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Leroy Newbill v. John A. Hendricks : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

LEROY NEWBILL,

Plaintiff,

vs.

JOHN A. HENDRICKS, as Judge of
the District Court of the Second
Judicial District in and for the
County of Weber, State of Utah,

Defendant.

Case No.
7251

Brief of Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

LERROY NEWBILL,

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Brief of Respondent

FACTS

The facts before this Honorable Court are not in dispute and have been fairly and accurately set forth in Plaintiff's Brief; however, it is the position of the respondent that the Justice of the Peace had jurisdiction of the cause and that the petitioner has a plain, speedy, and adequate remedy at law. Wherefore, the Peremptory Writ of Prohibition issued by this Honorable Court should be set aside and the petition or application of the plaintiff dismissed.

ASSERTION NO. 1

THE JUSTICE'S COURT HAD JURISDICTION.

In his brief in support of application, plaintiff makes one statement of error, as follows:

“The District Judge, defendant herein, erred in denying plaintiff’s motion to quash and to dismiss the complaint.”

The complaint, which is incorporated by reference as exhibit “A” to plaintiff’s application for Writ of Prohibition before this Honorable Court is: “In the Justices’ Court of The Precinct of Burch Creek, County of Weber, State of Utah.” It charges the plaintiff, Leroy Newbill, with the commission of a misdemeanor *in the aforesaid county and state*, in that on or about the 24th day of July 1948, he unlawfully kept intoxicating liquor for the purpose of sale, contrary to the provisions of 46-0-156, Utah Code Annotated 1943. There is, therefore, no dispute but that the misdemeanor was allegedly committed within the county of Weber. Said county embraces Burch Creek Precinct.

Section 20-5-4, Utah Code Annotated 1943, reads in part as follows:

“Justices’ courts have jurisdiction of the following public offenses committed within the respective counties in which such courts are established:

(3) Breaches of the peace, committing a willfull injury to property, and all misdemeanors punishable by a fine less than \$300 or by imprison-

ment in the county jail or municipal prison not exceeding six months, or by both such fine and imprisonment.’’

The Code of Criminal Procedure, through section 105-57-1, directs :

“In criminal cases the jurisdiction of justices of the peace extends to the limits of their respective counties.”

There is no provision in the Code of Criminal Procedure requiring that the place of trial be established in the precinct from which the justice is elected or appointed. There is provision by section 105-57-12 that the defendant, by affidavit stating that he has reason to believe he cannot have a fair and impartial trial before the justice about to try the same, may have the action transferred to a justice of the county agreed upon by the parties.

This court in *State vs. Johnson*, 100 Utah 316, 114 Pac. (2) 1034, at page 1042 of the Pacific, has held that the question of venue may be waived.

A consideration of the remarks of this honorable court in *Dillard vs. District Court of Salt Lake County*, 69 Utah 10, 251 Pac. 1070, leads to the conclusion that subparagraph 3 of section 20-5-4, Utah Code Annotated 1943 (*supra*) was adopted to avoid confusion concerning the jurisdiction of justices' courts. The case discloses :

“In the year 1925, the Legislature, by chapter 62, Laws of Utah 1925, passed an act entitled ‘an act to amend section 1784, Compiled Laws of

Utah 1917, relating to the criminal jurisdiction of justice's court, where in and whereby the jurisdiction of justices' courts over public offenses was limited to those committed within their respective precincts or cities in which such courts are established."

This court stated at page 1072 of the Pacific:

"Other objections to the statute in question are that it produces confusion and derangement in criminal practice and procedure in justices' courts, and is inconsistent with other statutory provisions. *There can be no doubt of this consequence.* The system of procedure in such courts as established by law is in many respects adjusted to and dependent upon, the existence of a territorial jurisdiction coextensive with the county. It is suggested that the restricted jurisdiction will in effect render nugatory the statute providing for the change in the place of trial on the ground of prejudice, because there will be no justice out of the precinct with jurisdiction to whom the action can be transferred; and that, in a case where the precinct justice is himself accused, or is disabled by sickness, or is disqualified by interest or relationship to the accused person, of occurring in one of the numerous counties having no city courts, there would be no other court with jurisdiction before whom the action could be commenced or tried. Other similar objections along this line are made. It is apparent that the statute was passed without consideration of these consequences. But these are not judicial questions, and we may not upon such grounds declare the act invalid. The evils must be corrected, if at all, by the Legislature."

