IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1301

GANNETT CO., INC., *Petitioner,*

v.

HON. DANIEL A. DePASQUALE, County Court Judge of Seneca County, New York, et al., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF NEW YORK COURT OF APPEALS

BRIEF FOR RESPONDENTS IN OPPOSITION

HON. DANIEL A. DePASQUALE
KYLE EDWIN GREATHOUSE
DAVID RAY JONES
STUART O. MILLER,
District Attorney of Seneca County

BERNARD KOBROFF
Criminal Justice Appellate
Reference Service
80 Centre Street
New York, N.Y. 10013

Of Counsel

INDEX

TABLE OF AUTHORITIES

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77 - 1301

GANNETT CO., INC.,

Petitioner,

v.

HON. DANIEL A. DePASQUALE, as Judge of the Seneca County Court, KYLE EDWIN GREATHOUSE, DAVID RAY JONES and STUART O. MILLER, as District Attorney of Seneca County,

Respondents.

On Petition for a Writ of Certiorari to the State of New York Court of Appeals

---

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the New York Court of Appeals and the dissenting opinion are reported at 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756 (1977) [Pet. App. p. 2a-20a]. The opinion of the New York Supreme Court, Appellate Division, Fourth Department is reported at 55 A.D.2d 107, 389 N.Y.S.2d 719 (4th Dept. 1976) [Pet. App. p. 21a-28a].

QUESTIONS PRESENTED

1. Is it permissible to exclude the public and press from a pretrial hearing held to suppress statements made by the defendant and physical evidence seized from the defendant where the defendant requests the exclusionary order in an effort to minimize media publicity prior to jury selection?

2. Was it permissible for the Seneca County Court judge to issue such an exclusionary order where: (a) the defendants are out-of-state transients accused of the murder and robbery of a local area resident who is a former police officer with substantial roots in the community; (b) there were no eyewitnesses, other than the defendants, to the alleged crime; (c) the alleged deceased's body has never been recovered; (d) the defendants, having fled the jurisdiction, were arrested in Michigan and returned to the County; (e) one of the defendants is sixteen years of age; (f) the case had continuously generated extensive media publicity throughout the county as well as the surrounding counties; and (g) Seneca County has a population of only approximately 36,000?

3. Does the court's affordance of "an opportunity to be heard, not in the context of a full evidentiary hearing, but in a preliminary proceeding adequate to determine the magnitude of any genuine public interest" which "may be found to outweigh the risks of premature disclosures," comply with the press' due process right of access to such hearings? (43 N.Y.2d supra at 381; Pet. App. p.11a).

4. Does the court's affordance to "the media access to transcripts redacted to exclude matters ruled inadmissible during the closed suppression hearing" and complete transcripts "when the defendants' interests were not longer in jeopardy" satisfy "any true public interest...consonant with constitutional free press guarantees"? (43 N.Y.2d supra at 381; Pet. App. p. 12a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved, except for the Sixth Amendment, are adequately set forth in the Petition.

The Sixth Amendment to the United States Constitution provides, in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State...."

STATEMENT OF THE CASE

The facts, as summarized by the court below, are as follows:

> During the course of pretrial suppression hearings in a highly publicized murder case, the court directed that the evidentiary proceedings be closed to the public, including the press. The closure order was imposed as a means to ensure the defendants' right to a fair trial by forestalling the prejudicial effects of further notoriety. In this article 78 proceeding in the nature of prohibition, the petitioner, a disseminator of news through press and television, claims that the court's action violated First Amendment guarantees and the Sixth Amendment right to a public trial.***
>
> This claim to unrestricted media access to criminal proceedings of public interest stems from an unusual matter locally known as "the Clapp murder case." Wayne Clapp was a former town policeman. He had lived his entire 42 years in the Rochester area and had developed deep ties in the surrounding rural communities. On July 19, 1976, he was reported missing.

