Open Courts and Fair Trials: Control of High-Profile Cases

Shea Denning
May 2024

1

May you close the courtroom for the suppression hearing?

What are the competing concerns?

2

[W]hen the case is a 'sensational' one tensions develop between the right of the accused to trial by an impartial jury and the rights guaranteed others by the First Amendment.

Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976)

3

What Does the First Amendment Protect?

The right of the public (and press) to attend criminal trials is implicit in the guarantees of the First Amendment.

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)

This right of access also applies to preliminary hearings in criminal cases.

Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1 (1986).

A Qualified Right

The right of access is a qualified right.

Proceedings may be closed when findings are made that closure is **essential to preserve higher values** and is **narrowly tailored** to serve that interest.

Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1 (1986).

Right to Access v. Right to Fair Trial

If the higher-value interest is the defendant's right to a fair trial, findings in support of closure must show:

1. There is a ***substantial probability*** that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent, and
2. Reasonable alternatives cannot protect the defendant's right.

Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1 (1986).

Sixth Amendment Right to a Public Trial

- Sixth Amendment provides for a public trial for the benefit of the accused.
- This protection extends to suppression hearings.
- Any closure of a suppression hearing or trial (or portion thereof) must meet the following test:
  - Party seeking to close hearing must advance overriding interest
  - Closure must be no broader than necessary to protect interest
  - Trial court must consider reasonable alternatives
  - Trial court must make adequate findings to support closure

Waller v. Georgia, 467 U.S. 39 (1984)

The Upshot?

It is a tough road to closure.

If you close a proceeding over the defendant's objection and in violation of the defendant's Sixth Amendment rights, that is structural error.

Weaver v. Massachusetts, 582 U.S. 286 (2017)

May you seal the exhibits?

Right of Access to Court Records

Common law right of access to court records

Access may be denied when **essential to preserve higher values** and restriction is **narrowly tailored**

Baltimore Sun Co. v. Goetz, 886 F.2d 60 (4th Cir. 1989).

10

Control of the Courtroom

NC CODE OF JUDICIAL CONDUCT, CANON 3 A.(7)

- A judge should exercise discretion with regard to permitting broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during civil or criminal sessions of court or recesses between sessions, pursuant to the provisions of Rule 15 of the General Rules of Practice for the Superior and District Courts.

12

Control of the Courtroom

RULE 15 OF THE GENERAL RULES OF PRACTICE

Allows

- Media coverage of public judicial proceedings

But

- Presiding judge has authority to prohibit or terminate coverage in the courtroom and adjacent corridors

Prohibits

- Audio pickup of bench conferences, counsel-counsel conferences, attorney-client discussions
- Coverage of police informants, minors, undercover agents, relocated witnesses, sex crime victims and families
- Coverage of jurors at any stage. Judge must so inform jurors.

13

N.C.P.I.--Crim. 100.15
General Criminal Volume
Page 1 of 1

N.C.P.I.—CRIM. 100.15 INSTRUCTIONS RE CAMERAS AND MICROPHONES IN COURTROOM.

NOTE WELL: For additional information regarding cameras and microphones in the courtroom see Chapter 22 of the North Carolina Trial Judges Bench Book as well as Rule 15 of the General Rules of Practice for the Superior and District Courts.

Before I speak to you concerning jury selection, I wish to mention the matter of possible news media coverage of this trial.

You may have noticed T.V. or camera equipment in the courthouse. Media coverage of jurors is expressly prohibited at any portion of the proceeding, including that portion in which a jury is selected. The cameramen and the photographers are not permitted to take pictures of you.

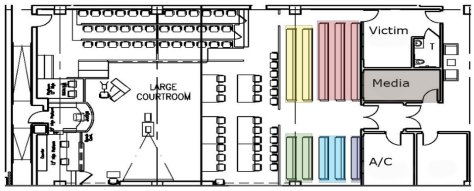
Therefore, you should not even consider whether this trial, or a portion of it, will be covered by the media by any of the means I have mentioned. It will not affect you personally, or the trial, so I urge you to put that matter out of your mind.

14

Control of the Courtroom

RULE 15 OF THE GENERAL RULES OF PRACTICE

SAMPLE COURTROOM



15

Practical Tips for Handling the Media

- **Don't be too quick to ban.** Allowing a camera can prevent reporting errors and reduce confusion.
- **Consider a decorum order.** Give everyone notice of specific requirements.
- **Savvy camera person.** Require that camera operator be familiar with Rule 15 and any applicable local rules.
- **Media room.** Allow a separate media room for video/audio feed. Post media rules in the room and on the door.
- **Key exhibits.** Encourage parties to prepare copies for media.

16

Preparation is Key. Meet with Your Team.

