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Constitutional Law - Contempt by Publication - Phoenix Newspapers, Inc. v. Superior Court, 418 P.2d 594 (Ariz. 1966)

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Thus the Supreme Court in its opinion makes it evident that the primary consideration is the encouragement of a free press as guaranteed by the First Amendment, and that the right of privacy, although recognized,[30] is subordinate to the rights of freedom of press and speech.

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Constitutional Law—CONTEMPT BY PUBLICATION. During a pre-trial hearing for a writ of habeas corpus, counsel for Donald Chambers, charged with first degree murder, noticed the presence of William Prime. Prime was employed as a reporter for the petitioner, Phoenix Newspapers, Inc. Fearing prejudicial pre-trial publicity, Chamber's counsel requested the court to enjoin all persons from disclosing what had transpired at the hearing. Although the court so ordered, the petitioner published an account of these proceedings, and the court ordered the petitioner to appear and show cause why it should not be held for contempt.

Phoenix Newspapers initiated an action in the Supreme Court of Arizona[1] to prohibit the Superior Court of Maricopa County, Arizona, from proceeding with the contempt hearing. In granting the prohibition the court based its decision upon the guarantees of a free press and public trial contained in Article 2 of the constitution of Arizona.[2] It ruled that a court cannot directly limit a newspaper's right to inform the public of what had transpired in open court.[3]

Where the Constitutional guarantees of freedom of the press[4] come into conflict with the right of an accused to a fair and speedy trial by an impartial jury,[5] there arises a problem of interpreting the courts'

that the narrow holding of Time, Inc. v. Hill limits the effect of the decision to "reports of matters of public interest," a theme which appears repeatedly in the libel cases cited above. The term "public interest" is construed very broadly by the Court, however, and is not limited to comment upon public affairs or the expression of political ideas, nor is "timeliness and importance" necessary to the enjoyment of the constitutional protection. Time, Inc. v. Hill, *supra*, note 6, at 542.

30. A recent decision has restricted the power of government to interfere with the individual's right of privacy. See Griswold v. Connecticut, *supra*, note 7.

1. Phoenix Newspapers, Inc. v. Superior Court, 418 P.2d 594 (Ariz. 1966).

2. ARIZ. CONST. art. 2 § 6, which provides that "Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." It is further provided in § 11 that "Justice in all cases shall be determined openly, and without unnecessary delay."

3. Phoenix Newspapers, Inc. v. Superior Court, *supra* note 1.

4. U.S. CONST. amend. I.

5. U.S. CONST. amend. VI.

power to summarily punish by constructive contempt[6] an out-of-court publication for obstructing the administration of justice. Until comparatively recent years, determination of what constituted such a contempt was a matter of local law,[7] and the generally accepted test to be applied was that of a "reasonable tendency" to interfere with the adjudication of a pending trial.[8]

In *Bridges v. California*,[9] however, the Supreme Court laid down the "clear and present danger" test[10] as the criterion for state courts[11] to follow in determination of whether an out-of-court publication could be held in contempt. That the requirements of this test are much more stringent than the test of "reasonable tendency" is attested by the Court's reversal of all subsequent constructive contempt by publication convictions.[12] Although generally affirming the courts' contempt power in cases where the publication does present a "clear and present danger" to a pending adjudication, it was held that in borderline cases, freedom of

6. A constructive, or indirect contempt is one which is committed outside of the presence of the court, and directed against the authority or dignity of the court, therefore being criminal in nature. *In re* Bozorth, 38 N.J. Super. 184, 118 A.2d 430 (1955). But if a publication is placed in the immediate presence of the court in such a way that it is likely to interfere with a present proceeding, it may be punished as a direct contempt. *Ex parte* Aldridge, 169 Tex. Crim. 395, 334 S.W.2d 161 (1960).

