1973

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

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

THOMAS DUANE DANKS,
Plaintiff-Appell

vs.

JOHN W. TURNER, Warden, U
State Prison,
Defendant-Respon

BRIEF OF RESP

APPEAL FROM A JUDGM
JUDICIAL DISTRICT COU
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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 RESPONDENT

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 respondent urges that this Court affirm the judgment of the court below which denied the appellant's petition for a writ of habeas corpus.

STATEMENT OF FACTS

On October 13, 1970, Thomas Duaine Danks was arrested for the robbery of Jack Elsbury. At 1 p.m. Officer Floyd Ledford requested a warrant to search the Colonial Village Motel, Tom Danks' residence, for money and money bags. The supporting affidavit stated:

> "On the date of October 13, 1970, at approximately 11 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."

This evidence was admitted at trial.

On November 9, 1970, petitioner requested a ninety-day disposition pursuant to Utah Code Ann. § 77-65-1 (1953). An information was filed on December 18, 1970. A trial was set for February 2, 1971, but the prosecutor

was unable to proceed because his subpoenas had not been sent out. Defendant's counsel offered to proceed on February 4, 1971, but the Court declined. February 7, 1971, was the ninetieth day, and fell on a Sunday. The next day, February 8, 1971, was the date of the trial.

POINT I.

THE COURT BELOW HAD JURISDICTION OVER THE OFFENSE AND THEREFORE, THE DENIAL OF THE WRIT OF HABEAS CORPUS WAS PROPER.

Appellant alleges that his conviction and the judgment entered thereon must be set aside because the Third Judicial District Court was without jurisdiction because he was not brought to trial within 90 days after having made a request for final disposition. Utah Code Ann. § 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 have 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 . . ."

Utah Code Ann. § 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 thereof, 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 interpreted these statutes in two recent cases. In *State* v. *Belcher*, 25 Utah 2d 37, 475 P. 2d 60 (1970), the facts show that a complaint was filed against the defendant on August 6, 1969. On September 19, 1969, defendant made a request for final disposition under Utah Code Ann. § 77-65-1 (1953). On November 20, 1969, a preliminary hearing was held and the information was filed on November 26, 1969. The state was granted a continuance for good cause shown on December 8, 1969, and a trial date was set for January 26, 1970. The petitioner then asked the court to exonerate him because he was not tried within 90 days from the date of his request for final disposition. Justice Ellett, speaking for a *unanimous court*, said:

> "There are several reasons why he cannot properly be freed. In the first place, the court for good cause shown continued the trial date; in the second place, he could have been tried on December 8, 1969, except for his plea of insanity; and in the third place, there was no way to dispose of the

> matter finally until the information was filed. His request was premature. He could not enter a plea of guilty to the complaint; and if the complaint had been dismissed, the matter would not be disposed of finally, since the dismissal would not be res judicata and another complaint could be filed at any time with the statute of limitations (four years from date of crime, Sec. 77-9-2, U. C. A. 1953)."

Utah Code Ann. §§ 77-65-1 and 2 were again the issue in the case of *State* v. *Bonny*, 25 Utah 2d 117, 477 P. 2d 147 (1970), decided two months after *Belcher*. The case in *Bonny* was continued five days beyond the ninety-day period to accommodate the defense. The Court held 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 was within his discretion and authority to do so." 477 P. 2d at 148. The Court further stated that as long as the continuance took place within the ninety-day period the Court maintained its jurisdiction.

The *Bonny* case was decided upon the issue of whether the Court had good cause to continue the case. However, the case could have been decided upon an alternative ground as pointed out by Justice Ellett in his concurring opinion where he stated:

> "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 Utah 2d at 119, 477 P. 2d at 148.

It "is traditionally within the discretion of the trial judge . . ." to grant a continuance. *Ungar* v. *Sarafite*, 376 U. S. 575 at 589 (1964). Furthermore, the states are in accord that this discretion shall not be disturbed unless exercise of the discretion has been prejudicial to the substantial rights of the defendant. *Lofton* v. *People*, 450 P. 2d 638 (Colo. 1969); *Shelton* v. *Lamb*, 460 P. 2d 156 (Nev. 1969); *State* v. *Mathis*, 7 Utah 2d 100, 319 P. 2d 134 (1957); *State* v. *Polson*, 448 P. 2d 229 (Ida. 1969).

