



Krause v. Rhodes

570 F.2d 563 (1977) | Cited 17 times | Sixth Circuit | October 20, 1977

Order

The petitions for rehearing with suggestions of rehearing en banc filed by the defendants-appellees having come on for consideration, and of the Judges of this court who are in regular active service less than a majority having favored ordering consideration en banc (Judges Weick, Celebrezze and Peck favored rehearing en banc and Judge Weick has filed a separate dissent), the petitions for rehearing have been referred to the hearing panel.

Upon consideration of the petitions for rehearing the court concludes that the issues raised therein were fully considered upon submission and decision of the case.

Accordingly, the petitions for rehearing are denied.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN / Clerk

Disposition

The petitions for rehearing are denied.

WEICK, Circuit Judge, dissenting.

Three of the seven active Judges of this Court, namely Circuit Judges Celebrezze, Peck and Weick, voted in favor of en banc consideration. Only one Judge in addition to the three-Judge panel, voted against en banc consideration.

This is one of the most important cases ever to come before this Court for determination. It surely merited en banc consideration. It involved inter alia the question of the individual liability of the State of Ohio's Chief Executive Officer, the Governor of the State, for damages resulting from his calling out the Ohio National Guard, at the request of the Mayor of the city of Kent, to suppress a riot occurring on the campus of Kent State University, during the continuance of which riot the R.O.T.C. building on the campus was destroyed by fire, and stores in the city of Kent were looted by the mob. The rioting, looting, and arson constituted felonies under Ohio law. Ohio Rev. Code §§ 2917.02, 2917.03, 2911.01, 2911.02, 2909.02, and 2909.03.



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The jury returned a verdict in favor of all the defendants after a trial which lasted nearly three months, which defendants included all of the members of the Ohio National Guard, the Governor of Ohio, and the President of Kent State University.

A panel of this Court has reversed on the sole ground of alleged threats against and assault upon one of the jurors in the case.

It is the Governor's contention that the District Court erred in denying motions for a directed verdict which were made by him at the close of plaintiffs' evidence and renewed at the close of all of the evidence. As will be shown below, the Governor was entitled to a directed verdict.

Since the Governor was entitled as a matter of law to the direction of a verdict in his favor, any other errors of law occurring at the trial are harmless. The panel recognized this proposition of law when it held that a verdict should have been directed in favor of the President of Kent State University and entered judgment in his favor. The suit against the President of Kent State University was plainly frivolous. The supporting authorities for harmless error are:

Rule 61 Fed. R. Civ. P.

Prebble v. Brodrick, 535 F.2d 605 (10th Cir. 1976).

L. & S. Enterprises v. Great American Ins. Co., 454 F.2d 457 (7th Cir. 1971).

Quick v. American Steel & Pump Corp., 397 F.2d 561 (2d Cir. 1968).

The Governor was requested, by proclamation of the Mayor of the city of Kent issued on May 2, 1970, two days before the incident complained of, to call out the Ohio National Guard to suppress a riot, which proclamation read in part as follows:

I, LeRoy M. Satrom, Mayor of the City of Kent, Ohio, pursuant to the power invested in me as the chief magisterial officer of this City do hereby request the assistance of the Ohio National Guard to assist the Police Department and other local law enforcement agencies in restoring law and order in the City of Kent and particularly in the area of Kent State University and its environs.

Local law enforcement agencies can no longer cope with the situation and I instruct you to provide the necessary assistance to restore peace and order to our community.¹

Even prior to that proclamation the County Prosecutor had obtained an injunction prohibiting assemblies within the city of Kent.

The Governor did not act to suppress the riot until after the mob had destroyed by fire the R.O.T.C.



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building located on the campus and had looted stores in the city of Kent. The Governor was authorized to act under Ohio Revised Code §§ 5923.21 and 5923.23.

This case is unprecedented. There is no reported case wherein the Governor of a state has ever been held liable for calling out the militia to suppress a riot or insurrection, and no case where a Governor's liability has been submitted to a petit jury for determination.

The Supreme Court, in *Scheuer v. Rhodes*, 416 U.S. 232, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974), held that the District Court acted prematurely in dismissing the complaint and that it should have taken some evidence. The Court did not state that it had to be a full dress trial. The Court said on page 249:

In dismissing the complaints, the District Court and the Court of Appeals erroneously accepted as a fact the good faith of the Governor, and took judicial notice that "mob rule existed at Kent State University." There was no opportunity afforded petitioners to contest the facts assumed in that conclusion.

