1982

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

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 Journalists, Sigma Delta Chi, Utah Chapter,	Case No. 18231
Petitioners,	
-vs-	
HONORABLE DEAN E. CONDER, District Judge, and RONALD DALE EASTHOPE,	
Respondents.	

MEMORANDUM OF RESPONDENT HONORABLE DEAN E. CONDER

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NATURE OF THE CASE

This is an original petition for extraordinary writ to vacate an order of the district court entered against the press during a criminal trial.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this court affirming the order of the district court which restricted the press from using the term "Sugarhouse rapist" during the trial of Ronald Dale Easthope.

STATEMENT OF FACTS

In September of 1981, Ronald Dale Easthope was arrested and charged with aggravated sexual assault.

On the day of his trial, February 3, 1982, prior to impaneling the jury, the Honorable Dean E. Conder held a final hearing in camera on certain defense motions (R. at 165-174). At that hearing Judge Conder ordered that the term "Sugarhouse" not be used in the trial by either counsel or witnesses, nor that the defendant's criminal record be alluded to during the trial (R. at 167). Defense counsel mentioned the "considerable amount" of pre-trial publicity (R. at 165), and Judge Conder found that the epithet "Sugarhouse Rapist" was "commonly known" (R. at 167). Judge Conder denied a defense motion to sequester the jury (R. at 165).

At the end of the victim's testimony, Judge Conder held another in camera hearing (R. at 254-258). The defense moved to have the press restricted, for the brief period of the trial only, from using the epithet "Sugarhouse Rapist" (R. at 254-255). The motion was granted (R. at 254). Upon further defense motion the court ordered the press not to refer to "Mr. Easthope's activities prior to the trial that would in any way show his involvement with the law." (R. at 255).

The order was released immediately after a verdict was returned and the jury polled (R. at 650).

The epithet "Sugarhouse Rapist" had been created several years before, and used extensively by the press to describe an unknown assailant believed to be responsible for a series of apparently related rapes in the Sugarhouse area of Salt Lake City. Later, in 1971, Mr. Easthope was arrested and convicted of two of the rapes attributed to this "Sugarhouse Rapist." Around the time of his trial on the two rape charges, the news media referred to Mr. Easthope as the "Sugarhouse Rapist." From arrest, until the first day of Mr. Easthope's current criminal trial for aggravated sexual assault, the news media referred to Mr. Easthope as the "Sugarhouse Rapist." See exhibit A to brief of KSL, and footnote 1 on page 4 of the brief of KUTV, for examples. The press also alluded to the numerous rapes attributed to the "Sugarhouse Rapist" in the past, but which were never proven to have been committed by Mr. Easthope.

During the course of the trial Mr. Easthope testified in his own defense (R. at 557-596). While the jury was informed of Mr. Easthope's two prior rape convictions, the jurors were not informed that Mr. Easthope was the person branded by the news media as the "Sugarhouse Rapist." The jury was also not informed of the unproven innuendos that Mr. Easthope had perpetrated the other rapes attributed to this "Sugarhouse

Rapist." The news media was ready to use the prejudicial brand during the current trial. Petitioner KUTV's memorandum at page 4.

Mr. Easthope was found guilty of aggravated sexual assault and was sentenced to an indeterminate term of five years to life in prison.

I

THE FIRST AMENDMENT FREEDOM OF THE PRESS IS NOT ABSOLUTE:

A. WHERE IT THREATENS A CRIMINAL DEFENDANT'S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL;

B. WHERE IT PRESENTS A CLEAR AND PRESENT DANGER OF INTERFERING WITH THE ADMINISTRATION OF JUSTICE; AND

C. WHERE THE ALLEGEDLY PROTECTED SPEECH CONSISTS OF A MERE INFLAMMATORY EPITHET.

A

Whenever two or more Constitutional rights come in conflict, it is difficult, but necessary, to decide which of the two rights must bow and which shall be dominant. This Court has found thtat it is difficult to resolve the tension which occurs when freedom of the press conflicts with the right to a fair trial. In re Modification of Canon 3A(7), 628 P.2d 1292, 1293 (Utah 1981).

