1-24-1984

Borg v. District Court of Second Judicial Dist.

SUPREME COURT, STATE OF COLORADO

Case No. 83SA510

ANSWER TO RULE TO SHOW CAUSE

KAREN BORG,

Petitioner,

vs.

THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT, for THE CITY AND COUNTY OF DENVER and JAMES C. FLANIGAN and PAUL A. MARKSON, JR., DISTRICT JUDGES in and for the CITY AND COUNTY OF DENVER in the SECOND JUDICIAL DISTRICT OF THE STATE OF COLORADO,

Respondents.

This is an original proceeding in which Karen Borg, as petitioner, sought issuance of a rule to show cause directed to the respondents requiring them to justify the district court orders relating to the filing of a direct information in the district court, following a finding by the county court, at a preliminary hearing, that probable cause had not been established. This court issued the rule to show cause as requested by the petitioner.

The respondents herewith make answer to the rule to show cause.

THE ISSUE FOR DETERMINATION

The questions which this court is called upon to determine is whether the Respondent Judge Flanigan abused his discretion in permitting the filing of the direct information in the district court following the county court finding of no probable cause.

No jurisdictional question is involved for the reason that Crim.P. 7(c)(2) provides that the district attorney, with the consent of the court having trial jurisdiction, may file a direction information if:

> A preliminary hearing was held in the county court and the accused person was discharged.

This Court has made it very clear that:

> When the county court dismisses a felony complaint after holding a preliminary hearing pursuant to Crim.P. 5(a)(4)(IV), the sole remedy available to the prosecution is requesting permission of the district court to file a direct information in accordance with Crim.P. 7(c)(2). Holmes v. District Court, 668 P.2d 11 (Colo. 1983).

We aver that the rule applicable to class 1 misdemeanors is identical to that which governs felony complaints. This is provided by Crim. P. 5(c)(4) where we find, inter alia, that with reference to class 1 misdemeanors, a defendant is entitled to a preliminary hearing and that:

> Dismissal of a complaint following a preliminary hearing shall not be a bar to a subsequent filing of a direct information in the district court charging the defendant with the same offense.

In this rule no mention is made of the necessity, for such filing, that consent of the district court be obtained. However, since such consent is essential to filing of informations generally, we believe it is required under this rule in order to harmonize it with Crim.P. 7(c)(2).

In the instant action the petitioner Karen Borg was charged with a class 1 misdemeanor, i.e., criminal negligent homicide.

The ultimate issue, accordingly, is whether in permitting the filing of the direct information the Respondent Judge Flanigan, and the district court, abused their discretion. The propriety of the action of the Respondent Judge Markson hinges upon the resolution of this question.

We respectfully aver that the district court and Judge Flanigan were not guilty of an abuse of discretion. We aver that the Respondent Judge Markson acted properly in refusing to overrule the decision of Judge Flanigan, and in staying proceedings pending determination, by this court, of the validity of the decision of Judge Flanigan, by resorting to this original proceeding.

THE FACTS

We agree that the pertinent ultimate facts are accurately set forth in the petition filed herein, which resulted in the issuance of the rule to show cause. In addition to the facts set forth in the petition, which incorporates therein the motion for leave to file a direct information and the attached statement of Matthew Donelan, we believe that a complete understanding of the question presented requires consideration of the evidence presented at the preliminary hearing. Petitioner asserts that at the preliminary hearing evidence was heard from

> numerous witnesses...including two eyewitnesses to the accident.

We have ordered a transcript of this evidence. The county court reporter has been unable to supply this transcript as of this

date. Accordingly, we ask leave to file this transcript, when it is received, as a supplement to this answer.

We direct this Court's attention to certain statements contained in the motion for leave to file a direct information. The motion makes a showing that:

> 3. On November 4, 1983, there was a Preliminary Hearing held in County Courtroom 9 H, before the Honorable Robert Crew and evidence was presented by the People to establish:
>
> (a) That the crime of Criminally Negligent Homicide occurred within the City and County of Denver, State of Colorado, on or about the 25th day of August, 1983, at 12:45 P.M.;
>
> (b) That Fatimah Hussin was walking in an unmarked crosswalk with the green light in her favor when she was struck and killed by an automobile;
>
> (c) That the automobile that struck the victim was driven by Karen E. Borg, the petitioner herein;
>
> (d) That the automobile driven by Karen E. Borg entered and passed through the intersection against a red light and at a speed of approximately 35 MPH;
>
> (e) That it was a clear, dry, warm day;
>
> (f) That the victim in the crosswalk was struck and carried by the defendant's automobile and was killed;
>
> (g) That the passenger in the defendant Borg's automobile gave a statement at the Preliminary Hearing consistent with his attached statement.

