1-22-1970

Civil Service Commission v. Doyle

PRINGLE, J.

NO. 24440

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

THE CIVIL SERVICE COMMISSION OF THE STATE OF COLORADO,	)	Error to the District Court of the City and County of Denver State of Colorado
Plaintiff in Error,	)	
vs.	)	
CORTLANDT E. DOYLE,	)	HONORABLE NEIL HORAN Judge
Defendant in Error.	)	

BRIEF OF PLAINTIFF IN ERROR

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January, 1970.

I N D E X

TABLE OF CASES CITED

OTHER AUTHORITIES CITED

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BRIEF OF PLAINTIFF IN ERROR

INTRODUCTORY STATEMENT

The Plaintiff in Error was the Defendant in the trial court and will be referred to as the "Commission"; the Defendant in Error was the Plaintiff in the trial court and will be referred to as the Plaintiff or by name, i.e., "Doyle". Any references to the record on error will be identified by folio numbers in parentheses.

STATEMENT OF THE CASE

The Plaintiff, Doyle, was an employee of the Industrial Commission of the State of Colorado in the capacity of principal

clerk. On February 9, 1965, charges were filed against him by the Industrial Commission with the Civil Service Commission and he was suspended from his duties pending determination by the Commission. Having been relieved of his actual duties on the prior February 2, 1965, and placed on leave, his leave status was terminated on February 9. Pursuant to his rights as a certified employee, Doyle requested a hearing before the Commission regarding the facts and circumstances surrounding his dismissal. At Doyle's request a Bill of Particulars was filed with the Commission by the appointing authority indicating that the gravamen of the charges against Doyle was that he struck a fellow employee in anger, had struck other employees, and had generally failed to conduct himself in a manner consistent with good personnel practices. Upon hearing of the charges, evidence was introduced by the appointing authority and Doyle, and the material issues of fact were contested at the hearing before the Commission.

After taking the matter under advisement, the Commission on April 26, 1965 ruled in favor of the appointing authority and upheld Doyle's dismissal. The hearing before the Civil Service Commission was reported by one, Phillip B. Bryant.

Subsequent to the decision of the Commission, Doyle appealed the decision of

the Commission to the District Court in and for the City and County of Denver, State of Colorado, in Action No. B-83655. An order was entered by the lower court upon Doyle's application directing the Commission to show cause within twenty days of receipt of the order why its order should not be vacated and to lodge with the court the record of the proceedings before the Commission within thirty days. (ff. 12-13) Pursuant to said order issued by the district court, the Civil Service Commission undertook to have the reporter, Phillip B. Bryant, prepare a transcript for certification to the district court. An extension of time was sought by the Commission and granted by the district court within which to lodge with the Clerk of the Court the record of the administrative proceedings. However, because of certain difficulties with the reporter the transcript was not timely prepared nor filed with the district court within the extended time but was ultimately filed with the district court after the date set in such extension. Doyle then filed with the court a Motion for Default Judgment, seeking such relief on the ground that the Commission having timely failed to lodge the record with the trial court the court had nothing to review. (ff. 33-34) Hearing was had on Doyle's Motion and the district court dismissed the proceedings before it and ordered Doyle reinstated on the basis of the failure of

the Commission to timely file the transcript. (ff. 156, 157-159, 160-165)

That decision of the district court was appealed to the Colorado Supreme Court in Action No. 22027, and the Colorado Supreme Court, after considering the matter on briefs and oral argument, reversed and remanded the case for consideration on the record that had been filed with the district court.

On remand in the district court Doyle for the first time raised the issue that the transcript filed with the district court was not a true and accurate transcript of the proceedings before the Commission. (ff. 249-253) As a result thereof the district court held an in limine hearing to determine whether or not a true and accurate transcript was before the court and on the basis of the sworn testimony of the original reporter found the transcript to be inaccurate and incomplete and ordered the Civil Service Commission to furnish a true, correct, and complete transcript. (ff. 267-268)

At this juncture, and for the first time, Doyle raised the issue that the original reporter, Phillip B. Bryant, was not a certified shorthand reporter and, therefore, under no circumstances could a proper record be certified to the district court by the Commission. Subsequently,

on the basis of a certified transcript of Mr. Bryant's testimony before the district court impeaching the transcript previously prepared by him, the Commission had a corrected transcript prepared, correcting all errors testified to by Mr. Bryant and thereupon recertified the transcript to the district court. The district court again held a hearing on the corrected and recertified transcript, at which hearing the Commission argued that all errors testified to by the reporter, Phillip B. Bryant, had been corrected as evidenced by the recertified transcript and that no showing of any error or omission prejudicial to Doyle had been made or remained in the corrected transcript.

