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A PROSECUTION IN A "STRIKE" CASE

FRANK SWANCARA[1]

In April, 1914, there was a strike in the coal fields of Southern Colorado, and numerous breaches of the peace occurred, including homicides. There was an alleged murder committed in the town of Chandler, but as there were killings at other places, the event in Chandler was not particularly noticed by writers of the time. Owing to the attendant circumstances, and subsequent developments, this alleged murder and the prosecution arising therefrom is worthy of discussion, particularly in these days when it is conventional to complain of defects in the administration of our criminal law. This article is not, however, a complaint. Neither is anything said herein intended to be a fault finding with any official or tribunal mentioned. If it should appear to the reader that any such a one committed error, in any sense of that term, let it be understood that he or it acted honestly.

The facts hereinafter mentioned are gathered from the record in the case discussed. While there was a strike prevailing in most coal regions in southern Colorado, there was no strike at Chandler. Consequently there were no strikebreakers or "scabs" in that camp. Nevertheless there was, one day, a mob at Chandler, resembling the famous one of Herrin. It was not locally mobilized, but, like a band of invading Huns, it came from other towns or camps. The invaders came "to take Chandler," not to redress any wrong but, it seems, simply because of circumstances and feelings arising from the fact that the mine at Chandler was peacefully in operation with non-union labor. The town was looted, many of its inhabitants were assaulted, beaten and robbed; stores and buildings were burglarized. William King, a respected and law abiding citizen of Chandler, was killed by a bullet fired by some member of the attacking horde.

Countless crimes were committed on the occasion of that invasion, according to the testimony found in the record, a voluminous record consisting of almost 5,000 folios. The store keeper was taken to his own store and thrown through the panel of the door. A hotel was broken into. The press and the periodicals did not give much, if any, publicity to the outrages at Chandler. All this oc-

[1]Member of the Denver, Colo. bar.

curred after the Ludlow incident, and our historians and writers seem to have dealt with the strike situation only as far as the conclusion of the "Ludlow massacre," and the subsequent investigations thereof.

Following the Chandler occurrences, criminal prosecutions were instituted. Only one case, however, ever came to trial. Important as this prosecution was, it was little known, and is scarcely remembered today. The bar remembers chiefly another case, known as the "Lawson" case. In the Chandler case seven defendants were charged with murder in the first degree. At the conclusion of the trial the jury found two of them guilty of voluntary manslaughter. These were sentenced to serve a term in the state penitentiary. The evidence against one of them was strong; as to the other not so great. The latter was an official of a labor organization. He testified that he only tried to stop the shooting.

A writ of error was sued out by the convicted parties, and execution of the sentence was stayed. In due time the abstract of the record and the brief of the plaintiffs in error was filed. The same was prepared by a vast array of able counsel; at least it was so signed. Thereafter, within the time allowed for that purpose, the Attorney General then in office and two assistant attorney generals prepared, and on January 9, 1917, filed in the Supreme Court, an able brief on behalf of the people, seeking an affirmance of the conviction. On April 13, 1917, the plaintiffs in error filed their reply brief. The status of the case then was such that the reviewing court could take it up and consider the errors assigned and argued. If oral argument had been requested, the time for such argument could have been set and the cause permitted to take the usual course.

Nothing further was heard of or concerning the case, by the people or by the officers of the county where it had been tried, until September 27, 1917. The news then received did not take the form of a decision, or a determination of the case by the appellate court. Instead, it was then learned that the succeeding Attorney General had filed a Confession of Error. This new, or second, Attorney General came into office shortly after his predecessor had filed the brief in behalf of the people.

The filing of a confession of error in a criminal case pending on writ of error was never, in the entire history of the state, a common occurrence. It was unusual even with the officer who filed the document in this case. Generally, the attorney general in question sought an affirmance of the judgment of conviction in criminal

cases. As a rule, almost without exception, he did not file a confession of error even where there was error in the record. There are many criminal cases on record where the supreme court of Colorado reversed the judgment on account of errors in the record, in the absence of any confession of error, during the term of office of this attorney general as well as during the incumbency of his predecessors and of his successors. Some of these cases are cited in the note below.[2]

A confession of error *was* filed, however, in almost every case where the defendant was convicted of a crime alleged to have been committed in the course of strike disturbances, and such confession of error was filed after a former attorney general had filed a brief in support of the conviction and sentence in at least two of such cases. *Lawson* v. *People,* 63 Colo. 270, 165 Pac. 771; *Richardson* v. *People,* 69 Colo. 155, 170 Pac. 189.