The passenger in the defendant Borg's automobile referred to in paragraph (g) above was Matthew Donelan. His statement, which is consistent with his testimony at the preliminary hearing established that:

1. Karen Borg, shortly after noon on August 25, 1983, was driving her automobile north on South University Boulevard and crossed east Evans, moving toward Asbury Avenue.

2. She was going "35 to 40 miles per hour".

3. She crossed Evans Avenue on a green light.

4. At that time "the light at Asbury was yellow for northbound traffic."

5. "When we were quarter of a block away from Asbury I noticed the light was red. I noticed the girl crossing the street."

6. "Karen mentioned the light was red and because by this time we were close to the intersection she made the decision to run the light. She sped up about 3 more miles per hour. At this time the girl was in our lane which is the left N.B. lane. The girl turned around just prior to impact. Karen didn't see the girl. I don't know why she didn't see her. She was clearly visible to me." (Page 1 of statement attached to the district attorney's motion; LL17-32).

7. "When the car struck the girl, Karen screamed and covered up her eyes, slammed on the brakes same time victim was struck." (Page 2 of statement, LL10-14, it also appears as a part of the petition herein).

The foregoing statements, admittedly given by the witness Matthew Donelan at the preliminary hearing, as a matter of law, were sufficient to establish probable cause to believe that the offense of criminal negligent homicide had been committed by the defendant Karen Borg. This evidence demonstrates that the county court erred in holding to the contrary.

The full statement of Matthew Donelan in and of itself was sufficient to warrant the exercise of discretion by Judge Flanigan, either to grant or to deny the motion for leave to file the direct information and respondent exercised that discretion by granting the motion.

This Court stated in Fabling v. Jones, 108 Colo. 144, 144 P.2d 1100, that:

> To have looked in such a manner as to fail to see what must have been plainly visible was to look without a reasonable degree of care and is of no more effect than if she had not looked at all.

This exact language has been quoted many times in later opinions of this court. See Clark v. Bunnell, 172 Colo. 32 (38), 469 P.2d 782.

In addition to this lack of "reasonable degree of care" the respondents were told that Karen Borg ran through a red light at which time she increased here speed about three miles per hour, prior to which she was going between 35 and 40 miles per hour, and that her brakes were not applied until the car actually struck the woman crossing University Boulevard with the green light in her favor. If this situation does not make a showing of

probable cause to establish criminal negligence, we are at a loss to understand a situation in which criminal negligence could arise. The situation at least required a trial by court or jury upon the issue of criminal negligence.

APPLICABLE CASE LAW

At this point we think it appropriate to direct this Court's attention to some basic rules governing the exercise of the discretion of the district court to grant or deny the request of the district attorney to file a direct information under the facts here present.

As already stated the only remedy available to the prosecution following a finding by the county court of no probable cause, is to ask leave to file a direct information in the district court.

> The requirement of court consent prescribed by Crim. P. 7(c)(2) 'implies a real application of discretion'. Holmes v. District Court, supra.

Within the guidelines of People v. Swazo, 191 Colo. 425, 553 P.2d 782, Judge Flanigan did exactly that. His consent to filing the information was an "informed consent", as required by Swazo.

In exercising this discretion Judge Flanigan was required ". . . to balance the right of the district attorney to prosecute criminal cases against the need to protect the accused from discrimination and oppression." Holmes v. District Court, supra; People v. Freiman, 657 P.2d 452 (Colo. 1983).

In granting the motion of the district attorney the respondent Flanigan said:

> "The court has reviewed the written motion of the District (attorney) to file directly in the District Court an information against Karen E. Borg, K-a-r-e-n E. B-o-r-g.
> There was a preliminary hearing in the Denver County Court. That Court found that probable cause against this defendant was not established."
> See transcript of this ruling, attached hereto as Exhibit A.

