Tenn. Op. Atty. Gen. No. 95-126, 1995 WL 767275 (Tenn.A.G.)

Office of the Attorney General
State of Tennessee

Opinion No.
95
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126

December 28, 1995

Validity of banning photographic equipment from city board meeting under the First Amendment and Article I, Section 19 of the Tennessee Constitution -- Reconsideration of Opinion No. 95-101

Representative Ronnie M. Cole
24 Legislative Plaza
Nashville, Tennessee 37243-0176

QUESTION

A proposed ordinance of the City of Bells makes it unlawful for anyone to bring any video or photographic equipment into an official meeting of the Board of Mayor and Aldermen. It further prohibits taking photographs of anyone in the room during an official meeting. Would such an ordinance violate the First Amendment, Tennessee's Open Meetings Act or otherwise be invalid?

OPINIONS

1. Since neither the Supreme Court of the United States, the Tennessee Supreme Court nor any federal appeals court has recognized the existence of a right of access to public meetings under the First Amendment beyond the courtroom context, this Office remains of the opinion that the proposed ordinance would not violate the First Amendment.

2. The proposed ordinance's blanket ban on bringing video or photographic equipment into an official meeting of the Board, as well as its prohibition against taking photographs of anyone at the meetings, would violate Article I, Section 19 of the Tennessee Constitution as implemented by the Open Meetings Act, Tenn. Code Ann §§ 8-44-101, et seq. The breadth of the proposed total ban goes well beyond that which is reasonably related to the city's legitimate interests.

ANALYSIS [FN1]

I. Right of Access under the First Amendment

The First Amendment states in pertinent part that “Congress shall make no law ... abridging the freedom of speech, or of the press ....” The Supreme Court has found that the expressly guaranteed freedoms of the First

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Amendment have as a major purpose the protection of the free discussion of governmental affairs.Mills v. Alabama, 384 U.S. 214, 218, 86 S.Ct. 1434, 116 L.Ed.2d 484 (1966). The Court observed in Globe Newspaper Co. v. Superior Court for the County of Norfolk, 457 U.S. 596, 605-06, 102 S.Ct. 2613, 2619, 73 L.Ed.2d 248 (1982) that "[b]y offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self government ...." The Supreme Court has derived from these core purposes of the First Amendment a limited right of access of constitutional stature.

The Court described this constitutional right in the context of the right of access to a criminal trial in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576, 100 S.Ct. 2814, 2827, 65 L.Ed.2d 973 (1980):

> It is not crucial whether we describe this right to attend criminal trials to hear, see and communicate observations concerning them as a 'right of access,' cf. Gannett, supra, 443 U.S., at 397, 99 S.Ct., at 2914 (POWELL, J., concurring); 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), or a 'right to gather information,' for we have recognized that 'without some protection for seeking out the news, freedom of the press could be eviscerated.' Branzburg v. Hayes, 408 U.S. 665, 681, 92 S.Ct. 2646, 2656, 33 L.Ed.2d 626 (1972). The explicit, guaranteed rights to speak and to publish would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily.

***2** See Cable News Network v. American Broadcasting Company, 518 F.Supp. 1238, 1242 (N.D. Ga. 1981) ("there does exist a limited right of the public and the press to access to information concerning governmental activity"). See also Nixon v. Warner Communications, Inc., 435 U.S. 589, 609, 98 S.Ct. 1306, 1317-18, 55 L.Ed.2d 570 (1978)("The First Amendment generally grants the press no right to information about a trial superior to that of the general public").

This right of access has been held to apply to criminal trials for two reasons. First, "the criminal trial historically has been open to the press and general public... [and] Second, the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole." Globe Newspaper Co. v. Superior Court for the County of Norfolk, 457 U.S. at 605-06, 102 S. Ct. at 2619.

