United States v. Ives

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UNITED STATES v. IVES

RIGHT TO TESTIFY—Disruptive defendants—defendants who insist upon conducting themselves in a disorderly and disrespectful manner at trial may lose their opportunity to take the stand. 504 F.2d 935 (2d Cir. 1974)

The problems created by disruptive defendants in criminal trials have probably existed since the establishment of a system for the administration of justice. The true dimensions of this phenomenon and its ramifications for society as a whole, however, have been brought to light by several highly charged and much publicized trials which have taken place since the late nineteen sixties.¹ A recent Ninth Circuit decision, United States v. Ives,² poses a serious challenge to the constitutional boundaries previously laid down by the Supreme Court to delineate the permissible discretion afforded a trial judge in handling obstreperous defendants. The Ninth Circuit held that a defendant whose courtroom demeanor is sufficiently disorderly and offensive may be deemed to have waived the opportunity to testify in his own defense.³

In Ives, the petitioner was tried for murder on an Indian Reservation.⁴ His first trial ended in a mistrial due to his continual disruptions of the proceedings. The second trial judge, in preparing for trial, read the transcripts of the first proceeding and conferred with the first presiding judge. In an effort to prevent a second mistrial, the second judge took certain precautions which included the installation of special audio equipment in the courtroom and in a cell directly below it so that Ives could follow the progress of his trial in the event that it became necessary to remove him from the courtroom. In addition, special telephones

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¹ The two cases which were most responsible for focusing public attention on the problem of disorderly trials were the so called “Chicago Seven” conspiracy trial, United States v. Dellinger, (N.D. Ill. Crim. No. 69CR180, 1969), rev’d, 472 F.2d 340 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973); and the New York Black Panther case, People v. Cain (Sup. Ct. N.Y. County 1970), aff’d, 38 App. Div.2d 900, 330 N.Y.S.2d 973 (1st Dep’t 1972). For a full discussion of the problem in general, see N. DORSEN & L. FRIEDMAN, DISORDER IN THE COURT 3-9 (1st ed. 1973) [hereinafter referred to as DISORDER]. ² 504 F.2d 935 (9th Cir. 1974). ³ The court also ruled on three subsidiary points involving jurisdictional issues and the question of the particular defendant’s mental competency to stand trial. However, these issues have no bearing on the constitutional considerations which are the subject matter of this note, and will not be further discussed. ⁴ Such an offense is a violation of federal law under 18 U.S.C. §§ 1111, 1153 (1970).
(with blinking lights rather than bells) were installed in the cell and at defense counsel’s table so that Ives could communicate with his attorneys during every stage of the proceedings.

Ives continuously disrupted his second trial in substantially the same manner as he previously had done, refusing to answer questions, shouting obscenities at the judge and jurors, and violently attacking both his own and opposing counsel. As a result, he was removed from the courtroom to the special cell on numerous occasions. Specifically, Ives was given the opportunity to take the stand on three separate occasions, and in every instance he refused to cooperate either with his own lawyer or with the judge. On the first and second occasions, the judge removed Ives from the courtroom. On the third occasion, an extended confrontation between Ives and the trial judge took place. Although Ives was not removed from the courtroom at this time, his attorney assumed that he was not going to take the stand and proceeded to call another witness. Following a physical attack by petitioner on the United States attorneys, however, he was removed from the courtroom for the last time and was not permitted to return despite repeated requests by his lawyers that he be permitted to return in order to testify.5 Ives was subsequently convicted of murder.

The Court of Appeals for the Ninth Circuit affirmed the conviction, holding first that a defendant’s right to testify in his own behalf can be waived by his obstreperous conduct during the trial;6 second, that what type of conduct constitutes disruption and what measures should be taken to control it are committed to the discretion of the trial judge;7 and third, that before a waiver of the right to testify can be found, the defendant must be made aware of the consequences of his behavior.8

The court advanced three major arguments in support of its conclusion. First, the opinion stated that a unique set of historical circumstances had, in effect, made the question of whether or not the Constitution guaranteed a defendant in a criminal action the right to testify one of first impression with little if any direct authority on which to rely in reaching a decision. The common law rules of evidence had traditionally precluded defendants from

5. 504 F.2d 935, 944 (9th Cir. 1974).
6. Id. at 941.
7. Id. at 942.
8. Id.
testifying on their own behalf. In addition, no specific mention was made of a right to testify in the Constitution itself. The court maintained that if the opportunity to testify was, in fact, grounded in the Constitution, then the source of this guarantee must necessarily be the due process clause of the fifth amendment. The court pointed out, however, that assuming that this constitutional right to testify does exist, it has been largely ignored because of the enactment by Congress in 1878 of a statute recognizing defendants as competent witnesses. Since the opportunity to testify was protected by statute, the courts were not required to confront the question of whether or not this right was independently guaranteed by the Constitution.