The Revised Statutes of Utah, 1933, as officially adopted and published, amended jurisdictional provisions of section 20-5-4 and reestablished jurisdiction of the Justices' courts over offenses committed within the respective counties. On page 379 of the revision the following note appears:

“The text of this section is a restoration of the law as it existed prior to the amendment by Laws, 1925, Chap. 62, which limited the jurisdiction of justices of the peace in criminal cases to offenses committed within their respective precincts or cities, thus rendering conviction for a misdemeanor committed in a precinct other than that of the place of trial a nullity. *Dillard v. District Court*, 251 P. 1070, 69 U. 10.”

There can be no doubt that the complaint was properly issued and the justice's court of the precinct of Burch Creek had jurisdiction over the subject matter; and that upon the arrest of the accused, jurisdiction existed over the person of Leroy Newbill, the appellant or petitioner herein. Any irregularity occurring thereafter may have been raised upon appeal as provided by law, or by application to the District Court upon collateral attack as provided and authorized under the provisions of Article 8, Section 7 of the Constitution of the State of Utah, which provides as follows:

“The District Court shall have original jurisdiction in all matters civil and criminal, not excepted in this Constitution, and not prohibited by law; appellate jurisdiction from all inferior courts and tribunals, and a supervisory control of the same. The district Courts or any judge thereof, shall have power to issue writs of *habeas*

corpus, mandamus, injunction, quo warranto, certiorari, prohibition and other writs necessary to carry into effect their orders, judgments and decrees, and to give them a general control over inferior courts and tribunals within their respective jurisdictions.”

There are authorities which hold that a justice of the peace is a precinct officer and may not carry his court like a personal chattel outside of the district from which he was appointed. See *Cox vs. Perkins*, 299 Ky. 470, 185 S.W. (2) 954, wherein the Kentucky court so held. However, it is to be noted that this case concerns an action brought directly against the justice of the peace and does not concern appellate action in direct attack upon his irregular exercise of jurisdiction. The Kentucky court held that the justice had no power to act beyond his territorial precinct, township or jurisdiction. The same result was reached in *Ex parte Robinson*, 56 Oklahoma Criminal 404, 41 Pac. (2) 127; and *Harrington vs. State*, 66 Oklahoma Criminal 310, 91 Pac. (2) 787. The *Robinson* case, *supra*, is reported as a habeas corpus proceeding wherein the petitioner claimed that he was unlawfully convicted of murder because of a denial of a preliminary hearing, in that the justice of the peace who conducted the preliminary hearing acted in the incorporated town of Konawa, Oklahoma, whereby he was elected and appointed a justice of the peace of Konawa township district which was beyond the limits of the town. The *Harrington* case would also appear to be quite directly in point and involves a violation of liquor control laws of the state of Oklahoma. Yet, it is to be noted that

in the Harrington case (upon appeal and application for dismissal) the complaint itself was issued by a justice of the peace who, at the time of issuing the complaint, was not within his territorial limits as such.

Other cases hereinafter cited hold that in the absence of express statutory limits, where jurisdiction runs within the county of commission, it is only required that trial be held somewhere within the county. See *Antilla vs. Justice's Court of Big River Township*, 209 Cal. 621, 290 Pac. 43. See also *ex parte Cohen*, 107 Cal. App. 288, 290 Pac. 512; *State vs. Bunke*, 113 Ore. 523, 233 Pac. 538; and *State vs. Maughn*, 35 Utah 426, 100 Pac. 934. Under provisions of legislative authorization and the authorities of this honorable court, the Justice of the Peace of Burch Creek Precinct had jurisdiction over the offense and although the arraignment of the accused was conducted beyond his precinct and the sentence issued, jurisdiction was not to be nullified. In the event this court should decide that a justice of the peace cannot conduct trial any place within the county but is limited to the precinct of his appointment, nevertheless we submit that an abuse of process or irregularity in proceedings would not thereby deprive the Court of jurisdiction but would only be grounds for appeal, or in the event that an appeal does not afford a plain, speedy and adequate remedy, give rise to entitlement to an extraordinary writ applied for and issued directly to the justice in question.