The right of a judge to grant a continuance is intimately connected with the right to a speedy trial. The United States Supreme Court has said that the right to a speedy trial:

> ". . . 'is *necessarily relative*. It is consistant with delays and *depends on circumstances*. It secures rights to a defendant. It does not preclude the right of public justice.' (Citation omitted.) 'Whether delay in completing a prosecution . . . amounts to an unconstitutional deprivation of rights *depends on the circumstances* . . . The delay must not be *purposeful or oppressive*.' (Citation omitted.) '(T)he essential ingredient is orderly expedition and not mere speed.'" (Emphasis added.) *United States* v. *Ewell*, 383 U. S. 116 at 120 (1966).

In the present action, the information was filed on December 18, 1970, which would make the ninety-day period run up to or past March 18, 1971. Petitioner's trial was February 8, 1971, well within the ninety-day disposition period. Even if petitioner's arguments are valid, and the ninety days were up on Sunday, February 7, 1971,

the continuance was granted pursuant to statute (Rule 6(a) U. R. C. P.) and the Court did not abuse its discretion in granting the continuance. Either way, the Court had jurisdiction at the time it passed judgment and convicted appellant as the ninety-day period had not run. Based solely on the holding in *Belcher, supra,* appellant's contention that the trial court did not have jurisdiction cannot stand.

The appellant's assertions in support of his position are without merit. Appellant asserts that the unanimous opinion in *Belcher* was "clearly" repudiated by *Bonny,* a decision handed down only two months later. The basis of this assertion is that Justice Ellett's concurring opinion said that another reason for the holding was that the request was premature (i.e., reiterating the holding in *Belcher*) while the majority of the court decided the case on the basis that "good cause" for granting a continuance was shown. It is highly improbable that this Court would *silently* reverse a unanimous decision interpreting an important section of the criminal law and do so only two months after that decision was handed down. There was not even a hint or word of explanation in *Bonny* as to why *Belcher* was allegedly being repudiated.

Appellant asserts that the language of Utah Code Ann. § 77-65-1 (1953), itself supports the notion that notice can be given before the information has been filed. If it were any other way, appellant asserts, the right to a speedy trial would mean little since the criminal process

could take a long time from the period when the complaint is filed to the period when the information is filed.

This argument overlooks many other provisions in the Code which prevent an excessive period from the time the complaint is filed to the time the information is filed. Utah Code Ann. § 77-12-14 (1953), provides that a defendant must be taken before a magistrate "without unnecessary delay." Utah Code Ann. § 77-15-5 (1953), sets out strict rules governing postponements at a preliminary hearing. After the preliminary hearing and commitment (Utah Code Ann. § 77-15-19, 20, 23 (1953)), the district attorney has only 30 days to file an information or he is in contempt of court. Utah Code Ann. § 77-17-1 (1953). In addition, every defendant has the general right to a speedy trial. Utah Code Ann. § 77-1-8(6) (1953). These provisions, in conjunction with Utah Code Ann. § 77-65-1 and 2 (1953) for prisoners, provide adequate safeguards to guarantee the right to a speedy trial. Since other provisions in the Code adequately provide for a speedy trial, appellant's assertion that this right can *only* be meaningful if a § 77-65-1 request can be filed before an information is clearly erreoneous.

It is also true that the majority of courts in other states have not followed appellant's interpretation of similar "final disposition" statutes. In *State* v. *Coffey*, 438 S. W. 2d 167 (Mo. 1969), the defendant-prisoner was brought before a magistrate on July 18, 1966, to answer a complaint charging him with larceny. He was granted preliminary hearing on June 14, 1967. Defendant claimed

that he was denied the right to a speedy trial and that if counsel had been provided when requested, he could have taken advantage of the Missouri "180-day rule", §§ 222.080 and 222.100, R. S. Mo. 1959, V. A. M. S., which is very similar to Utah Code Ann., §§ 77-65-1 and 2 (1953). The court rejected this contention saying:

> "The constitutional right to a speedy trial has no application until a criminal *prosecution* is commenced. The constitutional provisions invoked contemplate a pending *charge* and not merely a pending complaint, which represents the mere possibility that a criminal charge will be filed." (Original emphasis.) *Id.* at 171.

