Supreme Court of the United States

October Term, 1968

In the Matter of:

LESTER GUNN, et al.,

Appellants.

vs

UNIVERSITY COMMITTEE TO END THE WAR IN VIET NAM, et al.,

Appellees.

Docket No. 269

Pt. 1

Place Washington, D. C.

Date January 13, 1969

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C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

LESTER GUNN, et al., Appellants;	:	
vs.	:	Case No. 269
UNIVERSITY COMMITTEE TO END THE WAR IN VIET NAM, et al., Appellees.	:	

Washington, D. C.
Monday, January 13, 1969

The above-entitled matter came on for argument at 1:50 p.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: Case No. 269, Lester Gunn, et al., appellants, versus University Committee to End the War in Viet Nam, et al.

Mr. Louisell?

ARGUMENT OF DAVID W. LOUISELL, ESQ.

ON BEHALF OF APPELLANTS

MR. LOUISELL: Mr. Chief Justice, may it please the Court:

Few cases that I have seen in recent years so much invoke the ancient admonition, "Oh to distinguish the reality of things from the tyranny of labels," or as this Court put it, I believe, in Trop against Dulles, "How simple would be the tasks of constitutional adjudication if the decision of specific problems were a matter of selecting the labels pasted upon them."

We respectfully submit, Your Honors, that the 3-judge District Court below, from the Western District of Texas, by seizing upon the label of Dombrowski against Pfister, without penetrating through to the context and the meaning in context of that teaching of this Court, that the 3-judge court has done violence to the realities of the situation, has defied logic, experience and history, and requires reversal.

Now, our facts here, Your Honors, are from a stipulation between the appellants' and the appellees' counsel, and from the affidavits filed by the individual plaintiffs and a

few of their fellow students, and the affidavits of the Sheriff of Bell County, Texas, and his deputies. That is the source of the facts here, those stipulations and affidavits.

Very briefly, on December 12, 1967, just a little more than four years within the shadow of Dallas, the President went to Central Texas College to make a dedicatory speech. The night before his arrival, the Secret Service had a conference with the local police officers of the surrounding cities, with the sheriffs of both counties. The land involved here lies in both Bell and Coryell Counties. They had a conference soliciting cooperation in protection of the President.

On the morning of December 12th, the plaintiffs and others, members of the committee, their associates, hearing that this event was going to take place, started out from Austin, about 60 or 70 miles from Killeen, and proceeded to the neighborhood of Killeen, Texas.

This college is near Killeen. Killeen serves one of the biggest military reservations in the United States, Fort Hood, thousands of troops stationed there, many of them on their way to Viet Nam, many of them just returned from Viet Nam.

These people, at least seven in number, and at least in two automobiles, proceeded to the area of the college where the President was to speak, and when they arrived there, he had begun to speak, or was about to begin.

They had their signs -- their signs of protest against the war in Viet Nam -- very shortly, almost immediately, I think I can say, after their arrival on the scene, violence broke out. I think I can put in a nutshell the condition of the violence by reference to one item in the evidence. A big, burly Sergeant was heard to remark, "Let me at 'em. They've never seen blood."

There were fisticuffs. Their signs were torn to shreds. It was a dangerous situation.

Q On the basis of those facts, I have a little difficulty seeing how they fit within the language of the Texas statute appearing on the bottom of page 2 and the top of page 3 of your brief.

A That is correct. I don't see how it was possible. Of course, we are dealing here with a rural area, a non-lawyer Justice of the Peace, and so forth. I don't see how it was possible to conceive that that statute would have any application to anything that these plaintiffs had been involved in. I want to enlarge upon that.

Q The statute seems to require at least some kind of noise, doesn't it?

A Precisely. It just had nothing to do, this particular statute, with any of the facts that the record shows.

Q Either noise or something akin to indecent exposure.

A That is precisely right.

Q Or the displaying of a weapon.

A As the statute reads, "Whoever shall go into or near any public place, or into or near any private house, and shall use loud and vociferous, or obscene, vulgar, or indecent language, or swear or curse, or yell or shriek, or expose his or her person to another person of the age of 16 years or over" -- another statute, of course, for those under 16 -- "or rudely display any pistol or deadly weapon in a manner calculated to disturb the person or persons present at such place or house shall be punished by a fine not exceeding $200."

