Washington and Lee Law Review

Volume 16 | Issue 2 Article 7

Fall 9-1-1959

Habeas Corpus Used To Supervise Lower Courts

Follow this and additional works at: https://scholarlycommons.law.wlu.edu/wlulr

 Part of the Civil Procedure Commons

Recommended Citation

Habeas Corpus Used To Supervise Lower Courts, 16 Wash. & Lee L. Rev. 232 (1959), https://scholarlycommons.law.wlu.edu/wlulr/vol16/iss2/7

This Comment is brought to you for free and open access by the Washington and Lee Law Review at Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington & Lee University School of Law Scholarly Commons. For more information, please contact lawref@wlu.edu.

rules, if any, are not controlling when an atypical situation arises."[30]

It would seem, therefore, that the majority in the principal case is in accord with the English decisions[31] and with the New York trend[32] which hold that the terms of admission are far from conclusive as to the capacity of an alien to acquire a domicile. The principal case, in treating Gosschalk as a domiciliary for the purpose of obtaining relief from domestic difficulties, is consistent with the decisions which open our courts in civil actions to aliens who are in the United States illegally.[33] The majority opinion justifiably adopts the view that a person who enters the United States on a temporary visitor's visa is not precluded, as a matter of law, from acquiring a new domicile of choice.

JOHN R. ALFORD

HABEAS CORPUS USED TO SUPERVISE LOWER COURTS

Mr. Finefellow, an influential and aggressive supporter of a candidate in a local election, is arrested less than a week before election day and charged with forgery. He claims that the charge is not only unsubstantiated but a political plot designed to defeat his candidate in the forthcoming election. Although eligible for bail, he desires an opportunity to prove his innocence and clear his name before the election, fearing that he may not have obtained even a preliminary hearing by that time. A malicious prosecution suit, coming as it would after the election, would be of little value. In similar circumstances the relator in *Commonwealth ex rel. Levine v. Fair*[1] petitioned for a writ of habeas corpus ad subjiciendum. The Supreme Court of Pennsylvania, relying on a unique rule long established in that state, held that the writ should issue and discharged the relator.

This represents a material extension of the writ as applied by

---

[30]Note, 42 Colum. L. Rev. 640, 642 & nn.9, 10, 11, 12, 13 (1942).

[31]See note 26 supra.

[32]Jacoubovitch v. Jacoubovitch, 278 App. Div. 1027, 112 N.Y.S.2d 1 (2d Dep't 1952); Taubenfeld v. Taubenfeld, 276 App. Div. 873, 93 N.Y.S.2d 757 (2d Dep't 1949); Townsend v. Townsend, 176 Misc. 19, 26 N.Y.S.2d 517 (Sup. Ct. 1941); Greiner v. Bank of Adelaide, 176 Misc. 315, 26 N.Y.S.2d 515 (Sup. Ct. 1941); Gray v. Gray, 143 N.Y. 354, 38 N.E. 301 (1894).

[33]Arteaga v. Allen, 99 F.2d 509 (5th Cir. 1938); Martinez v. Fox Valley Bus Lines, 17 F. Supp. 576 (N.D. Ill. 1936); Janusis v. Long, 284 Mass. 403, 188 N.E. 228 (1933); Feldman v. Murray, 171 Misc. 360, 12 N.Y.S.2d 533 (Sup. Ct. 1939).

[1]394 Pa. 262, 146 A.2d 834 (1958).

most American courts. It is generally agreed that habeas corpus is available only to test the jurisdiction of the restraining authority.[2] In the principal case the relator was arrested on a properly issued warrant based on an information duly sworn to and filed.[3] The constable's jurisdiction to hold him seems clear. Under such circumstances the writ will normally be denied unless there is a total failure to allege an offense to the law or unless the act charged does not constitute an offense due to the unconstitutionality of the statute under which the prosecution is brought.[4] Otherwise it is feared that every man who considers himself improperly arrested would sue out a habeas corpus, thereby disrupting the ordinary processes of the law.[5] The facts in the principal case are such that under these rules there can be no relief by habeas corpus.

