10-1978

Smith v. Daily Mail Publishing Co.

Lewis F. Powell Jr.

W. Va S/Ct invalidated, as a prior restraint, statute making it a crime to publish name of juvenile charged with criminal offense.

Here apparently the name of juvenile was obtained by Reps through their investigation. There had been no public hearing or any other disclosure.

Landmark may control on prior restraint.

PRELIMINARY MEMORANDUM

November 10, 1978 Conference
List 1, Sheet 4

No. 78-482

SMITH

v.

STATE EX REL. DAILY MAIL PUBLISHING CO., et al.

Cert to W. Va. Sup. Ct. (Neely)

State/Civil Timely

1. SUMMARY: This case poses the question whether West Virginia Code § 49-7-3, which forbids the publication in a newspaper of the name of any child involved in juvenile court proceedings, */ creates an imper-

*/ W.Va. Code § 49-7-3 provides in pertinent part: "[N]or shall the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without a written order of the court . . .

I would think Landmark Communications covers this case, but you may wish to join 3.

Paul

missible prior restraint on the freedom of the press.

2. FACTS: Petrs are circuit court judges and the prosecuting attorney of Kanawha County, West Virginia; resps are two newspapers and several of their employees.

In February 1978 both newspapers printed stories naming a juvenile charged in the fatal shooting of a student at a local junior high school. The county prosecuting attorney sought and obtained indictments against resps for violating § 49-7-3. Resps brought an original action in the West Virginia Supreme Court of Appeals seeking to prohibit petrs from prosecuting them under the statute. Resps argue that the statute constituted a prior restraint in violation of the West Virginia Constitution. The West Virginia court, however, decided to tap the well-developed body of federal case law in this area and tested the statute against First Amendment standards of the Federal Constitution. Noting that prior restraints bear a "heavy presumption" against their constitutional validity Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971), the court rejected the state's argument that a child's interest in anonymity with regard to his youthful transgressions and the state's interest in assuring him a future free of prejudice were sufficiently compelling to uphold the statute. The court found little distinction between this case and Oklahoma Publishing Co. v. District Court. 45 L.W. 3599 (1977 which held unconstitutional a state court's injunction against publicati in the news media of the name and photograph of an 11 year old boy charg in a juvenile proceeding with delinquency by second degree murder. The

Virginia court also found support in Landmark Communications, Inc. v. Virginia, 46 L.W. 4389 (1978), which invalidated a statute that subjected newspapers to criminal sanctions for divulging information regarding proceedings before state judicial review commissions. Finally, the court found Cox Broadcasting Corp. v. Cohen, 420 U.S. 469 (1975), instructive. In that case this Court held a Georgia tort action for invasion of privacy grounded upon a newspaper's publication of the name of a rape victim unconstitutional in spite of the legitimate state interest in protecting innocent victims from embarrassment. From these cases, the West Virginia Supreme Court concluded that § 49-7-3 constitutes a prior restraint on freedom of the press in violation of the First Amendment. Accordingly, writs of prohibition issued.

3. CONTENTIONS: Petrs first urge that this Court adopt a balancing test employed by the District Court for the Virgin Islands in Virgin Islands v. Brodhurst, 285 F.Supp. 831 (DC, Virgin Islands, 1968), which held that the advantages accomplished by a statute shielding the names of juvenile offenders justified the limitation placed upon the press. Petrs argue that "in balancing the interests between the freedom of the press and the juvenile's interest in anonymity, . . . clearly the juvenil interest and the state's interest in protecting the youth outweigh the public's right to know." Petn at 13. Petrs characterize Oklahoma Publishing Co. as holding merely that since the relevant Oklahoma statute provided for closed juvenile detention hearings, the press could not be enjoined from publishing the name of the juvenile revealed during a

"public" proceeding. Landmark Communications, Inc., according to petrs, "was not decided on the issue of whether the statute created an impermissible prior restraint." Finally, petrs argue that § 49-7-3 does not impose an absolute prohibition on publication of the child's name, but rather places the determination whether the name should be published with the "proper person -- the judge.

