ABC v. Stewart

360 F. 3d 90 (2nd Cir. 2004).

Judge Katzmann:

This case calls upon us to balance two weighty constitutional rights: the First Amendment right of the press and of the public to access criminal proceedings and the Sixth Amendment right of criminal defendants to a fair trial. A conglomeration of news organizations and publications has appealed from an order of the United States District Court for the Southern District of New York (Judge Cedarbaum) barring the media from attending the *voir dire* examinations of prospective jurors held in the district judge's robing room but providing for the release of the transcripts of the *voir dire* examinations. We conclude that, under the circumstances presented here, the district court erred in closing the *voir dire* proceedings. We therefore vacate the portion of the district court's order denying the media contemporaneous access to the *voir dire*. We recognize that, because *voir dire* has already been completed, this remedy has no practical implications with respect to this case. We, nevertheless, decide the issues presented because the underlying dispute regarding the First Amendment right of access is capable of repetition in future cases.

This case stems from the high-profile criminal prosecution of Martha Stewart, the founder and former chief executive officer of Martha Stewart Living Omnimedia, Inc. and the doyenne of the home-lifestyle industry, and of her former stockbroker, Peter Bacanovic. The criminal charges against Stewart and Bacanovic stem from Stewart's sale of 3,928 shares of stock in the biotech company, ImClone Systems, Inc., on December 27, 2001. Stewart made this sale just before ImClone's stock price plummeted following an announcement that the Food and Drug Administration had rejected the company's application for approval of its highly touted cancer-fighting drug. The government subsequently initiated an investigation into whether

Stewart undertook this trade in violation of federal securities laws and regulations that prohibit trading on the basis of material, nonpublic information. The Superseding Indictment alleges, *inter alia*, that, after learning of these investigations, Stewart and Bacanovic "entered into an unlawful conspiracy to obstruct the investigations, to make false statements and provide false and misleading information regarding Stewart's sale of ImClone stock, and to commit perjury, all to conceal and cover up" the fact that Baconovic had provided Stewart with non-public information and that Stewart had traded on the basis of that information.

From the start, the Stewart case found itself the focus of an unusually high level of media attention. Recognizing the problems presented in empaneling an unbiased jury under these circumstances, the district court, with the consent of both sides, devised a two-part *voir dire* process. Prospective jurors would first be screened based on their responses to a lengthy questionnaire. Members of the remaining venire panel would then be individually questioned, outside the presence of other prospective jurors, in the district judge's robing room. Before jury selection began, the government wrote to the court, expressing concern that members of the media would attempt to interview prospective jurors during jury selection on January 6, 2004, when questionnaires were to be distributed. As a result, the government requested, on behalf of all parties to the case, that the court remind representatives of the media that such contact was forbidden. In response, the district court issued an order, dated January 2, 2004, prohibiting the media from communicating with jurors or prospective jurors or with their family members until such time as that juror's or potential juror's service was complete. According to the district court, this measure was "necessary to ensure the integrity of the proceedings" as well as "the public's and the parties' overriding interest in a fair trial."

Following the distribution of questionnaires on January 6, 2004, counsel for Stewart, by

letter dated January 7, 2004, advised the court that a posting had appeared on the website www.gawker.com, paraphrasing certain portions of the jury questionnaire. The author of the entry purported to be a prospective juror, and there is no evidence in the record to suggest otherwise; nor is there any indication that the media played a role in the disclosure. Nevertheless, citing this incident in support of its request, the government, by letter dated January 14, 2004, which was not docketed or made public until after the entry of the order here at issue, asked the district court to exclude the media from the *voir dire* proceedings scheduled to be conducted in the robing room and to prohibit the media from publishing or otherwise disclosing the identity of prospective jurors. This measure, the government represented, was necessary to ensure juror candor and thereby protect the "parties' right to a fair trial." That same day, several reporters wrote to the district court to inquire whether subsequent *voir dire* proceedings would be held in open court and, if not, to request that the court consider allowing pool reporters to attend the sessions. The reporters noted that pool reporters had been effectively employed during *voir dire* examinations in the prosecutions of Imelda Marcos and of Sheik Omar Abdel Rahman and his co-conspirators.

Notwithstanding this request, without affording members of the media notice or an opportunity to be heard, the district court issued an order on January 15, 2004 providing that "no member of the press [could] be present for any *voir dire* proceedings [to be] conducted in the robing room" and that, instead, "a transcript of each day's *voir dire* proceedings [would] be made public the following day, with the names of prospective or selected jurors redacted from the transcripts, as well as such deeply personal information as any juror [should] reasonably request not be made public."

