10-28-1982

Castro v. District Court of Tenth Judicial Dist.

SUPREME COURT, STATE OF COLORADO

Case Number 82-SA-412

ORIGINAL PROCEEDING, PUEBLO DISTRICT COURT, No.: 82-CR-17

ANSWER TO RULE TO SHOW CAUSE

BERNARD C. CASTRO, JR.,

Petitioner,

versus

THE DISTRICT COURT OF THE TENTH JUDICIAL DISTRICT AND THE HONORABLE RICHARD D. ROBB, ONE OF THE JUDGES THEREOF,

Respondents.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

RULES AND STATUTES

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STATEMENT OF THE ISSUES

There are two issues to be considered by the Court in this original proceeding. They are:

1. Whether this case has been properly filed as an original proceeding under the provisions of Rule 21, of the Colorado Appellate Rules, and,

2. Whether the trial court is required to grant a defendant credit for time spent in presentence confinement when imposing a sentence to the county jail on a misdemeanor conviction.

STATEMENT OF THE CASE

On November 20, 1981, Bernard C. Castro, Jr. was arrested following the death of Ruben A. Manzanares. Castro was subsequently charged with Second Degree Murder and bail was set at forty thousand dollars ($40,000.00) which was never posted.

On July 16, 1982, the petitioner was convicted of Criminally Negligent Homicide, a class one misdemeanor. On August 30, 1982, Castro was sentenced to serve twenty-four (24) months in the Pueblo County Jail and was not granted credit for the two hundred eighty-four (284) days of presentence confinement. A copy of the mittimus is attached to the Petition. (Petitioner's Exhibit C) A transcript of the sentencing hearing has been filed with the Clerk of this Court as part of the record. (Exhibit I)

On September 13, 1982, the petitioner filed a petition in this Court and the Rule to Show Cause was issued on September 16, 1982. This answer is filed in response to the Rule to Show Cause.

SUMMARY OF THE ARGUMENT

It is the respondents' contention that this is not an appropriate case for the exercise of this Court's original jurisdiction. The petition is in the nature of prohibition and has purportedly been filed pursuant to Rule 21 of the Colorado Appellate Rules. However, it does not comply with the requirements and limitations as set forth in that Rule.

It is well established that the purpose of original proceedings is to consider whether the trial court is proceeding without or in excess of its jurisdiction. It is also appropriate for this Court to review an abuse of discretion where an appellate remedy would be inadequate. Contrary to the allegations in the petition, the court had jurisdiction to sentence the petitioner, a defendant who had been convicted of criminally negligent homicide. It was also within the court's discretion to deny Castro credit for the time he spent in presentence confinement. Furthermore, there were postconviction as well as appellate remedies available to the petitioner which he chose not to pursue. Instead, he has attempted to circumvent those appellate procedures by filing a petition in the nature of prohibition in this Court. The respondents submit that this is an improper exercise of this Court's original jurisdiction.

As to the arguments raised in the petition, the respondents contend that it was within the sound judicial discretion of the sentencing court to determine whether credit for presentence confinement should be granted. The court considered all of the facts and circumstances concerning the case, imposed the maximum sentence, and denied credit for time spent in the county jail. This was a proper exercise of the court's discretion.

ARGUMENT

I. THIS COURT SHOULD NOT EXERCISE ORIGINAL JURISDICTION IN THIS CASE.

The court determined that it was appropriate to impose the maximum sentence in this case, and Castro was sentenced to serve twenty-four (24) months in the Pueblo County Jail. Credit for the time spent in presentence incarceration was denied. At the sentencing, the petitioner's attorney stated that he intended to "file a motion requesting that the mittimus reflect the two hundred eighty-four (284) days of presentence confinement." (See page six, Exhibit I.) There was no motion filed, nor was there any request for relief in accordance with Rule 35 of the Rules of Criminal Procedure. The petitioner has ignored these rules and by-passed available appellate remedies. Instead, he has filed a petition requesting this Court to exercise original jurisdiction in a case in which there is an adequate remedy at law. It is submitted that Rule 21 of the Colorado Appellate Rules is not applicable to these proceedings.

