IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 71-2927

RALPH STELL, et al.,

Plaintiffs-Appellees,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor-Appellee

v.

THE BOARD OF PUBLIC EDUCATION FOR THE CITY OF SAVANNAH AND COUNTY OF CHATHAM,

Defendants,

DARNELL BRAWNER, et al.,

Defendants-Intervenors-Appellants

On Appeal from the United States District Court
for the Southern District of Georgia

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

While the intervenor-appellant has framed three questions presented, the United States, plaintiff-intervenor-appellee herein, contends the only issue presented is whether the district court erred in ordering the implementation of Plan "F" revised for the desegregation of the elementary grades of the public schools in Savannah City and Chatham County.

STATEMENT

1. Procedural History. This suit to bring about desegregation of the Savannah City-Chatham County School District was filed in January, 1962, by plaintiff Ralph Stell. The United States intervened as plaintiff in the action in November, 1965. The current phase of this litigation started on May 26, 1971.

On that date the defendant school board moved for modification of the district court's July 18, 1970, order so that the school district might "comply as nearly as practicable to the rulings of the Supreme Court in Swann v. Mecklenburg County, et seq." Their plan involved the desegregation of secondary schools, and in its motion, the board asked for an April 1, 1972, deadline for submission of a plan for the

elementary schools, and one remaining secondary school. Hearings on this motion were held on June 18, and June 25, 1971. At the latter hearings, defendants-intervenor-appellants entered the case.

On June 30, 1971, the district court approved the school board plan and ordered the board to report its progress in drawing up a desegregation plan for the remaining schools on August 5, 1971. Plaintiffs on July 1, 1971, filed both an appeal and a motion for summary reversal, alleging that the desegregation plan should have covered all twelve grades. On August 3, 1971, this court withheld ruling on the motion for summary reversal pending a report from the district court on the school district's progress toward an elementary school plan. After an August 5, 1971, hearing on the school district's progress, the lower court reported that more time was needed for the planning and implementation of an elementary grade plan. On August 23, 1971, this Court ordered the district court to require the board "forthwith" to establish and implement a unitary elementary school system. Stell v. Board of Public Education for the City of Savannah and the County of Chatham, 446 F. 2d 904 (5th Cir. 1971).

The task of the district court, as set forth by this Court, was to:

> [r]equire the School Board forthwith 1/ to constitute and implement a student assignment plan for elementary schools which complies with the principles established in Swann v. Charlotte-Mecklenburg Board of Education, 91 S. Ct. 1267 (1971), insofar as they relate to the issues presented in this case. The District Court shall require the School Board to file semi-annual reports during the school year similar to those required in United States v. Hinds County School Board, 5 Cir., 1970, 433 F. 2d 611, 618. Also, the District Court shall require the School Board to announce and implement the provisions for desegregation of faculty and staff as set out in Singleton v. Jackson Municipal Separate School District, 5 Cir., 1970, 419 F. 2d 1211.

On August 31, 1971, the district court entered the order herein appealed. The defendant school board has not appealed.

Appellants do not contest the court's order with regard to reporting provisions, and faculty and staff employment procedures.

2. Facts. The Savannah City-Chatham County School District is a combined urban-suburban district, including 62

1/ Alexander v. Holmes County Board of Education, 396 U.S. 20, 90 S. Ct. 29 (1969).

schools and encompassing all of Chatham County. For the 1970-71 school year the district served more than 40,000 students.

In the June 30, 1971, order, the district court stated:

> In 1970-71 there were four all-black junior high schools in the system. In twenty-two other schools Negroes comprised less than 10% of the total enrollment in each. According to a pupil census in December, 1970, there were ... seven schools in which the ratio of whites or blacks was less than 10% ... [and] there were four all-white and five all-black elementary schools. In seventeen elementary schools the ratio of white or black pupils was less than 10%.
>
> * * *
>
> My reading of these cases [Swann and Davis] ... (and the necessary implication from the subsequent disposition of numerous cases pending in the Fifth Circuit Court of Appeals) convinces me that the present Chatham County system is constitutionally defective. To contend that it is unitary in respect to student assignment is to indulge in a degree of phantasy approaching autism.

The single issue separating the parties other than the defendants-intervenors in the 1971 litigation in this case has been one of timing. The effect of this Court's action in this case has been to compel implementation of a plan of desegregation for the elementary schools for the 1971-72 school year, rather than in 1972-73.

At the August 30, 1971, hearing, the board offered two plans of elementary school desegregation for the district court's consideration, Plan "A", and Plan "F" revised, but the board stated that it was unable to recommend either of them for implementation, as had been ordered by the court. Four other plans had been considered by the board, and rejected as impractical. They were also offered to the Court. Plan "A" represented a combination of non-contiguous or satellite zoning, together with pairing and clustering of schools. The present attendance zone boundaries for 28 schools would have been changed. The cost of Plan "A" was greater than any other plan considered by the board.

