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No. 27654

IN THE SUPREME COURT OF THE STATE OF COLORADO

KENNETH H. BOTHAM, JR.,

Petitioner

vs.

THE DISTRICT COURT IN AND
FOR THE TWENTY-FIRST JUDICIAL
DISTRICT AND STATE OF COLORADO,
AND WILLIAM M. ELA, ONE OF THE
JUDGES THEREOF,

Respondents.

Edward A. Lipton
ORIGINAL PROCEEDING

PURSUANT TO RULE 21

COLORADO APPELLATE RULES

ROLLIE R. ROGERS
Colorado State Public Defender

JAMES F. DUMAS, Jr.,
Chief Deputy State Public Defender

EDWARD A. LIPTON
Deputy State Public Defender

ATTORNEYS FOR PETITIONER
1575 Sherman Street
Denver, Colorado 80203
Telephone: 892-2665

No. _____

IN THE SUPREME COURT OF THE STATE OF COLORADO

KENNETH H. BOTHAM, Jr.)	
)	
Petitioner,)	
)	<u>ORIGINAL PROCEEDING</u>
vs.)	
)	<u>PURSUANT TO RULE 21</u>
THE DISTRICT COURT IN AND)	
FOR THE TWENTY-FIRST JUDICIAL)	<u>COLORADO APPELLATE RULES</u>
DISTRICT AND STATE OF COLORADO,)	
AND WILLIAM M. ELA, ONE OF THE)	
JUDGES THEREOF,)	
)	
Respondents.)	

COMES NOW, KENNETH H. BOTHAM, Jr., Petitioner herein, by and through his attorneys, and respectfully requests this Honorable Court, pursuant to Rule 21, Colorado Appellate Rules, to issue a Writ of Prohibition to Respondent Court prohibiting said Respondent Court from Ordering the sale of Petitioner's assets in partial satisfaction of the costs of Petitioner's trial.

AND as grounds therefor, Petitioner, by and through his attorneys, states as follows:

I.

That Respondent Court has proceeded and is proceeding without or in excess of its jurisdiction, and that no other expeditious remedy exists.

II.

That the facts upon which Petitioner contends that Respondent Court is proceeding without or in excess of its jurisdiction are as follows:

1. That on November 8, 1975, the Defendant was arrested and charged with the crimes of Murder in Mesa County.

2. That on or about December 5, 1975, the Honorable County Court of Mesa County appointed the Office of the Public Defender to represent the Defendant on a partially indigent basis. (See Appendix A).

3. That during the months of November and December, 1976, the matter was tried by a jury in Mesa County and the jury returned verdicts of guilty with respect to each count. (The jury verdict was guilty to one count of First Degree Murder and guilty to three counts of Second Degree Murder.)

4. That during the course of the trial both the Prosecution and Defense subpoenaed witnesses from various places within and outside the State of Colorado and the Court has been billed substantial amounts of money to prosecute the Petitioner.

5. That the Petitioner has been sentenced to die as a result of the jury verdict on the charge of First Degree Murder.

6. The Petitioner has duly perfected his appeal to the Colorado Supreme Court wherein he alleges numerous errors including, inter alia, the refusal of the trial court to grant Petitioner's Motion for a Change of Venue and the refusal of the trial court to disqualify himself upon Petitioner's Motion for Disqualification. The Petitioner respectfully represents to this Court that he has a meritorious appeal from his conviction of First Degree Murder and Second Degree Murder in the within cause.

7. That the victim of the First Degree Murder was the Petitioner's wife who died intestate leaving surviving two minor sons, her parents and Petitioner.

8. In the within cause the District Attorney did not file a Motion requesting that the Court order the seizure and sale of Petitioner's property to apply on the payment of costs incurred herein. However, on or about March 1, 1977, the Respondent

Court, sua sponte, issued a Citation directed to the attorneys for the Petitioner and others to show cause why Petitioner's properties should not be delivered to the Sheriff of Mesa County for determination of Petitioner's obligations and sale of said properties. (See Appendix B).

9. That on or about March 31, 1977, Respondent Court issued an Order directed to the Sheriff of Mesa County, requiring the said Sheriff to seize the assets of the Petitioner and hold them for a period of thirty days to await the possible filing of other proceedings relative to those assets and at the conclusion of that thirty day period to sell the Petitioner's assets. (See Appendix C).

10. That Petitioner has been granted a Stay of Execution of the Respondent's Order directing the sale of Petitioner's assets pending the outcome of the present litigation. (See attached Appendix D).

11. That at the hearings conducted pursuant to Respondent's citation, (Appendix B), the Petitioner was not actually present, despite Counsel's request that the Respondent Order the Petitioner be produced.

