The Burger Court Opinion Writing Database

Withrow v. Larkin

421 U.S. 35 (1975)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 28, 1975

No. 73-1573 - Withrow v. Larkin

Dear Byron:

I am writing out my thoughts on some points which you may or may not agree with fully. If not, I may add them as a concurrence.

Regards,

WEB

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 13, 1975

Re: No. 73-1573 - Withrow v. Larkin

MEMORANDUM TO THE CONFERENCE:

I agree that the judgment of the District Court must be reversed and the case remanded. Unlike the majority, however, I believe that a "remand for fuller emendation of the findings, conclusions and judgment," ante, at 9, is not only "justified" but essential to "informed and intelligent appellate review." Schmidt v. Lessard, 414 U.S. 473, 477 (1974).

I believe there is a fundamental inconsistency between (1) stating that a remand for compliance with Fed.R.Civ.P. 52(a) and 65(d) would not "in the circumstances here . . . add anything essential to the determination of the merits," ante, at 9, and concluding that "[o]n the present record, it is quite unlikely that appellee would ultimately prevail . . . .", id., at 10, and (2) speculating that the action of the Board in transmitting its findings and conclusions to the district attorney was not deemed "critical" by the District Court and inviting the court to consider the issue on remand. Id., at 22 with n.25. The point is that because of

the failure of the District Court to comply with the Federal Rules, it is impossible to tell what it deemed "critical." Review by this Court therefore becomes an exercise in speculation. The proposed opinion seems to acknowledge this when it says: "Findings of that kind made by judges with special insight into local realities are entitled to respect, but injunctions resting on such factors should be accompanied by at least the minimum findings required by Rules 52(a) and 65(d)." Id. In light of that statement, I fail to see any justification whatever for reaching out to decide a constitutional issue that in its pure form may not be, and indeed probably is not, presented by this case.

Remand for compliance with the Federal Rules seems to me particularly appropriate when the standard of review is, as it is in this case, whether the District Court abused its discretion, Brown v. Chote, 411 U.S. 452, 457 (1973), and cases cited, a fact not explicitly acknowledged by the opinion. The proposed opinion declines to disturb the District Court's conclusion "that appellee would suffer irreparable injury by having his license temporarily suspended," ante, at 8 n.8,[1/] and it confesses that the "issue is substantial." Id. at 15. How then can it

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1/ I believe there is at least a question in that regard. Appellants maintained at oral argument that appellee lived in Michigan, came to Wisconsin only infrequently, and had left the day-to-day running of the clinic in the hands of another.

properly conclude that the order under review was "the result of improvident exercise of judicial discretion"? Meccano, Ltd. v. John Wanamaker, 253 U.S. 136, 141 (1920). To be sure, "where it is plain that the disposition was in substantial measure a result of the lower court's view of the law, which is inextricably bound up in the controversy, the appellate court can, and should review such conclusions." Societe Comptoir De L'Indus, etc., v. Alexander's Dept. Stores, Inc., 299 F.2d 33, 36 (CA 2 1962). But again, the opinion, quite properly on this record, acknowledges uncertainty as to what the District Court thought "critical," ante, at 22 n.25, and it admits that the "issue is substantial." In my view, the opinion has invoked the District Court's modification of its judgment as an excuse to reach out and decide an issue of law which may not be in the case on the one hand, while pretending that it has never been mofified on the other.[2/]

The opinion seems to recognize that, once the Court has embarked on the course of review on the merits, it cannot confine itself to the incomplete and turbid opinion of the District Court, even as supplemented

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2/ The opinion does not question the power of the District Court to modify its judgment, after probable jurisdiction had been noted, without the permission of this Court. See Fed.R.Civ.P. 62(a); 7 J. Moore, Federal Practice ¶ 62.05 (2d ed. 1974); Ideal Toy Corp. v. Sayco Doll Corp., 302 F.2d 623 (CA 2 1962).

by the amended judgment. For, as the opinion notes, the question before the District Court "was whether the showing made raised serious questions, under the Federal Constitution." Ante, at 7, quoting Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310, 316 (1940). Yet, the opinion states that it is "not persuaded" by the fact that the Board "proceeded to make and issue formal findings of fact and conclusions of law asserting that there was probable cause to believe that appellee had engaged in various acts prohibited by the Wisconsin statutes," ante, at 19 (footnote omitted), and that the "findings and conclusions were verified and filed with the district attorney for the purpose of initiating revocation and criminal proceedings." Id.

