

1 The State ex rel. News Herald et al. v. Ottawa County Court of Common Pleas,
2 Juvenile Division.

3 [Cite as State ex rel. News Herald v. Ottawa Cty. Court of Common Pleas, Juv.
4 Div. (1996), __ Ohio St.3d __.]

5 *Motion for reconsideration of Supreme Court order dismissing action*
6 *seeking writ of prohibition -- Reconsideration granted and writ*
7 *allowed in part, when.*

8 (No. 96-1463 -- Submitted September 10, 1996 -- Decided October 10,
9 1996.)

10 IN PROHIBITION.

11 ON RECONSIDERATION.

12 The Ottawa County Court of Common Pleas, Juvenile Division,
13 respondent, has pending before it a case known as *In the Matter of Kevin*
14 *Fabian, Alleged Delinquent Child*. The delinquency proceedings had been
15 initiated against Kevin Fabian on February 20, 1996. The *Fabian* case arose as
16 a result of a 1994 drive-by shooting in which Fabian, then age sixteen, was

1 alleged to have participated. The juvenile court case has drawn considerable
2 local media attention.

3 On or after February 20, 1996, the Ottawa County Prosecutor moved the
4 trial court in *Fabian* to commence proceedings pursuant to Juv.R. 30 to transfer
5 Fabian to the general division of the common pleas court to be tried as an adult.

6 The trial court set the Juv.R. 30(A) probable cause hearing for June 24, 1996.

7 On June 12, 1996, the Port Clinton *News Herald* moved the trial court to permit
8 the public, including the press, to attend the juvenile court proceedings in

9 *Fabian* or, in the alternative, to conduct an evidentiary hearing to determine
10 whether closure was appropriate. The trial court held the requested evidentiary

11 hearing on June 24, 1996. At the hearing, both the assistant prosecutor and
12 Fabian's counsel argued in favor of barring the public from the proceedings.

13 However, neither the assistant prosecutor nor Fabian's attorney offered any
14 evidence indicating that opening the juvenile court proceedings to the press and

15 public would harm Fabian or jeopardize the fairness of the proceedings against
16 him.

1 Following the June 24, 1996 closure hearing, the trial court determined
2 that the bindover proceedings were to remain open to the public and the press.
3 However, the trial court *sua sponte* issued a contemporaneous “gag” order
4 which was later committed to writing in the form of a judgment entry. The gag
5 order provides, in part, that “no media representative shall publicly report or
6 personally discuss the case until the final decree on certification [certifying
7 Fabian to be tried as an adult] is entered by the Court.” Additionally, the trial
8 court refused to allow the *News Herald* to inspect the docket sheet in *Fabian*
9 and the various pleadings that had been filed in the case, such as the
10 delinquency complaints and the prosecutor’s motion to try Fabian as an adult.¹

11 On June 24 and 25, 1996, the trial court in *Fabian* conducted open
12 sessions of the Juv.R. 30(A) preliminary hearing. Thereafter, the trial court
13 scheduled a Juv.R. 30(B) hearing for August 9, 1996, to determine whether to
14 transfer jurisdiction over Fabian to the adult criminal justice system.

15 On June 25, 1996, three Ohio newspapers, the Port Clinton *News Herald*,
16 the Fremont *News-Messenger* and the Sandusky *Register* (collectively

1 “relators”) filed an original action in this court seeking the issuance of a writ of
2 prohibition “barring any enforcement by respondent of the portion of the order
3 at issue here barring relators from disclosing certain information, and barring
4 enforcement of the court-imposed confidentiality of the case number assigned
5 to Fabian, docket sheet, and motion to try Fabian as an adult.” On June 28,
6 1996, this court granted an alternative writ and set a schedule for the
7 submission of briefs and the presentation of evidence. See 76 Ohio St.3d 1203,
8 667 N.E.2d 404.