Plaintiff, by his application for Writ of Prohibition before this honorable court, would elect that the district

court, on appeal, erred in not *dismissing and quashing* the complaint. It is the position of the respondent herein that the District Court, on appeal, properly denied such a motion. If the motion were granted there would be no complaint before the justice's court and no further proceedings to be heard in the district court. There is no assignment before this honorable court to the effect that the complaint was not properly issued by the Justice of the Peace of Burch Creek Precinct. The only error assigned is that he held court outside of his territorial limits.

ASSERTION NO. 2

THE DISTRICT COURT, DEFENDANT HEREIN, IS NOT IN ERROR.

In his brief, counsel for the applicant, Leroy Newbill, states that an appeal from the action of the Justice's Court was filed with the District Court in and for the County of Weber. The provisions of section 105-57-38, Utah Code Annotated 1943, read as follows:

“Any defendant in a criminal action tried before a justice of the peace may appeal from the final judgment therein to the district court of the county where the court of such justice is held at any time within 30 days from the entry of the judgment.”

On the final page of his brief, counsel submits that the plaintiff was entitled to have the complaint dismissed on motion, under the provisions of section 105-57-44, Utah Code Annotated, 1943, which reads in part:

“The complaint on motion of the defendant may be dismissed upon the following grounds:

(1) That the justice did not have jurisdiction of the offense.”

Again we respectfully assert that there is no doubt of the jurisdiction of the Justice of Burch Creek or any other justice of the County of Weber, over the offense allegedly committed in said county. No application was made to the defendant, District Court, the respondent herein, for collateral proceedings against the judgment entered by the justice, rather plaintiff follows statutory procedure by direct appeal. He does not, in his appeal, request that the judgment of the justice be set aside but rather, claims a lack of jurisdiction. The District Court correctly ruled that the motion to dismiss be denied and that the defendant be required to appear upon a future day certain and plead to the charge in anticipation of trial de novo. As indicated by Chief Justice Pratt of this honorable court, in his reasoning concerning the merits of petition for prohibition in the case of Robinson vs. City of Ogden, Utah, 185 Pac. (2) 256 at page 263, had the defendant judge of the District Court granted the motions of the plaintiff there would not only be a dismissal of the appeal but also a dismissal of the action “leaving nothing against petitioner in either court.” The District Judge refuses to dismiss since the matter is properly before him on appeal and orders a trial de novo; then the plaintiff, Leroy Newbill, decides that his appeal will leave him in the same position perhaps as we was before the Justice Court; it is then he appears before this

honorable court, claiming that he is entitled to a Writ of Prohibition enjoining the District Judge from proceeding and taking the action contemplated by appeal. The position of the plaintiff is most waivering.

ASSERTION NO. 3

THE DISTRICT COURT ACQUIRED ORIGINAL JURISDICTION.

Plaintiff invoked jurisdiction of the District Court and the action of the court may not now be set aside by Writ of Prohibition upon the petition of the plaintiff. The question of original jurisdiction of the District Court over misdemeanors triable before a justice of the peace was reached in *State vs. Ferguson*, 83 Utah 357, 28 Pac. (2) 175 and in the case of *State vs. Telford*, 95 Utah 228, 72 Pac. (2) 626. Mr. Justice Wolfe, speaking for this honorable court, stated:

“If the district court does proceed where it is shown that the matter was improperly transferred, certainly the party requesting that it should so proceed cannot question what he consented to and requested. He is barred from asserting that the jurisdiction was not invoked, not because the court properly assumed it, but because estoppel holds up its hand and says, ‘You shall not assert that its jurisdiction is improperly invoked.’ If he cannot assert such lack of proper procedure, it is as to him as if it had been proper. There is a vast difference between something being correct and proper, and a situation where it is not but the facts are such that the court pulls down the curtain on the contemplated assertion that it was not proper because of the principle of estoppel.”

And again Mr. Justice Wolfe in the same case states :

“Therefore, it must be assumed as far as the defendant is concerned that it did come up from an appeal, which was the only other way it could properly come up. Thus, the jurisdiction of the district court is final unless a constitutional question is involved.

“In such case the appeal of this court should be dismissed rather than the judgment affirmed. Affirmance takes in the inference that an appeal to this court lies. Dismissal of the appeal infers a holding that no appeal alies and assigned errors cannot be reviewed. We take cognizance of the record in so far as to determine that the case so stipulated into the district court was wrong, invoke the principle of estoppel against the appellant, which results in a situation of the defendant having had a final hearing in the district court. The record revealing this, we should on our own motion dismiss on the ground that defendant has no right of appeal to this court. We cannot consider assigned error and thus, by inference, hold that there is a right of appeal.”