The United States Supreme Court has held that freedom of the press, under some circumstances, dominates over other Constitutional rights. For example, in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (hereafter Cox), cited by petitioner KUTV at page 10 and petitioner KSL at pages 14 and 15, the United States Supreme Court held that a rape victim's right to privacy under the specific facts of that case was not sufficient to allow criminal or civil sanctions to be applied against a reporter who published a victim's name. Cox is inapposite to the case at bar. A decisive factor in the court's conclusion therein was that the expectation of a right to privacy is small when the information in dispute is already public:

> [T]he prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record.

Id. at 494-495.

In the present case, rights to a fair trial, rights to liberty are concerned, not rights to privacy in matters everyone knows anyway. It is enlightening to note that the court did not ever rule that rights to privacy may never, under any circumstance, outweigh freedom of the press.

The leading case, dealing with a confrontation between the First Amendment and a criminal defendant's right

to a fair trial, is Nebraska Press Association v. Stuart, 427 U.S. 539 (1976) (hereafter Nebraska Press). The order appealed from in Nebraska Press prohibited (1) reporting of events occurring at an open preliminary hearing, and (2) all facts "strongly implicative" of the accused. The United States Supreme Court held that the press can report what occurs at a trial and that the second part of the order was too vague and broad to survive scrutiny. But, in Nebraska Press the Court refused to hold freedom of the press superior to a criminal defendant's right to a fair trial:

> [T]he petitioners would have us declare the right of an accused subordinate to their right to publish in all circumstances. But if the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined to do. It is unnecessary, after nearly two centuries, to establish a priority applicable in all circumstances. Yet it is nonetheless clear that the barriers to prior restraint remain high unless we are to abandon what the Court has said. . . .

Id. at 561.

In Nebraska Press, the United States Supreme Court specifically held that where lengthy pretrial periods are concerned, there must be a factual, case by case analysis of the propriety of using orders against the press to insure a

defendant's right to a fair trial. The Court then presented a standard by which courts could decide the merits in proposed, lengthy, pretrial orders against the press:

> We turn now to the record in this case to determine whether, as Learned Hand put it, "the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." [Citations omitted.] To do so, we must examine the evidence before the trial judge when the order was entered to determine (a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger. The precise terms of the restraining order are also important.

Id. at 562.

The clear holding in Nebraska Press that the freedom of the press is not absolute, and that a case by case analysis is appropriate if a person's liberty is at stake has never been overruled or modified. Thus only an analysis of the specific facts will determine, in this case, which constitutional right is paramount. See Point II below for that analysis.

B

In Marshal v. United States, 360 U.S. 310 (1959) (hereafter Marshal) the United States Supreme Court found that news reports of suppressed evidence which were heard by jurors were prejudicial. As in the present case, the news accounts in Marshal included the defendant's prior record and allegations of other, unrelated wrongdoing. The Court held:

> We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence [citation omitted]. It may indeed be greater, for it is then not tempered by protective procedures.

Id. at 312-13.

In Pennekamp v. Florida, 328 U.S. 331 (1946) (hereafter Pennekamp), Justice Frankfurter in a concurring opinion stated: "The right to undermine proceedings in court is not a special prerogative of the press." Id. at 364. In Pennekamp, the United States Supreme Court considered a contempt citation issued against the press. The court held that such citations are correct and proper if the speech used by the press presented a "clear and present danger" to the administration of justice. Id. at 334.

To allow court ordered restrictions, the press commentary must concern pending litigation. The purpose of the "clear and present danger rule" as it applies to the administration of justice was explained in Bridges v. California, 314 U.S. 252 (1941):

> The very word "trial" connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections to be won through the use of the meeting-hall, the radio, and the newspaper."

Id. at 271.

In the instant case, Judge Conder found that use of the brand "Sugarhouse Rapist" would be "highly prejudicial" during the brief trial period (R. at 254). He so feared the prejudicial impact thereof that he ordered counsel and witnesses not to use even the word "Sugarhouse" alone (R. at 167).

The fears and prejudice engendered by use of "Sugarhouse Rapist" do not stem from the charge at trial but from earlier, unrelated events. Use of the "Sugarhouse Rapist" injects new improper material into the present case which does not concern the present case at all. If a juror heard that Mr. Easthope was alleged to be this infamous "Sugarhouse rapist" of the past, that alone could inflame and prejudice the juror.

Before Mr. Easthope was first charged with any of the rapes attributed to the "Sugarhouse Rapist," the epithet's use was part of a very emotional situation. An atmosphere of extreme fear existed in the sugarhouse area.