Q I suppose it could be argued that the use of -- not of loud and vociferous, certainly -- but the use of obscene, vulgar or indecent language could be, by writing rather than orally --

A Undoubtedly, but there is no indication that there was any obscenity involved in the language here, or any indecent protest involved in the language.

The important thing to stress, it seems to me, in the study of the facts here, is that despite the occasion -- and there were about 25,000 --

Q Who do you represent, counsel?

A I represent the appellants, the Sheriff, the County Attorney, and the Justice of the Peace.

Q I am confused. You have just conceded that the statute had no applicability to this.

A I say that they were charged -- the charge under the statute did not cover any of the conduct --

Q I thought the three-judge court had struck down the statute for over-breadth, didn't it?

A It struck down the statute, as nearly as one can tell, for over-breadth, and it struck it down in the abstract, and it specifically said it wasn't examining into the application of the statute.

Q Well, your position, then, is what, may I ask?

A Our position is twofold: First of all, that in the situation that developed here, with a dismissal of these foolish criminal charges under the so-called "Disturbed" or "Dist'd the Peace" complaint that had been filed, the dismissal of those charges, and the complete absence of a scintilla of indication that the State of Texas was using this statute to repress freedom of speech rendered the case purely an advisory proposition and that the 3-judge court should have granted the motion to dismiss.

That is the first proposition.

The second proposition is that if you do have to reach the question of the statute's constitutionality, or if the court below had to, on its face it is clearly not an unconstitutional statute as vague or over-broad.

Q You say that as it was interpreted, the law, that it was unconstitutional?

A They didn't interpret it below, Your Honor.

Excuse me. I mean they didn't apply it to the facts. You will note, from the opinion of the court below, on page 89, the court says:

"Before we discuss the issues presented as to the merits of this controversy, it may be wise to state what is not involved."

At the top of page 89.

"This case does not involve in any way an appraisal of the constitutionality of the application of the statutes to the plaintiffs. We do not evaluate whether Article 474 was constitutionally applied to these plaintiffs' activities. Our sole concern is the determination of whether Article 474, on its face, is unconstitutional," and so forth.

Q Where is the injunction in the record?

A The injunction, I must admit, is couched in very unusual format. The injunction comes at the very end of that opinion on page 92, at the bottom of the page.

Q "They are entitled to their declaratory judgment that the statute is impermissibly unconstitutionally broad and to injunctive relief against the enforcement of Article 474, as now worded, insofar as it may affect rights guaranteed under the First Amendment." Is that it?

A That is correct.

Q Is that all we have in the way of an order?

A That is all we have by way of a judgment.

Q And is that what is here before us for review?

A That is what is here. That is the appeal that is taken.

Q And you say that what we should do is reverse that order, to the extent it is an order, and what -- remand with direction to dismiss the complaint?

A That would be the correct procedure; reverse with instructions to dismiss the complaint as utterly a nonexistent controversy.

Q We never reverse in the case of a moot case. We vacate.

A Yes, Your Honor.

Q You say this is a nonexistent controversy?

A That is precisely right. I think it can be shown-- if you wish, I can get right into that. I might just mention a little more of the chronology here, in case it isn't completely clear.

The point I wanted to stress about the facts is that no State official, no State Trooper, no Sheriff, no city policeman, did anything to inhibit these people coming and making their protest.

Q Counsel, may I ask you this question: You have two problems here as I understand this case. One is a Dombrowski issue of jurisdiction. The other is a question as to whether this

statute is unconstitutional on its face.

Now, what actually happened here is that there was a criminal prosecution of these people who are here as appellants. That was dismissed. There was no basis for it under the statutes, according to the Texas courts. That is not this case. Subsequently --

A The exact basis of the dismissal was; that it took place on a Federal enclave, and was not even within the jurisdiction of the State.

Q All right. Subsequently, this suit was instituted by the people who appear here as appellees.

A Right.

