IN THE FLORIDA SUPREME COURT

GEORGE FIRESTONE, et al.

Appellants,

v. case no. 72,789

NEWS-PRESS CO., INC.,
d/b/a FORT MYERS NEWS-PRESS,

Appellee.

SUPPLEMENTAL BRIEF OF APPELLANT FIRESTONE

On Appeal from the Second District Court of Appeal

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF CASES

SUMMARY OF ARGUMENT

The plaintiff/appellee, News-Press, asserts a special right of access to polling places for its journalists to gather news.

The claim raises two issues. One, does a journalist have a right of access separate and superior to that of the general public to enter government owned property to gather information? Second, what are the limits on the public right of access to government owned property to gather information?

Journalists do not have a special right of access to government owned property to gather information. Their right of access is the same as that of the general public. If the public can be excluded from government owned property, so can journalists.

The public's right of access to government owned property to gather information about government processes is defined by the nature of the property. That is, the court should use standard forum analysis, just as it would in analyzing questions of access to government owned property to exercise first amendment rights of expression. There is no principled reason to treat the right of access to government owned property to gather information differently than the right of access to express views.

Since polling places and polling rooms are nonpublic forums, public access may be limited based on the special purpose of the forum. Polling rooms are not open for all first amendment activity. They are only open for the special purpose of casting

ballots. Therefore, public and press access may be limited to the casting of ballots and not for the exercise of first amendment rights generally because such a limitation is reasonable in light of the purpose of the forum.

If the court finds that the test of Press-Enterprise Co. v. Superior Court of Calif., 106 S.Ct. 2735 (1986), applies to executive branch forums as well as judicial forums, s. 101.121, Fla. Stat., passes the test. The polling room has not been traditionally open to the general public since 1895, and public observation of elections process does not play the same integral part in that process that it does in the judicial process. The public's role in the judicial process is so integral that essentially it is as much a participant as the judge, the jury, the prosecutor and the defendant.

We urge the court to uphold the constitutionality of the statute and to reverse the district court.

ARGUMENT

THE PLAINTIFF HAS NO GREATER RIGHT OF ACCESS TO GOVERNMENT PROPERTY TO GATHER INFORMATION THAN THE GENERAL PUBLIC. THE PUBLIC'S RIGHT OF ACCESS TO GATHER INFORMATION DEPENDS ON THE NATURE OF THE PUBLIC OR NONPUBLIC FORUM INVOLVED.

The plaintiff, News-Press, asserts a first amendment right to enter the polling room to gather news.

The claim presents two questions. The first is, does a journalist have a right separate and superior to that of the general public to gather information? The second is, what are the limits on the public right of access to government owned or controlled property to gather information?

The answer to the first question is, No, a journalist does not have a right superior to that of the general public to gather information. Houchins v. KQED, 438 U.S. 1, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978). In this case, the U.S. Supreme Court emphatically held that a newsperson's right to gather information is identical to that of the public at large.

> Beyond question, the role of the media is important; acting as the "eyes and ears" of the public, they can be a powerful and constructive force, contributing to remedial action in the conduct of public business. They have served that function since the beginning of the Republic, but like all other components of our society media representatives are subject to limits.
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> * * *
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> "[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. . ."

Id., 438 U.S. at 8, 11, (for the latter passage, quoting Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2 628

(1972)). See also, Pell v. Procunier, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974), and Saxbe v. Washington Post Co., 417 U.S. 843, 94 S.Ct. 2811, 41 L.Ed.2d 514 (1974), holding:

> [N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public. The proposition that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally ... finds no support in the words of the Constitution or any decision of this Court. Saxbe, 417 U.S. at 850, 94 S.Ct. at 2815.

The Supreme Court has never retreated from this view. See Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980), and Press-Enterprise Co. v. Superior Court of Calif, -- U.S. --, 106 S.Ct. 2735 (1986). In both these cases, press representatives challenged the closure of various aspects of criminal trials (in Richmond Newspapers it was the trial itself; in Press-Enterprise it was a preliminary hearing). In each case every justice to write an opinion discussed the right of press access in terms of the right of public access.

To answer the second question, we suggest that the right of access to gather information about the process of government should be treated -- when access to government controlled property is concerned -- the same as the right of access for expressive purposes. In essence, this means that the court should analyze information access questions the same way it analyzes questions of access to demonstrate or speak out on issues.

That is, the court should conduct a standard forum analysis and determine access based on the nature of the forum involved, as it does when determining access for expressive purposes. We see no principled reason to distinguish between the right of

access to government property to gather information and the right of access to speak out. Each arises from the first amendment; each has the same public and constitutional purpose of protecting and promoting debate on public issues. An analysis that treats each complimentary right differently will inevitably elevate one above the other.