9 On June 29, 1996, *after* this court had issued the alternative writ, relators
10 published news that had been embargoed under the trial court’s gag order. In
11 reporting the information, relators apparently believed that this court’s issuance
12 of the alternative writ had stayed the juvenile court’s gag order in *Fabian* and
13 had permitted them to publish. Conversely, the trial judge in *Fabian* viewed
14 the alternative writ as having stayed only his authority to convene contempt
15 proceedings against relators. Therefore, on July 1, 1996, the trial judge in
16 *Fabian* advised relators that if relators did not ultimately prevail in the

1 prohibition action, he would hold relators in contempt for having published
2 information contrary to the gag order. Accordingly, on July 9, 1996, relators
3 moved this court for clarification of the alternative writ or, in the alternative,
4 for an expedited briefing schedule and an expedited ruling on the merits of the
5 prohibition action. However, on August 1, 1996, a majority of this court
6 dismissed relators' prohibition action, stating:

7 "This cause originated in this court on the filing of a complaint for a writ
8 of prohibition. Upon consideration of relators' motion to clarify alternative
9 writ or, in the alternative, to expedite briefing schedule,

10 "The court finds, *sua sponte*, upon reconsideration of its order granting
11 an alternative writ, that whatever the apparent merits of relators' complaint, *a*
12 *writ of prohibition is not the appropriate remedy to challenge the*
13 *constitutionality of the order of a trial judge.* Because relators' complaint does
14 not challenge the jurisdiction of the inferior court,

1 “IT IS ORDERED by the court, *sua sponte*, that this cause be, and
2 hereby is, dismissed.” (Emphasis added.) 76 Ohio St.3d 1220, 668 N.E.2d
3 510.

4 Relators now seek reconsideration of the order of the majority of this
5 court which, *sua sponte*, dismissed relators’ action for a writ of prohibition.

6 *Baker & Hostetler, David L. Marburger, Hilary W. Rule, and Anthony J.*
7 *Franze*, for relators.

8 *Connelly, Soutar & Jackson, Kevin E. Joyce, William M. Connelly and*
9 *Sarah Steele Riordan*, for respondent.

10 DOUGLAS, J. Before us is the motion of relators for reconsideration of
11 the August 1, 1996 order of a majority of this court which, *sua sponte*,
12 dismissed relators’ action seeking a writ of prohibition. The order dismissing
13 relators’ prohibition action stated that “a writ of prohibition is not the
14 appropriate remedy to challenge the constitutionality of the order of a trial
15 judge.” 76 Ohio St.3d 1220, 668 N.E.2d 510. However, a majority of this

1 court now agrees that dismissal of relators' prohibition action was improper.

2 Accordingly, we grant the motion for reconsideration.

3 I

4 Prohibition

5 There is a long line of cases holding that an action for a writ of
6 prohibition is the proper vehicle to challenge an order of a trial court which
7 orders closure of court proceedings. In fact, historically, it has been held that
8 prohibition is the *only* remedy available to non-parties who wish to challenge
9 an order which restricts the rights of free speech and press of such non-parties.

10 The citations to just three of the cases will suffice.

11 In *State ex rel. Adams v. Gusweiler* (1972), 30 Ohio St.2d 326, 330, 59
12 O.O.2d 387, 389, 285 N.E.2d 22, 24, this court held that prohibition is the
13 appropriate remedy to both prevent excesses of lower tribunals and to
14 invalidate orders already made that engage in such excesses. In *State ex rel.*
15 *Dayton Newspapers, Inc. v. Phillips* (1976), 46 Ohio St.2d 457, 75 O.O.2d 511,
16 351 N.E.2d 127, this court held, at paragraphs one and two of the syllabus, that

1 “[a] writ of prohibition provides an appropriate remedy to prevent the
2 enforcement by a trial court of an order improperly excluding the public and
3 members of the press from pretrial hearings * * *,” and “[a] newspaper has
4 standing to seek a writ of prohibition to prevent a trial court from enforcing an
5 order improperly excluding the public and reporters for the news media from
6 pretrial hearings * * *.” Even more recently we decided in *In re T.R.* (1990),
7 52 Ohio St.3d 6, 556 N.E.2d 439, certiorari denied (1990), 498 U.S. 958, 111
8 S.Ct. 386, 112 L.Ed.2d 396, at paragraph one of the syllabus, that
9 “[i]nterlocutory orders of a trial court restricting public access to pending
10 litigation are not final, appealable orders, and may be challenged during the
11 pendency of the litigation *only* through an action for a writ of prohibition.
12 Members of the press and public who seek access to a closed court proceeding
13 have standing to seek a writ of prohibition for this purpose.” (Emphasis
14 added.)

15 The federal law is no different. The United States Supreme Court has
16 held that “prior restraints on speech and publication are the most serious and

1 the least tolerable infringement on First Amendment rights.” *Nebraska Press*
2 *Assn. v. Stuart* (1976), 427 U.S. 539, 559, 96 S.Ct. 2791, 2803, 49 L.Ed.2d 683,
3 697. Therefore, the First Amendment demands that the court systems of the
4 several states provide challengers of such restraints with *immediate* judicial
5 remedies. *Natl. Socialist Party of Am. v. Village of Skokie* (1977), 432 U.S. 43,
6 44, 97 S.Ct. 2205, 2206, 53 L.Ed.2d 96, 98.