Counsel for the appellants, a coalition of news organizations and publications

immediately moved to vacate or modify the January 15 Order. Specifically, the Media Coalition challenged three aspects of the January 15 Order as unconstitutional abridgements of the First Amendment: (1) its closure of the *voir dire* proceedings scheduled to be administered in the robing room; (2) its provision for juror anonymity; and (3) its imposition of a prior restraint on the publication of jurors' names, regardless of how the media discovered such names. At an in-court hearing held to address the motion on January 16, 2004, the district court elaborated on the factual basis for the January 15 Order:

> This is not an ordinary high-profile case. I have tried many over the years. This is a case in which the press is interested in all sorts of things in which I have never seen as much press interest in a case and we have had the most remarkable efforts to approach jurors who came to fill out questionnaires after I issued an order prohibiting such efforts to approach the jurors.
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> We have had– and I do not say this critically– an extraordinary interest quite beyond the public's right to know. There has been so much public pronouncement of opinions that different people have been exposed to. And people have formed judgments. I have already seen it. Many people have already formed judgments, prejudged. I have read commentators who have already made up their minds, who are read by potential jurors.

These attributes of the case, the district court explained, distinguished it from other high-profile prosecutions, such as the trials of Leona Helmsley, Imelda Marcos, and Vincent Gigante, and necessitated closure of the *voir dire* proceedings to encourage juror candor, thereby "protecting the defendants' right to an impartial jury." Accordingly, the district court declined to vacate or significantly modify the January 15 Order. The district court did, however, clarify that only the names of venire members would be redacted from the *voir dire* transcripts.

This appeal, which challenges only the district court's closure of the *voir dire* examinations, followed. The district court denied the Media Coalition's request for a stay of *voir dire* pending appeal, and the Media Coalition did not seek such a stay from this Court. Consequently, individual *voir dire* of prospective jurors commenced on January 20, 2004, and concluded on January 23, 2004.

The right to attend criminal trials is implicit in the guarantees of the First Amendment. Without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated. This First Amendment right of access, the Supreme Court has explained, derives from two features of the criminal justice system: First, the criminal trial historically has been open to the press and the general public; and second, public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. The Supreme Court has further recognized that the guarantee of open public proceedings in criminal trials extends to the *voir dire* examination of potential jurors.

The constitutional right of access, however, is not absolute, and must, in certain circumstances, give way to other rights or interests, such as the defendant's Sixth Amendment right to a fair trial or the privacy interests of prospective jurors. But the Supreme Court has made clear that the presumption of openness cannot easily be overcome. In the specific context of access to *voir dire* examinations, the Court has stated: "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." Where the competing interest asserted is the right of the accused to a fair trial, the Supreme Court fashioned the following balancing test for determining whether closure is appropriate: "The [proceeding] shall be closed only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights."

As a preliminary matter, we consider whether the January 15 Order infringed upon the Media Coalition's First Amendment right of access, so as to require application of the balancing tests set forth in [relevant Supreme Court precedents], in light of the district court's provision for the release of the transcripts of the *voir dire* examinations. In this regard, the government argues that the January 15 Order did not "entirely or even significantly impair" the public's first amendment right of access but "merely deprived Appellants of 'the contemporaneity and the "color and texture" of the *voir dire* proceedings.'" But one cannot transcribe an anguished look or a nervous tic. The ability to see and to hear a proceeding as is unfolds is a vital component of the First Amendment right of access. Indeed, during the *voir dire* in this case, counsel for one of the defendants challenged a potential juror for cause, stating, "You can tell from the look on his face and the tension when he was answering those questions that he is angry." On the basis of this challenge, the district court excused the potential juror.

We do not mean to suggest that providing documentary, in lieu of concurrent, access is never an appropriate result. Where, applying the constitutionally mandated balancing test, a court has found that concurrent access must be denied, the provision of a transcript may well be the best available substitute. The provision of a transcript, however, does not somehow allow for a more lenient balancing test. The government's contention that the limited denial of access imposed by the January 15 Order "is not a sufficiently 'substantial constitutional consideration' to outweigh the considerable interests of the defendants and the public in a fair trial," thus begs the question of whether there was a sufficient factual basis for denying access at all. Accordingly, we turn to that question.