According to reports in the news media, including the petitioner's two daily papers and Rochester television station, Clapp had last been seen leaving Roy's Marina accompanied by two unidentified youths. His boat had later been returned laced with bullet holes. But his pickup truck and .357 magnum revolver, along with the two strangers, had vanished. Divers began searching Seneca Lake for Clapp's remains. The body of the deceased, however, was never recovered.

On July 22, the media announced that a nationwide police alert for Clapp's truck had proved successful. Michigan police had spotted the vehicle and, after a three-hour chase requiring helicopters and tracking dogs, they arrested a 16-year-old Texas youth, Kyle Greathouse, and his 21-year-old traveling companion, David Jones. The next day, front page articles revealed that Greathouse, apparently acquiesing to police requests, had led Michigan authorities to the location where he had buried the stolen revolver. The press later reported, without expanding, that the suspects had made admissions or confessions before waiving extradition proceedings and being returned to New York.

A Seneca County Grand Jury returned a lengthy indictment charging the two youths with second degree murder and robbery. On August 6,

petitioner's morning daily reported that the accused "pleaded innocent yesterday *** at their arraignment before Seneca County Court Judge Daniel DePasquale. 'Not guilty, your honor,' the 16-year-old Greathouse answered *** Jones gave the same response."

At the commencement of a pretrial suppression hearing, defense attorneys argued that an unabated buildup of adverse publicity had already jeopardized their clients' ability to receive a fair trial. To minimize the prejudicial effects of further disclosures, they asked that the pretrial proceedings be held in camera. The District Attorney had no objections. In an oral ruling the court concluded that "these matters are in the nature of a Huntley hearing and suppression of physical evidence, and it is not the trial *** Certain evidentiary matters may come up in the testimony of the People's witnesses that may be prejudicial to the defendants, and for those reasons the court is going to grant both [defendants'] motions." The public, including the petitioner's staff reporter, were removed from the courtroom. The suppression hearing then commenced and continued in camera to its conclusion the next day.

Three days later, counsel for Gannett appeared and asked the County Court to reconsider and vacate its ruling nunc pro tunc. Since the proceeding had already been concluded,

> a copy of the hearing transcript was also requested. While finding this intervention untimely, the court accommodated the asserted public interest. It signed Gannett's show cause order directing both the defense and the People to justify withholding the transcripts. The issues were fully briefed, and on November 16, the merits were argued. But the advantages of hindsight and further debate only reinforced the court's initial determination that open suppression hearings, if exposed to notoriety, would have deprived Greathouse and Jones of any meaningful opportunity to receive a fair trial. The court's original finding of "a reasonable probability of prejudice to the defendants" not only justified closure in the first instance but, in the Trial Judge's view, applied with equal force to the request for transcripts as well.
>
> The Appellate Division disagreed and, while trial in the criminal proceeding was still pending, granted the petitioner's renewed request for access to the sealed records.

(43 N.Y.2d supra at 374-376; Pet. App. pp. 2a-5a.)

POINT ONE

NO SUBSTANTIAL FEDERAL QUESTION IS INVOLVED

A. The Decision By The New York Court of Appeals in Gannett v. DePasquale et al, Was Rendered In Accordance With This Court's Decisions And Presents No Substantial Federal Question.

1. The Basis Of The Decision Was Construction Of New York State's Public Policy.

This case does not concern the right of the press to publish free from governmental restraint. No order restraining press publication was issued. No order restraining anyone from speaking to the press was issued. No one was held in contempt. The press was at all times free to publish anything concerning the case of People v. Greathouse and Jones that it unilaterally decided to publish.

