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Constitutional Law - Due Processs - Criminal Prosecutions - Remedies to Review

Jacque G. Stockman

CASE NOTE

CONSTITUTIONAL LAW — DUE PROCESS — CRIMINAL PROSECUTIONS — REMEDIES TO REVIEW. Marino, a life-term convict since 1925 on a charge of murder, petitioned the United States Supreme Court for review under habeas corpus on the grounds of denial of due process under the Fourteenth Amendment. The Winnebago County Court in Illinois, whose judgment is final and not subject to review, had quashed Marino's writ of habeas corpus based principally on lack of adequate representation by counsel. Before the United States Supreme Court the Illinois Attorney General confessed an error, and consented to reversal of the judgment of the Illinois Court. The Supreme Court held that the federal courts had jurisdiction because Marino had exhausted his remedies in the state courts and that Marino was denied due process of law as guaranteed by the Fourteenth Amendment in view of the undisputed facts which indicated that lack of adequate counsel had not been considered by the state courts on its merits. The concurring opinion reprimanded the court system in Illinois very severely for allowing a situation to exist whereby a convict who claims factual errors in the proceedings that resulted in conviction, which errors were not recorded in the record, has in effect no remedy to try his case on its merits. *Marino v. Ragen*, 68 S. Ct. 240 (1947).

A consideration of the remedies available in North Dakota for post-conviction hearings leads to the conclusion that a condition exists which is similar to that in Illinois. In Illinois, the convict has not only a maze of remedies—writ of error, habeas corpus, coram nobis—so that it is difficult to select the proper one, but the fact is that not one of these remedies is sufficient to put all cases of alleged constitutional errors into issue on their merits. Thus, in view of the federal rule that state remedies must be exhausted before a federal court will take jurisdiction on a constitutional point, *Pepke v. Cronon*, 155 U. S. 100, 15 S. Ct. 34, 39 L. Ed. 84 (1894); *Markuson v. Boucher*, 175 U. S. 184, 20 S. Ct. 76, 44 L. Ed. 124 (1899); *Ex parte Hawke*, 321 U. S. 114, 64 S. Ct. 448, 88 L. Ed. 572 (1944); *Woods v. Nierstheimer*, 328 U. S. 211, 66 S. Ct. 996, 90 L. Ed. 1177 (1946), the Illinois convict must, as a matter of procedure, present his petition to the various state courts under all available remedies, knowing it will be denied on procedural technicalities. Then he must apply to the federal courts where he may receive trial of his question on its merits as part of the consideration of whether or not he has been deprived of due process. *A Study of the Illinois Supreme Court*, 15 U. of Chi. L. R. 119 (1947); *Collateral Relief From Convictions in Violation of Due Process in Illinois*, 42 Ill. L. R. 332 (1947). The main doctrines successfully relied upon by convicts in their applications to federal courts charging violation of constitutional rights by state courts have been: 1) lack of adequate representation by counsel; 2) use of coerced confessions; 3) convictions on testimony which the prosecution knew to be false at the time of the trial, *A Study of the Illinois Supreme Court*, 15 U. of Chi. L.R. 119 (1947); 4) the systematic exclusion of defendant's race from the jury, Boskey and Pickering, *Federal Restrictions on State Criminal Procedure*, 13 U. of Chi. L. R. 266 (1946). If a convict has exhausted his