The Confession of Error filed September 27, 1917, in this "strike case" involving the Chandler homicide, while it may have embraced several assignments of error, confessed, in substance, but two alleged errors. One of these concerned an instruction to the jury, and the other related to remarks of the trial judge.

As to the first. There was a count in the information upon which plaintiffs in error had been tried which charged the specific act of murder to some person unknown to the district attorney, and then alleged that the defendants were then and there present, standing by, aiding, abetting and assisting such unknown person to commit the murder. The court instructed the jury that if defendants "aided, abetted or assisted" the one actually guilty of murder in the commission of such crime, they themselves were guilty of murder. The first alleged error confessed consisted in the failure of the trial court to make the instruction more complete and instruct further that the defendants must also be found to have *known the criminal intent* of the person aided or abetted.

Spokesmen for labor unions have not hesitated to criticize, or even to denounce, a federal judge who has issued an injunction in a case involving a labor controversy. Perhaps they have said that he was not only wrong, but also corrupt. At any rate the propriety

[2]Judgment reversed in: *Davidson* v. *People,* 64 Colo. 281, 170 Pac. 962 (conspiracy, false pretenses); *Moynahan* v. *People,* 63 Colo. 433, 167 Pac. 1175 (receiving stolen goods); *King* v. *People,* 64 Colo. 398, 172 Pac. 8 (larceny); *DeRose* v. *People,* 64 Colo. 332, 171 Pac. 359 (forgery); *DePriest* v. *People,* 64 Colo. 358, 171 Pac. 1004 (non-support); *Kilpatrick* v. *People,* 64 Colo. 209, 170 Pac. 956 (non-support); *Liby* v. *People,* 63 Colo. 276, 165 Pac. 765 (rape); *Perry* v. *People,* 63 Colo. 60, 163 Pac. 844 (murder).

of the injunctions has been freely discussed. So it seems proper to note the workings of legal machinery when the results were favorable to "union men."

If the confession of error had not been filed, the appellate court might have held the instruction sufficient, since it was framed substantially in the language of the statute (Section 6,645 C. L. 1921) and was in form usually not objected to.

In 1 Randall's Instructions to Juries, section 314, it is said:

"An instruction which follows the language of the statute in defining a principal or an accessory will ordinarily be sufficient, and usually it is better to do so."

See also *State* v. *Bland,* 9 Idaho 796, 76 Pac. 780, and other cases cited by the author.

Again, if the confession of error had not been filed, the appellate court might have considered the failure of plaintiffs in error to object to the instruction, and might have held the error waived. Again, if the alleged error confessed was in fact an error, it may have been a harmless error, or an error cured by verdict. The defendants were not found guilty of murder in any degree whatever. The verdict found them guilty only of voluntary manslaughter. At common law, and under statutes declaratory thereof, there cannot be accessories before the fact to voluntary manslaughter, which is a killing in the heat of sudden passion and without malice (Section 6,666 C. L. 1921), and is, therefore, inconsistent with the idea of premeditation. 29 C. J. 1,066, section 38. It may be that error in defining accessories is harmless when the verdict is for voluntary manslaughter.

There should be no reason why in a labor case a minor error is a more ominous scarecrow than it is in a liquor case, if it is. In *Gizewski* v. *People,* 239 Pac. 1,026, a liquor case, the court quotes from *May* v. *People,* 236 Pac. 1,022, as follows:

"Where one knowingly and willfully violates the law, and his guilt is clearly proven, he cannot successfully rely for a reversal on technical errors occurring during the trial."

It may be rightfully assumed that the question above mentioned was presented in a motion for new trial, and that such motion was argued. There is a probability that the trial judge was satisfied on the hearing of such motion that no prejudicial error was committed. Certainly the local prosecuting officers and the first attorney general were so convinced. Who can say that the Supreme Court would

have arrived at a different conclusion if it had considered that question?