Q They were before a 3-judge court, and that 3-judge court granted a declaratory judgment and entered the order that you said, and then said "We will stay the mandate and we will not actually enter an order of injunction right now, but a declaratory judgment was granted"; is that right?

A Well, they said they would await any further injunctive order until a meeting of the Texas Legislature, which Legislature has convened.

Q They did say the plaintiffs are entitled to a declaratory judgment, and that they wouldn't do anything further by way of injunction until after the Texas Legislature met; is that right?

A But they also said that plaintiffs were entitled

to an injunction.

Q I understand that. Your argument here is that there was no jurisdiction under Dombrowski to entertain this action; is that right?

A That is correct.

Q And do you also argue that if jurisdiction lies, that nevertheless, the statute is not unconstitutional on its face?

A Precisely. Those are the two points that I wish to emphasize.

Now, to make the rest of the chronology very brief, remember, if I may say this: that it was the military police who detained these plaintiffs, and it was only after they had detained them, and that they were brought into the presence of the State people, that they were taken by the State people to the jail where this charge which, if it hadn't been dismissed, because of the Federal enclave, certainly would have had to be dismissed for the reasons already suggested from the Bench.

They were released on bail. Their attorney promptly came and got them released on bail, and it was on December 21st that they started this 3-judge suit.

On February 13, as already mentioned, all these criminal charges were dismissed, February 13, 1968. On February 15, therefore, the defendants, the appellants here, defendants in the 3-judge suit, moved to dismiss the suit for the reasons

already suggested from the Bench.

Counsel for these appellants wanted the motion -- in fact, he made a special motion to have his motion to dismiss heard first, but the court insisted on merging the motion to dismiss with a hearing on the merits and filed the opinion that we just read from, the concluding order part of it, on April 10th.

There was a motion for a new trial that was denied, a so-called addendum opinion written, and the appeal was taken to this Court.

Q I am just confused. Are you saying that that complaint does not make a charge under 474?

A I am saying that I cannot conceive how that complaint would make a charge -- that is, a sustainable charge -- under 474.

Q What it says is that, deposes and says that one Damon on the 12th did then and there unlawfully and willfully -- I guess that means "disturb the peace," is that right?

A That is right. Of course, in print it looks as though it were a new document, but it was a form merely filled in by the Justice of the Peace.

Q If this is not a charge under 474, what is it?

A Well, it was undoubtedly intended, Your Honor, by this lay Justice of the Peace, to be a charge, but you don't charge a person with disturbing the peace. You may, as a

preliminary matter, hoping for a plea of guilty, but a sustainable, legal charge has to be in the legal language that you are complaining about; that they did loudly and vociferously, in a public place, and so forth, just as you don't charge a man with murder; you charge him with having on such-and-such a date --

Q I know, but what I am trying to get at is that you are telling us that there is no issue under Section 474 before us, and never has been in this litigation; is that right?

A That there never was a valid criminal charge made against these people.

Q No, that's not my question. Are you telling us that this complaint makes no charge under 474 and, therefore, no question on the face or otherwise under 474 is even in this litigation?

A I am saying that this was not a sustainable legal charge under 474, in my judgment. But I don't suppose that is too important, because in any event, this was dismissed. This was dismissed because of the Federal enclave proposition. What had not been dismissed, Your Honor, because of the Federal enclave, it seems to me that unless it were correctly amended to state a charge, the judge would have had to throw it out on motion of the defendants, and if he didn't, certainly the Criminal Court of Appeals would have thrown it out.

Therefore, when they come into Federal Court with a 3-judge suit, there is just no real fight of any true kind to

complain about.

Now, if I may come to the substance of the case, as has already been indicated from the Bench, from a legal viewpoint this really merges into the two points you indicated, Mr. Justice, the advisory point and the question of the facial, so-called, unconstitutionality of the statute.

In addition to the cases in our brief on the advisory point, this Court will remember just at the last term, the comprehensive review of the whole Frothingham problem in Flast against Cohen, where the Court had occasion to go, I think, to the philosophic depths of the whole notion of justiciability and the advisory opinion as a function of it.

