3-7-1986

Blevins v. Tihonovich

SUPREME COURT, STATE OF COLORADO

Case No. 85 SA 390

ANSWER BRIEF
Appeal from the District Court of Pueblo County
Honorable PHILIP J. CABIBI, Judge

JAMES D. BLEVINS,

Petitioner-Appellant,

v.

DAN TIHONOVICH, Sheriff of the County of Pueblo,
State of Colorado,

Respondent-Appellee.

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I N D E X

CASES

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RULES

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INTRODUCTORY STATEMENT

This is an appeal from a district court's refusal to overturn a county court's determination of probable cause. Additional facts regarding the evidence presented at the county court's preliminary hearing are included in the second argument.

SUMMARY OF THE ARGUMENT

1. The district court did not commit error when it determined that it was without jurisdiction to reopen or reconsider the county court's determination of probable cause.

2. The county court did not abuse its discretion in refusing to allow the petitioner-appellant to call a witness at the preliminary hearing; the petitioner-appellant was attempting to turn the preliminary hearing into a mini-trial or a discovery tool.

ARGUMENT

I.

THE DISTRICT COURT DID NOT COMMIT ERROR WHEN IT DETERMINED THAT IT WAS WITHOUT JURISDICTION TO REOPEN OR RECONSIDER THE COUNTY COURT'S DETERMINATION OF PROBABLE CAUSE.

In issuing an order disposing of the petitioner-appellant's petition for a writ of habeas corpus, the district court determined that it was without jurisdiction to reopen or reconsider the county court's determination of probable cause, even if the method of attack were by habeas corpus (v. 1, p. 14). The district court was correct, anticipating the very recent case of White v. McFarlane, 85SA180 (Colo. Jan. 17, 1986). See also People v. Atkin, 680 P.2d 1277 (Colo. 1984); People v. District

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Court, 652 P.2d 582 (Colo. 1982).

The petitioner-appellant is not being deprived of any substantive rights by refusal to review the preliminary hearing. The writ of habeas corpus is a means of resolving the lawfulness of detention, but it has never been a permissible vehicle to review issues resolved by, or attack the judgments of, another court. See, e.g., Ryan v. Cronin, 191 Colo. 487, 553 P.2d 754 (1976). Unless one is detained without process or pursuant to a judgment that is totally void, habeas relief is not appropriate. Habeas corpus has been rejected as a means of challenging the sufficiency of evidence to hold a criminal defendant for trial. Oates v. People, 136 Colo. 208, 315 P.2d 196 (1957). Additionally, the petitioner-appellant here has a remedy to his alleged problem -- proceeding to trial to determine guilt or innocence. The petitioner-appellant also could have sought an original writ under C.A.R. 21. See White v. McFarlane, supra.

II.

THE COUNTY COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO ALLOW THE PETITIONER-APPELLANT TO CALL A WITNESS AT THE PRELIMINARY HEARING; THE PETITIONER-APPELLANT WAS ATTEMPTING TO TURN THE PRELIMINARY HEARING INTO A MINI-TRIAL OR A DISCOVERY TOOL.

The People, at the preliminary hearing, called one witness, Paul Jersin. Jersin testified that he was driving his car in

Pueblo during the afternoon of November 23, 1984 (v. 1, pp. 43-44). His girlfriend, Raeann Johnson, was his passenger (v. 1, p. 43). A car driven by the petitioner-appellant was swerving erratically, and Jersin testified that the petitioner-appellant first threw nails at his car (v. 1, pp. 44-45, 46-47). Then, from a distance of 1 or 2 feet, the petitioner-appellant fired a handgun in the direction of Jersin's car, but Jersin braked his car so as to avoid being hit (v. 1, pp. 48-49). Johnson, according to Jersin, had cried out that the petitioner-appellant was going to shoot (v. 1, p. 14, l. 23).

The counsel for petitioner-appellant, prior to the start of the preliminary hearing, stated, "Your Honor, I doubt if I would call anyone, and obviously if I don't sequester them I can't call them." (v. 1, p. 42, ll. 23-25). But, at the end of Mr. Jersin's testimony, the defense counsel attempted to call Raeann Johnston (sic) (v. 1, p. 72, ll. 12-13). Johnson was apparently then in the hallway (v. 1, p. 73, ll. 3-4). When the prosecutor protested that the preliminary hearing was not a discovery proceeding (v. 1, p. 74, ll. 11-12), the defense counsel said the basis relied on for calling her was that she was listed as a victim of one of the two counts and that there was no evidence as to her being in physical jeopardy (v. 1, p. 74, ll. 14-18).

The county court denied the request to call Johnson, stating that the evidence was sufficient and that the preliminary

hearing was not a mini-trial (v. 1, p. 75, ll. 12-21).

No error occurred here in the county court refusing to allow the petitioner-appellant to call one of the victims. The defense counsel did not articulate any valid reason for requiring Johnson's testimony, for clearly there was direct and nonhearsay evidence of an assault upon her, sufficient for a probable cause hearing. After having said no defense evidence would be presented, the defense counsel apparently saw the other victim in the hallway and he apparently wished to exercise an opportunity at discovery. While a judge can't, for example, completely curtail cross-examination of a witness at a preliminary hearing, see Kuypers v. District Court, 188 Colo. 332, 534 P.2d 1204 (1975), a "defendant has no constitutional right to unrestricted confrontation of witnesses and to introduce evidence at a preliminary hearing." Rex v. Sullivan, 194 Colo. 568, 571; 575 P.2d 408 (Colo. 1978).

A preliminary hearing's purpose is to require sufficient evidence presented to justify a reasonable judge or jury, trying the facts, in finding each element of the crime charged. People v. Treat, 193 Colo. 570, 568 P.2d 473 (1977). A preliminary hearing is a screening device; it is not supposed to turn into a mini-trial or a discovery hearing. See People v. Quinn, 183 Colo. 245, 516 P.2d 420 (1973); People v. Treat, supra.

The petitioner-appellant here did not demonstrate or allege

any necessary or exculpatory reason for having Ms. Johnson testify. If this honorable court reaches and addresses this issue, it should determine that no error took place under the circumstances here.

CONCLUSION

For the reasons stated above, this honorable court should affirm the determination of the district court that the county court has not been shown to have committed error.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within ANSWER BRIEF upon all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado this 7th day of March 1986, addressed as follows:

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Irene R. Hansen

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