

FILED

JAN 13 2011

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

**OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS
PETITIONER**

IN RE: RAYCOM MEDIA, INC. d/b/a WDAM, LLC

CASE NO. _____

EMERGENCY PETITION FOR WRIT OF MANDAMUS

COMES NOW Petitioner Raycom Media, Inc. (d/b/a WDAM, LLC) (hereinafter “WDAM”), pursuant to Rule 21 of the Mississippi Rules of Appellate Procedure, and files this Emergency Petition for a Writ of Mandamus directing the Honorable Forrest County Youth Court (hereinafter the “Youth Court”) to withdraw and vacate its December 30, 2010 and January 11, 2011 injunctive orders prohibiting WDAM’s broadcast of certain video images of juvenile abuse at the Forrest County Detention Center.

I. STATEMENT OF ISSUES PRESENTED AND RELIEF SOUGHT

This is a clear case of the Youth Court’s violation of the First Amendment to the United States Constitution. The issue for this Court is whether the Youth Court’s December 30, 2010 and January 11, 2011 Orders act as an unconstitutional prior restraint on Hattiesburg television station WDAM’s ability to publish truthful information of public significance; here, that information is a video of alleged abuse of children in the custody of the Forrest County Juvenile Detention Center (hereinafter the “Detention Center”). This Court has specifically addressed a similar attempt at prior restraint and ruled it unconstitutional. *See Jeffries v. State*, 724 So. 2d 897, 900 (Miss. 1998) (courts consistently reject any restraint on the publication of legally obtained information).

Neither the State nor the Youth Court’s Injunction has demonstrated any compelling state interest to support the prohibition of WDAM’s broadcast. Indeed, despite the State’s heavy burden to overcome the presumptive invalidity of a prior restraint, no witnesses were called by

the State or exhibits introduced by the State at the hearing of this matter. Thus, there is no evidentiary support in the record for the issuance or re-affirmation of the Injunction.¹

The Youth Court's only two arguments in favor of preventing disclosure fail: one as a matter of law and one as a matter of fact. First, the Youth Court argues that the video of the abuse was obtained unlawfully by an employee of the Detention Center. However, even if this allegation were true, there is no dispute that WDAM did not participate in any such unlawful action and that it came across the video lawfully. Under such circumstances, the United States Supreme Court has held unconstitutional the prohibition of disclosure of a matter of public importance where the media defendant played no part in the illegal interception of the video. *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

Additionally, the Youth Court's holding that the Orders protect the privacy of its juvenile inmates has been mooted by WDAM's express agreement: (1) not to disclose the identity of the juveniles involved; and (2) to "blur" the faces of the juveniles in the video in order to protect their identities.

Therefore, WDAM respectfully requests that this Court issue a Writ of Mandamus directing the Forrest County Youth Court to withdraw and vacate its December 30, 2010 and January 11, 2011 injunctive orders prohibiting WDAM's broadcast of certain video images of juvenile abuse at the Forrest County Detention Center.

II. FACTS

The following is a statement of facts necessary to an understanding of the issues presented by this Petition. A certified copy of the entire court record for Cause No. MIS #37 in

¹ A transcript of the January 5, 2011 hearing has been ordered by Petitioner. The court reporter has indicated that it will be available on Tuesday, January 18, 2011. Upon its receipt, the Petitioner will immediately supplement this Petition by filing the transcript as "Exhibit C" hereto.

the Youth Court Division of the Forrest County Court is attached hereto as collective Exhibit “A.”

Tawanna Bolton (hereinafter “Bolton”), a former employee of the Detention Center, provided WDAM with a video tape depicting alleged physical abuse of six juvenile inmates at the Detention Center. The Youth Court alleges in its Order that Bolton illegally obtained the videos. (*See* January 11, 2011 Final Order Granting Injunctive Relief (hereinafter “Final Order”) at p. 1) (attached to this Petition as “Exhibit A”). It is undisputed that WDAM was not involved in Bolton’s taking of the video and did not participate in any illegal conduct. (*Id.* at p.4, ¶ 6 (WDAM “not involved with how the videotapes were obtained by Bolton”)).

