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WISCONSIN POTOWATOMIES, HANNAHVILLE IND. COM. v. WILSEY 1153

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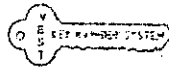
infringement of the public trial right. That does not, however, make it constitutionally mandated in all exclusion circumstances. It would hardly be feasible to expect, in the witness-oriented exclusion cases, that a witness afraid for her health or safety would feel, or actually be, in any better position following a trial court *voir dire* or order designed to remove from the spectators the persons responsible for her fears. A spectator's animosity or other state of mind is far more easily hidden than one's age or sex, and an apprehensive witness can be expected to continue to be apprehensive following a selective exclusion. In these circumstances, the health and safety of the witness and the rights of the defendant seem much better served by careful inquiry to determine the need for the witness's testimony and the witness's inability to testify in public, followed by an exclusion order that is limited in time to the witness's testimony only and otherwise operates, where possible, to minimize the impact on the defendant's rights.¹¹

[5] The colloquy in the record in this case reveals that the trial judge's concern was multi-faceted. His exclusion order was based partly on concern for the welfare of a young expectant mother and her unborn child and partly on her own subjective fear of reprisal—whether reasonable or unreasonable—if she testified in public. While the record falls short of establishing a real danger to her health or that of her child, or the reasonableness of her fears in terms of actual threats, or even a demonstration in court of her inability to testify publicly, this court is very reluctant to second-guess the trial court's discretion on a cold record four years hence. *See*

United States ex rel. Bruno v. Herold, *supra*, 408 F.2d at 127, 129. In view of the defense objection at trial, the benefits of hindsight and reflection suggest the trial court might have been more circumspect in its decision, perhaps following the approach outlined above. Nevertheless, this court can perceive, under the applicable law, no error of constitutional magnitude indicating a disregard of the trial court's responsibility to conduct a fair and public trial.¹²

Accordingly, petitioner's application must be denied.

So ordered.



Petition of the WISCONSIN POTOWATOMIES OF the HANNAHVILLE INDIAN COMMUNITY on behalf of Leroy Wandahsega, Jr., et al., Petitioner,

v.

William Edward WILSEY and Miriam Carole Wilsey, his wife, Respondents.

No. 74-17-Civ-Occ.

United States District Court,
M. D. Florida,
Ocala Division.
July 11, 1974.

An Indian community in the State of Michigan sought habeas corpus relief with respect to infants who were Indians of the half blood, who had been committed by a Michigan court to the Michigan Department of Social Services for adoption purposes and who had been

11 *E. g.*, the order could be fashioned around a response by the witness to a question directed at whether there are some particular people whose presence would or would not disturb her.

12. Petitioner invites the court to reach an opposite result by ruling that in *People v. Hagan, supra*, and *People v. Hinton, supra*; the New York Court of Appeals has reached

results inconsistent with the Sixth and Fourteenth Amendments. We decline the invitation, finding no difficulty viewing those cases to be sensible accommodations to the rights of defendants, witnesses, and the integrity of the State's judicial processes, and completely consistent with fundamental notions of due process and the generally recognized contours of the public trial right.

Petition denied.

Although Michigan court had committed children, who were Indians of half blood to Michigan Department of Social Services for adoption purposes and Department placed them for adoption by aunt and uncle in Florida, children were not "in custody" of aunt and uncle for purposes of federal habeas corpus requirement that person having custody be named as respondent. West's F.S.A. § 63.052(3); 28 U.S.C.A. §§ 2254, 2254(a).

Where Michigan court had committed children, who were Indians of half blood, to Michigan Department of Social Services for adoption purposes and Department placed them for adoption by aunt and uncle in Florida, and no Florida court had ruled on federal claims of Indian community located in State of Michigan, principles of comity required that Indian community first exhaust available state remedies before seeking habeas corpus relief in federal courts. 25 U.S.C.A. §§ 476-478; M.C.L.A. § 712A.1 et seq.; West's F.S.A. § 63.052 (3); 28 U.S.C.A. §§ 2254, 2254(a, b).

James S. Welch, Lakeland, Fla., for respondents.

UOFLAT, District Judge.

The facts indicate that on November 22, 1971, in the State of Michigan, Leroy Wandahsega, the father of the three children involved herein, shot and killed his wife and her mother, and then took his own life. Leroy Wandahsega was a full-blooded Potawatomie Indian, making his children Indians of the half blood, as their mother was Caucasian. The three children had each been enrolled as members of the Hannahville Indian Community at birth, the Community having previously been organized and incorporated pursuant to Title 25, United States Code, Sections 476-478 (1972) (originally enacted as Act of June 18, 1934, ch. 576, §§ 16-18, 48 Stat. 987-988).