The opinion's approach seems to me fraught with problems and risks, some of which have been discussed. First, although requiring the consideration of facts which may or may not have been considered relevant or "critical" by the District Court, it implicitly adopts an interpretation of those facts which it admits may not comport with reality and which do violence to the evidence. See ante, at 22 with n.25. Second, to the extent the opinion concentrates on the ultimate findings of probable cause in the Board's "Decision," App. 59, it neglects the fact that the Board also made specific findings ("Conclusions of Law") that appellee

had engaged in conduct which violated Wis. Stat. § 418.18 (1)(g).[3/] To my mind the specificity of those conclusions renders the constitutional question presented more difficult than that which the opinion purports to decide. Finally, and I repeat, whether or not the members of the Court are ultimately "persuaded" that a violation of due process is established on the facts in this case is irrelevant. The analysis and discussion, even with respect to the facts it chooses to regard and their interpretation, vividly demonstrate that, assuming adequate compliance with the Federal Rules, there was no abuse of discretion by the District Court. It is only because that assumption is not true that I would be willing to concur in the judgment -- adding, of course, a few well chosen (?) comments about the gross fraud perpetrated by this "quack."

Regards,

LWB

3/ "(1) That in practicing medicine and surgery under the name Glen Johnson the licensee was engaging in conduct unbecoming a person licensed to practice or detrimental to the best interests of the public, within the meaning of sec. 448.18 (1)(g), Stats.

"(2) That in counseling and advising doctors employed by him at his abortion clinic to use names other than the names under which they were originally licensed to practice medicine and surgery in Wisconsin, the licensee has engaged in conduct unbecoming a person licensed to practice or detrimental to the best interests of the public, within the meaning of sec. 448.18 (1)(g), Stats." App. 58-59.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 8, 1975

Re: 73-1573 - Withrow v. Larkin

Dear Byron:

With the proliferation of separate opinions -- it seems to be a malady of spring -- I have decided that the jurisprudence will suffer no irreversible damage if I abandon my proposed concurring opinion in this case.

I therefore join your opinion of March 20, 1975.

Regards,

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

February 17, 1975

Dear Byron:

Please join me in your opinion in No. 73-1573, Withrow v. Larkin.

Sincerely,

William O. Douglas

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 12, 1975

RE: No. 73-1573 Withrow v. Larkin

Dear Byron:

I agree.

Sincerely,

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

February 4, 1975

No. 73-1573, Withrow v. Larkin

Dear Byron,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73–1573

Harold Withrow et al., etc., Appellants, *v.* Duane Larkin. | On Appeal from the United States District Court for the Eastern District of Wisconsin.

[February —, 1975]

MR. JUSTICE WHITE delivered the opinion of the Court.

The statutes of the State of Wisconsin forbid the practice of medicine without a license from an examining board composed of practicing physicians. The statutes also define and forbid various acts of professional misconduct, proscribe fee splitting, and make illegal the practice of medicine under any name other than the name under which a license has issued if the public would be misled or other detriment to the profession would result. To enforce these provisions, the examining board is empowered under Wis. Stat. §§ 448.17 and 448.18 to warn and reprimand, temporarily to suspend the license and "to institute criminal action or action to revoke the license when it finds cause therefor under any criminal or revocation statute . . . ."[1] When an investigative

[1] "No person shall practice or attempt or hold himself out as authorized to practice medicine, surgery, or osteopathy, or any other system of treating the sick as the term 'treat the sick' is defined in s. 445.01 (a), without a license or certificate of registration from the examining board, except as otherwise specifically provided by statute." Wis. Stat. § 448.02 (1).

"The examining board shall investigate, hear and act upon practices by persons licensed to practice medicine and surgery under

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1573

Harold Withrow et al., etc., Appellants, *v.* Duane Larkin. | On Appeal from the United States District Court for the Eastern District of Wisconsin.

[February —, 1975]

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To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated: ______

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STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 7, 9, 10, 14–16, 22

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1573

Harold Withrow et al., etc., Appellants, v. Duane Larkin. | On Appeal from the United States District Court for the Eastern District of Wisconsin.

[March —, 1975]

MR. JUSTICE WHITE delivered the opinion of the Court.

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STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 1, 3, 5, 8, 14-15, 21-22

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated: _____

Recirculated: 4-9-75

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1573

Harold Withrow et al., etc., Appellants, v. Duane Larkin. | On Appeal from the United States District Court for the Eastern District of Wisconsin.

[April —, 1975]

MR. JUSTICE WHITE delivered the opinion of the Court.

