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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN THADDEUS MARTINEK,
Plaintiff-Appellant,

vs.

DELMAR LARSON, Sheriff
Salt Lake County,
Defendant-Respondent.

Case No. 13975

BRIEF OF APPELLANT

Appeal from denial of Appellant's Petition for Writ of Habeas Corpus in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Marcellus K. Snow, Judge, presiding

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TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE	1
DISPOSITION IN THE LOWER COURT	2
RELIEF SOUGHT ON APPEAL	2
STATEMENTS OF FACTS	2
ARGUMENT:	
POINT I. WHERE APPELLANT WAS ARRESTED ON THE BASIS OF A GOVERNOR'S WARRANT ISSUED DEMAND FOR EXTRADITION BY THE GOVERNOR OF CALIFORNIA, EVIDENCE ESTABLISHING APPELLANT'S PRESENCE IN THE STATE OF UTAH ON THE DATE OF THE COMMISSION OF THE ALLEGED BURGLARY PROHIBITS FURTHER DETAINMENT OF APPELLANT	4
POINT II. AFFIDAVITS PRESENTED BY RESPONDENTS IN THE TRIAL COURT ATTEMPTING TO ESTABLISH APPELLANT'S PRESENCE IN CALIFORNIA AT THE TIME OF THE COMMISSION OF THE ALLEGED OFFENSE WERE HEARSAY EVIDENCE AND THEREFORE INADMISSIBLE	6

Page

POINT III. IN HABEAS CORPUS PROCEEDING, EVIDENCE ESTABLISHING THAT APPELLANT WAS NOT PRESENT IN THE DEMANDING STATE ON THE DATE OF THE COMMISSION OF THE ALLEGED OFFENSE CONSIDERED AGAINST NO OTHER COMPETENT EVIDENCE IS SUFFICIENT TO MEET THE REQUIRED BURDEN OF CLEAR AND SATISFACTORY PROOF 9

SUMMARY 10

CASES CITED

Biddinger v. Commissioner of Police of City of New York, 245 U.S. 128, 62 L. Ed 193, 38 S. Ct. 41 (1917) 5

Crabtree v. Measday, 508 P. 2d 1317 (N.M. App. 1973) cert den. 508 P. 2d 1302 7

Holton v. Lancomer, 504 P. 2d 872 (Hawaii 1972) 7

Hyatt v. New York en rel Corkran, 188 U.S. 691, 47 L Ed 657, 23 S. Ct. 456 (1903) 5, 9

Illinois ex rel. McNichols v. Pease, 207 U.S. 100, 52 L. Ed 121, 28 S. Ct. 58 (1907) 4, 10

Little v. Beckstead, 11 Ut 2d 270, 358 P. 2d 93 (1901) 4

Munsey v. Clough, 196 U.S. 364, 49 L. Ed 513, 25 S. Ct. 282 (1905) 10

People ex rel Stanton v. Meyering, 178 N. E. 122 (Ill. 1931) 7

Page

State ex rel Sine v. Pinnebaker,
9 NW 2d 57 (Minn. 1943) 7

STATUTES CITED

Utah Code Annotated, Section 77-56-10 (1953) 2

Utah Code Annotated, Section 77-56-13 (1953) 3, 4

Utah Rules of Civil Procedure, Rule 65B (f) 2

Utah Rule of Evidence, Rule 63 (1971) 8

OTHER AUTHORITIES CITED

51 American Law Reports,
Habeas Corpus Section 35 9

Wigmore on Evidence, Section 1709 7

IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN THADDEUS MARTINEK, *Plaintiff-Appellant,* vs. DELMAR LARSON, Sheriff Salt Lake County, *Defendant-Respondent.*	Case No. 13975

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

JOHN THADDEUS MARTINEK, appellant, appeals from the denial of a petition for a writ of habeaus corpus by the Third Judicial District Court, Salt Lake County, State of Utah, the Honorable MARCELLUS K. SNOW, Judge, presiding.

DISPOSITION IN THE LOWER COURT

On January 24, 1975, a petition for a writ of habeas corpus filed by JOHN THADDEUS MARTINEK was denied by the Honorable MARCELLUS K. SNOW, Judge.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the denial of the petition for a writ of habeau corpus by Judge Snow and discharge of JOHN THADDEUS MARTINEK from the custody of the Salt Lake County Sheriff.

