University of Baltimore Law Forum

Volume 9
Number 1 *Fall/Winter 1978/1979*

Article 10

1979

Supreme Court Decisions: A Suit of Armor

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In addition, Stewart and Marshall recognized the dangers in compelling disclosure of confidential news sources. Informants have been essential to the gathering of information and ultimate dissemination of news of public interest. Warrants could force reporters to reveal the identity of these sources even though they may be unrelated to the evidence sought. Future sources of important—but secret information, fearful of having their identity revealed, may be reluctant to confide in the press.

In a separate dissenting opinion, Justice Stevens discussed another dimension of the case. He emphasized the private nature of the evidence sought and questioned the sufficiency of the reasonable belief standard when the police make an unannounced search of property belonging to a non-suspect. Since the warrant clause of the fourth amendment was not framed to protect private papers and at the same time does not define probable cause, Stevens stressed the need to distinguish between evidence of a personal nature and instruments of a crime. He recognized that there should be probable cause that the defendant committed a crime and that the defendant is likely to destroy any evidence related to it. If a lower probable cause standard is employed and personal matters are seized, reputations could be injured and privacy invaded. Only the subpoena process affords a *prior* opportunity to challenge the search and therefore, to prevent access to private materials.

However, the majority did not agree that a subpoena procedure should be required where an unannounced search is conducted on the property of a newspaper not suspected of committing a crime. A warrant is not barred in such a case and a special exemption from searches and seizures for the press was rejected.

—Charles Chester

A Suit of Armor

On March 28, 1978 the Supreme Court reinforced the common law principle of judicial immunity from civil suit. In a 5-3 decision the Court in *Stump v. Sparkman,* 98 S.Ct. 1099 (1978), concluded that an Indiana Circuit Court judge who authorized the sterilization of a fifteen year old girl in an *ex parte* proceeding, was immune from civil suit under 42 U.S.C.§1983.

The circumstances preceding the application of the doctrine are shocking. In 1975 Linda and Leo Sparkman sought medical advice as to why they could not conceive a child. At this point Linda Spitler Sparkman first learned that she had been sterilized at the age of fifteen. Her mother, Ora Spitler McFarlin, had petitioned the Circuit Court of DeKalb County, Indiana to order the sterilization of her daughter. Mrs. McFarlin had alleged that without her knowledge and consent, her daughter, Linda, dated and stayed overnight with various young men. Mrs. McFarlin directed her attorney, Warren G. Sunday, to prepare an affidavit which stated that "Linda was 'somewhat retarded' although she attended public schools and had been passed along with other children in her age level." *Sparkman v. McFarlin* 552 F.2d 172, 173 (7th Cir. 1977). The petition and affidavit were presented to Judge Stump of the Circuit Court who issued the requested order without appointing a guardian *ad litem* to represent Linda's interests, without holding an evidentiary hearing, without providing Linda with notice of the petition, and without even filing the order in the DeKalb County Circuit Court. The only "notice" Linda received during this period of time was that she was to enter the hospital for an appendectomy.

Linda and Leo Sparkman brought an action seeking damages pursuant to 42 U.S.C. §§1983, 1985 (3) contending that the actions of the defendants, Ora E. McFarlin, Warren G. Sunday, Esq., Dr. John Hines, and Judge Harold Stump, violated her constitutional rights by sterilizing her or causing her to be sterilized. Pendent state claims were attached for assault and battery and medical malpractice. Leo Sparkman asserted a pendent claim for loss of potential fatherhood. The District Court, in granting the defendants' motions to dismiss, held that no federal action would lie against any of the defendants because Judge Stump, the only state agent, was absolutely immune from suit pursuant to the doctrine of judicial immunity. *Sparkman v. McFarlin,* Civil No. F 75-129 (N.D. Ind. May 13, 1976). "Whether or not Judge Stump's approval of the petition may in retrospect appear to have been premised on an erroneous view of the law, Judge Stump surely had jurisdiction to consider the petition and act thereon." 98 S.Ct. at 1104.