The second alleged error confessed consisted of certain conduct on the part of the trial judge. No member of the bar ever doubted the honesty, integrity and judicial ability of the judge in question. The conduct complained of by plaintiffs in error consisted of certain remarks of the judge. Most, if not all, of these were made in connection with rulings on the admissibility of certain evidence or the propriety of certain questions propounded to witnesses. The court, in its remarks, assumed that there was a conspiracy to invade the town of Chandler, and that the defendants were "in that crowd" which came to the town. In the instructions to the jury the trial court afterwards told the jury to disregard remarks of either court or counsel made during the progress of the trial. Certainly there is, or was, room for argument that the remarks did not constitute reversible error in view of the instructions given.

The brief and argument of the *first* Attorney General sought to show that there was no such conduct on the part of the trial judge as to warrant a reversal of the judgment. That brief contained fifty-seven pages, and concluded with the following statement:

"We conscientiously believe that the defendants here had a fair and impartial trial and that the verdict of the jury should be affirmed by this court."

After one Attorney General has filed a brief in support of a conviction, especially in a case where a human life has been lost, and the life of a good citizen at that, it seems strange that his successor in office would desire, in any case, and irrespective of his own views, to file a confession of error and thus, in effect, strike the brief of his predecessor from the files. Why was it done in this case? The second Attorney General in the document filed by him said:

". . . This cause has now been set down for oral argument in which we must either participate and endeavor to uphold the sentence of the lower court, or decline to do so. Responsibility in the matter having thus devolved upon us, we shall advise this Honorable Court of our own conclusions in the premises irrespective of any action heretofore taken by our predecessor in office.

"We have made a careful examination of the record. From such investigation, we are convinced that there is such error in the record as ought to result in the reversal of the judgment. We cannot, therefore, in good conscience, contend for its affirmance. . . ."

We do not know that the former Attorney General, or some one of his assistants familiar with the case, would not appear and participate in the oral argument on behalf of the state. No doubt such former official would have been able "in good conscience" to contend orally, as he had in writing, for an affirmance. The second attorney general if unable to argue "in good conscience" in support of the conviction, could have waived oral argument, allowing the plaintiffs in error to make their argument without his replying thereto. He could have allowed the appellate court to consider the case on the briefs theretofore filed on both sides and on the oral arguments not replied to, and thus let the court itself be the final arbiter in the matter of alleged errors.

The District Attorney who prosecuted the case in the trial court was not consulted as to his wishes, or those of the residents of the county, regarding a confession of error, nor consulted in any manner for any purpose, by the second Attorney General.

The confession of error is signed by the second Attorney General alone. Usually in criminal cases pending on writ of error, the work of his department is done by some assistant, and the brief filed by the office is usually signed in the name of such assistant as well as that of the Attorney General. It may be that if an assistant had been given this case in charge, he would not have filed a confession of error, but would have contended for an affirmance as in other cases, or have stood by the brief and argument of the first Attorney General.

Of course, the murder case now under discussion did not end automatically upon the filing of a confession of error, although the outcome could then have been predicted. The Supreme Court still had control of the same, and the power to dispose of it, including the power to affirm the judgment, according to the practice announced in some jurisdictions. *Oil Mill* v. *Coal Co.* (Miss.), 91 So. 698. It had the authority to ascertain whether the record supports the allegations of the confession of error. *Henderson* v. *State,* (Okla.), 197 Pac. 720. It had the power and authority to consider the case, and determine it, in the same way as if no confession of error had been filed. *State* v. *Stevens,* 153 N. C. 604, 69 S. E. 11; *State* v. *Waite* (Wash.), 238 Pac. 617.

The confession of error by the second attorney general was filed September 27, 1917. If the court did not intend to consider the case on its merits, nor examine the record, it might have disposed of it within a very short time. No announcement, however,

came from the court until Jaunary 7, 1918. On that date the court filed a memorandum in the case. The same may now be found under the title *"Richardson* v. *People,"* in 69 Colo. 155, or 170 Pac. 189, and is in these words:

"Per Curiam.

