Washington and Lee Law Review

Volume 20 | Issue 1 Article 22

Spring 3-1-1963

Protection of Criminal Defendant from Prejudicial Publicity

PROTECTION OF CRIMINAL DEFENDANT FROM PREJUDICIAL PUBLICITY

The rights of a defendant in a criminal case may be adversely affected by the release to the public of prejudicial information concerning him. In many instances, this information has been conveyed to potential jurors by press, radio or television publicity prior to the trial. A serious problem arises when a public prosecutor is responsible for the release of such information to public news media.

In the recent Fourth Circuit case, *United States v. Milanovich*[1] the defendant was charged with larceny. Prior to the trial, the prosecutor volunteered information to a local radio station concerning the criminal record of the accused. At least three times during the week preceding the trial, the radio station broadcast the statement that the defendant "was a woman with a long record of arrests on charges of prostitution and liquor sales."[2] On appeal from a conviction the defendant claimed that the releasing of prejudicial information to public news media concerning her criminal record constituted misconduct warranting a reversal even though she conceded that no actual prejudice existed among the jurors finally selected.[3] The conviction was affirmed.

The government made no attempt to defend the conduct of its prosecutor. Indeed, it conceded that such conduct violates the duties and responsibilities of the office; however, no American authority can be found holding a prosecutor accountable for such misconduct. An important question relates to the sanctions that can be used

---

[1]303 F.2d 626 (4th Cir. 1962).

[2]Id. at 629.

[3]The defendant relied upon Henslee v. United States, 246 F.2d 190 (5th Cir. 1957), which held that where a prosecutor was responsible for the release of prejudicial information concerning the defendant to public news media during the trial, the defendant is entitled to a new trial as a matter of course without showing that the jury was exposed to such information and thereby actually prejudiced. The case is distinguishable, however, in that some doubt existed as to whether the jury was actually prejudiced. The judge upon learning of the publicity, asked the jurors if anyone had read or heard any matter in the news connected with the trial. There was no affirmative answer. On these facts the conviction for misappropriation of public funds was reversed.

In Milanovich, upon learning of the publicity, which occurred prior to the trial, the court undertook a thorough voir dire examination of prospective juors. Anyone who had heard the broadcasts was excused. Furthermore, the court offered to continue the case or grant a change in venue but the defendant chose to proceed to trial.

against a prosecutor who refuses to recognize his duty to protect the rights of those against whom he proceeds.[4] Since the prosecutor is an advocate he is not expected to be impartial.[5] However, he is the representative of the public, and is charged with the duty of protecting the innocent as well as prosecuting the guilty.[6] As the representative of the public, the prosecutor's statements carry great weight with the people. This was recognized in 1940 by the Committee on Professional Ethics and Grievances of the American Bar Association.[7] While acknowledging the duty of the Attorney General of the United States to report to the people on the affairs of his office, the Committee noted that any statement of fact he made would ordinarily be accepted as true by the public. Consequently, the Committee said any assertion of fact likely to create an adverse attitude in the public mind regarding prospective or pending litigation should be omitted. It follows that where similar statements are released by local court officers concerning actions pending within the locality, the acceptance by the public is, though less in degree, similar in kind and effect.

The committee did not discuss the sanctions available for use against the prosecutor who releases information injurious to the rights of those brought to trial in the local courts. In the English case of *Daw v. Ely*,[8] an attorney was held in contempt of court for arguing the merits of his client's pending case in the newspapers. As far as can be determined, no attorney in the United States has been held in contempt upon these grounds.

Subsection 1 of the federal contempt statute[9] limits the scope of summary contempt proceedings, triable without a jury, to cases of misbehavior in the presence of the court or "so near thereto as to ob-

---

[4]Mr. Justice Frankfurter in concurring with the majority in Irvin v. Dowd, 366 U.S. 717, 730 (1961), commented upon the frequency of such occurrences: "Not a term passes without this court being importuned to review convictions, had in states throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts—too often, as in this case, with the prosecutor's collaboration."

[5]DiCarlo v. United States, 6 F.2d 364, 368 (2d Cir. 1925).

[6]Burger v. United States, 295 U.S. 78, 88 (1935). "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win the case, but that justice shall be done."

Canon 5, Canons of Professional Ethics, says: "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done."

[7]Opinion 199, Jan. 1940, 26 A.B.A.J. 233 (1940).

[8]L.R. 7 Eq. 49 (1868).