On appeal, the Seventh Circuit Court of Appeals reversed the judgment of the Circuit Court and held that Judge Stump failed to act within his jurisdiction when he approved the petition to have Linda Spitler sterilized. The Court reasoned that although IND. CODE 33-4-4-3 confers original jurisdiction in all cases of law and equity, it does not cloak a Circuit Court judge with blanket immunity. The Court found that there was no statutory basis for Judge Stump's approval of the petition. In addition, Judge Stump was acting unlawfully even if he was creating an innovative legal remedy to meet changing social conditions, an argument made in support of the broad discretion exerciseable by a judge. A judge may not use his judicial power "to order extreme irreversible remedies such as sterilization in situations where the legislative branch of government has indicated that they are inappropriate." 552 F.2d at 176.

Of significance is the fact that the Court of Appeals found the actions taken to be an illegitimate exercise of judicial common law power due to failure to comply with elementary principles of procedural due process. 552 F.2d at 176.

The Supreme Court reversed the decision of the Court of Appeals and found that Judge Stump was immune from liability for damages even if his approval of the petition for sterilization was in error. The concepts of jurisdiction and the judicial act requirements were found to be determinative of the extent of the doctrine of judicial immunity. The Court noted that the Seventh Circuit Court of Appeals misconstrued the doctrine. Because Judge Stump had performed a judicial act that was not in clear absence of all jurisdiction, he was thus entitled to judicial immunity. 98 S.Ct.at 1106.

The Supreme court examined the statutory authority vested in an Indiana Circuit Court Judge pursuant to IND. CODE 33-4-4-3 (1976), which states:

> Said Court shall have exclusive jurisdiction in all cases at law and in equity whatsoever and in criminal cases and actions for divorce, except where exclusive or concurrent jurisdiction is, or may be conferred by law upon other justices of the peace. . .

Formerly, Indiana Circuit Court judges had the authority to authorize sterilization but only upon institutionalized persons. Ch. 227, §1, 1951 Indiana Act 649; Chap. 244, §§1-3, 1937 Indiana Acts 1164; Chap. 312, §§2-6, 1931 Indiana Acts 116; Chap. 241, §§1-6, 1927 Indiana Acts 713 (repealed 1974). The Supreme Court did not consider it significant that the authority to sterilize had been repealed. What was significant, however,

was the fact that at the time there "was no Indiana statute. . . prohibiting a Circuit Court, a court of general jurisdiction, from considering a petition of the type presented to Judge Stump." 98 S.Ct. at 1105.

The express statutory authority had been for the sterilization of an institutionalized individual. Despite that fact, it did not follow that a court of general jurisdiction had no power to act upon a petition for sterilization of a minor in the custody of her parents minus statutory authority. *See Kemp v Kemp* 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974), *Smith v. Command* 231 Mich. 409, 294 N.W. 140 (1925). Therefore, a Circuit Court judge of a court of general jurisdiction has jurisdiction over the subject matter of any case before him provided there is no statute or case prohibiting such jurisdiction.

A related proposition is a case where the judge failed to observe a statute or case law limitation on his judicial power yet he was not deprived of the defense of judicial immunity. The opinion in the case of *A.L. v. G.R.H.*, 325 N.E.2d 501 (Ind. App. 1975) did not indicate that a circuit judge was without jurisdiction to rule upon the parent's petition to sterilize their child. "The clear implication of the opinion is that when presented with such a petition, the Circuit Judge should deny it on its merits rather than dismiss it for lack of jurisdiction." 98 S.Ct. at 1106. Rather than acting in the clear absence of jurisdiction, Judge Stump exceeded it in the disposition of the case before him.

The Supreme Court failed to address the question of why one who acts in excess of his jurisdiction is provided with judicial immunity. The Court did, however, recognize the importance to the administration of justice that a judge be free to act without fear of personal reprisal. 98 S.Ct. at 1108, quoting from *Bradley v. Fisher* 80 U.S. (13 Wall.) 355 (1872). Judges must be free from harassing, expensive and time consuming law suits. *Pierson v. Ray*. 386 U.S. 547 (1967); *McCray v. Maryland* 456 F.2d 13 (4th Cir. 1972).