Generally, publications relating to a matter which has been fully adjudicated cannot be held in contempt. Evers v. State, 241 Miss. 560, 131 So.2d 653 (1961). However, it is not important that the case is before the court in a technical sense, but only that the court is, or will soon be deliberating upon a decision. Pennekamp v. Florida, 328 U.S. 331, 369 (1946) (concurring opinion).

7. Patterson v. Colorado, 205 U.S. 454 (1907).

8. Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918).

9. 314 U.S. 252 (1941).

10. This test was first developed in Schenck v. United States, 249 U.S. 47 (1919), and subsequently extended to other areas where freedom of expression was in issue.

11. The federal courts were limited early in applying this contempt power to cases of "misbehavior of any person or persons in the presence of said courts, or so near thereto as to obstruct the administration of justice." 4 STAT. 487 (1831). The present statute, 18 U.S.C. § 401 (1964), contains substantially the same language. Moreover, the federal courts were prevented from employing the "reasonable tendency" doctrine when it was held that "so near thereto" was to be interpreted in a geographical rather than a causal sense. Nye v. United States, 313 U.S. 33 (1941). "Federal courts are prohibited by law from punishing by contempt outside publications." Goss v. State, 204 F. Supp. 268, 274 (N.D. Ill. 1962) (dictum) *rev'd* on other grounds, 312 F.2d 257 (7th Cir. 1963).

12. Wood v. Georgia, 370 U.S. 375 (1962); Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, *supra* note 6. "In accordance with what we have said on the 'clear and present danger' cases, neither 'inherent tendency' nor 'reasonable tendency' is enough to justify a restriction of free expression." Bridges v. Calif, *supra* note 9, at 273.

the press should prevail.[13] While all of the recent Supreme Court decisions have dealt with non-jury trials, at least one court[14] has held the same tests should be applied to jury trials. This reasoning has been criticized[15] on grounds that a jury needs more protection.

The "clear and present danger" doctrine as applied to out-of-court publications has been met with general acceptance in the state courts.[16] Some courts, although feeling compelled to follow the Supreme Court's lead, have severely criticized the reasoning behind this test,[17] feeling that "trial by newspaper" and intimidation of the judge is thereby sanctioned.[18] It has been urged by one court that the state legislature restore a broad power of contempt for such publications,[19] although, in view of recent decisions, it appears probable that the Supreme Court would overrule such a statute.[20]

13. Pennekamp v. Florida, *supra* note 6, at 347. Generally, a trial is a public event, the proceeding of which can be reported with impunity. Craig v. Harney, *supra* note 12. Neither the intensity of the language employed, nor its inaccuracies, nor the fact that the material reported will be inadmissable in evidence, is sufficient to render a publication liable for contempt unless the requirements of the "clear and present danger" doctrine are met. Craig v. Harney, *supra* note 12; Baltimore Radio Show v. State, 193 Md. 300, 67 A.2d 497 (1949) *cert. denied* 338 U.S. 912 (1950); *cf.*, People v. Post Standard Co., 13 N.Y.2d 185, 195 N.E.2d 48, 245 N.Y.S.2d 377 (1963) ("where no willfulness is alleged"). "The vehemence of the language used is not alone the measure of the power to punish for contempt. The fires which it kindles must constitute an imminent, not merely likely threat to the administration of justice. The danger must not be remote or even probable; it must immediately peril." Craig v. Harney, *supra* note 12, at 376. Even harsh, untruthful, and improperly motivated criticism of the conduct of the judge or other officials connected with a case pending final disposition is similarly unpunishable by contempt, for the proper remedy is a civil action for libel. Turkington v. Municipal Court, 85 Cal. App. 2d 631, 193 P.2d 795 (1948); Pennekamp v. Florida, *supra* note 6, at 348; *accord*, Craig v. Harney, *supra* note 12, at 376. ("Judges are to be men of fortitude, able to thrive in a hardy climate.")

14. Baltimore Radio Show v. State, *supra* note 13. The Supreme Court's refusal to hear this case has left some question as to whether or not the same test should be applied to a jury trial.