7 Clearly, prohibition is the proper action to be brought to test the trial
8 court’s gag order in *Fabian*. The gag order in *Fabian* prohibits relators from
9 publishing certain information lawfully gathered by them in proceedings which
10 are open to the public. However, this court’s August 1 order dismissing the
11 prohibition action effectively left these relators, who are *non-parties* in the
12 underlying juvenile court action, without any remedy to challenge the
13 constitutionality of this prior restraint on free speech. Accordingly, we vacate
14 the August 1, 1996 order dismissing relators’ prohibition action since that order
15 improperly deprived relators of the right to challenge the constitutionality of
16 the trial court’s prior restraints on media publication.

1 II

2 Prior Restraint

3 Prior restraints on media publication are presumptively unconstitutional.

4 See, generally, *New York Times Co. v. United States* (1971), 403 U.S. 713, 714,

5 91 S.Ct. 2140, 2141, 29 L.Ed.2d 822, 824-825. In fact, research reveals that

6 apparently the United States Supreme Court has never permitted a prior

7 restraint on pure speech. *In re Providence Journal Co.* (C.A.1, 1986), 820 F.2d

8 1342, 1348, certiorari granted (1987), 484 U.S. 814, 108 S.Ct. 65, 98 L.Ed.2d

9 28, certiorari dismissed (1988), 485 U.S. 693, 108 S.Ct. 1502, 99 L.Ed.2d 785.

10 Accordingly, in *Craig v. Harney* (1947), 331 U.S. 367, 374, 67 S.Ct. 1249,

11 1254, 91 L.Ed. 1546, 1551, the court said that “[a] trial is a public event. What

12 transpires in the court room is public property. * * * Those who see and hear

13 what transpired can report it with impunity. There is no special perquisite of

14 the judiciary which enables it, as distinguished from other institutions of

15 democratic government, to suppress, edit, or censor events which transpire in

16 proceedings before it.” See, also, *Oklahoma Publishing Co. v. Dist. Court*

1 (1977), 430 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355; *Nebraska Press Assn. v.*
2 *Stuart, supra*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683; *Cox Broadcasting*
3 *Corp. v. Cohn* (1975), 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328.

4 The order of the trial court in *Fabian* is a classic order of prior restraint.

5 The order prohibited publication of information legally obtained by relators.

6 Relators were threatened with criminal contempt if they violated the order by

7 publishing. Upon consideration of the merits and the evidence of record, we

8 find that the gag order in *Fabian* is patently unconstitutional. Therefore, a writ

9 of prohibition barring the trial court from enforcing the gag order is hereby

10 allowed. However, with respect to the juvenile court records that relators have

11 sought to have disclosed (*i.e.*, the case number in *Fabian*, the docket sheet and

12 the prosecutor's motion to try *Fabian* as an adult), we note that an action in

13 mandamus -- not prohibition -- is the appropriate vehicle to seek disclosure of

14 such records.² Therefore, relators' request for a writ of prohibition in

15 connection with the trial court's refusal to disclose the juvenile court records is

16 hereby denied.

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III

Conclusion

For the reasons stated herein, we grant relators' request for reconsideration of this court's prior judgment in this case. In so doing, we adhere to established precedent holding that the remedy of prohibition is the appropriate (and maybe only) vehicle for a non-party to obtain review of an interlocutory gag order. We allow a writ of prohibition to dissolve the gag order in *Fabian*, but deny the writ to the extent it seeks to compel the trial court to disclose the case number in *Fabian*, the docket sheet, and pleadings filed in the juvenile court action.

Reconsideration granted
and writ allowed in part.

MOYER, C.J., RESNICK, F.E. SWEENEY, PFEIFER, COOK and STRATTON, JJ.,
concur.

1 *FOOTNOTES:*

2 ¹ Apparently, the News Herald was able to obtain copies of the
3 delinquency complaints from an independent source, but has not been able to
4 acquire the docket sheet or any other court record in *Fabian*, including the
5 prosecutor's motion to try Fabian as an adult and the case number assigned to
6 *Fabian*.

7 ² But, see, Juv.R. 37(B).

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