"Plaintiffs in error were convicted of voluntary manslaughter and sentenced to serve terms in the penitentiary. They have assigned and argued numerous alleged errors occurring in the trial of the cause, which they claim entitle them to a reversal of the judgment. The prosecution, acting through the Attorney-General, has filed a confession of error and asks for a reversal of the judgment. Under these circumstances, it is not incumbent upon us to investigate the record and determine as to the correctness of his conclusions. We therefore reverse the judgment and remand the cause."

It is an opinion "per curiam," which, according to 30 Cyc. 1,390, indicates that all the judges were "of one mind," even as to the statement; "It is not incumbent upon us to investigate the record."

This is probably the only reported case where this court, or any other court, reversed a judgment without indicating the errors which ncessitated or caused the reversal, with the exception of *Soto* v. *People,* 64 Colo. 528, 173 Pac. 399.

It is to be observed that there is no statement or suggestion in the opinion or memorandum that the court paused to consider or notice any of the errors assigned, or even any alleged error confessed. After watching Key Number 1,186 (6) in the American Digest System, title "Criminal Law," for several years, and otherwise making a research concerning the points mentioned in this paper, the writer feels inclined to assert that the Richardson and Soto cases are without a precedent or a parallel.

In the course of a search, probably vain, for a similar opinion, one would find that in *Brasheers* v. *State* (Okla.), 192 Pac. 433, the court quoted the entire confession of error, thereby enabling counsel and the trial court to ascertain the errors on account of which the judgment was reversed. The opinions in other cases indicate that the court examined the record for itself, and did not reverse the judgment solely because a confession of error was filed. *Henderson* v. *State,* supra; *Green* v. *State,* (Okla), 193 Pac 1,077; *Scwake* v. *State* (Okla.), 198 Pac. 996; *State* v. *Stevens,* supra. In *Bindrum* v. *State* (Okla.), 228 Pac. 168, the following is the syllabus by the court:

"Where the Attorney General confesses error, this court will examine the record, and, if the confession is sustained thereby, and is well founded in law, the conviction will be reversed."

The same syllabus is given by the court in *Raymer* v. *State* (Okla.), 228 Pac. 500, and a similar one in *Tucker* v. *State* (Fla.), 105 So. 140.

The court that prepared and filed the memorandum in the Richardson case, the subject of this article, said in an earlier case (*Lawson* v. *People,* supra), that where a former Attorney General has filed a brief on behalf of the people, seeking to uphold a conviction, and a second Attorney General later has filed a confession of error, it is "the better practice to pass upon some of the assignments of error, or one of them at least, upon which the (second) Attorney General has confessed error." This particular "better practice" was applied to *Zancannelli* v. *People,* 63 Colo. 252, 165 Pac. 612, where, according to the published report, a former Attorney General apparently did not file a brief, but in the Richardson case, where such a brief had been filed, the "better practice" was omitted.

In *Soto* v. *People,* supra, the supreme court, reversing a judgment in a criminal case in which a confession of error was filed, said:

> "The attorney general had presented a confession of error and asks a reversal of the judgment.
>
> "It is the uniform rule of this court in such cases to act affirmatively upon such request of the attorney general. By the Constitution and statutes of this state the Attorney-General is the only person who is authorized by law to appear for the people, before the Supreme Court. The duty and responsibility of the control of such cases are his. . . .
>
> "The judgment is reversed."

"The judgment is reversed."

From this opinion, or memorandum, it seems that the judgment was reversed solely because a confession of error was filed, and that such step was taken because the attorney general has "control" of the case, and it is "the uniform rule" to act upon his "request." Thus there is ground for believing that the Richardson case was reversed, not on account of errors, but because of a "request" of the attorney general. If this is in accordance with a "uniform rule," then in most cases the fate of one convicted in a trial court is made to depend, in some degree, on whether a "request" will be forthcoming in his case.

In *Lawson* v. *People,* supra, and in *Zancannelli* v. *People,* supra, the court went further than to merely act on the request of the Attorney General, and gave a reason for so doing. If there was

error in the record in the Richardson case, the same procedure could have been followed there.

