2000

Frank Granato v. The Salt Lake County Grand Jury : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

FRANK GRANATO

Plaintiff-Appellant

vs.

THE SALT LAKE COUNTY GRAND JURY, et al

Defendants-Respondents

Case No. 14425

BRIEF OF RESPONDENTS

Appeal from the Judgment of the
District Court of Salt Lake County
Honorable Ernest F. Baldwin, Jr., Judge

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BRIEF OF RESPONDENTS

STATEMENT OF THE NATURE OF THE CASE

On the 16th day of August 1975, the Salt Lake County Grand Jury, an investigative body, convened by the judges of the Third Judicial District Court in and for Salt Lake County, State of Utah, returned an indictment against the appellant Frank Granato, which indictment was filed in the District Court for Salt Lake County. On the 12th day of December 1975, the appellant filed an amended complaint in the District Court of Salt Lake County, State of Utah, requesting the court to issue a writ of habeas corpus against the respondents upon the claim that the

indictment issued against him was a constructive restraint, in violation of due process and of the equal protection afforded him by the 5th and 14th Amendments of the Constitution of the United States, and by Article 1, Sections 7, 12, 24 and 27 of the Constitution of the State of Utah. Appellant based his claim upon the following allegations:

1) That the indictment was issued without probable cause.

2) That the appellant was denied a preliminary hearing.

3) That the appellant was denied the right to take depositions before trial.

4) That the appellant was denied the names, addresses and telephone numbers of persons interviewed by the grand jury, whether or not they would be called as witnesses in the prosecution of the case.

5) That the appellant was denied the right to obtain a copy of the entire transcript of the testimony of all witnesses who appeared before the grand jury.

DISPOSITION IN LOWER COURT

The lower court, the Honorable Ernest F. Baldwin, Jr., presiding, granted respondents' motion to dismiss appellant's amended complaint by reason of the fact that the same failed to state a claim upon which relief could be granted.

ARGUMENT

POINT I

THAT THE LOWER COURT DID NOT ERR IN DISMISSING APPELLANT'S COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED.

Respondents have no quarrel with appellant's position that habeas corpus is civil in nature, and that the same is provided for by the Utah Rules of Civil Procedure.

Rule 6b(f)(1) requires that the complaint for a writ of habeas corpus shall

> "... state that the person designated is legally restrained of his liberties by the defendant..."

It is generally acknowledged that custody by the person against whom a petition of habeas corpus is directed must be such that he can produce the body of the petitioner at a hearing. See U. S. Ex. Rel., Lynn v. Downer, 322 U. S. 756, 88 L. Ed. 1585. Likewise, it is generally the rule that a person released from custody on bail is not so restrained of his liberty as to be entitled to a writ of habeas corpus. See Stallings v. Splain, 253 U. S. 339, 64 L. Ed. 940. See also annotation at 77 ALR. 2d 1308.

The purpose of the writ of habeas corpus is to insure the speedy release of persons legally restrained of their liberty. It is not

intended as a means for appellant review. The Utah Supreme Court in Bryant v. Turner, 19 U. 2d 284, 431 P. 2d 121, stated:

> "The writ is, as our rules describe it, an extraordinary writ, to be used to protect one who is restrained of his liberty, where there exists no jurisdiction or authority, or where the requirements of the law have been so ignored or distorted that the party is substantially and effectively denied what is included in the term 'due process of law'..."

The inquiry on a writ of habeas corpus is addressed not to the question of errors committed by a court within its jurisdiction, but to the question as to whether the proceedings or judgment under which petitioner is restrained, are void. Areson v. Pincock, 62 U 527, 220 P 503.

In view of the fact that the appellant Frank Granato is neither confined nor restrained, but is in fact free on his own recognizance, during the pendency of the matter before the trial court, there is no claim or basis upon which the trial court could issue against the grand jury and its members any kind of order requiring that they produce the petitioner, and release him.

