

1978

Richard L. A. Phillips v. Rex Vance : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

RICHARD L. A. PHILLIPS, :
Plaintiff-Appellant, :
-vs- : Case No. 15944
REX VANCE, Sheriff of Salt :
Lake County, State of Utah, :
Defendant-~~Appellant~~, :
~~Respondent~~

BRIEF OF RESPONDENT

AN APPEAL FROM THE DISMISSAL OF A
PETITION FOR A WRIT OF HABEAS
CORPUS IN THE THIRD JUDICIAL DISTRICT
COURT, IN AND FOR SALT LAKE COUNTY,
STATE OF UTAH, THE HONORABLE PETER F.
LEARY, PRESIDING.

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IN THE SUPREME COURT OF THE
STATE OF UTAH

RICHARD L. A. PHILLIPS,	:	
Plaintiff-Appellant.	:	
-vs-	:	Case No. 15944
REX VANCE, Sheriff of Salt Lake County, State of Utah,	:	
Defendant-Respondent.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Richard L. A. Phillips, appeals from the dismissal of his petition for a Writ of Habeas Corpus in the Third Judicial District Court, Salt Lake County, State of Utah (R. 20).

DISPOSITION IN THE LOWER COURT

On May 26, 1978, appellant petitioned the Third Judicial District Court, in and for Salt Lake County, State of Utah, for a Writ of Habeas Corpus (R. 2). Appellant's petition was heard in the above-mentioned court on July 6, 1978, at which time appellant motioned the court to continue

the matter in order for respondent to answer his interrogatory (R. 12). The lower court denied appellant's motion for a continuance, dismissed his petition and ordered appellant returned to California. (R. 12, 20).

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmance of the lower court's dismissal of appellant's petition for a writ of habeas corpus.

STATEMENT OF THE FACTS

On April 25, 1978, Governor Scott M. Matheson received requisition papers from the State of California for the extradition of the appellant, Richard L. A. Phillips. Those papers were subsequently transmitted to the Salt Lake County Sheriff for execution on May 4, 1978. The extradition documents charged appellant with murder and attempted murder.

On May 26, 1978, appellant petitioned the Third Judicial District Court, in and for Salt Lake County, State of Utah, for a writ of habeas corpus (P. 2). On June 27, 1978, appellant filed a Request for Production of Documents seeking, inter alia, all extradition documents received by Governor Matheson from California, all California police reports relating to the events surrounding the underlying crime, and any other documents relating to appellant's extradition to California currently in respondent's possession (R. 4, 5).

On June 22, 1978, appellant motioned the lower court for a Temporary Restraining Order to prohibit appellant from being removed to California for a period of 30 days (R. 7). The motion was argued before the lower court on June 29, 1978, and the court granted appellant's motion up to and including July 6, 1978. (R. 8).

On July 3, 1978, appellant filed interrogatories requesting to know what "surveillance techniques were used at the time of the alleged offense, either on the petitioner or on his associates," what electronic surveillance techniques were used and the exact time and place of the crimes (R. 11). At the July 6, 1978, hearing appellant motioned the court for a continuance "for the reasons that defense counsel is not prepared to go ahead with the case having been unable to complete discovery." (R. 15). Appellant's counsel argued that he should be allowed discovery in order to establish whether appellant was or was not under surveillance by California authorities at the time of the murder (T. 3, 4). Appellant's counsel contended that this information would help him show that appellant was not in California at the time of the commission of the offense (T. 5).

Respondent argued that it had established a prima facie case by introducing California's extradition documents

and that the burden of proof had then shifted to the appellant to show that he was not the Richard L. A. Phillips charged or that he was not in California at the time of the alleged commission of the murder. (T. 2,3). Respondent further argued that appellant had had over six weeks to arrange for witnesses and that even if he procured witnesses claiming appellant was not in California when the murder was committed, it would only create a conflict in the evidence which would not defeat extradition (T. 8).

After hearing arguments for both sides, the court denied appellant's motion for a continuance, dismissed his petition for habeas corpus relief, and ordered appellant returned to California. (T. 8, 9,; R. 8, 17, 18, 20). This appeal follows.

