1965

Note, Commonwealth ex. rel. Stevens v. Myers

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CRIMINAL LAW—Habeas Corpus—Prematurity—Pennsylvania has abrogated the prematurity doctrine.*

Commonwealth ex rel. Stevens v. Myers, 419 Pa. 1, 213 A.2d 501 (1965).

Appellant Stevens was found guilty of felony murder in a jury trial in 1954 and sentenced to life imprisonment. At the time of the trial, Stevens was already serving a ten to twenty year unrelated sentence for robbery which began to run earlier in 1954. No direct appeal was taken from the murder conviction; however, in 1959 and again in 1963 the murder conviction was attacked by means of a petition for habeas corpus. Both petitions were denied.[1] The instant case is an appeal from the dismissal of the second petition.

Although prior to this case habeas corpus could be used only as a means of postconviction collateral attack against a sentence which the relator was presently serving, the Pennsylvania Supreme Court held that the prematurity doctrine would no longer bar a habeas corpus attack on a sentence which the relator had not yet begun to serve. On the merits the court held that the refusal of trial counsel to take a direct appeal because of Steven's indigency might constitute a denial of his right to counsel because of the retroactive application of *Douglas v. California*.[2] The order of the lower court was vacated and the case remanded for rehearing. Under the old rule governing issuance of the writ, 1974 would have been the earliest date at which Stevens could have attacked the 1954 murder conviction.[3]

In deciding that the prematurity of a habeas corpus petition would no longer be grounds for its denial, the court based its rationale on three factors.[4] First, the writ of habeas corpus has developed historically into the expanded function of postconviction collateral attack, and is the "chief and only comprehensive method of collateral attack in Pennsylvania."[5] Second, the recent changes wrought in the area of constitutional

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* *Editor's note:* At the time this issue went to press, the Pennsylvania legislature enacted the Post Conviction Hearing Act, which was approved on January 25, 1966 (Pennsylvania Laws 1965, act 554). This act establishes a single post-conviction procedure for dealing with allegations of denial of due process. The act, however, does not expressly provide for the prematurity problem. It seems, therefore, that the law of the instant case is still valid and will be incorporated into the act by the judiciary.

1. Commonwealth *ex rel.* Stevens v. Myers, 398 Pa. 23, 156 A.2d 527 (1959), *cert. denied*, 363 U.S. 816 (1960).

2. 372 U.S. 353 (1963).

3. Commonwealth *ex rel.* Salerno v. Banmiller, 189 Pa. Super. 156, 149 A.2d 501 (1959).

4. The court expressly notes that the prematurity doctrine has never been fully considered by the Pennsylvania Supreme Court. Commonwealth *ex rel.* Stevens v. Myers, 419 Pa. 1, 5 n.6, 213 A.2d 613, 616 n.6 (1965).

5. *Id.* at 11 n.15.

law by the United States Supreme Court demand an expanded function for the writ in the state courts.[6] Third, prejudice results to the prosecution and defense, because of the length of time which intervenes between the trial of the crime which is being collaterally attacked and retrial when an intervening sentence must be served. This delay is often so protracted that all witnesses are dead.[7]

The history of habeas corpus in Pennsylvania has been a long and steadily developing one which had its genesis in the English common law[8] and which is guaranteed by the Pennsylvania Constitution.[9] Generally, the writ in this jurisdiction will issue only if the sentencing court is without jurisdiction, if the record shows no crime has been committed, if an illegal sentence has been passed, if the relator has been detained after his sentence has expired, or if the relator has been denied due process.[10] Furthermore, the writ will lie only to test actual and present restraint, and cannot be used where the prisoner is in custody as a result of a final decree: the judgment of a court of competent jurisdiction carries with it a presumption of regularity and this presumption is not open to collateral attack by means of habeas corpus.[11] In spite of these restrictions, habeas corpus has become the most frequently used postconviction remedy.[12]

Recently, certain modifications and relaxations of the strict rules governing the issuance of habeas corpus began to occur. These changes laid the basis for the change in the instant case. A good example of the system

6. *E.g.*, Douglas v. California, *supra* note 2; Fay v. Noia, 372 U.S. 391 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963).

7. The court mentions several recent cases in which habeas corpus was granted. In *O'Lock v. Rundle*, 415 Pa. 515, 204 A.2d 439 (1964) the time was 20 years between trial and retrial. In *Commonwealth ex rel. Butler v. Rundle*, 416 Pa. 321, 206 A.2d 283 (1965) the time was 25 years, *Commonwealth ex rel. Stevens v. Myers*, *supra* note 4, at 14 n.18.

