[J-60-2007]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA	: No. 2 WAP 2006
	:
	: Appeal from the Order of the Superior
v.	: Court entered August 22, 2005 at No. 373
	: WDA 2004, reversing the Order of the
	: Court of Common Pleas of Allegheny
JAMIE LYNN UPSHUR	: County entered March 2, 2004 at No.
	: MISC 410 March 2004.
	:
APPEAL OF: WPXI, INC.	: ARGUED: September 11, 2006
	:
	: RESUBMITTED: April 13, 2007

CONCURRING OPINION

MADAME JUSTICE BALDWIN **DECIDED: JUNE 20, 2007**

I concur in the result of Justice Saylor's majority opinion on the ground that the trial judge did not abuse his discretion in granting WPXI access to a copy of the audio tape at issue, but write separately to emphasize that the trial judge was not compelled to grant access to anything beyond a transcript of that tape. I believe that there is a substantive difference between an audio tape and a transcript which was not addressed by the majority.

As a preliminary matter, this Court has not yet made an express determination that a right of public access exists for preliminary hearings, as they are practiced in this Commonwealth. This Court has found that there is a rebuttable presumption of public access to various documents often associated with pre-trial proceedings, including: arrest

warrants and their supporting affidavits (Commonwealth v. Fenstermaker, 515 Pa. 501, 530 A.2d 414 (1987)); search warrants and their supporting affidavits (PG Publishing Company v. Copenhefer, 532 Pa. 1, 614 A.2d 1106 (1992)); and suppression hearings where a less exclusive alternative is available (Commonwealth v. Hayes, 489 Pa. 419, 414 A.2d 318 (1980)(plurality)). In Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986), the United States Supreme Court found that "[t]he qualified First Amendment right of access to criminal proceedings applies to preliminary hearings *as they are conducted in California*." Id. at 13, 106 S.Ct. at 2743, 92 L.Ed.2d at 13 (emphasis added). That Court relied on the facts that at the 41-day-long preliminary hearing, the accused had "the right to personally appear at the hearing, to be represented by counsel, to cross-examine hostile witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence." Id. at 12. There is no procedure in Pennsylvania to exclude illegally obtained evidence from a preliminary hearing. Pa.R.Crim.P. 542(C). While this Court may determine that this difference is not sufficient to bar public access to judicial documents from preliminary hearings, this issue should be squarely addressed.

It is true that in this Commonwealth we have a constitutional presumption of openness of courts, PA. CONST. art. I, § 11, as well as a common law presumption of public access to judicial records and documents. Nixon v. Warner Communications, Inc., 435 U.S. 589, 597, 98 S.Ct. 1306, 1312, 55 L.Ed.2d 570, 579-80 (1978); Commonwealth v. Fenstermaker, 515 Pa. 501, 508, 530 A.2d 414, 418 (1987). However, that does not mean the media must be provided with a specific mode of information. Information, in and of itself, is all that must be provided. Indeed, this Commonwealth has not previously created a "best mode" requirement for evidence, i.e., there is no requirement that a television station be permitted access to the most dramatic or sensational version of a judicial document, and, prior to today's opinion, no requirement that an audio or video tape be

released in addition to a transcript. I write further to provide substance to my disagreement with the majority opinion.

First of all, I would note that the United States Supreme Court has determined that "[t]he First Amendment generally grants the press no right to information superior to that of the general public." Nixon, 435 U.S. at 609, 98 S.Ct. at 1318, 55 L.Ed.2d at 586. It is also true that in Richmond Newspapers v. Virginia, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 93 (1980), which produced no Opinion of the Court, six justices agreed that the First Amendment requires public access to trials. This Court, in Fenstermaker, noted that the factors used by the United States Supreme Court in its analysis of the First and Sixth Amendment rights of access were equally applicable for analysis under Pennsylvania Constitution Article I, Sections 9 ("public trial") and 11 ("courts shall be open"). Thus, the factors enunciated by the United States Supreme Court in Gannett Co. v. DePasquale, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979) and Richmond Newspapers that militate in favor of public access are applicable. These factors include:

> to assure the public that justice is done even-handedly and fairly; to discourage perjury and the misconduct of participants; to prevent decisions based on secret bias or partiality; to prevent individuals from feeling that the law should be taken into the hands of private citizens; to satisfy the natural desire to see justice done; to provide for community catharsis; to promote public confidence in government and assurance that the system of judicial remedy does in fact work; to promote the stability of government by allowing access to its workings, thus assuring citizens that government and the courts are worthy of their continued loyalty and support; [and] to promote an understanding of our system of government and courts.