To overcome the presumption of openness, the district court was required, *inter alia*, to make detailed findings demonstrating that closure was essential to preserve "higher values."

Because the competing interest asserted in this case was the Sixth Amendment right of the defendants to a fair trial, the district court more specifically had to find, that there was a "substantial probability" that the defendants' right to an impartial jury would be prejudiced by publicity that closure would prevent.

Here, the district court's findings with respect to closure were essentially as follows: that members of the media had shown an intense interest in the Stewart prosecution, an interest beyond that exhibited in other high-profile cases and unprecedented in the district court's experience; that, in light of the extensive media coverage, which included editorial pronouncements of opinion about the underlying merits of the charges, many prospective jurors were likely to have prejudged the defendants; that it was essential for venire members to disclose any such preconceptions in order for the defendants to receive a fair trial; that there was a substantial risk that members of the media, if present at *voir dire* sessions, would disclose the names of prospective jurors in recounting the substance of the examinations; and that this possibility would inhibit venire members from giving full and frank answers to the questions posed. For the reasons that follow, we conclude that these findings were not sufficient to establish a substantial probability that open *voir dire* proceedings would have prejudiced the defendants' right to an impartial jury.

First, the district court did not find, and there is nothing in the record to suggest, that members of the media at any point violated an order of the district court or otherwise conducted themselves improperly in covering the case. While the district court stated that portions of the jury questionnaire that had been provided to prospective jurors on January 6, 2004, were disclosed to the public in violation of the Court's directives, there is no indication that this infraction was committed by a media representative. On the contrary, the information was posted

on the website www.gawker.com by a person purporting to be a prospective juror. The district court thus did not demonstrate a substantial probability that, absent closure, members of the media would have either disrupted the proceedings or disclosed information that the court had prohibited them from revealing.

Second, with respect to the district court's finding that many venirepersons were likely to have prejudged Stewart, we note that prospective jurors are likely to have preconceptions about the defendants in almost every criminal case that attracts media attention. If this fact alone were sufficient to warrant closure, then courts could routinely deny the media access to those cases of most interest to the public, and the exception to openness would swallow the rule.

Third, we discern no basis for the district court's conclusion that prospective jurors would have been unwilling to express for publication any preconceptions that they might have had about the defendants. As a preliminary observation, it is worth noting that the defendants, Martha Stewart and Peter Baconovic, were both seated in the robing room. We find it difficult to conceive of a potential juror who would be willing to reveal a bias against the defendants in their presence but not in the presence of reporters.

More importantly, the district court did not point to any controversial issue to be probed in *voir dire* that might have impaired the candor of prospective jurors. No sensitive or contentious lines of questioning were here identified by the district court. It is, for example, difficult to imagine a person losing his or her job because he or she acknowledged admiration for or animosity toward Stewart. Nor would it have required the theologian's heroic virtue for a person to express for publication a distrust in corporate leadership or a distaste for the niceties of home decorating. At oral argument, the government asserted for the first time that the *voir dire* proceedings examined whether prospective jurors had sexist attitudes that would impair their

impartiality, and that these attitudes are of the sort that prospective jurors might have been unwilling to express publicly out of fear of societal (or marital) reprisal. We do not have to decide whether the importance of uncovering sexism coupled with the high-profile nature of the proceedings would have been enough to justify closure because, as the government conceded at oral argument, the district court did not find that sexism was an issue in this case. In any event, we have independently reviewed the *voir dire* transcripts and ascertained that the questions asked did not call upon potential jurors to discuss gender bias or any other socially polarizing issues. Thus, there is nothing in either the district court's findings or in the record to suggest that the presence of reporters at *voir dire* proceedings would have especially chilled juror candor.

In sum, we do not see anything in the district court's findings, other than perhaps the degree of media coverage, that differentiates this case from any other high-profile prosecution. The mere fact that the suit has been the subject of intense media coverage is not, however, sufficient to justify closure. To hold otherwise would render the First Amendment right of access meaningless; the very demand for openness would paradoxically defeat its availability. We take very seriously the fair trial rights of defendants, and, district courts are empowered to close proceedings in appropriate circumstances to safeguard those rights. But, in general, openness acts to protect, rather than to threaten, the right to a fair trial. Where, as here, the *voir dire* proceedings do not explore particularly sensitive or controversial issues, knowledge that reporters are present probably discourages fabrication and ensures honesty on the part of venirepersons. Indeed, we note that it was the government, and not the defendants, who first requested closure (a request in which the defendants subsequently acquiesced), and it is the government, not the defendants, arguing for closure on appeal. If openness would truly have jeopardized the fair trial rights of the defendants in this case, we imagine that the defendants,

represented by experienced counsel, would have initiated the request for closure. Weighing the various interests at play, we find that the balance tilts heavily in favor of openness.