The reason for acting on the "request" of the Attorney General is, the court says, that he has "control" of the case. It has never been held, however, outside of Colorado, that such control is so great that he may even deprive the court of jurisdiction over the case. Cases regarding "control" are collected in note 32, in 6 C. J. 816.

The "control" the Attorney General has, is precisely that control which he possesses when he is contending for an affirmance of the judgment, or the upholding of a sentence. It means that he, and no one else, is authorized to appear for the state, and file motions or briefs. No court would affirm a judgment solely because the Attorney General "requested" it. There is no control had by him over the jurisdiction, judgment or action of the court. There is no substantial reason why the court may not, in criminal cases, affirm a judgment even where the Attorney General requests the contrary. It has been held that in civil cases there may be an affirmance notwithstanding a confession of error. *Oil Mill Co.* v. *Coal Co.* (Miss.), 91 So. 698. In a criminal case, the court in *State* v. *Waite* (Wash.), 238 Pac. 617, said:

> "The attorneys, of course, know that we cannot affirm or reverse a case simply because it is stipulated that there is or is not error in the record."

But what is the situation if the attorneys happen to be residents of Colorado?

In the Soto case, the Attorney General, to prove that he has "control" of the case, cited *State* v. *Fleming,* 13 Iowa, 443. It is safe to assume that the powers of the Attorney General are the same in Iowa as they are in Colorado. But does the Iowa court reverse a judgment in a criminal case solely because of a "request" of the Attorney General? Not at all. In *State* v. *Bailey,* 85 Iowa, 713, 50 N. W. 561, it had before it such a request. It reversed the judgment, but the following was the reason given:

> "As the errors confessed appear to be prejudicial, the application to docket the cause, reverse and remand it, will be granted."

Research fails to disclose a case in other jurisdictions where an appellate court was confronted with a confession of error by a second Attorney General after a former Attorney General had filed a brief on behalf of the state. The confessions of error always appeared

without a previous argument on behalf of the state. But even then, the courts did not reverse the judgment solely because such a document appeared in the case. There was some examination of the record by the court iself. In a recent gambling case *Rush* v. *State* (Okla.); 210 Pac. 316, the court said:

"This court concurs in the views expressed in the confession of error by Attorney General."

There is a vast difference between the action of the Colorado court in the Richardson case and that of the court in North Carolina which, in *State* v. *Stevens,* supra, said:

"While the opinion of the state's attorney has much weight with us, it is our practice to examine the record carefully ourselves before setting aside a conviction for crime and directing another trial."

It appears that counsel for the defendants (in the Richardson case) did not, at any time, expect that the case would terminate in the manner in which it was disposed of. Notwithstanding the fact that the first Attorney General went out of office, they began the preparation of a brief in reply to the brief that had been filed on behalf of the state. On April 13, 1917, they filed a reply brief, containing sixty-three printed pages. Either they did not expect a Confession of Error to be forthcoming, or else they doubted its efficacy.

One who obtains all his information of the Richardson case solely from the published report, will not regard the case either as serious or important. From the court's opinion, all that appears regarding the gravity of the crime charged, and the attendant facts, is the statement that defendants were "convicted of voluntary manslaughter." Usually, when a defendant is informed against for murder in the first degree, that fact appears in the published report, even where the verdict is one finding the defendant guilty of "voluntary manslaughter" —a situation illustrated in *Moore* v. *People,* 26 Colo. 213, 57 Pac. 857.

The published report of the Richardson case makes no mention of the first Attorney General, and it does not contain the name of such Attorney General or the names of the two Assistant Attorneys General who acted with him, in the space usually given to names of attorneys appearing in a case. It could not be that the names of these attorneys were kept off the report because they were out of office at the time the opinion was filed. In other such cases their names do appear, as in *Lawson* v. *People,* supra. In every other case the name of every attorney appearing is published, whether he is acting

at the time of the final decision or not. The suppression, or omission, of the names of the first Attorney General and his two assistants, in the report of the Richardson case, makes it appear as if the second Attorney General was the only individual that ever appeared on behalf of the people in the supreme court in that case. It also makes it appear, or seem, that the court did not have before it, or in its office, the brief of the first Attorney General. It makes it seem as if nothing had ever been done on behalf of the people, in that court, except the filing of the confession of error.

