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Live Video Testimony Did Not Violate Confrontation Clause

SUMMARY: The New York Supreme Court did not violate a defendant's constitutional right to confront her accuser when it allowed an elderly victim with a heart condition to testify in criminal court from California via two-way live video. The New York Court of Appeals decided *People v. Wrotten* on December 15, 2009.

BACKGROUND: In June 2003, an elderly man, the complainant in this case, was preparing food for his wife with a home health aid. Suddenly, the man said, she struck him from behind with a hammer and demanded that he give her money. He did. He suffered five head wounds and two broken fingers in the interaction.

Following the incident, the victim moved from Brooklyn to California to be closer to his children. A prosecutor brought a criminal action against the home health aid worker at whose trial the victim's testimony was required. The man, however, was then 85 years old, was frail, unsteady on his feet, and had a history of coronary disease. He stated, and his doctor confirmed, that traveling to New York to appear in a trial was too strenuous for him to undertake without undue risk to his health.

The prosecutor then asked the court to allow the victim to testify via two-way live video. Through this setup, the victim stated that he could see the judge, prosecutor, defense counsel, defendant and jury. The judge stated that he could see the victim/witness very clearly, including the expressions on his face.

At the close of trial, the defendant was convicted of second degree assault. She appealed, arguing that the district court violated her constitutional right to confront the witness against her by allowing the complainant to appear remotely, via video, instead of live in-person.

ANALYSIS: The Confrontation Clause of the Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The defendant argued that because the complainant was not present in the courtroom, the defendant's right of confrontation was denied.

The state argued that the district court had the authority to approve live video testimony in light of the victim's inability to travel due to frail health. Both the court's inherent powers to execute its judicial function and New York's Judiciary Law gave the court this power. The judiciary law includes a provision allowing the court to use innovative procedures where necessary to carry into effect the powers and jurisdiction possessed by the court.

A majority of the New York Court of Appeals, the state's highest court, agreed with the state, finding no constitutional violation. Two justices dissented. They opined that the court exceeded its powers. There was a provision in the law for child victims of sexual assault to testify via video because of the intense psychological strain such children would experience testifying before their assailants in court. The fact that this provision did not include witnesses suffering health problems meant, to the dissent, that the legislature had not intended to include them. Absent some authority, the district court had no right to permit the elderly victim here to testify outside of court and doing so violated the defendant's right to confront him.

EXCERPTS FROM THE MAJORITY OPINION (By Judge Ciparick): "Unable to find any explicit statutory prohibition regarding two-way televised testimony at trial, defendant argues that extant statutes implicitly preclude its admission. However, there is no specific statutory authority evincing legislative policy proscribing televised testimony. Indeed, the CPL requires live video testimony of a child witness in a prosecution of a sex crime after a judicial finding of 'vulnerability.' The CPL is silent as to other types of witnesses, like complainant here who the trial court found to be elderly, infirm, and physically incapable of appearing in court. Because article 65 addresses only a single, discrete circumstance and otherwise leaves courts' pre-existing authority unaffected, such witnesses' testimony via two-way televised transmission is presumably left to the trial court's discretion.

"Neither do the statutes providing for preservation of pre-trial testimony implicitly preclude the admission of live video testimony. CPL 680 permits testimony taken by 'examination on a commission' outside New York on defendant's application to be received as evidence at trial. CPL 660 allows either party to secure testimony -- including videotaped testimony -- for subsequent use in a case where the witness will be unavailable for trial. These statutes do not speak to the permissibility of real-time video testimony subject to cross-examination in front of a jury. Nowhere does the CPL purport to list all instances where live video testimony is permissible or all possible solutions to the problem of an unavailable witness. Supreme Court, acting pursuant to its inherent powers as defined in the New York Constitution and Judiciary Law, was therefore not precluded from exercising its authority to utilize necessary, extra-statutory procedures.

"Moreover, the exercise of this authority following a finding of necessity is permissible under the Confrontation Clauses of both the Federal and State Constitutions. We held in *Cintron* that CPL article 65's authorization of two-way closed-circuit testimony in a criminal trial passes constitutional

muster. Soon after, the United States Supreme Court held that live testimony via one-way closed-circuit television is permissible under the Federal Constitution, provided there is an individualized determination that denial of 'physical, face-to-face confrontation' is 'necessary to further an important public policy' and 'the reliability of the testimony is otherwise assured.' Thus, assuming without deciding that two-way video does not always satisfy the Confrontation Clause's 'face-to-face meeting' requirement, complainant's testimony would nonetheless be admissible under the federal standard if findings of necessity and reliability were made by the trial court.

"Live two-way video may preserve the essential safeguards of testimonial reliability, and so satisfy the Confrontation Clause's primary concern with 'ensur[ing] the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.' Essential to the holding in Craig was that 'all of the other elements of the confrontation right' were preserved, including testimony under oath, the opportunity for contemporaneous cross-examination, and the opportunity for the judge, jury, and defendant to view the witness's demeanor as he or she testifies. These traditional indicia of reliability were all present in this case."