Rule 21(a) of the Colorado Appellate Rules states as follows:

> This rule applies only to the original jurisdiction of the Supreme Court to issue writs as provided in Section 3 of Article VI of the Colorado Constitution as amended . . . Relief in the nature of prohibition may be sought in the Supreme Court where the district court is proceeding without or in excess of its jurisdiction . . .

And, subsection (d) of the Rule sets forth the necessary allegations to be included in the petition, and concludes as follows:

> . . .When the action, threatened action or refusal to act is within the discretion of the district court, prohibition or mandamus shall not be a remedy, but the same may be a ground for appeal after final judgment . . .

In the instant case, the district court had jurisdiction to sentence the petitioner, was not proceeding in excess of that jurisdiction, and did not abuse its discretion by denying Castro credit for time spent in presentence confinement. Clearly, the relief to be sought by the petitioner is to appeal the final judgment rather than to invoke the original jurisdiction of this Court.

Relief in the nature of prohibition under Rule 21, Colorado Appellate Rules, has repeatedly been interpreted by the decisions of this Court. In the case of Stiger, Jr. v. District Court, 188 Colo. 407, 535 P.2d 508 (1975), this Court stated:

> . . . Prohibition is generally a preventive remedy and usually issues only to prevent the commission of a future act, rather than undo an act already performed. In most cases, correction of error is the function of appeal, a trial court having the jurisdiction to render a wrong as well as a right decision. (Case citations omitted)

In the recent case of Coquina Oil Co. v. District Court, 623 P.2d 40 (Colo. S. Ct. 1981), this Court concluded that the exercise of original jurisdiction was not appropriate, and discharged the rule. The Court stated that the principles with respect to the functions of original proceedings

are well-settled and familiar, and discussed these principles as follows:

> . . . An original proceeding is authorized to test whether the trial court is proceeding "without or in excess of its jurisdiction". C.A.R. 21(a); see Vaughn v. District Court, 192 Colo. 348, 559 P.2d 222 (1977). Such a proceeding is also appropriate to review a serious abuse of discretion where an appellate remedy would not be adequate . . . Tyler v. District Court, 193 Colo. 31, 561 P.2d 1260 (1977); Lucas v. District Court, 140 Colo. 510, 345 P.2d 1064 (1959). It is not a substitute for appeal. Vaughn v. District Court, supra; Alspaugh v. District Court, 190 Colo. 282, 545 P.2d 1362 (1976) . . .

In Prinster v. District Court, 137 Colo. 393, 325 P.2d 938 (1958) the Court cited the case of In re Packer, 18 Colo. 525, 33 Pac. 578, and said:

> The district court having jurisdiction of the defendant and jurisdiction of the offenses charged, when the application for consolidation was presented, it had jurisdiction to determine that application. If it erred in its conclusion, such error in no way affected its jurisdiction. In other words, it had power to make an erroneous order as well as a correct one.

The Court went on to say that the delay or expense of an appeal was not a sufficient reason for holding that an appellate remedy was not speedy or adequate.

In the case of Fitzgerald v. District Court, 177 Colo. 29, 493 P.2d 27 (1972), this Court determined that the entry of judgment in the trial court was an appealable order, and the show cause order was discharged. In Fitzgerald, supra, the petitioners made no attempt to appeal the judgment, but sought to substitute

a remedial writ in the nature of prohibition for an appeal. In finding that this was proper the Court stated:

> . . . Prohibition is not available where the party seeking it has adequate remedies at law, or where it will supersede the functions of an appeal. Aurora v. Congregation, 140 Colo. 462, 345 P.2d 385; People ex rel. Pratt v. Stevens, 33 Colo. 306, 79 P. 1018. A writ of prohibition will not issue to restrain a court from the entry of judgment or from the issuance of an order which is reviewable on appeal. Tomboy Gold Mines Co. v. District Court of Arapahoe County, 23 Colo. 441, 48 P. 537.