On June 30, 1969, the district court for the second time held that the transcript as corrected and augmented remained not a true and accurate or complete transcript of the proceedings before the Commission and further that the reporter, Phillip B. Bryant, could not legally certify the said transcript since he was not a certified shorthand reporter, and the lower court then ordered that the case be remanded to the Civil Service Commission with orders to vacate the order of the Commission upholding Doyle's dismissal and to reinstate him in his previous position with back pay from February 2, 1965 to the date of reinstatement, together

with all other rights of employment. (ff. 363-365)

The Commission timely filed a Motion for New Trial (ff. 382-385) which was duly argued and denied by the lower court, (f. 399) and it is the order of the district court of June 30, 1969 which the Commission now seeks to have reversed by this Court. A thirty day stay of execution was applied for by the Commission and granted by the district court on September 26, 1969. Subsequent thereto a Motion for Stay of Execution was filed with this Court and was duly granted.

SUMMARY OF ARGUMENT

I. The trial court erred in finding that the inaccuracies in the tendered amended transcript were of such substance as to prevent the court from adequately reviewing the proceedings before the Civil Service Commission.

II. The trial court erred in concluding that the Defendant failed to comply with the order requiring a true and accurate transcript to be furnished.

III. The trial court erred in finding that the amended transcript was not properly certified under law.

IV. The trial court erred in concluding that the existence of deficiencies in the record dictated a reversal of the Commission and a grant of the relief sought by the Plaintiff.

ARGUMENT

I.

THE TRIAL COURT ERRED IN FINDING THAT THE INACCURACIES IN THE TENDERED AMENDED TRANSCRIPT WERE OF SUCH SUBSTANCE AS TO PREVENT THE COURT FROM ADEQUATELY REVIEWING THE PROCEEDINGS BEFORE THE CIVIL SERVICE COMMISSION.

Following the order of this Court in the previous appeal, Action No. 22027, reversing a previous decision of the trial court and remanding the case for full hearing on the merits, the Plaintiff, Doyle, for the first time raised the issue that the transcript filed with the trial court was not a true and accurate transcript of the proceedings before the Commission. The only errors in the transcript which were brought to the trial court's attention are those which were elicited from the testimony of the reporter, Phillip B. Bryant (ff. 554-698). A review of the errors or inaccuracies referred to clearly reveals that they were inconsequential and would have had no significant affect

upon the total impact of the transcript as a whole, and certainly offer no sound basis for a serious challenge of the transcript. The situation is similar to that presented in Foster v. Focht, 229 Pac. 445 (Okla), wherein complaint was made because of certain insignificant typographical errors in a published notice of sale in a foreclosure proceeding. The Court, however, refused to dignify the complaint, saying in its opinion:

> "Because, by typographical error in the printed notice of sale, one letter was omitted from a word, although its meaning was clearly apparent, and one line of type was inserted, the sufficiency of the notice is attacked by voluminous pleading and extensive verbiage in the plaintiff's brief, but the only purpose well served by the pleading of such trivial technicalities is to impose upon the time of a heavily burdened court and to record the absurdity of the pleader."

Although some obscure reference is made by Doyle and the reporter to other unspecified inaccuracies in the transcript, not only are they not delineated but there is no allegation as to how, if at all, these

might have affected the Plaintiff, Doyle. This was left to the imagination of the trial court. The Commission urges that it was incumbent upon the Plaintiff to come forward and establish just what the omitted or altered portions of the transcript were and how they affected the Plaintiff's claim of abuse of discretion and excess of jurisdiction. The Plaintiff apparently relied upon and the court based its order upon some amorphous claim that the transcript in some general way did not reflect every sound uttered during the Commission's hearing.

