1973

Thomas Duane Danks v. John v. Turner, Warden, Utah State Prison : Brief of Appellant

In The Supreme C
of the State of

THOMAS DUANE DANK

Plaintiff-A

-vs-

JOHN W. TURNER, WA
UTAH STATE PRISO

Defendant-

BRIEF OF A

Appeal from a
District Court, Salt
Honorable Joseph G.

VERNON B. ROMNEY
Attorney General, State of U
State Capitol
Salt Lake City, Utah
Attorney for Respondent

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In The Supreme Court of the State of Utah

THOMAS DUANE DANKS,
Plaintiff-Appellant,
-vs-
JOHN W. TURNER, WARDEN, UTAH STATE PRISON,
Defendant-Respondent.

Case No. 12874

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Thomas Duane Danks, appeals from a decision of the Third Judicial District Court denying his release from the Utah State Prison upon a Petition for a Writ of Habeas Corpus.

DISPOSITION IN THE LOWER COURT

On January 3, 1972, Thomas Duane Danks filed a Complaint and Petition seeking a Writ of Habeas Corpus in the Third Judicial District Court, Salt Lake County, alleging that his commitment to the Utah State

Prison was invalid. The matter came on for hearing on March 14, 1972, before Judge Joseph G. Jeppson, who denied the petition on April 4, 1972.

RELIEF SOUGHT ON APPEAL

The appellant, Thomas Duane Danks, seeks a reversal of the judgment of the court below with the direction that he be released from the custody of the Respondent upon a writ of habeas corpus.

STATEMENT OF FACTS

Thomas Duane Danks was arrested for robbery in October of 1970. On November 9, 1970, he requested a ninety-day disposition pursuant to Utah Code Annotated, § 77-65-1, (1953). (R. 3) The information charging robbery was filed December 18, 1970 (R. 3) and a trial date was set for February 2, 1971. On that date, which was within the ninety day period since the request for disposition, the prosecutor was not prepared to proceed with the trial because the secretary in his office had forgotten to send out the subpoenas. (Exhibit 2, p. 46-48) Appellant's trial counsel offered to proceed on February 4, 1971, still within the ninety day period, but that date was not agreed upon. The trial date was set for February 8, 1971, a Monday, which was the ninety-first day since the request for disposi-

tion. (Exhibit 2) Appellant objected to proceeding on that date because the court had no jurisdiction over the case because the trial had not been held within the ninety day period as provided in Utah Code Annotated, § 77-65-1 and 2, (1953). (Exhibit 2)

On October 13, 1970, Officer Floyd Ledford obtained a search warrant to search the Colonial Village Motel for money and money bags taken in the robbery. In support of the search warrant, Officer Ledford filed a supporting affidavit which provided: (Exhibit 1)

> On the date of October 13, 1970, at approximately 11:00 a.m., your affiant received information from the victim of a robbery that occurred October 13, in which Thomas Danks was arrested and searched by Officer Hardwick. Items used in the crime were found, and reason to believe that further items taken in the crime are at the residence of Thomas Danks at the Colonial Motel at aforementioned address.

Based on this affidavit a search warrant was issued (R. 5) and the items described in the warrant were seized from the Colonial Motel (R. 35) and introduced at trial over appellant's objection. (R. 35) A motion to suppress the items seized was held prior to trial and the motion was denied. (R. 24)

ARGUMENT

POINT I

THE COURT BELOW ERRED IN DENYING APPELLANT'S PETITION FOR A WRIT OF HABEAS CORPUS BECAUSE THE TRIAL COURT DID NOT HAVE THE JURISDICTION OVER THE OFFENSE.

It is abundantly clear that a conviction and judgment can be collaterally attacked on the basis that the trial court had no jurisdiction over the matter. See, e.g. *Sullivan v. Turner,* 22 Utah2d 85, 448 P.2d 907 (1968); *Brown v. Turner,* 21 Utah 2d 96, 440 P.2d 968 (1968); *Bryant v. Turner,* 19 Utah 2d 284, 431 P.2d 121 (1967).

Appellant contends that his conviction and the judgment thereon must be set aside because the Third Judicial District Court was without jurisdiction because he was not brought to trial within ninety days after he filed a ninety day notice of disposition. Utah Code Annotated, § 77-65-1, (1953) provides:

> Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of this state, and whenever during the continuance of the term of imprisonment there is pending in this state any untried indictment, information, or complaint against the prisoner, he *shall* be brought to trial within ninety days after he shall caused to be delivered to the

> County Attorney of the county in which the indictment, information or complaint is pending and the appropriate court written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint; provided, that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance . . . (Emphasis added.)