ARGUMENT

POINT I.

THE TRIAL COURT PROPERLY (1) DENIED APPELLANT'S MOTION FOR A CONTINUANCE AND (2) DISMISSED HIS PETITION FOR WRIT OF HABEAS CORPUS WHEN APPELLANT FAILED TO PRODUCE ANY EVIDENCE TENDING TO SHOW THAT HE WAS NOT IN CALIFORNIA AT THE TIME OF THE MURDER FOR WHICH HE IS BEING EXTRADITED

California seeks the extradition of appellant on charges of murder and attempted murder. Appellant petitioned

the Third Judicial District Court for a writ of habeas corpus, contending that he was not in California at the time of the murder and attempted murder (R. 2). On July 3, 1978, just three days before the hearing on appellant's petition for habeas corpus, appellant filed interrogatories on the respondent (R. 11). At the scheduled hearing on July 6, 1978, appellant's motion for a continuance, requested in order to allow respondent sufficient time to respond to the interrogatories, was denied and his petition was dismissed (R. 12).

Appellant now argues that the trial court committed prejudicial error by refusing to grant his request for a continuance in order to allow him to engage in discovery.

Respondent asserts that the trial court properly denied appellant's motion for a continuance, and properly dismissed appellant's petition for a writ of habeas corpus, for the following reasons:

A.

THE CONTROL OF DISCOVERY IS ENTRUSTED
TO THE DISCRETION OF THE TRIAL COURT
AND THE TRIAL COURT DID NOT ABUSE
ITS DISCRETION IN THIS MATTER.

Pursuant to Rule 33, Utah Rules of Civil Procedure (1953), appellant filed his interrogatories on respondent. Rule 33(a) allows a party to serve, without leave of court, interrogatories on another party which must be answered

within thirty days. The rule allows the court to shorten or lengthen the time for response and makes applicable the notice to compel discovery under Utah Rules of Civil Procedure (1953), where the party served objects or fails to answer.

Rule 37(a) provides an order to compel discovery where the party served under Rule 33 fails to respond, but the granting of this motion rests completely within the sound discretion of the trial court.

Thus, under the Utah Statutory law, ultimate control of discovery rests with the trial court. GM Leasing v. Murray First Thrift and Loan, 534 P.2d 1244 (Utah, 1975). This principle is consistent with the practice in other states. Banta v. Superior Court, 212 Ariz. 544, 544 P.2d 653 (1976); State ex rel. Babbit v. Arnold, 26 Ariz. App. 333, 548 P.2d 426 (1976); Commercial Union Insurance v. Wichita, 217 Kan. 44, 536 P.2d 54 (1975); Oklahoma Gas and Electric Co. v. Ches, 527 P.2d 165 (Okla., 1974). The courts have adopted this rule by concluding that "without reasonable judicial control, the instruments of discovery are susceptible to abuse and may be utilized for purpose of delay, annoyance and harrassment." Jones v. Bank of Nevada, 525 P.2d 1279, 1280 (Nev. 1975).

Because control of discovery lies within the discretion of the trial court, a reviewing court will overturn a decision regarding discovery only where it can be shown

that a trial court has abused its discretion. Johnson v. American Credit Bureau, Inc., 23 Ariz. App. 199, 531 P.2d 932 (1975). In Bartholomew v. Bartholomew, 538 P.2d 239, 240 (Utah, 1978), the Utah Supreme Court stated that it would not overrule a lower court's determination as to discovery in the "absence of any action in that regard which is so unreasonable as to be classified as capricious and arbitrary, or a clear abuse of his discretion." The Utah Supreme Court did not find an abuse of discretion or arbitrary or capricious action where a trial court did not dismiss an action with prejudice where the parties had previously agreed to dismissal with prejudice if discovery was not completed by a specific date (GM Leasing v. Murray First Thrift and Loan, supra) and where a party was granted summary judgment because the other party failed to produce his records as required by the trial court's order. Tucker Realty, Inc., v. Nunley. 16 Utah 2d 97, 396 P.2d 410 (1964).