II.

THE TRIAL COURT ERRED IN CONCLUDING THAT THE DEFENDANT FAILED TO COMPLY WITH THE ORDER REQUIRING A TRUE AND ACCURATE TRANSCRIPT TO BE FURNISHED.

As the record before the trial court existed immediately before its entry of Findings of Fact, Conclusions of Law, Order and Judgment on June 30, 1969 (ff. 363-365), all errors and irregularities relied upon by the court in making its previous order of June 11, 1968 (ff. 267-268) had been corrected. No errors or omissions of which the court had been apprised remained uncorrected. Based upon this the Commission then certified the record of proceedings before the Commission as it then stood to be "true, correct

and accurate in every significant aspect." (Exhibits). Based upon this certification it was the duty of the trial court to review the action of the Commission based upon that record, unless the Plaintiff came forward with clear, direct and definitive evidence of additional omissions of inaccuracies of significant nature. Such were not presented by the Plaintiff.

III.

THE TRIAL COURT ERRED IN FINDING THAT THE AMENDED TRANSCRIPT WAS NOT PROPERLY CERTIFIED UNDER LAW.

Rule 106 of the Colorado Rules of Civil Procedure pursuant to which the Plaintiff was proceeding in the lower court provides in section (a)(4) as follows:

> "If the complaint is supported by an affidavit the order to show cause may be issued, or the court may forthwith order the inferior tribunal, or any person having custody of the records of the proceedings described in the complaint, to certify to the court at a specified time and place a transcript of the record and proceedings, or such portion thereof as the court may direct." (Emphasis supplied.)

As may be seen by the reading of the above portion of Rule 106, the district court orders the inferior tribunal to certify a record to it. Absent from the rule is any mention of or reference to the certificate of a stenographer or court reporter. It is the Commission itself and no other body or person that certifies the record.

The rule as gleaned from Rule 106 comports with the general rule held universally applicable to the certification of records by inferior tribunals to reviewing courts. The rule is well stated in Volume 4A, Corpus Juris Secundum, Appeal and Error, Section 1062 at page 1032 where it said:

> "As a general rule, a certificate of the stenographer cannot supply the place of the certificate required to be made by another officer, or, as the rule is otherwise expressed, the stenographer's certificate has no significance whatever unless the trial judge adopts it as his own."

The rule as stated in Corpus Juris Secundum is the rule that exists in Colorado and, as a matter of fact, the authority cited by the editors of Corpus Juris Secundum is in part the case of Big Kanawka Co. v.

Jones, 45 Colo. 381, 102 Pac. 171 (1909), wherein the following statement appears on page 383 of the Colorado Report:

> "The stenographer's certificate has no significance whatever. Of course, if it should be made to appear that the trial judge intended to adopt, and make his own, the certificate of the stenographer, another question would be presented. * * * There is no statement by the trial judge that he approved or settled this bill, and he alone is invested with that power and charged with that duty. He must not only sign and seal a bill, but he must also allow it; that is, find and certify that it is full, complete and correct; and it cannot become part of the record until all these acts are performed. * * *" (Emphasis supplied.)

The rule has likewise been enunciated in numerous other cases in numerous other jurisdictions. For example, in Elvis v. Morrow, 162 S.W.2d 892, 895 (Ark.), the following statement appears:

> "That authentication of the transcript by a court stenographer is unavailing is too well settled to require extended citation."

Likewise, in Bell v. Brigance, 229 Pac. 27 (Cal. 1924), the following statement appears:

> "The certificate of the judge is the only certificate required or provided for by section 953a, supra, (compare Colorado Rules of Civil Procedure, Rule 106, supra) and is the only authentication of the transcript to which this court will look. The reporter's certificate may have been of assistance to the judge below, being prima facie evidence of the testimony and proceedings (Code Civ. Proc. § 273), but it adds nothing to the authenticity of the transcript in question."

The same rule appears succinctly stated in the case of Lake Erie and Western Railroad Company v. Clark, 34 N.E. 587, (Ind. App.), as follows:

> "Without the authentication by the judge the stenographer's report of the evidence is entirely without force."