[9]18 U.S.C. § 401(1) (1947).

struct the administration of justice."[10] The United States Supreme Court in *Nye v. United States,*[11] reversing its earlier position,[12] construed the words "so near as requiring that the contemptuous act must occur in physical proximity to the court.[13]

The act also provides in subsection 2 that the court's summary power to punish for contempt extends to cases of misbehavior of any of its officers in their official transactions. This power is not limited to occurrences in or near the physical presence of the court. The early cases construed "officer of the court" to include the misconduct of an attorney.[14] However, the United States Supreme Court in *Cammer v. United States,*[15] in reversing an attorney's conviction for contempt, held that an attorney was not an officer of the court within the meaning of the section.[16] In reaching this conclusion, the Court indicated that to bring an attorney within the summary contempt provision might, at times, result in narrowing the protection a client expects from his counsel.[17] Although not called upon to determine the issue in *Cammer,* the Court indicated that it would be hard to draw any line of distinction between official and unofficial transactions. The Court accepted as plausible the contention that, if any attorney were considered an "officer of the court" in his private practice, then he would be "engaged in official transactions whenever engaged in the practice of his profession."[18]

Thus, a distinction can be drawn between an attorney in private practice and a public prosecutor since the prosecutor's duties are couched in terms of protecting the public interest.[19] The courts have

---

[10]Ibid.

[11]313 U.S. 33 (1941).

[12]In the relatively early case of Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918), this section was construed by the United States Supreme Court to mean that "so near" as therein used, does not require that the contemptuous conduct occur in geographical proximity to the court proceedings, but that it is sufficient if the act has a direct tendency to obstruct the administration of justice.

[13]313 U.S. at 52.

[14]Ex parte Davis, 122 Fed. 139 (C.C.D. Fla. 1901).

[15]350 U.S. 399 (1956).

[16]Id. at 405.

[17]Id. at 406-07. Further, the petitioner offered convincing arguments that his conduct did not constitute "misbehavior" but was a "good faith attempt to discharge his duties as counsel for a defendant in a criminal case." 350 U.S. at 404.

[18]Id. at 404.

[19]The court did state, however, that in the Nye case (see note 11 supra), it had reviewed the legislative history of the Contempt Act of March 2, 1831, 4 Stat. 487 (1831), the forerunner of the present federal contempt statute, and had found that the purpose of the act was to limit the summary contempt power of federal courts. Thus, a narrow construction has been given to the present act.

consistently recognized this distinction by noting the "quasi-judicial" quality of the prosecutor's office.[20] Following this line of reasoning, the Supreme Court of Indiana held that a prosecutor was an officer of the court, and that it was the duty of the court to insure his proper conduct.[21] Similarly, the Court of Appeals of Maryland in *Baltimore Radio Show, Inc. v. State*[22] asserted that the courts still have the traditional power to discipline officials who are a part of the administration of justice. Thus, under the federal contempt statute and similar state statutes,[23] a prosecutor releasing prejudicial information to the public could be held to answer for his misconduct. The fact remains that such powers have not been exercised.

In 1892, William S. Forrest, a member of the Chicago Bar, said that the only workable solution to this and other comparable problems was the exercise of self control by the legal profession.[24] Accepting this idea, the American Bar Association, in 1908, adopted the Canons of Professional Ethics, of which Canon 20 on "Newspaper Discussion of Pending Litigation" provides that newpspaper publication by a lawyer as to pending or anticipated litigation is to be condemned.[25] For the most part, Canon 20 has been ignored, being considered too general to accomplish its desired result. In a survey, conducted under the auspices of the American Bar Association,[26] judges, lawyers and

---

[20]State ex rel. Griffith v. Smith, 363 Mo. 1235 258 S.W.2d 590 (1953); State ex rel. Poter v. District Court First Judicial Dist., 124 Mont. 249, 220 P.2d 1035 (1950); People v. Riley, 191 Misc. 888, 83 N.Y.S. 2d 281 (1948).

[21]Lake County Property Owner's Ass'n v. Holovacka, 233 Ind. 509, 120 N.E.2d 263 (1954).

[22]193 Md. 300, 67 A.2d 477 (1949).

[23]Md. Ann. Code art. 26 § 4 (1957); N.J. Stat. Ann. § 2A:10-1 (1952); Pa. Stat. Ann. tit. 17 § 2041 (1952).

Rule 904 of the Rules of the Supreme Bench of Baltimore City expressly recognizes the power of the courts to punish a state's attorney for issuance of any statement relative to the issues of a pending criminal action. See Baltimore Radio Show, Inc. v. State, note 22 supra.

[24]Foster, Trial By Newspaper, 14 Crim. Law. Mag. 550 (1892).

[25]Canon 20, Canons of Professional Ethics says: "Newspaper publication by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An ex parte reference to the facts should not go beyond quotation from the records or papers on file in the court; but even in extreme cases it is better to avoid any ex parte statement."

