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The State of Utah v. The Honorable Henry Ruggeri, District Judge : Plaintiff's Reply Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,
Plaintiff,

vs.

THE HONORABLE HENRY RUGGERI, DISTRICT JUDGE,
Defendant.

Case No. 10730

PLAINTIFF'S REPLY BRIEF

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AN EXTRAORDINARY WRIT IS AN AVAILABLE REMEDY TO ISSUE AGAINST THE DEFENDANT

The plaintiff submits that the defendant's contention that an extraordinary writ is not available in the instant case, is not well taken. The posture of this case clearly supports the issuance of an extraordinary writ.

The plaintiff seeks prosecution of C. W. "Buck" Brady on the charge of first degree perjury.(1) The perjury was allegedly committed during his testimony before a grand jury convened in Salt Lake County in 1965. Subsequent to an indictment being returned against Mr. Brady, he filed a motion to suppress the testimony given before the grand jury because of a claimed violation of his constitutional rights. After considering the issues, the defendant granted Brady's motion to suppress the evidence of the perjury. The order to suppress effectively precluded any further prosecution because the very evidence of the perjury could not be used. The legal import of the court's order was to dismiss the case. The District Attorney of the Third Judical District then proceeded two ways. The first was to appeal from the defendant's order and the second to apply to this court for an extraordinary writ to review the defendant's decision. It seems well settled that an appeal may not be taken from an order that is not final. Section 77-39-4 Utah Code Annotated, 1953; *People v. Hill,* 3 Utah 334, 3 Pac. 75 (1884). Decisions from the United States Supreme Court have ruled that orders on motions to suppress were not appealable by the government since they were not final. *Caproll v. United States,* 354 U.S. 394 (1957); *Di Bella v. United States,* 369 U.S. 121 (1962). In Cipes, *Moore's Federal Practice,* Vol. 8, p. 41-30 comments as to this situation:

> "While a defendant whose motion to suppress is denied may raise the point on appeal in the

(1) This charge is different than the prosecution on a similar charge now on appeal before the court.

court of conviction, if the motion is granted the government may be effectively foreclosed from prosecuting if all or substantially all of its evidence is suppressed."

See also, Cipes, *supra* P 12.05 [2] p. 12-27.

There is nothing to suggest that in this case the position of the State of Utah is any different.

Cipes, *supra* notes that under these circumstances the right to mandamus may be appropriate. Cipes, *Moore's Federal Practices*, Vol. 8, ¶ 12.05 [2] p. 12-29. In *United States v. Igoe*, 331 F. 2d 766 (7th Cir. 1964) the Seventh Circuit granted a writ of mandamus against a trial judge who wrongfully dismissed the government case under circumstances where the decision was not appealable.[2] The Government's prosecution was effectively thwarted and the court determined under such circumstances a writ of mandamus would be available. The court observed:

> "With respect to the issuance of a writ of mandamus, on the other hand, we have considered all arguments advanced in opposition to it and find them unconvincing. We believe that the writ must be granted here. The District Court is directed to reinstate this case and set it for trial."

Judge Schnackenberg, in his concuring opinion, noted:

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(2) See Cipes, Moore's Federal Practice, Vol. 8, P 1205 [2].

(3) In, Note, 73 Har. L. Rev. 1936, 1399 (1960) it is wisely observed: "Furthermore, it seems the appellate jurisdiction should expand as the power of the district court to dismiss is enlarged, in order to maintain adequate supervision over the lower court."

> "In answer to a contention of defendant that neither by appeal or mandamus can the government secure a review by this court of the dismissal of the instant case for want of prosecution. I wish to add that this question is to be determined not by its form but by its substance."

Applying the above reasoning to the circumstances of this case it is clear that the substance of the defendant's order would effectively terminate the prosecution of Mr. Brady. Under these circumstances it was tantamount to a dismissal of the charges. The public as well as the defendant, has a right to substantial justice, and the prosecution of a case should not be arrested because the trial court has acted erroneously. Under such circumstances review by extraordinary writ is allowable.

In this case the defendant did not purport to enter his order as a matter of discretion, but concluded that sound constitutional principles dictated such a result. The case and authorities relating to the unavailability of mandamus or like writs to review discretionary acts are, therefore, inapplicable since this case does not present a situation where the evidence was of a nature that the trial court could admit or exclude in its discretion and the Court did not purport to so rule. In 35 Am. Jur. *Mandamus* § 294, it is observed:

> "Mandamus will issue, also, to compel the court to reinstate a criminal case, discontinued or dismissed for reasons insufficient in law."

The above rules have substantial support in case law from this court.

In the early case of *People v. Van Tassel,* 13 Utah 9, 43 Pac. 625 (1896) a justices court dismissed a petition and after application for mandamus to the district court, the Territorial Supreme Court held mandamus was applicable to compel the court to accept jurisdiction and try the cause. In *State ex rel Neilson vs. Third Judicial District Court,* 36 Utah 223, 102 Pac. 868 (1909) this court ruled mandamus was applicable to review the arbitrary dismissal of case.

In *Hanson v. Iverson,* 61 Utah 172, 211 Pac. 682 (1922) this court held mandamus applicable to review a dismissal where the trial court ruled it had no jurisdiction as a matter of law. In *State v. Second District Court,* 36 Utah 396, 104 Pac. 282 (1909) a writ of mandamus was denied the District Attorney from the dismissal of an action, but only after the court reviewed the substance of the application and found it insufficient on the merits and that, therefore, mandamus was inapplicable. Therefore, treating the substance of this case, rather than form, it is clear mandamus is an appropriate remedy.

In addition certiorari would be an appropriate remedy if the defendant exercised his discretion and abused the exercise as plaintiff submits occurred. Rule 65 B(b)(2) U.R.C.P. provides certiorari is available "[w]here an inferior tribunal . . . or officer exercising judicial functons has . . . abused its discretion;." See also *Higgins v. Burton,* 64 Utah 550, 232 Pac. 915 (1924).

Obviously, the extraordinary writ is available in this case to compel the defendant to accept jurisdiction and proceed to trial.

ADDITIONAL AUTHORITY

The plaintiff wishes to call to the Court's attention two relevant authorities not noted in the plaintiff's initial brief.

In Sobel, *The New Confession Standards, Miranda v. Arizona* (1966) the Honorable Nathan R. Sobel, Justice of the Supreme Court, Kings County, New York, discusses the application of *Miranda* in the context of a grand jury. He notes the New York rule on appearance before grand juries and states:

> "The federal courts do not follow this minority view. In the federal courts, a subpoena is not 'compulsion.' Therefore, a *de facto* 'witness' or 'target' or a de jure defendant may be subpoenaed before the grand jury and unless a claim of privilege is made, any testimony obtained may be used at the trial."

This clearly acknowledges that as yet the federal rule nor the Federal Constitution require the result reached by the defendant.

In an article, September 26, 1966, the Grand Jury: Protection Against the State or Prosecutor's Rubber Stamp, New York Times, p. 44, the nature of the New York Grand Jury system is discussed and it is noted

the New York Constitution requires a grand jury indictment for a felony. Thus, a "target" situation can exist if the indictment put before the Grand Jury naming the defendant results in his also being called as a witness. This is not the case in Utah. The New York cases are therefore of limited value.

CONCLUSION

It is respectfully submitted this court should issue an extraordinary writ requiring the defendant to admit the excluded evidence and to proceed to trial in the case of State v. Brady.

Respectfully submitted,

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