

State ex rel. Rosenthal v. Poe
98 S.W. 3d 194 (Tex. Crim. App. 2003).
Judge Hervey:

A state trial judge, Ted Poe], signed an order permitting WGBH Educational Foundation, Mead Street Films, Inc., and the PBS television program *Frontline* (collectively referred to as “Co-Production”) to videotape for later public broadcast, all of the proceedings (including jury deliberations) in the capital murder trial of Cedric Ryan Harrison. As part of his order authorizing the videotaping, Judge Poe found that Co-Production “has demonstrated seriousness of purpose and committed significant resources to this public educational endeavor and is uniquely deserving of the exclusive right to broadcast the footage it records.” Unattended cameras and sound recording equipment will record the jury deliberations with no one from Co-production present in the jury room during these deliberations. The judge has taken other measures to ensure that none of the proceedings will be broadcast “until after the conclusion of all matters in the trial court.”

The record further reflects that Judge Poe did not authorize the videotaping of the proceedings until after having carefully questioned Mr. Harrison and his lawyer about Mr. Harrison’s decision to consent to the videotaping and being satisfied that Mr. Harrison freely consented to it. The record also reflects that Mr. Harrison waived in writing, any statutory or constitutional right to use any of the recordings “as evidence in a motion for new trial, on direct appeal, or in post-conviction proceedings in state or federal court” and to use any of the recordings “as evidence of error or misconduct that may occur during trial and jury deliberations.” Mr. Harrison also acknowledged in writing his understanding “that recorded jury deliberations cannot be used in a motion for new trial, direct appeal, or post-conviction proceedings.” Mr. Harrison’s attorney asserted in writing that Mr. Harrison’s waiver “was

executed voluntarily and freely” and that Mr. Harrison was “competent to make such waiver.”

When jury selection proceedings began, each veniremember was required to fill out a juror questionnaire form which asked the veniremember whether videotaping the proceedings to be aired for public television purposes after the trial would affect various aspects of the veniremember’s deliberations such as the veniremember’s “ability to be fair.” The record further reflects that, at the beginning of voir dire, Judge Poe carefully explained to the veniremembers that the trial proceedings would be videotaped for broadcast after trial for educational purposes and asked the veniremembers whether this would affect their deliberations. Poe also informed the veniremembers that he had never heard of this happening before and that he believed that the videotaped proceedings would be “edited, cut down to some kind of an hour, two hours.” The record reflects that 13 veniremembers were “excused by agreement” because “they had a problem about having the case videoed.” The next day two more veniremembers were “excused by agreement” for similar reasons. That same day District Attorney Charles Rosenthal filed this original mandamus proceeding in this Court seeking to bar only the videotaping of the jury deliberations.

A trial court’s inherent power includes broad discretion over the conduct of its proceedings. Though some limits to this broad discretion may exist, this Court would find it very difficult to decide that the judge has no discretion to permit the videotaping of jury deliberations (even for live broadcast) in the absence of a statute that specifically prohibits it. The District Attorney argues that Judge Poe has no discretion to permit videotaping of the jury deliberations because the first sentence of Article 36.22, Texas Code of Criminal Procedure, clearly prohibits it. The first sentence of Article 36.22 provides that “no person shall be permitted to be with a jury while it is deliberating.” DA Rosenthal claims that videotaping the

jury's deliberations will unlawfully pierce the "veil of confidentiality" of jury deliberations established by the first

Judge Poe claims that it is within his sound discretion to permit videotaping of the jury deliberations because no "statute, rule, or common law in Texas" clearly prohibits an unattended camera to videotape the jury deliberations for later public broadcast. Poe argues that videotaping jury deliberations does not violate the "plain" language of Article 36.22 because Article 36.22 does not establish an absolute "veil of confidentiality" of jury deliberations but only prohibits persons from being present with the jury during deliberations for the purpose of preventing jurors from being subjected to outside influences and pressures.

This case boils down to what the Legislature meant in the first sentence of Article 36.22 by its language, "no person shall be permitted to be with a jury while it is deliberating." We normally construe a statute according to its "plain" textual meaning without resort to extratextual sources. We will, however, also resort to extratextual sources to construe a statute if we decide that the statute is ambiguous or that construing the statute according to its "plain" textual meaning will lead to "absurd consequences."

