Tulsa Law Review

Volume 12 | Issue 3

1977

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Recommended Citation
C. R. Martin, *Robinson & Rule VI: Legitimate Rule-Making or Judicial Legislation*, 12 Tulsa L. J. 503 (2013).

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ROBINSON & RULE VI: LEGITIMATE RULE-MAKING OR JUDICIAL LEGISLATION?

C. Rabon Martin*

On November 23, 1976, the Oklahoma Supreme Court denied an application for a writ of prohibition directed at the judges of the Oklahoma Court of Criminal Appeals. In *Wofford v. Bussey*,[1] the petitioner complained that the Oklahoma Court of Criminal Appeals had exercised jurisdiction over an appeal by the state which was not authorized by statute. At the preliminary hearing, Wofford was ordered held for trial, but the charge was dismissed at the district court arraignment for insufficient evidence. The district attorney then filed an appeal with the Oklahoma Court of Criminal Appeals pursuant to the court's Rule VI.[2] The court reversed the trial court's order and remanded the case for further prosecution,[3] whereupon Wofford sought the prohibition writ, arguing that the appeal of the dismissal of his case was not authorized by statute, and that the Court of Criminal Appeals therefore lacked jurisdiction.

The Oklahoma Supreme Court denied the writ on the rationale that the Oklahoma Constitution grants exclusive appellate jurisdiction in criminal cases to the Oklahoma Court of Criminal Appeals.[4] The Supreme Court noted that "[t]he argument is simply that the Court of Criminal Appeals has proceeded in excess of its jurisdiction; such being the case, and without more, the question is clearly beyond the jurisdiction of the Supreme Court."[5]

Wofford raises two intriguing questions. First, has the Oklahoma Court of Criminal Appeals in fact exceeded its jurisdiction? Second,

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1. 556 P.2d 1280 (Okla. 1976).
2. OKLA. CRIM. R. VI.
3. State v. Wofford, 549 P.2d 823 (Okla. Crim. 1976).
4. OKLA. CONST. art. VII, § 4.
5. 556 P.2d at 1281.

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and more important, if that court has exceeded its jurisdiction, prohibition being unavailable, what is the appropriate remedy?

JURISDICTIONAL ASPECTS

Rule VI provides as follows:

> The State of Oklahoma . . . shall have the right to appeal an adverse ruling, or order, of a magistrate sustaining a Motion to Suppress Evidence, Quashing an Information, Sustaining a Plea to the Jurisdiction or Demurrer to Information, or an Order Discharging Defendant at preliminary examination because of Insufficiency of the Evidence to establish either that a crime has been committed, or there is probable cause that the accused has committed a felony.

The court's rules provide that the state may first appeal the magistrate's ruling to a district judge and, if the ruling is sustained, may appeal directly to the Oklahoma Court of Criminal Appeals.[6] This language strikes a sharp contrast with the Oklahoma statutes which mandate that:

> Appeals to the Criminal Court of Appeals may be taken by the State in the following cases *and no other*:
>
> 1. Upon judgment for the defendant on quashing or setting aside an indictment or information.
> 2. Upon an Order of the Court arresting the judgment.
> 3. Upon a question reserved by the State.[7]

The apparent conflict between the directives of the statute and Rule VI has not been explained by the court of criminal appeals.

The history of Rule VI began with the 1931 decision of *State v. Newell*,[8] where the court of criminal appeals held that the statutes establishing time limits for appeals in criminal cases apply equally to both the defendant and the state; thus, the state's attempt to appeal a reserved question of law more than six months after acquittal was dismissed. This rather innocuous ruling lay dormant for the next forty-one years.

In the meantime, problems frequently arose over criminal charges being refiled by district attorneys after dismissal at preliminary hearings because of insufficient evidence. Since jeopardy had not yet attached, a district attorney could refile as many times as he chose until he obtained a favorable ruling. In 1970, the Oklahoma Court of Criminal

6. OKLA. CRIM. R. 6.1 to 6.5.
7. OKLA. STAT. tit. 22, § 1053 (1958) (emphasis added).
8. 52 Okla. Crim. 5, 2 P.2d 280 (1931).