Upon discovering that WDAM possessed the video or a copy thereof, Forrest County Youth Court Prosecutor Pamela Castle filed a Motion for Injunctive Relief on December 30, 2010 to prevent WDAM from broadcasting the video. (*See* December 30, 2010 Motion for Injunctive Relief). That same day, the Honorable Michael McPhail, Forrest County Youth Court Judge (hereinafter “Judge McPhail”), signed and had entered an Order Granting Injunctive Relief – without notice – against WDAM, its agents and representatives, Bolton, and “others unknown at this time.” (*See* December 30, 2010 Order Granting Injunctive Relief).

After receiving the December 30, 2010 Order, WDAM filed its Motion to Dissolve the Court’s Order Granting Injunctive Relief on January 5, 2010 on grounds that the Order was both procedurally and substantively improper. (*See* January 5, 2010 Motion to Dissolve Order Granting Injunctive Relief). Following a January 6, 2011 hearing, Judge McPhail issued a Final Order Granting Injunctive Relief on January 11, 2011, which enjoins WDAM, Bolton, and “any other person or agent of other media outlets that may come into possession of said videotapes....from disclosing, publishing or broadcasting the contents of said images or

videotapes to any other person or agency.” (See Final Order at p. 9). The Order concludes, *inter alia*, that WDAM did not present evidence of a “need” for disclosure of the video, that the confidentiality of a delinquent minor is paramount, and that WDAM did not acquire the video “in a legal fashion.”² (*Id.* at 8, ¶ 2).

At the hearing below, WDAM placed into evidence a DVD showing the blurred faces of juveniles and represented to the Court that this is the manner in which the video would be shown on its televised newscasts. A copy of the video is attached to this Petition as “Exhibit B.”

III. ARGUMENT

A. Standard for Granting Writ of Mandamus

The Mississippi Supreme Court may exercise jurisdiction over a request for a writ of mandamus upon a showing that: (1) other adequate means of relief are unavailable, (2) deciding the question now would promote judicial efficiency and economy, (3) immediate review would be in the public interest, and (4) petitioner has a clear right to the relief sought. *In re: Corri-Williams Tobacco Co.*, 691 So. 2d 424, (Miss. 1997). WDAM meets all of these requirements.

First, resolution of the question presented to this Court is urgent: whether a Forrest County television station’s may broadcast a video showing alleged abuse of inmates at the Forrest County Juvenile Detention Center. WDAM does not wish to disclose the identities of the minors involved, and in fact, has agreed to blur their faces in the video. Instead, WDAM wishes only to alert the public to video evidence of a matter of extreme public importance and interest. Pursuing its remedies through the Circuit Court, and then through appeal, would constitute an irreparable denial of important First Amendment values, and sweep the impact of the public

² However, Judge McPhail’s January 11, 2011 Order does state that “there is nothing in this Order that bans, prohibits or restricts WDAM from broadcasting any information concerning the altercation where WDAM has acquired that information in a legal fashion.” (*Id.* at p.4, ¶ 6).

viewing of the video depicting alleged abuse under the rug and away from public scrutiny. This Court's immediate review is necessary and in the public's best interest. As the United States Supreme Court stated in *Nebraska Press Association. v. Stuart*:

Where, however, a direct prior restraint is imposed upon the reporting of news by the media, *each passing day may constitute a separate and cognizable infringement of the First Amendment*. The suppressed information grows older. Other events crowd upon it. To this extent, *any First Amendment infringement that occurs with each passing day is irreparable*.

Nebraska Press Assn, 423 U.S. 1327, 1329, 96 S.Ct. 251, 254 (1975) (emphasis added).