15. Gross v. State, *supra* note 11, at 275 (dictum).

16. *E.g.* State v. Morris, 75 N.M. 475, 406 P.2d 349 (1965); Turkington v. Municipal Court, *supra* note 13.

17. Singer v. State, 109 So.2d 7, 15 (Fla. 1959). "I have been and remain wholly intolerant of *any outside* influence sought to be visited upon *any* court during the pendency of *any* case." *In re* Jameson, 139 Colo. 171, 197, 340 P.2d 423, 437 (1959).

18. Atlanta Newspapers, Inc. v. State, 101 Ga. App. 105, 113 S.E.2d 148 (1960).

19. *Ibid.*

20. Opinion of the Justices, 208 N.E.2d 240 (Mass. 1965). Many states, however, have enacted statutes specifically forbidding the use of the contempt power for an out-of-court publication: CAL. CIVIL PROCEDURE CODE § 1209 (1955); REV. LAWS OF HAWAII § 269-3 (1955); KY. REV. STAT. ANN. § 432.240 (1955); PA. STAT. ANN. tit. 17, § 2044 (1962). In some states, only false or grossly inaccurate reports of the proceedings may be held

In the present case, the Arizona court has followed what appears to be the general trend in destroying, or at least narrowly construing, the power of a court to hold a newspaper, or other out-of-court mass media, for contempt by publication. As previously noted[21] the court has grounded its decision entirely upon the guarantees and necessities of a free press. The opinion of the court not only fails to mention the "clear and present danger" test, but also fails to recognize any direct judicial restraint upon publication of materials relating to a pending case.[22] In short, this decision may be characterized as the culmination of the present trend, for it carries further, if not actually completes, the restriction of contempt by publication.

While the case may represent the fatal stroke to contempt by publication, at least in Arizona, the doctrine may never have really been alive, for, as the court points out, "the [Supreme] Court has not found this test to have been met since the time of their decision in *Toledo Newspaper Company v. United States*, in 1918, and that, that case has been subsequently overruled." [23] Clearly, a resurgence of the contempt power seems unlikely, although it may still be available in its present form in most states. For those who would condemn this decision and the present trend as sanctioning "trial by newspaper," let it be noted that the courts have not been left bare to the winds of public opinion. The courts have been provided with alternate and indirect means of protecting a defendant's right to a fair trial.[24]

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in contempt: IDAHO CODE ANN. § 18-1801 (1948); IND. STAT. ANN. § 3-905 (1946 Repl.); N.Y. PENAL CODE § 600 (1944); N.C. GEN. STAT. ANN. § 5-1 (1953 Recompiled); N.D. CENT. CODE ANN. § 27-10-01 (1960); WIS. STAT. ANN. § 256.03 (1957). But it appears doubtful whether such a provision could today be upheld by the Supreme Court. People v. Post Standard Co., *supra* note 13. In addition, some states have enacted statutes similar to 18 U.S.C. § 401, *supra* note 11; *E.g.*, GA. CODE ANN. § 24-105 (1959); TENN. CODE ANN. § 23-902 (1955).

21. *Supra* note 2.

22. In a very capable concurring opinion, Bernstein, Vice C.J., traces the present trend, but he also arrives at the same conclusion as the majority: "I hold to the assertion that full disclosure of the trial proceedings contributes to the efficiency and integrity of the criminal process and believe that the moment we permit other than such full disclosure we are heading toward the complete and unpenetrable secrecy reminiscent of the days of the Star Chamber." Phoenix Newspapers, Inc. v. Superior Court, *supra* note 1 at 601 (concurring opinion).

23. *Id.*, at 599.

24. Mistrials have been the standard remedy, but other preventative measures, such as change of venue and continuance, may be used at the discretion of the court. See Marshall v. United States, 360 U.S. 310 (1959); Sheppard v. Maxwell, 384 U.S. 333, 357-363 (1966).