Second, the court stated that there has been a considerable amount of judicial uncertainty as to whether the opportunity of a defendant to testify is a right, or merely a privilege which, presumably, carries less weight. The court concluded that it was unnecessary to make this distinction, for even if it is assumed that the testimonial opportunity is a right and not a privilege, and that it is independently protected by the fifth amendment, the right must nevertheless be claimed by an attempt to take the stand or it will be deemed to have been waived.

The court concluded that the petitioner's conduct was sufficiently objectionable to constitute a waiver of his opportunity to testify whether such opportunity was a right or a privilege, and whether it was protected by the Constitution or merely secured by statute. However, the court did take cognizance of prior case law to the effect that a waiver of a right or privilege guaranteed by the Constitution will be measured against a higher standard than a similar right or privilege which is merely secured by statute.

Third, the court took notice of a similar Second Circuit case,
United States v. Bentvena,\(^{15}\) wherein a disruptive defendant also had been denied the opportunity to take the stand. The circuit court’s decision in Bentvena indicated that, while the opportunity to testify might conceivably be waived by a defendant’s courtroom demeanor, the behavior of the particular petitioner before it did not call for such a conclusion. Consequently, it was held that such denial of the defendant’s opportunity to testify constituted proper grounds for reversal.

The Ives court further noted the decision of Illinois v. Allen,\(^{16}\) handed down by the Supreme Court subsequent to Bentvena. In Allen a test for constitutional balancing was established: a defendant will be deemed to have waived his right to be present in the courtroom if his conduct is so disorderly and disrespectful of the court that the proceedings cannot be effectively carried on while he remains present.\(^{17}\) Allen also held that the determination of what types of behavior might lead to the conclusion that a defendant has waived his opportunity to be present is within the discretion of the trial judge.\(^{18}\) The Ives court applied the Allen test to the fact situation in Bentvena in reasoning that a defendant can waive his right to testify by his conduct in substantially the same manner as he can waive his right to be present in the courtroom.\(^{19}\)

The Constitutional Dimensions of the Defendant’s Opportunity to Testify

The Ives court referred to the fact that defendants in criminal actions had not always been permitted to testify personally in American courts.\(^{20}\) This practice was not, however, a function of any of the constitutional issues that were considered by the Ives court. Rather, it was a carry-over from the English common law rules of evidence which deemed a defendant in a criminal prose-
Disruptive Defendants

It was thought that competency would be more harmful than helpful to the accused since the jury might infer guilt if he then refused to take the stand, while cross examination might place him in a situation where even an innocent man might appear at a disadvantage if he did testify.

Thus, prior to Congressional enactment of 18 U.S.C. § 3481, in 1878, recognizing defendants as competent witnesses in federal courts, the rules of incompetency which had characterized the English common law were the predominant force in the American judicial system as well.

The constitutional origins of the right of a criminal defendant to take the stand, to which the court hypothetically alluded, are found in the due process clause of the fifth amendment. In Galpin v. Page, the Supreme Court enunciated a principle which has remained essentially unchanged for over a century, and which is to this day the basis of the claim that the opportunity of a criminal defendant to offer testimony is constitutionally protected:

It is a rule as old as the law . . . that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered (emphasis added).

21. Id. at 456.
22. Id.
26. 504 F.2d 935, 939 (9th Cir. 1974).
27. 85 U.S. (18 Wall.) 350 (1873).
In *Snyder v. Massachusetts,*\(^29\) the Court again acknowledged the overriding significance of a defendant's opportunity to defend himself, stating that “[a] defendant who has been denied the opportunity to be heard in his defense has lost something indispensable, however convincing the *ex parte* showing.”\(^30\)

This precise notion, that due process requires that a criminal defendant be afforded the opportunity to present a defense, was reiterated by the Court in strikingly similar language seventy-five years after the *Galpin* opinion in the case of *In re Oliver,*\(^31\) wherein it was held that:\(^32\)

[F]ailure to afford the petitioner a reasonable opportunity to defend himself against the charge . . . was a denial of due process of law. A person's right to reasonable notice of a charge against him and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence, and these rights include, as a minimum, a right to examine witnesses against him, *to offer testimony, and to be represented by counsel* (emphasis added).