remedies in North Dakota—appeal and error, habeas corpus, certiorari—and has not been able to put in issue and try on its merits any of the above factual errors in the proceedings which errors are not in the record, then he has been deprived of due process of law by the North Dakota Courts and may apply to the federal courts for consideration under the Fourteenth Amendment. Appeal and error is statutory in North Dakota, N. D. Rev. Code Sec. 29-2800 (1943), and is available for a fixed period, less than one year, after conviction and sentencing, *Re Shantz*, 26 N. D. 380, 144 N. W. 445 (1913); *State v. Hagen*, 54 N. D. 136, 208 N.W. 947 (1926); *State v. Krueger*, 57 N.D. 636, 223 N.W. 583 (1929); *State v. Gibson*, 69 N. D. 70, 284 N. W. 209 (1938), as a part of the regular criminal judicial procedure, to question any procedural irregularities which affect the substantial rights of the convicted, N .D. Rev. Code sec. 29-2806, 29-2826 (1943), *State v. Tolley*, 23 N.D. 284, 136 N.W. 784 (1912); *State v. Tracy*, 34 N. D. 498, 158 N. W. 1069 (1916). Thus the convict who makes use of his right of appeal and error within the statutory limit may put into issue questions concerning his constitutional rights. However the opinion in the instant case was concerned with those persons who for one reason or another have not made use of their right to appeal within the time limit, and those who make use of their right and discover later other constitutional abuses. They must seek justice under other remedies. Habeas corpus, N. D. Rev. Code Sec. 32-2200 (1943), is a writ of inquiry guaranteed by both the Federal Constitution under Article I, section 9, and the North Dakota State Constitution under section 5. The writ may be sought and issued as a matter of right for the purpose of inquiring "into the reasons for which a person is detained or deprived of his liberty in order to determine its legality," Rottschaefer, *Constitutional Law*, 820 (1st Ed. 1939). The writ puts into issue the jurisdiction of the court which convicted and placed the prisoner in confinement, N. D. Rev. Code Sec. 32-2217 (1943); *State v. Overby*, 54 N. D. 295, 209 N. W. 552 (1926); *Reichert v. Turner*, 62 N. D. 152, 242 N. W. 308 (1932); *Ex parte Moore*, 71 N. D. 274, 300 N. W. 37 (1941). The test question is, "whether the court had jurisdiction over the person and the subject matter, and power to make the particular order or judgment entered in the proceeding?" *State v. Baeverstad*, 12 N. D. 527, 97 N. W. 548 (1903); *Ex parte Solberg*, 52 N. D. 518, 203 N. W. 898 (1925); *Reichert v. Turner*, 62 N. D. 152, 242 N. W. 308 (1932). In *Reichert v. Turner*, supra, an error in the information which the trial court determined was correct was held to be an error of law and not of jurisdiction, and thus the error was not allowed to be re-examined on habeas corpus. The court there said, "Jurisdiction does not depend upon the correctness of the decision . . . . If the court committed error in making its determination, such error did not render the determination an act outside of the court's jurisdiction." The finding of a committing magistrate on a preliminary examination was held conclusive against collateral attack by habeas corpus in *State v. Baeverstad*, supra. A district court's ruling on a plea in abatement that the defendant had neither had, nor waived, preliminary examination for the offense charged was held not reviewable by habeas corpus because the ruling was made by a court having jurisdiction of the person adn the subject matter.