EXCERPTS FROM THE DISSENTS (By Judges Jones and Smith): "In the absence of any express legislative authorization, the trial court here lacked the inherent authority to permit the complainant to testify from California via live two-way television.

"The Legislature provided for the taking of testimony by live two-way television only under the limited circumstances set forth under Article 65 of the Criminal Procedure Law, which was enacted in response to the widespread recognition that child victims of sex abuse crimes typically suffer from acute anxiety and psychological trauma when giving live testimony.

"The right of confrontation includes -- indeed, is, at its core -- the right to meet one's accuser face to face. Neither our Court nor the United States Supreme Court has held, and I would not now hold, that a two-way-television encounter is 'face to face' in this sense. The assumption underlying the constitutional right of confrontation is that a witness brought into the presence of the accused will be less likely to swear to a false accusation, or to do so convincingly. The point of confrontation is thus the psychological effect it has on the witness. That effect is, beyond question, substantially diluted when, though the witness and the accused can see each other, the witness knows that the accused is far away. I therefore conclude that defendant in this case was not permitted to "confront" her accuser in the constitutional sense."

COMMENTS & QUESTIONS

1. What did the complainant say the defendant did?

2. Describe the complainant, generally. Where did he live following the incident?

3. What aspect of the trial did the defendant argue was basis for reversal?

The Sixth Amendment to the U.S. Constitution states that: "In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." This provision seems to be quite clear and straightforward. It would seem that the writers of the Constitution felt that criminal defendants had the right to meet their accusers face-to-face. It is difficult to read this provision in any other way. However, technology may be changing this.

For the first 200 years following the creation of the Constitution, technology did not greatly change the way courts could receive or view evidence. With the development of satellite, microchip, and telecommunications technology, however, longstanding concepts that shaped courts' understanding of basic constitutional rights began to change. The Founders did not imagine eavesdropping, infrared, x-ray, heat-sensing or global positioning technology. The ways that we can engage in communicate with, monitor, track and indentify one another have increased dramatically in manner and scope. Law follows, rather than precedes, such developments, adopting by necessity either through judge's decisions where there is no established law, or through legislatures' statutory attempts to address them. Often, as this case demonstrates, parties dispute whether or how the legislature intended to handle a particular constitutional challenge presented by modern technology.

In this case, the New York Court of Appeals felt that live video was an approprate substitute for this face-to-face confrontation. Do you agree with this decision?

Why is it helpful for a defendant to "confront" witnesses against her? Do you think the benefits of confrontation were compromised in this case? The complainant appeared to the court and jury on a television monitor, broadcast live. Do we ascribe any qualities, good or bad, to things we see on a TV set? Does it shape our impressions of a person's emotions or character? Does it limit our ability to perceive how the person seems to feel with respect to a statement or question?

New York law makes special provisions for the testimony of vulnerable child witnesses. When the judges talk about vulnerable child witnesses and the fragile complainant in this case, are they addressing the same characteristics? If there is a difference, is it meaningful in this case?

If the law can be extended to cover an elderly gentleman victim, why should it not be extended to any witness? Can technology replace the face to face contact contemplated by the Framers?

Why do we go to such lengths to accommodate someone accused of a crime? Shouldn't we go out of way, instead, to accommodate the elderly complainant in this case?

If you were accused of a crime, would you not want to confront the witnesses against you face-to-face? Would a technological alternative be sufficient for you?

First Amendment Protects Even The Meanest Speech

SUMMARY: An extreme religious group that protested at the funeral of an American soldier killed in Iraq, with signs assailing gays, the military and the Catholic Church, was protected by the First Amendment against claims by the soldier's father. The United States Court of Appeals for the Fourth Circuit decided *Snyder v. Phelps* on September 24, 2009.

BACKGROUND: In March 2006, Marine Lance Corporal Matthew Snyder was killed in Iraq. Matthew had grown up in Westminster, Maryland, and gone to high school there. His father, Albert Snyder, therefore chose St. John's Catholic Church in Westminster for the funeral. Local newspapers carried notice of the time and location of the funeral for friends and community members who wished to come and honor him.

In addition to those who came to support Matthew were members of the Westboro Baptist Church in Topeka, Kansas. This church, led by Fred Phelps and comprised predominantly of his family and in-laws, has such an intense hatred of gays and lesbians that they protest at military funerals. Church members reason that the military is pro-homosexuality, apparently drawing this conclusion from the elimination of the military's affirmative discrimination against gays and lesbians in military service—the so-called "don't ask, don't tell" policy—during the Clinton Administration.

Westboro members appeared outside St. John's Church during Matthew's funeral bearing signs assailing gays, the military and the Catholic Church. Included among the signs' messages were "God Hates the USA," "America is doomed," "Pope in hell," "Fag troops," "You're going to hell," "God hates you," "Semper fi fags," and "Thank God for dead soldiers." The protestors obeyed police orders and remained a prescribed distance from the doors of the church.