The respondents argued that Stump's approval of the petition was not a judicial act "because it was not given a docket number, was not placed on file with the clerk's office, and was approved in an *ex parte* proceeding without notice to the minor, without a hearing and without the appointment of a guardian *ad litem*." 98 S.Ct. at 1106. In concluding that the Judge did perform a judicial act, the Court focused on whether his act was a function normally performed by a judge and whether the parties dealt with him in his judicial capacity. Certainly Ora McFarlin had presented the petition to Judge Stump because he was a circuit court judge, 98 S.Ct. at 1108, and consideration of a petition relating to the affairs of a minor is the type of action judges are normally called upon to review in their official capacity, 98 S.Ct. at 1108. This is the subjective test that must be met for an ordinary act to be labeled a judicial act.

The dissenting opinions in *Stump* suggest that the Judge's actions did not constitute a judicial act. Justices Stewart, Marshall, and Powell failed to convince the majority that Stump's actions were not those "normally performed by a Judge." At 98 S.Ct. 1109, the dissent states:

> it is not clear to me whether the Court means that a Judge normally is asked to approve a mother's decision to have her child given a surgical treatment or that a Judge "normally" is asked to approve a mother's wish to have her daughter sterilized.

Merely because Stump was asked to approve a petition because he was a circuit court judge did not make that approval a judicial act. The dissent reasoned that in determining what constitutes a judicial act, factors such as whether the proceeding presents a case or controversy, adversaries, and decision-making, are important. In the absence of any of these "normal attributes" of a judicial proceeding there is no judicial act. 98 S.Ct. at 1110.

Justice Powell, in dissent, emphasized what he thought to be the central feature of the case: petitioner's preclusion of any possibility for the vindication of the respondent's rights elsewhere in the judicial system. 98 S.Ct. at 1112. He argued that a judicial act is one that does not preclude a party's right to resort to appellate or other judicial remedies. Judge Stump should have been denied judicial immunity when his unjudicial conduct prevented Linda Sparkman from resorting to appellate or other judicial remedies otherwise available.

While bolstering the concept of judicial immunity, the Court, in an aside, provided a history lesson which served to justify the use of the doctrine. The decision explained that the first Supreme court decision on judicial immunity held that judges were not liable in civil actions for their judicial acts even when such acts were in excess of their jurisdiction. *Randall v. Brigham* 74 U.S. (7 Wall.) 523 (1868). Four years later in *Bradley v. Fisher, supra,* the Court held that "judges of courts are not liable to civil action for their judicial acts even when such acts were in excess of their jurisdiction and are alleged to have been done maliciously or corruptly." 80 U.S. at 337.

While *Bradley v. Fisher* was being argued before the court, Congress enacted the Civil Rights Act of 1871. Section 1, now codified as 42 U.S.C. §1983 (1976), was enacted to protect black citizens from organized racist movements and to provide a remedy for injuries that were occuring at the hands of federal and state law enforcement officials during the Reconstruction. See CONG. GLOBE, 42nd Cong, 1st Sess. 653 (1871).

The present Section 1983 provides:

> Every person, who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subject, any citizen of the U.S., or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

In *Pierson v. Ray, supra,* a group of black clergymen brought suit against a police Court Judge for false arrest and violation of Section 1983. The clergymen had attempted to use a "white only" waiting room in a Jackson, Mississippi bus terminal and were arrested and convicted of violating a state breach of the peace statute. MISS. CODE ANN. 62087.5 (Supp. 1971). The majority found the Police Court Judge absolutely immune from suit under Section 1983, and based its decision on the belief that judicial immunity was a well established principle of common law. Further, the Court found the doctrine firmly entrenched within the legislative history of Section 1 of the Civil Rights Act. 386 U.S. at 553-554.

Justice Douglas severely criticized the majority's reliance on the legislative history of Section 1 of the Civil Rights Act. 386 U.S. at 547, 559-563. Douglas suggested that Congress recognized and accepted the fact that State Court Judges would not be immune from actions based on Section 1 of the Act. The maladministration of justice was due to the impartial administration of law and equity and providing broad immunity would only serve to foster this problem. 386 U.S. at 559.

However, *Pierson v. Ray, supra,* has been the governing rule despite the questionable legislative record. While courts have qualified the immunity doctrine with respect to executive, administrative, and other quasi judicial officers[1], they have consistently upheld judicial immunity as prohibiting Section 1983 suits against judges.