Utah Code Annotated, § 77-65-2, (1953), then provides:

> In the event that the action is not brought to trial within the period of time as herein provided, no court of this state shall any longer have jurisdiction thereon, nor shall the untried indictment, information, or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

This court has dealt with these statutes in recent cases. In *State v. Belcher*, 25 Utah2d 37, 475 P.2d 60 (1970), the prisoner filed a ninety day disposition before the information was filed. The complaint was filed on August 6, 1969. The notice for the ninety day disposition was filed on September 19, 1969, and the information was filed November 26, 1969. The trial was

set for December 8, 1969, on which date a notice of insanity was filed. The State got a continuance for good cause shown. The matter was then set for January 26, 1970, and the prisoner was not there. On March 9, 1970, the prisoner pleaded guilty to a lesser felony. This court, through Justice Ellett, said that there was no way to dispose of the matter until the information was filed, as a guilty plea to a felony must be entered to an information and not a complaint. This court said the request for ninety day disposition was premature. This court, after the *Belcher* case, dealt with the problem in *State v. Bonny,* 25 Utah2d 117, 477 P.2d 147 (1970). In that case the prisoner filed the notice for ninety day diposition two days after the complaint was filed. The trial setting was later offered; the date offered being within the ninety day period. The trial was then set to a date which was five days beyond the ninety day period. The court said that if there is a reasonable basis in the record to support the proposition that the trial court granted a continuance "for good cause shown" it is within his discretion and authority to do so. Justice Ellett concurred in a separate opinion as follows:

> The defendant prematurely demanded final disposition of the case before the information was filed. He was tried within the ninety days following the filing of the information. 25 Utah2d at 119.

This separate opinion clearly indicates that the majority of this court did not find that the fact that the notice

was filed prior to the filing of the information was fatal to the prisoner's contention. That is, Justice Ellett's opinion said that the notice was premature. The majority of the court did not so hold, but decided the case on the basis that "good cause" within the meaning of the statute was shown. This opinion in *Bonny* clearly repudiates the *Belcher* opinion of this court, decided prior to *Bonny,* that the notice must be filed after the information is filed. Further support for the proposition that the ninety day notice can be filed prior to the filing of the information is found in the language of the statute itself, Utah Code Anotated, § 77-65-1, (1953). The statute provides that the notice can be filed to an indictment, information, or complaint, and that the notice is to be filed in the appropriate court. Thus, in the case of a complaint, the "appropriate court" is different than if the notice is for final disposition of an information. Because the purpose of the statute is to carry into effect the constitutional guarantee of a speedy trial and define precisely what is meant by a "speedy trial" [See *State v. Wilson,* 22 Utah 2d 361, 453, P.2d 158 (1969)], the notice and request for such a trial within the ninety day period can clearly be meaningful only if the request can be invoked at the early stages of the criminal prosecution. Otherwise, a request for a ninety-day disposition (speedy trial) would mean little if the criminal process took an excessive time from the period when the complaint is filed until the time the information was filed. For Utah Code Annotated, § 77-65-1, (1953), to be meaningful, it is clear that the notice and

request must be considered valid if it is filed before the information is filed. Further in *State v. Wilson, supra,* this court held the trial court had no jurisdiction because the trial was not within the ninety day period, and the charge was dismissed. There the notice was filed before the information was filed. Nothing in *Belcher* or *Bonny* indicates that *Wilson* has been overruled. Further, the stipulation by the State indicates no objection to the way the notice was filed. The State did not object in the lower court that the notice was filed prematurely. Therefore, the general rule prevails that unless objected to at trial, a point cannot be raised for the first time on appeal. Thus appellant contends that any defect or error in the way the notice was filed was waived by the state.

The ninetieth day in appellant's case fell on a Sunday. Rule 6(a), Utah Rules of Civil Procedure, provides that if the last day of a period of time prescribed by an applicable statute is a Sunday, the period is extended to the next day. However, appellant did not object to the fact that the trial was not held on the *ninetieth* day. The objection was to the fact that the trial was not held within the ninety day period when appellant was prepared to proceed and when appellant offered to proceed.