In addition to their in-person protest at the funeral service, members of Phelps' church posted what they called an "epic" on their website. This essay, titled "The Burden of Marine Lance Cpl. Matthew A. Snyder," stated that Matthew's parents "raised him for the devil"… "taught him that God was a liar"… "taught Matthew to defy his Creator, to divorce, and to commit adultery." Such statements, along with numerous Bible verses, went on for several pages.

Mr. Snyder did not see the protestors during the ceremony. He became aware of their presence and their messages when he saw the news later that day. Seeing an animated group of people denouncing the troops, the country and the Catholic church and railing against the military, in whose service his son had lost his life, had a profound effect on Mr. Snyder. He told the court that the depression he experienced at the loss of his son grew worse and that he could not think of his son's funeral or death, or make peace with it, because images of these protestors intruded upon his thoughts. He believed that he would never be able to think of his son's military service or his passing in a positive light because of what the protestors had done.

Mr. Snyder sued Phelps and his church. At trial, the jury awarded him $2.9 million in compensatory damages and a total of $8 million in punitive damages. The court then lowered the punitive award to $2.1 million, concluding that $8 million was excessive. The defendants appealed.

ANALYSIS: Mr. Snyder's claims included invasion of privacy by intrusion upon seclusion, intentional infliction of emotional distress, and civil conspiracy. The defendants argued that their protest and their messages were protected expression under the First Amendment

The district court noted that the First Amendment protects most, but not all, speech. Sometimes words can be so pointed, so narrowly focused on an individual with the intention to harm that person either personally or in reputation, that the words lose their protection, encroaching too far on a person's individual rights. The decision in the district court took this position, finding that the defendants had impermissibly harmed Snyder, supporting compensation for his injuries.

The Fourth Circuit disagreed. Looking closely at the exact words and phrases used by the defendants, the appeals court concluded that the defendants' messages were, overall, generalized statements of belief on social and political issues and not pointed attacks on Matthew Snyder. They concluded that no one could reasonably conclude from the words the defendants used that they were attempting to state facts about Matthew or his parents. Instead, the defendants were using dramatic language and hyperbole to inflame public opinion on topics of social interest, including military service and homosexuality. Statements of opinion on important public subjects are entitled to First Amendment protection, regardless of how offensive are the particular words or images chosen.

Finding that the balance of the harms alleged and the Constitutional rights asserted tipped in the defendants' favor, the Fourth Circuit reversed the district court, striking down the monetary awards to Mr. Snyder.

EXCERPTS FROM THE COURT'S OPINION (Judge King): "It is well established that tort liability under state law, even in the context of litigation between private parties, is circumscribed by the First Amendment. Although the Supreme Court . . . specifically addressed the common law tort of defamation, the Court explained that its reasoning did not turn on the precise form in which state power has been applied. Accordingly, the Court later applied the First Amendment to other torts not involving reputational damages, and we have applied the Court's controlling principles to other state law torts [including fraud, breach of duty of loyalty, and trespass]. Thus, regardless of the specific tort being employed, the First Amendment applies when a plaintiff seeks damages for reputational, mental, or emotional injury allegedly resulting from the defendant's speech.

"[The Supreme] Court has recognized that there are constitutional limits on the *type* of speech to which state tort liability may attach. Thus, although there is no categorical constitutional defense for statements of opinion, the First Amendment will fully protect statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual.
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"[W]e are obliged to assess how an objective, reasonable reader would understand a challenged statement by focusing on the plain language of the statement and the context and general tenor of its message. And we must emphasize the verifiability of the statement, because a statement not subject to objective verification is not likely to assert actual facts.

"There are two subcategories of speech that cannot reasonably be interpreted as stating actual facts about an individual, and that thus constitute speech that is constitutionally protected. First, the First Amendment serves to protect statements on matters of public concern that fail to contain a provably false factual connotation. We assess as a matter of law whether challenged speech involves a matter of public concern by examining the content, form, and context of such speech, as revealed by the whole record. Speech involves a matter of public concern when it involves an issue of social, political, or other interest to a community. In order to be treated as speech involving a matter of public concern, the interested community need not be especially large nor the relevant concern of paramount importance or national scope.

"Second, rhetorical statements employing loose, figurative, or hyperbolic language are entitled to First Amendment protection to ensure that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation. The general tenor of rhetorical speech, as well as the use of loose, figurative, or hyperbolic language sufficiently negates any impression that the speaker is asserting actual facts.