However, this case does concern the right of press access to information. As this Court stated in Branzburg v. Hays, 408 U.S. 665, 684-685 (1972)," newsmen ... may be prohibited from attending ... trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal." This view was reiterated in Pell v. Procunier, 417 U.S. 817, 837 (1974) when this Court stated: "[t]he Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally." See similarily Zemel v. Rusk, 381 U.S. 1, 16-17 (1965). In short, it may be one thing for the government to tell the press that it cannot publish the Pentagon Papers but it is quite another thing for the press to tell the government that it must be given access to the Pentagon Papers so it can publish

them. Cf. New York Times Co. v. United States, 403 U.S., 713, 730 (1971)(concurring opinion of Justices White and Stewart).

Gannett originally took the position, which was upheld by the New York Appellate Division, Fourth Department, that the denial to the press of access to pretrial evidentiary suppression hearings bore the same "heavy presumption against [their] constitutional validity" [Nebraska Press Ass'n. v. Stuart, 427 U.S. 539, 558 (1976)] as did "prior restraints" on the press' right to publish information which it already possessed. Gannett no longer takes this "absolutist" position but now states that "the task of the judiciary must be to seek an accommodation" between "[t]he preservation of a defendant's right to an impartial jury" (Pet. Brief p. 11) and the press' right to access. The law of New York State already provides for such an "accommodation."

Gannett incorrectly states the law by asserting that courtrooms are presumptively closed in New York and that the public and press have the burden of justifying their "presence in the courtroom" (Pet. Brief p. 14). The law as stated by the Court of Appeals is that "criminal trials are presumptively open to the public, including the press" (43 N.Y.2d, supra at 376; Pet. App. p.5a). However, this presumption is not absolute. The court maintains its inherent power "to protect the rights of parties and witnesses, and generally to further the administration of justice" (43 N.Y.2d, supra at 377; Pet. App. p.7a). Included therein is the power to close the courtroom to the public and press when the Judge, presiding at a constitutionally mandated evidentiary suppression hearing, is so requested by the defendant, and

when that Judge determines that "press commentary on those hearings would threaten the impaneling of a constitutionally impartial jury in the county of venue" (43 N.Y.2d, supra at 380; Pet. App. p. 10a). Only at that point is the pretrial evidentiary hearing presumptively closed. The burden of going forward then shifts to the public and/or press to show that the public interest "outweigh[s] the risks of premature disclosures" (43 N.Y.2d, supra at 381; Pet. App. p. 11a). If this burden is met, the hearing remains open; if not, then so long as the defendant is in jeopardy the media is granted "access to transcripts redacted to exclude matters ruled inadmissible." Complete transcripts are made available "when the defendants' interests [are] no longer in jeopardy" (43 N.Y.2d, supra at 381; Pet. App. p. 12a).

New York's public policy as so expressed is entirely consistent with this Court's opinions. This Court has never required that a defendant must first allow himself to be prejudiced by media disclosure of inadmissible evidence before he can request the court's protection from such prejudicial disclosures. While the measures described by this Court in Sheppard v. Maxwell, 384 U.S. 333 (1966), may mitigate the effects of the prejudice already done to a defendant by pretrial publicity they are not the only available "measures short of prior restraints on publication tending to blunt the impact of pretrial publicity," Nebraska Press Ass'n v. Stuart, supra at 564.

In a criminal prosecution it is the defendant who has the most at stake. The Sixth Amendment states that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State...." If "the accused" decides to forego

his right to a public pretrial evidentiary suppression hearing in order to assure his right to an impartial jury, then that choice should be honored. The public may be curious, the media may be engaged in the business of disseminating "news", but sixteen year old Kyle Edwin Greathouse has been indicted for murder and that charge carries with it a twenty-five year minimum sentence. The Sixth Amendment will be of little avail to Greathouse if he can only invoke its guarantee of a "trial, by an impartial jury" after he has been prejudiced. It is illogical that this Court must require the accused to waive his constitutional right to a "speedy trial" but not permit the accused to waive his constitutional right to a "public trial." No defendant should have to request continuances until the prejudice the media has done him can, perhaps, be dissipated; nor should he be forced to incur the expense, inconvenience, and perhaps loss of witnesses that a 300 mile change of venue would entail.