The record (R. 3) clearly indicates that the trial was held on the ninety-first day after the notice for ninety day disposition was filed. The trial was held on February 8, 1971. It was originally set for February

2, 1971, but it was continued beyond the ninety day period because the secretary at the District Attorney's Office forgot to send out the subpoenas in time. Appellant offered to go to trial on February 4, 1971, within the ninety days, and objected to the February 8, 1971, date. Appellant contends that the fact that the District Attorney's secretary forgot to send out the subpoenas is not "good cause shown" within the meaning of the statute.

While it is true that a court can continue a criminal matter in its wise discretion, the dictates of Utah Code Annotated, § 77-65-1, (1953), mandate that a continuance be only for "good cause." The burden of complying with the statute is on the prosecution. *State v. Wilson, supra.* "Good cause shown" is not a fixed term, and is a matter for judicial determination in each particular case. See, e.g. *Fike v. State,* 388 P.2d 397 (Okl. 1963). However, it is equally clear that "good cause shown" means a substantial reason, a legal excuse. In *Norton v. Superior Court,* 100 Ariz. 65, 411 P.2d 170 (1966), the court dealt with a statute that provided that trial must be had within a certain time after arraignment. The statute provided that the trial could be continued for "good cause shown." In that case the prosecutor offered as reasons for getting a continuance that he had six past due cases and that the courts were congested. The court held that the burden of showing good cause was on the prosecution and that a defendant's statutory and constitutional rights were not dependent on the amount of business courts have, or good cause

for delay would depend on the population of the county in which the defendant was prosecuted. Appellant contends that his statutory and constitutional right should not be dependent on the efficiency of the District Attorney's secretary. "Good cause" will be totally meaningless if a trial can be continued because a secretary forgot to do something. If a secretary's failure to send out subpoenas is "good cause shown," Utah Code Annotated, § 77-65-1, (1953), is not mandatory as its language indicates. It would not even be directive if one could simply say something was "forgotton" and so a continuance was needed.

Appellant contends that the prosecution has not shown good cause for not having the trial within the ninety day period after the notice and request for disposition was properly filed. Therefore, under the dictates of Utah Code Annotated, § 77-65-1 and § 77-65-2, (1953) the trial court had no jurisdiction over the matter and the information should have been dismissed. Appellant contends that as the trial court had no jurisdiction over the matter, the conviction and judgment are invalid and must be set aside.

POINT II

THE COURT BELOW ERRED IN DENYING APPELLANT'S PETITION FOR A WRIT OF HABEAS CORPUS BECAUSE ITEMS ILLEGALLY SEIZED UNDER AN INVALID SEARCH WARRANT WERE INTRODUCED AGAINST APPELLANT AT TRIAL.

Appellant contends that the judgment of conviction can be attacked collaterally because of extraordinary circumstances. In this case, the requirements of law were so ignored and distorted that appellant was deprived of due process. Numerous cases in this court have held that under such circumstances, a judgment of conviction can be attacked collaterally. See, e.g., *Sullivan v. Turner, supra; Brown v. Turner, supra; Bryant v. Turner, supra; Gallegos v. Turner,* 17 Utah2d 273, 409 P.2d 386 (1965). Further, this court in *Jaramillo v. Turner,* 24 Utah 2d 19, 465 P.2d 343 (1970), held that if there is a miscarriage of justice and it would be unconscionable not to re-examine a conviction, and an appeal was not taken for some justifiable reason, the error can be corrected by collateral attack despite the normal rules of procedure. Appellant contends that where there is, as here, a purely constitutional question as to the validity of a search warrant, that question can be examined on collateral attack.

Evidence that was seized under the search warrant was introduced against appellant at his trial. (R. 35) That eveidence consisted of items taken in a robbery. (R. 35) Appellant contends that the search warrant was invalid because it was issued pursuant to an affidavit in support of a search warrant, that affidavit not showing probable cause for the issuance of the warrant. Appellant sought to suppress the evidence at a motion to suppress hearing. The motion was denied. (R. 35) Appellant now contends that the introduction of the

evidence seized under the search warrant was an error such that he was denied due process of law.