It is very apparent that the members of the grand jury are not holding the appellant and restraining his freedom, so that the trial court, when presented with the question of the petition in this matter, correctly ruled that there was no complaint upon which relief could be

granted at this time. It appears that the many challenges set forth in petitioner's complaint are challenges of the constitutionality of the basis upon which the appellant Granato stands before the court for trial. Under the ordinary situation, habeas corpus is not available in advance of trial, either to test the constitutionality of statutes, or to challenge the jurisdictional questions that may arise. Henry v. Henkel, 235 U. S. 219, 59 L. Ed. 203; Rodman v. Pothier, 264 U. S. 399, 68 L. Ed. 759.

Accordingly, it appears without question that the lower court did not err in dismissing appellant's complaint, and that the court was correct in ascertaining that the complaint, under the existing circumstances, does not state a claim for which the relief requested, to-wit: the issuance of a writ of habeas corpus, could be granted.

POINT II

THE COURT PROPERLY DENIED APPELLANT'S REQUEST FOR VERBATIM COPIES OF TRANSCRIPTS OF GRAND JURY WITNESSES.

The grand jury is, by creation, a special body given great investigatory powers by the statute creating it, and likewise placed under strict control by the same creating statutes. (Section 77-18, 19, 20, Utah Code Annotated 1953). The claim of the appellant that he is constitutionally entitled to the verbatim transcript of all witnesses who appeared before the grand jury relative to the indictment is a challenge to the secrecy concept

of the grand jury. Section 77-19-10, Utah Code Annotated 1953, as amended 1971, specifically requires as follows:

> "... No member of the grand jury, nor any person at any time present at any session of the grand jury, shall disclose what he himself or any other grand juror or person may have said at such session. No grand juror shall divulge in what manner he or any other grand juror may have voted on a matter before them; any grand juror or other person may, however, be required by the court to disclose the testimony of a witness examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the court, or to disclose the testimony given before the grand jury by any person upon a charge against such person for perjury in giving his testimony, or upon his trial thereof."

Thus, disclosure by grand jurors of testimony is regulated by statute. The need for this secrecy is deep-rooted in the laws of the State of Utah, and was supported by the court in the early case of United States v. Kirkland (1887) 5 U 123, 13 P 234.

The legislature, in anticipating the need to prescribe such secrecy in the grand jury proceedings in Section 77-19-9, Utah Code Annotated 1953, as amended 1971, specifically prohibited the making of more than two copies of the stenographer's transcript, and also prohibited the showing of the transcript to anyone except by court order. That section provides as follows:

> "...Two copies only of any testimony required to be transcribed as in this section provided shall be made by the stenographic reporter. One such copy shall be delivered to the clerk of the district court of the

> county in which the grand jury is in session and one copy thereof shall be delivered to the county attorney... No person to whom a transcript of the testimony has been delivered as herein provided shall exhibit said transcript to any person nor divulge the contents thereof to any person except upon written order of the court duly made after hearing the persons in whose custody said copy is placed; ..."

The Utah Supreme Court held in State v. Faux, 9 U. 2d 350, 345 P. 2d 186, 190 (1959), that the permission for examination of the transcript is at the discretion of the court, stating:

> "The trial judge discreetly and properly circumscribed the procedure so that only material portions of the transcript of the testimony of witnesses would be exposed and then only to the extent he deemed the ends of justice required it.
>
> None of the statements, discussions, actions, or votes of the grand jurors are in any wise to be disclosed. The transcript is to be examined by only one person, defense counsel, who is an officer of the court, under strictly limited circumstances. The order included these restrictions: that the district attorney should "screen" the testimony of such witnesses and make available to defense counsel only portions relevant and material to the case; that the inspection should be made in the office of the district attorney; that defense counsel could make no copy but only take notes as to substance; and that the latter should not reveal to any other person any of the contents of said record except as it might become material for impeachment at the trial. No case has been cited, and we are aware of none, which holds that an order so carefully preserving secrecy of the grand jury proceedings is an abuse of discretion.