Secondly, as explained, *infra*, WDAM has a clear right to the relief it seeks through this Petition. The Youth Court's orders constitute an unconstitutional prior restraint and it has failed to show any compelling state interest to justify its actions.

B. The Youth Court's Orders Are An Unconstitutional Prior Restraint on WDAM's Publication of Truthful Information of Public Significance.

As this Court knows, prior restraint on speech is presumptively invalid. *Jeffries v. State*, 724 So. 2d at 899. The Supreme Court reporters are replete with unsuccessful attempts by the state to uphold laws and/or judicial actions restricting media outlets' First Amendment rights. *See, e.g., Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979) (West Virginia statute providing criminal sanctions for publication of juvenile offender's name without juvenile court permission deemed unconstitutional, since publication was "truthful information about a matter of public significance" and state interest insufficient to counsel against publication). *See also Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (damages not available against newspaper for publishing rape victim's name in violation of state statute criminalizing publication when name became known to public through official court records); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977) (vacating injunction prohibiting news media from publishing name or photograph of juveniles where despite state statute closing juvenile trials to public, judge had

permitted reporters and other members of public to attend court hearing because state cannot constitutionally restrain dissemination of truthful information in public domain).

So, when the Youth Court attempts to justify its prior restraint on WDAM's broadcast of the video of alleged abuse at the Detention Center, it will do so with a "heavy presumption *against* its constitutional validity." *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 558 (1976) (emphasis added). It will also do so under the shadow of Mississippi's Constitution and courts, which valiantly protect the right of free speech against infringement by the state. *See* Miss Const. Art. 3, § 13 (right of free speech "shall be held sacred") and *Jeffries*, 724 So. 2d at 900 ("[i]n Mississippi courts as in federal courts, the protection of free speech is sacred and not to be dismissed lightly by trial judges"). The Youth Court's prior restraint here is to be given "the most exacting scrutiny" in this Court's determination of its validity. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979); *see also Nebraska Press Assn.*, 427 U.S. at 557-561 (the court interprets the guarantees of the First Amendment of the United States Constitution to afford special protection against orders that prohibit the broadcast of truthful information). And when this intense level of scrutiny is applied, a state's attempt to prior restraint seldom passes constitutional muster. *Daily Mail Publishing Co.*, 443 U.S. at 102.

In order to overcome the presumption of an unconstitutional prior restraint, the Youth Court must show the following: (1) that the publication of the alleged abuse of certain inmates at the Forrest County Juvenile Detention Center would result in damage to a "near sacred right" or a state interest "of the highest order"³ (2) whether the prior restraint would be effective, and (3) whether less extreme measures are available. *Jeffries*, 724 So. 2d at 899 (citing *Nebraska Press Association*, 427 U.S. at 562-64. The Youth Court had two chances – the December 30, 2010

³ *Daily Mail Publishing Co.*, 443 U.S. at 103.

Order and the January 11, 2011 Order – and in both cases has failed to come close to meeting its tremendous burden to justify prior restraint.

The Youth Court makes a futile effort to show a compelling state interest justifying prior restraint. The Youth Court appears to hold that its prior restraint here is done to protect the “anonymity of juveniles within the jurisdiction of the Youth Court” and that this confidentiality is “conducive to the protection and rehabilitative purposes of the Youth Court.” (See Final Order at p. 5, 9). The Final Order makes no attempt to elaborate on the connection between confidentiality and rehabilitative purposes of the Youth Court. Moreover, Forrest County did not elaborate on this concept in its Motion for Injunctive Relief, nor did it provide a witness to testify at the January 6, 2010 hearing or provide any other evidentiary support on this or any other subject.