Thus, respondent submits that a trial court's discretion is very broad in matters of discovery and its decisions relating to discovery will not be overturned without a showing of a clear abuse or obvious capriciousness. In the instant case, appellant does not contend that the trial court abused its discretion in denying his motion for continuance

in order to allow for discovery, but even if he had, the grounds for his complaints would not amount to an abuse of discretion.

Appellant argues that discovery would have allowed him to prove he was not in California when the crimes were committed without waiving his privilege against self-incrimination and by more credible evidence than his own self-serving testimony. The trial court responded to these contentions at the July 6, 1978, hearing by observing that appellant should know where he was on the date the murder was committed and should have been able to produce witnesses to establish that he was not in California at the time. (R. 31, 32). It is obvious that appellant would not need to engage in discovery to show his non-presence in California at the time of the murder if, in fact, he was not there. If he was not in California at that time he could have produced witnesses to that effect, the result of which would have been that he would not have to waive his privilege against self-incrimination by offering his own self-serving testimony. Thus, had appellant contended that the action of the trial court was an abuse of discretion, it is clear from these facts that no abuse existed and that the court's action in denying discovery was proper.

Appellant relies heavily on Harris v. Nelson, 394 U.S. 286, reh. den. 394 U.S. 1025 (1969), for the proposition that "law and justice" might require the allowance of discovery in appropriate circumstances. Respondent does not challenge this conclusion, but again asserts that the "appropriate circumstances" for discovery did not exist in the instant matter.

In Harris v. Nelson, supra, Alfred Walker had been convicted in a California state court of the crime of possession of marijuana. After exhausting state remedies, he filed a petition for habeas corpus in the Federal District Court and motioned the court for an evidentiary hearing, which the court granted. Two months later, Walker served upon the respondent warden a series of interrogatories pursuant to Rule 33 of the Federal Rules of Civil Procedure. Respondent filed objections to the interrogatories, alleging they were not proper in a habeas corpus proceeding. The District Judge (Harris) disallowed the objections and directed that the interrogatories be answered. The Ninth Circuit Court of Appeals vacated the order of the District Court, holding that the discovery provisions of the Federal Rules of Civil Procedure were not applicable to habeas corpus proceedings.

The United States Supreme Court agreed with the Ninth Circuit "that Rule 33 of the Federal Rules of Civil Procedure is not applicable to habeas corpus proceedings." 394 U.S. at 290. However, the Supreme Court did conclude that in appropriate circumstances, where a district court was confronted with a petition for habeas corpus which establishes a prima facie case for relief, the district court could authorize suitable discovery procedures in accordance with 28 U.S.C. § 2246.

Respondent first notes that Rule 33 of the Utah Rules of Civil Procedure, the rule pursuant to which appellant filed interrogatories on the respondent, is exactly patterned after Rule 33 of the Federal Rules of Civil Procedure. The Harris Court stated unequivocally that Rule 33 is not applicable in habeas corpus proceedings. It based this conclusion on two grounds.

First, the Court found that Rule 33 does not properly fit the special character of habeas corpus proceedings:

"Indeed, it is difficult to believe that the draftsmen of the Rules or Congress would have applied the discovery rules without modification to habeas corpus proceedings because their specific provisions are ill-suited to the special problems and character of such proceedings. For example, Rule 33, which Walker here invoked, provides for written interrogatories

to be served by any party upon any 'adverse party.' As the present case illustrates, this would usually mean that the prisoner's interrogatories must be directed to the warden although the warden would be unable to answer from personal knowledge questions relating to petitioner's arrest and trial. Presumably the warden could solicit answers from the appropriate officials and reply 'under oath,' as the rule requires; but the warden is clearly not the kind of 'adversary party' contemplated by the discovery rules, and the result of their literal application would be to invoke a procedure which is circuitous, burdensome, and time consuming." 394 U.S. at 296

Second, because of the liberal construction of Rule 33, generally provided for by the courts and because Rule 33 allows the filing of interrogatories without leave of court, the Harris Court felt that the blanket availability of discovery in habeas corpus proceedings would only serve to delay the proceedings and do violence to the purpose of habeas corpus.