> In the recent case of Pittsburgh Glass Co. v. United States, 360 U. S. 395, 3 L. Ed. 2d 1323, 79 S. Ct. 1237 (1959), the United States Supreme Court divided five to four on the question whether the trial court had abused its discretion in refusing the defendants permission to inspect grand jury minutes covering testimony of a key government witness. The government had offered to let the trial judge screen the testimony and to allow inspection of material portions, which offer the defendant rejected. For the majority, Justice Clark reviewed the authorities and arguments for grand jury secrecy; for the minority Justice Brennan similarly covered the desirability of permitting full disclosure to the defense, and stated that the court had abused its discretion in refusing it. However, it will be noted that both opinions reflect that the question of disclosure rests in the sound discretion of the trial court. To the same effect see the recent case of State ex rel. Clagett v. James, Mo., 327 SW. 2d 278. Majority opinion by Hyde, J., Eager, J., dissented opinion denying rehearing, 327 SW. 2d 289. See annotations at 127 ALR 272 for collation of authorities pro and con as to secrecy of grand jury proceedings."

Another Utah case involving the same question is State v. Harries, 221 P. 2d 605, 615 (1950), in which Harries, former chief enforcement officer of the Liquor Control Commission, was convicted for the crime of receiving a bribe, and appealed, claiming error in seven points, one of which was denying to the accused the right to inspect and make a copy of the transcript of the testimony of the witnesses appearing before the grand jury. The court held that "the matter is left to the sound discretion of the trial court and the burden to establish an abuse of that discretion." State v. Harries goes on to say:

> "It has always been the policy of the law that the investigations and deliberations of a grand jury should be behind closed doors and that the results of its labors should not be disclosed."

In the present case, appellant claims a constitutional right to have verbatim transcripts of all grand jury witnesses. The United States Supreme Court has declared that there is no such right.

In Pittsburgh Plate Glass Co. v. United States, supra, the defendants, on a charge of conspiracy, requested that the trial judge permit them to inspect the grand jury minutes covering the testimony before that body of a key government witness at the trial. On certiorari, the defendants contended that they had a right to the transcript because it dealt with subject matter generally covered at the trial. The defendants did not show a particularized need for the disclosure of the grand jury minutes. The court held that "the short of it is the petitioners did not invoke the discretion of the trial judge but asserted a supposed absolute right, a right which we hold they did not have." The Utah Supreme Court in Faux and Harries, supra, established a similar position by holding: "The defendant is not entitled to inspect a copy of the transcript before trial as a matter of right."

The federal grand jury is similar to Utah in secrecy in other ways. Both courts allow the secrecy broken in the same manner. The

United States Supreme Court states that the policy of maintaining the secrecy of grand jury proceedings in the federal court must not be broken except when there is a compelling necessity shown with particularity. That particularity can be "to impeach a witness to refresh his recollection, to test his credibility and the like. Those are cases of particularized need where the secrecy of the proceedings is lifted discreetly and limitedly." See United States v. Procter and Gamble Co., et al, 356 U.S. 677, 2 L. Ed. 1077, 78 S. Ct. 183 (1958).

The Utah Supreme Court has declared that the use of the grand jury transcript is for impeachment purposes only, and that it is only because the legislature has provided for such limited use. (Section 77-19-9), Utah Code Annotated 1953, as amended.

State v. Harries, supra, states that:

> "... However, we cannot go further than permitted by the provisions of this chapter for the reason that the authority to relax is with the legislature and not the courts. The quoted sections establish that the legislature only intended to lessen the tension of the common law rules to the extent of making a transcript available to the defense for impeachment purposes...
>
> ...Furthermore, the legislature very easily prescribed that a copy of the transcript be furnished the defendant, had it intended such to be the case ...
>
> ... The transcript was inspected by counsel for the defendant so the only question is: Was the permitted

> inspection too late for the purposes contemplated by the statute? If use of the transcript is limited to impeachment purposes, then defendant could not make a claim of contradictory stories until a witness who had appeared before the grand jury had testified in the trial of the cause."

It has long been the practice to have secret grand jury sessions. In 1887, when Utah was still a territory, U. S. v. Kirkland, supra, stated that:

> "Every member of the grand jury must keep secret what is said or how he voted but may be required by any court to disclose the testimony of a witness examined before them for the purpose of ascertaining whether it is consistent with that given upon trial. . ."