During his recent trial, a clear and present danger existed that the news media's resurrection of the epithet, and its use in connection with Mr. Easthope would arouse and inflame hatred, and would prevent the court from administering justice to Mr. Easthope, who was charged with a separate, very serious crime. Judge Conder did not order the press never again to use the appellation. The court order only imposed six days of restriction during which Mr. Easthope could receive justice. After the verdict was announced the press could sensationalize again all they wanted.

Because the use of "Sugarhouse Rapist" would have presented a clear, palpable danger of prejudicing the jury, Judge Conder was correct in ordering the press not to use the epithet until after verdict was reached.

C

In addition to the need to analyse facts and circumstances where two constitutional rights conflict, many forms of speech and expression have no constitutional protection. Examples are words creating a clear and present danger of thwarting the administration of justice, libel and slander, obscenity, fighting words, speech harming the national security, etc.

The United States Supreme Court has often tried to distinguish real, protectable expression, that is, the exposition of ideas and thoughts, from words or expressions which do not rise to the level of communication of information.

For example, in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) the U.S. Supreme Court faced the question whether "fighting words" were protected speech. The court held they were not:

> It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Id. at 572.

This rule, concerning "fighting words", was best stated in Cantwell v. Connecticut, 310 U.S. 296, 309-310 (1940) where the court declared:

> Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution... .

Id. at 309-310 (Emphasis added)

An epithet is defined in Webster's New Collegiate Dictionary as "a characterizing word or phrase accompanying or occurring in place of the name of a person or thing; or a disparaging or abusive word or phrase." (Emphasis added). The appellation "Sugarhouse Rapist" falls clearly within the definition of an epithet. "Sugarhouse Rapist" does not convey information about Mr. Easthope. It brands Mr. Easthope by innuendo as that person responsible for numerous rapes he was never convicted of. The stigma attached to the epithet, if it reached the jury, would be highly inflammatory and prejudicial.

The order of Judge Conder strove to prevent something far worse than a breach of the peace through "fighting words". Judge Conder's order was tailored to avoid the mere use of an epithet that could violate Mr. Easthope's Constitutional right to a fair trial and result in the loss of his freedom for from five years to the rest of his life. The news media was free to attend and report all the proceedings and convey all "information" during Mr. Easthope's trial for aggravated sexual assault. The challenged order's only purpose was to keep sensationalistic journalism from branding Mr. Easthope with an epithet which could deny to Mr. Easthope a fair, objective trial.

II

THE ORDER OF THE COURT IN QUESTION WAS REASONABLE, NOT VIOLATIVE OF THE FIRST AMENDMENT, AND MANDATED BY THE NEED FOR A FAIR TRIAL.

Balancing the precise terms of the district court's order between the First and Sixth Amendments results in affirmance of the lower court's decision.

The terms of the order were minimally restrictive. The press could attend the trial. The press was not barred from being present. The press could report on any facts or information developed at the trial. They were only ordered not to brand the defendant as the "sugarhouse rapist", a term which the court found was "highly prejudicial". (R. at 254)

The duration of the order was minimal. The order went into effect on the first day of trial and was released as soon as the jury verdict was rendered and the jury polled. (R. at 650) The court had not restricted the press in any manner in its pre-trial publicity. In fact, the press had used the term "sugarhouse rapist" in referring to Mr. Easthope often before trial. (R. at 165; pet. KUTV Memo at 4 n. 1; Pet. KSL Memo. Exh. A)

The court had every indication that the press would brand Mr. Easthope as the "sugarhouse rapist" during the trial. The press had done so during pre-trial stages of the case. The pre-trial publicity had been described as "considerable". (R. at 165)

Petitioners had refused to follow their own voluntary principles and guidelines concerning pre-trial publicity, which guidelines state that prior record and prior charges should not be publicized pre-trial. See below at 15-16.

The epithet "sugarhouse rapist" is not a part of the exposition of ideas, nor information entitled to constitutional protection. The term is a characterization, a slur, a brand, an epithet. It is a fictitious nomenclature for an unknown person who may or may not have committed all of the rapes attributed to him. It is a term for sensationalizing news accounts and increasing publicity.

