

**Commonwealth of Kentucky
Court of Appeals**

NO. 2009-CA-000346-OA

WLWT-TV5; WCPO-TV;
WXIX-TV; KYPOST.COM; AND
NBC NEWS, A DIVISION OF
UNIVERSAL, INC.

PETITIONERS

v. AN ORIGINAL ACTION
ARISING FROM CAMPBELL CIRCUIT COURT
ACTION NO. 97-CR-00280

HON. JULIE REINHARDT WARD,
JUDGE, CAMPBELL COUNTY CIRCUIT
COURT, DIVISION I

RESPONDENT

CHERYL MCCAFFERTY AND
COMMONWEALTH OF KENTUCKY

REAL PARTIES IN INTEREST

ORDER
DENYING EMERGENCY RELIEF

KELLER, JUDGE: This matter is before this Court on an CR 76.36(4) motion for emergency relief to maintain the status quo pending resolution of an underlying

petition for a writ of prohibition and/or mandamus filed by WLWT-TV, WCPO-TV9, WXIX-FOX 19, KYPOST.COM, and NBC News, a Division of NBC Universal, Inc. (hereinafter referred to collectively as the Petitioners). In their motion, the Petitioners ask this Court to issue an order staying enforcement of the Campbell Circuit Court's (the circuit court) February 24, 2009, order banning cameras from the courtroom until its underlying petition can be considered by a three-judge panel of this Court. Having reviewed the motion, a video of the hearing before the circuit court, and the responses filed on behalf of the circuit court and the Attorney General as real party in interest, the Court ORDERS that emergency relief be, and it is hereby, DENIED.

FACTS

There are some disputes regarding the underlying facts; however, the record indicates that the following facts are not in dispute. Cheryl McCafferty is currently on trial in Campbell Circuit Court for the murder of her husband. The Petitioners sought permission from the circuit court to place cameras in the courtroom to film/videotape the trial. The circuit court initially permitted the placement of one camera in the courtroom, with all petitioners to have access to the "feed" from that camera. However, the circuit court ultimately banned all cameras from the courtroom and ordered the "feed" line removed.

The Petitioners state that, on Friday, February 20, 2009, (three days before the trial's scheduled start date of February 23, 2009), the circuit court judge advised the Petitioners that she would not permit them to broadcast live streaming video. Furthermore, the Petitioners were not permitted to broadcast large portions of testimony; however, the judge did state she would permit the Petitioners to broadcast small portions of testimony and to discuss the events of the trial on their daily news broadcasts.

The Petitioners state that they were somewhat confused by the judge's statements and sought clarification on Saturday, February 22, 2009. Specifically, the Petitioners were uncertain if they were permitted to post video and/or audio segments of testimony on their respective blogs and/or websites. At approximately 11:20 p.m., the judge's staff attorney sent an e-mail to co-counsel for the Petitioners indicating that the judge would "not permit the pulling up of any witness' [sic] testimony via the Internet or . . . website." This prohibition also extended to blogs. This Court notes that, at this time, there was no written order signed by the Judge.

The Petitioners, apparently believing that the Judge's "order" amounted to "an unconstitutional prior restraint," filed a motion to intervene seeking a hearing regarding the denial of "their First Amendment right to blog about and post video/audio portions of trial testimony." According to the

Pctitioners, the judge reluctantly met with counsel in chambers on the morning of trial, February 23, 2009. Again, according to the Petitioners, the judge “expressed anger and personal offense at [them] for filing the motion” and advised them that “she would hold a hearing when it was convenient for her” but not until after the McCafferty trial started. The Petitioners state that the judge then told them that they could either withdraw their motion or remove all cameras from the courtroom. When the Petitioners advised the judge that they would not withdraw their motion, she ordered the cameras removed and ordered all recording equipment that had been installed outside the courtroom removed.

The judge then scheduled a hearing on the issue for that afternoon. Counsel for the Petitioners state that the circuit court did not notify them of the hearing and that they only learned of the hearing through their clients. At the hearing, the Petitioners asked to have the cameras re-installed and for permission to blog about the trial and post or air video and audio of witness testimony. The court denied that request.

While the Petitioners paint the judge as being uncooperative, she stated in her order denying their motion that she “went to great lengths to address and respond to the questions of the media.” Furthermore, the judge stated that she attempted to reach a compromise with the Petitioners regarding what could be

posted or aired and that the Petitioners rejected that compromise. Therefore, she ordered removal of all cameras from the courtroom.

In its order, the circuit court noted that the Petitioners are entitled to protection from prior restraint under the First Amendment. However, that protection is subject to limitation if there is a compelling governmental interest and the restraint is narrowly tailored to meet that interest. The circuit court noted that the parties had sought and been granted an order separating witnesses, a procedure designed to insure that later witnesses do not tailor their testimony based on what earlier witnesses may have said. The court indicated that permitting live streaming or contemporaneous blogging about witness testimony would thwart the protection afforded by separation of witnesses. The court deemed that the need to keep witnesses separated and to protect their testimony from potential taint by media coverage was a compelling governmental interest sufficient to support her order. Finally, the court noted that she has the discretion to ban cameras from her courtroom and she was exercising that discretion.

STANDARD OF REVIEW

There are essentially three issues raised in this matter. The first is whether the circuit court's banning of cameras from the courtroom amounted to an unconstitutional prior restraint of the Petitioners' First Amendment rights. This

issue involves a question of law and is subject to *de novo* review. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001).

If the circuit court's order did not amount to an unconstitutional prior restraint, the second issue is whether the circuit court judge abused her discretion.

