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THE RIGHT TO A PUBLIC TRIAL IN CRIMINAL PROSECUTIONS

While the Wyoming Constitution makes no provision for an accused's right to a public trial, the Supreme Court of this state has held that the prosecution of a criminal must be public even though there is no specific provision to that effect in the State Constitution.[1] In reviewing *State v. Holm*,[2] our Supreme Court held that a court order for the exclusion of spectators from the courtroom during the taking of testimony did not deprive the accused of a public trial and therefore was not a reversible error upon the part of the trial court. The exclusionary order did not include the families or friends of the defendant and the prosecutrix, and at the resumption of the trial following the making of the order, there were thirty-five or more people in the audience. Thereafter, the number of spectators ranged from forty to forty-five persons.

The Sixth Amendment to the United States Constitution provides that, "In all criminal prosecutions, the accused shall enjoy the right to a . . . *public trial.* . . ." (emphasis added) It has been well established that the term "shall" is, and necessarily must be, interpreted as denoting a mandatory direction to those judicial bodies using constitutional and statutory provisions as their basis for judicial determination. This is especially true where the public or private right of any one depends upon its being used in a mandatory sense.[3] In view of this Constitutional requirement, the *Holm* case raises the question as to the extent and under what circumstances a trial court may exclude the "public" from a criminal trial. It is with these questions that this note will deal.

The origin of this Constitutional guarantee is not clear, but the Supreme Court of the United States has discussed its possible derivation,[4] stating in part:

> The traditional Anglo-American distrust of secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French Monarchy's abuse of *letre de cachet.*

Another thought is expressed by Wigmore[5] who suggests that the admission of the public would give rise to the reasonable possibility that persons unknown to the parties or their counsel, but having knowledge of the facts, might be drawn to the trial and lend assistance to the administration of justice. However, Wigmore cited only one case for this

1. State v. Holm, 67 Wyo. 360, 224 P.2d 500 (1950). Nothing appeared in the record as to whether or not the persons present and admitted at various stages of the trial, consisted entirely of the family and friends of the accused and prosecutrix, or whether members of the general public were also present.
2. Id. at 512.
3. Black, Law Dictionary (4th ed. 1951) p. 1541.
4. In re Oliver, 333 U.S. 257, 268 (1948).
5. 3 Wigmore, Evidence, § 1834 (3rd ed. 1940).

possibility and in view of poor courtroom attendance and pretrial investigation, such occurrence is probably even less likely today.

Regardless, however, of the exact origin of the constitutional requirement for a public trial, or the reasons advanced in its favor, this same undefined fear of the deprivation of personal and public liberty has had its effect upon, and has carried over into, the state level as shown either in provisions of the various constitutions[6] or in the judge-made common law of the state.[7] It should be noted here that although the Sixth Amendment is necessarily obligatory and binding upon federal courts, the United States Supreme Court has stated by way of dictum that this amendment *ex proprio vigore* ". . . does not apply to the trial of criminal prosecutions by a state."[8] By virtue of the Fourteenth Amendment, however, the Sixth Amendment requirement of a public criminal trial is obligatory upon the states.[9]

What is the meaning of the term, "public trial"? It has been defined as, "a trial held in public, in the presence of the public or in a place accessible and open to the public at large or persons who may be properly admitted."[10] The term has also been defined as, "a trial by jury"[11] and "one which is not limited or restricted to any particular class of the community but is open to the free observation of all."[12] Thomas M. Cooley states that the term "public" does not mean that every person who sees fit shall, in all cases, be permitted to attend but the requirement is fairly observed if, without partiality or favoritism, a "reasonable portion of the public" is allowed to attend.[13] It appears that this latter definition has been the most readily acceptible by a majority of the courts.