Clerk, TCA, and Senior Resident

- Expanded jury pool
- Space:
  - Courtroom selection
  - Arranging separate media room
  - Technology check
- Courtroom seating plan
- Designating the court's media liaison – TCA?
- Preparing Clerk's staff for onslaught of information requests

County Sheriff

- More officers in courtroom and in and around courthouse
- Enhanced weapons search
- Security of windows, side and back entrances, perimeter
- Juror safety issues – travel, secured entry and exit
- Witness and custodial defendant safety
- Defendant's entry point if from jail
- Evacuation and active shooter plans
- Traffic and media truck control

Control of the Courtroom

G.S. 15A-1034

(a) The presiding judge may impose reasonable limitations on access to the courtroom when necessary to ensure the orderliness of courtroom proceedings or the safety of persons present

Control of the Courtroom

OTHER TOOLS

- Sequestration of witnesses
  - G.S. 15A-1225; N.C. R. Evid. 615

Control of the Courtroom

OTHER TOOLS

- Removal of a disruptive spectator
  - G.S. 15A-1033: The judge in his discretion may order any person other than a defendant removed from a courtroom when his conduct disrupts the conduct of the trial.

Control of the Proceedings

LIMITING EXTRAJUDICIAL STATEMENTS

Prior restraints on speech

Prior restraints on speech are ***presumptively unconstitutional***.

To be valid, a prior restraint on publication must be based on factual findings that:

1. Publicity is likely to affect jurors and the right to a fair trial;
2. Lesser measures such as a change in venue, continuance, or voir dire have been considered and will not mitigate risk; and
3. The order will actually work to keep prejudicial information from jurors.

And even then, there is nothing that proscribes the press from reporting events that transpire in the courtroom.

§ 7A-276.1. Court orders prohibiting publication or broadcast of reports of open court proceedings or reports of public records banned.

No court shall make or issue any rule or order banning, prohibiting, or restricting the publication or broadcast of any report concerning any of the following:

any evidence, testimony, argument, ruling, verdict, decision, judgment, or other matter occurring in open court in any hearing, trial, or other proceeding, civil or criminal;

and no court shall issue any rule or order sealing, prohibiting, restricting the publication or broadcast of the contents of any public record as defined by any statute of this State, which is required to be open to public inspection under any valid statute, regulation, or rule of common law.

If any rule or order is made or issued by any court in violation of the provisions of this statute, it shall be null and void and of no effect, and no person shall be punished for contempt for the violation of any such void rule or order.

§ 5A-11. Criminal contempt.
(a) Except as provided in subsection (b), each of the following is criminal contempt:
. . .

(5) Willful publication of a report of the proceedings in a court that is grossly inaccurate and presents a clear and present danger of imminent and serious threat to the administration of justice, made with knowledge that it was false or with reckless disregard of whether it was false. No person, however, may be punished for publishing a truthful report of proceedings in a court.

(b) No person may be held in contempt under this section on the basis of the content of any broadcast, publication, or other communication unless it presents a clear and present danger of an imminent and serious threat to the administration of criminal justice.

(c) This section is subject to the provisions of G.S. 7A-276.1, Court orders prohibiting publication or broadcast of reports of open court proceedings or reports of public records banned.

May the Court restrain the speech of *trial participants*?

Restraining speech by trial participants

- First Amendment does not prohibit discipline of a lawyer for remarks that create a substantial likelihood of material prejudice to the trial
  - *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991)

Rules of Professional Conduct

Rule 3.6: A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a **substantial likelihood of materially prejudicing an adjudicative proceeding** in the matter.

. . .

[A] lawyer may make a statement that a reasonable lawyer would believe is **required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client.** A statement made pursuant to this paragraph shall be limited to such information as is reasonably necessary to mitigate the recent adverse publicity.

Rules of Professional Conduct

Rule 3.8(f): The prosecutor in a criminal case shall . . . except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, **refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused** and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Restricting Speech by Trial Participants

- Yet, North Carolina courts have reviewed orders prohibiting extrajudicial statements by the parties under the same standard as that applied to orders restricting the media.
  - *Beaufort County Bd. of Educ. v. Beaufort County Bd. of Comm'rs*, 184 N.C. App. 110 (2007)

Takeaways

1. First and Sixth Amendment right to open courts and public trials
   - Right is not absolute. May give way to overriding interest if restriction is narrowly tailored.
   - Before a criminal trial (or any portion of it) may be closed, party seeking closure must advance overriding interest, court must consider reasonable alternatives, and court must make adequate findings. Closure must be no broader than necessary.
2. Common law right of access to court records
   - Access may be denied if essential to preserve higher values and restriction is narrowly tailored.
3. Court may exercise control of courtroom by excluding certain individuals from trial and imposing reasonable limitations on access.
4. Prior restraints on speech are presumptively unconstitutional.
   - Rules of Professional Conduct limit statements by attorneys.