

1982

KUTV Inc v. Honorable Dean E. Conder and Ronald Dale Easthope : Memorandum of Petitioners

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

KUTV INC., Deseret News Publishing)
Company, KSL AM and TV, a Division of)
Bonneville International Corporation,)
and Society of Professional Journal-)
ists, Sigma Delta Chi, Utah Chapter,)
Petitioners,)

vs.)

HONORABLE DEAN E. CONDER, District)
Judge, and RONALD DALE EASTHOPE,)

Respondents.)

Case No. 18231

MEMORANDUM OF PETITIONERS
KUTV INC. AND DESERET NEWS
PUBLISHING COMPANY

On Complaint and Petition for An Extraordinary
Writ to the Third Judicial District
Court, Salt Lake County, Utah
The Honorable Dean E. Conder, Judge

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MEMORANDUM OF PETITIONERS
KUTV INC. AND DESERET NEWS
PUBLISHING COMPANY

Petitioners KUTV Inc. and Deseret News Publishing Com-
pany respectfully submit this Memorandum in support of peti-
tioners' Complaint and Petition for Extraordinary Writ filed
herein on February 4, 1982.

NATURE OF THE CASE

This is an original proceeding on KUTV Inc.'s and
Deseret News Publishing Company's complaint and petition for an

extraordinary writ directing the Third Judicial District Court for Salt Lake County to vacate an order prohibiting the Utah news media from using the term "Sugarhouse Rapist" and/or referring to respondent Ronald Dale Easthope's past criminal convictions, and for a determination that the District Court's order is beyond its authority and contrary to law.

RELIEF SOUGHT IN THIS COURT

Petitioners seek an order vacating the Third District Court's order prohibiting the Utah news media from using the term "Sugarhouse Rapist" or from referring to respondent Ronald Dale Easthope's past criminal convictions; Petitioners also seek a judgment that the Third District Court's order is or was a violation of Petitioners' constitutional rights.

STATEMENT OF FACTS

On February 3, 1982, the first day of respondent Ronald Dale Easthope's criminal trial for aggravated sexual assault, respondent Honorable Dean E. Conder (hereinafter the "District Court") observed an employee of KUTV Inc. in the courtroom. The District Court requested that the KUTV employee meet in chambers with the Judge, the Prosecutor, the Defendant and counsel for the Defendant. Counsel for KUTV was not present at this meeting. Outside the presence of the jury, but on the record, the District Court issued an order prohibiting the

Utah news media from broadcasting, publishing or otherwise conveying to the public during the pendency of the trial the term "Sugarhouse Rapist" or any information relating to the past criminal convictions of Ronald Dale Easthope.

In 1971, Respondent Ronald Dale Easthope (hereinafter the "Defendant") had been charged by police with ten rapes and was convicted on two counts of rape, one count of sodomy, and one count of aggravated robbery. The term "Sugarhouse Rapist" was used by the news media during the Defendant's previous trial and subsequent convictions because most of the Defendant's victims lived and were assaulted in the Sugarhouse area of Salt Lake City.

Upon being informed of the District Court's order, counsel for KUTV Inc. (hereinafter "KUTV") requested and was granted permission to meet later in the afternoon of February 3, 1982 with the District Court, the Prosecutor, the Defendant and counsel for the Defendant. In chambers and off the record, the District Court explained that its order was motivated by its concern that the Defendant's Sixth Amendment right to a fair trial would be jeopardized if the news media published information concerning the Defendant's past criminal convictions or used the term "Sugarhouse Rapist" in referring to the Defendant. Counsel for KUTV pointed out that the Defendant's criminal convictions and the sobriquet "Sugarhouse

Rapist" were matters of public record,¹ and argued that the District Court's order constituted an impermissible prior restraint. Counsel for KUTV also suggested that the District Court could adequately protect the Defendant's right to a fair trial by imposing other less extreme restrictions, such as sequestering the jury or instructing the jury not to avail itself of the media during the trial. The District Court, after indicating that it had already admonished the jury not to read the newspapers, listen to radio news, or watch the news on television, denied KUTV's request that the order be vacated. KUTV's six o'clock and ten o'clock news programs for February 3, 1982 were rewritten to comply with the District Court's order.

