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10-1974

## MTM, Inc. v. Baxley

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Supreme Court of the United States Mashington, D. G. 20543

CHAMBERS OF JUSTICE WILLIAM O. DOUGLAS

February 26, 1974

Hold for

DISCUSS

MEMORANDUM TO THE CONFERENCE:

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

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

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

liam O. Douglas

The Conference

Jack - The ala. statule could well be construed and an not apply we to obscenity coser - or 3 &/ct suggests. On the face it seems directed to prostitution & other sex acts. I have not reepanement Speight Slayton & the vanor ops., but my recallection is that they employinged that there was no way the ga statule ( directly at obscenty) could be sustained. 24 9 an correct, whey should'ut younger apply ?

PRELIMINARY MEMO

March 15, 1974 Conf. List 1, Sheet 1

No. 73-]119

(appeal from USDC, N.D.-Ala., S.D. (Rives, McFadden, <u>Pointer</u>) Federal - civil

MTM, INC. & MOBILE BOOKMART, INC.

BAXLEY, Attorney General Untimely\*/

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

 $\star$ /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).

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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 <u>Speight v. Slaton</u>, No. 72-1557, decided Feb. 27, 1974. Section 1103 of the Alabama statute provides in part: <sup>6</sup>[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

ssit?

-3-

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 construct 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 obscen ity laws.

4. <u>CONTENTIONS</u>: The appellants have filed a rambling 42 page brief. They state that the question presented is virtually identical with that presented in <u>Speight v. Slaton</u>\*/ 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. <u>Near v. <sup>M</sup>innesota</u>, 283 U.S. 697 (1931).

-4-

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 <u>Younger</u>, 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. <u>Kenosha v. Bruno</u>, 93 S. Ct. 2222 (1973).

5. <u>DISCUSSION</u>: The issues here are, as far as I can see identical to those presented in <u>Speight</u>, 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.

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

No

March 6, 1117 Uwan

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

With regard to whether this case is distinguishable from <u>Speight</u>, I think the answer is no. Underlying the <u>Speight</u> 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 <u>Speight</u> is irrelevant. What counts is how the statute was used here--apparently unconstitutionally beyond peradventure.

No. 73-119 MIM v. BAXLEY Argued 12/10/74 (3 2/4) a museure statute smuler in principle to Ohio statute in Huffman, It could be construed, like theo's & ga's, to apply only to materials (movies, books, etc) preverily found to be abscene - but ala S/ct bor not yet combued it State said statute could be construed ai not applying State it usued temp. injunction VS. See wote mantenance of "musane". The appellants mether appealed nor moved for dissolution of injunction. Enstead, they sought relief from a 3 flct, Theat court held that the nursand statute was quasi-comment & held that younger prohebiled tedaral interference. 3 flct declined to decide whether Jourgar doctrue applier to civil cases, I would apply younger to civil cases, Its vationale or basically equitable - plur county & federalism, appellants have had adequate venery at law, homesely, we state is not a party to a civil action that is sought to be enjowed in Fed cts - but I save no defference in privile. Here the state has a clear regulatory interest - a further reason for applying ymuger " ghesi-comment or lad faith. ments: If we reach merits, statute - absent a norrow construction - is an invalid prior verhaut.

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mith (for appellant) ala, proceeded under Red light ababement statutes - which is defferent from Ohed law Celo S/ct has not interpreted the statute an to whether it applies to a theatre was book store. Enquer that no appear may be Loken september ten, neguretion - but admite a procedure excits for abokement of the injunction. I Stewart noted that gougales ( her UCC core from Hel) costs grave doubts as he whitter they coul is property here - on and 3 / ct did not reach coust. of really Jenkin ( City atty of Bernungham) quari-commol maller. Lowyers representing purreyous of obscenity litigate each film - usesting on separate cases, - & by-poss Mul stale courts, preshoting state con. "Comety & federalism' expressily relevant in Meere cerementances.

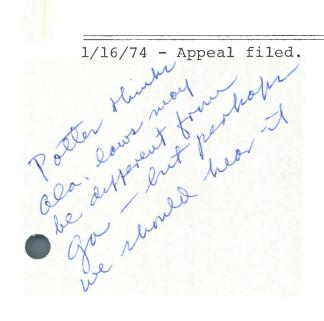
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Voted on....., 19... Assigned ....., 19... No. 73-1119 Announced ....., 19...

MTM, INC., ET AL., Appellants

vs.