It is particularly significant to note that the Court in *Oliver* carefully delineated that which was merely generally alluded to in *Galpin,* setting out those elements which were considered to be the minimum essentials of a defendant’s “day in court,” including specifically the right to offer testimony.

In decisions subsequent to *Oliver,* the Supreme Court has repeatedly referred, either expressly or by implication, to the right of a criminal defendant to offer testimony as being of constitutional dimensions, stating most emphatically in *Brooks v. Tennessee*\(^33\) that “[w]hether the defendant is to testify is an important tactical decision as well as a matter of constitutional right.”\(^34\) In *Morrissey v. Brewer,*\(^35\) the Court was confronted with the question of whether or not the protections of the due process clause which apply to a defendant in a criminal prosecution similarly apply to a parolee at a revocation hearing. The Court proceeded from the premise that the parolee was not entitled to “the

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30. *Id.* at 116.
32. *Id.* at 273.
34. *Id.* at 612.
35. 408 U.S. 471 (1972).
full panoply of rights due a defendant,'" but nevertheless, decided that one of the basic procedural safeguards afforded to the parolee, even under this lesser standard, was an "opportunity to be heard in person." The logical extension of this line of reasoning would certainly seem to be, by implication, that this same opportunity must also be afforded to the criminal defendant. In less specific terms, the Court recently held in *Chambers v. Mississippi*, citing *Oliver*, that the right of a defendant to present a defense is a fundamental element of due process.

In *Poe v. United States*, the Federal District Court for the District of Columbia advanced perhaps the most definitive explication of the principles announced in *Oliver*. The court held that:

An accused in a criminal trial in federal court has the right to testify in his own behalf. This right is guaranteed and protected by the fifth and sixth amendments to the Constitution and by federal statute 18 U.S.C. § 3481.

The right to testify is a basic right.

Citing *Poe* in *United States v. Looper*, the Fourth Circuit stated that "[t]he right to testify has been described as a constitutional right. . . . Certainly, in a federal court, it is not less than a statutory right, and it may not be denied a defendant if, being advised, he elects to exercise it." Similarly, the District of Columbia Circuit stated in dictum in *United States v. McCord* that "as a matter of law, a defendant is always vouchsafed the constitutional right to testify."

**Waiver of the Right to Testify?**

In arriving at its decision that petitioner Ives had, by his contumacious conduct during his trial, waived his right to take the stand, the court applied the standard for handling disruptive defendants established by the Supreme Court in *Illinois v.*

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36. *Id.* at 480.
37. *Id.* at 489.
39. *Id.* at 294.
41. *Id.* at 176.
42. 419 F.2d 1405 (4th Cir. 1969).
43. *Id.* at 1406.
44. 420 F.2d 255 (D.C. Cir. 1969).
45. *Id.* at 257.
Allen.\textsuperscript{46} Allen was tried for armed robbery and was proceeding pro se. Upon numerous occasions he verbally abused the trial judge, which led to his eventual expulsion from the courtroom. In approving of the trial judge's decision to remove Allen, the Court stated:\textsuperscript{47}

\begin{quote}
[W]e explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.
\end{quote}

The \textit{Ives} court stated that the \textit{Allen} holding, which dealt with the right of a defendant to be present at trial, was equally applicable to the case at hand which involved a defendant's opportunity to testify.\textsuperscript{48} Moreover, the court suggested that had \textit{Allen} been decided prior to, rather than after \textit{United States v. Bentvena},\textsuperscript{49} a case in which the material issue was essentially identical to the issue in \textit{Ives} (the denial of a defendant's right to testify), the outcome of the \textit{Bentvena} decision might have been different.\textsuperscript{50}

There appears to be a serious fault in the decision reached by the Ninth Circuit. The \textit{Ives} court grafted the \textit{Allen} standard, which was formulated with respect to a defendant's right to be present at trial, onto a fact pattern which involved the denial of an entirely distinguishable and fundamentally more significant right—the opportunity of a defendant to offer testimony in his own behalf. The receipt of the defendant's testimony was not an issue in \textit{Allen}.