"[N]o reasonable reader could interpret any of these signs as asserting actual and objectively verifiable facts about Snyder or his son. The signs reading 'God Hates the USA/Thank God for 9/11' and 'Don't Pray for the USA,' for example, are not concerned with any individual, but rather with the nation as a whole. Other signs (those referring to 'fags,' 'troops,' and 'dead soldiers') use the plural form, which would lead a reasonable reader to conclude that the speaker is referring to a group rather than an individual. Additional signs are concerned with individuals, such as the Pope, who are entirely distinct from Snyder and his son, or with groups, such as priests, to which neither Snyder nor his son belong. Finally, those signs stating 'Thank God for Dead Soldiers' and 'Thank God for IEDs' only constitute a reference to Snyder's son if the reader makes the assumption that their only object is Matthew Snyder and not the thousands of other soldiers who have died in Iraq and Afghanistan, often as a result of IEDs.

"Even if the language of these signs could reasonably be read to imply an assertion about Snyder or his son, the statements are protected by the Constitution for two additional reasons: they do not assert provable facts about an individual, and they clearly contain imaginative and hyperbolic rhetoric intended to spark debate about issues with which the Defendants are concerned. Whether 'God hates' the United States or a particular group, or whether America is 'doomed,' are matters of purely subjective opinion that cannot be put to objective verification. The statement 'Thank God,' whether taken as an imperative phrase or an exclamatory expression, is similarly incapable of objective verification. And, as heretofore explained, a reasonable reader would not interpret the signs that could be perceived as including verifiable facts, such as 'Fag Troops' and 'Priests Rape Boys,' as asserting actual facts *about* Snyder or his son. To the contrary, these latter statements, as well as others in this category, consist of offensive and hyperbolic rhetoric designed to spark controversy and debate. By employing God, the strong verb 'hate,' and graphic references to terrorist attacks, the Defendants used the sort of loose, figurative, or hyperbolic language that seriously negates any impression that the speaker is asserting actual facts about an individual. Accordingly, we are constrained to agree that these signs — 'America is Doomed,' 'God Hates the USA/Thank God for 9/11,' 'Pope in Hell,' 'Fag Troops,' 'Semper Fi Fags,' 'Thank God for Dead Soldiers,' 'Don't Pray for the USA,' 'Thank God for IEDs,' 'Priests Rape Boys,' and 'God Hates Fags' — are entitled to First Amendment protection.

"The reasonable reader's reaction to two other signs — 'You're Going to Hell' and 'God Hates You' — also must be specifically addressed, as these two signs present a closer question. We must conclude, however, that these two signs cannot reasonably be interpreted as stating actual facts about any individual. The meaning of these signs is ambiguous because the pronoun 'you' can be used to indicate either the second person singular or plural form. A reasonable reader could interpret these signs, therefore, as referring to Snyder or his son only, or, on the other hand, to a collective audience (or even the nation as a whole).

"We need not resolve this question of usage, however, because a reasonable reader would not interpret the statements on these two signs as asserting actual and provable facts. Whether an individual is 'Going to Hell' or whether God approves of someone's character could not possibly be subject to objective verification. Thus, even if the reasonable reader understood the 'you' in these signs to refer to Snyder or his son, no such reader would understand those statements ('You're Going to Hell' and 'God Hates You') to assert provable facts about either of them."

COMMENTS & QUESTIONS

1. Who are Albert and Matthew Snyder?

2. What relationship does Fred Phelps have to them?

3. Did Mr. Snyder see the protestors? What was the "epic" the Westboro church members posted on their website that involved this case?

In addition to asserting their First Amendment defense on appeal, the church members argued that the district court had erred with a jury instruction it provided for them to consider in their deliberations over the verdict. The instruction described different First Amendment standards and asked them to weigh their application in this case. How much protection the First Amendment afforded to the type of speech at issue in this case, however, is a legal question. Juries are "fact finders." They are empowered to determine what happened. But judges are to decide all legal issues applicable in a trial. Had the court not found the Westboro church members' expressions protected, it could have ordered a new trial on the basis of the error made in allowing the jury to decide a legal question.

Don't you find the conduct of the church members in this case to be disgusting?

Do agree with the court's reasoning that the statements on the signs and in the "epic" were not directed personally at Mr. Snyder and his family? Do any of the protestors' statements sound like factual assertions?

When a young man has died serving his country, is there any social benefit to a court's protecting protestors' ability to disturb the man's funeral? Is social benefit the overriding concern? Is there any benefit to society in protecting the protestors' speech rights?

Does the protestors' reasoning for appearing at military funerals make sense? Should only logical speech be entitled to First Amendment protection?

Could the protestors burn an American flag? Could they burn a military uniform? Could they create a mock soldier, pin a sign "Semper fi fag" on it, and shoot guns at it? Would that be speech?

The appeals court notes that opinion on a subject of public importance is protected by the First Amendment. Is angry condemnation of gay people an important public idea? Once laws protect certain classes of individuals, should the Constitution protect speech that derides them?

Do you think that the Founders meant to protect this kind of speech when they wrote the First Amendment? Would the decision have been the same if the Founders were the judges in this case? Is this just part of the price we have to pay to have free speech in our society?