"Except for interrogatories to be served by the 'plaintiff' within 10 days after the commencement of 'the action,' Rule 33 provides that the interrogatories may be served without leave of court. The 'adverse party' must then take the initiative to contest the interrogatories and a hearing in court on his objections is required. Unavoidably, unless there is a measure of responsibility

in the originator of the proceeding, the 'plaintiff' or petitioner, this procedure can be exceedingly burdensome and vexatious. The interrogatory procedure would be available to the prisoners themselves since most habeas petitions are prepared and filed by prisoners, generally without the guidance or restraint of members of the bar. For this reason, too, we conclude that the literal application of Rule 33 to habeas corpus proceedings would do violence to the efficient and effective administration of the Great Writ. The burden upon courts, prison officials, prosecutors, and police, which is necessarily and properly incident to the processing and adjudication of habeas corpus proceedings, would be vastly increased; and the benefit to prisoners would be counterbalanced by the delay which the elaborate discovery procedures would necessarily entail." 394 U.S. at 297.

For these reasons, the Harris Court concluded that the discovery provisions of Rule 33 of the Federal Rules of Civil Procedure would not be applicable in habeas corpus proceedings. Rule 33 of the Utah Rules of Civil Procedure being patterned after Rule 33 of the Federal Rules, the same reasons and conclusions apply in the instant case. Respondent Sheriff Vance, is ill-equipped to answer the questions propounded in appellant's interrogatories as they deal with a murder and attempted murder committed in California. Likewise, such a broadranging preliminary inquiry is neither

necessary or appropriate in the context of a habeas corpus proceeding in connection with an extradition. For these reasons, respondent asserts that Rule 33 of the Utah Rules of Civil Procedure should not be applied in habeas corpus proceedings brought to defeat extradition.

While the Harris Court held Rule 33 inapplicable to habeas corpus proceedings, it did note that 28 U.S.C. § 2246 might allow discovery in habeas corpus matters in very limited circumstances. Section 2246 allows disposition, in the discretion of the judge, on application for habeas corpus. Respondent notes that Rule 65B(i) of the Utah Rules of Civil Procedure contains no comparable provision which would allow for even limited discovery in habeas corpus proceedings. Thus, respondent asserts that, under Utah law, the filing of interrogatories is improper in a habeas corpus proceeding.

B.

APPELLANT FAILED TO FILE HIS
INTERROGATORIES IN A TIMELY
MANNER.

Appellant filed his petition for writ of habeas corpus on May 26, 1978 (R. 2), but did not file his interrogatories until July 3, 1978, (R. 11), just three days before the scheduled hearing on his petition.

Courts have long held that interrogatories served long after the commencement of an action and a short time before the case is set for trial come too late. 7 Cyc. Fed. Proc., 3rd Ed., p. 476. Indeed, in Theis v. Chicago and N.W.R. Co., 107 Iowa 522, 78 N.W. 199 (1899), the Supreme Court of Iowa found that where a plaintiff had begun an action in November of 1895 which was set for trial on August 29, 1896, and had not filed interrogatories until August 13, 1896, the interrogatories were not timely filed. The Iowa court concluded that the plaintiff could have filed his interrogatories substantially earlier and that by waiting as he did would create substantial delays.

In Heffron v. Los Angeles Transit Lines, 170 Cal. App. 2d 709, 339 P.2d 567 (1959), the plaintiff filed suit on November 2, 1956. On November 26, 1957, trial was set for February 24, 1958. Plaintiff filed his interrogatories on February 5, 1958, to which respondent promptly objected. The California District Court of Appeals found that plaintiff's interrogatories had not been filed in a timely manner and allowed respondent's objections to them.

The above-quoted cases clearly illustrate the requirement that interrogatories be filed in a timely fashion. This is especially critical in a habeas corpus proceeding

because of the expedited nature of the proceeding. Furthermore, where the habeas corpus proceeding was initiated to challenge extradition, also on expedited proceeding, there is even further need to act quickly and file interrogatories in a timely fashion.