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Appeals, then comprised of Judges Nix, Brett and Bussey, moved to end this abuse. In *Nicodemus v. District Court*,[9] the court condemned the practice of "judge shopping," holding that refiling required the state to show that new evidence existed which would overcome the reason for the prior dismissal.[10] This requirement was expanded in *Jones v. State*,[11] where the court explained that "new evidence" meant evidence not known to the state at the first preliminary hearing, or which could not have been easily acquired at that time. Judge Bussey dissented, expressing his belief that the state should have a right to appeal to the district court, in the same manner as the defendant may have, the sufficiency of the evidence reviewed by filing a motion to quash.[12] In *Harper v. District Court*[13] the court held a district judge powerless to interfere with a magistrate's disposition of a case at the preliminary hearing. Again, Judge Bussey dissented.

By 1972, composition of the Oklahoma Court of Criminal Appeals had changed. Judge Nix had left the court and was replaced by Judge Simms. Shortly thereafter, the court decided *State v. Caldwell*.[14] At a preliminary hearing an examining magistrate had sustained a motion to suppress, and the district attorney sought a writ of mandamus or prohibition to block the dismissal. Although denying the writ on the basis that extraordinary writs cannot control the exercise of judicial discretion, the court went on to give birth to Rule VI with the following introduction:

> The defendant who receives an adverse ruling from a magistrate, has the unquestioned right to have the identical issue presented to a District Judge . . . . The State has neither a procedure, nor a forum, to assert a co-equal right. *As a matter of deep public interest and to more nearly achieve a true balance of the scales of criminal justice*, we are therefore called upon to re-examine this Court's position in *Nicodemus*, *Jones* and *Harper*, and do hereby adopt the following rule . . . .[15]

The only authority offered by the court for this extraordinary action was the 1931 *Newell* holding that statutory time limits for appeals apply to both the state and the defendant.[16]

9. 473 P.2d 312 (Okla. Crim. 1970).
10. *Id.* at 316.
11. 482 P.2d 169 (Okla. Crim. 1971).
12. *Id.* at 175.
13. 484 P.2d 891 (Okla. Crim. 1971).
14. 498 P.2d 426 (Okla. Crim. 1972).
15. *Id.* at 428 (emphasis added).
16. *Id.*

Since the legislature has not statutorily provided the avenues of appeal made available to the state by Rule VI, the only question remaining is whether or not the rule-making powers of the Oklahoma Court of Criminal Appeals are sufficiently broad to enable that court to create modes of procedure for district court appeals in addition to those authorized by statute. The rule-making power of the court of criminal appeals is defined by statute: "Said court and judges thereof shall have the power to . . . prescribe and promulgate such rules for the government of said court as it may deem necessary."[17] This rule-making power was construed as early as 1909 in *Yandell v. Territory*[18] and as recently as 1944 in *Denton v. Hunt*[19] as the power to make reasonable rules for regulation of practice before the court of criminal appeals.

The jurisdiction of any court depends upon the constitutional or statutory provisions creating it and defining the limits of its jurisdiction. No "rule" can enlarge or expand this jurisdiction. As the United States Supreme Court said in *United States v. Sherwood*,[20] "[a]n authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction."[21] Thus, it would seem that the procedural modes created by Rule VI are neither authorized by statute nor within either the delegated or inherent rule-making powers of the Oklahoma Court of Criminal Appeals.

In December of 1975, after Rule VI had been in force for three and one-half years, another problem for district attorneys arose. Rule VI afforded the state an opportunity to take the merits of a search issue before the Oklahoma Court of Criminal Appeals if a motion to suppress was sustained by an examining magistrate and upheld by a district judge; however, Rule VI did not apply where a motion to suppress was overruled at the preliminary hearing but then sustained at a district arraignment. Likewise, no statutory appeal was afforded the state under such circumstances. This prosecutorial burden was lifted by the court of criminal appeals in *State v. Robinson*.[22] In *Robinson*, the Tulsa County District Attorney attempted to appeal the merits of a search issue after a district court judge had sustained a motion to suppress and dismissed the case. The court of criminal appeals dismissed

17. OKLA. STAT. tit. 20, § 41 (1962).
18. 3 Okla. Crim. 188, 104 P. 923 (1909).
19. 79 Okla. Crim. 166, 152 P.2d 698 (1944).
20. 312 U.S. 584 (1940).
21. *Id.* at 589-90.
22. 544 P.2d 545 (Okla. Crim. 1975).