Drive Drunk? Lose Your Car

SUMMARY: When a woman was arrested for drunk driving and refusing to take a breathalyzer test, the automobile she was driving was subject to forfeiture to the State of Minnesota, even though the auto was jointly owned by her husband who was not involved in the traffic stop. The husband did not qualify as an "innocent owner" to preclude the forfeiture of the $40,000 vehicle. A divided Minnesota Supreme Court decided *Laase v. 2007 Chevrolet Tahoe* on December 17, 2009.

BACKGROUND: In May 2006, David Laase met his wife at a golf club at about 7 p.m. He had already played a round of golf and was headed home, while his wife was playing in a league that evening and remained at the club. The vehicle he left at the club for her was a 2007 Chevrolet Tahoe. Mr. Laase was the primary driver of this vehicle. Mrs. Laase, however, did have her own keys to it and would use it for her own purposes without asking.

Mr. Laase did not see his wife drinking, nor did he have the impression that she had been drinking when he left the club. At about 1 a.m., however, he got a call from her informing him that she had been arrested for drunk driving. Because she refused to take a breathalyzer test, she was charged with second-degree criminal refusal, to which she later pleaded guilty. (A footnote in the opinion indicates that the degree of the crime reflected a prior driving-while-impaired conviction in 2002.)

The second-degree refusal conviction empowered the prosecutor to seize the vehicle Ms. Laase used in committing the drunk driving offense. Mr. Laase challenged the forfeiture, arguing that he was an "innocent owner" of the vehicle because he did not know his wife had been drinking the night she used the Tahoe.

The district court accepted this position and ordered the vehicle returned. The county attorney appealed and the court of appeals upheld the innocent owner defense. The county then appealed to the Minnesota Supreme Court.

ANALYSIS: Paragraph 7(d) of Minnesota's vehicle forfeiture statute states: "A motor vehicle is not subject to forfeiture under this section if its owner can demonstrate by clear and convincing evidence that the owner did not have actual or constructive knowledge that the vehicle would be used or operated in any manner contrary to law or that the owner took reasonable steps to prevent the use of the vehicle by the offender."

Mr. Laase argued that this provision of the statute plainly rendered forfeiture inapplicable to his 2007 Chevy Tahoe. Because he did not know or suspect that his wife had been drinking at the time he left the golf club that evening, he had neither actual nor constructive notice that his vehicle would be used "in any manner contrary to the law." Therefore, his SUV was not subject to forfeiture. The trial and appeals court accepted this position.

The county argued that this "innocent owner" provision was controlled by another section of the Minnesota statutes called "canons of construction." One of these canons (or rules) states that in "construing the statutes of this state... the singular includes the plural; and the plural includes the singular." Applying this rule, the county argued, rendered the "innocent owner" defense available only if the owners, plural, could demonstrate that the owners did not have actual or constructive knowledge that the vehicle would be used or operated in any manner contrary to law. Mrs. Laase could not make this claim because she got behind the wheel in an impaired condition. Mr. Laase could not make it on his own because the facts indicated that Mrs. Laase was the vehicle's joint owner. Her name, along with Mr. Laase's, appeared on the vehicle title.

In response to this argument, Mr. Laase countered that rules, or canons, of construction are applied only when the plain language of a statute is unclear. Because the innocent owner statute was not unclear or ambiguous, there was nothing to interpret other than the words themselves, which applied to a single owner. Mr. Laase, the primary owner of the vehicle had no knowledge of pending illegal use of the Tahoe, so the state could not seize it.

A bare majority (4 of 7 justices) agreed with the county. The majority reasoned that the statute entitled "canons of construction" applied to all of Minnesota's statutes and did not require ambiguity. In every Minnesota law that does not expressly state otherwise, singular words include their plural counterparts and vice-versa. Because Mrs. Laase was not innocent in using the vehicle while intoxicated, Mr. Laase could not defeat forfeiture, despite his have known nothing of her drunk driving until 1 a.m., some five hours after he last saw her that evening.

Three justices dissented. They reasoned that making "owner" plural here to defeat Mr. Laase's claim was inconsistent with other provisions of the same vehicle forfeiture law. Justice Paul Anderson relied on a provision of the statute identifying family members as innocent owners provided the impaired driver does not have three or more prior convictions. Removing spouse from the protection of "family member" was an undue limitation. The dissent also noted that deprivations of property are disfavored under the law and therefore should not be undertaken where the law's applicability is uncertain. Another provision in the statute states that each joint owner's possession encompasses the full vehicle. The dissent reasoned that this provision indicated the legislature's intent to protect an innocent joint owner from seizure.

EXCERPTS FROM THE MAJORITY OPINION (By Justice Gildea): "The legislature has provided that '[t]he object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature.' To interpret a statute, the court first assesses whether the statute's language, on its face, is clear or ambiguous. If the law is clear and free from all ambiguity, the plain meaning

controls and is not disregarded under the pretext of pursuing the spirit.

