10-1974

MTM, Inc. v. Baxley

Lewis F. Powell Jr.

Hold for

DISCUSS

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

February 26, 1974

MEMORANDUM TO THE CONFERENCE:

Re: No. 73-1119, MTM, INC. V. BAXLEY

No. 73-1119, MTM v. Baxley raises some questions in common with those in Speight which we are disposing of on the basis of a recent Georgia Supreme Court decision.

This case--Baxley--will be on our March 15th Conference List. I suggest that the three cases being held for Speight also be considered on March 15th.

wo
William O. Douglas

The Conference

Jack - The Ala. statute could well be construed ~~as to~~, as not applying to obscenity cases - as 3 J/Ct suggests. On its face it seems directed to prostitution & other sex acts. I have not re-examined Spaght v Slaton & the various opns., but my recollection is that they emphasized that there was no way the Ga statute (directly at obscenity) could be sustained. If I am correct, why shouldn't Younger apply?

PRELIMINARY MEMO

Note

Owens

March 15, 1974 Conf.
List 1, Sheet 1

No. 73-119

appeal from USDC, N.D.-Ala., S.D.
(Rives, McFadden, Pointer)

MTM, INC. & MOBILE BOOKMART, INC.

Federal - civil

v.

BAXLEY, Attorney General Untimely*/

1. Several theatres and bookstores were closed pursuant to an Alabama nuisance statute aimed at premises "in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists." Appellants

*/The appeal has been docketed 8 days late. The defect is nonjurisdictional.

sought injunctive and declaratory relief in federal court under 42 U.S.C. §1983; 28 U.S.C. §§1343(3) & 2201. The USDC dismissed the action. Appellants contend that the USDC should have intervened under principles enunciated in Younger v. Harris, 401 U.S. 37 (1971).

2. FACTS: Appellant MTM operated the Pussycat Adult Theatre in Birmingham, Alabama. The nuisance consisted of repetitive acts which cummulated to a nuisance. These acts were numerous convictions for violation of the obscenity laws of the City of Birmingham for showing obscene movies and selling obscene matter. A hearing was held on May 24, 1973, in state court and a t.r.o. issued closing the theatre. Apparently appellant initiated the present suit in federal court on May 3, 1973, upon learning of the nuisance proceeding. It appears that the appellant Mobile Bookmart runs a bookstore vending allegedly obscene matter adjacent to the theatre, but the briefs are not clear on this. The order granting the t.r.o. also enjoined appellants from removing any and all personal property from the premises.

The Alabama statutory scheme is almost identical to the Georgia scheme in Speight v. Slaton, No. 72-1557, decided Feb. 27, 1974. Section 1103 of the Alabama statute provides in part: "[E]vidence of the general reputation of the place or any admission or finding of guilty of any person under the original laws against prostitution, lewdness, or assignation, at any such place shall be admissible for the purpose of proving the existence of said nuisance and shall be prima facie evidence of such nuisance and of knowledge of, and acquiescence and participation therein, on the part of the

person or persons charged with maintaining such nuisance as herein defined." The statute permits the t.r.o. to run until a final decision is made. If the existence of a nuisance is established in the trial of the action, the court may enter a perpetual injunction from further maintaining the nuisance.

3. 3 JUDGE DISTRICT CT OPINION: The court ruled that it did not have to reach the question whether Younger principles applied to state civil proceedings since "the state proceedings here in question complement, or serve as a substitute for, the criminal laws of the state." The court concluded that there was no showing of bad faith or harassment, and that there was "an insufficient showing that plaintiffs will suffer irreparable injury if consigned to their state court remedies." The court noted that the Alabama statues might be "flagrantly and patently violative of express constitutional prohibitions," but stated that the Alabama Supreme Court might construe the statute as inapplicable to motion picture theatres and book stores, obviating any federal constitutional question. The court distinguished Speight, contending that the Georgia statute "is specifically directed at obscenity" and "calls for the destruction of the materials." Moreover, in Speight the government admitted that some of the materials were not obscene whereas here the government contends that each and every film and book is legally obscene. Finally, in Speight, there was no way to construe the statute to avoid constitutional infirmity, and it appeared there that the Georgia Supreme Court may have already approved of the use of state nuisance statutes to enforce obscenity laws.

4. CONTENTIONS: The appellants have filed a rambling 42 page brief. They state that the question presented is virtually identical with that presented in Speight v. Slaton.*/ Appellants' arguments are the same too. They dispute the validity of the civil enforcement of state criminal laws. They also contend that the statutory scheme constitutes a prior restraint on speech. Near v. Minnesota, 283 U.S. 697 (1931).

The Birmingham Assistant City Attorney moves to Dismiss the Appeal on grounds that it was filed out of time. The defect is nonjurisdictional. He also moves to Affirm. He contends that this was an action taken in aid of the enforcement of state criminal laws and, in the absence of any of the special circumstances delineated in Younger, should not be subject to federal interference. He also argues that suit cannot be brought against prosecuting officials without alleging that such parties acted outside their official capacities. Kenosha v. Bruno, 93 S. Ct. 2222 (1973).

5. DISCUSSION: The issues here are, as far as I can see, identical to those presented in Speight, despite the USDC's attempt to distinguish the two cases.

2/27/74 Knicely Op USDC in separate appx.

*/The attorneys for appellants were also counsel for appellants in Speight.

March 6, 1974 Conf.