8. 1 BLACKSTONE, COMMENTARIES *135. The English statute is the Habeas Corpus Act, 16 Car. 1 C. 10, Star Chamber (1640). The writ would lie if a person was detained by order of an illegal court, by the king, or warrant of the council or privy council. See generally, Collings, *Habeas Corpus for Convicts*, 40 CALIF. L. REV. 325 (1952).

9. ". . . [A]nd the privilege of the writ of *habeas corpus* shall not be suspended, unless when in case of rebellion or invasion the public safety may require it." PA. CONST. art. 1, § 14.

10. Halderman's Petition, 276 Pa. 1, 119 Atl. 735 (1923), discussed in Sedler, *Habeas Corpus in Pennsylvania*, 20 U. PITT. L. REV. 652, 653 (1959).

11. Commonwealth *ex rel.* McGlinn v. Smith, 344 Pa. 41, 24 A.2d 1 (1942); Respublica v. Arnold, 3 Yeats 263 (1801).

12. . . . Today habeas corpus has become a remedy most frequently employed after conviction. In the Ninteenth Century, however, most petitions involving criminal commitments preceded conviction. . . .

. . . [T]he original role of merely bringing the prisoner before the court for the purpose of furthering its business has been supplanted by a new function—reviewing the proceedings of the committing court with a view to possible invalidation of its judgment.

Oaks, *Habeas Corpus in the States*, 32 U. CHI. L. REV. 243, 245, 258 (1965).

in this state is the *Dermendzin* case.[13] The court in that case held that, though technically premature, *improper* or *excessive* sentences have been corrected even though the present confinement is within the term of a legal sentence.

Moreover, in the federal courts more had been said about state habeas corpus procedures which indicated both that the rules set forth in the *McNally* case had been relaxed and that more effective habeas corpus procedures were needed in the states.[14] One of these federal cases on which this court relied was *Martin v. Virginia*.[15] The court there held that, at least in the federal system, the concept of restraint has been relaxed. Consequently, one on parole is still in custody, and custody is equated with restraint of liberty. "[Habeas corpus] is not now and never has been a static, narrow, formalistic remedy; its scope has grown. . . ."[16] Thus the historical basis had been laid for the modification of the prematurity concept in the instant case.

The second broad basis for the holding is related to, and interacts with, the historical development of the writ of habeas corpus. This basis, as Justice Roberts indicates, is the tremendous increase in the number of habeas corpus petitions occasioned by the recent United States Supreme Court decisions on the rights of the accused. The instant case is a good example.[17] At issue in the present case is an allegation of denial of right to counsel on appeal. This right was given to the criminal defendant in the state courts in *Douglas v. California*.[18] The holding in *Douglas* is retroactive.[19] It is important to note that the basis for the *Douglas* decision is the equal protection clause of the fourteenth amendment, for the implications of the instant case when analyzed in light of this fact are far reaching. As indicated above, one function of the writ of habeas corpus has been to attack convictions which allegedly are violative of due process.[20] Many of the recent United States Supreme Court decisions which have applied the provisions of the first ten amendments to the states have done so by means of the due process clause of the fourteenth amendment.[21] The implication of the holding in the instant case in view

13. Commonwealth *ex rel.* Dermendzin v. Myers, 397 Pa. 607, 156 A.2d 804 (1959). See Commonwealth *ex rel.* Cooper v. Banmiller, 193 Pa. Super. 524, 165 A.2d 397 (1960).

14. The leading prematurity case, *McNally v. Hill*, 293 U.S. 131 (1934) also involved consecutive sentences, one of which was attacked by means of a petition for habeas corpus before the admittedly valid sentence had run. The holding of that case, as Justice Roberts points out in the instant case, applies to the scope of the writ only in the federal courts.

15. 349 F.2d 781 (4th Cir. 1965).

16. *Id.* at 784, quoting Jones v. Cunningham, 371 U.S. 236, 243 (1963).

17. Commonwealth *ex rel.* Stevens v. Myers, *supra* note 4, at 13 n.3.

18. *Supra* note 2.

19. Smith v. Crouse, 378 U.S. 584 (1964).

20. Sedler, *supra* note 10, at 657.

21. *E.g.*, Gideon v. Wainwright, *supra* note 6. This case is a typical example of the "selective incorporation" approach. *Gideon* held that the right to counsel, because it is funda-

of these facts is that, in addition to the extension of habeas corpus to formerly premature due process allegations, the writ may also be used where a denial of due process retroactively applied is alleged and, furthermore, where a denial of equal protection is retroactively asserted. This change could be a major one, or, as the concurring opinion of Chief Justice Bell indicates, could or should be limited.

