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Maness v. Meyers

419 U.S. 449 (1975)

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Mr. Justice Marshall
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Mr. Justice Rehnquist

MEMORANDUM TO THE CONFERENCE

From: Brennan, J.

Circulated: APR 3 1974

Recirculated: _____

RE: No. 73-689 Maness v. Meyers

Petitioner, a Texas lawyer, and co-counsel, Karl A. Maley, also a Texas lawyer, were adjudged guilty of criminal contempt of the 169th Judicial District Court of Bell County, Texas. After unsuccessful applications for relief to the Texas Supreme Court and Texas Court of Criminal Appeals, Maley successfully obtained federal habeas corpus relief in the United States District Court for the Western District of Texas, ___ F. Supp. ___ (1973), but petitioner invoked relief by petition for certiorari to this Court.

Petitioner and Maley were co-counsel in defense of a suit brought by the Municipal Attorney of Temple, Texas, on behalf of the City to enjoin Mike McKelva, operator of Mike's News Stand,

from selling allegedly obscene magazines, and directing him to surrender the magazines to the sheriff to be destroyed. The action is authorized by Article 527, Texas Penal Code. That Article also subjects the distributor of obscene materials to criminal prosecution.

The Municipal Attorney did not have copies of the magazines to put in evidence at the trial but did have a list of magazine titles prepared by a police officer who copied a list of titles of suspect magazines at Mike's New Stand in the course of an investigation of the business. The officer made the list without examining the contents and looking only at the covers, and he purchased none of the magazines. Two days before trial the Municipal Attorney caused a subpoena duces tecum to be served on the defendant McKelva directing him to produce the magazines listed by title and to appear and testify as a witness for

the plaintiff City. Petitioner and co-counsel Maley filed a motion to quash the subpoena on the ground that compulsory production of the magazines in compliance with the subpoena would contravene defendant McKelva's privilege against self-incrimination. The trial judge overruled the motion after oral argument. McKelva was then called as a witness for the City and when asked whether he had the listed magazines with him answered, "Sir, under the advice of counsel, I refuse to answer on the grounds that it may tend to incriminate me." The trial judge thereupon recessed the trial until the afternoon to afford McKelva another opportunity to comply with the subpoena. When Court reconvened McKelva was again called to the stand. He testified that he did not have the magazines with him and was refusing to produce them "solely because . . . the production

of such magazines would entail a substantial possibility of self-incrimination."

At the close of the trial the trial judge announced that he was "finding not only Mr. Michael McKelva in contempt of court but is also finding Mr. Maley and [petitioner] Mr. Maness as his attorneys guilty of contempt of court" and "In each of these cases the Court is fixing the punishment for this contempt at ten days confinement in the Bell County Jail and a fine of two hundred dollars."

Article 1911a, Revised Civil Statutes of Texas provides that "an officer of the court held in contempt by a trial court, shall, upon . . . motion . . . , be released upon his own personal recognizance pending a determination of his guilt or innocence by a judge of a district court, other than the offended court. . . ." Petitioner and Maley invoked this statute and were tried de novo

before respondent judge on the record made before the trial judge. Respondent judge adjudged both guilty but revised the punishment to $500 fines without jail sentences.

I think that this conviction must be reversed but I am not as confident as I was at conference that it should be reversed summarily. The Court has had few occasions to consider contempt convictions of lawyers based on advice to clients. Hickman v. Taylor, 329 U.S. 495 (1947) and In re Green, 369 U.S. 689 (1962), seem to be the most recent decisions. Hickman affirmed the reversal by the Third Circuit of a civil contempt finding against a lawyer for failure to produce his "working papers." The rationale of that decision was that the general policy against invading the privacy of an attorney's course of preparation is so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to

establish adequate reasons to justify production through a subpoena or court order. In Green the Court reversed the contempt conviction of a lawyer who counselled disobedience by his labor union client of a restraining order against picketing. His ground was that the order in his opinion was invalid under state law and that the controversy was within the exclusive jurisdiction of the National Labor Relations Board; he also advised the union that the best way to test the order was to continue picketing and, if the pickets were held in contempt, to appeal or to test any order of commitment by habeas corpus. We held that, even assuming validity of the order under state law, "it violates the due process requirements of the Fourteenth Amendment to convict a person of a contempt of this nature without a hearing and an opportunity to establish that the state court was acting in a field reserved exclusively by Congress for the federal agency." 369 U.S., at 693.

Both of these decisions suggest that the question whether the underlying order is valid is important, perhaps crucial, to the validity of an attorney's contempt conviction for counselling his client to disobey it. Yet as John Harlan argued in dissent in Green, these cases may also involve the necessity for accommodation with the United Mine Workers' principle that violation of an "order issued by a court whose claim to jurisdiction over the underlying proceeding is not frivolous may be punished as criminal contempt even if it is determined on appeal that such jurisdiction was lacking." Id., at 693.

United States District Judge Roberts, who granted petitioner's co-counsel Maley federal habeas relief, regarded that accommodation as required, and relying on the Fifth Circuit's statement of the proper analyses in United States v. Dickinson, 465 F. 2d 496 (1972), struck the balance in the lawyer's favor. I think Judge

Roberts' opinion is soundly reasoned and am prepared to adopt it. But I think that's more appropriately done after oral argument.