Although recognizing this right as one of constitutional stature, the Supreme Court has found that it is not absolute. To the extent the press and public are completely barred from access, a compelling governmental interest must be established and the bar must be narrowly tailored to serve that interest. However, the Court recognizes that to the extent access limitations resemble time, place and manner restrictions on protected speech, they would not be subject to such strict scrutiny.Globe Newspaper Co. v. Superior Court for the County of Norfolk, 457 U.S. at 607, n. 17, 102 S.Ct. at 2620, n.17. The most recent line of federal court cases regarding blanket bans on cameras in the courtroom have found that such rules resemble "time, place and manner restrictions" on protected speech and that an intermediate level of scrutiny is appropriate.

In U.S. v. Hastings, 695 F.2d 1278, 1279 (11th Cir. 1983), the Eleventh Circuit upheld the constitutionality of a court rule which "prohibit[s] televising, broadcasting, recording, and photographing proceedings in federal criminal trials...."Initially, the Hastings Court determined the appropriate level of scrutiny:

> The federal rules in the case before us [prohibiting cameras in the courtroom] resemble 'time, place, and manner' restrictions. Rule 53 and Local Rule 20 do not absolutely bar the public and the press from any portion of a criminal trial; rather, they merely impose a restriction on the manner of the media's news gathering activities. The press is free to attend the entire trial, and to report whatever they observe. Thus, we conclude that strict scrutiny does not apply in the instant case, and the per se rules here might well survive the lesser level of scrutiny which is applicable....

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Id. at 1282. Then, the Eleventh Circuit defined this less restrictive test in the context of a ban on cameras in the courtroom:

> We derive from recent Supreme Court cases the appropriate level of scrutiny for a 'time, place, and manner' regulation that restricts access in the courtroom. Such a restriction is constitutional if it is reasonable, if it promotes 'significant governmental interests,' and if the restriction does not 'unwarrantedly abridge ... the opportunities for the communication of thought.'

***3** Id. See also U.S. v. Kerley, 753 F.2d 617, 620 (7th Cir. 1985) (adopting the Eleventh Circuit approach of a "reasonable time, place and manner" regulation in the context of a ban on cameras in the courtroom); U.S. v. Yonkers Board of Education, 747 F.2d 111, 114 (2d Cir. 1984) ("Rule [prohibiting cameras in courtroom] is simply a 'time, place and manner' restriction, which should not be subjected to strict scrutiny, but should be upheld if reasonable."); Conway v. United States, 852 F2d 187, 188 (6th Cir. 1988). Likewise, some federal appellate courts have recognized this limited right of access in the context of civil trials.Westmoreland v. CBS, Inc., 752 F.2d 16, 23 (2d Cir. 1984)("[W]e agree with the Third Circuit ... that the First Amendment does secure to the public and the press the right of access to civil proceedings ....")

In determining whether a uniform ban on cameras in the courtroom would survive such intermediate scrutiny, the Eleventh Circuit enumerated two institutional interests: (1) "courts have an interest in preserving order and decorum in the courtroom..." and (2) "there is an institutional interest in procedures which tend to insure a fair trial."Id. at 1283.[FN2] In Estes v. Texas, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 234 (1965), the Supreme Court of the United States articulated the following interests for banning cameras from criminal trials:

> 1. The potential impact of television on the jurors is perhaps of the greatest significance... The conscious or unconscious effect that this may have on the juror's judgment cannot be evaluated, but experience indicates that it is not only possible but highly probable that it will have a direct bearing on his vote as to guilt or innocence.
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> 2. The quality of the testimony in criminal trials will often be impaired. The impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable ....
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> 3. A major aspect of the problem is the additional responsibilities the presence of the television places on the trial judge. His job is to make certain that the accused receives a fair trial. This most difficult task requires his undivided attention... The telecasting of a trial becomes a political weapon, which, along with other distractions inherent in broadcasting, diverts his attention from the task at hand -- the fair trial of the accused ....
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> 4. [W]e cannot ignore the impact of courtroom television on the defendant. Its presence is a form of mental -- if not physical -- harassment, resembling a police line-up or the third degree.