After the parents' deaths, the Juvenile Officer for Menominee County, Michigan (the county in which the Hannahville Indian Community is located and in which the events related took place) filed a petition with the county probate court alleging that the three children were without legal custodians and were therefore dependent children within the meaning of the Michigan Juvenile Court Act. The petition further requested that the probate court take "temporary custody of said children to facilitate proper planning for them." On December 1, 1971, the probate court issued an order making the children temporary wards of that court. Thereafter, on January 13, 1972, the probate court issued a further order making the children permanent wards of the court and committing them to the Michigan Department of Social Services for adoption purposes. The Department of Social Services determined that the best inter-

On July 1973 that the court should have that only the authority of the 1973 that the court should have that the body having federal state fairs. A decision subsequently in It provided placed in a Community any formal ment as it ordered the Department quest, within the appropriate agency for del gan for del partment of Service, Di refused to

ests of the children would be served if they were transported to Florida, there to be placed for adoption by Mr. and Mrs. William Wilsey, the children's maternal aunt and uncle (and respondents herein). Jake McCulloch, paternal great uncle of the children, who had contested the proceedings in the probate court on his own behalf (rather than on the part of the Hannahville Indian Community), filed a petition for delayed appeal with the probate court, which petition was denied. Thereupon, the children were brought to Florida, where the Wileys, filed a petition for adoption in the Circuit Court for Lake County, which proceeding is still pending.

On July 13, 1972, the Hannahville Indian Community became formally involved, when it filed a complaint in the United States District Court for the Western District of Michigan seeking a declaratory judgment to the effect that the county probate court had been without jurisdiction to determine who should have custody of the children, and that only the Indian Tribal Council had authority to do so. On November 16, 1973 that court delivered a memorandum opinion finding that the Michigan probate court had no jurisdiction to decide who should have custody of the children, and that the Tribal Council was the only body having that power as a result of federal statutes regulating Indian affairs. A declaratory judgment was subsequently issued on December 17, 1973. It provided that the three children "be placed in accordance with [the Indian Community's] customs and subject to any formal procedures for child placement as it may promulgate." The court ordered the Director of the Michigan Department of Social Services to request, within the limits of his authority, the appropriate Florida governmental agency to return the children to Michigan for delivery to the Tribal Council for placement. When the Florida Department of Health and Rehabilitative Service, Division of Family Services, refused to honor his request, the Han-

nahville Indian Community filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Michigan. On April 3, 1974, that court reluctantly denied the petition since it did not appear that it had jurisdiction to do otherwise. Thereupon, the Indian Community filed the present petition in this Court.

[1,2] This petition names William Edward Wilsey and his wife, Miriam Carole Wilsey, as respondents. While it is true that respondents have actual, physical control over the children at the present time, the Court does not believe that this fact alone is sufficient to satisfy the traditional habeas corpus requirement that the person having custody over the body of the party must be named as respondent. It would appear that the Michigan Department of Social Services no longer has custody of the children for habeas corpus purposes. However, under Florida law it would appear that pending a final judgment of adoption the Division of Family Services of the Florida Department of Health and Rehabilitative Services is the official guardian of these children. F.S.A. § 63.052(3) (Supp.1974). Therefore, it may very well be necessary to join the Division of Family Services as a party respondent in any habeas corpus proceeding seeking the release of these children.

Be that as it may, however, this Court is of the opinion that it should not hear the petition for habeas corpus at this time for reasons of comity. There is some question at the outset whether Title 28, United States Code, Section 2254, applies at all to the circumstances presented by this petition, as Subsection (a) of that Section appears to require, as a precondition to its application, that the person be "in custody pursuant to the judgment of a State court," and no Florida court has yet ruled on any matter relating to this controversy. See, e. g., *Hillegas v. Sams*, 349 F.2d 359 (5th Cir. 1965), cert. denied, 383 U.S. 928, 36 S.Ct. 927, 15 L.Ed.2d 347 (1966);

Brown v. Rayfield, 320 F.2d 96 (5th Cir.), cert. denied, 375 U.S. 902, 84 S.Ct. 191, 11 L.Ed.2d 143 (1963); *United States ex rel. Daniels v. Johnston*, 328 F.Supp. 100 (S.D.N.Y.1971). While it is true that the Michigan probate court has rendered a judgment in this matter, it is not possible for this Court to accept the argument that the children are presently in the custody of the Florida Division of Family Services as the result of the Michigan ruling, for clearly the Michigan courts have no power over Florida governmental entities. The better view would appear to be that Section 2254 does not apply to this petition, since no Florida court has yet ruled on petitioners' federal claims. See *Hillegas v. Sams*, 349 F.2d 859, 860 (5th Cir. 1965) (Brown, J. concurring), cert. denied, 383 U.S. 928, 86 S.Ct. 927, 15 L.Ed.2d 347 (1966); *United States ex rel. Daniels v. Johnston*, 328 F.Supp. 100 (S.D.N.Y.1971). See also *Amsterdam, Criminal Prosecutions Affecting Federally Guaranteed Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U.Pa.L. Rev. 793 (1965). This means, of course, that Subsection (b) of Section 2254 likewise does not apply. However, that Section 2254(b) is not applicable does not necessarily mean that this Court can proceed to hear the petition at this time. It is a well-settled principle that a federal court should not hear a habeas corpus petition in such a case (i.e., prior to trial), rather that it should stay its hand until the state courts have had an opportunity to rule on the issue. Ex parte *Royall*, 117 U.S. 241, 6 S.Ct. 734, 29 L.Ed. 868 (1886). Under the *Royall* standard, it is clear that federal courts have the power to hear a habeas corpus petition prior to any state trial; but they should withhold exercise of that power except in "cases of urgency, involving the authority and operations of the General Government, or the obligations of this country to, or its relations with, foreign nations." *Id.* at 252, 6 S.Ct. at 740. See also H. Hart & H.