"The parties appear to agree that the innocent owner defense in the vehicle forfeiture statute is unambiguous. The parties disagree, however, over whether *all* owners of the vehicle must be innocent in order for the defense to apply. The statute is written in the singular, providing that the defense is available if the vehicle's owner demonstrates innocence. But the County contends that we should rely on the canon in which the legislature has stated that 'the singular includes the plural.' With 'owner' construed as 'owners' in subdivision 7(d), the County argues it is clear that the defense does not apply to this case because both 'owners' were not innocent. Mr. Laase responds that canons of construction, including the canon that the singular includes the plural, have no applicability here because the statute is not ambiguous.

"We have utilized the 'canons of interpretation' set forth in Minn. Stat. § 645.08 in determining the plain meaning of a statute without first concluding that the statute was ambiguous. We have also specifically used the canon that the singular includes the plural to help ascertain the plain meaning of statutes without first concluding that those statutes were ambiguous.

"As we have done in these other cases, we likewise conclude here that we do not need to find an ambiguity in the 'innocent owner' provision in subdivision 7(d) before invoking the assistance of the canon of interpretation in section 645.08(2). The legislature has directed that we apply this canon unless its application would defeat the legislature's intent or result in a construction that is repugnant to the context of the statute."

EXCERPTS FROM THE DISSENT (By Justices Anderson and Page): "While we have said that Minnesota's forfeiture statutes are remedial in nature and are to be liberally construed, we have also acknowledged that they are punitive.... The [U.S.] Supreme Court has also stated that '[f]orfeitures are not favored; they should be enforced only when within both letter and spirit of the law.'

"If the offender is a family or household member of the owner and has three or more prior driving convictions, the statute presumes the owner knows about the offender's prior violations. That the presumption is not triggered until the offender has three prior convictions is another sign that the legislature intended to extend the innocent owner defense to some family or household members. In some cases, the family or household members will include joint owners, as here. Yet nothing in subdivision 7(d) excludes joint owners from those qualifying as family or household members. Because the use of the singular-includes-the plural canon from Minn. Stat. § 645.08 results in a construction that is inconsistent with the manifest intent of the legislature, I conclude that we should not apply it here.

"The court applies the principle that 'the singular includes the plural' to construe subdivision 7(d) to require that *all* of the vehicle's owners be able to demonstrate by clear and convincing evidence that *none* of them knew the vehicle would be used to commit the designated offense. In other words, the court construes subdivision 7(d) to read as follows:

> A motor vehicle is not subject to forfeiture under this section only if *every owner* can demonstrate by clear and convincing evidence that *each owner* did not have actual or constructive knowledge that the vehicle would be used or operated in any manner contrary to law or that *each owner* took reasonable steps to prevent use of the vehicle by the offender. If the offender is a family or household member of the "owners" and has three or more prior impaired driving convictions, *each owner* is presumed to know of any vehicle use by the offender that is contrary to law.

"Read as the court does, that is a burden that Mr. and Mrs. Laase cannot meet here, because Mrs. Laase was driving the vehicle while intoxicated. We should not read into the statute language that the legislature has left out, either purposely or inadvertently."

COMMENTS & QUESTIONS

1. What sport do Mr. and Ms. Laase play?

2. Were they together on the night of the incident underlying this case?

3. Did Mr. Laase do anything wrong? What vehicle was involved in this dispute?

Forfeiture, or government seizure of property used to commit a crime, came under widespread use during the so-called "war on drugs" in the 1980s. Legislatures passed these laws to serve a variety of purposes, including further punishing offenders, removing from reach assets like guns and means of transportation used to commit crimes, and as a means of recovering some of the government's expenses in enforcing the law: items taken through forfeiture are typically auctioned off. The forfeiture process does complicate law enforcement, however, and the societal benefits must be weighed against the costs of fighting cases like this one, involving claimed innocent owners.

Does taking the vehicle in this case make a future violation by Mrs. Laase less likely? Is forfeiture fair to Mr. Laase?

What effect is the result in this case likely to have on the relationship between Mr. and Mrs. Laase? Do you think its overall impact will be beneficial or harmful to them? Should forfeiture law contemplate the emotional effect it will have on an innocent owner?

Is Mr. Laase an innocent owner under the law? If he is, why doesn't his claim win? If he isn't, what is he guilty of?

Let's assume forfeiture law creates an opportunity for the public to buy valuable goods at very low prices and that the public likes this aspect of the law. Is that a reason to expand it? Should government be able to seize the shirts, shoes, pants, and wristwatch an offender was wearing at the time of a crime? Can government take the money in his wallet at the time? How about credit cards? What if the crime involved credit card fraud? Could the government charge some items on the card—for example, an amount equal to the damages caused in the crime?

A footnote to the opinion indicates that Mrs. Laase had a prior driving-under-the-influence offense in 2002. In light of that, did Mr. Laase really have no idea that his wife had been drinking or would drink? Is that the standard for family members? If not, what knowledge was required to not be "innocent?"