The court went on to explain that the above statute and the Sixth Amendment right to a speedy trial apply only *after an indictment or information is filed.* Even though denial of an immediate preliminary hearing was illegal and destroyed the presumption of regularity of the proceedings, the lower court did not lose jurisdiction either under the statute or the Sixth Amendment because the information was not filed until July 5, 1967. At the time *Coffey* was decided, the statutory language had provided that the "180 Rule" applied only after an information or indictment had been filed.

However, the view that the right to a speedy trial does not inure until after the filing of an information was again upheld in this jurisdiction even after the Missouri legislature amended the statute (see Mo. R. S., Cumulative Supplement, 1971, p. 220) to include the word "com-

plaint." *State* v. *Bone*, 473 S. W. 2d 681 (Mo. 1971). See also *Harlow* v. *United States*, 301 F. 2d 361 at 366 (5th Circ. 1961), cert. den. 371 U. S. 814 (1962). C. F. *Edmiaston* v. *Neil*, 452 F. 2d 494 (6th Circ. 1971).

Appellant also claims that *State* v. *Wilson*, 22 Utah 2d 361, 453 P. 2d 158 (1969), stands for the proposition that even when notice was filed before the information the trial court was nonetheless held to have no jurisdiction because it had not brought the defendant to trial within the 90 day period. This exact issue was never raised in *Wilson*, and in any event, the subsequent *Belcher* case is the only case which has spoken directly to the issue of whether a request for final disposition can be filed before the information. *Belcher*, therefore, not *Wilson*, represents the precedent on this point.

Appellant complains that failure of the District Attorney's secretary to send out subpoenas was not "good cause shown" for the granting of a continuance under Utah Code Ann. § 77-65-1 (1953). Because of the secretary's oversight, the trial could not be held on February 2, 1971, as originally scheduled. The court, for its own reasons, declined to hold the trial on February 4, 1971, a Thursday. As a result the defendant was forced to stand trial on the 91st day, Monday, February 8, 1971, pursuant to Rule 6(a) U. R. C. P., since trial could not be held on Sunday, February 7, 1971. Appellant has not shown or claimed any adverse or prejudicial effect resulting from this delay of, at most, a few days. This Court

has said that when a person duly convicted comes before the court:

> ". . . it is not the proper function of the courts to be hypercritical in scrutinizing proceedings in an effort to discover some basis for relieving him from the penalty the law demands . . . because of some technical defect or irregularity which had no actual adverse effect upon his rights or the outcome of the phoceedings." *Brown* v. *Turner*, 21 Utah 2d 96 at 99, 440 P. 2d 968 at 970 (1968).

The delay complained of here resulted from mere inadvertence or every day human carelessness. It was neither "purposeful (n)or oppressive." *Ewell, supra*, p. 120. Appellant is asking this court to decide important legal and policy matters on the basis of secretarial error. This is a rather insubstantial reason for disturbing the trial court's traditional exercise of discretion in granting a continuance.

Since the facts of the case at the bar place the case well within the constitutional standard regarding right to a speedy trial, and within Utah case law, appellant should not be granted relief on the ground that the trial court lacked jurisdiction over the offense.

POINT II.

THE COURT BELOW WAS CORRECT IN DENYING APPELLANT'S PETITION FOR A WRIT OF HABEAS CORPUS BECAUSE THE INCRIMINATING EVIDENCE INTRO-

DUCED AT TRIAL WAS SEIZED UNDER A VALID SEARCH WARRANT.

Petitioner's suggestions that the search of his motel residence and any evidence obtained therefrom were illegal are totally unfounded.

The Fourth Amendment provides: "No warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U. S. Const. Amend. IV.