Wechsler, *The Federal Courts and the Federal System* 1431-92 2d ed. (1973). While it is true that the present case does not involve a criminal charge as does the typical habeas corpus petition, yet there is a state judicial proceeding in progress in the Circuit Court for Lake County, Florida, which this Court feels compelled by the principle of comity to allow to proceed to its conclusion.

A case very similar to this with regard to the legal issues involved is *United States in Behalf of Tullee v. House*, 110 F.2d 797 (9th Cir. 1940). In that case, a member of the Yakima Indian tribe was arrested by officials of the State of Washington for fishing for and selling fish without the license required by a state statute. Prior to trial, the Indian sought a writ of habeas corpus in federal court, alleging that the statute was in conflict with a treaty between the United States and the Yakima tribe which gave members of the tribe exclusive fishing rights in all streams running through or bordering the reservation. It was asserted that this conflict constituted a sufficiently exceptional situation to justify a pre-trial writ of habeas corpus. However, both the District Court and the Ninth Circuit Court of Appeals disagreed, and denied the petition.

As in *House*, so in this case, there is currently pending a state judicial proceeding in which petitioners can make their federal claims. On this point, the court in *House* stated: "[a]s said in *United States, ex rel. v. Tyler*, [sic] . . . 269 U.S. 17, 46 S.Ct. 2, 70 L.Ed. 138, that insofar as the questions raised 'involve treaty or constitutional rights' the state courts 'are as competent as the federal courts to decide them' . . ." *Id.* at 800. Clearly the courts of the State of Florida are competent to determine petitioners' federal law claims. Accordingly, it is

Ordered that:

The petition for a writ of habeas corpus filed on May 3, 1974, by the Wiscon-

sin Potowatomies
dian Community
Wandahsega, Jr.,
and Tyrone W. W
nied for failure
state remedies as
Royall, 117 U.S. 2
Ed. 868 (1886).



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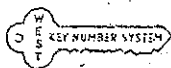
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Wandahsega, Jr., Veronica Wandahsega,
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nied for failure to exhaust available
state remedies as required by Ex parte
Royall, 117 U.S. 241, 6 S.Ct. 734, 29 L.
Ed. 868 (1886).



Elisha BURCH and Christine Burch,
Plaintiffs,

v.

Mike CARMODY et al., Defendants.
No. 72 C 1400.

United States District Court,
E. D. New York.
May 29, 1974.

Action under Civil Rights Act on
ground that county police officer signed
and swore to an information and com-
plaint which maliciously charged plain-
tiffs with having committed offense of
assault and that such defendant and oth-
er county police officers conspired to
give false testimony, tampered with, and
withheld relevant evidence and other-
wise maliciously prosecuted plaintiffs,
resulting in their conviction, and that
county police commissioner, police cap-
tain and police officer knowingly or neg-
ligently refused to prevent commission of
the wrong. The District Court, Neaher,
J., held that plaintiffs had right to jury
trial, and that fact that official positions
in police force were described in com-
plaint did not entitle defendants to dis-
missal of complaint on theory that they
lacked capacity to be sued in that they
were not "persons" within the Civil
Rights Act.

Order accordingly.

1. Federal Civil Procedure §2073

Plaintiffs had right to jury trial in
their action under Civil Rights Act alleg-
ing that county police officer signed and
swore to information and complaint
which maliciously charged plaintiffs with
having committed offense of assault and
that such defendant and other county po-
lice officers conspired to give false testi-
mony, tampered with, and withheld, rele-
vant evidence and otherwise maliciously
prosecuted plaintiffs, resulting in their
conviction, and that county police com-
missioner, police captain and police of-
ficer knowingly or negligently refused to
prevent commission of the wrong. 42
U.S.C.A. §§ 1983, 1985, 1986.

2. Civil Rights §13.7

Fact that, in civil rights action
against named individuals, their official
positions in police force were described
in complaint did not entitle them to dis-
missal of complaint on theory that they
lacked capacity to be sued in that they
were not "persons" within the Civil
Rights Act. 42 U.S.C.A. §§ 1983, 1985,
1986.

Robert Shulman, Mineola, N. Y., for
plaintiffs.

George W. Percy, Jr., County Attorney,
Suffolk County, Riverhead, N. Y., by
Stanley S. Corwin, Greenport, N. Y., for
defendants other than Howard Lyons,
Jr.

MEMORANDUM AND ORDER

NEAHER, District Judge.

In this action under 42 U.S.C. §§ 1983,
1985 and 1986, plaintiffs Elisha and
Christine Burch sue for monetary dam-
ages, complaining of alleged violation of
their civil rights under color of State law.
The complaint alleges (1) that defendant
Carmody, a Suffolk County police officer,
signed and swore to an information and
complaint which falsely and maliciously
charged the plaintiffs with having com-
mitted the offense of assault in the sec-