In *Nathanson v. United States*, 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed. 154 (1933), the United States Supreme Court held that an affirmation of suspicion or belief in the application for a search warrant, without any statement of supporting facts, will not meet the probable cause requirement of the Fourth Amendment. In *Nathanson* a search warrant was issued upon the allegation that the affiant had "cause to suspect and does believe" that certain merchandise was in a specified location. The Court said that the affidavit "went upon mere affirmation of suspicion and belief without any statement of adequate supporting facts." The Court then held:

> Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefore from the facts and circumstances presented to him under oath or afifrmation. Mere affirmation of belief or suspicion is not enough.

Appellant contends that the affidavit in support of the search warrant was just as defective as that in *Nathanson*. There were no underlying facts and circumstances set forth to support the belief stated.

The Court later in *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964), further set

forth the probable cause standards that must be met. In that case the affidavit in support of the search warrant stated as follows:

> Affiants have received reliable information from a credible person and do believe that heroin . . . [and other drugs] are being kept at the above described premises . . . [contrary to law].

On that basis a search warrant was issued. The Court first held that the standard of reasonableness for a search was the same under the Fourth and Fourteenth Amendments, citing *Ker v. California,* 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963). The Court then explained that

> The informed and deliberate determinations of the magistrate, empowered to issue warrants . . . are to be preferred over the hurried actions of officers . . . who may happen to make arrests . . . 12 L.Ed.2d at 736

> The point of the Fourth Amendment, which is not often grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that these inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often

> competitive enterprise of ferretting out crime. *Jones v. United States,* 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960)

The Court indicated that while substantial deference must be paid to a magistrate's determination of probable cause, the courts must still insist on a neutral and detached function and that magistrates not serve "merely as a rubber stamp for police." The Court then held, 12 L.Ed.2d at 727, that the magistrate must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusions.

The affidavit in support of a search warrant need not reflect only the personal observations of the affiant if the magistrate is informed of underlying circumstances supporting affiant's conclusions and belief. The Court in *United States v. Ventresca,* 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965) upheld the search warrant and found probable cause, and reaffirmed the above principles and said, 13 L.Ed.2d at 689:

> This is not to say that probable cause can be made out by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the 'underlying circumstances' upon which the belief is based.

Petitioner contends that the affidavit in this case was stated in conclusory terms. The statement that "items used in the crime were found" is clearly a conclusion totally unsupported by any underlying facts or circumstances which explained to the magistrate how the affiant knew it to be true.

The Court in *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584. 21 L.Ed.2d 637 (1969) dealt with the following situation. The affidavit in support of the search warrant stated that the F.B.I. had watched the defendant's activities for several days, the activities were described, information as to the defendant's telephone listing was set forth, a statement was made by the affiant that the defendant was known to affiant as a bookmaker. The Court said, concerning the statement of affiant that the defendant was known to him as a bookmaker, that it was but a "bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate's decision." The Court then dealt wth the problem of the corrobroation of the informer's tip and the sufficiency thereof. The Court said, 21 L.Ed.2d at 645, that suspicion can't be used "to give additional weight to allegations that would otherwise be insufficient."

From the above cases it is apparent that the affidavit in support of the search warrant in appellant's case was defective in that it did not state probable cause. It is of no consequence that there may have been additional information available to the police or magistrate.

> It is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention. *Aguilar v. Texas, supra,* fn. 1, 12 L.Sd.2d at 728.

See also *Spinelli v. United States,* fn. 3, 21 L.Ed.2d at 642. Appellant thus contends that the presence or absence of probable cause must be determined solely on the basis of what is contained in the supporting affidavit.

Appellant contends that the affidavit in this case was not sufficient under the above cases. All that is contained is an affirmation of belief that items taken were at appellant's residence. That was condemned by *Nathanson, supra,* and the cases following. The affidavit contains a conclusion that "items used in the crime were found." No underlying facts and circumstances were set forth supporting the conclusion. The affidavit also states that the affiant received information from the victim of the crime, but the affidavit does not state what that information was.

Thus, appellant contends that the affidavit did not show probable cause, and so the warrant was invalid. As a result, the items were seized invalidly and should not have been admitted at trial. As they were, appellant contends that he was denied due process of law and his conviction is invalid and must be set aside.

CONCLUSION

For the reasons above stated, that the trial court had no jurisdiction over the charge and that items illegally seized were introduced at trial, appellant respectfully submits that the judgment of the court below be reversed and that he be granted the writ of habeas corpus he seeks.

Respectfully submitted,

BRUCE C. LUBECK

Attorney for Appellant