In the words of Justice Jackson, dissenting in Craig v. Harney, 331 U.S. 367, 394 - 395 (1947):

> Every other right, including the right of a free press itself, may depend on the ability to get a judicial hearing as dispassionate and impartial as the weakness inherent in men will permit.

2. The Basis Of The Decision Below Was Construction Of A State Statute.

The decision by the New York Court of Appeals in the instant case involved the construction of a state statute. Gannett challenged Judge DePasquale's exclusionary order on the grounds that it was

> ...directly contrary to the provisions of Section 4 of the Judiciary law which provides, with certain exceptions here inapplicable, that the "sittings of every court within this state shall be public, and every citizen may freely attend the same" (r33).*

In holding that this statute was constitutional and was not violated by the exclusionary order, the Court of Appeals decision was consistent with the prior decisions in People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769 (1954) and Matter of United Press Ass'n v. Valente, 308 N.Y 71, 123 N.E.2d 777 (1954) (cited with approval in Branzburg v. Hayes, 408 U.S. 665, 684 (1972)).

It is well settled that if the sole basis for a state court's decision is one of statutory construction, "the case cannot be the subject of either appeal or certiorari." Stern and Gressman, Supreme Court Practice, pp. 86-87 (4th ed. 1969). It is equally clear that this Court is bound by the state court's construction of state statutes except in extreme circumstances. See Mullaney v. Wilbur, 421 U.S. 684 (1975); Winters v. New York, 333 U.S. 507 (1948); Murdock v. City of Memphis, 20 U.S. 590 (1875).

---

*References preceded by "r" refer to the pagination of the Record in the New York Court of Appeals.

3. The Case Turns Solely Upon An Analysis Of The Particular Facts Involved.

Judge DePasquale determined that unless the public and press were excluded from the hearing as the defendants had requested there was "a reasonable probability of prejudice to the defendant" (r45; Pet. App. p. 37a). This determination turned solely upon the Judge's view of the facts before him. It is well settled that this "Court will usually deny certiorari when review is sought of a lower court decision which turns solely upon an analysis of the particular facts involved", United States v. Johnston, 268 U.S. 220, 227 (1925), cited in Stern and Gressman, Supreme Court Practice, p. 172 (4th ed. 1969).

Gannett was granted a full hearing on the merits before Judge DePasquale and the facts of this case were known and understood by all the parties. In its own petition for a writ of prohibition against Judge DePasquale, Gannett noted that: (1) "the charges and the events preceding them were the subject of great public interest" (r26); and (2) "[i]n addition, the criminal investigation and the Criminal Case were the subject of numerous articles and reports by news media other than those of Petitioner."

Petitioner now argues that even though "the accused" requests closure as a means of ensuring his right to an "impartial jury," this cannot be granted him as "[c]losure may mask a collusion among the participants harmful to the defendant, and of which he is personally unaware." (Pet. Brief p. 9). It is condescending to the defendant and his counsel (as well as to the People and the Court) for Gannett to presume the responsibility of protecting the accused from himself.

The defendant must be permitted to determine his own defense free from interference by well intentioned but perhaps misguided samaritans.

If the defendants had prevailed at the suppression hearing they had a triable defense. The People's case was entirely circumstantial. Three people leave on a boat and two return. There are bullet-holes in the boat but there is no deceased and, except for the defendants, no eyewitness to what had occurred. If they fail at the suppression hearing their defense is almost hopeless. Full confessions by them of what had occurred on the boat as well as the alleged murder weapon itself will be in evidence against them. That Gannett fully understood the importance to the defendants of this pretrial evidentiary hearing is shown by its statement that: "because of the absence of a corpus,...the judicial determination of their admissibility may be determinative of the Criminal Case" (r28).