Estes v. Texas, 381 U.S. at 545-49, 85 S.Ct. 1634-36.[FN3]

The Hastings Court balanced these interests, which are primarily grounded in the Sixth Amendment, against the interests in favor of permitting media coverage: (1) "the right of access to criminal trials, fosters public confidence in the fairness of the criminal justice system;" (2) "the right of access allows the public to operate as

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a check on potential abuses in the judicial system;" and (3) "the right of access promotes the truth-finding function of the trial." Hastings, 695 F.2d at 1282-83. After weighing these competing interests, the Hastings Court struck the balance in favor of the ban. Id. Likewise, other federal courts have similarly upheld such a ban against First Amendment challenge in the criminal trial context.Conway v. U.S. 852 F.2d 187, 188 (6th Cir. 1988)(citation to "at least three federal circuit courts of appeals [upholding] the constitutionality of Rule 53 [banning cameras in federal courtrooms]").

***4** Neither the Supreme Court of the United States, the Tennessee Supreme Court nor any federal court of appeals has recognized this limited right of access under the First Amendment outside the context of access to courtroom trials. In the absence of such authority, this Office cannot conclude that the courts would necessarily recognize such a limited right of access in the context of city council meetings. Moreover, at least one federal district court has held that a ban on cameras in the chamber of a local legislative body does not violate the First Amendment.Johnson v. Adams, 629 F.Supp. 1563, 1564 (E.D.Tex. 1986). In particular, the district court in Texas stated:

> The Titus County Commissioners Court has the privilege to restrict the use of cameras in presence during its sessions if it so wishes. The House of Representatives and the Senate of the United States do. The Titus County Commissioners are no less the master of their own house than are the members of those great deliberative bodies.

Id. at 1564-65. Accordingly, this Office remains of the opinion that an ordinance banning persons with cameras, camcorders or other photographic equipment from a city council meeting does not violate any currently recognized First Amendment rights.

II. Article I, Section 19 of Tennessee Constitution and Open Meeting Act

On the other hand, Article I, Section 19 of the Tennessee Constitution establishes a right to "open government" that expressly extends beyond court proceedings to other governmental meetings. In particular, the provision states:

> That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.

In Dorrier v. Dark, 537 S.W.2d 888, 892 (Tenn. 1976), the Tennessee Supreme Court reached the following conclusion as to the relationship between this constitutional provision and the Open Meetings Act:

> Thus, in the first two sentences of [Article I, Section 19], the Constitution provides freedom of the press, open government and freedom of speech. Clearly, the Open Meetings Act implements the constitutional requirement of open government.

(Emphasis supplied).

In drawing that relationship, the Tennessee Supreme Court emphasized the broad remedial purposes of the Act. Accordingly, the Act should be liberally construed. Marta v. Metropolitan Government of Nashville and Davidson County, 842 S.W.2d 611, 616 (Tenn. App. 1992)("The Sunshine Law is remedial. [citation omitted] It should, therefore, be construed broadly to promote openness and accountability in government.") As expressed by the Tennessee Supreme Court, the core purposes of the Open Meetings Act and Article I, Section 19 are parallel to those found by the United States Supreme Court from which it derived a limited right of access to criminal trials. But the Tennessee constitutional provision, which is "implemented" by the Open Meetings Act,

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clearly extends beyond criminal trials to a broad class of governing bodies or boards. Thus, this Office concludes that the Tennessee Constitution does guarantee a right of access that is expressly extended to meetings of governing bodies and boards through the Open Meetings Act.

***5** The Tennessee Supreme Court has historically applied analytical standards similar to those applied by the federal courts as to parallel constitutional protections. Just as federal courts have treated camera bans in the courtroom context as "manner" restrictions on the right of access, so we would expect our state courts to treat the ban under consideration here as resembling a "time, place and manner" restraint on protected speech and would subject such regulations to an intermediate level of scrutiny. See, e.g., H & L Messengers v. City of Brentwood, 577 S.W.2d 444, 450-53 (Tenn. 1979) (applying a reasonable time, place and manner analysis under the First Amendment to Article I, Section 19 in the context of commercial speech).