See also Thomsen v. Giebisch, et al., 186 Pac. 11 (Ore.).

From the above citations it would appear conclusively established that the

universal rule and the rule in Colorado is to the effect that it is the inferior tribunal that certifies a record and not the stenographer, absent some rule or provision of law explicitly providing to the contrary. There is no such rule in Colorado. The only statutes dealing with the subject at all are to be found in Chapter 126 of the Colorado Revised Statutes relating to shorthand reporters. Brief reflection will quickly reveal that the word "certified" as used in the phrase "certified shorthand reporter" in Chapter 126 does not equate with the word "certify" used in Rule 106 as part of the phrase "certifying a record". One has no necessary relationship to the other as may be seen from the statute itself in two revealing particulars. First, under Chapter 126 not all reporters in county courts need be certified but certainly county courts may themselves certify records. Second, the purpose expressed in the act creating the Board of Shorthand Reporters makes it clear that the intention is to regulate the profession of shorthand reporting for its betterment and not to establish qualifications of those persons who may make official certification of records to reviewing tribunals.

It is obvious also that before enactment of Chapter 126 records and bills of exception were commonly certified and that no "certified shorthand reporters" then existed pursuant to law.

Thus, in the instant case, the record was before the trial court and the court should have taken cognizance thereof. This Court in the earlier appeal in this very case, Action No. 22027, held that where a record is before a court pursuant to a review proceeding under Rule 106, the court must take cognizance of it and examine the same within the confines of Rule 106.

IV.

THE TRIAL COURT ERRED IN CONCLUDING THAT THE EXISTENCE OF DEFICIENCIES IN THE RECORD DICTATED A REVERSAL OF THE COMMISSION AND A GRANT OF THE RELIEF SOUGHT BY THE PLAINTIFF.

The trial court was correct when it stated in its "Findings of Fact, Conclusions of Law, Order and Judgment" of June 30, 1969 that "The Court, as a reviewing court, cannot supply evidence or cure imperfections in a reporter's transcript by indulging in guesswork or inferences or presumptions." The court then proceeded in a course which was contrary to this statement. Since all of the inaccuracies in the transcript, of which the court had been apprised were corrected, in order for the court to reverse the Commission and grant to the Plaintiff the relief prayed for, it had to indulge in guesswork or inferences as to the actual existence and character of other

inaccuracies in the transcript and presume error therefrom. The court further stated that by reason of the imperfections which it believed existed in the transcript it could not review the proceedings before the Commission as required by law, but in spite of this and, therefore, without any review of the record, the court proceeded to presume error therein.

If, for purposes of argument, we are to accept the trial court's finding to the effect that it did not have a complete and accurate transcript before it, then the trial court had but two alternatives--it could have dismissed the appeal, or, under proper circumstances, it could have ordered the matter remanded to the Commission for rehearing with proper record to be made. The trial court, however, took neither of these courses but rather entered an order which is wholly unsupported by law.

The Commission is empowered by the Constitution to determine in the first instance the application of all laws governing the classified service. Colorado Constitution, Article XII, Section 13. Review by the courts is limited to whether the factual matters in dispute have been resolved upon the basis of proper evidence and whether correct legal principles have been applied. These determinations are to be made for an examination of

the record made before the Commission. Colorado Rules of Civil Procedure, Rule 106 (a)(4), and CRS 1963, 3-16-5, Civil Service Commission v. Hazlett, 119 Colo. 176, 201 P.2d 616 (1948). Having in effect stricken the reporter's transcript the trial court did not have a complete record before it and, therefore, had nothing to consider. Clearly the trial court could not reverse the findings and order of the Commission on the basis of mere speculation and conjecture as to what transpired in the proceedings before the Commission. In Francis v. Heidel, 68 P.2d 583 (Mont.), the Supreme Court of Montana said:

> "The proposition that an appellate court will not put a trial court in error on a partial record is so fundamental that a citation of authority is hardly necessary. 'For a question to be reviewed, the record or the requisite part thereof must contain or set forth such matters relating thereto as will enable the court to determine whether or not there is error in respect thereto. The error complained of must be founded on, or borne out by, the record, which should be in such form as to enable the court to determine the error complained of.' (citations)"