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the attempted appeal as unauthorized by statute.[23] However, after disposing of the issues, the court proceeded to enact another new rule, decreeing:

> In all future cases where the criminal prosecution has been dismissed . . . after the trial court has sustained a motion to suppress . . . such dismissal will not bar the refiling of a new information, but in the event the case be refiled it should not be re-assigned to the same judge who has previously ruled on the motion to suppress, and the judge to whom such case is assigned will not be bound by the prior ruling on the motion to suppress. . . . [But] the State may not, for the second time, refile the information . . . .[24]

Thus, the state was afforded the procedural equivalent of an appeal through the relitigation of the merits of the search issue before a different judge.

Aside from the difficulty which *Robinson* shares with Rule VI regarding the authority of the court of criminal appeals to create or change procedural modes of practice in the district courts, the case raises another important question. *Robinson* permits relitigation of a search issue at the same level of the judicial hierarchy, but before a different judge in a new proceeding. Just as relitigation of a cause of action is barred by the doctrine of res adjudicata, relitigation of conclusive issues is barred by the doctrine of collateral estoppel. In *Ashe v. Swenson*,[25] the United States Supreme Court held that the doctrine of collateral estoppel is embodied in the fifth amendment guarantee against double jeopardy and is enforceable against the states through the fourteenth amendment. The recent decision of *United States v. Regan*[26] held *Ashe* applicable to suppression of evidence.

In summary, it appears that the rule-making power of the Oklahoma Court of Criminal Appeals has been invoked in Rule VI and *Robinson* in a manner inconsistent with the court's statutory appellate jurisdiction and the United States Constitution. The "rule" of *Robinson*, that in the second judge hearing a search issue is not bound by the ruling of the first, is inconsistent with the constitutional doctrine of collateral estoppel.

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23. OKLA. STAT. tit. 22, § 1053 (1958).
24. 544 P.2d at 551.
25. 397 U.S. 436 (1970).
26. 528 F.2d 1262 (2d Cir. 1975), *cert. denied*, — U.S. —.

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REMEDIES AVAILABLE

If the court of criminal appeals has in fact exceeded its jurisdiction, the Oklahoma Supreme Court's decision in *Wofford v. Bussey* raises an important question; if the supreme court has no jurisdiction to determine if the Oklahoma Court of Criminal Appeals has exceeded its jurisdiction, what other remedy is appropriate? Several possibilities exist.

State Habeas Corpus

Although the court of criminal appeals has exclusive appellate jurisdiction in criminal cases, habeas corpus is a civil proceeding and habeas petitions may be considered by the Oklahoma Supreme Court, as well as the court of criminal appeals.[27] Accordingly, if the issue of whether the court of criminal appeals exceeded its jurisdiction through enacting Rule VI or the *Robinson* refiling procedure was presented by means of a petition for a writ of habeas corpus, the lack of jurisdiction which resulted in the denial of the writ of prohibition in *Wofford* would no longer preclude the supreme court from deciding the question. However, the supreme court's declaration in *Wofford* that the court of criminal appeals has exclusive appellate jurisdiction to determine its own jurisdiction indicates that the supreme court could deny a petition for writ of habeas corpus on the same grounds. This apparent conflict between jurisdiction to hear an application for a writ of habeas corpus and the lack of jurisdiction to determine the jurisdiction of the Oklahoma Court of Criminal Appeals must still be resolved. Judging from the language in *Wofford*, it certainly seems that the supreme court would be disinclined to pass upon the issue, even if presented via habeas corpus.

Prohibition and Habeas Corpus Before the Court of Criminal Appeals

It is unlikely that the Oklahoma Court of Criminal Appeals would rule that it exceeded its own jurisdictional limitations in enacting Rule VI and the *Robinson* refiling procedure, although this remains as one avenue of possible relief. In the past, the court has declined to assume original jurisdiction and entertain the merits of the question of issuing a writ of prohibition against the Tulsa County District Court.[28] Accord-

27. OKLA. STAT. tit. 12, § 1333 (1961); *see Ex parte* Deickman, 33 Okla. 749, 127 P. 1077 (1912).

28. *See* State v. Elies, No. CRF-76-2187 (Okla. Crim., filed Sept. 9, 1976).

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ingly, it is safe to assume that subsequent applications would be similarly rejected. Prudence would suggest, however, that this remedy be attempted before pursuing the option below.