Unlike the federal courts' assessment of the interests supporting the ban on cameras in criminal jury trials, it might be argued that the governmental interests in support of a per se ban on all cameras in a city council meeting are not as weighty. First, the Sixth Amendment right to a fair trial for a criminal defendant is not implicated in any fashion during the city council meeting. Second, the concern of the "adverse impact [of television coverage] on jurors, witnesses, and other trial participants" on the truth seeking function in a criminal or even civil trial is also not present at a city council meeting, i.e. there are neither jurors nor subpoenaed witnesses whose testimony may be tainted by the presence of a television camera in a city council chamber.

On the other hand, a similar institutional interest, which carries over from the courtroom trial context to the city council chamber, is maintaining decorum and an orderly meeting. Generally, a city council may make reasonable rules to ensure that its meetings are conducted in an orderly and efficient manner. Eugene McQuillin, The Law of Municipal Corporations § 13.07 (3rd ed. 1992). Further, a city council may impose reasonable restrictions on persons in attendance at public meetings. Id. More specifically, under its charter, the City of Bells, Tennessee may exercise the State's police power as delegated by the General Assembly to protect the public health, safety and welfare and all implied powers that are necessary to carry out the powers expressly given. See 1994 Tenn.Priv.Acts, ch. 80 § 4(l) & (t). In subjecting the proposed ordinance to a "time, place and manner" test, one must balance these competing interests. The question is whether these interests would be held sufficient to justify a blanket (or some lesser) restriction on the presence of photographic equipment and the taking of pictures at the city council meeting.

The reasonableness or validity of a municipal regulation that prohibits the activity of recording what takes place at a public meeting -- by photograhic or other means -- has not been addressed by the courts of this State. Tennessee's courts have determined that the policy of the Open Meetings Act is to promote openness and accountability in government. See Dorrier v. Dark, 537 S.W.2d at 892; Marta v. Metropolitan Government of Nashville, 842 S.W.2d at 616. They have also recognized that those policies must be balanced against the power of public officials to conduct their public meetings in an orderly fashion.Whittemore v. Brentwood Planning Com'n, 835 S.W.2d 11 (Tenn. App. 1992). In other jurisdictions where the courts have addressed the issue, they have recognized that the policy of state "sunshine laws" dictates openness and accountability in government and that a municipal regulation restricting the activity of recording a meeting is invalid unless the regulation reasonably furthers public safety and welfare or furthers a governing body's ability to conduct its meetings in an orderly and efficient manner.

***6** For instance, in Belcher v. Mansi, 569 F.Supp. 379 (D. R.I. 1983), a United States District Court in Rhode Island struck down a school committee's policy that prohibited audio tape recording of committee meetings

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without the express knowledge and consent of the committee. Like Tennessee's Act, the Rhode Island law demanded that certain meetings be open to the public, and the law contained no express provision allowing persons in attendance to tape record, videotape, or broadcast the meeting. The Court found, however, that tape recording would further the law's purpose because it would provide persons unable to attend the meeting with an accurate and complete record of the proceedings. Although the Court found the policy of a blanket ban to be invalid, the Court stated that restrictions designed to preserve the orderly conduct of a meeting or to safeguard public facilities against damage by the use of equipment unsuited to the meeting hall's electrical system might legally be imposed.