For some reason, resps Daily Gazette and Marsh (one of its reporters) go to great length to show that the West Virginia statute is not within the obscenity, libel, and defamation exceptions to the freedom of press guarantee of the West Virginia constitution. Resps Gazette and Marsh also argue that West Virginia cannot constitutionally authorize state judges the discretion to grant or deny a newspaper permission to publish a juvenile defendant's name. "If a newspaper had to retain an attorney to petition a court to schedule a hearing to obtain an order approving publication of a juvenile's name every time a juvenile is arrested and charge with the commission of a felony in a public place -- certainly a matter which the public in a given locality has a right and need to know -- the value of the public's timely receiving this information would be lost -- assuming the judge saw fit to grant the order." These resps finally argue that the state interests supporting § 49-7-3 do not justify the prior restraint on First Amendment freedoms..

Resp Daily Mail Publishing Co. largely reasserts the reasoning of the West Virginia Supreme Court.

4. DISCUSSION: In Oklahoma Publishing Co. this Court held "that

the First and Fourteenth Amendments will not permit a state court to prohibit the publication of widely disseminated information obtained at court proceedings which were in fact open to the public." 45 U.S.L.W. at 3599. The court stressed the public nature of the proceedings: "[M]embers of the press were in fact present at the hearing with the full knowledge of the presiding judge, the prosecutor, and the defense counsel. No objection was made to the presence of the press in the courtroom or to the photographing of the juvenile as he left the courthouse." Id. Thus, the thrust of Oklahoma Publishing Co. would appear to be that the state interest in prohibiting publication of already public information is insufficient to justify the prior restraint on the press. Here, the newspapers acquired the juveniles name through independent investigation, and there is no indication that the juveniles name was, or was likely to become, publicly known.

In Landmark Communications, Inc., the Court invalidated a Virginia statute making it a crime to divulge information regarding proceedings before a state judicial review commission that is authorized to hear complaints about judges' disability or misconduct. Stressing that a major purpose of the First Amendment is to protect the free discussion of governmental affairs, including discussion of the operations of courts and of judicial conduct, the court concluded that "the publication Virginia seeks to punish under its statute lies near the core of the First Amendment, and the Commonwealth's interests advanced by the imposition of criminal sanctions are insufficient to justify the actual

and potential encroachments on freedom of speech and of the press which follow therefrom." 46 U.S.L.W. at 4392. Here, although the names of persons accused of crime are of legitimate interest to the public, it is not clear that publication of such names "lies near the core of the First Amendment."

This Court's decisions in the First Amendment area suggest, but do not seem to compel, the conclusion reached by the West Virginia Supreme Court. The state maintains that nondisclosure of the names of juvenile defendants is central to its juvenile justice system. The interests advanced by the state in support of the statute are hardly insubstantial, and this case, which to me is a closer one than the cases cited by the West Virginia Supreme Court, seems deserving of serious consideration.

There are two responses.

10/31/78 Cooper W.Va. op in petn.
CMS

Argued ....., 19... *Assigned* ....., 19... No. 78-482

Submitted ....., 19... *Announced* ....., 19...

SMITH

vs.

DAILY MAIL PUBLISH

Potter Stewart
Please circulate
+ we

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.			✓										
Brennan, J.		✓											
Stewart, J.			✓										
White, J.		✓											
Marshall, J.		✓		✓									
Blackmun, J.		✓											
Powell, J.			✓										
Rehnquist, J.			✓										
Stevens, J.			✓										
.....													

LFP/lab 2/26/79

To: Clerk Date: February 26, 1979

From: L.F.P., Jr.

No. 78-482 Smith v. State

The Supreme Court of West Virginia invalidated a state statute that proscribed the publishing of the name of a juvenile in connection with any juvenile proceedings. The court relied in major part on Oklahoma Publishing Co. and Nebraska Press, holding the statute to be an invalid prior restraint.

The Attorney General of West Virginia, on behalf of petitioners, has filed a weak and second-rate brief, arguing that the state interest in protecting juveniles from publicity and furthering their rehabilitation if found guilty of crime, is sufficiently substantial to justify the statute, and the imposition of a criminal penalty for its violation.

This case arose when the Charleston Gazette, a daily newspaper published in Charleston and owned by respondent Daily Mail Publishing Co., deliberately violated the statute for the purpose of setting up a test case. It ran a story about a 14-year-old student charged with murder,

giving his name, and in the same issue ran an editorial explaining - in rather juvenile terms (see petr's brief, p. 3 and 4) why the newspaper was being so brave.

