North Dakota Law Review

Volume 29 | Number 3 Article 5

1953

Constitutional Law - Due Process and Equal Protection - Exhaustion of State Remedies as Condition Precedent to Relief in Federal Courts

W. James Liebeler

RECENT CASES

CONSTITUTIONAL LAW — DUE PROCESS AND EQUAL PROTECTION — EXHAUSTION OF STATE REMEDIES AS CONDITION PRECEDENT TO RELIEF IN FEDERAL COURTS — Petitioner was convicted in the Los Angeles Municipal Court of violating a broadly phrased vagrancy statute which provided that "every *** dissolute person *** is a vagrant."[1] According to Mr. Justice Black in his dissenting opinion the conviction was based primarily on what the petitioner had said in public speeches in a Los Angeles public park.[2] A notice of appeal was immediately filed in the Appellate Department of the Los Angeles Superior Court. Petitioner thereupon made a substitution of attorneys. The notice of the hearing in the appellate court was sent to the original counsel who, upon receiving it, returned it to the clerk and informed him of the substitution. The clerk assured the counsel that the notice would be sent to the proper attorney. It was not done and the conviction was affirmed on default. Petitioner then applied to the United States Supreme Court for a writ of certiorari after the Appellate Department had refused to vacate the judgment. He contended that he had been deprived of due process of law under the Fourteenth Amendment because the vagrancy statute was vague and indefinite and that he had not been given notice and hearing in the Appellate Court. *Held,* Justices Black and Douglas dissenting, that the writ of certiorari had been improvidently granted and should be dismissed as the decision below rested on adequate state grounds and the federal questions had not been seasonably raised in accordance with the requirements of state law. *Edelman v. State of California,* 73 Sup. Ct. 293 (1953).

The question of the constitutionality of the vagrancy statute was not raised in the trial court. It was first mentioned in the grounds of appeal and as the Appellate Court affirmed the judgment on default it was not there considered or passed upon. No deprivation of any constitutional right was alleged in the motion to vacate the judgment. Thus it is seen that the petitioner had not raised the constitutional questions in a timely fashion nor had they been passed on or considered by any state court. In such a case the Supreme Court will not usually assert jurisdiction.[3]

It seems however, as contended by Mr. Justice Black in the dissenting opinion, that the court rested its dismissal on a belief that the petitioner could still test the validity of his conviction in a habeas corpus proceeding in the California courts [4] and on a presumption that a state will not deny a remedy for deprivation of a constitutional right such as here alleged.[5] The implication is that if the petitioner had exhausted his state remedies the Supreme Court would have heard the case on its merits.

The rule that the federal courts will not grant relief until all state remedies have been exhausted is well established.[6] Nevertheless this doctrine pre-

1. California Penal Code §647 (5) (Deering 1949).
2. 73 Sup. Ct. 293, 297.
3. Hulbert v. City of Chicago, 202 U.S. 275 (1906). Mutual Life Insurance Company v. McGrew, 188 U.S. 291 (1903).
4. *In re* Bell, 19 Cal.2d 488, 122 P.2d 22 (1942) (habeas corpus is the only means of testing the constitutionality of a conviction after recourse to appeal is exhausted).
5. United States v. Bank of New York, 296 U.S. 463 (1936). Robb v. Connolly, 111 U.S. 624 (1884). (The duty to guard and enforce federal constitutional rights rests equally on the State and Federal Courts).
6. *Ex Parte* Hawk, 321 U.S. 114 (1943); United States v. Tylor, 269 U.S. 13 (1925). See 62 Stat. 960 (1948), 28 U.S.C. §2254 (Supp. 1946).

supposes the existence of some adequate state remedy [7] and in the absence of such a remedy the federal courts will grant relief.[8] It is on this basis that the dissent would pass on the substantive constitutional questions involved or have the case remanded to the Appellate Department for a clarification of the basis of its action.[9]

An examination of the cases indicates that the petitioner could have used the writ of habeas corpus to test the constitutionality of his conviction in the California Supreme Court.[10] It is also to be noted that he could have alleged two counts in the application for the writ: (1) deprivation of due process because of the vagueness of the vagrancy statute and (2) deprivation of due process and equal protection because of the failure of the Appellate Court to give him notice of the hearing.[11]

It is then seen, with reference to the adequacy of these state remedies that: (1) even though it is generally held that a criminal statute which is so indefinite and uncertain that men of common intelligence will differ substantially as to its meaning or application is unconstitutional and void as a violation of the due process clause of the Fourteenth Amendment,[12] it has been held that the very statute here under attack is a valid exercise of the legislative authority[13] and (2) California provides that failure to send notice of the hearing in the Appellate Department shall not affect the jurisdiction of the said department.[14]

In order to grant the petitioner relief on the state level the California courts would be obliged to either negative prior holdings that the statute is constitutional or declare their own rules of procedure invalid as constituting a deprivation of due process or equal protection. This, together with the fact that the only remedy the petitioner could avail himself of in the state courts[15] could be used only to test jurisdiction [16] and constitutionality [17] and could not operate as a writ of error [18] or to raise any question as to whether the

---

7. Young v. Ragen, 337 U.S. 235 (1949); Woods v. Nierstheimer, 328 U.S. 211 (1946).

8. Marino v. Ragen, 332 U.S. 561 (1947) (With reference to procedural morass in Illinois); *Ex Parte* Hawk, 321 U.S. 114, 118 (1943); *See* 47 Mich. L. Rev. 72 (1948).

9. *See* State Tax Commissioner v. Van Cott, 306 U.S. 511 (1939) (sent back because of supervening events); *cf.* Herb v. Pitcairn, 324 U.S. 117 (1944).