No. 73-1119
MTM, Inc. etc. v. Baxley (State AG)

If I understand the vote at conference on Speight, Younger does not apply because the Court views this as a civil proceeding, not a criminal proceeding, and because the Court has concluded that Younger is not controlling in civil cases.

No

With regard to whether this case is not distinguishable from Speight, I think the answer is no. Underlying the Speight result was the assumption that an entire bookstore may not be put out of business absent a prior judicial determination that everything in it is obscene. There is no such determination here. That the statute may apply to certain activities not covered by the Ga. stat. in Speight is irrelevant. What counts is how the statute was used here--apparently unconstitutionally beyond peradventure.

(Bookmart/State of Ala)

No. 73-1119 MTM v. BAXLEY

Argued 12/10/74

(3 J/Ct)

A nuisance statute similar in principle to Ohio statute in Huffman. It could be construed, like Ohio's & Ga's, to apply only to materials (movies, books, etc) previously found to be obscene — but Ala S/Ct has not yet construed it. {3 J/Ct said statute could be construed as not applying to obscenity}

See cert. note for what statute applied

State Ct issued temp. injunction vs. maintenance of "nuisance". The appellants neither appealed nor moved for dissolution of injunction. Instead, they sought relief from a 3 J/Ct. That court held that the nuisance statute was quasi-criminal & held that Younger prohibited federal interference. 3 J/Ct declined to decide whether Younger doctrine applies to civil cases.

I would apply Younger to civil cases. Its rationale is basically equitable — plus comity & federalism. Appellants have had adequate remedy at law. Normally, the state is not a party to a civil action that is sought to be enjoined in Fed Cts — but I see no difference in principle. Here the state has a clear regulatory interest — a further reason for applying Younger. 3 J/Ct called statute quasi-criminal.

No allegations of harassment or bad faith.

Merits: If we reach merits, statute — absent a narrow construction — is an invalid prior restraint.

Smith (for appellant)

Ala. proceeded under Red light abatement statutes - which is different from Ohio law

Also S/Ct has not interpreted the statute as to whether it applies to a theatre or a book store.

Argues that no appeal may be taken from temp. injunction - but admits a procedure exists for abatement of the injunction.

J Stewart noted that Gonzales (her UCC case from Ill) casts grave doubts as to whether this case is properly here — as S/Ct did not reach const. of statute

Jenkins (City atty of Birmingham)

Quasi-criminal matter.

Lawyers representing purveyors of obscenity litigate each film - usually on separate cases - & by-pass the state courts, frustrating state law. "County & federalism" especially relevant in these circumstances.

Conference 3-15-74

Court USDC, N.D. Ala.

Argued ....., 19...

Submitted ....., 19...

Voted on ....., 19...

Assigned ....., 19...

Announced ....., 19...

No. 73-1119

MTM, INC., ET AL., Appellants

vs.

WILLIAM J. BAXLEY, ETC., ET AL.

1/16/74 - Appeal filed.

Potter thinks Ala. laws may be different from ours — but perhaps we should hear it

Note

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

No. _____,

73-1119 MTM v. BAXLEY Conf. 12/13/74

The Chief Justice Vacate

No construction of statute by Ala S/Ct.

But C/J accept Stewarts suggestion to apply Gonzales

Has to be a written opinion explaining why.

Douglas, J. Reverse

On merits of Younger issue.

Brennan, J. Vacate

Follow Gonzales

Stewart, J. Vacate

Gonzales applies

This would leave case appealable to CA 5 - not to us.

Normally we should not decide case on issue not briefed & argued. But parties can help us on this type of jurisdictional issue.

We should make very clear that single DC should decide certain issues w/o requesting convening of 3 D/Ct.

Agree we must write all of this out.

White, J. Vacate

Vacate

Marshall, J. Vacate (tentative)

Vacate

Blackmun, J. Vacate

Powell, J. Vacate

Grayson

Rehnquist, J.

January 16, 1975

No. 73-1119 MTM, Inc. v. Baxley

Dear Bill:

Please join me in your Per Curiam.

Sincerely,

Mr. Justice Rehnquist

CC: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 16, 1975

Re: No. 73-1119, MTM, Inc. v. Baxley

Dear Bill,

I agree with your proposed per curiam in this case.

Sincerely yours,

P.S.

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 20, 1975

Re: No. 73-1119 - MTM, Inc. v. Baxley

Dear Bill:

Please join me in your per curiam.

Sincerely,

Harry

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 21, 1975

RE: No. 73-1119 MTM, Inc. v. William J. Baxley

Dear Bill:

I agree with the Per Curiam you have prepared in the above.

Sincerely,

Bill

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

February 12, 1975

Re: 73-1119 - MTM v. Baxley

Dear Bill:

I join your proposed per curiam disposition dated January 15, 1975.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

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

CHAMBERS OF
E THURGOOD MARSHALL

February 27, 1975

Re: No. 73-1119 -- MTM, Inc. et al. v. William J. Baxley

Dear Bill:

I agree with your suggested Per Curiam.

Sincerely,

T.M.

Mr. Justice Rehnquist

cc: The Conference

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
								12/23/74
	dissent 1st draft 3/20/75	Join WHR 1-21-75		Concurring opinion 1st draft 1/24/75	Join WHR 2-27-75	Join WHR 1-20-75	Join WHR 1-16-75	PC 1st draft 1-14-75 2nd draft 1-15-75
				2nd draft 3/22/75				
					73-1119 MTM v. Baxley			