Did you realize that forfeiture statutes even existed? If you owned your own car and drove it drunk, the vehicle could be subject to forfeiture. Do you think that this is appropriate? Is the forfeiture of an expensive too severe a penalty for drink driving? Should the prosecutor have the discretion as to which vehicles are subject to forfeiture? Should this statute be enforced against everyone if it is enforced against some?

Parents Don't Get Second Chance Before School Board

SUMMARY: Tennessee school officials did not violate the Constitution in refusing to permit the parents of some football players dismissed from the team from addressing the school board about the matter a second time. The United States Court of Appeals for the Sixth Circuit decided *Lowery v. Jefferson County Board of Education* on November 12, 2009.

BACKGROUND: In 2004, Jefferson County High School replaced the head coach of its varsity football team. The new coach was a disciplinarian who pushed team members hard to improve their skills and win games. Many players disliked his coaching style. They asserted that he threw away college recruiting letters to disfavored players, humiliated and degraded players, used inappropriate language and required a year-round conditioning program in violation of high school rules.

A group of disgruntled team members decided to create a petition stating that they hated the coach and did not want to play for him. The petition's creators asked their teammates to sign it. They said that they would wait until after the season had ended and then present it to the principal in hopes that it would lead to the coach's replacement. As often happens with such plans, word of the petition got out. The coaching staff were upset and decided to interview players individually about the petition. Those who had signed it, but apologized to the coach, were permitted to remain on the team. The plaintiffs in this case were kicked off the football squad.

Parents of the dismissed players reached out to school board and community members to express their dissatisfaction with the coach and what had happened. Jefferson County school policy permits individuals concerned with school activities to request five minutes to address the board during its regular meeting. A parent requested speaking time to address the subject, "football." The request was granted for the board's November 2005 meeting.

A lawyer for the parents spoke on their behalf. His tone was polite, but he criticized several school officials and threatened legal action if his clients' concerns were not addressed. When school officials did not take the actions the parents wanted, they requested to speak again at the December school board meeting. As before, the parent who called stated that the subject of the speech would be "football."

After discussion, school officials decided not to allow the parents to speak again at the December meeting. The parents then sued, arguing that the school violated their constitutional rights.

ANALYSIS: Free speech rights are subject to reasonable "time, place and manner" restrictions, categories influenced both by historical use and government treatment of the location. Streets and parks have been sites of public discussion, argument, and protest throughout history. In those places, government has little if any right to ban speech, though it can impose procedures to maintain public safety and guarantee fair and equal access to the forum.

Jefferson County's school board meeting was a "limited public forum." The school designated it as an appropriate place to hear from speakers on topics of school and community concern, but within certain limits designed to promote order and efficiency. The Supreme Court has established a test for speech restrictions regarding a limited public forum. To be lawful, the restriction must 1) be content-neutral, 2) be narrowly tailored to serve a significant government interest, and 3) leave open ample alternative channels for communication.

The parents argued that the school unduly infringed upon their speech rights by forbidding them access to the school board to state their views. Denying their request in advance of the meeting was, they argued, a form of "prior restraint," which is strongly disfavored even within the already strict free-speech context. They also argued that the denial was not "content-neutral."

The court sided with the school, reasoning that it had satisfied the requirements imposed by the Supreme Court on a limited public forum. Although the parents argued that the school opposed their request because it objected to criticism of its faculty and staff, the court accepted the school's assertion that it denied it to avoid repetition. Even though one official said he wanted to avoid harassing statements, he also cited repetition. Allowing officials to deny a repetitive request was narrowly tailored, recognizing that the main purpose of a school board meeting is to advance school business and that school board members appeared voluntarily without payment. Imposing content-neutral rules on how school-board-meeting time is spent was reasonable in light of the 5-minute public-speaking option, which the school had already granted to the upset parents.

Finally, the school had left open additional channels of communication. The parents had spoken to many people within the school and the community, held press conferences, and broadly distributed written materials describing the events and their complaints involving the football team.

"Prior restraint" is a form of speech suppression the Supreme Court has singled out as presumptively unconstitutional. Prior restraint occurs when the government prohibits a speaker or publication, in advance, from addressing particular views or ideas. That was not the case here, the court reasoned, because the school was opposing repetition and wasting school-board meeting time, not the subject matter of the parents' planned address.

EXCERPTS FROM THE COURT'S OPINION (By Judge Sutton): "The board's denial of the plaintiffs' request to speak under Policy 1.404 passes this test. Here is how the policy works: It allows citizens to apply and be approved to speak for five minutes at board meetings; it provides that '[t]he director of schools shall take appropriate steps to determine that appeals or appearances before the board are

not frivolous, repetitive, nor harassing in nature'; and it says that '[t]he chairman shall have the authority to terminate the remarks of any individual who does not adhere to the above rules or chooses to be abusive to an individual board member or the Board as a whole.' In practice, the 'executive committee'—the director (Moody) and chairman (Sharpe)—decide whether to allow a particular individual to speak, and the board may vote at the meeting to allow someone who has not gone through the screening process to speak at the meeting.