10. *In re* Bell, 19 Cal.2d 488, 122 P.2d 22 (1942).

11. *Cf.* Cochran v. State of Kansas, 316 U.S. 255 (1942) where it was held that Kansas denied Cochran equal protection in refusing him privileges of appeal that it afforded to others.

12. Gorin v. United States, 111 F.2d 712, 719 (9th Cir. 1940), Aff'd. 312 U.S. 19 (1941); Lanzetta v. New Jersey, 306 U.S. 451 (1939); Balzer v. Caler, 74 P.2d 839 (Cal. App. 1937), Aff'd 11 Cal.2d 663, 82 P.2d 19 (1938).

13. State v. Harlowe, 174 Wash 227, 24 P.2d 601 (1933); *In re* McCue, 12 Cal. App. 145, 95 Pac. 110 (1908) upholding §647 (5) as constitutional. It was said that, "One charged with being an idle, lewd or dissolute person is sufficiently advised of the character of his offense." *Accord, Ex Parte* Ah Fook, 49 Cal. 402 (1874), holding that "lewdness" is sufficiently explicit so as not to violate the due process clause of the Fourteenth Amendment (Construction of an immigration law).

14. Revised Appellate Department Rules, Rule 3 (b) (Deering 1949).

15. Habeas corpus, see note 4 *supra*.

16. Bowen v. Johnston, 306 U.S. 19 (1939); *Ex Parte* Drew, 188 Cal. 717, 207 Pac. 249 (1922); *Ex Parte* Moore, 71 N.D. 274, 300 N.W. 37 (1941); Ryan v. Nygaard 70 N.D. 687, 297 N.W. 694 (1941).

17. *Ex Parte* Siebold, 100 U.S. 371 (1879); *In re* Bell, 19 Cal.2d 488, 122 P.2d 22 (1942); State *ex rel.* Gaulke v. Turner, 37 N.D. 635, 164 N.W. 924 (1917); *Ex Parte* McAlpine, 47 S.D. 472, 199 N.W. 478 (1924).

18. Knewel v. Egan, 268 U.S. 442 (1925); *Ex Parte* Conner, 16 Cal.2d 701, 108 P.2d 10 (1940).

facts charged were sufficient to constitute the offense or not,[19] lends great weight to the contention that there was no adequate state remedy for the petitioner to fall back on.

It should be pointed out that the Supreme Court has always accorded the rights guaranteed by the first Ten Amendments, especially those of freedom of speech, press and religion, a preferred constitutional position.[20] This, taken in conjunction with the facts outlined above and the precedents of liberalization of procedural requirements in such cases,[21] would lead to the position that the court ought to have heard the case on the merits or remanded it to the Appellate Department for a clarification of the basis of its action. The interests of preserving a preferred position for the basic civil rights while still maintaining a reasonably orderly procedure would best be served by the latter course of action. W. JAMES LIEBELER

HIGHWAYS — TITLE TO FEE AND RIGHTS OF ABUTTING OWNERS — RIGHTS AS TO SOIL, TREES, GRASS, MINERALS AND OTHER MATERIALS WITHIN HIGHWAYS. — Plaintiff was the owner of a tract of land lying on both sides of a section line. Under the authority of state law, a highway had been built on the section line. Plaintiff posted the land against hunting on both sides of the highway. He sued for an injunction restraining the defendant from hunting game on the highway and right of way. Affirming a decision of the trial court, the Supreme Court of North Dakota *held* that the defendant was not entitled to hunt wild game along the highway because the plaintiff owned the fee to the land upon which the highway was located, subject only to the right of the public to use the road for highway and travel purposes. *Rutten v. Wood*, 57 N.W.2d 112 (N.D. 1953).

While the case is of interest to sportsmen, its true significance is found in the light it casts upon the rights of abutting landowners to drill, explore, lease and remove minerals from land underlying a highway. The decision of the court clearly indicates that the only interest possessed by the public is an easement of way upon the highway, the landowner retaining the soil, springs, mines, quarries, timber and the like, although there appears to be a right in the public officials to use suitable materials for improving or repairing the road.[1] The owner of real property abutting a street is presumed to own to the center of the street.[2] A transfer of land conveys the soil to the center of the highway, if nothing contrary appears from the grant.[3]

19. *Ex Parte* Cutler, 1 Cal. App.2d 238, 36 P.2d 441 (1934); *Ex Parte* Ruef, 150 Cal. 666, 89 Pac. 605 (1907).

20. Thomas v. Collins, 323 U.S. 516 (1944); Schneider v. State, 308 U.S. 147, (1939); De Jonge v. Oregon, 299 U.S. 353 (1937); 33 Minn. L. Rev. 390 (1949); 48 Col. L. Rev. 427 (1948).

21. In Terminiello v. Chicago, 337 U.S. 1 (1949) a conviction of breach of the peace was reversed on the basis of a charge given in the trial court to which no objection had been taken and which had gone unnoticed and unargued through the entire proceedings in the Illinois Appellate courts, being ferreted out only by the independent research of the supreme court justices; Stromberg v. California, 283 U.S. 359 (1931); 59 Yale L.J. 971 (1950).

1. Byron K. and William F. Elliott, Roads and Streets §499 (1926).

2. N.D. Rev. Code §47-0116 (1943): "An owner of land bounded by a road or street is presumed to own to the center of the way, but the contrary may be shown."

3. N.D. Rev. Code §47-1010 (1943). "A transfer of land bounded by a highway passes the title to the person whose estate is transferred to the soil of the highway in front to the center thereof unless a different intent appears from the grant."