In addition to the cases cited in the brief, I invite particular attention to cases as old as the famous Mustad case, and even older, the case cited in the Flast against Cohen opinion, California against the San Pablo Railroad and the other cases cited in the Flast opinion.

But it really seems to me -- it really seems to me -- that the most recent cases of this Court, just the Princess Anne County Commission case decided at this very term, where a 10-day order was set aside because it was ex parte, with no chance for an adversary exchange. That case, although brought up by the appellees, I think, is excellent authority for a realistic appraisal of whether there was any contest, any genuine justiciable controversy before the Federal 3-judge court.

On the constitutionality of the statute, if that has to be reached, let me just say that if this statute is unconstitutionally broad, is guilty of over-breadth or vagueness, what about our California comparable section, 415 of the penal code? What about the New York section on disorderly conduct, revised as recently as 1965, Section 24.20 of McKinney's New York Statutes? What about the Connecticut statute that is set forth in detail in the case we cite, the case of Barber against Kinsella?

What about the Minnesota statute, to pick a midwestern jurisdiction? Minnesota Statutes Annotated, Section 609.72. Even the American Law Institute hasn't been able to do anything much more satisfactory than this Texas language in its proposed Section 250.2 on disorderly conduct, "makes unreasonable noise or offensively coarse utterance," and so forth.

I submit in confidence that a condemnation of the Texas statute, written, of course, not in scientific jargon, not so many decibels, but in the common parlance of the country, is, on its face, unconstitutional. If it ever has been, or if it ever is applied in such a way as to deny people their First Amendment rights, or to inhibit them in any realistic sense, not only does Texas law, but Federal law under this Court's holding in Monroe against Pape, provides a very fine remedy when there is a true controversy.

Q Well, since these complaints were dismissed

during the course of this civil proceeding in the Federal Court, are you also making the argument that the mere fact of the dismissal removed any basis upon which the 3-judge court could either render a declaratory judgment or injunctive relief? There was nothing to enjoin, no prosecutions to enjoin, and nothing about which to give a declaratory judgment since there was no threat of invoking this statute against these people in the future; is that what you are saying?

A Not precisely that, because if, in fact, the threat of the statute's application to inhibit First Amendment rights lurked in the background, as in the Dombrowski case --

Q What do you do in Zwickler and Koota, where we said, when we sent it back to the 3-judge court, this may not be a situation for a declaratory judgment at all. There are elements required to maintain a declaratory judgment. We told them they couldn't have any injunction in that case. They would be entitled, at most, to a declaratory judgment, but only if that was the proper suit for a declaratory judgment in the circumstances within the elements that controlled it.

Is that what this is?

A Not at all. In that case there was a very serious, basic, substantive conflict about whether free speech --

Q You seem so anxious to get us to say that they were wrong on reaching the constitutional question of this statute on the surface, on the face. If it was, then it was

not a proper suit for a declaratory judgment or injunction, then why isn't that the end of the case as --

A It is. It isn't a proper suit.

Q We don't have to say they were wrong in holding that this statute is unconstitutional on its face, then, do we?

A Well, I don't say you have to reach that question, no; but if you do reach it, I do say the answer is very clear and I think the Koota situation is very clearly distinguishable. There, as I read the opinion of this Court --

Q I don't understand why you want to distinguish it. I am trying to help you. I don't understand it because --

A The Koota case has gone back to the District Court for the reason --

Q I know, but what we said, and what we said in Koota was that, yes, he is entitled to a declaratory judgment, even though not to an injunction in the circumstances, not much different from this, but he is not even entitled to a declaratory judgment unless you are satisfied that the elements which make up that course of action have been satisfied.

A That is right.

I would like to reserve the rest of my time for rebuttal.

MR. CHIEF JUSTICE WARREN: Mr. Clinton?

ARGUMENT OF SAM HOUSTON CLINTON, JR., ESQ.

ON BEHALF OF APPELLEES

MR. CLINTON: Mr. Chief Justice, may it please the Court:

I think in essence what counsel was indicating when he said that this statute was not applicable was that my clients were not guilty of violating the statute and, of course, that is clear. Not that it has much to do with the issue, but I gather that is what he was saying, which brings us to what this lawsuit is all about.