I will give the editor credit for conceding that:

> "Perhaps the decision [to publish the story, and revealed the name of the juvenile] was shaded by the urge to report a story, <u>any story</u>, as fully as possible." (Underscoring supplied.)

After running the story and the editorial, the newspaper sought a writ of prohibition against the state's attorney, and others, to prevent prosecution under the statute.

The statute seems clearly invalid under our decisions with respect to prior restraint. Unless I am "wide of the target" in this view, no bench memo is necessary.

L.F.P., Jr.

The Chief has noted you are out at this time

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: MAY 18 1979

1st DRAFT Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 78-482

Robert K. Smith, Etc., et al., Petitioners, v. Daily Mail Publishing Co., Etc., et al. | On Writ of Certiorari to the Supreme Court of Appeals of West Virginia.

Out minor case due to my surgery

[May —, 1979]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider whether a West Virginia statute violates the First and Fourteenth Amendments of the United States Constitution by making it a crime for a newspaper to publish, without the written approval of the juvenile court, the name of any youth charged as a juvenile offender.

(1)

The challenged West Virginia statute provides:

> "[N]or shall the name of any child, in connection with any proceedings under this chapter be published in any newspaper without a written order of the court. . . ." W. Va. Code § 49-7-3.

and

> "A person who violates . . . a provision of this chapter for which punishment has not been specifically provided, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten nor more than one hundred dollars, or confined in jail not less than five days nor more than six months, or both such fine and imprisonment." *Id.*, at 49-7-20.

On February 9, 1978, a 15-year-old student was shot and killed at Hayes Junior High School in St. Albans, W. Va., a small community located about 13 miles outside of Charleston, W. Va. The alleged assailant, a 14-year-old classmate, was identified by seven different eye witnesses and was arrested by police soon after the incident.

The Charleston Daily Mail and the Charleston Daily Gazette, respondents here, heard about the shooting by monitoring routinely the police band radio frequency; they immediately dispatched reporters and photographers to the Junior High School. The reporters for both papers learned the name of the alleged assailant simply by asking various witnesses, the police and an assistant prosecuting attorney who were at the school.

The staffs of both newspapers prepared articles for publication about the incident. The Daily Mail's first article appeared in its February 9 afternoon edition. The article did not mention the alleged attacker's name. The editorial decision to omit the name was made because of the statutory prohibition against publication, without prior court approval.

The Daily Gazette made a contrary editorial decision and published the juvenile's name and picture in an article about the shooting; it appeared in the February 10 morning edition of that paper. In addition, the name of the alleged juvenile attacker was broadcast over at least three different radio stations on February 9 and 10. Since the information had become public knowledge, the Daily Mail decided to include the juvenile's name in an article in its afternoon paper on February 10.

On March 1, an indictment against the respondents was returned by a grand jury. The indictment alleged that each knowingly published the name of a youth involved in a juvenile proceeding in violation of W. Va. Code § 49–7–3. Respondents then filed an original jurisdiction petition with the West Virginia Supreme Court of Appeals, seeking a writ

of prohibition against the prosecuting attorney and the circuit court judges of Kanawha County, petitioners here. Respondents alleged that the indictment was based on a statute that violated the First and Fourteenth Amendments of the United States Constitution and several provisions of the State's constitution and requested an order prohibiting the county officials from taking any action on the indictment.

The West Virginia Supreme Court issued the writ of prohibition. Relying on holdings of this Court, it held that the statute abridged the freedom of the press. The court reasoned that the statute operated as a prior restraint on speech and that the State's interest in protecting the identity of the juvenile offender did not overcome the heavy presumption against the constitutionality of such prior restraints.

We granted certiorari. — U. S. — (1978).

(2)

Respondents urge this Court to hold that because § 49–7–3 requires court approval prior to publication of the juvenile's name it operates as a "prior restraint" on speech.[1] See *Nebraska Press Association* v. *Stuart*, 427 U. S. 539 (1976); *New York Times Co.* v. *United States*, 403 U. S. 713 (1971); *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415 (1971); *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931). As such, respondents argue, the statute bears "a 'heavy presumption' against its constitutional validity." *Organization for a Better Austin, supra*, at 419. They claim that the State's interest in the anonymity of a juvenile offender is not sufficient to overcome that presumption.