In a great number of criminal cases, reviewed by appellate courts, where the conviction was not set aside, counsel for the defense contended, in good faith, that there was glaring error in the record, but the Attorney General was able, in good conscience, to contend for an affirmance. Had he agreed with counsel for the accused, the result might have been different. It is not the luck of the ordinary defendant to have the Attorney General so agree. In *Beeler* v. *People,* 58 Colo. 451, 146 Pac. 762, the defendant killed, not a non-union workman, but a "young Hereford steer." No confession of error was filed, and not withstanding a faulty instruction, the judgment of conviction was affirmed.

The trial of this "strike case" occupied nearly two months. No labor or expense was spared on either side. A great array of counsel was employed on behalf of the defense. The county employed a special prosecutor to assist the district attorney. An assistant Attorney General also participated on behalf of the people. The District Attorney was present and in charge of the prosecution. The magnitude of the task confronting either side, and the importance of the trial, is made manifest by its length and by the number of witnesses testifying. Fifty-nine witnesses were called by the people, and fifty-one by the defense.

Everyone thought that this trial was a serious business; everyone believed that the *verdict* would be the sole factor upon which would depend the ultimate fate of the defendants, or each of them, in respect to incarceration in the penitentiary. No one anticipated that ultimately there would be a summary reversal of the judgment by the supreme court, in the event of a conviction in the trial court.

As before noted, the reversal was one without an opinion, unless the court's brief memorandum can be called an opinion. The memorandum did not point out any error at the trial. The reversal was ordered in such summary manner as is ordinarily employed in disposing of some unimportant motion in an unimportant case. The

reversal was ordered on nothing except the "request" of the Attorney General then in office, if under the Soto case a confession of error is to be deemed a "request," and then too, a request coming, as it did, after a former Attorney General had filed a brief on behalf of the people, contending, seriously and ably, for an affirmance of the judgment and the conviction.

Announcement of the reversal in the Richardson case was made by the supreme court on January 7, 1918. The reversal being ordered on the request of the Attorney General, there would, of course, be no petition for a rehearing filed by him. It would have been futile for the special prosecutor who had been employed by the county where the case was tried, or for the District Attorney, to have filed a petition asking the Supreme Court to reconsider, or consider, the case on its merits. In *Soto* v. *People,* supra, the court refused to be influenced by the brief of the District Attorney which had been filed even before the court reversed the case on a confession of error.

The Richardson case was never retried. It was reversed nearly four years after the crime was committed, and more than three years after the trial. Probably the local officers believed that after the lapse of such period of time, another verdict of guilty could not be obtained, or that if it could be, the result would not be worth the time and labor necessarily involved in another trial. The expense too, is appalling in such cases. The prosecution was dismissed, soon after a new District Attorney went into office in that district.

William King was killed, and under circumstances which caused the local officers of the law to believe that the killing was a murder. A grand jury, during a long session, made diligent inquiry into the facts attending the homicide, and presented indictments. The District Attorney, Gilbert A. Walker, did all in his power, as a prosecuting officer, to bring the guilty parties to justice. His oath of office demanded that action of him, and good conscience would make it imperative. The county authorities gave their earnest and active cooperation. Seven persons were finally brought to trial on a charge of murder in the first degree, and conspiracy to murder. The jury acquitted five of them, and found two guilty of voluntary manslaughter. A motion for new trial having thereafter been overruled, the court pronounced a sentence upon them, fixing a term in the state penitentiary. The Attorney General then in office and two of his staff, whose names appear in the official reports of other cases, including *Lawson* v. *People,* supra, but not in this case, did all in their power to make the verdict of the jury stand and to have the judgment and

conviction upheld in the appellate court. What happened thereafter has been already detailed. The short memorandum of the supreme court, in this case, is the climax in the story of the killing, probably murder, of William King, as told by official records.

William King was only a non-union laboring man, living in the obscurity which surrounds any one who makes his living by the sweat of his brow. Consequently but few persons were much concerned over bringing his assailants to justice. Nobody seemed to care, after a while, what would become of the case. It may be that now the disintegrating bones of William King are lying in an unmarked grave, the sod covered with noxious weeds and decaying grass. Further reflections are left to the reader.