The University Committee, and the named plaintiffs, feeling that there was the chilling effect that this Court has spoken of in similar type cases, a chilling effect on the exercise of their First Amendment rights, they sued in the court below and a three-judge court was convened.

They asked for three things, essentially: declaratory relief that Article 474 was facially invalid.

Q Isn't it a fact that these criminal complaints were dismissed before that proceeding was concluded?

A No, sir.

Oh, before it was concluded. I am sorry.

Q Yes.

A The underlying complaints were dismissed after the three-judge court had been convened and the matter was noticed for hearing.

Q But before --

A But before we actually got before the 3-judge hearing.

Q And was the 3-judge court apprised that they had been dismissed before it ended?

A By motion; yes, sir.

Q Then what -- how do you justify the 3-judge court going on to deal with the case.

A The same way that the 3-judge court justified it, with emphasis, if I may: The 3-judge court found, based upon uncontroverted evidence before it -- in this case testimony in the form of agreed affidavits -- that if the people were in court and so testified, this is what they would testify to, not only the three plaintiffs, but the two affiants who were a part of the party ff seven represented to the court under oath that they had felt the chilling effect of these prosecutions and had ceased all activities in behalf of the University Committee to End the War in Viet Nam; that they knew others who had done so.

It was for this reason that the court said we do have not just a broad curtailment of activities, but a suspension of expression altogether. It went on to find that the dispute was a live one, a very live one, because here people were saying to the court, "We are no longer taking part in these activities that we had before we were handled in the way we were handled

up in Bell County."

Q Was there anything in the stipulation whether there was any suggestion that this statute was going to be enforced against others in this situation of protest against Viet Nam?

A There was a suggestion in two ways: One in the pattern of the conduct of at least two of the appellants here, who were the defendants below, the Sheriff and the Justice of the Peace, that, to put it bluntly, the Sheriff said in the record, "You folks get out of my county and don't come back. We don't like people like you around here."

The J.P. said, the Justice of the Peace said, when the people came before him, "We don't like traitors in this county and I am setting a $500 bond on your case, although the maximum fine is $200, to make sure that you come back because I want to try this case."

Q I suppose that all collapsed when the complaints were dismissed.

A Well, that particular part collapsed, but you were asking about any continuing threat, and here they are telling them, "Don't come back. If you do, we are" in effect --

Q Has anything happened since? Have any of these folks been prosecuted for anything since?

A There is no evidence of --

Q Have there been any demonstrations since?

A Well, the people say they are not going to demonstrate in Bell County as long as the Sheriff acts like he does and the J.P. puts them under a $500 -- invokes a statute that counsel now tells the Court we are in no manner guilty of.

That is the thrust of the basis of their saying that they are, therefore, not --

Q Does this declaratory judgment stop them from saying, "I don't want you in my county. If you come in here again, I am going to give you a $500 fine"?

A No, sir. The declaratory judgment -- may I preface that answer by saying actually the court below has not issued either a declaratory judgment or an injunction. They have said in an opinion that we are entitled to it, but they have stayed their mandate, pending the --

Q Do you think there is a final judgment?

A Well, I mention that at the beginning of my motion to affirm, but since it has been used in other -- since this similar type thing has happened, particularly in some of your reapportionment cases, I figured it was probably final, and apparently the court thought so, too.

Q But there is a judgment here.

A There is the opinion. We have not entered any kind of order of injunction. There is no language agreed upon as to some sort of order that would follow the opinion. The reason the court did that, it sets out, they stayed their

mandate because the Legislature was coming into session. They wanted to give the Texas Legislature a chance to work on this statute.

Then the Legislature -- it happened almost coincidentally -- met in Special Session as distinguished from regular session, and adjourned without taking any action because of the limited nature of that session.

Then before we could go back to the three-judge court for any further action, papers were filed in this Court and the mandate was stayed further, so that is the situation as far as the outstanding nature of any kind of order. There just isn't any. We have the opinion and it has been stayed. The mandate was stayed first by the court below and now by this Court.