Fenstermaker at 507, 530 A.2d at 417. What I believe is lacking from the majority's analysis is how these factors (or others) militate in favor of releasing an actual copy of the audio tape as opposed to the transcript of the audio tape that was initially released by the

magistrate. I do not find sufficient incremental benefit in any of these factors to justify any harm done by the release of the tape, with such harm encompassing decreased privacy of the other participants on the tape, including the victim, and the increased pain to the victim's family.

Federal courts have addressed the issue of access to audio and video tapes as "judicial documents" more frequently than courts in this Commonwealth. There is a split amongst the Circuits regarding whether the presumption of public access is a "strong presumption." For the most part, whether the presumption is considered to be strong is determinative of the issue, i.e., if there is a strong presumption of access, the tapes will be released, but if the presumption is weaker, the tapes will likely not be released. In the Second, Third, Fourth, Seventh and District of Columbia Circuits, the presumption of access is strong. See U.S. v. Graham, 257 F.3d 143 (2d Cir. 2001); U.S. v. Martin, 746 F.2d 964 (3d Cir. 1984); U.S. v. Criden, 648 F.2d 814 (3d Cir. 1981); In re Associated Press, 172 Fed.Appx. 1 (4th Cir. 2006) (tapes used in Moussaui trial must be released after being fully disclosed to jury—but note that in this case the contents of the tapes had not been transcribed); U.S. v. Guzzino, 766 F.2d 302 (7th Cir. 1985); and In re Nat'l Broad. Co. (U.S. v. Jannette), 209 U.S.App.D.C. 354, 653 F.2d 609 (D.D.C. 1981). However, in the Fifth, Sixth and Eighth Circuits, the presumption of access is less strong. See Belo Broadcasting Corp. v. Clark, 654 F.2d 423, 431-34 (5th Cir. 1981); Beckham, infra (6th Cir.); and McDougal, infra (8th Cir.). It should be noted that in many of the cases where public access was granted (including both leading cases from the Third Circuit), the defendant in the underlying action was a public figure.

The Third Circuit has released audio tapes, finding that such tapes are judicial documents. Criden, supra; Martin, supra. However, even in Martin, where the Third Circuit found that audio tapes must be released, it indicated that "[w]here proffered evidence is found inadmissible because it is unreliable, or because it is more prejudicial than probative,

the dangers of broad dissemination may substantially outweigh any benefits." Martin, 746 F.2d at 969. Thus, where, as here, there is a question as to the admissibility of the evidence, which will not be determined until a suppression hearing held by the trial court, rather than the magistrate, the actual copy of the tape should be withheld until that decision is reached. I would also note that contrary to Appellant's contentions, Third Circuit precedent is not binding on this Court, but rather is to be used as persuasive authority. See Hall v. Pa. Bd. of Prob. & Parole, 578 Pa. 245, 254-55, 851 A.2d 859, 865 (2004).

In 1996, the Eighth Circuit determined that a transcript of a video taped deposition of President Clinton provided sufficient public access and a copy of the actual tape itself was not required. U.S. v. McDougal, 103 F.3d 651 (8th Cir. 1996). In analyzing common law access right to the tape, the Eighth Circuit indicated that:

> (1) substantial access to the information provided by the videotape had already been afforded; (2) release of the videotape would be inconsistent with the ban on cameras in the courtroom under Fed.R.Crim.P. 53; (3) in other cases involving videotaped testimony of a sitting president, the tapes were not released; and (4) there exists a potential for misuse of the tape, a consideration specifically recognized in Nixon . . . .

Id. at 654. The court also relied upon its determination that "courts should avoid becoming the instrumentalities of commercial or other private pursuits." Id. at 658 (citing Nixon).