Respondent asserts that the trial court properly denied appellant's request for a continuance, in order to allow respondent time to answer his interrogatories, because said interrogatories were not filed until three days before the scheduled hearing on appellant's petition for habeas corpus.

C.

HAD THE TRIAL COURT GRANTED APPELLANT'S MOTION FOR A CONTINUANCE IN ORDER TO ALLOW RESPONDENT SUFFICIENT TIME TO RESPOND TO APPELLANT'S INTERROGATORIES, THE INFORMATION PROCURED THROUGH DISCOVERY WOULD NOT HAVE BEEN ADEQUATE TO HELP APPELLANT CARRY HIS BURDEN OF PROOF.

At the hearing on appellant's petition for habeas corpus, appellant contended that he was not in the demanding state (California) at the time the offense which he had been accused of committing was perpetrated (T. 3). Appellant argued that the information he sought by way of discovery would allow him to show that he was not in California at the time the murder and attempted murder were committed (T. 4, 5).

Respondent asserts that had the trial court granted appellant the discovery he sought, the information gained thereby would not have established that he was not in California at the time the crimes were committed. Therefore, appellant would not have carried his burden of proof and the trial court would have been compelled to dismiss his petition.

One way a request for extradition may be defeated by the person demanded is to establish that he was not in the demanding state at the time the crime with which he is charged with committing was perpetrated. State ex rel. Gaines v. Westheus, 318 Mo. 928, 2 S.W. 2d 612 (1923). However, the demanded person must prove this fact beyond a reasonable doubt. People ex rel. Martin v. Elrod, 344 N.E. 2d 714 (Ill., 1976). If his evidence is merely contradictory, it will not overcome the prima facie case established by the Governor's warrant. Smith v. State, 373 F.2d 149 (9th Cir., 1967). Indeed, in South Carolina v. Bailey, 239 U.S. 412 (1933), the United States Supreme Court stated that a court would not discharge:

"a defendant arrested under [a] governor's warrant where there is merely contradictory evidence on the subject of presence in or absence from the state, as habeas corpus is not the proper proceeding to try the question of alibi, or any question as to the guilt or innocence of the accused." 289 U.S. at 421.

Thus, in order for the appellant to have gained release at the trial level, he would have had to establish beyond a reasonable doubt that he was not in California when the crimes were committed. Appellant proposed to prove this by discovering whether California police had him under surveillance at the time of the commission of the murder and attempted murder. Appellant apparently believed that he was under surveillance by California police elsewhere when the crimes were committed and that police reports might establish that fact.

Assuming, arguendo, that discovery had been allowed and that the police reports showed appellant to have been under surveillance at a location away from the scene of the murder and attempted murder, that fact would not establish that appellant was not in California when the crimes were committed, but rather that he was in California at the time. The fact that he was under surveillance away from the scene of the crimes is not relevant to the extradition proceeding, but would be raised as an alibi at his trial in California. South Carolina v. Bailey, supra.

Assuming, arguendo, that discovery had been allowed and that the police reports showed that appellant was not under police surveillance at the time of the commission of the crimes, this fact would not establish beyond a reasonable doubt

that appellant was not in California at the time of the commission of the crimes charged. Such a showing would only prove that appellant was not under police surveillance at the time.

For appellant to prevail on his claim that he was not in California when the crimes were committed, he must show by credible evidence that he was outside the state. In either case hypothesized above the evidence would not be sufficient to establish that necessary fact. Thus, had discovery been allowed, the information sought by the appellant would not have been adequate to sustain his burden of proof and procure his release. Therefore, the trial court properly denied appellant's motion for a continuance in order to obtain discovery.

CONCLUSION

Respondent asserts that the trial court properly denied appellant's request for a continuance in order to facilitate his request for discovery because (1) Rule 33 of the Utah Rules of Civil Procedure is not applicable to habeas corpus proceedings and (2) appellant's interrogatories were untimely filed.

Respondent further asserts that the trial court properly dismissed appellant's petition for writ of habeas corpus because appellant failed to show that he was not in California at the time the charged crimes were committed.

Respectfully submitted,

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