Section 77-19-10, Utah Code Annotated, as amended 1947, states that none can disclose what grand jurors say, or how they voted, but may be required to disclose what witnesses said to show whether they are inconsistent at trial.

U. S. Circuit Courts have also ruled that the testimony of witnesses before a grand jury is privileged and confidential. Goodman v. U. S., 108 F. 2d 516 (Cal. 1939), states that, "It has long been the policy of the law, in furtherance of justice, that the investigations and deliberations of a grand jury should be conducted in secret, and that for most intents and purposes, all its proceedings should legally be sealed against divulgence."

The appellant cites a Nevada case to support his claims for a verbatim copy of a transcript of the grand jury. That case, Shelby v. South Judicial District Court in and for the County of Pershing, 414 P. 2d 942 (Nevada 1966) can be differentiated from the present facts. There, appellant desired only to inspect the transcript of the testimony of the witnesses, while here, appellant desires a verbatim copy. Moreover, in this case, counsel was, and is, permitted to inspect the transcript.

Shelby can further be distinguished in that in Shelby no transcript was made, and in this case there was one made. This practice is due to the differing statutes in the State of Utah and the State of Nevada. Utah Section 77-19-9, Utah Code Annotated 1953, as amended 1971, not only requires that a transcript be made, but also requires that the transcript must be secret. Nevada NRS 172, 173, does not specifically allow that a copy of the transcript be made for review by the defendant, nor does it even infer that a transcript be made at all.

The refusal of the lower court to permit verbatim copies of transcripts to be made available to appellant is well founded in law and necessity, and did not constitute error by that court.

POINT III

THE LOWER COURT'S ORDER DENYING THE APPELLANT A PRELIMINARY EXAMINATION DID NOT VIOLATE THE DUE PROCESS AND EQUAL PROTECTION PROVISIONS OF THE CONSTITUTIONS OF THE UNITED STATES AND THE STATE OF UTAH.

Historically, the grand jury has been the principal buffer between the individual and the power of the state to prosecute for crime. The grand jury was developed as a means of avoiding abuses in early England, where the use of preliminary hearings was part of the criminal investigative procedure. That the grand jury, and not the preliminary hearing, was made a part of the United States Constitution, indicates the importance associated early to that body.

The question of grand jury indictment versus preliminary hearings has often been considered by the courts, and despite the defense cries of prosecutional "orientation" of the grand jury, the courts have consistently held that an indictment by a grand jury itself establishes sufficient probable cause to hold an accused for trial, so that post-indictment preliminary hearings to review probable cause is not warranted. See Coleman v. Burnett, 477 F. 2d 1187; U. S. v. Rogers, 455 F. 2d 407; Costello v. U. S., 350 U. S. 359; Robbins v. U. S., 486 F. 2d 26; U. S. v. Mackey, 474 F. 2d 55; U. S. v. Dorsey, 462 F. 2d 361.

Appellant claims that any accused has the fundamental right to a preliminary hearing before trial, and cites Johnson v. Superior Court of San Joaquin Co., 539 P. 2d 792 (Cal. 1975), to support his claim. This case is distinguishable and inappropriate to the instant case. There, a preliminary hearing was held before the grand jury acted. The court held that it was improper for the prosecutor to withhold from the grand jury testimony produced at the preliminary hearing. In the instant case, the appellant seeks an additional procedural step, a preliminary hearing after indictment, which in effect would render the grand jury function powerless.

The California Supreme Court in Johnson, supra, specifically refused to consider whether the lack of a past indictment preliminary hearing violated due process. The court stated:

> "Having disposed of this case on statutory grounds (interpretation of California penal code 83. 97), we need not consider petitioner's alternative due process argument."

The concurring opinion of Judge Mosk agreed with the result, but disagreed on entertaining the due process argument. The appellant quoted Judge Mosk's disagreeing discussion of due process. Thus, the appellant's quote is merely dicta, not even binding in California.

Appellant further relies upon the case of People v. Duncan, 201 NW. 2d 629, 388 Mich. 489 (1972), in which a preliminary examination before or after an indictment was held to be required by a Michigan statute, which reads:

> "The state and the accused shall be entitled to a prompt examination and determination by the examining magistrate in all criminal cases . . ." 1 of Chapter VI of 1927 P. A. 175.