Q Mr. Clinton, are you suggesting that if the law enforcement authorities of a county come to demonstrators and say, "Now look here, we don't like demonstrations in this county, and if you try to demonstrate here we are going to prosecute you under this statute," that in and of itself that is enough to authorize a Federal District Court to consider the constitutionality of the statute mentioned by the law enforcement authorities, and if they find it unconstitutional on its face, to enjoin its application? Is that it?

A Well, no. I think there is more to it. There is more to this case than that.

Q Well, there was at the beginning, but what was

there after the complaints were dismissed more than that?

A I am satisfied that the court below took into consideration perhaps the good faith of even the dismissal of the complaints, for example. You see, there is absolutely no evidence in this record that these events did, in fact, take place on what is now described as a Federal enclave. There is simply no evidence that that is so.

In fact, circumstantially, as the counsel said, the military police first put their hands on the protestors and then delivered them into the hands of the Deputy Sheriff while still on the college campus, suggesting that maybe it wasn't truly on a Federal enclave where criminal jurisdiction had been ceded.

So I say first that I think the court below maybe looked at the timing of the filing of the motion to dismiss and the grounds of the motion to dismiss and the fact that there was no evidence in support of it, plus the court obviously looked to the things that I am suggesting should be looked to, the continuing suspension by these persons of their own activities in Bell County particularly.

I think it ought to be said about Bell County that housing, or being the home, as it is, of Fort Hood, and being a military installation, this particular committee that I represent looks upon it as a proper place in which to spread its views.

So it is more than just barring, or these people feeling they can't go to Bell County. Bell County is the place they think they ought to be, as distinguished from even some of the adjoining counties. It is of special significance to --

Q Is that statute the only breach of peace statute there is on the Texas books?

A No, it is not the only one. It is the general statute --

Q How were these charges tied up with this statute?

A Well, we allege that that is what was involved and the appellants here denied in their answer that 474 was unconstitutional and we stipulated in that stipulation that what was at issue was Article 474, all of which was raised before the 3-judge court on a motion for a new trial, analyzed by the 3-judge court, and the 3-judge court says clearly we have been litigating Article 474 here or we wouldn't have been here to start with.

Q Is there a common law breach of the peace in Texas?

A No, sir. But I wanted to answer your other question because behind Article 474 there are other statutes that may be said to relate to a breach of the peace, but this is the one that has the short title "Disturbing the Peace," and this is the one that we have all agreed was raised here and was involved.

One other sort of technical matter, what you have before you, or what we had before us that was dismissed was a complaint filed by the Sheriff or the Deputy Sheriff before the Justice of the Peace, and insofar as counsel says it is inadequate to allege an offense, of course, we don't stand trial, necessarily, on that offense. We stand trial on any information that is later issued by the County Attorney based upon that charge that has been filed.

We have to make bond. We are put in jail and we have to make bond to be released from the charge.

Q You don't yet know until the information issues what charge you had to defend against.

A Right; what specific part of that very broad and multi-faceted --

Q And before what court would the information be charged?

A The Justice of the Peace in this instance, the same Justice of the Peace who made --

Q And then what is there -- an appeal de novo or something?

A Yes, there is an appeal de novo. I'm sorry. The extent of the fine determines the direction in which you go. Let's say there would be an appeal de novo.

Q No indication that the Justice of the Peace, if filed before him, or on the appeal de novo, that any defense

constitutional or otherwise might be entertained?

A Well, after the Justice of the Peace was saying what he had done, we didn't look forward to a trial before him. He said as soon as they were brought before him that he did not like traitors in his county, and then he imposed -- he said, "You can plead guilty and the fine will be $200," which is the maximum, incidentally, "or you can make a bond for $500."

When the appellees, who were the plaintiffs below, protested that that was rather excessive, he said, "Well, I just want to make sure you are here so I can try this case." They did not believe that they had much future ahead before him.

MR. CHIEF JUSTICE WARREN: We will recess now.

(Whereupon, at 2:30 p.m. the argument in the above-entitled matter was recessed, to reconvene at 10:00 a.m., Tuesday, January 14, 1969.)