The Supreme Court further stated at page 250:

Further proceedings, either by way of summary judgment or by trial on the merits, are required. The complaining parties are entitled to be heard more fully than is possible on a motion to dismiss a complaint. (Emphasis added)

In other words, the Court did not direct a full dress trial, which, in the present case, lasted nearly three months, and the defendants are confronted with a second trial because of the panel's reversal of the judgment for the defendants.

But now the "complaining parties" have been fully heard. Without any question mob rule did in fact prevail, not only on the Kent State campus but also in downtown Kent where stores had been looted, and the police were unable to cope with the mob.

The Governor was not present on the campus at any time during the rioting and the shooting. The Guard was in charge of its officer members.

Assuming that some members of the Guard did use excessive force to suppress the riot, this would impose no liability on the absent Governor because the Guard was in the command of the Adjutant General or his representative officers; nor would the Governor be personally liable if the Guard had not been properly trained as this function was performed solely by the Federal Government. See *Gilligan v. Morgan*, 413 U.S. 1, 37 L. Ed. 2d 407, 93 S. Ct. 2440 (1973).

In *Moyer v. Peabody*, 212 U.S. 78, 53 L. Ed. 410, 29 S. Ct. 235 (1909), Mr. Justice Holmes, who wrote the opinion for the Court, stated at page 85:



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So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had not reasonable ground for his belief.

In *Sterling v. Constantin*, 287 U.S. 378, 77 L. Ed. 375, 53 S. Ct. 190 (1932), Mr. Justice Hughes, in referring to the discretion vested in a Governor to determine whether an exigency existed requiring the militia, stated: "His decision to that effect is conclusive."

In *Scheuer v. Rhodes*, *supra*, the Supreme Court stated what the defendants were charged with, as follows:

In essence, the defendants are alleged to have "intentionally, recklessly, willfully and wantonly" caused an unnecessary deployment of the Ohio National Guard on the Kent State campus and, in the same manner, ordered the Guard members to perform allegedly illegal actions which resulted in the death of plaintiffs' decedents. (Emphasis added) (416 U.S. at p. 235)

There was not an iota of evidence offered at the trial to support the above-quoted language of the Supreme Court, charged by the plaintiffs in their complaints.

In *Barr v. Matteo*, 360 U.S. 564, 3 L. Ed. 2d 1434, 79 S. Ct. 1335 (1959), the Supreme Court, in an opinion written for the Court by Mr. Justice Harlan, held that the Acting Director of the Office of Rent Stabilization had absolute immunity in defense of a suit for alleged libel contained in a press release. The Court quoted with approval from an "admirably expressed" opinion of Judge Learned Hand in *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949).

Barr v. Matteo was recently followed by the Court of Appeals for the District of Columbia Circuit, and was held not to be eroded by recent decisions of the Supreme Court. *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institution*, 184 U.S. App. D.C. 397-398, 566 F.2d 289-291, en banc (46 U.S.L.W. 2156, 2157, decided Sept. 16, 1977).

In *Cunningham v. Ellington*, 323 F. Supp. 1072 (W.D. Tenn. 1971), a three-Judge Court, consisting of Judges Phillips, Bailey Brown and Robert McRae, Jr., dismissed a damage suit for wrongful death of a man who was shot by police who were investigating a robbery, and upheld the validity of a Tennessee statute declaratory of the common law authorizing the use of deadly force to effect an arrest of a felon fleeing from arrest.

That case was followed in another damage suit, *Beech v. Melancon*, 465 F.2d 425 (6th Cir. 1972), cert. denied, 409 U.S. 1114, 34 L. Ed. 2d 696, 93 S. Ct. 927 (1973), in a per curiam opinion concurred in by Judges Edwards, McCree (in the result), and Kent.

These two cases were followed by this Court in *Wiley v. Memphis Police Dept.*, 548 F.2d 1247 (6th



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Cir. 1977), cert. denied, 434 U.S. 822, 98 S. Ct. 65, 54 L. Ed. 2d 78 (1977).

In the present case, before any shots were fired by the Guard, the guardsmen were approached by a rock-throwing mob, who were uttering obscenities. A number of the members of the Guard testified that they were afraid for their lives. There is no evidence that any officer of the Guard issued an order to fire.