The defendants' nightmare was to prevail at the suppression hearing and yet they see all the suppressed evidence, broadcasted by the media to the potential venireman of Seneca County, become common knowledge. Or worse be greeted by a newspaper headline and television special announcement to the effect that: "MURDERERS MAY GO FREE BECAUSE POLICE BUNGLED." Such a headline would of course be within the sole discretion of the media.

If the defendant chooses not to run such a risk, but rather requests the prophylactic of closure of the pretrial proceeding "to blunt the impact of pretrial publicity", Nebraska Press Ass'n., supra, at 564 then petitioner and amici note standards that would require that first the

defendant, in open court, demonstrate that: (1) there is a "substantial likelihood" that this potentially inadmissible evidence will prejudice him with potential jurors of the county; and (2) there are no alternatives available other than closure.

Such standards would unfairly discourage defendants from requesting closure. Contrary to Gannett's assertion that the indigent defendants in the instant case were better able than itself to undertake the "financial" burden involved (see Pet. Brief p. 14) it is probably unlikely that a defendant, on trial for murder, will choose to use his limited time, energy and money in confronting the media rather than the State. For fear of antagonizing the press, and thus creating an additional adversary, commentators have cautioned defense counsel to "rarely" request closure of pretrial evidentiary suppression hearings. See Rothblatt, Fair Trial-Free Press: The Recurring Theme, N.Y.L.J. Jan. 27, 1978, p. 1, col. 1, p. 26, col. 2. To place a burden upon the defendant of making - in open court - an evidentiary showing of potential prejudice will probably forever forclose such defense requests.

This case turned solely upon the hearing Judge's analysis of the particular facts. Also to argue as Gannett and amici do that merely because the hearing Judge did not mention the Sheppard measures implies that he did not consider them overlooks both the law and public policy of the State of New York. It overlooks the full hearing granted to Gannett and it also overlooks the pronouncements of this Court. Cf. Smith v. Digmon, __U.S.__ (22 CrL 4150; Jan. 18, 1978).

Change of venue, for example, would be unavailable here as a means of protecting the accused. All applications for change of venue in New York State are made to the Appellate Division and not to the trial court. N.Y Crim. Proc. Law §230.20. Hence the hearing Judge cannot even consider this alternative to closure. Also, the Appellate Division Fourth Department has adopted a rule that motions for changes of venue are considered "premature" if they are made prior to the voir dire of the jury, see People v. Gray, 51 A.D.2d 889, 380 N.Y.S.2d 403 (4th Dept. 1976); People v. Hatch, 46 A.D.2d 721 (4th Dept. 1974); People v. Sekou, 45 A.D.2d 982 (4th Dept. 1974). Therefore, before the option of a change of venue would have ever become available the public pretrial suppression hearing would have been completed and defense counsel's voir dire would have proven unavailing.

POINT TWO

THE CASE IS MOOT

The obvious ground for this Court's denial of Petitioner's petition is that this case is moot. As soon as Greathouse and Jones entered their pleas, to lesser included crimes, in satisfaction of the indictment Gannett was offered the entire transcript of the suppression hearing. At that point the question as to whether Judge DePasquale had exceeded his authority in excluding the public and press from the suppression hearing was mooted.

CONCLUSION

Wherefore, Respondents Respectfully Submit That The Questions Upon Which This Case Depend Are So Insubstantial As Not To Need Further Argument, And Respondents Respectfully Move The Court To Dismiss This Petititon For A Writ Of Certioari Or, In The Alternative, To Grant The Petition For A Writ Of Certiorari And Summarily Affirm The Judgment Entered In The Cause By The Court of Appeals Of New York.

Dated: Seneca Falls, New York
April, 1978

Respectfully submitted,

HON. DANIEL A. DEPASQUALE
KYLE EDWIN GREATHOUSE
DAVID RAY JONES
STUART O. MILLER, District
Attorney of Seneca County

BERNARD KOBROFF
Criminal Justice Appellate
Reference Service
80 Centre Street
Room 402
New York, NY 10013
of Counsel