The epithet "sugarhouse rapist" was highly inflammatory. The judge found the term "highly prejudicial," and indeed it was. The further order of the court not to publicize the prior contacts with the law was only an afterthought to ensure that not only the letter but also that the spirit of the first order would not be violated.

A real and substantial liberty interest was at stake. Mr. Easthope was an ex-convict who would almost assuredly go to prison for at least five years and perhaps for life, if convicted.

In balancing all of the factors, we have on one hand an order of brief duration, which did not limit attendance or reporting of the trial, which did not limit pre-trial publicity, which limited only the branding or characterizing of the defendant about matters

of a highly inflammatory nature which preceded the subject matter of this trial by several years and which related to unproven charges the press desired to attribute to Mr. Easthope. On the other hand, we have only the press' desire for sensationalism, for prejudicial publicity, for slurring.

In May, 1980, a special committee was empanelled by the Utah State Bar which promulgated Standards and Guidelines for news reporting of criminal and other proceedings. The Guidelines were "published and distributed" as "Principles and Guidelines for news reporting" by six organizations including KUTV News, KSL TV News, Deseret News and the Utah State Bar. Committee members included Michael Beardsley, an agent of Petitioner KUTV Inc.; Ernest Ford, an agent of petitioner KSL; and William Smart, an agent of Petitioner Deseret News. Admittedly the Standards and Guidelines are "voluntary", and "do not necessarily reflect in all respects what the members of the .... news media believe would be permitted or required by law". Id. at 1. Therefore, respondent cannot argue that petitioners are estopped from asserting some right to publicize the material in question. However, the Guidelines do state:

> These Guidelines are intended to reflect standards that are a reasonable means of accommodating, on a voluntary basis, the correlative constitutional rights of free speech and free press with the right of an accused to a fair trial.

Id. at 1.

Under "prior convictions" the guidelines read:

> Prior criminal charges and convictions are, in some areas, matter of public record and in some instances may be available to the news media through police agencies or from court records. Such information is inadmissible on the question of guilt and pretrial publication may jeopardize a defendant's right to a fair trial and therefore, should be avoided.

Id. at 4.

Although the guidelines are not legally binding, being voluntary, they are factually significant in that they show to the court that petitioners and the press recognize that even pre-trial publicity can affect the outcome of judicial proceedings, let alone publicity during the trial itself. They also reflect to a judge, that if the news media voluntarily feels it should avoid the less dangerous pre-trial publicizing of prior charges and convictions, then the publicizing thereof should be avoided even more during the so critical trial period. The fact that the press had refused to follow its own guidelines concerning Mr. Easthope indicates to a judge that they will likely not refrain from use of "Sugarhouse Rapist" during trial.

Pre-trial press publicity is less likely to prejudice than trial publicity. Jury voir dire can weed out people who have been exposed to too much pre-trial publicity, or who have been influenced thereby. However, a juror who hears prejudicial material during trial cannot be weeded out. Thus, a weighing and balancing of constitutional rights concerning trial publicity should not require as strict a scrutiny as a consideration concerning pre-trial publicity.

But even if we use the pre-trial publicity test in Nebraska Press, supra, the order of Judge Conder was appropriate.

We have already analyzed "the precise terms of the restraining order" and the "nature and extent of pre-trial news coverage". There remains the question of how effectively the order would prevent the threatened danger. The only likely way the jurors could be infected with petitioners' desired, inflammatory characterization, would be through the media itself. The order would undoubtedly be effective, and indeed was effective in stopping the threat of prejudice.

The last prong in the Nebraska Press pre-trial publicity test is to weigh all less restrictive measures.

One could argue that ordering the jurors not to read or listen to news accounts concerning the trial would be sufficient. The judge did make such orders, but felt they were insufficient; otherwise, he would not have entered his order to the press.

The current state of the art of news reporting is such that people cannot be assured that news will only be presented at certain known times of the day. Almost daily, newsbreaks on radio and television suddenly occur, with extremely brief news updates of local and national significance. Jurors could not be assured of avoiding news accounts of the trial even if they quickly turned off a television set when a newsbreak appeared, or refrained from watching all of the regularly scheduled news. The headlining is too quick and succinct.

In addition, if the general public were aware of the press' brand of Mr. Easthope during the trial, jurors might well be informed of the characterization of Mr. Easthope in casual conversation. A juror could easily be asked about his /her jury duty, or volunteer that the juror is participating in a rape trial, at which time a party to the conversation might question whether it was the trial of the "sugarhouse rapist," which that person knows, from the news media, is occurring.