[26]Phillips & McCoy, Conduct of Judges and Lawyers 161-87 (1952). For several years prior to publishing this book, the council of the Survey of the Legal Profession under the American Bar Asociation made extensive inquiries throughout the United States concerning matters affecting the administration of justice. Many of the results of these inquiries were included in the above titled chapter.

newspaper editors were asked to comment upon the desirability of enforcing Canon 20. While they pointed out many difficulties involved in its enforcement, those replying were almost unanimously in favor of upholding the Canon.[27] Therefore, it is submitted that Canon 20 should be revised in order to state more definitely the principle on which the Canon is based.

The major problem that arises in adhering to the Canon is occasioned when a pending prosecution is of the nature likely to create great public interest. The attorneys are met by demands from the press to make statements concerning the case. The press asserts that it is merely meeting the demands of the public. The problem is further complicated by the acceptance of the premise that the guarantee of a public trial under the sixth amendment of the Constitution of the United States, besides the inherent protection afforded the defendant, also vests certain qualified rights in the public so that the people may keep abreast of the conduct of the public's business.[28] The Supreme Court of Massachusetts in *Cowley v. Pulsifer*[29] said "[I]t is of the highest moment that those who administer justice should always act under the sense of public responsibility . . . ."[30]

The United States Supreme Court has thus far refused to adjudicate the delicate issues involved in resolving the conflict between the rights of the press to supply the public with sensational publicity concerning the details of actions pending in the courts and the rights of the defendant to a fair trial by an impartial jury.[31] Thus, in the instance where there has been publicity surrounding a criminal trial the defendant must rely on the standard established by the United States Supreme Court in the leading case of *Irvin v. Dowd*[32] to determine the impartiality of a juror. The court said there that the mere existence of a preconceived notion as to the innocence or guilt of an accused was insufficient to rebut the presumption of a prospective jurior's impartiality.[33] The defendant must show that the publicity has been so extensive and prejudicial that the court cannot reasonably accept the statements of jurors who assert that their pre-

[27]Id. at 161.
[28]See Comment, 13 Wash. & Lee L. Rev. 199 (1956).
[29]137 Mass. 392 (1884).
[30]Id. at 394.
[31]Maryland v. Baltimore Radio Show, 338 U.S. 912, 919-20 (1950).
[32]366 U.S. 717 (1961).
[33]Id. at 722-23.

judices can be cast off.[34] Acting under this standard, the determination of whether or not a fair trial has been held rests in the sound discretion of the trial court.[35]

Under this system, it can seldom be ascertained with certainty that the constitutional rights of the accused have been upheld. The Supreme Court of California in *People v. Stroble*[36] recognized this when it said that: "the bias of jurors who have been exposed to repeated sensational publicity concerning a case is likely to be unconscious; they may honestly disclaim bias and yet have unknowingly prejudged in the case."[37] In this case, as in *Milanovich,* the prosecutor was the instigator in releasing publicity concerning the defendant. It has been shown that by this misconduct the prosecutor may expose the defendant to undetected bias, prejudicing the jury against him. This misconduct should not go unrestrained.[38]

Where a prosecutor is guilty of extreme or repeated misconduct of this nature, disbarment proceedings are available. But they should not be undertaken if any less severe punishment will accomplish the desired end.[39] It is submitted that contempt proceedings are available and that they should be instituted in cases where a prosecutor refuses to accept the duties and responsibilities attending his public office.

J. R. CANTERBURY

---

[34]"[The] findings of impartiality should be set aside only where prejudice is 'manifest'." 366 U.S. at 724. See also, Reynolds v. United States, 98 U.S. 145, 156 (1878).

[35]Janko v. United States, 281 F.2d 156 (8th Cir. 1960), Thistle v. People, 119 Colo. 1, 199 P.2d 642 (1949); People v. Mangano, 354 Ill. 329, 188 N.E. 475 (1933); Commonwealth v. Valverdi, 218 Pa. 7, 66 Atl. 877 (1907).

"The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial . . .Generalizations beyond that statement are not profitable, because each case must turn on its special facts." Marshall v. United States, 360 U.S. 310, 312 (1959).

[36]36 Cal. 2d 615, 226 P.2d 330 (1951).

[37]Id. at 334.

[38]The results obtained from the survey of the legal profession discussed, supra note 26, with but two exceptions, showed affirmative answers to the question: "Would it be in the public interest for courts to punish lawyers who violate Canon 20 for contempt of court when, in the opinion of the judge, such violation constitutes a clear and present danger that the litigant in a civil or criminal action may be deprived of a fair trial by due process of law?" McCoy & Phillips, Conduct of Judges and Lawyers, 173 (1952).

[39]"The [disbarment] proceeding is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministration of persons unfit to practice in them." Ex parte Wall, 107 U.S. 265, 288 (1882).