If either of these rights should enjoy a superior position, it should be the right to speak out -- the core right of the first amendment -- and not the right of access to information.

The U.S. Supreme Court has long recognized the right of the public to receive information about social, political, esthetic, moral and other ideas. Red Lion Broadcasting Co. v. FCC, 89 S.Ct. 1794, 1807 (1969), upholding the broadcasters' fairness doctrine.

There seems to be no doubt today that the public has a right of access to some information about the process of government. Press-Enterprise Co. v. Superior Court of Calif., supra; However, the limits of that right are ill-defined, although it seems clear that the constitution, while creating some right of access to information, does not create "a concomitant governmental duty to disclose." Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1168 (3d Cir. 1986).

> Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathered in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded.

Branzburg v. Hayes, 408 U.S. 684-685, 92 S.Ct. at 2658. See also Houchins v. KQED, supra. And not all information related to a

criminal trial is essential to the press and public if it endangers the right of a fair trial. Press-Enterprise, supra.

There are two lines of cases concerning the right of access to information. In one line, involving access to forums controlled by the executive branch, access has been limited. See Houchins v. KQED, supra; Branzburg v. Hayes, supra; Pell v. Procunier, supra; and Saxbe v. Washington Post, supra. In the other line, involving access to judicial forums, it has been expanded. See Richmond Newspapers Co. v. Virginia, supra; and Press-Enterprise Inc. v. Superior Court of Calif., supra. "We do not yet know whether the Supreme Court will apply its [more recent] analysis of access in the context of judicial proceedings to the context of the executive branch." Capital Cities Media Inc. v. Chester, 797 F.2d at 1174. But these cases are not incompatible, however, if the nature of the different forums are considered.

Richmond Newspapers and Press-Enterprise both involved questions of access to some aspect of the criminal trial process. In Richmond Newspapers the court held that the trial itself must be open to the public absent compelling reasons for closure. In a lengthy discussion about the legal history of the open nature of criminal trials and the role they play in society, the court in essence concluded that courtrooms during criminal trials were traditional public forums and that the public, as spectators,

were participants in the trial. Essentially the public was as much a participant as the judge, the prosecutor, the defense counsel, the defendant and the jury. (Last week this court held that both civil and criminal judicial proceedings were public events and thus their processes and records were presumptively public. Barron v. Florida Freedom Newspapers, 13 FLW 497 (Fla. Aug. 26, 1988).)

In Press-Enterprise, the court reaffirmed the Richmond holding, and extended it to preliminary hearings. Thus, in essence, that stage of the criminal trial process also took place in a traditional public forum, and the public could not be excluded without compelling reasons to do so.

In Houchins, Pell v. Procunier and Saxbe v. Washington Post, however, a different forum was involved -- prisons. In Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 133-134, 97 S.Ct. 2532, 2542, 53 L.Ed.2d 629 (1977), the court held that prisons were nonpublic forums.

There are indications from the various opinions that the members of the court had some type of forum analysis in mind throughout the consideration of these cases, even if it was not clearly articulated. For example, Justice Stevens, dissenting in Houchins with Justices Brennan and Powell, wrote that he would accept reasonable time, place and manner restrictions on public and press access to prisons. Id., 438 U.S. at 36. And Justice Stewart, concurring in Richmond Newspapers, wrote that a trial courtroom was traditionally a public place, but access was not absolute and that reasonable time, place and manner restrictions

such as would apply to traditional public forums in other contexts would be permissible. Id., 448 U.S. at 599-600.

The test applied in Press-Enterprise is similar to that applied to cases involving limitations on expression in public forums, but with some odd, confusing twists. The court set out two considerations:

> 1. Whether there was a tradition of accessibility, for that reflected the "favorable judgment of experience"; and
>
> 2. Whether public access played a significant positive role in the functioning of the governmental process in question.

The court then said that the right of access was not absolute, but could be limited by overriding interests, such as those of an accused to a fair trial, as long as the exclusion is narrowly tailored.

This test sounds remarkably similar to the test applied to content-based restrictions on the exercise of first amendment rights in traditional public forums. See Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 55, 103 S.Ct. 948, 960, 74 L.Ed.2d 794 (1983); and City of Renton v. Playtime Theatres Inc., 106 S.Ct. 925, 928 (1986). The first consideration goes to the question of whether the forum is a traditionally public one. The second goes to whether a content-based restriction is involved.

In any event, Houchins and Richmond Newspapers-Press-Enterprise, should be read together and the latter two cases especially should be read in light of their facts. It is clear that the strict test of Press-Enterprise applies only when a traditional forum such as the judicial process is involved. The

Supreme Court has judged that the court process, at least, is a traditionally open one and the public plays a more integral role in the trial process than in other aspects of government.