Petitioners do not dispute that the statute amounts to a prior restraint on speech. Rather, they take the view that even if

[1] Respondents do not argue that the statute is a prior restraint because it imposes a criminal sanction for certain types of publication. At page 11 of their brief they state, "The statute in question is, to be sure, not a prior restraint because it subjects newspapers to criminal punishments for what they print" after the event.

it is a prior restraint the statute is constitutional because of the significance of the State's interest in protecting the identity of juveniles.

(3)

The resolution of this case does not turn on whether the statutory grant of authority to the juvenile judge to permit publication of the juvenile's name is, in and of itself, a prior restraint. First Amendment protection reaches beyond prior restraints, *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829 (1978); *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975), and respondents acknowledge that the statutory provision for court approval of disclosure actually may have a less offensive effect on freedom of the press than a total ban on the publication of the child's name.

Whether we view the statute as a prior restraint or as a penal sanction for publishing lawfully obtained, truthful information is not disposition; each action calls for the highest form of state interest to sustain its validity. The focus in a prior restraint case differs because the types of state interests that warrant such restraints have been very narrowly restricted to justifications such as national security or protection of the Sixth Amendment rights of a criminal defendant. See *Near* v. *Minnesota ex rel. Olson*, *supra*, at 716; *Nebraska Press Association* v. *Stuart*, *supra*, at 561. See also *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546 (1975). However, even though the interests that may support a state's effort to punish publication have not been so narrowly limited as to subject, the state must nevertheless show that its punitive action was necessary to further the interests asserted. *Landmark Communications, Inc.*, *supra*, at 843.

Our recent decisions demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards. In *Landmark Communications, Inc.* v. *Virginia*, we declared unconstitutional a Virginia statute making it a crime to publish information regarding confidential

proceedings before a state judicial review commission that heard complaints as to state court judges' disabilities and misconduct. In declaring that statute unconstitutional, we concluded:

> "[T]he publication Virginia seeks to punish under its statute lies near the core of the First Amendment, and the Commonwealth's interests advanced by the imposition of criminal sanctions are insufficient to justify the actual and potential encroachments on freedom of speech and of the press which follow therefrom." *Id.*, at 838.

In *Cox Broadcasting Corp.* v. *Cohn*, *supra*, we held that damages could not be recovered against a newspaper for publishing the name of a rape victim. The suit had been based on a state statute that made it a crime to publish the name of the victim; the purpose of the statute was to protect the privacy right of the individual and the family. The name of the victim had become known to the public through official court records dealing with the trial of the rapist. In declaring the statute unconstitutional, the Court, speaking through MR. JUSTICE WHITE, reasoned:

> "By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served . . . the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection." *Id.*, at 495.

One case that involved a true prior restraint is relevant to our inquiry. In *Oklahoma Publishing Co.* v. *District Court*, 430 U. S. 308 (1976), we struck down a state court injunction prohibiting the news media from publishing the name or photograph of an 11-year-old boy who was being tried before a juvenile court. The juvenile judge had permitted reporters and other members of the public to attend a hearing in the

case, notwithstanding a state statute closing such trials to the public. The court then attempted to halt publication of the information obtained from that hearing. We held that once the truthful information was "publicly revealed" or "in the public domain" the court could not constitutionally restrain its dissemination.

None of these opinions directly controls this case; however, all suggest strongly that if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally halt or punish publication of the information, absent a need to further a state interest of the highest order. These cases involved situations where the government itself provided or made possible press access to the information. That factor is not controlling. Here respondents relied upon routine newspaper reporting techniques to ascertain the identity of the alleged assailant. A free press cannot be made to rely upon the willingness of government to provide information on matters of public significance which the public has a right to know. See *Houchins* v. *KQED, Inc.*, 438 U. S. 1, 11 (1978) (plurality opinion); *Branzburg* v. *Hayes*, 408 U. S. 665, 681 (1972). If the information is lawfully obtained, as it was here, the state may not publish its publication except when necessary to further an interest more substantial than is present here.

