Brandenburg v. Ohio

PER CURIAM - Latin for "by the court." An opinion from an appellate court that does not identify any specific judge who may have written the opinion.

Per Curiam Opinion

The appellant, a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute for "advocat[ing] . . . the duty, necessity, or propriety Page 395 U. S. 445 of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."

Ohio Rev.Code Ann. § 2923.13. He was fined $1,000 and sentenced to one to 10 years' imprisonment. The appellant challenged the constitutionality of the criminal syndicalism statute under the First and Fourteenth Amendments to the United States Constitution, but the intermediate appellate court of Ohio affirmed his conviction without opinion. The Supreme Court of Ohio dismissed his appeal *sua sponte* "for the reason that no substantial constitutional question exists herein." It did not file an opinion or explain its conclusions. Appeal was taken to this Court, and we noted probable jurisdiction. 393 U. S. 94 (196). We reverse.

The record shows that a man, identified at trial as the appellant, telephoned an announcer-reporter on the staff of a Cincinnati television station and invited him to come to a Ku Klux Klan "rally" to be held at a farm in Hamilton County. With the cooperation of the organizers, the reporter and a cameraman attended the meeting and filmed the events. Portions of the films were later broadcast on the local station and on a national network.

The prosecution's case rested on the films and on testimony identifying the appellant as the person who communicated with the reporter and who spoke at the rally. The State also introduced into evidence several articles appearing in the film, including a pistol, a rifle, a shotgun, ammunition, a Bible, and a red hood worn by the speaker in the films.

One film showed 12 hooded figures, some of whom carried firearms. They were gathered around a large wooden cross, which they burned. No one was present Page 395 U. S. 446 other than the participants and the newsmen who made the film. Most of the words uttered during the scene were incomprehensible when the film was projected, but scattered phrases could be understood that were derogatory of Negroes and, in one instance, of Jews. [Footnote 1] Another scene on the same film showed the appellant, in Klan regalia, making a speech. The speech, in full, was as follows:

"This is an organizers' meeting. We have had quite a few members here today which are -- we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio, Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to

suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."

"We are marching on Congress July the Fourth, four hundred thousand strong. From there, we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you. " Page 395 U. S. 447

The second film showed six hooded figures one of whom, later identified as the appellant, repeated a speech very similar to that recorded on the first film. The reference to the possibility of "revengeance" was omitted, and one sentence was added: "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel." Though some of the figures in the films carried weapons, the speaker did not.

The Ohio Criminal Syndicalism Statute was enacted in 1919. From 1917 to 1920, identical or quite similar laws were adopted by 20 States and two territories. E. Dowell, A History of Criminal Syndicalism Legislation in the United States 21 (1939). In 1927, this Court sustained the constitutionality of California's Criminal Syndicalism Act, Cal.Penal Code §§ 11400-11402, the text of which is quite similar to that of the laws of Ohio. *Whitney v. California*, 274 U. S. 357 (1927). The Court upheld the statute on the ground that, without more, "advocating" violent means to effect political and economic change involves such danger to the security of the State that the State may outlaw it. *Cf. Fiske v. Kansas,* 274 U. S. 380 (1927). But *Whitney* has been thoroughly discredited by later decisions. *See Dennis v. United States,* 341 U. S. 494, at 341 U. S. 507(1951). These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. [Footnote 2] As we Page 395 U. S. 448 said in *Noto v. United States*, 367 U. S. 290, 367 U. S. 297-298 (1961), "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action."

See also Herndon v. Lowry, 301 U. S. 242, 301 U. S. 259-261 (1937); *Bond v. Floyd*, 385 U. S. 116, 385 U. S. 134 (1966). A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control. *Cf. Yates v. United States*, 354 U. S. 298 (1957); *De Jonge v. Oregon*, 299 U. S. 353 (1937); *Stromberg v. California*, 283 U. S. 359 (1931). *See also United States v. Robel*, 389 U. S. 258 (1967); *Keyishian v. Board of Regents*, 385 U. S. 589 (1967); *Elfbrandt v. Russell*, 384 U. S. 11 (1966); *Aptheker v. Secretary of State*, 378 U. S. 500 (1964); *Baggett v. Bullitt*, 377 U. S. 360 (1964).

Measured by this test, Ohio's Criminal Syndicalism Act cannot be sustained. The Act punishes persons who "advocate or teach the duty, necessity, or propriety" of violence "as a means of accomplishing industrial or political reform"; or who publish or circulate or display any book or paper containing such advocacy; or who "justify" the commission of violent acts "with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism"; or who

"voluntarily assemble" with a group formed "to teach or advocate the doctrines of criminal syndicalism." Neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime Page 395 U. S. 449 in terms of mere advocacy not distinguished from incitement to imminent lawless action. [Footnote 3]

Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. [Footnote 4] Such a statute falls within the condemnation of the First and Fourteenth Amendments. The contrary teaching of *Whitney v. California, supra,* cannot be supported, and that decision is therefore overruled.

Reversed.

[Footnote 1]

The significant portions that could be understood were:

"How far is the nigger going to -- yeah."

"This is what we are going to do to the niggers."

"A dirty nigger."

"Send the Jews back to Israel."

"Let's give them back to the dark garden."

"Save America."

"Let's go back to constitutional betterment."

"Bury the niggers."

"We intend to do our part."

"Give us our state rights."

"Freedom for the whites."

"Nigger will have to fight for every inch he gets from now on."

[Footnote 2]

It was on the theory that the Smith Act, 54 Stat. 670, 18 U.S.C. § 35, embodied such a principle and that it had been applied only in conformity with it that this Court sustained the Act's constitutionality. *Dennis v. United States,* 341 U. S. 494(1951). That this was the basis

for *Dennis* was emphasized in *Yates v. United States*, 354 U. S. 298, 354 U. S. 320-324 (1957), in which the Court overturned convictions for advocacy of the forcible overthrow of the Government under the Smith Act, because the trial judge's instructions had allowed conviction for mere advocacy, unrelated to its tendency to produce forcible action.

[Footnote 3]

The first count of the indictment charged that appellant

"did unlawfully by word of mouth advocate the necessity, or propriety of crime, violence, or unlawful methods of terrorism as a means of accomplishing political reform. . . ."

The second count charged that appellant "did unlawfully voluntarily assemble with a group or assemblage of persons formed to advocate the doctrines of criminal syndicalism. . . ." The trial judge's charge merely followed the language of the indictment. No construction of the statute by the Ohio courts has brought it within constitutionally permissible limits. The Ohio Supreme Court has considered the statute in only one previous case, *State v. Kassay*, 126 Ohio St. 177, 184 N.E. 521 (1932), where the constitutionality of the statute was sustained.

[Footnote 4]

Statutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent lawless action, for, as Chief Justice Hughes wrote in *De Jonge v. Oregon*, *supra*, at 299 U. S. 364: "The right of peaceable assembly is a right cognate to those of free speech and free press, and is equally fundamental." *See also United States v. Cruikshank*, 92 U. S. 542, 92 U. S. 552 (1876); *Hague v. CIO*,307 U. S. 496, 307 U. S. 513, 307 U. S. 519 (1939); *NAACP v. Alabama ex rel. Patterson*, 357 U. S. 449, 357 U. S. 460-461 (1958).