12. That at the hearings conducted pursuant to Respondent Court's Order, the Petitioner's infant children were not represented by Counsel and Respondent did not appoint a Guardian Ad Litem to represent their interests.

13. That no representative of the estate of Petitioner's deceased wife was present or given notice of such proceedings.

14. That Respondent apparently ruled that the matter then before him was criminal in nature and that the Petitioner had no right to be present in contravention of Article II, Section 16 of the Colorado Constitution.

15. That Respondent apparently ruled that since the matter was not civil in nature but a part of an ongoing criminal case, the Petitioner's infant children had no interest or standing and the Respondent therefore declined to appoint a Guardian.

16. That C.R.S. 15-11-803 (1973) precludes Petitioner from recovering from the estate of his deceased wife when he is convicted of murdering her and mandates that any property held jointly would pass as if Petitioner pre-deceased his wife. C.R.S. 1973, 15-11-803 (1). Since there is no surviving spouse, the entire intestate estate passes to the issue of the Decedent. C.R.S. 15-11-103 (1) (a).

17. That the camera equipment and loading equipment referred to in Appendix C were owned jointly by Petitioner and his wife and at least one of the guns was owned by the Petitioner's wife.

WHEREFORE, KENNETH H. BOTHAM, JR., Petitioner herein by and through his attorneys, respectfully requests that this Honorable Court issue a Writ of Prohibition prohibiting the Respondent Court from Ordering the seizure and sale of assets without permitting Petitioner to be present at any hearing, without first determining the interest of the Petitioner and others and without appointing a guardian to represent the interests of Petitioner's infant children.

Respectfully submitted,

Rollie R. Rogers

ROLLIE R. ROGERS, Reg. No. 3741
COLORADO STATE PUBLIC DEFENDER
1575 Sherman Street
Denver, Colorado 80203
892-2661

Edward A. Lipton

EDWARD A. LIPTON, Reg. No. 2861
Deputy State Public Defender
518 Main, Room A
Grand Junction, Colorado 81501
243-9000

I hereby certify that a true and correct copy of the above and foregoing Original Proceeding Pursuant to Rule 21, Colorado Appellate Rules was duly served upon the following: the Office of the District Attorney of the 21st Judicial District, the District Court in and for the Twenty First Judicial District and William M. Ela, one of the Judges thereof, and to the Office of the Attorney General, 1525 Sherman Street, 3rd Floor, Denver, Colorado, 80203, this 3rd day of May, 1977.

Rollie R. Rogers

(Appendix A)

December 5, 1975
IN COUNTY COURT
MESA COUNTY, COLORADO

DEC 5 1975

Ante Defiler

CLERK

Robert Emerson, Esq.
Deputy Public Defender
U. S. Bank Building
Grand Junction, Colo. 81501

IN RE: People vs Kenneth Herbert Botham, Jr.
Criminal Action No. 75X3308

Dear Mr. Emerson:

This letter is to notify you of your appointment to represent Kenneth Herbert Botham, Jr. on a partially indigent basis. Gary Cowan, Esq. has refused to represent him by court appointment.

Very truly yours,

Harold P. Moss, Judge
Mesa County Court

HPM:mb

cc: Terrance Farina, DA

(Appendix A)

STATE OF COLORADO,

County of Mesa

Pleas in the County Court of Mesa

FILED
IN COUNTY COURT
MESA COUNTY, State of Colorado.

Before the Honorable Harold P. Moss DEC 5 1975
JUDGE OF SAID COURT.

At a Term thereof, begun and held at the Court House in Grand Junction in said
County, on the 2nd day of Jan. (it being the 5th day) of
December, A. D. 1975

PRESENT:

HONORABLE Harold P. Moss

JUDGE of the County Court of Mesa County, State of Colorado.

Terrance Farina Esq., DISTRICT ATTORNEY of the
Twenty-first Judicial District.

Dick Williams Esq., SHERIFF of said County.

Anita Delfelder Esq., CLERK of said Court.

THE PEOPLE, ETC.,
vs.

No. 75X3308

Kenneth Herbert Botham, Jr.

ORDER ASSIGNING COUNSEL
ON PARTIAL INDIGENT BASIS

Be It Remembered, That heretofore, and on the 5th day of
December, A. D. 1975, the same being one of the regular judicial days
of the January Term, A. D. 1975, the following proceedings (inter alia)
were had and entered of record in said Court, to-wit:

THE PEOPLE, ETC.,
vs.

No. 75X3308

Kenneth Herbert Botham, Jr.

At this day comes Terrance L. Farina Esq.,
District Attorney, who prosecutes the pleas of THE PEOPLE in this behalf, and the said defendant
Kenneth Herbert Botham, Jr.
is brought into Court. And thereupon, after due investigation, it appearing to the Court that the said
defendant is a poor person and unable to employ counsel, It Is Ordered by the Court that
Robert Emerson Esq., one of the
Attorneys of this Court be, and he is, assigned to defend him herein.