In fact, WDAM has already addressed this issue with the Youth Court. Indeed, WDAM made clear to the Court its intention to: (1) withhold disclosure of the identity of all minors depicted in the video, and (2) blur the faces of any and all minors in the video before the video is broadcast. (See Mot. to Dissolve Injunctive Relief at ¶ 13 and Transcript of Jan. 6, 2011 hearing). For reasons unknown to WDAM, the Youth Court does not appear to have considered these concessions in its Final Order. Further, with this agreement by WDAM, the Youth Court cannot legitimately claim that the identity-redacted broadcast of alleged abuse at the its Detention Center seeks to serve the best interests of the children in custody who were allegedly abused and who could be in harm’s way later if this alleged conduct is not curtailed. Certainly the State has no “near sacred right” to protect itself from the public dissemination of alleged abusive practices. WDAM’s agreement on this topic also effectively addresses prong number 3 of the Youth Court’s burden, which requires consideration of less extreme measures.

Importantly, the identity-protecting measures proposed by WDAM actually negate the Youth Court's entire basis for prohibiting the broadcast of the video.

Significantly, the Youth Court's Order permits the station's use of other information bearing on the allegedly abusive behavior. WDAM has recorded interviews with a number of former juvenile inmates, now eighteen years or older, all with their parents' consent. Those interviews will be used as appropriate, and the station will take steps to render it impossible to identify the interviewees. But the pictures of actual abuse revealed in the tape are indispensable to the ability of the public to evaluate the behavior of the custodians charged with the welfare of the detainees.

C. The Youth Court's Assertion That Bolton Unlawfully Obtained the Video Obtained Is Irrelevant.

The Final Order states, upon information and belief, that Bolton, *but not WDAM*, obtained the subject video "through unauthorized and possibly unlawful means." (See Final Order at p. 2). The Youth Court relies upon this assertion, and cites *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977), in an attempt to justify its prior restraint by arguing that the video was not lawfully obtained. (*Id.* at 6-7) ("[k]ey issues are whether or not the information ...[was] lawfully obtained."). In fact, the Youth Court's Final Order later stated that "there is nothing in this Order that bans, prohibits or restricts WDAM from broadcasting any information concerning the altercation where WDAM has acquired that information in a legal fashion." (*Id.* at p. 8, ¶ 2).

The Final Order, however, ignores United States Supreme Court precedent 24 years after *Oklahoma Publishing Company*, which was provided to the Youth Court (see Mot. to Dissolve Injunctive Relief at 11) and which limited the consideration to only how the media outlet itself came about the information, and not what happened beforehand. In *Bartnicki v. Vopper*, 532

U.S. 514 (2001), the United States Supreme Court specifically held that a statute prohibiting disclosure by a media defendant is unconstitutional where the tape concerns a matter of public importance and *the media defendant played no part in the illegal interception of the contents of the tape*. As discussed, *supra*, the Youth Court has expressly acknowledged that WDAM played no part in the illegal interception of the video, assuming for purposes of argument that the video was in fact unlawfully obtained. The Youth Court's assertion that the video was unlawfully obtained – even if it is later proven that it was – is irrelevant to the Court's consideration of WDAM's constitutional right of free speech, because WDAM obtained the video lawfully.

D. The Youth Court Cannot Rely On Its Governing Statute To Justify Unconstitutional Prior Restraint

Of course, a Mississippi statute can never trump either the United States or the Mississippi Constitutions. To the extent that a state statute conflicts with constitutional mandates, the statute must yield to the Constitution. *See, e.g., Smith*, 443 U.S. at 103; *Oklahoma Publishing Co.*, 430 U.S. 308. Nevertheless, the Youth Court relies upon Miss. Code Ann § 43-21-261 governing the disclosure of “records involving children.” Notably, the statutory phrase “records involving children” is specifically defined in another section of the Code to include only certain specified records “*from which the child can be identified*.” Miss. Code Ann. § 43-21-105(u) (emphasis added). Here, the definition of a record involving children is not met. In the first place, the tape is of such poor quality that it is highly unlikely that a child could be identified. And as previously discussed, WDAM has no intention of disclosing the identity of the juveniles depicted in the subject video, and, to insure that no identification of children can be made, WDAM will blur any faces which may be shown. (See “Ex. B” to Petition, which was introduced into evidence in the Youth Court to reflect the video after the juveniles’ faces were blurred). Thus, because no juveniles “can be identified” in the video, it, as a matter of law, is not

a “record[] involving children” as the Youth Court maintains. Furthermore, the subject video is purportedly of images displayed on a video monitor located at the Forrest County Juvenile Detention Center. Thus, the image made the subject to these proceedings does not even arguably fall within the definition of a youth court record under the statute.