On February 8, 1982 after a trial in which the Defendant testified that he had previously been convicted and that he had been enrolled in a rehabilitation program for sex offenders, the Defendant was found guilty of the crime of aggravated sexual assault.

¹ For example, the Deseret News published reports referring to the Defendant's past criminal convictions and/or using the term "Sugarhouse Rapist" on October 14, 1981; September 24, 1981; September 23, 1981; July 7, 1977; January 23, 1974; August 23, 1973; June 1, 1973; October 21, 1971; July 9, 1971; June 23, 1971; March 4, 1971; and February 27, 1971. Similarly, KUTV broadcast news programs referring to the Defendant as the "Sugarhouse Rapist" on September 24, 1981; June 15, 1979; and July 7, 1977.

ARGUMENT

The District Court's order prohibiting the Utah news media from referring to the Defendant as the "Sugarhouse Rapist" or mentioning the Defendant's prior convictions expired of its own terms upon the conclusion of the Defendant's trial. Although the District Court's order expired prior to its consideration by this Court, Petitioners' case is not moot because it falls into that category of disputes "capable of repetition, yet evading review" which the United States Supreme Court has ruled exempt from the mootness doctrine.

Absent extraordinary circumstances not present in this case, the District Court may not impose prior restraints upon the media's publication of information concerning the defendant in a criminal case which are matters of public record. Such prior restraints violate the media's First and Fourteenth Amendment rights and are contrary to a recognized public policy favoring public criminal trials.

I.

THE ISSUES IN THIS CASE ARE
NOT MOOT EVEN THOUGH THE DISTRICT
COURT'S ORDER HAS EXPIRED

By its terms the District Court's order prohibiting the reporting of Defendant's prior criminal convictions or the use of the term "Sugarhouse Rapist" (hereinafter the "Order")

expired upon the conclusion of the Defendant's trial in the District Court. The Defendant was convicted five days after the District Court issued its Order and four days after the Petitioners filed their Complaint and Petition with this Court. Despite the fact that the Order has expired, this case is not moot.

As recognized by the United States Supreme Court in Nebraska Press Association v. Stuart, "jurisdiction is not necessarily defeated simply because the order attacked has expired, if the underlying dispute between the parties is one 'capable of repetition, yet evading review'." 427 U.S. 539, 546 (1976). See also, Richmond Newspapers, Inc. v. Virginia, 100 S. Ct. 2814 (1980); Gannett Co., Inc. v. DePasquale, 99 S. Ct. 2898 (1979).

In the Nebraska Press case, representatives of the news media challenged a trial court's order restraining the publication or broadcasting of certain confessions and admissions made by the defendant prior to his trial for the murders of six family members. Although the trial court's order had expired long before the case was considered by the Supreme Court, the Court found that the controversy in that case was "capable of repetition" in two ways. First, if the defendant's conviction were reversed and a new trial ordered, the trial court might again impose a restrictive order. Second, if the

lower court's decision upholding the restrictive order were allowed to stand, similar orders might be sought in other criminal cases. "[I]f we decline to address the issues in this case on grounds of mootness," stated the Supreme Court, "the dispute will evade review in this Court since these orders are by nature short-lived." Nebraska Press Association v. Stuart, 427 U.S. at 547; see also, Gannett Co., Inc. v. DePasquale, 99 S.Ct. at 2904. These rationales articulated by the United States Supreme Court apply with equal force to the instant case. Consequently, this Court should conclude that this case is not moot and that it should be decided on its merits.

II.