No court has gone so far as to place a numerical figure upon the number of persons who should be allowed to attend in order to fulfill the requirement of a public trial. The matter has been left to the discretion of the trial judge subject, however, to review on the question of whether or not there appears to be an abuse of such discretion. While, as stated above, there has been no express figure set, the United States Supreme Court has stated that, "At the very least an accused is entitled to have his friends, relatives, and counsel present. . . ."[14] By such a statement it is reasonable to conclude that we do have a bare minimum which must be allowed. However that may be, the trial courts of neither

6. A provision for a public trial appears in the constitutions of all but four of the several states. Those states which have no such provision, including Wyoming, Massachusetts, New Hampshire and Virginia, have nevertheless held that the right to a public trial is present through implication in the light and spirit of the due process clause of the Fourteenth Amendment.
7. State v. Holm, supra note 1.
8. Gaines v. Washington, 227 U.S. 81, 85 (1928).
9. State v. Holm, 67 Wyo. 360, 224 P.2d 500 (1950).
10. Black, Law Dictionary (4th ed. 1951) p. 1676.
11. State ex rel. Dressler v. Rigg, 252 Minn. 239, 89 N.W.2d 699, 702 (1958).
12. People v. Greeson, 230 Mich. 124, 203 N.W. 141, 149 (1909).
13. 1 Cooley, Const. Lim. 647 (8th ed. 1927); see also, People v. Tietelbaum, 163 C.A.2d 184, 329 P.2d 157 (1958).
14. In re Oliver, 333 U.S. 257, 272 (1948).

federal or state jurisdictions may exclude the public *indiscriminately, generally* or *entirely.*[15]

In 1913, a federal circuit court decision[16] held that an accused was not deprived of a public trial by an order of the court excluding spectators from the courtroom where court officers, members of the bar, and persons in any manner *connected* with the case were permitted to remain during testimony by the minor prosecutrix of the crime of rape. The court stated:

> We think the better doctrine is that, it is not reversible error to exclude spectators . . . when there is no showing whatever that the defendant was prejudiced thereby or deprived of the presence, aid or counsel of any person whose presence might have been of advantage to him.

This statement was vigorously attacked in the opinion of *Davis v. United States*[17] wherein the court held that the denial of a constitutional right *necessarily* implies prejudice and nothing more than that need be shown. Appellate courts have generally found that it is not an abuse of the trial court's discretion to exclude portions of the general public from the courtroom where it is necessary in order to relieve a witness from embarrassment (by reason of having to testify to delicate or revolting facts) or where it is demonstrated that the witness cannot, without being freed from such embarrassment, testify to facts material to the case.[18] In this respect it is interesting to note that the appellate court in the *State v. Poindexter*[19] case held that the trial court's *refusal to exclude* specific persons (prison officials) so that a prison inmate, who refused to testify in their presence, could present his testimony, deprived the defendant of a fair trial and therefore was a reversible error on the part of the trial court.

There has been a general, if not a uniform, holding on the part of both the federal courts and state courts that in order to preserve a fair trial to the accused, the trial court judge may exclude the public (or at least portions thereof) from the courtroom, or restrict attendance for various *sound* reasons. Most prominent among these reasons are: (1) to prevent over-crowding of the courtroom, (2) to maintain proper decorum in the courtroom so that the administration of justice will not be impeded (drunkeness, distracting verbal outburst and other types of behavioral misconduct), and (3) where the public interest necessarily requires it; for example, to protect the morals of a certain segment of the

15. United States v. Kobli, 172 F.2d 919 (3rd Cir. 1949).

16. Regan v. United States, 202 F. 488 (9th Cir. 1913); contra, Davis v. United States, 247 F. 394 (8th Cir. 1917).

17. Davis v. United States, supra note 16, at 398.

18. Regan v. United States, 202 F. 488 (9th Cir. 1913); Callahan v. United States, 240 F. 683 (9th Cir. 1917); State v. Poindexter, 231 La. 630, 92 So. 2d 390 (1957); United States v. Geise, 262 F.2d 151 (9th Cir. 1958); contra, Tanksley v. United States, 145 F.2d 58 (9th Cir. 1944). Note Judge Wilbur's well reasoned dissent in the Tanksley case supporting the justification and reasoning of the Regan opinion.

19. State v. Poindexter, supra note 18.

public especially where the case involves scandalous or indecent matters which might be demoralizing to young and immature minds.[20]

The defendant in a criminal prosecution, by virtue of the Sixth Amendment to the federal Constitution or similar state constitutional provisions or the due process clause of the Fourteenth Amendment to the federal Constitution, has a right to a "public trial" and many of our courts hold that the defendant also has the right to waive this right, either expressly or impliedly.[21] In *United States v. Sorrentino,*[22] it was said, "To deny the right of waiver . . . would be to convert a *privilege* into an *imperative.*" However, it has been held by some courts that a defendant cannot waive a public trial because a trial is a public event and what transpires in the courtroom is *"public property."*[23] According to these cases, even though the right to a public trial is for the defendant's benefit, it does not follow that he may waive this right to the detriment of the public who, except under some circumstances, have a public right to attend the full course of the proceedings in order to see that the defendant is fairly dealt with and to observe how their *servants* conduct public business. It appears that a majority of the courts prefer and follow the former view, that the defendant may waive a public trial, on the basis that a privilge, or right, cannot be *forced* upon the defendant if he prefers not to take advantage of the privilege offered to him.