In ruling in that manner it affirmatively appears that Judge Flanigan found no "discrimination" or "oppression" on the part of the district attorney. There was no showing whatever other than that the district attorney in good faith believed that the county court erred as a matter of law in finding no probable cause, and that it was his duty to see to it that the loss of a human life because of the criminal negligence of the driver of an automobile should not go unnoticed by the law without a trial on the merits. This conclusion is inescapable if this court sees fit to examine the full transcript of the preliminary hearing, even though it was not presented to respondent Judge Flanigan.

This court has stated that:

> "Crim. P. 7(c)(2) does not require a showing of new or additional evidence". Holmes v. District Court, supra.

The existence of facts clearly establishing probable cause was made to appear before Judge Flanigan, and it was not necessary for the district attorney, in his motion for leave to file a direct information, to draw the conclusion that the county court erred as a matter of law.

A preliminary hearing is not the place for a "mini-trial" or a place where the credibility of witnesses is to be resolved by

the county court. Rex v. Sullivan, 194 Colo. 568, 575 P.2d 408. In Hunter v. District Court, 190 Colo. 48, 543 P.2d 1265 we find:

> "We hold that a judge at a preliminary hearing has jurisdiction to consider the credibility of witnesses only when, as a matter of law, the testimony is implausible or incredible. When there is a mere conflict in the testimony, a question of fact exists for the jury, and the judge must draw the inference favorable to the prosecution."

CONCLUSION

If the position taken by petitioner in this case were to be upheld by this court, the discretion of the district court to grant leave to file a direct information would be nullified in a case where the county court clearly erred as a matter of law in finding no probable cause. Since the only remedy available to the district attorney, in such a case, is to move the district court for leave to file a direct information, such a holding would deprive the district attorney of any remedy whatever.

For the reason that Judge Flanigan properly exercised his discretion, with knowledge of all pertinent facts, the actions of all respondents in this matter were proper, and the rule to show cause should be discharged.

Respectfully submitted January 24, 1984.

NORMAN S. EARLY, JR.
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Second Judicial District
State of Colorado

BY: O. Otto Moore

O. OTTO MOORE, Reg. No. 4851
Assistant District Attorney

BY: Brooke Wunnicke
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CERTIFICATE OF MAILING

I certify that on January 24, 1984, I placed in the United States mail, postage prepaid and properly sealed and addressed a a true and correct copy of the foregoing Answer to Rule to Show Cause, to:

James W. Macrum, Jr., Esq.
1860 W. Littleton Blvd.
Littleton, Colorado 80120

Brooke Wunnicke

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Unnumbered Criminal Action, Courtroom 16

REPORTER'S TRANSCRIPT

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff,

vs.

KAREN E. BORG,

Defendant.

The within matter came on as a matter of course at 8:30 a.m., Friday, December 9, 1983, before the HONORABLE JAMES C. FLANIGAN, District Judge.

This is a transcript of said matter of course.

FOR THE PEOPLE: BRYAN LYNCH
Deputy District Attorney

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Exhibit A.

* * *

(The within matter came on as a matter of course in open court, 8:30 a.m., Friday, December 9, 1983, as follows:)

THE COURT: Any other matters of course?

MS. LYNCH: Yes, your Honor, my name is Bryan Lynch, of the District Attorney's Office.

The People have a motion to file directly in District Court that I would like to tender.

THE COURT: The Court has reviewed the written motion of the District to file directly in the District Court an information against a Karen E. Borg, K-a-r-e-n E. B-o-r-g.

There was a preliminary hearing in the Denver County Court. That Court found that probable cause against this defendant was not established.

This is the exclusive right of the District Attorney to file an information in District Court under the circumstances with permission of the Court and the consent of the Court.

The Court signs the order permitting the filing. Now, is there a bond to be set?

MS. LYNCH: No, your Honor, the People will proceed by summons.

THE COURT: All right, anything else?

MS. LYNCH: No, your Honor.

* * *

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

I, Ruth M. Stadler (Winters), Certified Shorthand Reporter within the State of Colorado, Official Reporter of Courtroom 16 of the District Court at Denver, Colorado, do hereby certify that I caused my said shorthand notes to be reduced to typewritten form and that the foreing pages numbered 1 through 2, inclusive, constitute a full, true and correct transcript of my said shorthand notes so taken aforesaid.

IN WITNESS WHEREOF, I have hereunto set my hand this 14th day of January, 1984.

Ruth M. Stadler (Winters)