The same is true in the instant case. The sentence imposed upon Castro was a final judgment, which was an appealable order. Therefore, the petitioner had an adequate remedy at law which he has chosen not to pursue. He should not be allowed to raise issues by way of a remedial writ which were reviewable on appeal.

II. THE TRIAL COURT IS NOT REQUIRED TO GRANT A DEFENDANT CREDIT FOR TIME SPENT IN PRESENTENCE CONFINEMENT WHEN IMPOSING A SENTENCE TO THE COUNTY JAIL ON A MISDEMEANOR CONVICTION.

There is no constitutional right that the period of presentence confinement be credited against a sentence imposed for a criminal offense. People v. Dennis, 649 P.2d 321 (Colo. S. Ct. 1982); Godbold v. District Court, 623 P.2d 862 (Colo. S. Ct. 1981); People v. White, 623 P.2d 868 (Colo. S. Ct. 1981); People v. Martinez, 192 Colo. 388, 559 P.2d 228 (1977).

In the absence of a statute requiring the granting of credit for presentence confinement, it is within the sound discretion of the sentencing court to determine whether such credit against a sentence should be granted. People v. Reed, 190 Colo. 517, 549 P.2d 1086 (1976).

The question in this case is whether there is a statute which requires that a defendant sentenced to the county jail be granted credit for presentence confinement. Petitioner's reliance on C.R.S. 1973, 16-11-306, as amended, is misplaced, since that statute deals only with persons sentenced to the custody of the Department of Corrections for a felony offense. That statute requires the sentencing court to note the period of presentence confinement on the mittimus and requires the Department of Corrections to grant the defendant credit for that period against his sentence. People v. Dempsey, 624 P.2d 374 (Colo. Ct. App. 1981). Since Castro was not sentenced to the Department of Corrections, C.R.S. 1973, 16-11-306, as amended, is not applicable to this case.

For the same reason, C.R.S. 1973, 16-11-302.5, as amended, is inapplicable. That statute requires that a defendant sentenced to the Department of Corrections for a misdemeanor be granted credit for presentence confinement by the Department. Again, since Castro was not sentenced to the Department of Corrections, that statute is not involved in this case.

In the petition, it is alleged that the court denied credit for presentence confinement and "no authority exists for

the respondent to make such a determination". Castro's allegations continue with a statement that "the Department of Corrections and not the respondent is given statutory authority to deduct time spent in presentence confinement from the sentence". These allegations are not only misleading, they are inaccurate statements of the law governing this case. As has been stated herein, the statute referred to in the petition is inapplicable. In addition, the petitioner complains that the court lacked the authority to proceed as it did, but cites nothing in support of his argument that the court must grant credit for time on a misdemeanor sentence to the county jail. The petitioner failed to cite authority at the time of sentencing, subsequent to the sentence being imposed, and none is included in his petition. Clearly, his arguments are without merit.

C.R.S. 1973, 16-26-101, et. seq., as amended, governs the imposition of sentences to the county jail. There is nothing in that statute which mandates the granting of credit for presentence confinement. Absent such a statute, it was within the sound discretion of the trial court to decide whether Castro should be given credit for the period of presentence confinement. The court, therefore, did not exceed its jurisdiction, nor abuse its discretion in denying the petitioner credit for presentence confinement.

CONCLUSION

For all the reasons stated herein the respondents submit that the Rule to Show Cause issued herein be discharged.

Respectfully submitted,

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SUPREME COURT, STATE OF COLORADO

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CERTIFICATE OF MAILING

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Petitioner,

versus

THE DISTRICT COURT OF THE TENTH JUDICIAL DISTRICT AND THE HONORABLE RICHARD D. ROBB, ONE OF THE JUDGES THEREOF,

Respondents.

THIS IS TO CERTIFY that I, Robyn G. Toft, have mailed a true copy of the foregoing Answer to Rule to Show Cause to Mr. Alex Martinez, Deputy State Public Defender, 414 Thatcher Building, Pueblo, Colorado 81003 by depositing the same, postage prepaid, in the United States Mail on this 27th day of October, 1982.

Robyn G. Toft