Another example is Mitchell v. Board of Education of Garden City School District, 493 N.Y.S.2d (N.Y.App.Div. 1985). There, the Court found that a ban on tape recorders was too restrictive "particularly when viewed in light of the legislative scheme embodied in the Open Meetings Law ... which was enacted and designed to enable members of the public to 'listen to the deliberations and decisions that go into the making of public policy'."493 N.Y.S.2d at 826. The Court recognized that the local body could adopt rules for its operation, but not rules that were irrational and unreasonable. The Court rejected as without basis the local body's arguments in favor of the rule: 1) that it was needed to protect members of the public who speak at the meetings; 2) that tape recordings could be altered or used out of context; and 3) that tape recordings were unnecessary because, under the open meetings law, the board kept minutes and made them available to the public."[W]e find that a prohibition against the use of unobstrusive recording devices in inconsistent with the goal of a fully informed citizenry," the Court stated, and accordingly, annulled the board's ban against recorders.

Finally, in Peloquin v. Arsenault, 616 N.Y.S.2d 716 (N.Y.Sup.Ct. 1994), the Court invalidated a blanket ban on all cameras and camcorders when the sole justification advanced for the policy was that certain board members and members of the public found video recording to be distracting because they did not wish to appear on television. While the Court seemed to acknowledge that a local body could legally restrict video recording that was "obtrusive and distracting," the Court found the board's justification to be insufficient.

A similar concern has been expressed as reason for the proposed ordinance in Bells, Tennessee. According to a newspaper account submitted with the opinion request to this Office, certain members of the public have complained about being videotaped when speaking at city board meetings. In Peloquin, however, that concern was not deemed sufficient by itself to render the proposed ordinance reasonable. Moreover, members of a city governing body advanced a similar argument in Dorrier v. Dark, asserting that their free speech rights were violated by having to deliberate in public. But the Tennessee Supreme Court found that any chilling effect was at most a subjective matter with the individual member of the public body in question and rejected the argument. It is reasonable to assume that Tennessee courts would also reject as a justification for the proposed Bells ordinance the subjective feelings of persons attending a public meeting.

***7** Upon reconsideration of Op. Tenn. Atty. Gen. 95-101, this Office is of the opinion that it does not matter whether the Open Meetings Act itself limits the conditions that governing bodies may place upon members of the public who attend their meetings. Under Article I, Section 19 of the Tennessee Constitution, a city council may only regulate access to its public meetings in a manner that reasonably serves public safety and welfare, or its ability to conduct orderly and efficient proceedings. Based on the authorities discussed above, it is the opinion of this Office that these interests would not be deemed sufficient to justify a total ban on video and photographic equipment at city council meetings or on photographing those present at the meeting. The breadth of the proposed total ban goes well beyond that which is reasonably related to the city's legitimate interests. This Office is further of the opinion that city governing bodies may regulate the use of such devices, but only in a

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manner reasonably calculated to serve the public safety and welfare or the interest in conducting efficient and orderly public meetings. For example, a city council may prevent cameras from being operated in a manner that actually disrupts a council's proceedings, that presents a danger to the public safety, or that otherwise prevents the council from conducting an orderly and efficient meeting. Moreover, a city board would not be required to make special provisions in order to accommodate such devices.

Charles W. Burson
Attorney General & Reporter

Michael E. Moore
Solicitor General

Michael W. Catalano
Associate Solicitor General

Gina J. Barham
Deputy Attorney General

[FN1]. This opinion letter is a reconsideration of Opinion No. 95-101 (October 2, 1995) and Opinion No. 77-251 (August 4, 1977). Those opinions are withdrawn, and this opinion is substituted in lieu thereof.

[FN2]. Although a similar interest of preserving decorum may also exist in legislative chambers, there is not a similar interest in preserving a defendant's Sixth Amendment right to a fair trial before a meeting of a legislative body.

[FN3]. In Estes, a celebrated criminal trial in the early 1960s, the Court did foresee the possibility that technology might alter its conclusion that the presence of television cameras with their attendant cables, lights and microphones deprived the defendant of his right to a fair trial under the Sixth Amendment. The Court noted that "[w]hen advances in theses arts permit reporting by printing press or by television without their present hazards to a fair trial we will have another case."381 U.S. at 540, 85 S.Ct. at 1631.

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