(4)

The sole interest advanced by the State to justify its criminal statute is to protect the anonymity of the juvenile offender. It is asserted that confidentiality will further his rehabilitation because publication of the name may encourage further antisocial conduct and also may cause the juvenile to lose future employment or suffer other consequences for this single offense. In *Davis* v. *Alaska*, 415 U. S. 308 (1974), similar arguments were advanced by the State to justify not permitting a criminal defendant to impeach a prosecution wit-

ness on the basis of his juvenile record. We said there that "[w]e do not and need not challenge the State's interest as a matter of policy in the administration of criminal justice to seek to preserve the anonymity of a juvenile offender." *Id.*, at 319. However, we concluded that the State's policy must be subordinated to the defendant's Sixth Amendment right of confrontation. *Ibid.* The values embodied in the First Amendment are generally equal in importance to those rights guaranteed by the Sixth Amendment. See *Nebraska Press Association* v. *Stuart*, 427 U. S. 539, 561. The reasoning of *Davis* that the constitutional right must prevail over the state's interest in protecting juveniles applies with equal force here.

The magnitude of the State's interest in this statute is not sufficient to overcome the presumptive invalidity of a restraint or to justify application of a criminal penalty to respondents. Moreover, the statute's approach does not satisfy constitutional requirements. The statute does not restrict the electronic media or any form of publication, except "newspapers," from printing the names of youths charged in a juvenile proceeding. In this very case, three radio stations announced the alleged assailant's name before the Daily Mail decided to publish it. Thus, even assuming the statute served a state interest of the highest order, the means of accomplishing that purpose are insufficient.

In addition, there is no evidence to demonstrate that the imposition of criminal penalties is necessary to protect the confidentiality of juvenile proceedings. As Respondents Brief points out at page 29 n. **, all 50 states have statutes that provide in some way for confidentiality, but only five, including West Virginia,[2] impose criminal penalties on nonparties for publication of the identity of the juvenile. Although every state has asserted a similar interest, all but a handful

[2] Colo. Rev. Stat. § 19-1-107 (6); Ga. Code § 24A-3503 (g) (1); N. H. Rev. Stat. Ann. § 169:27-28; S. C. Code § 14-21-30.

have found other ways of accomplishing the objective. See *Landmark Communications, Inc.* v. *Virginia, supra,* at 843.[3]

(5)

Our holding in this case is narrow. There is no issue before us of unlawful press access to confidential judical proceedings, see *Cox Broadcasting, supra,* at 496 n. 26; there is no issue here of privacy or pretrial prejudice. At issue is simply the power of a state to punish the truthful publication of an alleged juvenile delinquent's name lawfully obtained by the newpaper.[4] The asserted state interest cannot justify the statute's imposition of criminal sanctions on this type of publication. Accordingly, the judgment of the West Virginia Supreme Court of Appeals is

Affirmed.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

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[3] The approach advocated by the National Council of Juvenile Court Judges is based on cooperation between juvenile court personnel and newspaper editors. It is suggested that if the courts make clear their purpose and methods then the press will exercise discretion and generally decline to publish the juvenile's name without some prior consultation with the juvenile court judge. See Riederer, Secrecy or Privacy; Communication Problems in the Juvenile Court Field, 17 J. Mo. Bar 66, 69–70 (1961); Conway, Publicizing the Juvenile Court: A Public Responsibility, 16 Juv. Ct. Judges J. 21–22 (1965).

[4] In light of our disposition of the First and Fourteenth Amendment issue, we need not reach respondents' claim that the statute, by being applicable only to newspapers but not other forms of journalistic expression, violates equal protection.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 22, 1979

No. 78-482 - Smith v. Daily Mail Pub'l. Company

Dear Chief,

Please join me.

Sincerely yours,

B. R. W.

The Chief Justice

Copies to the Conference

cmc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 22, 1979

Re: 78-482 - Smith v. Daily Mail Publishing Co.

Dear Chief:

Please join me.

Respectfully,

JPS

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

June 13, 1979

RE: No. 78-482 Smith v. Daily Mail Publishing Co.

Dear Chief:

Please join me in your circulation of June 13.

Sincerely,

Bill

The Chief Justice

cc: The Conference

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
5/12/79								
1st draft 5/18/79	join cj 6/13/79	join cj 6/12/79	join cj 5/23/79	join cj 6/20/79	join cj 5/25/79	out done by cj	1st draft can in judgment 6/7/79	
2nd draft 6/6/79							2nd draft 6/13/79	
3rd draft 6/13/79							3rd draft 6/21/79	
4th draft 6/20/79								
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