There are certain aspects of a prosecution which arguably can, if absolutely necessary, proceed in the defendant's absence without an enormous risk of prejudice.\textsuperscript{52} Where a defendant's

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\item \textsuperscript{46} 397 U.S. 337 (1970).
\item \textsuperscript{47} Id. at 343.
\item \textsuperscript{48} 504 F.2d 935, 941 (9th Cir. 1974).
\item \textsuperscript{49} 319 F.2d 918 (2d Cir. 1963), cert. denied sub nom. Ormento v. United States, 375 U.S. 940 (1963), rehearing denied, 397 U.S. 928 (1970). See notes 14-18 supra and accompanying text for a discussion of the court's synthesis of \textit{Bentvena} and \textit{Allen}.
\item \textsuperscript{50} 504 F.2d 935, 942 (9th Cir. 1974).
\item \textsuperscript{51} Allen was excluded from the courtroom during \textit{voir dire} and during the presentation of the prosecution's case-in-chief but was present throughout the presentation of his own defense. Illinois v. Allen, 397 U.S. 337, 340-41 (1970).
\item \textsuperscript{52} \textquoteright{}[I]n a prosecution for a felony the defendant has the privilege . . . to be present
\end{itemize}
opportunity to tell his own version of the facts to the jury is involved, however, there is probably no other phase of the proceeding which requires more vigilant and judicious protection. Recognizing that a defendant's opportunity to offer testimony is an integral element of his right to present a defense,\textsuperscript{53} the Supreme Court has stated that the very integrity of the fact finding process itself is seriously called into question by a "denial or significant diminution"\textsuperscript{54} of the exercise of that right. Thus the standard established in \textit{Allen} for handling disruptive defendants should not be mechanically applied in the \textit{Ives}-type case where the loss of an entirely different and essentially more significant right is contemplated.

\textit{Alternatives: Civil Contempt and Deposing the Defendant}

It may arguably be asserted that Ives abused his right to testify personally. However, the apparent constitutional guarantee of the right to testify, the particular significance of that right, and the severity of the penalties facing Ives upon conviction of murder should have dictated a search for alternative procedures which could have ensured Ives' right, while preserving decorum in the court. There are at least two acceptable alternatives to expulsion of a disorderly defendant from the courtroom which the \textit{Ives} court could have attempted to utilize. Indeed the first, citing the defendant in civil contempt, was specifically approved of in \textit{Allen}.

The contempt power has long been recognized by the courts as a judicial weapon against parties who, by their actions, effec-

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\item \textsuperscript{54} \textit{Chambers v. Mississippi}, 410 U.S. 284, 295 (1973).
\item \textsuperscript{55} 397 U.S. 337, 344-45 (1970).
\end{itemize}
tively disrupt legal proceedings. In *Ex parte Robinson*, the Supreme Court stated that:

The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice.

As early as 1812, the Court spoke of the contempt power as a means of controlling disrespectful conduct stating, in *United States v. Hudson*, that "[t]o fine for contempt, imprison for contumacy, enforce the observance of order, etc., are powers which cannot be dispensed with in a court because they are necessary to the exercise of all others." Similarly, in *Anderson v. Dunn*, the Court stated in reference to the use of the contempt power that "courts of justice are universally acknowledged to be vested, by their very creation with power to impose silence, respect and decorum in their presence. . . ."

These early judicial assertions that the contempt power could be used to contain acts of disrespect for the court referred to criminal contempt, essentially as a punishment of the individual who had committed the disrespectful act. Unlike criminal contempt, civil contempt is not designed as a punitive sanction, but rather, as an inducement to the individual to conduct himself in a particular manner. This distinction is well explained by the Supreme Court in *Gompers v. Bucks Store and Range Company*:

Imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order.

56. 86 U.S. (19 Wall.) 505 (1873).
57. Id. at 510.
58. 11 U.S. (7 Cranch.) 32 (1812).
59. Id. at 34.
60. 19 U.S. (6 Wheat.) 204 (1821).
61. Id. at 226.
62. See generally DISORDER, supra note 1, at 102-05.
63. 221 U.S. 418, 442 (1911).
It is evident from the language used by the Court that the civil contempt power was, at the outset, contemplated to be used in order to compel an individual to perform an affirmative act, rather than to refrain from behaving in a disruptive manner. Moreover, it appears that prior to the Allen decision, the use of civil contempt as a method of handling disruptive defendants had not been considered.\textsuperscript{64} Despite the lack of precedent for the use of civil contempt in this manner, the Allen court stated:\textsuperscript{66}

Another aspect of the contempt remedy is the judge's power, when exercised consistently with state and federal law, to imprison an unruly defendant such as Allen for civil contempt and discontinue the trial until such time as the defendant promises to behave himself.