We suggest that the specific analysis of Press-Enterprise be used with care. We submit that it can lead to serious analytical problems if widely used.

First, the use of tradition or history of accessibility is a slippery and unreliable test in all cases. It is curious -- in fact stunning -- that the U.S. Supreme Court would use it here to justify boundaries on first amendment rights, when the court has expressly rejected the same test to set the boundaries for states' rights under the tenth amendment. See Garcia v. San Antonio Metro Transit Authority, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). In that case the court expressly rejected consideration of what constituted traditional state powers as unworkable because "tradition" was constantly subject to change.

Second, to frame the test of access to all governmental forums on the basis of the public's significant positive role in the functioning of the process is equally unworkable, and suspect. As Justice Brennan, a noted partisan for a broad reading of the first amendment, cautioned in his concurring opinion in Richmond Newspapers, the reach of a right of access to information -- ie, the significant positive role an informed citizenry can play in governmental functioning -- is "theoretically endless". Id., 448 U.S. at 588. Justice Brennan observed that clever argument could cast any right of access issue in light of the dangers of decreased data flow. For

theoretically, an informed public always plays a significant positive role in the functioning of government.

Thus, for example, a government practice of openness, such as Florida's adoption of the Sunshine Law for open meetings, and the Public Records Law for documents, could be found to give rise to a constitutional right of access to those meetings and documents. The U.S. Supreme Court has not yet extended its thinking so far. In fact, the court has held that a state statute requiring open government meetings turned those meetings into designated public forums -- that is, they are public forums created by government fiat. Madison Joint School District v. Wisc. Empl. Relations Com., 429 U.S. 167, 97 S.Ct. 421, 50 L.Ed.2d 376 (1976). Since government may undesignate a designated public forum, Perry Education Association, supra, the clear implication must be that access to government meetings to gather information is not absolute and may be limited on the basis of forum analysis.

Just as government has the right to control its physical premises to limit expression to that reasonable in light of the purposes of the premises, or nonpublic forum (most government buildings will typically be nonpublic forums), see Perry Education Association, supra; Cornelius v. NAACP Legal Defense and Education Fund, 473 U.S. 788, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985), it should also be able to control its premises to limit access for the purpose of exercising first amendment rights to gather information.

We do not mean to suggest, however, that government officials may hide behind this rule to suppress information. As

Justice Stevens wrote in dissent in Press-Enterprise, 106 S.Ct. at 2746, "An official policy of secrecy must be supported by some legitimate justification that serves the interest of the public office."

At the same time, though, "[t]he Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act. The Constitution, in other words, establishes the contest, not its resolution." Houchins, 438 U.S. at 14. The court squarely held that there was no constitutional right to particular information or to openness from the bureaucracy. Ibid. The court further cautioned that because the constitution set out no standards for when information must be revealed, judges would have to fashion access to particular information on an ad hoc basis, which the court disapproved. Ibid.

Applying forum analysis to the question presented in this case, we submit that the general public has no right of access to the polling room because it is a nonpublic forum reserved for the limited purpose of casting ballots. See our initial brief, pp. 20-26. Just as the public may be excluded from the polling room for the purposes of speaking out, so may the public be excluded and precluded from gathering information. Each aspect of first amendment speech and press rights must be treated on the same footing.

And just as the general public may be excluded because of the special purpose of the nonpublic forum, so may the press be excluded.

The press may be excluded even if this court decides that

the full test of Press-Enterprise must be applied to this case. For the fact is, general public access to the polling room has not been a tradition since 1895. See ss. 39 and 42, ch. 4328, Laws of Florida (1895). The fact that individual supervisors of elections have violated the law and allowed journalists inside the polling room does not create a tradition any more than a policeman's failure to write speeding tickets creates a national tradition protecting speeding.

Moreover, general public observation at the polls during the elections process is not significant to the process itself. It is not as integral to the process as public observation is to a court proceeding. Rather, elections take place best in secrecy to protect the secrecy of the ballot and to prevent the possibility of voter harassment and vote fraud, which has been endemic in our history.

Therefore, we submit that the press has no right of access to gather information that is greater than that of the general public. Where the general public is denied access to information, the press also is denied access.

We further submit that the limits on the public's right of access to government owned or controlled property should be determined in light of standard forum analysis. If the court disagrees, we submit that the public and the press have no right of access to the polling room and surrounding protected zone because the state's regulations pass the test in Press-Enterprise.

We urge this court to reverse the decision of the district court and to uphold the constitutionality of s. 101.121, Fla.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was furnished by hand to Terrence Lenick, PO Box 1480, Fort Myers, Fla. 33902; and Steven Carta, PO Box 1906 Fort Myers, Fla. 33902, this 29th day of August, 1988.

Jason Vail