Since Utah does not have a similar statute, the application of this holding is without value. This is particularly true, since the court in Duncan also said at page 633:

> "The conclusion is inescapable that in the absence of a clear statutory provision for a preliminary examination following presentment of an indictment by a grand jury, then there never has been such a right."

Appellant further claims that Article I, Section 13, of the Utah Constitution gives the right to preliminary hearing. This section of the Constitution states:

> "Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment. The formation of the grand jury and the powers and duties thereof shall be as prescribed by the Legislature. (As amended November 2, 1948, effective January 1, 1959)." (Emphasis added).

The last sentence was added as a 1949 amendment, giving legislature power to prescribe how to proceed in prosecutions by indictment.

An additional supportive aspect of the grand jury, indictment is based upon the fact that the standard for finding a reason to bind over a defendant after a preliminary examination is less for preliminary hearings than it is for a grand jury to return an indictment.

Section 77-19-5, Utah Code Annotated 1953, as amended 1943, states that the grand jury ought to find an indictment when all of the evidence before them, taken together, if unexplained or uncontradicted, would, in their judgment, warrant a conviction by a trial jury. Section 77-20-1, Utah Code Annotated 1953, as amended 1943, states that 5 out of 7 jurors must concur for an indictment. The standard for the preliminary examination is stated in Section 77-15-19, Utah Code Annotated 1953, as amended 1943. "If it appears from the examination that a public offense has been committed, and that there is sufficient cause to believe the defendant guilty thereof." Marhs v. Sulhvan, 9 U 12, 16 33 P 224 (893), states that it is sufficient that the testimony shows to the satisfaction of the magistrate a probable cause of guilt on the part of the accused.

If the standard is lower for finding a reason to bind over a

defendant after preliminary examination than it is for a grand jury, then what additional protection benefit would the defendant receive by submitting his case to the lower standard of the preliminary examination?

That a preliminary examination is not indispensable for a trial after an indictment has long been the practice in Utah. In the case of Thiede v. Territory of Utah, 159 U.S. 510, 513, 40 L.Ed. 237, 239-240 (1895), Thiede was held for murder, and the trial court convicted him. On appeal, one of the points of error was that the stenographer refused to transcribe his shorthand of the preliminary hearing because he feared lack of payment due to previous cases. Since the time within which this was, by statute, required to be done had already passed, the objection to trial without a transcript would have been fatal to the indictment, or delayed the trial unreasonably. The court held:

> "Before a ruling is made which necessarily works out such a result, it should appear either that the statute gives an absolute right to the defendant to insist upon this preliminary filing, or else that the want of it would cause material injury to his defense. Neither can be affirmed. A preliminary examination is not indispensable to the finding of an indictment or a trial thereon; and if the examination itself is not indispensable, it would seem to follow that no steps can be taken in the course or as a part of it can be."

Therefore, the denial of an additional preliminary hearing was not error by the lower court.

POINT IV

THE LOWER COURT'S ORDER DENYING THE APPELLANT THE RIGHT TO TAKE DEPOSITIONS, AS REQUESTED, DID NOT VIOLATE DUE PROCESS AND EQUAL PROTECTION OF THE CONSTITUTION OF THE UNITED STATES AND THE STATE OF UTAH.

Appellant made application to the trial court to take the depositions of all persons necessary for adequate preparation of his defense. This included all witnesses who appeared before the grand jury. This, of course, is but another attempt to circumvent the secrecy of the grand jury.

To support his position, appellant cites the case of State v. Geurts, 11 U. 2d 345, 359 P. 2d 12, claiming that the Utah Supreme Court held it to be error for an accused charged by indictment to be denied the right to take depositions before trial. In the Geurts case, the defendant was indicted by a grand jury while serving a term as Commissioner of Salt Lake City. Thereafter, proceedings under Chapter 7, Title 77, UCA 1953, to remove defendant from office, were commenced. A jury found him guilty of malfeasance in office, and a judgment was entered removing him from office. On appeal, appellant Geurts claimed as error the trial court's ruling denying his request to take depositions. The Supreme Court ruled that the proceeding was a quasi-criminal special statutory proceeding which, under the applicable statute, did not permit a

preliminary hearing, and that therefore it was subject to the Utah Rules of Civil Procedure, including the right to take depositions. The court said:

> "This proceeding can be nothing other than a special statutory proceeding, and we can see no reason why such rules are 'clearly inapplicable' thereto. Therefore, we conclude that under usual circumstances the taking of depositions should be permissible."