It seems to me that, in all fairness, if we are going to subject the Governor of Ohio to the ordeal of a second trial, when he has been absolved by a jury at the first trial, there should at least be some discussion of the basis for such action. There was no evidence that the Governor acted with malice.

In deciding whether to call out the militia the Governor and the Adjutant General certainly had the right to rely on the decisions of the Supreme Court which are cited above and which were in effect at the time. Subsequent decisions of the Supreme Court which may have imposed stricter standards and liability which did not theretofore exist, may not be retroactively applied without violation of due process under the Fifth Amendment. *Marks v. United States*, 430 U.S. 188, 51 L. Ed. 2d 260, 97 S. Ct. 990 (1977). Neither Congress nor the federal courts may enact ex post facto laws.

One additional issue remains to be discussed, namely, the panel's treatment of "The Jury Issue."

It was the duty of the trial judge, when it was reported to him that an alleged threat and assault had been made on one of the jurors, immediately to interrogate that juror at a hearing, at which counsel for all of the parties would be present and would be permitted to participate. At such hearing the Court could have learned from the juror himself exactly what happened and whether he (the juror) had discussed the threats with other jurors. A record should have been made of the proceedings in order to assure appropriate appellate review. *Remmer v. United States*, 347 U.S. 227, 98 L. Ed. 654, 74 S. Ct. 450 (1954). There the Court said:

We do not know from this record, nor does the petitioner know, what actually transpired, or whether the incidents that may have occurred were harmful or harmless.

Neither does anyone know in the present case, because the District Judge never conducted a hearing. He never interrogated the juror. The Judge never questioned other jurors to learn whether they knew anything about it.

The juror had apparently reported the alleged incident to a United States Marshal, and he reported it to the FBI and to the Court. The FBI interviewed the juror but made no written report. The United States Attorney was also consulted. The Judge indicated to counsel that he would excuse the juror but he never did excuse him. The Judge also reported the incident to the entire jury in open court. The FBI apparently decided to do nothing about it, which leads to the inference that the alleged threat and assault may never have taken place.



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Under these circumstances, the panel should have followed the guidelines of the Supreme Court in *Remmer v. United States*, *supra*, and should have remanded for an evidentiary hearing. Then, if it developed that the charge of tampering was unsupported, the panel could affirm. If the charge was supported and found to be prejudicial, the panel could then reverse. *Remmer v. United States*, 350 U.S. 377, 100 L. Ed. 435, 76 S. Ct. 425 (1956).

The trial in the District Court, having lasted as it did for nearly three months, has caused terrific expense to the plaintiffs, as well as to the state of Ohio which defended the Guardsmen, the Governor, and the President of Kent State. Expense was also incurred in the defense of the criminal trials against the Guardsmen in the District Court, which trials resulted in directed verdicts of acquittal.

Also, as this Court as well as two Justices of the Supreme Court know, even now all is not quiet on the front.

I do not address other issues appearing in this case, namely, the liability of members of the Guard who fired no shots; the liability of officers of the Guard who issued no order to fire; the liability of officers and members of the Guard who were not even present during the riots and shootings.

En banc consideration should have been granted.

The judgment in favor of the Governor should be affirmed. The Jury Issue should be remanded to the District Court for an evidentiary hearing under the guidelines of *Remmer v. United States*, *supra*.

1. Plaintiffs' counsel conceded at the trial that the Governor had the right to call out the National Guard. As well stated by the panel on page 570 of its slip opinion: In opening statements to the jury and in colloquy with the district court and opposing counsel it was admitted by attorneys for the plaintiffs that there had been violent assemblies in Kent and on the campus of Kent State on Friday, Saturday and Sunday nights, May 1, 2 and 3. Counsel conceded that Governor Rhodes had the right to call in the National Guard "because of the violence which had occurred, because it was unexcusable [sic], unjustifiable. . . ." It is admitted in the brief of the plaintiffs that students and other young people engaged in violence and vandalism in Kent, Ohio and on the campus during the three preceding days. On Saturday May 2nd the crowd burned the ROTC building on the campus and interfered with officers and firemen who attempted to control the fire. On Sunday May 3rd a crowd on the campus became disorderly and attempted to attack the university president's home. This crowd was finally dispersed by the National Guard after it had left the campus and caused further damage in downtown Kent. Policemen, firemen and national guardsmen were repeatedly assaulted while attempting to maintain and restore order during the three-day period.