Moreover, given that the Youth Court has enjoined materials not a “record[s] involving children,” it acted outside the jurisdictional authority granted to it by the State of Mississippi. The Court has jurisdiction to issue “all writs and processes including injunctions necessary to the exercise of jurisdiction and to carrying out the purpose of this chapter.” Miss. Code Ann. § 43-21-153. As the Mississippi Supreme Court has stated, the policy of and purpose of the Youth Court and its supporting statute “is the **protection and care of children in trouble** and the rehabilitation of those gone astray.” *Helmert v. Biffany*, 842 So. 2d 1287, 1291 (Miss. 2003). An injunctive order which protects employees of the Youth Detention Center who possibly engaged in the abuse of inmates to the detriment of those inmates certainly falls outside the Court’s statutory authority.

But, even if the subject images were considered to be “records involving children” pursuant to § 43-21-105(u) and giving rise to the Court’s jurisdiction over this matter, disclosure of such records is actually promoted by § 43-21-261. This section provides for disclosure when “required for the best interests of the child, the public safety or the functioning of the youth court.” *See* Miss. Code Ann § 43-21-261(1). The statute goes on to allow for disclosure to “any person pursuant to a finding by a judge of the youth court of compelling circumstances affecting the health or safety of a child and that such disclosure is in the best interests of the child.” Miss. Code Ann § 43-21-261(1)(g).

Certainly making the public aware, through the actual video, of the possible abuse of

children in the custody of the Forrest County Juvenile Detention Center is in the best interests of the children in custody and the “public safety or the functioning of the youth court.” This is especially true given that the result of proscribing WDAM’s broadcast of the video of possible abuse is the protection of those at the Forrest County Juvenile Detention Center who allegedly participated in or sponsored the alleged abuse, rather than the children in danger.

E. The Youth Court’s Orders Are Also Procedurally Invalid

In its Final Order Granting Injunctive Relief, the Youth Court stated correctly that , “Rule 81(a) of the Mississippi Rules of Civil Procedure (M.R.C.P.) states that Youth Court proceedings are not governed *entirely* by the M.R.C.P.” Order at 3 (emphasis added). Notably, however, the Comment to Rule 81(a) specifically states that, “in any instance in which the controlling statutes are silent as to a procedure such as ... methods of service of process and notices ... the M.R.C.P. govern.” *See In Interest of T.L.C.*, 566 So.2d 691, 698 (Miss. 1990) (“Rule 81, Miss.R.Civ.P., provides that the Rules have limited applicability to youth court proceedings. *The Rules are enforceable where they do not conflict with statutorily provided procedures.*”) (emphasis added).

Miss. Code Ann. § 43-21-203(4) specifically recognizes that, "All [youth court] hearings shall be conducted under such rules of evidence and rules of court *as may comply with applicable constitutional standards.*" (Emphasis added). In that same vein, the Mississippi Supreme Court has rightly recognized that, regardless of the provisions of the youth court statute concerning the issuance and service of process, no judgment, order, or decree is valid or binding upon a party who has no notice of proceeding against him ... *it is not within the power of the legislature, under our constitution, to dispense with this notice either actual or constructive.*"

Maddox v. Bush, 4 So. 2d 302 (Miss. 1941) (emphasis added). While Miss. Code Ann. § 43-21-153 generally provides the Youth Court with the power to grant injunctions, Rule 65 of the Mississippi Rules of Civil Procedure still governs the requirements for the issuance of such injunctive relief – including the requirement of notice. *See generally* C.M. v. R.D.H., 947 So. 2d 1023, 1028-29 (Miss. Ct. App. 2007) (implicitly recognizing that, despite limited applicability of Rules to certain actions, Rule 65 of the Mississippi Rules of Civil Procedure governs the issuance of preliminary and permanent injunctions). The face of the December 30, 2010 “Order Granting Injunctive Relief” reflects that it was issued without notice.