The Sixth Circuit, in U.S. v. Beckham, 789 F.2d 401 (6th Cir. 1986), agreed that the common law right of access to judicial documents included tape recordings, but found that "when the right to make copies of tapes played in open court is essentially a request for a duplicate of information already made available to the public and the media," then the lower court has far more discretion to determine that further access is not required. Id. at 415. According to the court in Beckham, the First Amendment values served by the presumption of openness of courts are:

> the appearance of fairness; public confidence in the judicial system; the discouragement of misconduct, perjury or secret bias; the enhancement of the performance of all parties, the protection of the judge from imputations of dishonesty; the education of the public; the provision of a safe outlet for public hostility and concern; the avoidance of covert actions and secret proceedings; and equal treatment of rich and poor.

Id. at 406-07 (citing Richmond Newspapers). These values are not enhanced by duplicative public access being provided to the media.

As the Eighth Circuit noted in McDougal, supra, there is a tension in the federal courts between media access to the courts and the federal rules of procedure which ban cameras from the court room. That tension also exists in Pennsylvania. Pennsylvania Rule of Criminal Procedure 112, regarding publicity, broadcasting, and recording of proceedings indicates that: "[e]xcept as provided in paragraph (D), the stenographic, mechanical, or electronic recording, or the recording using any advanced communication technology, of any judicial proceedings by anyone other than the official court stenographer in a court case, for any purpose, is prohibited." Pa.R.Crim.P. 112(C). Paragraph D relates to a recording made by a defendant or affiant for purposes of a written record for subsequent proceedings. Additionally, this Commonwealth's Code of Judicial Conduct, Canon 3.A(7) limits any "broadcasting, televising, recording or taking photographs in the courtroom" to very limited circumstances, largely for educational purposes.[1]

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[1] > Judges should prohibit broadcasting, televising, recording or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:
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> (a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record or for other purposes of judicial administration;
>
> (b) the broadcasting, recording, or photographing of investitive, ceremonial, or naturalization proceedings;

(continued…)

This tension does not impair access to trials. As discussed above, the media has the same right to attend trials as any other member of the public. See Nixon, supra,

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(…continued)

> (c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:
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> (i) the means of recording will not distract participants or impair the dignity of the proceedings; and
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> (ii) the parties have consented; and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproductions; and
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> (iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and
>
> (iv) the reproduction will be exhibited only for instructional purposes in educational institutions.
>
> (d) the use of electronic broadcasting, television recording and taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions of any trial court nonjury civil proceeding, however, for the purposes of this subsection 'civil proceedings' shall not be construed to mean a support, custody or divorce proceeding. Subsection (iii) and (iv) shall not apply to non-jury civil proceedings as heretofore defined. No witness or party who expresses any prior objection to the judge shall be photographed nor shall the testimony of such witness or party be broadcast or telecast. Permission for the broadcasting, televising, recording and photographing of any civil nonjury proceeding shall have first been expressly granted by the judge, and under such conditions as the judge may prescribe in accordance with the guidelines contained in this Order.

Fenstermaker, supra. Although many media organizations have ethical policies limiting their publication of the names of victims of crime, the courts and the legislature do not limit the media's ability to publicize the information obtained by attending these trials.[2] While access to the audio tape at issue in this case does not directly implicate the rules regarding recording court sessions, I find that a presumption of access to audio and video tapes is difficult to reconcile with the rules propagated by this Court which prohibit recording of courtroom proceedings. However, if one assumes that information is not required to be delivered to the media in its most dramatic form, and thus a transcript of the audio tape is sufficient, the tension between the rules and access to judicial documents is greatly reduced. When there are "no restrictions upon press access to, or publication of any information in the public domain," Constitutional rights are not implicated. Nixon at 609, 98 S.Ct. at 1318, 55 L.Ed.2d at 586. Information was made available. There is no constitutional requirement that copies of the actual tapes at issue be released.

On the narrow ground that the decision regarding access to judicial records is within the sound discretion of the trial court, and Judge James did not abuse that discretion by providing access to a copy of the audio tape in question, I would join the majority opinion's result. I cannot join the sweeping determination that access to copies of audio (and perhaps video) tapes used in the judicial process must be given to the press, particularly where, as here, the tape was played at a preliminary hearing and no admissibility determination had been made.

[2] See 42 Pa.C.S. § 5988 (prohibiting the **courts** from releasing the name of a juvenile victim of physical or sexual abuse).