"*This policy is content-neutral*. Any restriction on speech under this policy is 'justified without reference to the content' of the speech, making it content-neutral on its face. The policy's stated justifications include: 'allow[ing] everyone a fair and adequate opportunity to be heard'; 'assur[ing] that the regular agenda of the Board is completed'; and 'recogniz[ing] the voluntary nature of the Board['s] time and us[ing] that time efficiently.' Each of these justifications has nothing to do with the subject of an individual's proposed speech and everything to do with conducting orderly, productive meetings.

"*The policy serves significant governmental interests*. Unstructured, chaotic school board meetings not only would be inefficient but also could deny other citizens the chance to make their voices heard. That is why 'public bodies may confine their meetings to specified subject matter.'

"*The policy narrowly and carefully advances these interests*. Outside the context of viewpoint-based or content-based speech regulations, the regulation 'need not be the least restrictive or least intrusive means' of serving the government's objective. 'So long as the means chosen are not substantially broader than necessary to achieve the government's interest . . . the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative.'

"The school board's policy is narrowly tailored because it prohibits speech only when it is 'repetitive,' 'harassing' or 'frivolous.' The policy thus allows almost all speech except when it is likely to interfere with the board's interests in efficient and productive meetings. The evidence at trial supports a finding that Moody and Sharpe denied the request on the ground that the proposed speech fell into these narrowly-tailored exceptions, particularly the prohibition on 'repetitive' speech. Lisa Lowery testified that she mentioned the same subject—'football'—both times she asked for speaking time. Moody testified that he considered this request repetitive because 'the speaker was the same, it was going to be the same topic,' and Sharpe testified that he inferred from his discussion with Giles that 'most of what was going to be said there was going to be similar to what we had heard in November.' On this record, the jury could fairly find that the request fell into a neutral category—'repetitive' speech— and thus was permissibly denied. If, as everyone seems to agree, a moderator may limit a speaker to five minutes on a topic at any one meeting, he generally should be able to limit the same speaker to five minutes on the same specific topic across two meetings.

"*The policy allows ample alternative channels of communication*. Although the policy limits the length of speaking opportunities at board meetings, it allows speech in all other contexts with few, if any, restrictions. Tennessee law allows citizens to contact members of public bodies like the school board—an opportunity that the plaintiffs took ample advantage of here. In addition to the first appearance before the board in November, the plaintiffs talked informally to the athletic director, the principal, director of schools Moody, four board members, including chairman Sharpe, and four county commissioners. Giles compiled a booklet of information and gave it to board members. After appearing before the board in November, Kelley sent each board member a letter restating the plaintiffs' position. The plaintiffs held not one but two press conferences to protest the dismissals from the team. Giles testified that he and the other plaintiffs 'presented a tremendous amount of shocking information' to 'every level' of decision-maker. All things considered, the policy amounted to a content-neutral time, place and manner regulation."

COMMENTS & QUESTIONS

1. What marked the beginning of the trouble for the athletes at Jefferson County High School?

2. What was their petition about?

3. How did the coach respond?

Depending on the athlete and the school, playing on a high school football team can have important consequences for a student's college prospects and even, for a few athletes, his career. Did Jefferson County do enough to protect its athletes' rights? What rights does or should an athlete have against a coach he doesn't like?

What's more important in school athletics, allowing students a chance to participate in an activity that will shape their perceptions of sports, the school, and team interaction, or winning? Is your answer the same for a little school whose players have never gone on to college or pro ball as it is for big high schools whose players are well represented at the highest levels of the sport?

What is a parent's role in a school's decision of whether and how to put a student on the team or on the field?

If a school or coach can decide which athletes should be included on the team, does the same power enable coaches to suspend or remove players? Must the coach have a reason? Should athletes have the right to petition the school for reinstatement? Is that what happened here?

If a coach's paid employment depends on winning often, should he have discretion in who plays for him, when, and how to train and discipline athletes? Should a volunteer coach have the same powers? Is it fair to vary how student athletes are treated depending on a coach's whims, personality or status as paid or unpaid?

Should students or parents get a vote in which coach is hired or retained or in how much he is paid? Should they have this right with teachers too?

If the school board denies the parents' request to speak because it feels the speech will be repetitive, isn't it focused on the content? Is that constitutional?

In addition to ruling for the school board, the district court also awarded them attorney fees and expenses of over $87,000. The plaintiffs appealed that award as well as the underlying decision. The Sixth Circuit analyzed the claim under Supreme Court precedent. The highest court has ruled that attorney fees are appropriate in a constitutional rights action that is frivolous, unreasonable, or without foundation. This case, the court determined, was none of those things. While it was not a winning case, the court determined that there was evidence to support bringing it. The court therefore reversed the fee award. Do you think that this lawsuit was frivolous? Was there action short of a lawsuit that the parents could have taken to have their concerns addressed?

What should parents do if they do not agree with the teaching/coaching style of a teacher or coach? What should they do if they do not agree with the actions of the school board?

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