The statutes of the State of Wisconsin forbid the practice of medicine without a license from an examining board composed of practicing physicians. The statutes also define and forbid various acts of professional misconduct, proscribe fee splitting, and make illegal the practice of medicine under any name other than the name under which a license has issued if the public would be misled, such practice would constitute unfair competition with another physician, or other detriment to the profession would result. To enforce these provisions, the examining board is empowered under Wis. Stat. Ann. §§ 448.17 and 448.18 to warn and reprimand, temporarily to suspend the license, and "to institute criminal action or action to revoke license when it finds cause therefor under any criminal or revocation statute . . . ."[1] When

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"The examining board shall investigate, hear and act upon practices by persons licensed to practice medicine and surgery under

p. 8

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated: _____

Recirculated: 4-10-75

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1573

Harold Withrow et al., etc., Appellants, *v.* Duane Larkin. | On Appeal from the United States District Court for the Eastern District of Wisconsin.

[April —, 1975]

MR. JUSTICE WHITE delivered the opinion of the Court.

The statutes of the State of Wisconsin forbid the practice of medicine without a license from an examining board composed of practicing physicians. The statutes also define and forbid various acts of professional misconduct, proscribe fee splitting, and make illegal the practice of medicine under any name other than the name under which a license has issued if the public would be misled, such practice would constitute unfair competition with another physician, or other detriment to the profession would result. To enforce these provisions, the examining board is empowered under Wis. Stat. Ann. §§ 448.17 and 448.18 to warn and reprimand, temporarily to suspend the license, and "to institute criminal action or action to revoke license when it finds cause therefor under any criminal or revocation statute . . . ."[1] When

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"The examining board shall investigate, hear and act upon practices by persons licensed to practice medicine and surgery under

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
CE THURGOOD MARSHALL

February 27, 1975

Re: No. 73-1573 -- Harold Withrow et al. v. Duane Larkin

Dear Byron:

Please join me.

Sincerely,

T. M.

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 11, 1975

Re: No. 73-1573 - Withrow v. Larkin

Dear Byron:

Please join me.

Sincerely,

H.A.B.

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 10, 1975

No. 73-1573 Withrow v. Larkin

Dear Byron:

Please join me.

Sincerely,

L. Lewis

Mr. Justice White

lfp/ss

cc: The Conference

73-1573

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 18, 1974

73-1573

Dear Chief:

The argument in Withrow v. Larkin by the state this morning reinforces my conviction that we seldom get good arguments from the parties on jurisdictional issues. Both parties usually want a determination on the merits. At some Conference when the schedule permits, I would like to advance the suggestion that the Court's legal officers look into any jurisdictional aspects of cases that we have actually granted or noted, and circulate memoranda to us when they believe there is such a problem not fully briefed.

Sincerely,

WHR

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 10, 1975

Re: No. 73-1573 - Withrow v. Larkin

Dear Byron:

You are probably neither the first nor the last member of the Court to write an assigned opinion somewhat differently from one other member of the Court's recollection of the Conference discussion. My first choice would have been, as stated in Conference, to chastise the District Court rather sharply for its failure to comply with the procedural requirements governing the issuance of injunctions; you have chosen t chastise them mildly, and go on to the merits. I agree with y treatment of the merits, and will join your opinion if you could see your way clear to make one relatively minor change.

The second paragraph of your footnote 8 on page 8 of the first draft deals with the showing of irreparable injury. Your third sentence reads:

> "If the District Court is correct in its constitutional premise that an agency which has investigated possible offenses cannot fairly adjudicate the legal and factual issues involved, then its conclusion that appellee would suffer irreparable injury by having his license temporarily suspended by such an agency seems irrefutable. Cf. Gibson v. Berryhill, 411 U.S. 564, 577, n. 16 (1973).

The Gibson footnote, as I read it, simply refers to a finding of the District Court in that case that a suspension of a license to practice the profession would cause irreparable damage. In this case, the appellants filed an affidavit in opposition to the motion for a preliminary injunction alleging that appellee did not regularly practice medicine personally in the state after February, 1973. App. 64. I would not like us to endorse the notion that as a matter of law any license suspension automatically amounts to "irreparable injury" for purposes of enjoining the enforcement of a statute. Would you be willing to change the third sentence of the second paragraph of footnote 8 by deleting the last two words -- "seems irrefutable" -- and replacing them with something like "might well follow", "could well follow", or something else less emphatic than "seems irrefutable".

If you make this change, your reward will be a "join" letter from me!

Sincerely,

Mr. Justice White

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 11, 1975

Re: No. 73-1573 - Withrow v. Larkin

Dear Byron:

Please join me.

Sincerely,

Mr. Justice White

Copies to the Conference