THE FIRST AND FOURTEENTH
AMENDMENTS TO THE UNITED STATES
CONSTITUTION DICTATE THAT
THE DISTRICT COURT'S ORDER BE
HELD INVALID AS AN IMPERMISSIBLE
PRIOR RESTRAINT

As recently recognized by this Court, "[f]reedom of the press and the right to a fair trial are among our most cherished values. Any tension between these values is therefore difficult to resolve." In re Modification of Canon 3A(7), 628 P.2d 1292, 1293 (Utah 1981). Petitioners submit, however, that in this case any "tension" or conflict between the two constitutional values can be readily alleviated by

remedies considerably less drastic than the judicial censorship of public information prescribed by the District Court. This Court should condemn the District Court's "gag order" as an impermissible prior restraint which negates the Petitioners' rights under the First and Fourteenth Amendments of the United States Constitution.

In Richmond Newspapers, Inc. v. Virginia, a trial court, in an attempt to prevent the jurors in a murder trial from acquiring potentially inaccurate information about the case from the news media, excluded the public and media representatives from the courtroom. The publishers of a local newspaper contested the closure order, and the United States Supreme Court held that "the right to attend criminal trials is implicit in the guarantees of the First Amendment Absent an overriding interest articulated in the findings, the trial of a criminal case must be open to the public." 100 S. Ct. 2814, 2829-30 (1980). Furthermore, the Supreme Court pointed out that unlike a pretrial proceeding, "there exist in the context of the trial itself various tested alternatives to satisfy the constitutional demands of fairness." Id. at 2830. Sequestration of the jurors and exclusion of disruptive witnesses from the courtroom were both recognized by the Supreme Court as acceptable alternatives to closure of the trial. "All of the alternatives admittedly present difficul-

ties for trial courts," stated the Court, "but none of the factors relied on here was beyond the realm of the manageable." Id.

It is significant to note that in the case at bar, as in the Richmond Newspapers case, the trial court's attempt at prior restraint arose in the context of a trial setting, rather than a pretrial proceeding. Once a jury has been impaneled, remedies such as jury sequestration may reasonably be expected to obviate any threat that adverse publicity might pose to a defendant's right to a fair trial.

In the instant case, the District Court's Order did not prevent the Petitioners from attending the Defendant's trial, but rather it suppressed the dissemination of information about the Defendant's prior criminal convictions, despite the fact that portions of the Defendant's own testimony during the trial alluded to his prior convictions for sexual offenses. The United States Supreme Court has emphasized, however, that a trial court's order prohibiting the "reporting of evidence adduced at [an] open preliminary hearing . . . plainly violated settled principles: '[T]here is nothing that proscribes the press from reporting events that transpire in the courtroom'." Nebraska Press Association v. Stuart, 427 U.S. at 568 (quoting Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966)).

Similarly, in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), the Supreme Court considered a case in which the father of a deceased rape victim sought to recover damages for invasion of privacy from a broadcasting company which, in violation of Georgia law, televised the identity of the victim during its coverage of the rapist's trial. After noting that the victim's identity was a matter of public court record, the Court ruled that "[o]nce true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it." Id. at 496.

In Nebraska Press and Cox the United States Supreme Court decreed that a trial court may not restrict the publication of pretrial courtroom evidence or public court records. Consequently, it is difficult to imagine on what grounds the District Court can justify its prohibition against the publication of information gleaned not only from the court's public records but also from files maintained by the news media themselves. This is especially true since both this Court and the Supreme Court of the United States have ruled that adverse publicity alone does not necessarily prevent a defendant in a criminal case from obtaining a fair trial.

It has often been acknowledged that in extreme circumstances, adverse publicity can deprive a defendant in a criminal case of his Sixth Amendment right to a fair trial. See,

e.g., Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Rideau v. Louisiana, 373 U.S. 723 (1963); State v. Pierre, 572 P.2d 1338 (Utah 1977); Sinclair v. Turner, 20 Utah 2d 126, 434 P.2d 305 (1967). As the United States Supreme Court admonished in Murphy v. Florida, however, these cases "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process." 421 U.S. 794, 799 (1975). See also, Nebraska Press Association v. Stuart, 427 U.S. at 565 (even "pervasive and concentrated" pretrial publicity does not automatically lead to unfair trial); State v. Pierre, 572 P.2d at 1349 ("news prominence alone [does not] presumptively deprive one of due process in a trial setting").