STATE OF COLORADO,

County of Mesa ss.

Harold P. Moss, Judge
Mesa County Court

I, Anita Delfelder Clerk of the County Court
of Mesa County, State of Colorado, do hereby certify the above
and foregoing to be a true, complete and perfect transcript and copy of a certain Order had and entered of
record in said Court, in a cause therein lately pending, wherein THE PEOPLE, etc., was plaintiff, and
Kenneth Herbert Botham, Jr. was defendant,
as the same now remains on record in this Court.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of
said Court, at the Court House in Mesa
County and State aforesaid, this 5th day of
December, A. D. 1975.

Anita Delfelder CLERK.

By Margaret Blumberg DEPUTY CLERK.
Margaret Blumberg

(Appendix B)

IN THE DISTRICT COURT IN AND FOR THE
COUNTY OF MESA AND STATE OF COLORADO

ACTION NO. X10065

_____ plaintiff

-vs-

KENNETH HERBERT BOTHAM, JR.

_____ defendant

MINUTE ORDER

FILED
IN DISTRICT COURT
MESA COUNTY, COLORADO

MAR 2 1977

Ben O. Peltier
CLERK

Date and Time: March 1, 1977, _____ a.m. _____ p.m.

Nature of Hearing: _____

Presiding Judge: Wm. M. Ela

People Appeared By: _____

Defendant Appeared By: _____

Appointed: _____ Retained: _____

Court Reporter: _____

Clerk or Deputy: _____

Witnesses: _____

Action by Court: The Court has for attention the matter of defendant's obligation for the payment of attorney's fees and court costs for the trial preparation and trial proceedings prior to this date. The Court is aware that the Public Defender's office has been appointed to represent the Defendant and that in addition to counsel fees obligations there have been substantial obligations incurred for witness fees and court costs. In the course of the proceedings, the court has been exposed to possible substantial assets of the defendant which do not appear to be exempt property or free from the right of liquidation to satisfy defendant's obligation for payment of the above referred to expenses and the court being aware that various persons are presently holding defendant's properties and to prevent the dissipation of said assets and the establishment of propriety for utilizing said properties for payment of expenses,

IT IS THEREFORE ORDERED That a citation issue to any persons known to the court to have access to the defendant's properties for the purpose of having them appear and show cause why defendant's properties should not be delivered to the Sheriff of Mesa County for holding pending final determination of defendant's obligations of applying the proceeds of the sale of said property to satisfy aforementioned obligations. Accordingly, the Clerk of the Court will issue citations to be served by the sheriff.

Wm. M. Ela

Judge

4/3

(Appendix C)

FILED
IN DISTRICT COURT
MESA COUNTY, COLORADO
21 1977

MAR 31 1977

MINUTE ORDER

-VS-

R. Ben O. Fisher
MURKIN

Nature of Hearing: Disposition of personal property

Presiding Judge: Wm. M. Egan

People Appeared By: Erance Faria

Defendant Appeared By: Parents + Patrick Carty; James Martin, CRLS

Appointed:

Retained:

Court Reporter: Bill Price

Clerk or Deputy: Betty L. Thomason

Witnesses: _____

Action by Court: It considered lists of property & debts
presented by Bathams Sr. It considers this is still
criminal proceeding. Mr. Martin argued children had an
interest in property through Pat Batham. It ordered property
be turned over to Sheriff's office that is set out on a
list as shown below. D.A. will advise attorney general
to proceed with liquidation. Pub. Def. & parents given
30 days to file an appeal, or deliver property
to Sheriff.

Tape Deck
list of cameras
guns in evidence
loading equipment
tape recorder
speaker
aquarium
detonator (system)

Approved,
Wm. M. Elh
Judge

(Appendix D)

IN THE DISTRICT COURT IN AND FOR THE
COUNTY OF MESA AND STATE OF COLORADO
Action No. X10,065

PEOPLE OF THE STATE OF COLORADO)
Plaintiff-Appellee)
vs.)
KENNETH H. EOTHAM, Jr.,)
Defendant-Appellant.)

O R D E R

MATTER COMING ON FOR HEARING and the Court being duly
advised in the premises, it is hereby ordered,

THAT the Sheriff of Mesa County or any other party
having in his custody or control, assets belonging to the
Defendant-Appellant or claimed to belong to Defendant-
Appellant is hereby stayed from selling such assets or
otherwise disposing of same.

DONE IN OPEN COURT THIS 20 DAY OF April, 1977.

Wm. M. Els

Certified to be a full
true and correct copy of
original in my custody

Dated APR 20 1977



Deputy