Although not in the record, a recent capital homicide case is illustrative of the very distinct possibility of the above inadvertent discovery of inflammatory press insinuation and innuendo. In the trial of Ervil Lebaron, a conscientious juror, under the same type of order as in the present case not to read or listen to news accounts of the trial, was accidentally tainted with knowledge of prior, unproven innuendos perpetrated by the press A young grandson or other young relative of the juror, knowing that the juror was involved in the LeBaron trial, after hearing a news report, ran in to tell the juror that LeBaron had killed severa other people in the past. As a result thereof, Judge Banks could no proceed with the penalty phase of the trial and sentenced LeBaron to life imprisonment.

A change of venue would have been useless. Petitioners KUTV, KSL, and Deseret News have a state-wide circulation. Without leaving the state of Utah, it would be impossible to escape the effects of their use of the epithet "sugarhouse rapist".

Merely to continue the trial would also have been an exercise in futility. Whenever the trial did occur, it would still be newsworthy, and the press would be ready to act. The interest of the press in their journalistic creation "sugarhouse rapist" had lasted ten years, clearly showing that no reasonable continuance would avoid prejudicial publicity.

A final alternative would have been to sequester the jury. It is true that many courts have favored sequestration. Sheppard v. Maxwell, 384 U.S. 333 (1966). In more recent cases, the alternative of sequestration has been shown to suffer numerous flaws. In Sacramento Bee v. U.S. District Court, 656 F.2d 477 (9th Cir. 1981), the court found that preparing to sequester the jury involved mechanical complications that would hamper the trial and:

> would mean in effect, putting the jury in prison, in effect putting them in a posture in which there will be deep resentment against the court, and perhaps the defendant in this matter, having results which will be unpredictable, but clearly serious.

Id. at 480.

Beyond the influence on the jury and the mechanical complications, sequestration is a heavy burden to be imposed financially upon the county. State v. Allen, 373 A.2d 377, 381 (N.J. 1977). Court administrators have found that a twelve person jury costs the state at least $1,500 to $1,800 per diem to sequester. Commonwealth v. Hayes, 414 A.2d 318,348 (PA.1980).

The expense and prejudice caused by sequestration are heavy. These must not be balanced against the news media's right to publish the facts of the trial, which was never in question. The press would have the state and Mr. Easthope shoulder these burdens so the news media may use an epithet, "made for publicity", that would be adverse to the defendants' right to a fair trial (R.at 255).

One could argue that the court could have allowed the news media a completely free hand in its characterizations and slurs, and if the jury did become prejudiced, a new trial could be granted. This alternative is unreasonable for two reasons.

First, a tainted juror could be timid and not reveal the taint.

Second, the alternative of a re-trial is not really a very viable alternative. The United States Supreme Court has said:

> The costs of failure to afford a fair trial are high. In the most extreme cases, like Sheppard and Estes, the risk of injustice was avoided when the convictions were reversed. But a reversal means that justice has been delayed for both the defendant and the State; in some cases, because of lapse of time re-trial is impossible or further prosecution is gravely handicapped. Moreover, in borderline cases in which the conviction is not reversed, there is some possibility of an injustice unredressed.

Nebraska Press at 555.

In balancing First and Sixth Amendment rights under the present circumstances, the order of Judge Conder was reasonable, fair and appropriate. Even if the Nebraska Press test for pre-trial publicity is used, the result is the same.

CONCLUSION

The freedom of the press is not absolute. Where it comes in conflict with other constitutional rights, courts must balance and weigh the interests of each such right. In balancing, the interest of the press in characterizing and branding the criminal defendant in the trial below is far outweighed by the brief, narrow order of the court issued to protect the right to a fair trial. The use of the term "sugarhouse rapist" was a mere epithet, and was not a part of the "exposition of ideas" protected by the First Amendment. The use of the term presented

a clear and present danger of interfering with the administration of justice.

Respectfully submitted this 11th day of June, 1982.

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CERTIFICATE OF MAILING

This is to certify that two true and correct copies of the foregoing Memorandum of Respondent Honorable Dean E. Conder were mailed to the following by placing same in the United States Mail, postage prepaid, this 11th day of June, 1982:

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