This question was considered by the Colorado Supreme Court in Laessig v. May D & F, 157 Colo. 260, 402 P.2d 183 (1965). In that case an appeal was taken from a directed verdict but the record on appeal contained no reporter's transcript. This Court said:

> "It is axiomatic that a judgment entered by a court of general jurisdiction is presumed to be correct. A litigant suffering an adverse judgment has the burden of overcoming this presumption. The record presented to use for review contains nothing from which it is made to appear that the trial court erred. We must look to the record alone to determine whether the trial court acted properly in the premises. * * *
>
> "In the instant case we do not have the exact motion or any statement whatever concerning the grounds thereof appearing in the record. We are told that the evidence was heard 'to conclusion of plaintiff's case.' We do not know what the evidence amounted to."

The Colorado Supreme Court then affirmed the decision of the lower court in the Laessig case.

The Commission submits that the same rule applies when, as in the instant case, the appellate court has only a partial or an inaccurate record. And in applying this rule to the instant case-- the Civil Service Commission having jurisdiction over the subject matter--it is presumed that its findings and order are correct. The Plaintiff has the burden of overcoming this presumption, but could not have accomplished this if the record before the trial court was stricken.

The general rule in this regard is set forth in 4A C.J.S., Appeal and Error, Section 1104 at page 1114:

> "Generally, the failure to incorporate into the transcript or return all the evidence introduced or offered and excluded which is necessary to a decision on the errors assigned will cause the appeal or writ of error to be dismissed or quashed or, in the absence of errors on the face of the record proper, the judgment to be affirmed, or for cause shown, or, in the discretion of the court, the case may be remanded or certiorari may issue for the insertion of the omitted matter."

In Hinshaw v. Dyer, __ Colo. __, 442 P.2d 992 (1968), a case cited by this Court

in its Findings of Fact, Conclusions of Law, and Order and Judgment, the Colorado Supreme Court said:

> "This is not the situation where a plaintiff in error through no fault of his own is precluded from presenting an adequate record for our review of the matter. If such were the case the matter would no doubt be remanded for a new trial, where hopefully an adequate and proper record would be made."

Further support for the argument that this matter should be remanded to the Commission for a rehearing can be found in Geer v. Presto, 135 Colo. 536, 313 P.2d 980 (1957), and Commissioners v. Salardino, 136 Colo. 421, 318 P.2d 596 (1957). In each of these cases the record of proceeding before the administrative body was so imperfect as to preclude the trial court from basing a considered judgment thereon, and under such circumstances the trial court had ordered a reversal of the decision of the administrative body and had ordered the remission prayed for by the plaintiff. However, on appeal the Colorado Supreme Court reversed the decision and remanded the matter to the trial court with instructions to further remand it to the administrative body for rehearing, at which a proper record could be made.

By reversing the order of the Civil Service Commission in the instant case and by ordering the Commission to reinstate the Plaintiff with all benefits connected therewith on the basis of what the trial court found to be an incomplete record, this Court interposed itself as the fact finder without the benefit of having heard the testimony or the evidence presented at the initial hearing before the Commission.

CONCLUSION

It seems clear that the trial court erred in reversing the order of the Commission without consideration of the record before it, or if we assume the trial court's position, without a complete and accurate record before it.

The Commission urges that the record and transcript before the trial court was corrected and the corrected record properly certified by the Commission and that the most expeditious and equitable court would be for this Court to reverse and remand this matter to the trial court for a review on the basis of the certified record before it of the propriety of the action taken by the Commission. This would place the case in a stance most likely to result in a final disposition on the merits with at most one more resort to this Court. The Commission recognizes, however, that at

this point there may be a serious practical impediment to such a course of action. As appears from the statement filed by the District Court at some late stage of the interminable progress of this case before the trial court the reporter's transcript which has been the subject of the entire dispute herein was lost by the district court. The granting, therefore, of the above priority for relief would presumably be subject to the transcript being relocated.

Alternatively the Commission urges that this Court should reverse the order of the trial court and remand the matter to said court with instructions that it be further remanded to the Commission for rehearing, at which rehearing a full, complete, and accurate record can be made.

Respectfully submitted,

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