Judge Poe claims that videotaping the jury deliberations does not violate the first sentence of Article 36.22 because the unattended camera is not a "person with [the] jury" and "cannot possibly introduce outside influences and pressures on the jury" while it is deliberating. But each of the millions of viewers of the videotape is a person, and the playing of the videotape (live or not) permits these persons to "be with the jury while it is deliberating" under the "plain" language of the first sentence of Article 36.22. And, videotaping the jury deliberations with an unattended camera does introduce an "outside influence and pressure" on the jury while it is deliberating. Questioning the veniremembers during voir dire about whether this will affect their

deliberations all but admits that this is an “outside influence and pressure” since these are normally the types of questions asked after an improper outside influence has been brought to bear on a jury for which our law presumes prejudice. In addition, it normally cannot be determined whether an event introducing an “outside influence and pressure” on the jury has affected jury deliberations until **after** (not before) the event has occurred. Even though many of the veniremembers in this case may have indicated that videotaping their deliberations will not affect them, this really cannot be determined until after the jury has completed its deliberations.

The chief function of our judicial machinery is to ascertain the truth. The use of television, however, cannot be said to contribute materially to this objective. Rather, its use amounts to the injection of an irrelevant factor into court proceedings. In addition experience teaches that there are numerous situations in which it might cause actual unfairness-some so subtle as to defy detection by the accused or control by the judge.

The potential impact of television on the jurors is perhaps of the greatest significance. They are the nerve center of the fact-finding process. It is true that in States like Texas where they are required to be sequestered in trials of this nature the jurors will probably not see any of the proceedings as televised from the courtroom. But the inquiry cannot end there. From the moment the trial judge announces that a case will be televised it becomes a cause celebre. If the community be hostile to an accused a televised juror, realizing that he must return to neighbors who saw the trial themselves, may well be led [to rule against the accused out of fear].

Moreover, while it is practically impossible to assess the effect of television on jury attentiveness, those of us who know juries realize the problem of jury “distraction.” The State argues this is de minimis since the physical disturbances have been eliminated. But we know that distractions are not caused solely by the physical presence of the camera and its telltale red

lights. It is the awareness of the fact of telecasting that is felt by the juror throughout the trial. We are all self-conscious and uneasy when being televised. Human nature being what it is, not only will a juror's eyes be fixed on the camera, but also his mind will be preoccupied with the telecasting rather than with the testimony.

We hold that the first sentence of Article 36.22 clearly and indisputably prohibits the videotaping of jury deliberations. The existence of a proposed and pending Senate Bill that more clearly prohibits what the first sentence of Article 36.22 already clearly prohibits is of no consequence. We further note that our interpretation of the first sentence of Article 36.22 is also consistent with the ancient and centuries-old rule that jury deliberations should be private and confidential in order to promote "freedom of debate," "independence of thought" and "frankness and freedom of discussion and conference."

Finally, Judge Poe points to instances where other jurisdictions (Arizona and Wisconsin) have permitted videotaping of jury deliberations and claims that this had "no impact on jury deliberations." DA Rosenthal speculates that videotaping the jury deliberations in the Arizona experiment affected the jury deliberations since two out of the three cases chosen for initial broadcast resulted in hung juries and mistrials. The practice of other jurisdictions, however, does not control our interpretation of Article 36.22.

As is our custom, we withhold issuance of the writ to accord Judge Poe an opportunity to make that unnecessary. [**Editor's Note:** In other words, this court informally asks the trial judge to rescind his own order permitting the videotaping, and stops short of issuing a "writ of mandamus" officially ordering him to do so.]

Points for Discussion

1. PBS' *Frontline*, with permission of a Milwaukee judge (and both the prosecution and defense), did videotape and later air excerpts from jury deliberations (See the network's *Inside the Jury Room*, from 1986). The case involved a mentally-challenged defendant, a parolee on trial for having purchased a handgun as part of a fanciful plan to become a security guard.

Assuming you find that the public interest in such programming justifies the intrusion into the jury room in that case, is there a distinction to be made in capital murder cases (like this one in Texas), where a defendant's life is at stake?

2. Do you think that Judge Hevel accurately interpreted the relevant statute in this case? That is, was the statute intended to prevent unattended cameras, rather than only real, live humans, to "be with" a jury when it is deliberating?