The circuit court judge had

a right and obligation to maintain control over [her] own courtroom so as to minimize or prevent activities that might distract the jurors during the course of the trial. *Wilson v. Commonwealth, Ky.*, 836 S.W.2d 872, 884-85 (1992), *cert. denied*, 507 U.S. 1034, 113 S.Ct. 1857, 123 L.Ed.2d 479 (1993); *Preston v. Commonwealth, Ky.*, 406 S.W.2d 398, 404-05 (1966). Generally, whether to permit cameras in the courtroom is within the sound discretion of the trial court. 75 Am.Jur.2d, *Trial*, § 198 (1991).

Fugate v. Commonwealth, 62 S.W.3d 15, 21 (Ky. 2001). Therefore, if there was no prior restraint, we review the circuit court's order for abuse of discretion.

The third issue is whether the circuit court placed unconstitutional conditions on the Petitioners. This also is a question of law and is subject to *de novo* review. With these standards in mind, the Court will address the issues in the order set forth above.

ANALYSIS

1. Prior Restraint

At the outset, we note that the Petitioners have a right "to a mandamus remedy in the Appellate Courts where the trial courts have refused access to court

proceedings.” *Courier-Journal and Louisville Times Co. v. Peers*, 747 S.W.2d 125, 127 (Ky. 1988). Therefore, the Petitioners are properly before us.

The Petitioners argue that the circuit court’s order removing cameras from the courtroom amounts to an unconstitutional prior restraint. The circuit court recognized the media’s right to be present at a trial and the Petitioners have cited us to a number of cases standing for that proposition. We agree that the Petitioners have a right to be present at this trial, however,

[t]he First Amendment generally grants the press no right to information about a trial superior to that of the general public. “Once beyond the confines of the courthouse, a news-gathering agency may publicize, within wide limits, what its representatives have heard and seen in the courtroom. But the line is drawn at the courthouse door; and within, a reporter’s constitutional rights are no greater than those of any other member of the public.” *Estes v. Texas*, 381 U.S. 532, 589, 85 S.Ct. 1628, 1663, 14 L.Ed.2d 543 (1965) Harlan, J., concurring). Cf. *Saxbe v. Washington Post Co.*, 417 U.S. 843, 94 S.Ct. 2811, 41 L.Ed.2d 514 (1974); *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974). See also *Zemel v. Rusk*, 381 U.S. 1, 16-17, 85 S.Ct. 1271, 1280-1281, 14 L.Ed.2d 179 (1965).

Nixon v. Warner Communications, Inc., 435 U.S. 589, 609-10, 98 S.Ct. 1306, 1318, 55 L.Ed.2d 570 (1978). Furthermore, “there is no constitutional right to have . . . testimony recorded and broadcast.” *Id.* at 610, 1318.

Based on the preceding, it is clear that the circuit court’s order did not amount to an unconstitutional prior restraint of the media’s First Amendment

rights. While the order limited the means by which the media could have that access, it did not limit or prohibit access. The means granted by the court, personal observation with pen and paper, is the same access granted to the general public and this did not amount to a constitutional violation.

2. Abuse of Discretion

Having determined that the circuit court's order did not amount to an unconstitutional prior restraint, we must determine whether the court abused its discretion in banning the cameras. In her order, the judge indicated that she and the parties were concerned about the adverse impact real time broadcasting of testimony might have on later witnesses. The judge indicated that at least one member of the jury panel expressed concern regarding the presence of the media. At the conclusion of the February 23, 2009, hearing, the judge noted the amount of time she had spent in the week prior to trial dealing with issues related to the media and access of the media to the courtroom rather than with issues related to the trial. Furthermore, she noted that issues related to the media had already caused a delay in the start of the trial, and she expressed concerns regarding additional negative impact the presence of the media might have on the trial. These reasons more than amply support the judge's determination to ban cameras from the courtroom. Therefore, the Court discerns no abuse of discretion.

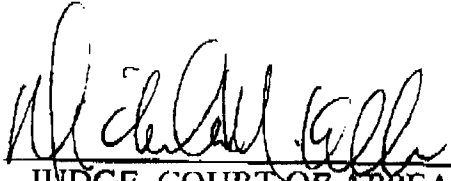
3. Doctrine of Unconstitutional Conditions

The doctrine of unconstitutional conditions states that the government cannot condition receipt of a benefit on the waiver of a constitutional right. *Perry . Sindermann*, 408 U.S. 593, 597, 92 S.Ct. 2694, 2697, 33 L.Ed.2 570 (1972). The Petitioners argue that the circuit court gave them the following ultimatum: either withdraw the motion to intervene and accept the limited mechanical audio/video access offered by the court or the court would ban all mechanical audio/video access. The Petitioners argue that, because they chose not to withdraw their motion, the judge retaliated against them by banning all mechanical audio/video access. The judge stated that she offered a compromise to the Petitioners – either accept the limited mechanical audio/video access or have no mechanical audio/video access.

The Court is of the opinion that it makes no difference which interpretation of events is correct, because the doctrine of unconstitutional conditions does not apply. In order for that doctrine to apply, there must be a constitutional right at stake. As set forth above, the Petitioners have no constitutional right to take mechanical audio/video equipment into the courtroom. Therefore, the judge was not asking the Petitioners to waive a constitutional right. She was simply setting the conditions under which she would grant them greater access than that which is constitutionally guaranteed.

For the foregoing reasons, the Court discerns no error on the part of the circuit court. Therefore, the Petitioners' motion for emergency relief is DENIED. The underlying original action shall be placed upon the docket of the first available motion panel upon expiration of the response time provided by the Civil Rules.

ENTERED: FEB 26 2009



JUDGE, COURT OF APPEALS