Floyd Ledford, an officer of nine years who at the time of the robbery was assigned to the police department robbery detail, appeared on October 13, 1970, before Judge Robert C. Gibson and in an affidavit in support of a search warrant, described the place to be searched (Colonial Village Motel, No. 5, 1530 South Main Street, Salt Lake City, Utah). The affidavit clearly stated the things to be seized (money and money bags, currency and change). The affidavit further stated that the items to be seized were stolen.

The victim of the robbery gave details of the robbery to Officer Ledford and later Thomas Danks was arrested. Items used in the crime were found on the person of Thomas Danks. The affidavit also stated there was probable cause to believe further items were to be found at the Thomas Danks residence at the Colonial Motel, No. 5. The robbery occurred at approximately 11:00 a.m., on October 13, 1970, and the warrant was obtained approximately two (2) hours later at 1:00 p.m.

Upon completion of the affidavit, Officer Ledford appeared before Judge Gibson and subscribed and swore to the affidavit as is required by Utah Code Ann. § 77-54-4 (1953), which states:

> "The magistrate must, before issuing the warrant, examine on oath the complainant, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them."

Whereafter, Judge Gibson being satisfied Officer Ledford's affidavit set forth the facts tending to establish the grounds of the application, or probable cause for believing that they exist, and believing their existence issued a warrant, as provided in Utah Code Ann. § 77-54-6 (1953), which requires:

> "If the magistrate is thereupon satisfied of the existence of the grounds of the application, or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his official title, to a peace officer in his county, commanding him forthwith to search the person or place named for the property specified and to bring it before the magistrate."

The search warrant was properly issued as provided by appropriate constitutional and statutory law.

The petitioner, by and through his attorney, moved the Third Judicial District Court of Salt Lake County to suppress any items of evidence taken from the defendant or his residence pursuant to a search warrant. The motion was made on the ground that the search warrant was

issued without probable cause. A hearing on the matter was set for January 11, 1971. The Honorable Bryant H. Croft, Judge, denied the motion on January 13, 1971 (R. 11). Later at the trial on February 8, 1971, the attorney again brought up the issue of probable cause for the issuance of the search warrant and the Honorable Gordon R. Hall, Judge, stated:

> "The Court finds that there was probable cause and as set forth in the affidavit. (T. 99 of February 8, 1971.)"

This Court in adjudicating the reasonableness of the search and seizure of evidence in *State* v. *Criscola*, 21 Utah 2d 272, 444 P. 2d 517 (1968), stated:

> "Due to the responsibility of the trial court in controlling the admissibility of evidence, and his advantaged position to pass on such matters, it is his prerogative to make this determination. For those reasons, his ruling should be indulged with a presumption of correctness and should not be disturbed unless it clearly appears that he was in error." 21 Utah 2d at 275.

There is no showing that the search warrant was not issued properly or that evidence was not seized legally. Furthermore, one city judge and two Third Judicial District judges have ruled that it was legal.

Petitioner cites several cases as authority for his claims. None of the cases cited by the petitioner are factually similar to the case at bar.

The first is *Nathanson* v. *United States*, 290 U. S. 41, 54 S. Ct. 11, 78 L. Ed. 159 (1933). In that case the

affidavit stated that the affiant had "cause to suspect and (did) believe that certain merchandise" was in the premises described.

In the case at bar, we are not concerned with an informer as in *Nathanson.* Furthermore, there was nothing in *Nathanson,* either in the affidavit or in the other proof introduced at trial, to suggest that any facts had been brought out to support a reasonable belief or even a suspicion. Accordingly, the Court held that "(m)ere affirmance of belief or suspicion is not enough." 290 U. S. at 47. However, in the case at the bar, there is much more than a "mere affirmance of belief or suspicion." The facts point out vividly that it was the victim of the crime who gave information concerning the crime. In addition, the petitioner was already under arrest and it was he who gave his address to the police. There was no informer involved and no need to establish his veracity or identity for probable cause to exist.

In *Aguilar* v. *Texas,* 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 223 (1964), the Court dealt with an Affidavit that stated only:

> "Affiants have received reliable information from a credible person and do believe that heroin . . . and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law." 378 U. S. at 109, 84 S. Ct. at 1511.