Chief Justice Bell argues that radical changes in constitutional law have swamped the state courts and, retroactively applied, "seriously endanger the safety and welfare of all law abiding citizens."[22] Relief, he argues, is warranted in this case only because the circumstances are exceptional. Thus, Chief Justice Bell advocates limitations on the abrogation of the prematurity concept. There is a possibility that his opinion may be implicitly contained within the majority opinion and subsequently adopted by them. The reason for this conclusion is that a due process or equal protection argument by its very nature must be decided by a tribunal on the basis of the *facts* in the case before it. Due process and equal protection in this respect involve an *ad hoc* determination in each case. This is precisely what the majority did in the instant case, and, perhaps, what the Pennsylvania Supreme Court will do in the future. Where exceptional factual circumstances warrant it, prematurity may be overlooked, and the case will proceed to be reheard on the merits.

The third broad basis on which the court relies in the instant case is not as closely related as are the historical development and constitutional law bases. The majority holds that the prejudice which results from delay is the immediate reason for the modification of the prematurity concept. Justice Cohen replies in his dissent that staleness of evidence is not a valid reason for striking down the prematurity concept, and that staleness of evidence was as much of a problem in the *McNally*[23] and *Ashe*[24] cases. Justice Cohen then invokes the principle that courts should never decide constitutional issues "unless and until they have to."[25]

This dissent raises a cogent point which must be answered. At the outset it must be noted that the so-called doctrine of abstention in constitutional law in the abstract embraces a broad range of possible applications. It cannot, however, be applied with so broad a brush when dealing with specific situations, because other factors may call for a decision at once. In the present case such factors exist. The length of time which usually intervenes if the prematurity concept is rigidly applied will in the majority of cases result in the disappearance of the evidence on both

mental, is made obligatory upon the states by the due process clause of the fourteenth amendment.

22. Commonwealth *ex rel.* Stevens v. Myers, *supra* note 4, at 25.

23. McNally v. Hill, *supra* note 14.

24. Commonwealth *ex rel.* Lewis v. Ashe, 335 Pa. 575, 7 A.2d 296 (1939).

25. Commonwealth *ex rel.* Stevens v. Myers, *supra* note 4, at 27.

sides. Thus, the prosecution, upon whom the burden of proof rests, will not be able to sustain that burden, and some prisoners who should remain incarcerated will be freed.

On the other hand, the convict innocent of a succeeding conviction would be in the unenviable position of helpless inaction while watching witnesses and other evidence which might free him pass out of his grasp. Perhaps this is one of the reasons for the seriousness of the crimes in which habeas corpus has been granted, and the almost total absence of lesser offenses from habeas corpus reports.[26] Justice Cohen feels that the majority decision merely shifts the burden to already overloaded prosecutors. This, however, is a small price to pay for a determination which will have to be made anyway, and which, if made presently, will protect the interests of both the state and the individual.

A consideration of the basis of the decision leads to the conclusion that the holding of the court is a wise one. Historically, conditions have changed radically, so that the common law writ of habeas corpus must fulfill a different, expanded function from that which it served at earlier common law. The impact of the recent constitutional decisions was the final drastic change which urgently called out for some procedural vehicle by which a convict could assert alleged violations of his rights. And the prejudice which results from disappearance of evidence under the prematurity concept is a pressing consideration. In short, the decision of the court is the necessary and logical outgrowth of historical development and the present relationship which exists between the state and the federal courts.

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CRIMINAL LAW AND PROCEDURE—Pennsylvania statute that authorizes a jury to impose costs on an acquitted misdemeanor defendant and subjects him to imprisonment for failure to pay such costs is invalid under the due process clause of the fourteenth amendment.

Giaccio v. State of Pennsylvania, 86 Sup. Ct. 518 (1966).

In the recent case of *Giaccio v. Pennsylvania*,[1] the United States Supreme Court outlawed the "Scotch verdict" practice in Pennsylvania criminal proceedings. This practice permitted a jury to impose the costs of prosecution on a defendant found not guilty of the substantive charge against him.

26. Reitz, *Federal Habeas Corpus*, 108 U. PA. L. REV. 461, 484 (1960). Prof. Reitz feels that this is very probably the reason. In his study of thirty-five federal cases in which habeas corpus was granted, the median sentence was twenty-five years.

1. 86 Sup. Ct. 518 (1966).