In the case of State vs. Johnson, 100 Utah 316, 114 Pac. (2) 1034, Mr. Justice Larson distinguishes, in an able treatise, between original and derivative jurisdiction and quotes from the case *In re Burnette*, 73 Kan. 609, 85 Pac. 575, as follows :

“The jurisdiction to consider and decide causes de novo is in its essence original. The manner in which a cast reaches the higher court is not the test. Jurisdiction being the power to hear and determine, the nature of the functions to be exercised controls whether they are brought into activity by primary process or by removal from

an inferior tribunal. Upon a trial de novo the power of an appellate court in dealing with the pleadings and the evidence in the application of the law and in the rendition of judgment according to the right of the case, all independent of the action of the lower court, is no different from what it would be if the case were begun there originally, and hence is not 'appellate,' within the meaning of laws creating jurisdiction. *Lacy v. Williams*, 27 Mo. 280; *County of St. Louis v. Sparks*, 11 Mo. (201) 203."

He further states in the Johnson case at page 1042 of the Pacific:

"In cases in personam, the question of venue may be waived. It is a right personal to the defendant to have his cause tried in the court of proper venue, but if he willingly submits the matter to a court having jurisdiction of the subject matter of the action he is bound by the verdict or the judgment. Objections to venue in cases in personam must be raised or will be held to have been waived. "The right to apply for a change of venue is waived by failure to apply therefor at the time and in the manner prescribed by law." 67 C. J. 219; 27 R.C.L. 819. 'It may be waived by certain acts of participation in the proceedings, or by filing a demurrer.'" 67 C. J. 202. 'To be effective an objection to the venue must be seasonably made or it will be waived.' It 'must be made at or before filing a demurrer, or answering to the merits.' 67 C.J. 89; 27 R.C.L. 784. It has been held that the objection may be made at the trial but not after the introduction of evidence, and it is too late after verdict or judgment. *Howland v. Sheriff of Queens County*, 7 N.Y. Super. Ct. 219; *Draper v. Kirkland*, 1 Head, Tenn., 260; *Howe v. Hatley*, 186 Ark. 366, 54 S.W. 2d 64; *Newcomer v.*

Sheppard, 51 Okl. 335, 152 P. 66; Johnston v. Wadsworth, 24 Or. 494, 34 P. 13; State v. Lehman, 182 Mo. 424, 81 S. W. 1118, 66 L.R.A. 490, 103 Am. St. Rep. 670.”

The concurring opinions of Mr. Justice Wolfe and Justice Pratt in the same case substantiate the position of the respondent in every particular and support the action of the District Judge, respondent herein.

It is difficult for counsel for the respondent to see how and in what manner the plaintiff has been prejudiced by the action of the District Judge, since in a trial de novo, it is possible that he may have been acquitted and released. How and in what manner may it now be established that he had no plain, speedy and adequate remedy at law? To grant the writ as requested by the plaintiff would absolve him from responsibility before the law since he would have this court order the District Judge to dismiss the complaint. Section 105-57-43, Utah Code Annotated 1943 provides that an appeal, duly perfected from the justice's court, transfers the action to the District Court for trial anew. The authority of the justice to take further steps in the matter is to be terminated, yet the record shows that after filing his appeal, plaintiff filed his motion to quash and dismiss.

See 31 Am. Juris. 728, Justices of the Peace, para. 37.

CONCLUSION

In summarization, counsel for respondent submit that the Justice of the Peace of Burch Creeks had jurisdiction of the offense charged; that having acquired jurisdiction lawfully and regularly through a complaint regularly issued, the Justice's Court would not lose jurisdiction or entitle the accused to a dismissal because of the fact he was arraigned and sentenced without the territorial limits of the precinct from which the complaint issued.

Further, having involved the jurisdiction of the District Court by his own application, plaintiff now attempts to divest the court of jurisdiction by Writ of Prohibition. No error of record has been committed by the District Court. Plaintiff has not exhausted his remedy at law. Therefore the Peremptory Writ of Prohibition, issued by this honorable court, should in all justice be set aside and the writ cancelled ab initio.

Respectfully submitted,

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