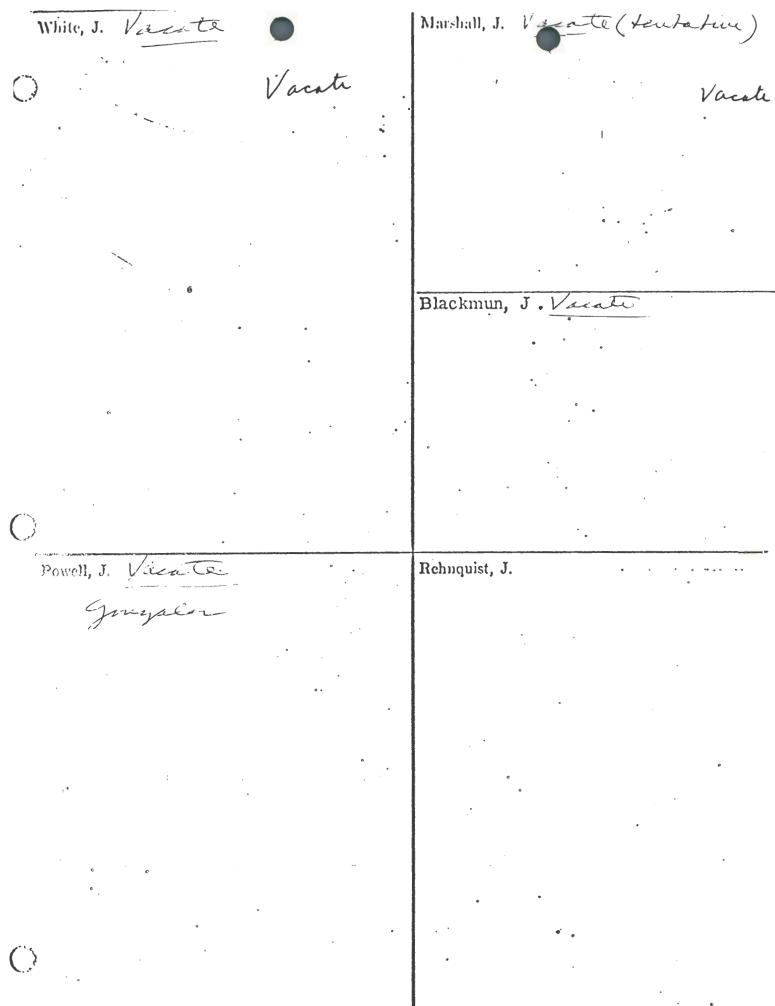
WILLIAM J. BAXLEY, ETC., ET AL.

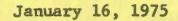


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Conf. 12/13/74 MTM V. BAXLEY 73-1119 The Chief Justice Vacate Douglas, J. Revence no construction of statute On ments of fevere · by ala s/ct. younger in But c/g accept stewarts I suggestion to apply Ginzales Has to be a written minion applaning when. Brennan, J. Vacate Stewart, J. Vacate Gonzales applies This would leave core oppealable Follow Jongales to CAS - not to us. nonwally we should not decide case an insue not briefed & argued, But parties can help us on this type of Juvisductional isel; We should make clear that sugle DC should decide certain issues w/o requestive convening of 3 Det. agoin we must unto all of this out.





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

Dear Bill:

Please join me in your Per Curiam.

Sincerely,

Mr. Justice Rehnquist CC: The Conference Supreme Çourt of the Anited States Mashington, P. Ç. 20543

CHAMBERS OF

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,

Mr. Justice Rehnquist

Copies to the Conference



Supreme Court of the United States Washington, D. Q. 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 Çourt of the Anited States Washington, P. Ç. 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,

Mr. Justice Rehnquist

cc: The Conference

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

CHAMBERS OF THE CHIEF JUSTICE

February 12, 1975

Re: 73-1119 - MTM v. Baxley

Dear Bill:

I join your proposed <u>per curiam</u> disposition dated January 15, 1975.

Regards,

less

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United State Washington, D. G. 20543

CHAMBERS OF

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.	Т. М.	Н. А. В.	L. F. P.	W. H. R.
	dessent							12/23/74
	dissent 1 st brogt 3/20/75	Join WAR 1-21.75		Concurring opinion 1 st draft 1/24/75 2 al boopt 3/22/75	Join WHR 2-27-75	Join WHR 1-20-75	Join WHR 1.16-75	PC Ist draft 1-14-75
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