Finally, we address the second prong of the balancing test– that is, that closure orders be no broader than necessary to protect the countervailing interest advanced. Assuming *arguendo* that the district court's factual findings had been sufficient to demonstrate that there was "a substantial probability" that Stewart's and Baconvic's "right to a fair trial [would] be prejudiced by publicity that closure would prevent," the district court did not, in our view, adopt a narrowly-tailored method of protecting the defendants' fair trial rights. We stress at the outset, that, different circumstances call for different cures. We therefore set forth no prescriptions to be applied formulaically in future closure cases. Concerned as we are only with the case before us, we merely observe that, in this case, there were at least two available alternatives to complete closure that would have effectively addressed the district court's stated concern about the candor of prospective jurors.

First, we do not see why simply concealing the identities of the prospective jurors would not have been sufficient to ensure juror candor. Under the January 15 Order, members of the media can access transcripts of the *voir dire* examinations, redacted only to conceal the names of prospective and chosen jurors. Venire members therefore could not speak openly and frankly free of any fear that their answers would be published, but only free of fear that their names would be published alongside their answers. The district court suggested that referring to members of the venire panel by number in place of name would not have been an effective alternative to contemporaneous closure for two reasons: If members of the media had attended the *voir dire* proceedings, (1) they might somehow have discovered the names of the prospective jurors-defeating actual anonymity, and (2) potential jurors would have feared that their names

would be discovered-undermining perceived anonymity. We respectfully disagree with both conclusions.

Other courts have been able to conceal juror identity, without closing *voir dire* proceedings to the media, and there is no indication in the record of media misconduct that might differentiate this case from others. At oral argument, the government suggested that the method used by the district court was more effective in encouraging disclosure than the alternative we note because prospective jurors examined in the robing room did not know that a transcript of the proceedings would be made available to the media, whereas if reporters had actually attended *voir dire*, venire members would have been aware of their presence and thus less willing to speak candidly. With respect to this argument, we are, as an initial matter, not entirely convinced that prospective jurors would have been able to distinguish a few pool reporters in attendance from the jury consultants and lawyers also present in the robing room. We cannot, moreover, accept the government's suggestion that the value of the procedure employed lay in its ability to mislead potential jurors, and we reject any inference that the district court would have intended to mislead venire members. To the extent that potential jurors were misled, this was an unfortunate consequence, not an added benefit, of the method used. Second, even assuming that candor concerns were, as the district court found, implicated by certain *voir dire* lines of questioning, we fail to see why the media had to be barred from the entirety of the *voir dire* examinations. No benefit inured from denying the media the right to be present when jurors answered routine background questions, put forth hardship requests, or recounted other trivial details. In fact, the government voiced no objection before the district court to allowing the media to attend these limited portions of the *voir dire* examinations. Here, partial closure was an available and an effective means of ensuring the candor of prospective

jurors.

We therefore do not think that, to the extent that there was a constitutionally recognized basis for closure, the district court chose the most narrowly tailored course available. But in reaching this conclusion, we take no position on what alternative procedure the district court should have used and by no means suggest that the methods we advance were the only two alternatives available to the district court.

For the forgoing reasons, we find that the district court did not set forth a sufficient factual basis for closure of the *voir dire* examinations and that, in any event, the district court's closure order was not narrowly tailored to protect the defendants' fair trial right. We therefore grant the appellants the only relief that they have requested, by vacating the portion of the January 15 Order that barred the media from attending the *voir dire* proceedings held in the district judge's robing room.

Points for Discussion

1. The court here brushes aside the notion that potential jurors' candor might be affected by having TV cameras present. Does this conclusion jibe with your own experience and intuition? Would you be more nervous knowing that you would be on the TV evening news than knowing that the print media might mention your name?

2. Judge Katzman argues here that not all highly newsworthy trials will make it difficult for jurors to be candid during the *voir dire* procedures. A rape trial, or a criminal trial in which race is an underlying issue, might be of concern, he suggests, but not a trial whose celebrity participant is best known for household hints. But might celebrity itself be a distorting factor?

Might some potential jurors be less than candid precisely because they want to be on TV “with Martha Stewart?”