STATEMENT OF FACTS

This appeal is brought on the basis of Utah Code Annotated Section 77-56-10 which provides that a person arrested upon a governor's warrant for extradition shall be given the opportunity to apply for a writ of habeas corpus to test the legality of the arrest, and, pursuant to Utah Rules of Civil Procedure, Rule 65B (f) which provides for habeas corpus relief whenever it appears to the appropriate court that any person is being unjustly imprisoned or otherwise restrained of his liberties. JOHN THADDEUS MARTINEK was arrested in Salt Lake City on a complaint of being a fugitive from justice from the State of California. He

was charged with having committed a burglary on April 24, 1973. A complaint was filed in Salt Lake City Court, the Honorable Robert C. Gibson, Judge presiding, on the grounds that Mr. Martinek was a fugitive from justice pursuant to *Utah Code Annotated Section* 77-56-13. This complaint was subsequently dismissed and Mr. Martinek was bound over to the Third District Court of Salt Lake County. Mr. Martinek was arraigned on a governors warrant before the Honorable Jay E. Banks, Judge, where upon he filed a petition for a writ of habeas corpos in the Third District Court of Salt Lake County, for the State of Utah.

On January 24, 1975, the Honorable Marcellus K. Snow, convened the hearing on Mr. Martinek's petition for writ of habeas corpus. Mr. Martinek introduced the testimony of Mr. Gary R. Murphy of Salt Lake City who stated that Mr. Martinek had worked for him as a milk delivery man in Salt Lake City from approximately April 3, 1973 to June 2, 1973.

Also, admitted at trial were certain affidavits offered by the County attorney which attempted to show that Mr. Martinek was in Shasta County, California on or about April 24, 1973 at which time an alleged burglary occurred. Timely objection was raised to the admission of these affidavits on the basis that they were hearsay evidence and therefore inadmissible. This objection was overruled and the petition for a writ of habeas corpus was then denied.

ARGUMENT

POINT I

WHERE APPELLANT WAS ARRESTED ON THE BASIS OF A GOVERNORS WARRANT ISSUED UPON DEMAND FOR EXTRADITION BY THE GOVERNOR OF CALIFORNIA, EVIDENCE ESTABLISHING APPELLANT'S PRESENCE IN THE STATE OF UTAH ON THE DATE OF THE COMMISSION OF THE ALLEGED BURGLARY PROHIBITS FURTHER DETAINMENT OF APPELLANT.

The Utah Supreme Court has recognized a person's right to test the validity of an extradition proceeding through a writ of habeas corpus and to challenge whether the statutory requirements have been met. *Little v. Beckstead,* 11 Ut 2d 270, 358 P.2d 93 (1961). *Utah Code Annotated* Section 77-56-13 requires that a person arrested pursuant to a governor's warrant be detained only if that person has "fled from justice."

This statutory language places the burden on the demanding state to prove that the person who they demand is, in fact, a fugitive from the laws of that state. Justice Harlan stated this view in *Illinois ex rel. McNichols v. Pease,* 207 U.S. 100, 112, (1907) by these words:

"When a person is held in custody as a fugitive from justice under an extradition warrant, in proper form, and showing upon its face all that is required by law to be shown as a prerequisite to its being issued, he would be discharged from custody unless it is made clearly and satisfactorily to appear that he is a fugitive from justice. Under the United States Constitution (Article IV, Section II, Par. II.)

The definition of the phrase "fugitive from justice" then becomes of prime importance in determining whether a person can be extradited. In *Hyatt v. New York ex rel. Corkran*, 188 U.S. 691 (1903), the Supreme Court clearly held that one who was not within a state when the crime was committed cannot be deemed a fugitive. Further, the only evidence which can be received in a habeas corpus proceeding or extradition is such evidence which tends to prove that the accused was not in the demanding state at the time the crime is alleged to have been committed. *Biddinger v. Commissioner of Police of the City of New York*, 245 U.S. 128 (1917).

The tradition that a person need not be subject to extradition proceedings has been firmly ingrained into our laws since the framing of the United States Constitution. In the case at hand, the testimony at trial establishes proof that Appellant was not in Shasta County California at the time of the alleged burglary and had left Shasta County almost three weeks prior to the commission of the alleged burglary. There was

no admissable evidence that he was in California on the date in question. Consequently, failure to prove that appellant was a "fugitive from justice" under the most traditional viewpoint requires that appellant be discharged from custody.

POINT II

AFFIDAVITS PRESENTED BY RESPONDENTS IN THE TRIAL COURT ATTEMPTING TO ESTABLISH APPELLANT'S PRESENCE IN CALIFORNIA AT THE TIME OF THE COMMISSION OF THE ALLEGED OFFENSE WERE HEARSAY EVIDENCE AND THEREFORE, INADMISSIBLE.

At common law, an essential feature of the hearsay rule is the right to cross examine, or have the opportunity to do so, any evidence which is brought against an accused. Although taken under oath, an affidavit denies an accused the right to cross-examine the witnesses against him because the accused is afforded no opportunity to do so. In fact, by definition, an affidavit is taken without notice to the opposing party. Even if notice was given and an accused was afforded the opportunity to cross-examine the affidavit, the hearsay rule would still not be satisfied unless the officer before whom the oath was taken was one impowered by law to supervise and direct the procedure

of taking the testimony. See Wigmore on Evidence, Section 1709.