It would appear, then, that absent extremely prejudicial circumstances, a defendant in a criminal trial is not entitled to insist that he be tried by jurors who have been unexposed to pervasive, adverse publicity. Consequently, it would be odd indeed if a trial court could, in the absence of such extraordinary circumstances, sharply curtail the freedom of the press for the purpose of sheltering a defendant from a degree of public comment which the United States Supreme Court has found constitutionally unobjectionable.

The United States Supreme Court has stressed that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." Nebraska Press Association v. Stuart, 427 U.S. at 559. The Court in Nebraska Press also stressed that the "authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights Yet is it nonetheless clear that the barriers to prior restraint remain high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it." Id. at 561.

It is noteworthy that in a case strikingly similar to this one, the Arkansas Supreme Court struck down a trial court's order enjoining the news media from referring to the accused as the "Quapaw Quarter rapist" in any story published prior to trial. In ruling that the trial court's order could not pass constitutional scrutiny, the Arkansas supreme court echoed the United States Supreme Court when it stated that "[a]ny prior restraint bears a heavy presumption against its constitutional validity, and the government carries a heavy burden of demonstrating justification for its imposition."

Arkansas Gazette v. Lofton, 598 S.W.2d 745, 746 (Ark. 1980).

Petitioners urge this Court, therefore, to conclude that if considerations of prejudicial pretrial publicity were insufficient to justify restrictions against using the term "Quapaw Quarter rapist" in Arkansas, a Utah trial court which has already impaneled a jury cannot rationally defend its prohibition against the media's use of the term "Sugarhouse Rapist."

Moreover, if the Supreme Court's characterization of the "barriers to prior restraint" is to have any meaning at all, it must describe some obstacle more substantial than that shown by the facts in this case. Although the District Court surely acted in good faith, Petitioners contend that the District Court's imposition of prior restraint was unjustified by the circumstances and is constitutionally deficient. The District Court made no findings that other measures short of prior restraint -- such as sequestration of the jury -- would prove inadequate to protect the Defendant's right to a fair trial. Indeed, the District Court did not even enter a finding that unsequestered jurors who would be exposed to publication of information about the Defendant's past criminal convictions or to references to the "Sugarhouse Rapist" would be improperly prejudiced against the Defendant. Before a trial court may so drastically limit the freedom of the press, it must find, on the basis of adequate evidence, that the defendant's Sixth

Amendment rights can be protected in no other way. No such showing was made here, and as a result, the District Court's Order cannot pass constitutional muster.

CONCLUSION

The District Court's Order, like those considered by the Supreme Court in the Nebraska Press, Gannett and Richmond Newspapers cases, was "by nature short-lived." Because controversies concerning such gag orders are "capable of repetition, yet evading review," this Court should not find Petitioners' case moot, but should decide it on the merits.

There was no showing in this case that media reports of the Defendant's prior criminal record had been or were likely to be in any way inaccurate or unduly inflammatory. Furthermore, a jury had already been impaneled at the time the District Court issued its Order, and the Defendant's right to a fair trial could have been adequately protected by the simple means of insulating the jury from any publicity appearing in the media during the trial. Petitioners ask this Court, therefore, to rule that unfounded speculation about the adverse effects of future news reports offered the District Court an inadequate foothold for surmounting the formidable constitutional barriers to prior restraint. The Order of the District Court should be vacated and a determination made that the Order

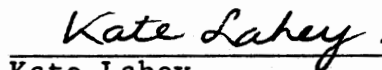
violated Petitioner's rights under the First and Fourteenth
Amendments.

Respectfully submitted this 11th day of February, 1982.

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CERTIFICATE OF DELIVERY

THIS IS TO CERTIFY that a copy of the foregoing MEMORANDUM OF PETITIONERS KUTV INC. AND DESERET NEW PUBLISHING COMPANY was mailed, postage prepaid this 11th day of February, 1982.

Honorable Dean E. Conder
District Judge
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