Judge Roberts began his analyses "by noting that the finding of contempt was in no way based upon any allegation of disrespectful or disruptive conduct by Petitioner, or upon any failure to obey a court order directed to him. Rather, the contempt consisted of advising and counselling a client that his constitutional rights would be endangered by obeying a court order . . . . We must [therefore] necessarily examine the propriety of the underlying assumption that McKelva's refusal to produce the magazines was contemptuous."

Judge Roberts then stated the United Mine Workers'principle that "Even incorrect court orders must ordinarily be obeyed until set aside." However, the Fifth Circuit had held in United States v. Dickinson that "an unconstitutional order must be obeyed if:

(1) the court has subject matter jurisdiction; (2) adequate and effective remedies are available for orderly review of the challenged ruling; and (3) the order does not require an irretrievable surrender of constitutional guarantees. " Judge Roberts held that element (1) was satisfied but that elements (2) and (3) were not. "The order for McKelva to obey the subpoena duces tecum required the irretrievable surrender of a constitutional right, with no adequate and effective remedies being available for the orderly review of the challenged ruling. McKelva and his attorney had no real opportunity to contest the constitutional order:

The choice had to be made on the spot, in the courtroom, whether to obey or disobey Judge Clawson's order. No immediate opportunity was available for appellate review of the order. Rather, McKelva's choice was either to refuse to obey the order or to be compelled to be a witness against himself, in violation of the Fifth Amendment."

In the circumstances, Judge Roberts was of the view that the case was ruled by the Fifth Circuit's statement in Dickinson that

> "It is obvious that if the order requires an irrevocable and permanent surrender of a constitutional right, it cannot be enforced by the contempt power. For example, a witness cannot be punished for contempt of court for refusing a court order to testify if the underlying order violates Fifth, Fourth or perhaps First Amendment rights . . . Once the witness has complied with an order to testify he cannot thereafter reprieve the information involuntarily revealed, even if it subsequently developed that compelling the testimony violated constitutional rights." 465 F. 2d at 512.

Thus, since the underlying order called for McKelva's irretrievable surrender of constitutional guarantees, Judge Roberts held that petitioner's co-counsel could not be held in contempt for "acting to protect the rights secured his client by the Fifth and Sixth Amendments to the Constitution."

It seems to me that our decisions in Hickman and Green support Judge Roberts' approach that,notwithstanding United Mine

Workers, when the determination can be made that an underlying order was in fact invalid, a lawyer's good faith advice to his client to refuse to comply with it cannot be punished as a criminal contempt.

Co-counsel Maley's success before Judge Roberts prompted Potter to vote at conference to deny Maness' petition with a "flag", that is, without prejudice to apply to the District Court for federal habeas relief. But is Maness "in custody" for purposes of habeas jurisdiction under 28 U.S.C. §2241? Respondents' order at page 28 of the Petition is that "in lieu of the punishment assessed by Judge Clawson, . . . the said Michael Anthony Maness be, and he is hereby, assessed the following punishment: a fine of $500, to be paid to the District Clerk . . . at or before 12 noon, October 12, 1973." Petitioner tells us at pp.2-3 of the petition that "by its terms the contempt judgment allowed

a grace period of approximately two weeks for payment of the fine, permitting the Petitioner to remain at large on a personal recognizance bond while seeking further relief . . . " He advises further at page 4 that after his unsuccessful efforts to get relief from the Texas Supreme Court and Court of Criminal Appeals "the respondent entered an order continuing the Petitioner on his personal recognizance bond, despite his failure to pay the fine, in order to permit the filing of a petition for the writ of certiorari to this Court."

The question of "in custody" was faced by Judge Roberts. His opinion states: "Petitioner [Maley] has clearly manifested his intention not to pay the $500 fine assessed against him, and to go to jail if necessary. The 'restraint' requirement of 28 U.S.C. §2254 is satisfied in that Petitioner is on bond and will, according to Judge Meyer's [respondent herein] order, go

to jail upon refusal to pay the fine. Marden v. Purdy, 409 F. 2d 784 (5th Cir. 1969). Judge Meyers has allowed Petitioner to remain free on personal recognizance bond pending the outcome of this collateral attack."

Our cases have certainly gone far in finding satisfaction of the "in custody" requirement on the basis of even minimal restraints on one's "liberty to do those things which in this country free men are entitled to do." Jones v. Cunningham, 371 U.S. 236, 243 (1963). Our most recent decision is last Term's Hensley v. Municipal Court, 411 U.S. 345, where we held that an accused convicted and sentenced to one year's imprisonment and released on his own recognizance pending appeal was "in custody." However, the opinion emphasized that California law imposed statutory restraints on him not shared by the public generally, and also that the State was eager to put him behind

bars and therefore that in his case confinement was not a "speculative possibility." Id., pp. 351-352. The petitioner in Marden v. Purdy relied upon by judge Roberts had also been convicted and sentenced to a year's imprisonment; he was released on cash bail pending appeal. I conclude therefore that we have not yet confronted the "in custody" question in a case, as here, of a petitioner sentenced only to a fine and released on his personal recognizance. Despite Judge Roberts' comments, it seems to me that there may be only a "speculative possibility" that failure to pay the fine means certain imprisonment. In any event, Mike Rodak called counsel at my request and reports that respondent, through the Attorney General of Texas, has perfected an appeal to the Fifth Circuit from Judge Roberts' order in the Maley case, that briefs will be filed this month, that oral argument will not be earlier than May, and that it is not possible

to predict when a decision will be announced. All in all, I do not think that I could vote to deny with a "flag."

W.J.B.Jr.