—Roxane N. Sokolove

[1]*See* Schuer v. Rhodes 416 U.S. 232 (1974) where personal representatives of the estates of students who died in the Kent State tragedy brought suit under 42 U.S.C. §1983 against the Governor of Ohio. Chief Justice Berger, after finding the suit not barred by the 11th Amendment, held that state officers had a qualified, not absolute immunity, the degree of qualification "being dependent upon the scope of discretion and responsibilities of the officer and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." 416 U.S. at 247.

Recent Decisions

Complete with Accessories

The Court of Appeals, in the case of *State v. Williamson,* 282 Md. 100, 382 A.2d 588 (1978), has held that an accessory before the fact may be indicted and convicted of first degree murder under the form of indictment prescribed in MD. ANN. CODE, Art 27, §616(a),[1] and that the indictment need not distinguish between principals and accessories in order for the conviction to be upheld.

Joyce Marcine Williamson was convicted by a Baltimore County jury of first degree murder and other charges arising from the death of her husband outside of their home on October 5, 1975. According to the findings of the jury, defendant Williamson hired one Lawrence Merrick to murder her husband; Merrick subsequently beat Mr. Williamson to death in a parked car in the driveway of his home on the date in question. The evidence indicated that following a period of negotiation with someone who ultimately refused to commit the murder defendant, with the assistance of her brother, then

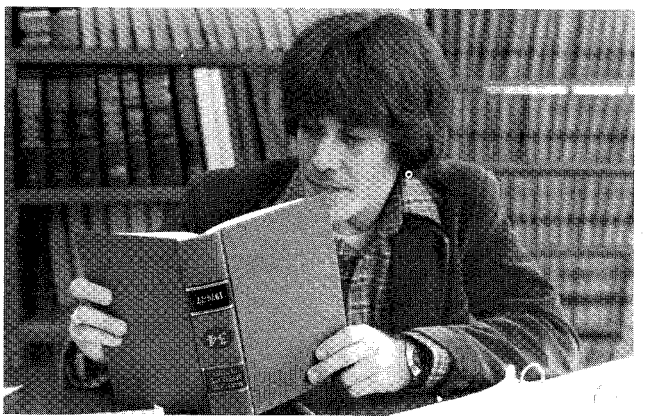

Photo by J.J.R.

arranged for the hiring of Merrick. There was, however, no evidence adduced at trial to indicate that defendant assisted Merrick in any way on the night of the murder, or that she was in a position to aid him in any way, or even that she was awake at the time of the murder. Concluding that there was no constructive presence of the defendant at the scene of the crime, the Court of Special Appeals held that the evidence was insufficient to show that Williamson was a principal in the murder of her husband and reversed the conviction. The issue then presented by the state to the Court of Appeals on a writ of certiorari was whether a defendant can be convicted of first degree murder when he has hired someone else to commit the murder and is therefore an accessory before the fact.

The Court of Appeals held that the abbreviated form of indictment for murder privided for in MD. ANN. CODE, Art. 27, §616 (a) allows for a conviction of murder when proof of either accessoryship or principalship is adduced, and thereby reversed the Court of Special Appeals.

At common law, distinctions were drawn between accessories and principals for reasons which even today remain unclear. A popular suggestion has been made that the doctrine of accessoryship was created by early common law judges in an effort to alleviate, in certain cases, the severity of the rule that all felonies were punishable by death. An accessory before the fact is one who procures, counsels or commands the commission of the criminal offense but is absent from the scene of the crime at the time of its commission. A principal may be of two degrees: a principal in the first degree being one who commits

[1]The section in question reads as follows: *"Where death penalty not sought.*— Except as provided in subsection (b), in any indictment for murder or mansiaughter, or for being an accessory thereto, it shall not be necessary to set forth the manner or means of death. It shall be sufficient to use a formula substantially to the following effect: That A.B., on the. . .day of. . .nineteen hundred and. . .at the county aforesaid, feloniously (wilfully and of deliberately premeditated malice aforethought) did kill (and murder) C.D. against the peace, government and dignity of the State."