4-15-1971

Civil Service Commission v. Doyle

LEE, J.

SUPREME COURT

STATE OF COLORADO

NO. 24440

THE CIVIL SERVICE COMMISSION OF THE STATE OF COLORADO,

Plaintiff in Error,

vs.

CORTLANDT E. DOYLE,

Defendant in Error.

PETITION FOR REHEARING
ON
BEHALF OF DEFENDANT IN ERROR

Error to the District Court of the City & County of Denver

Honorable Neil Horan, Judge

OPINION BY MR. JUSTICE HODGES
EN BANC
CHIEF JUSTICE PRINGLE AND
MR. JUSTICE DAY, NOT PARTICIPATING.

Duke W. Dunbar, Attorney General,
John P. Moore, Deputy Attorney General,
Robert L. Hoecker, Assistant Attorney General,

Attorneys for Plaintiff in Error.

Samuel J. Eaton,

Attorney for Defendant in Error.

COMES NOW the Defendant in Error, Cortlandt E. Doyle, by his attorney, Samuel J. Eaton, and petitions this Honorable Court for a rehearing pertaining to the Court's Opinion dated March 29, 1971. That Opinion reversed the judgment of the Trial Court and remanded the case directly to the Civil Service Commission of the State of Colorado.

Oral argument was had on this case on August 14, 1970. The Court sitting en banc; Chief Justice Pringle and Justices Lee, Kelley, McWilliams, Hodges and Groves heard the case. Since that time, however, Justice McWilliams is no longer on the bench and Justice Erickson has come upon the bench.

Defendant in Error is in agreement that on two occasions, the Trial Courts have held that the Defendant in Error should be reinstated to his position by the Civil Service Commission. The first appeal to this Court concerned the sole issue of whether or not an administrative body, by failure to comply with an Order of Court, could be in default and judgment entered against it. That issue was never directly answered by this Court. In the second appeal, to which this petition is directed, the main issue presented was whether or not an incorrect and improperly certified transcript of an administrative agency should be stricken from the record upon the evidence submitted, and whether or not the appealing Plaintiff should then prevail and be afforded the relief for which he has prayed.

In reversing the trial court the second time, the Court has overlooked or misapprehended the following items:

1. The Court, on page 3 of its Opinion, points out that the "lost" transcript of the testimony before the Civil Service Commission was filed with this Court long after oral argument, and not until December 8, 1970. The Court overlooked that at the time of oral argument, the record on appeal was not complete in that the transcript has been designated as part of the record, as Exhibit A, and appellant had failed to include this Exhibit as a portion of the record. Neither the Defendant in Error nor his attorney had an opportunity to examine or inspect this vital document at any time during the course of this appeal.

II. The Court on page 3 of its Opinion points out that it has determined that the Order of the Civil Service Commission must be sustained and therefore, it would be an useless gesture to remand the case to the trial court. If the Court will examine the Order of the Civil Service Commission dated April 26, 1965, the Court will find that that Order contains no findings of fact or conclusions by said Commission upon which a reviewing court can pass upon the action of the Commission. Greer v. Presto, 135 Colo. 536, 313 P. 2d 980; Commissioners v. Salardino, 136 Colo. 421, 318 P. 2d 596 and Hinshaw v. Dyer, 442 P. 2d 992.

The rule as set down by this Court has been and now is (till this Opinion) to the effect that without findings of fact and conclusions on the part of the administrative agency, there is nothing for the reviewing court to examine in order to determine whether there is competent evidence to sustain the action of the agency.

The action of this Court by remanding directly to the Civil Service Commission, deprives Defendant in Error of a substantial element, and an important part of his case in that this ruling is tantamount to depriving the Defendant in Error of his right to be heard and the taking of his property without due process of law.

III. As to the inaccuracy of the transcript known as Exhibit A, this Court has overlooked the fact that 70 pages of that transcript were never corrected, although the testimony in the case before the trial court is replete to the effect that those pages contained substantial errors of testimony. Twenty-nine pages of the transcript were only partially corrected by the Commission. Those examples set out on page 9 of this Opinion do not represent the testimony elicited from the reporter who took the testimony in the first instance. Of those numerous examples to which he specifically testified, whole questions and answers were omitted from the transcript and in many instances where the response would be in the affirmative or negative, those responses were omitted. Therefore, the presumption of the Court on page 10 is not correct, and the trial court's findings should prevail.

The Defendant in Error presented all of his objections to the accuracy of the transcript at the time of the hearing, which showed that there were approximately 96 incorrect pages; many of the pages containing one to four inaccuracies per page. Furthermore, it should be pointed out that trial court held pursuant to the law of this State that the Court could not supply the inaccuracies or correct them nor presume nor guess as to whether the articles in mistake were omitted. Hinshaw v. Dyer, supra.

IV. This Court has overlooked a primary element of law many, many times laid down by this Court itself, to the effect that the trial court, being the trier of fact, had the duty to determine what the facts actually were in case of conflicting evidence and to make all determinations of credibility. Baumgartner v. Tweedy, 143 Colo. 556, 334 P. 2d 586. Also, it is the function of the appellant court not to make factual determinations, but to review the evidence in light of the trial court's findings to determine whether this evidence is sufficient to support those findings. If they are, then such findings of fact are binding upon appeal. Ruston v. Centennial Real Estate and Investment Co., 166 Colo. 377, 445, P. 2d 64. The trial court made extensive findings in this regard.

V. By this Court ruling that an uncertified reporter taking testimony before an administrative agency does not affect the record on appeal is tantamount to holding that the mandate set out in Colorado Revised Statutes 1963 as Amended, 126-1-17 is without efficacy or effect. A ruling of this matter vitiates the intent and purpose of the shorthand reporter's statute. It should also be pointed out that the Civil Service Commission in its attempt to recertify the transcript did an impossible thing, in that the recertification was accomplished by a Commission composed of personnel entirely different than the Commission which heard the testimony. The Court in using Mr. Justice Doyle's special concurring Opinion in the case of Commission v. Continental, 143 Colo. 590, overlooked the fact that Mr. Justice Doyle's Opinion is a dissent from the ruling in that case, and therefore, is not authority nor the law of this State. Mr. Justice Doyle

states on pages 595 and 596

> "* * * Being of the opinion, however, that this Court has jurisdiction to decide the important issues and that it should do so now rather than to await a further trial and a further judgment of the trial court, I dissent from that part of the opinion which orders the district court to conduct a hearing and determine the issues.* * * " (Emphasis added).

VI. It is respectfully submitted that by this Court's reversal of the trial court's findings and judgment, this Court is violating the Defendant in Error's constitutional rights in that his property is being taken without due process of law, and in that, he is being precluded from proper presentation of his case, resulting in a denial of due process of law contrary to the Constitutions of the State of Colorado and the United States of America.

Respectfully submitted,

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