In effect, what the civil contempt remedy does is to confine the obstreperous defendant to prison while he "thinks it over." The uniqueness of this approach lies in the fact that individuals so confined "carry the keys to their prison in their own pockets".\textsuperscript{66} The civil contempt remedy would seem to be a highly effective approach toward controlling the behavior of all but the most uncooperative defendants.\textsuperscript{67} In any event, it does not appear from the record that the trial judge in Ives at any point attempted to use this sanction. Rather, it is stated in the opinion that the judge threatened Ives with expulsion after only the first interruption in the proceedings, during \textit{voir dire}.\textsuperscript{68} At the very least, in consideration of both the importance of the defendant's right to testify, and the severe penalties facing him upon conviction for murder, it would seem a fair conclusion that the judge should have attempted the contempt remedy before permanently excluding Ives from the courtroom.

Admittedly, the point may be reached where a disruptive defendant, unconvinced by citation for civil contempt, may have to be excluded from his own trial so that the proceedings can be

\textsuperscript{64} See \textit{Disorder}, \textit{supra} note 1, at 102-03.
\textsuperscript{66} \textit{In re Nevitt}, 117 F. 448, 461 (8th Cir. 1902).
\textsuperscript{67} The effectiveness of the civil contempt remedy is limited in that any prolonged confinement of the defendant would necessitate releasing the jury. However, the trial judge in \textit{Ives} was presented with an excellent opportunity to test the effectiveness of this course of action when the defendant disrupted the proceedings during \textit{voir dire}, before the jury had been empanelled. See note 66 \textit{supra} and accompanying text.
\textsuperscript{68} 504 F.2d 935, 942-43 (9th Cir. 1974).
effectively carried on. However, a second alternative approach exists which a trial judge might explore in the interest of preserving a defendant’s right to have his own testimony offered in evidence: the taking of the defendant’s deposition.

The 1970 Congressional enactment of 18 U.S.C. § 3503, as part of the Organized Crime Control Act, significantly broadened the circumstances under which depositions could be taken for use in criminal prosecutions. Prior to the enactment of § 3503, Rule 15(a) of the Federal Rules of Criminal Procedure had allowed a deposition to be taken only upon a showing that (1) “a prospective witness may be unable to attend or prevented from attending a trial or hearing,” (2) “that his testimony is material,” and (3) “that it is necessary to take his deposition in order to prevent a failure of justice . . . .” While Ives’ testimony might have been permitted to have been taken under the old federal rule, the more general and flexible standard adopted by the new statute would certainly appear susceptible of favorable interpretation in the case of disorderly defendants. Section 3503(a) provides in significant part:

Whenever due to exceptional circumstances it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved, the court at any time after the filing of an indictment or information may upon motion of such party and notice to the parties order that the testimony of such witness be taken by deposition. . . . (emphasis added).

Two additional changes in the rules governing depositions which were made by the enactment of § 3503 further highlight this alternative approach as being particularly well suited to application in the Ives case. First, subsection (f) of the statute provides specifically for the taking of a witness’ deposition in a criminal proceeding if “the witness refuses in the trial or hearing to testify concerning the subject of the deposition or part offered.” It is clear that Ives’ refusal on three separate occasions to cooperate with the judge and his own lawyers in their attempts to elicit his testimony would bring the instant case under the purview of subsection (f). Second, unlike Rule 15, subsection (d) of the new statute specifically makes mention of taking the deposition of a

71. 504 F.2d 935, 943-44 (9th Cir. 1974).
party defendant,\textsuperscript{72} thus bringing Ives within the meaning of "witness" as referred to in subsections (a) and (f).

What emerges from the foregoing discussion is that the trial judge should have explored the possibilities of either the civil contempt remedy or taking the petitioner's testimony by deposition in order to have afforded him the greatest, rather than the least possible protection under the Constitution and federal law. It would certainly seem reasonable to conclude that in failing to consider these alternatives to the expulsion of Ives from his own trial and doing nothing further, the trial judge chose an extreme, if not unwarranted course of action.

\textit{Conclusion}

In handing down its decision in \textit{Ives}, it is clear that the Ninth Circuit committed several serious errors. First, it failed to properly recognize the fundamental importance of a defendant's right to personally offer testimony, a right which goes to the very heart of the fact-finding process. Second, it adopted and applied to the instant case a standard for dealing with disorderly defendants which was established in reference to an entirely different and less significant right, i.e., the right to be present at every stage of one's own trial. Third, the court failed to explore any alternative courses of action which the trial judge might have pursued in preference to the ultimate sanction of expulsion from the courtroom.

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\textsuperscript{72} 18 U.S.C. § 3503(d)(1) (1970) provides: "in no event shall a deposition be taken of a \textit{party defendant} without his consent" [emphasis added].