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## SCOPE OF REVIEW ON HABEAS CORPUS

The rule that habeas corpus can never be employed to perform the function of a writ of error is so well established as to have become a legal maxim. In fact, one so often hears the rule that the exceptions which have come to attend it are apt to be overlooked.

Such, in effect, was the gist of a recent Pennsylvania case which treated with the subject, *Commonwealth ex rel. Madden, Appellant v. Ashe, Warden*.<sup>1</sup> The facts of the case, briefly, are these: Relator had pleaded guilty to eleven bills of indictment and was sentenced upon seven of them. While in custody in Western State Penitentiary he filed a petition for a writ of habeas corpus on the contention that there was duplication of sentence resulting from merger of some offenses within others. He conceded that he was not entitled to immediate discharge but he sought to have his sentence reviewed. The case came before the Superior Court on a review of the action of the Court of Common Pleas of Allegheny County in dismissing the petition.

Speaking through President Judge Rhodes the Court said:

"The court below dismissed the petition for the reason that the writ of habeas corpus can never be made use of to perform the function of a writ of error or an appeal, citing *Com. ex rel. Ross v. Eagen*, 281 Pa. 251, 126 A. 488; *Halderman's Petition*, 276 Pa. 1, 11 A. 735; *Com. v. Seechrist*, 27 Pa. Super. Ct. 423. The rule supported by these authorities. . . is directed at petitions which seek to raise the question of errors or irregularities which may have occurred in the course of trial and prior to the imposition of sentence, and which are not basic or fundamental. Our courts have said that the writ of habeas corpus should be allowed only when the court or judge is satisfied that the 'party hath probable cause to be delivered.' *Com ex rel. Biglow v. Ashe*, 348 Pa. 409, 410, 35 A. 2d. 340. But *where the legality of the sentence is questioned habeas corpus is available as a proper 'procedure for correcting the error.'*<sup>2</sup> . . . See *Com. ex rel. Schultz v. Smith*, 139 Pa. Super. Ct. 357, 367, 11 A. 656."

Acceptance of the Superior Court's invitation to "See *Com. ex rel. Schultz v. Smith*," supra, reveals the following comment:

". . . Under the liberal and humane construction given by our Supreme Court to our Habeas Corpus Act (February 18, 1785, 2 Sm. L. 275),<sup>3</sup> and the practice which has been established concerning it, there are certain basic and fundamental errors which may be corrected on habeas corpus, even though the defendant failed to appeal from the judgment, and which are recognized as exceptions to the

<sup>1</sup> 162 Pa. Super. Ct. 39, 56 A. 2d 335 (1948).

<sup>2</sup> Italics not in original text.

<sup>3</sup> 12 P. S. 1871.

principle [that habeas corpus can never be employed to perform the function of a writ of error].<sup>4</sup> For example:<sup>5</sup>

"Where an erroneous and illegal sentence has been imposed (*Com. ex rel. Smith v. Smith*, 324 Pa. 73, 74, 187 A. 387; *Com. ex rel. Wilhelm v. Morgan*, 278 Pa. 395, 123 A. 337; *Com. v. Curry*, 285 Pa. 289, 132 A. 376; *Com. ex rel. Fagan v. Francies*, 53 Pa. Super. Ct. 278; *Halderman's Case*, 53 Pa. Super. Ct. 554), whether

- (a) excessive<sup>6</sup> (*Com. ex rel. Bishop v. Smith*, 123 Pa. Super. Ct. 79, 186 A. 763), or
- (b) a lumping sentence (*Com. ex rel. Hollett v. McKenty*, 80 Pa. Super. Ct. 249, 250), or
- (c) a double sentence for the same offense (*Com. ex rel. Ciampoli v. Heston*, 292 Pa. 501, 141 A. 287), or
- (d) where the minor offense is swallowed up in the greater (*Com. ex rel. Wendell v. Smith*, 123 Pa. Super. Ct. 113, 186 A. 810), or
- (e) where the sentence was increased after the end of the term (*Halderman's Petition*, 276 Pa. 1, 119 A. 735)

it may be corrected on habeas corpus, for the error is basic and fundamental and so destructive of justice, that it cannot be permitted to stand, even though not appealed from."

It is well to remember that, as a general principle, habeas corpus cannot be used to obtain the review of a judgment of conviction under which the relator is being held where the judgment could have been attacked on the same grounds in an appeal; the writ cannot be employed to perform the function of a writ of error. It may, however, be equally desirable to bear in mind that where certain basic and fundamental errors exist, among which are those discussed herein, there are well-defined exceptions to the general rule which are worthy of notice.

BARTEL E. ECKER

<sup>4</sup> Material in brackets supplied.

<sup>5</sup> Format changed, but text unaltered.

<sup>6</sup> Cf. 28 Cornell L. Q. 215, 217, citing cases: "Usually the imposition of a sentence in excess of that prescribed by statute is not considered a jurisdictional defect warranting the use of habeas corpus."