There apparently have been no express holdings as to who has, or should have, the burden of securing a public trial for the defendant, but the language of numerous cases lead to the conclusion that the majority of the courts feel that the burden is upon the accused rather than upon the court or the prosecution.[24] These courts have reasoned that since other such *permissive* rights, such as *trial by jury* and *aid of counsel,* may be waived it would follow that he may also have the privilge of choosing whether or not to have a public trial. Courts holding that the defendant does not have power to waive this guarantee presumably might rule otherwise. Under the prevaling view, if he chooses to avail himself of

20. Davis v. United States, 247 F. 394 (8th Cir. 1917); Commonwealth ex rel. Paylor v. Cavell, 185 Pa. 176, 138 A.2d 246 (1958); State v. Holm, 67 Wyo. 360, 224 P.2d 500 (1950).

21. United States v. Kobli, 172 F.2d 919 (9th Cir. 1949); Lavery v. Commonwealth, 101 Pa. 560 (1882); People v. Cash, 52 C.2d 841, 345 F.2d 462 (1959); Paylor v. Cavell, 185 Pa. 176, 138 A.2d 246 (1958); State v. Teitelbaum, 163 C.A.2d 184, 329 P.2d 157 (1958).

22. United States v. Sorrentino, 175 F.2d 721 (3rd Cir. 1949), cert. denied, 338 U.S. 868 (1949).

23. Kirstowsky v. Superior Court, 143 C.A.2d 745, 300 P.2d 163 (1956). This action was commenced by a newspaper reporter who had been excluded from a murder trial, along with all other spectators except those persons which the defendant had requested to remain. The court, on appeal, held the exclusion to be a deprivation of the defendant's right to a public trial because of the order's sweeping and unlimited nature but pointed out that the right of the press to attend was, ". . . no greater than any other member of the public and may be excluded to the same but no greater extent as the general public."

24. United States v. Sorrentino, 175 F.2d 721 (3rd Cir. 1949), cert. denied, 338 U.S. 868 (1949). State ex rel. Dressler v. Rigg, supra note 11, at 702, ". . . it did not appear that the defendant *demanded* a public trial." (emphasis added)

this right he must take affirmative action and demand that his right to a public trial be recognized. Should he fail to demand a public trial he is deemed to have waived it and cannot later complain that he was deprived of his right to a public trial. This reasoning is somewhat analogous to that propounded by some courts in regard to the burden of securing a *speedy trial.*[25]

The issue of a constitutional deprivation by reason of the exclusion must be timely raised, by objection at the trial, or be deemed as having been waived by the defendant.[26] If the objection is timely raised, review upon this ground may be had an error is to be corrected through *appeal* and not by resort to the extraordinary remedy of *habeaus corpus* after conviction and imprisonment.[27]

By way of conclusion, the majority of courts, including Wyoming, appear to follow the definition of *State v. Nyhus,*[28] as interpreted by the *Regan* case and Judge Cooley, in regard to the meaning of the term "public trial." Following this line of thinking, the majority of courts hold that in the sound discretion of the trial court judge, spectators may be excluded under special circumustances, although not indiscriminately nor for the entire course of the proceedings. This is sound reasoning as it protects the accused from possible abuses of the trial court and, at the same time, affords the court the power and authority to maintain the proper courtroom atmosphere of dignity and respect which is due such an honorable and essential part of our everyday life and culture.

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25. U.S. Const. Amend. VI. See 11 Wyo. L.J. 44.
26. State v. Teitelbaum, 163 C.A.2d 184, 329 P.2d 157 (1958); United States v. Kobli, 172 F.2d 919 (9th Cir. 1949).
27. Baker v. Utecht, 161 F.2d 304 (8th Cir. 1947); cert. denied, 331 U.S. 856 (1947).
28. State v. Nyhus, 19 N.D. 326, 124 N.W. 71 (1909).