This decision does not alter the statutory provisions of the State of Utah pertaining to depositions in criminal matters, which provisions were upheld by this court in State v. Nielsen, Utah 1974, 522 P. 2d 1366. There, the defendant claimed the right in a criminal matter to take depositions under Rule 81(e), Utah Rules of Civil Procedure, which provides:

> "Application in Criminal Proceedings. These rules of procedure shall also govern in any aspect of criminal proceedings where there is no other applicable statute or rule, provided that any rule so applied does not conflict with any statutory or constitutional requirement."

The court found that the taking of depositions in criminal matters is governed by two statutes, Sections 77-46-1 and 77-46-2, Utah Code Annotated 1953, and that the provisions of Rule 81(e) were not applicable, and that the Rules of Civil Procedure "pertaining to discovery may not be used in criminal cases." The court stated:

> "The majority rule is to the effect that neither statues nor rules of civil procedure providing for discovery or inspection of evidence in the premises of an adverse party will be made applicable in criminal cases."
>
> "We are of the opinion that until such time as the statutes above referred to are modified or repealed by the legislature, this court would be without power to provide for discovery proceedings by court rule."

It is not as though the appellant is without the information he seeks, since the transcript of testimony before the grand jury is available for counsel's inspection and review. To allow depositions to be taken of anyone who defense counsel considers necessary for adequate preparation would allow a total destruction of the grand jury system.

In asking this court to overrule the Nielsen case, supra, the appellant is asking the court to revamp an area of the criminal law that would have far-reaching effects, particularly as the same may pertain to the future conduct of the grand jury system. If the deposition power requested by appellant is granted, then no witnesses can appear before a grand jury without fear that they will be subject to deposition by any one indicted by such grand jury. Thus, the greatest power of the grand jury system, that of secrecy, would be rendered useless.

Likewise, should the deposition power be granted to the appellant, and the Utah Rules of Civil Procedure made effective in

criminal cases, would appellant be subject to deposition by the prosecution in its discovery efforts in trial preparation?

It is respectfully submitted that the Nielsen case be upheld and that the order of the lower court denying the taking of depositions be sustained.

CONCLUSION

While appellant has presented many questions to be considered by this court, the main question is the right of appellant to have a writ of habeas corpus issued. As previously indicated, there is no present basis upon which the trial court could issue such writ, and its denial of appellant's application was proper and should be sustained.

Appellant would have the court conclude that the preliminary hearing has a special magic within the framework of due process and equal protection. It is submitted that in preserving the grand jury sustem, the creators of the Constitution of the United States, and the draftees of the Constitution of the State of Utah found justifiable cause to believe that such system would, in fact, afford due process and equal protection. The appellant has adequate protection under the present status of the law. His challenge of the grand jury system is a request to alter completely the criminal procedures long established by statute and case decision in this state.

The lower court acted correctly and followed both statutory and case law in denying appellant's request for habeas corpus, and in denying appellant's complaint of denial of due process and equal protection.

It is respectfully submitted that the ruling of the lower court be sustained and that the question of the guilt or innocence of the defendant be determined by the time honored method of jury determination. To reverse the lower court would be tantamount to the total elimination of the grand jury system. We ask only that the rights of the State be given the same consideration as those of the appellant.

Respectfully submitted,

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I hereby certify that the foregoing Brief of Respondents was served upon Phil L. Hansen and Associates, and D. Frank Wilkins, Counsel for Appellants, 250 East Broadway - Suite 100, Salt Lake City, Utah 84111, and upon R. Paul Van Dam, Salt Lake County Attorney, C-220 Metropolitan Hall of Justice, 251 East 5th South, Salt Lake City, Utah 84111, this _____ day of July 1976.