Again, this is factually distinguishable as we are not concerned with information from an informer. Neverthe-

less, the *Aguilar* test would still be satisfied under the facts of this case. Under *Aguilar*, an affidavit must contain underlying facts and circumstances that would allow a magistrate to independently judge the validity of the informant's conclusion. In the case at bar, the following facts are relevant: the victim had been interviewed by police; items used in the crime were found on petitioner; and petitioner's address was known to police. These facts, without more, would certainly provide an underlying factual basis that would indicate to a reasonable man that unrecovered items would be located at the suspect's residence. This satisfies the *Aguilar* standard.

Finally, petitioner cites *Spinelli* v. *United States*, 393 U. S. 410, 89 S. Ct. 589, 21 L. Ed. 2d 637 (1969), a narcotics case, in which an informer concluded that Spinelli was running a bookmaking operation. A warrant was thereupon issued. It should be pointed out that *Spinelli* has been narrowed to the point that appellant's assertions no longer correctly state the law. In *United States* v. *Harris*, 403 U. S. 573, 29 L. Ed. 723, 91 S. Ct. 2075 (1971), the majority stated its view by quoting the dissent in *Spinelli*:

> "A policeman's affidavit 'should not be judged as an entry in an essay contest,' *Spinelli*, *supra*, at 438 (Fortas dissenting), but rather must be judged by the facts it contains." 91 S. Ct. at 2080.

The Court also explained what constitutes a valid tip. First, the information received must be based on the personal and recent observations of the unidentified in-

formant. In the case at the bar, the information came directly from the victim, whose observations were, of course, personal and recent, and whose identity is known. Second, there must be factors showing that the information was gained in a reliable manner. The information in the case at the bar was gained through the victim and by means of a lawful search of the suspect. This is certainly more reliable than a "word of mouth" tip from an unnamed informer.

The *Harris* court distinguished *Spinelli* by pointing out that the affidavit in *Spinelli* failed to spell out how the informant came by his information. This is no problem in the case at the bar since an anonymous informant is not in the same category as a victim, who would certainly have first hand knowledge of the crime in a case of robbery. Also, information received first hand from the victim is much more than the "mere suspicion" and insufficient allegation condemned in *Spinelli.*

The *Harris* case emphasized the present approach of the court in search warrant cases:

> "In evaluating the showing of probable cause necessary to support a search warrant, against the Fourth Amendment's prohibition of unreasonable searches and seizures, we would do well to heed the sound admonition of *United States* v. *Ventresca,* 380 U. S. 102 (1965):
>
> > '(T)he Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the con-

> stitutional policy served, affidavits for search warrants, such as the one here, must be tested in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negitive attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.' 380 U. S. at 108. *Harris, supra* at 578."

Appellant's construction of the affidavit in question is the very sort of hypertechnicality which the Court condemned in both *Harris* and *Ventresca.*

None of petitioner's foregoing cases are factually similar or analogous to this action nor does his interpretation thereof represent the present view of the Court. On the contrary, cases cited by petitioner emphasize the factual and legal differences between these cases and the case at the bar.

There was certainly probable cause to arrest the defendant, and to search his residence with the warrant as issued by the magistrate. The magistrate's actions were proper and his determinations should not be limited but should be paid great deference by reviewing courts. In light of the foregoing discussion, petitioner's contentions are meritless.

CONCLUSION

Petitioner's allegations are without merit. Petitioner's first allegation that the ninety-day disposition requirement of Utah Code Ann. § 77-65-1 (1953), is not applicable on at least three grounds.

A. The ninety-day period begins to run from the date of the information and in this case had not expired.

B. The court for its own reasons continued the case as provided in Utah Code Ann. § 77-65-1 (1953).

C. According to petitioner's allegation, the ninetieth day would fall on a Sunday; therefore, the case would be extended till Monday when court could be held.

Petitioner's second allegation is meritless in that the search warrant was properly issued. The affidavit supporting the warrant stated probable cause to issue the warrant; therefore any evidence seized under the use of the warrant was admissible at the trial. Thus, neither statutory nor constitutional rights were violated. The respondent, therefore, requests that the trial court's judgment be affirmed.

Respectfully submitted,

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