Plan "F" revised involved the pairing and clustering of elementary schools, retaining existing attendance zone boundaries. Two schools would be closed. Transportation of about 4,400 additional students would be involved, and the court below found that "the present transportation facilities are sufficient to accomplish the additional busing under a staggered schedule of opening and closing schools."

In its order following the August 30, 1971, hearing the district court stated:

> The only question before me, as I perceive things, is whether I shall tell the Board that it is to immediately implement Plan A or to implement revised Plan F. The Court certainly cannot formulate a plan at this twelfth hour. No member of the Board had any other plan in mind or suggested any plan except the two referred to.

Defendants-intervenors offered evidence, through direct and cross-examination of school officials, concerning the effect of transportation on students, its cost, and the logistical problems involved. They did not, however, offer any alternative plans for desegregating the elementary schools.

DISCUSSION

The defendants-intervenors have raised no substantial question concerning the propriety of the district court's order. Their contention that the Savannah-Chatham schools are de facto segregated is fully answered by the contrary findings of fact of the district court, which the defendants-intervenors apparently do not challenge as clearly erroneous. See, Calhoun v. Cook, ___ F. 2d ___ (No. 71-2622, 5th Cir. decided October 20, 1971.) Given the court's findings, the sole question on this appeal is whether in ordering Plan "F", revised, into effect the district court exceeded its power to provide equitable relief.

In its initial submission of May 26, 1971, the school board clearly indicated that it planned to voluntarily desegregate all twelve grades. The mandate of this Court merely changed the school district's timetable for action. Although at the August 30, 1971 hearing the board could not agree upon a formal recommendation to the district court, Plan "F", revised, was developed by school officials; and when polled in court, a majority of the board favored that plan, apparently believing that it was the most educationally sound and administratively feasible plan available to them at that time. In this judgment the board has a wide discretion so long as the plan selected actually dismantles the dual school system. McDaniel v. Barresi, 402 U.S. 39 (1971). In fact, Plan "F", revised, effectively desegregates all but two of the school district's 42 remaining elementary schools. 2/

The techniques of pairing and clustering of schools contained in that plan have been widely used by courts in similar situations and were specifically approved by the Supreme Court in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), where the court said:

2/ The two remaining schools are to be closed as soon as practicable.

> [O]ne of the principal tools employed by school planners and by courts to break up the dual school system has been a frank - and sometimes drastic - gerrymandering of school districts and attendance zones. An additional step was pairing, 'clustering,' or 'grouping' of schools with attendance assignments made deliberately to accomplish the transfer of Negro students out of formerly segregated Negro schools and transfer of white students to formerly all-Negro schools.... As an interim corrective measure, this cannot be said to be beyond the broad remedial powers of a court.... The remedy for [the elimination of segregation] may be administratively awkward, inconvenient and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate dual school systems. 402 U.S. at 27.

Although the implementation of Plan "F", revised, will require the transportation of additional students, such a requirement has been approved where necessary to dismantle a dual system:

> The District Court's conclusion that assignment of children to the school nearest their home serving that grade would not produce an effective dismantling of the dual system is supported by the record. Thus the remedial techniques used in the District Court's order were within the court's power to provide equitable relief.... Desegregation plans cannot be limited to the walk-in school. Swann, supra, at 30.

While defendants-intervenors claim that there are substantial problems with the provision of transportation, there is no indication that their factual contentions have been

previously presented to the district court. Singleton v. Jackson Municipal Separate School District, 419 F. 2d 1211, 1216 (5th Cir. 1970). At the August 30 hearing, that court was faced with the task of choosing from the available plans a plan which promised realistically to work in desegregating the Savannah-Chatham schools. Green v. County School Board, 391 U.S. 430 (1968). Under the mandate of this Court to implement such a plan "forthwith", the order requiring implementation of Plan "F", revised, was in no way an abuse of the district court's discretion in formulating an equitable remedy. See, Brown v. Board of Education, 349 U.S. 294 (1955) and Green v. County School Board, 391 U.S. 430 (1968).

CONCLUSION

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 1971, I served the foregoing Brief for the United States on counsel for all parties by mailing two copies to each of the attorneys named below by United States mail, postage prepaid:

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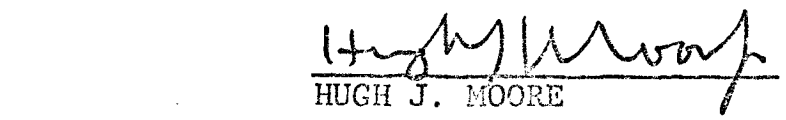

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