Notably, both Orders at issue here are vaguely titled “Order Granting Injunctive Relief” and “Final Order Granting Injunctive Relief.” Thus, it is not wholly clear to WDAM whether the initial Order was a Preliminary Injunction or a Temporary Restraining Order under the Mississippi Rules of Civil Procedure. This is important, as Miss. R. Civ. P. 65(a)(1) expressly states “*no preliminary injunction shall be issued without notice to the adverse party.*” (emphasis added). Thus, to the extent this Order is deemed to be a Preliminary Injunction, the Order should have been dissolved on this basis alone.

Additionally, the requirements for the issuance of a valid and proper Temporary Restraining Order are set forth in Miss. R. Civ. P. 65(b). Those requirements have not been met here. To the extent the Youth Court intended its initial Order to be a Temporary Restraining Order, the Order was defective on its face and should have been dissolved, as it failed to meet the following explicit requirements set forth in Rule 65(b):

- (a) Neither the Complaint, nor the Affidavit supporting said Complaint, set out “specific knowledge” of facts establishing irreparable harm;
- (b) The State’s attorney has not certified to the Court in writing the efforts it made to give notice to WDAM of its intent to seek injunctive relief and

the reasons notice should not be required;⁴

- (c) The Order does not define the alleged injury or state why it is irreparable;
- (d) The Order does not state why it was granted without notice;
- (e) The Order does not expire by its own terms within a period of ten (10) days or less; and
- (f) The Order has not been endorsed with the hour of issuance.

See Miss. R. Civ. P. 65(b).

With respect to notice, the State's failure to certify, in writing, its efforts to give notice and the reasons notice should not be required is especially troubling. This is because WDAM participated in a telephone conference with the Forrest County Prosecutor, a representative of the Forrest County Sheriff's Office, and the Forrest County District Attorney only one day before the issuance of the subject Order. These parties knew exactly how to contact WDAM for purposes of seeking injunctive relief, but simply chose not to do so. For the foregoing reasons, the Order Granting Injunctive Relief issued by this Court against WDAM should have been dissolved, and the ultimate Final Order Granting Injunctive Relief is deficient for the same reasons.

IV. CONCLUSION

For all of the reasons outlined above, this Honorable Court is urged to issue a Writ of Mandamus that the Youth Court dissolve and vacate its December 30, 2010 and January 11, 2011 Orders.

This, the 13th day of January, 2011.


⁴ The Comment to Rule 65(b) states that injunctive relief without notice is awarded only when "the verified facts of the complaint clearly justify plaintiff's apprehension about the threat of irreparable injury."

Respectfully submitted,

RAYCOM MEDIA, INC. (D/B/A WDAM, LLC)

By Its Attorneys

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CERTIFICATE OF SERVICE

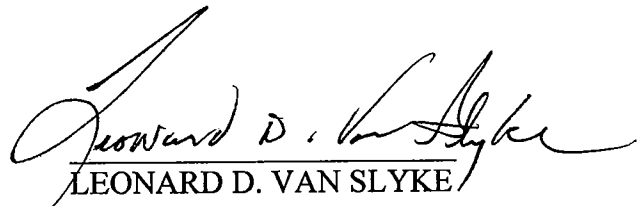
I certify that I have this day provided a copy of the foregoing, by United States Mail, facsimile, and electronic mail, to the following:

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This the 13th day of January, 2011.


LEONARD D. VAN SLYKE