Federal Habeas Corpus

Assuming that the court of criminal appeals has exceeded its jurisdiction in enacting Rule VI and *Robinson,* and assuming an individual successfully defended a criminal charge to a stage where he would be entitled to his freedom as far as the Oklahoma Statutes were concerned, but was restrained of his liberty under Rule VI or *Robinson,* that individual would presumably be entitled to federal habeas corpus relief.[29]

Existence of a federal question, the first requirement for federal relief, is easily satisfied under the terms of the habeas corpus statute itself. Section 2254(d)(4) provides for the issuance of the writ if the state court that is depriving the defendant of his liberty lacks jurisdiction over the subject matter or the person of the applicant. Additional potential federal questions include deprivation of liberty without due process of law, which requires a full and fair hearing before a tribunal empowered to grant relief; infringement of the doctrine of separation of powers in violation of the constitutional guarantee that all states shall have a republican form of government; and, as to *Robinson,* violation of the constitutional prohibition against relitigation of conclusive issues.

The real question regarding the availability of federal habeas corpus relief is that of exhaustion of state remedies. Simply stated, the question is whether a state prisoner who has won a discharge at a preliminary examination or at a district court arraignment, but who has not been freed because of further prosecution pursuant to Rule VI or the *Robinson* refiling procedure, must endure the second prosecution to its ultimate conclusion, bearing the expenses thereof, before applying to a federal court for habeas corpus relief? The answer appears to be that he need not. The United States Supreme Court, in *Reed v. Beto,*[30] and the Tenth Circuit Court of Appeals in *Sandoval v. Rodriguez,*[31] have held that where the highest court of a state passed upon the federal issues raised by the applicant, in a manner adverse to the applicant, he need not seek further relief in the state courts; immediate

29. 28 U.S.C. § 2254 conditions relief under federal law on the satisfaction of two requirements: (1) the existence of a federal question and (2) the exhaustion of state remedies.
30. 385 U.S. 554 (1965); *reh. denied,* 386 U.S. 969 (1967).
31. 461 F.2d 1097 (10th Cir. 1972).

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Tulsa Law Review, Vol. 12 [2013], Iss. 3, Art. 3

habeas corpus relief in the federal courts is available if his claim has merit. Since Rule VI and *Robinson* were created at the highest court level of this state, such action would be equivalent to a decision upholding those rules and immediate federal habeas corpus relief should be available, particularly if state prohibition were denied.

The final issue remaining concerns the stage of a prosecution, pursuant to Rule VI and *Robinson,* at which the federal question arises. Under Rule VI, the federal question would apparently arise as soon as an order of dismissal was entered by an examining magistrate, since under state statutes the defendant would be entitled to immediate release, but would be retained in custody pending the state's "appeal" of the magistrate's ruling to a district judge. Under *Robinson's* refiling procedure, however, a different situation is presented. When a district judge sustains a motion to suppress, the state may proceed to trial without the evidence which was suppressed and appeal the search issue after the defendant's acquittal on a reserved question of law. The defendant is discharged upon acquittal, regardless of the outcome of the appeal. However, if the state requests a dismissal following the sustaining of a motion to suppress and the dismissal is granted by the court,[32] the state is permitted to refile.[33] Under *Robinson,* of course, the new evidence requirement of *Nicodemus* and *Jones* need not be met, but the failure to do so does not give rise to a *federal* question, since the defendant can win his release under existing state remedies by convincing the second district judge to rule consistently with the first. However, once the second district judge upholds the search in derogation of the doctrine of collateral estoppel, a federal question exists and federal habeas corpus relief would be available.

CONCLUSION

In *Prentis v. Atlantic Coast Line Co.*,[34] Justice Holmes offered the following distinction between legislative and judicial action:

> A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.[35]

32. OKLA. STAT. tit. 22, § 815 (1969).
33. OKLA. STAT. tit. 22, § 817 (1969).
34. 211 U.S. 210 (1908).
35. *Id.* at 226.

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Rule VI was adopted "[a]s a matter of deep public interest and to more nearly achieve a true balance of the scales of criminal justice."[36] *Robinson's* refiling procedure was implemented following the Oklahoma Court of Criminal Appeals' observation that "a persuasive argument may be made on behalf of the people that an appeal from an order sustaining a motion to suppress should be authorized without jeopardy having attached."[37] Both Rule VI and *Robinson* appear to have been created by the court of criminal appeals to fill what was believed to be a void in Oklahoma's statutory scheme of criminal procedure. The question of whether this is improper judicial legislation will probably be decided eventually by a federal court, pursuant to an application for a writ of habeas corpus from a defendant aggrieved by Rule VI or *Robinson.*

36. 498 P.2d at 428.
37. 544 P.2d at 550.

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