Traditionally courts have shown distaste for affidavits as competent evidence at trial. In *State ex rel Sine v. Pinnebaker*, 9 N.W. 2d 257 (1943), the Minnesota Supreme Court refused to admit ex parte affidavits into evidence on the grounds that they were hearsay. More recently, other courts have denied admission to affidavits absent a statutory provision allowing for such. *Crabtree v. Measday*, 508 P.2d 1317, (1973), *Holton v. Lancomer*, 504 P.2d 872 (1972).

The Illinois Supreme Court considered a case parallel to the case at issue here. In *People ex rel Stanton v. Meyering*, 178 N.E. 122 (1931), accused was arrested in Chicago on a traffic violation whereupon a gun was discovered in a storage area of the car. The gun was the same gun which had killed a man in a bar in Wisconsin eight days prior to this arrest. A governor's warrant was issued to extradite accused and accused filed a petition for a writ of habeas corpus. At the proceeding, the prosecution presented a statement signed by the bartender in Wisonsin which stated that he had identified accused's picture as the man he'd seen in his bar on the day of the murder. Accused brought in witnesses, one of whom was his mother, who testified that accused was in Chicago on the day in question. In the face of this testimony, the Illinois court discharged the accused from custody because the evidence against accused was too remote to warrant

extradition. The statement by the bartender was not admitted because it was not taken under oath and it was not subject to cross-examination. Because the statement was hearsay, it was of no probative value and could not stand in the face of the uninpeached and uncontradicted testimony of the two witnesses.

Similarly in the case at hand the evidence is too remote to afford extradition. The only connection between accused is the affidavit of William Terry Hanlan who says that accused sold stolen property to him. There is no evidence offered to support this statement or to corroborate Hanlan's remarks. It is simply a naked exclamation on the part of a person not before the Court that accused should be brought back to California. A person living in Utah should be afforded the peace of mind that Utah Courts will not allow its citizens to be abruptly arrested and taken to another state for an alleged offense without first giving due consideration to the facts as they are charged.

Hearsay is defined by the Utah Rules of Evidence, Rule 63, as "an extrajudicial statement which is offered to prove the truth of the matter stated." The affidavits admitted by the trial court in this case are attempts to prove that accused was in Shasta County, California on the date of the alleged burglary. There is no evidence that accused was in California other than the affidavit of the person who had possession of the stolen property. There was no connection between

accused and the person who claimed that a sale was made. Hearsay of this type is inadmissible as evidence.

POINT III

IN A HABEAS CORPUS PROCEEDING, EVIDENCE ESTABLISHING THAT APPELLANT WAS NOT PRESENT IN THE DEMANDING STATE ON THE DATE OF THE COMMISSION OF THE ALLEGED OFFENSE CONSIDERED AGAINST NO OTHER COMPETENT EVIDENCE IS SUFFICIENT TO MEET THE REQUIRED BURDEN OF CLEAR AND SATISFACTORY PROOF.

Issuance of a governor's warrant of extradition is prime face evidence that extradition is appropriate. *Hyatt v. New York ex rel. Corkran,* supra. In effect, this raises a rebuttable presumption that accused was in the demanding state at the time of the commission of the crime. There has been confusion in the courts over what the proper burden of proof should be to rebut this presumption.

In the United States Courts, and in many state courts, the rule has been established that in order to secure the release of a person held for extradition, accused must "clearly and satisfactorily" show that the accused is not a fugitive from justice. See 51 American Law Reports, Habeas Corpus Section 35. This stand-

ard can be traced back to *Illinois ex rel McNichols v. Pease*, supra, where the United States Supreme Court first enunciated the "clear and satisfactory" standard in this type of proceeding.

It has been stated by the courts that contradiitory evidence of absence from the demanding state at the time of the alleged crime is not sufficint to secure the discharge of a person held for extradition. *Munsey v. Clough*, 196 U.S. 364 (1905). However, where there is no competent evidence opposing accused's evidence that he was not in the demanding state, the court has no choice but to discharge the accused. As has been shown, the affidavits against accused in the case at hand are hearsay evidence and, therefore, are inadmissible in a proceeding of this nature. In order to meet the "Clear and satisfactory" standard of proof, all that accused need do is to offer some evidence that he was not in California on the date of the commission of the alleged burglary. The evidence that accused has presented in this case clearly and satisfactorily proves his presence in Utah on the date in question.

SUMMARY

Appellant respectfully submits that the appellant has successfully proved that he was in the state of Utah on the date of the commission of the offense in California and that the affidavits offered as evidence against him are not admissible. As a protection of the residents of Utah from undue harrassment and to pre-

vent abuse of the extraordinary power held by state executive authorities in this area, courts should require sufficient proof before extradition is granted. Extradition is not automatic upon the issuance of a governor's warrant. Appellant respectfully submits that the petition for a writ of habeas corpus be granted and that he be discharged from the custody of Salt Lake County Sheriff.

Respectfully submitted,

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