texas, *supra* note 25 at 587.

41. 86 S. Ct. 1507 (1966).

42. *Id.* at 1517; *accord*, Estes v. Texas, *supra* note 25 at 542-543.

43. *Id.* at 1520.

44. *Ibid.*

45. *Ibid.*

46. *Supra* note 41 at 1522.

The significance of the case lies in the fact that even though no confession was involved and even though the death penalty had not been imposed and even though no broadcasting was allowable from the courtroom, the Court took another step and let the courts and press know that interference and lack of control could deny due process.

Lloyd Sullenberger