State ex rel Peterson v. Barnes, 3 N. D. 131, 54 N. W. 541 (1893). It has been held repeatedly that the writ of habeas corpus will not perform the function of reviewing errors or irregularities in the proceedings of a court having jurisdiction, *State v. Floyd*, 22 N. D. 183, 132 N. W. 662 (1911); *Reichert v. Turner*, 62 N. D. 152, 242, N. W. 308 (1932); *Ex parte Moore*, 71 N. D. 274, 300 N. W. 37 (1941); *Ryan v. Nygard*, 70 N. D. 687, 297 N. W. 694 (1941); *Mazakahomi v. State*, 25 N. W. 2d 772 (N. D. 1947). Since in North Dakota the District Court Judges as well as Supreme Court Judges can issue writs of habeas corpus, N. D. Rev. Code Sec. 32-2204, a question as to the reviewability of a final order in habeas corpus made by a District Judge arises. The cases seem to conclude that no appeal lies to the Supreme Court of North Dakota from a final order of a District Judge in habeas corpus, *Curruth v. Taylor*, 8 N. D. 166, 77 N. W. 617 (1898); *Ex parte Simonson*, 54 N. D. 164, 209 N. W. 211 (1926); but that a right of review may be exercised by the Supreme Court, *In re Zimmer*, 64 N. D. 410, 253 N. W. 749 (1934); and that this is accomplished by the petitioner making an original application in habeas corpus to the Supreme Court on the same facts stating therein that the prisoner has been remanded to prison by the District Court. The Supreme Court may then re-investigate and re-determine the case, *Curruth v. Taylor*, 8 N. D. 166, 77 N. W. 617 (1898); *State v. Stair*, 48 N. D. 472, 185 N. W. 301 (1921); *Ex parte Simonson*, 54 N. D. 164, 209 N. W. 211 (1926). The petitioner must set forth in his position all the grounds upon which he relies, *Kist v. Butts*, 71 N. D. 436, 1 N. W. 2d 612 (1942). From the above consideration of the technical requirements of habeas corpus in North Dakota, it is apparent that in North Dakota as in Illinois factual errors in proceedings which errors are not in the record can not be reviewed under habeas corpus because they do not question the jurisdiction of the court wherein the errors are claimed to have originated. A writ of certiorari, N. D. Constitution Sec. 103, Sec. 87; N. D. Rev. Code Sec. 32-3300, is a writ issued at the discretion of a district court or of the Supreme Court, N. D. Rev. Code Sec. 32-3301 (1943); *Cofman v. Ousterhouse*, 40 N. D. 390, 168 N. W. 826, 18 A. L. R. (1918); *Nelson v. Ecklund*, 68 N. D. 724, 283 N.W. 273 (1939). It calls for a review of the record of an inferior court, tribunal, board or officer; N. D. Rev. Code Sec. 32-3303 (1943); *In re Evingson*, 2 N. D. 184, 49 N. W. 733 (1891); *Johnson v. Clark*, 21 N. D. 517, 131 N. W. 715 (1911); *Cofman v. Ousterhouse*, 40 N. D. 390, 168 N. W. 826, 18 A. L. R. 219 (1918); *Livingston v. Peterson*, 59 N. D. 104, 228 N. W. 816 (1930), when no appeal or other plain, speedy, adequate remedy exists or when a miscarriage of justice is imminent, N. D. Rev. Code Sec. 32-3301 (1943); *Martin v. Ludonwese*, 48 N. D. 342, 184 N. W. 575 (1920); *Sell v. Davis*, 61 N. D. 130, 237 N. W. 307 (1931); *Nelson v. Ecklund*, 68 N. D. 724, 283 N. W. 273 (1939). Certiorari searches the record and questions whether the inferior court, tribunal, board or officer has pursued regularly its authority, N. D. Rev. Code Sec. 32-3309 (1943); *Nelson v. Ecklund*, supra. Authority means that the court has jurisdiction, and that its proceedings are not irregular, *State v. Peake*, 22 N. D. 457, 135 N. W. 197, 40 L. R. A. (N. S.) 354 (1912); *Baker v. Lenhart*, 50 N. D. 30, 195

N. W. 16 (1922); *Sell v. Davis*, 61 N. D. 130, 237 N. W. 307 (1931); *Brunette v. Sutton*, 71 N. D. 530, 3 N. W. 2d 106 (1942). Jurisdiction does not include review of the sufficiency or insufficiency of evidence, *State v. Frazer*, 47 N. D. 314, 182 N. W. 545 (1921); *Olson v. Welford*, 65 N. D. 522, 260 N. W. 593 (1935), or review of the merits of the case, *Cofman v. Ousterhouse*, 40 N. D. 390, 168 N. W. 826, 18 A. L. R. 219 (1918). A final order of a district court in certiorari proceedings may be appealed to the Supreme Court of North Dakota, *Cofman v. Ousterhouse*, supra; *Martin v. Ludonwese*, 48 N. D. 342, 184 N. W. 575 (1920), to determine whether the district court exceeded its jurisdiction, and not ordinarily to review the sufficiency of evidence nor the findings of the district court, *Peterson v. Points*, 67 N. D. 631, 275 N. W. 867 (1937). Because the writ of certiorari only considers the record, factual errors in proceedings which errors are not in the record can not be put in issue.

The conclusion reached after considering the available remedies in North Dakota for post-conviction hearings is that the convict in North Dakota, after the time limit for appeal and error, must run the gauntlet of applying to the state courts for remedies which seem likely to be refused on grounds of procedural technicalities before he can apply to the federal courts to have his case, concerning procedural errors in the trial which convicted him, tried on its merits to determine whether or not he was deprived of his constitutional right of due process of law. "The due process clause has been held to place a duty on the states to furnish some type of procedure by which prisoner's charges of violations of constitutional rights may be investigated." *A Study of the Illinois Supreme Court*, 15 U. of Chi. L. R. 119 (1947). What will North Dakota do?

JACQUE G. STOCKMAN
Second Year Law Student
University of North Dakota.