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Courtroom Closure During Suppression Hearings and More

by Randolph N. Jonakait

**Waller v. Georgia
and
Cole v. Georgia**
(Docket Nos. 83-321 and 83-322)

Argued March 27, 1984

ISSUES

Recent Supreme Court terms have seen separate heated debates and decisions on excluding the public from courtrooms, interpreting the Racketeer Influenced and Corrupt Organizations (RICO) Act, determining whether searches and seizures violated the Fourth Amendment and considering the scope of the exclusionary rule. These two actions, which have been joined together, present all these issues in one case.

FACTS

In early January, 1982, Georgia law enforcement officials, armed with warrants authorizing the seizure of evidence relating to gambling crimes, searched 150 homes in various parts of the state. The authorities, however, seized more than gambling evidence. According to the trial judge, the police "just went in and took everything in sight." Among other property, love letters, school report cards, family photographs and church contribution envelopes were carted away by the authorities.

These searches were part of a widespread Georgia attack on gambling which included an extensive, eight-month program of wiretapping. Guy Waller, Eula Burke, W. B. Burke, Clarence Cole and Archie Thompson were caught up in this net. They, as well as others whose cases are not before the Supreme Court, were charged with violations of the Georgia RICO Act and with commercial gambling offenses for operating a metropolitan Atlanta lottery. The lottery, which stored its information in a microcomputer maintained by Coles, was based on the daily volume of the New York Stock Exchange. All five were acquitted by a jury of the RICO offenses, but were convicted of the gambling charges. Waller received the heaviest sentence—three years in prison plus a \$20,00 fine.

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Courtroom Closure: After the jury was selected, a hearing was held to determine whether the evidence seized in the raids should be suppressed. The state prosecutor moved to bar the public from the hearing, contending that wiretap evidence would be divulged which might affect the privacy of people not then on trial. Since Georgia law forbids using recklessly disseminated wiretap evidence, the state argued that divulging such evidence in a public suppression hearing might preclude its use in subsequent prosecutions of others.

One of the two defense attorneys objected to the closure. Cole's attorney consented, however, and the state now contends that Cole has waived any right to claim that the closure violated the Constitution.

The trial court agreed with the prosecutor and barred the public from the entire seven-day hearing. Playing the wiretaps took up two and one-half hours of that proceeding.

Search and Seizure: Although much property not authorized by the gambling warrant was seized, Georgia stated that the police conduct was authorized by the state civil RICO statute. That Act allows that any property used in violation of the statute or any property obtained from the proceeds of a RICO violation be forfeited to the state. The statute also permits a law enforcement officer to seize any of the forfeitable goods without specific prior judicial approval if that seizure is incident to a lawful arrest or search and the officer has probable cause to believe the property is subject to forfeiture and will be lost or destroyed if not seized. Since any item is potentially forfeitable as long as it was acquired with racketeering gains, the police, who were conducting a lawful gambling search, were authorized to seize all the materials.

While not conceding that any of the evidence was illegally seized, the prosecutor agreed to return and have suppressed various personal items which the state was not going to present at trial. The trial court suppressed that property, but refused to suppress any of the other evidence.

The Georgia Supreme Court agreed with the trial court rulings on both the closure and the search and seizure issues and affirmed the convictions.

BACKGROUND AND SIGNIFICANCE

Courtroom Closure: Although the Supreme Court in a number of recent controversial decisions has held that the public cannot generally be excluded from criminal

trials, the significance of those rulings is limited because only a small percentage of such cases—certainly less than 10%—ever go to trial. Here, the Supreme Court has the opportunity to decide whether that presumption of openness extends to a suppression hearing—a proceeding which is not part of the formal criminal trial. Since a suppression hearing is the most important part of many criminal cases and since the public is greatly concerned with how the exclusionary rule is applied at such hearings, any decision on this issue should be important.

Waller and Cole argue that even if the desire to protect the privacy of those not parties to the case is an interest which justifies excluding the public, the order here was still improper because insufficient specific reasons were given for the closure. Instead, the trial court merely accepted the prosecutor's conclusions that the privacy interests of others might be involved. Furthermore, the order swept too far by closing the entire seven-day hearing instead of just excluding the public from the short portion of the proceeding where the wiretap information was revealed.

Georgia counters that the state had a valid interest in protecting the privacy of those not on trial as well as protecting its ability to later try others. In addition, the trial court ruling narrowly served those interests by only closing the suppression hearing and keeping the entire trial open to the public.

A ruling that while suppression hearings should normally be open, public exclusion here was justified would seem to conflict with *Press-Enterprise Co. v. Superior Court* (104 S. Ct. 819 (1983)), decided earlier this term. There, closure during the jury selection process to protect the privacy of potential jurors was found to be unconstitutional. The trial court erred by not articulating the reasons for the closure and by not considering alternatives to the blanket exclusion, such as holding only the few potentially embarrassing questions in private and leaving the rest of the proceeding public.

Search and Seizure: Two Fourth Amendment issues are presented. First, Waller and Cole contend that portions of the Georgia RICO Act are unconstitutional because they permit broad seizures without prior judicial approval. This violates established Fourth Amendment principles which forbid general, exploratory searches and those seizures which require advance judicial approval to make a search and seizure legal. Georgia responds that the statute is constitutional because it merely codifies Supreme Court decisions which sanction warrantless seizures incident to a lawful arrest or search when the police, acting under "exigent circumstances," see seizable items in "plain view." The resolution of this issue may seem to have narrow significance, however, because the federal RICO statute does not have provisions comparable to the ones attacked by Waller and Cole.

This case also allows the Supreme Court to recon-

sider the scope of the exclusionary rule. Waller and Cole state that without a valid warrant, everything the police seized would have to be suppressed. Even though the police did have a legal warrant for gambling evidence, the resulting seizures were so indiscriminate that the authorities acted in the same way as if they possessed no warrant. Consequently, everything seized, including the gambling evidence, should be suppressed.

Georgia replies that the exclusionary rule requires no such radical remedy. Instead, only illegally seized evidence must be suppressed, and since the gambling evidence was obtained pursuant to a valid warrant, the gambling evidence was properly admitted at trial.

Because of the nature of the claims, the Court will not have to reach all the issues presented. For instance, if the Court holds that the convictions must be reversed because of the courtroom closure, the Court will not have to reach the seizure questions. Similarly, the seizures could lead to a reversal and then the closure issue would not have to be reached. In addition, if the Court determines that the exclusionary rule does not require suppressing the gambling evidence, the Court would not have to resolve the constitutionality of the Georgia RICO Act.

ARGUMENTS

For Waller and Cole

1. Closure of the suppression hearing violated the Sixth and Fourteenth Amendments.
2. All the seized evidence should have been suppressed because the general searches of their homes and the wholesale seizure of their property and papers without particularized warrant or probable cause violated the Fourth Amendment.

For Georgia

1. The trial court properly closed the courtroom during the suppression hearing.
2. The Georgia civil RICO Act does not violate the Fourth Amendment and there is no requirement that all evidence seized be suppressed.

AMICUS ARGUMENTS

Interestingly, although the press has indicated a strong concern in other recent public trial decisions, no amicus briefs were filed in this case on the closure issue.

However, several groups—Americans for Effective Law Enforcement, The International Association of the Chiefs of Police and The Legal Foundation of America—have joined together in an amicus brief to support Georgia on the search and seizure points. These groups stress that conventional law enforcement tools have not worked well to attack organized crime and that RICO statutes which "can dismantle the property holdings of this illicit empire" are essential.