Although observing the general requirement that habeas corpus is limited to an attack on the jurisdiction of the restraining authority, some courts would be able to grant the relief required in this situation. Alabama has held that "a prisoner, who is in custody simply on a warrant of commitment, issued after preliminary examination, and before any indictment has been found, can, when brought on habeas corpus before a proper officer, claim as a matter of right that such officer shall hear and pass on all legal evidence which he offers . . . ."[6] The Alabama statutes then in force provided that the defendant must be discharged if no offense appeared to have been committed or if there was no probable cause for charging the prisoner with an offense.[7] A far greater obligation is thereby imposed upon the court than under the general rule, which allows the prisoner's discharge only where no offense known to the law is alleged. Where the writ is sought after trial, however, Alabama is in accord with the general rule that this collateral attack on the proceeding will lie solely to test jurisdiction.[8]

---

[2]25 Am. Jur. Habeas Corpus § 13 (1940); 39 C.J.S. Habeas Corpus § 16 (1944).

[3]146 A.2d at 837-38.

[4]39 C.J.S. Habeas Corpus § 20 (1944); Annot., 57 A.L.R. 85, 86 (1928).

[5]It is reasonable to assume that this practical consideration is one of the reasons for the restrictive policies which limit the use of habeas corpus. It is eloquently stated in Ex parte Davis, 107 N.J. Eq. 160, 152 Atl. 188, 191 (Ch. 1930). This argument is discredited in the principal case. "If a procedure is authorized and justified under the law, it is no argument to say that such a procedure would place a burden on the courts . . . . Justice is not limited by the size of the courtroom and freedom is not measured by the strength of a judge's back." 146 A.2d at 838.

[6]Ex parte Mahone, 30 Ala. 49, 50 (1857).

[7]The statutes then in force are quoted in part by the court. Id. at 50, 51. This provision is now found at Ala. Code tit. 15, § 24 (1940).

[8]Bray v. State, 140 Ala. 172, 37 So. 250 (1904); Ex parte Bizzell, 112 Ala. 210, 21 So. 371 (1896).

Wisconsin provides relief without relying upon any particular statutory authorization,[9] but the rationale, in the light of modern legal development, is suspect.[10] The Wisconsin courts seek to honor the requirement that habeas corpus must attack the jurisdiction of the restraining authority,[11] but the Wisconsin Supreme Court's view of jurisdiction is not in accord with the prevailing authority, under which jurisdiction is defined in terms of power to deal with the general type of case at hand.[12] The Wisconsin rule has been stated to be: "Where the circuit court possesses jurisdiction in the broad sense of the term, but ought not to exercise it in the way invoked, or at all in the given circumstances, it should be deemed, to all intents and purposes, except in the sense of want of power strictly so called, to be without jurisdiction."[13] It follows that a Wisconsin court is authorized to examine the evidence upon application for habeas corpus prior to trial and, if it is found that the committing magistrate acted upon evidence, which in its most favorable form did not justify the commitment, to hold that the error is jurisdictional and that habeas corpus is the proper remedy.[14]

The Supreme Court of California appears to advocate a frank departure from the strict rule that habeas corpus is available only to test the jurisdiction of the restraining authority.[15] This court points out that habeas corpus has been repeatedly utilized where a prisioner's constitutional guarantees have been violated even though the trial court's jurisdiction was conceded, and notes the use of the writ in "other situations ... to review a question of law that cannot otherwise be raised or is so important as to render the ordinary procedure inadequate."[16] A careful examination of the authorities relied on indicates that the California court's approach is not yet widely sanc-

---

[9]The current Wisconsin statutory provisions are similar to those of Alabama in that they allow the prisoner's discharge on habeas corpus "if no legal cause be shown for such ... restraint ...." Wis. Stat. § 292.20 (1057). However, no case appears to have construed this statute as liberally as Alabama has interpreted its statute.

[10]The Wisconsin view of jurisdiction is similar to the view employed by the Illinois Supreme Court in their original report of Collins v. Collins, appearing in the advance sheets at 150 N.E.2d 361 (1958). The jurisdictional point was subsequently modified in the permanent report. 14 Ill. 2d 178, 151 N.E.2d 813 (1958). See comment on the case at p. 255.

[11]Ex parte Cash, 215 Wis. 148, 253 N.W. 788 (1934).

[12]50 C.J.S. Jurisdiction 1089, 1091 (1947).

[13]Harrigan v. Gilchrist, 121 Wis. 127, 99 N.W. 909, 934 (1904).

[14]State ex rel. Durner v. Huegin, 110 Wis. 189, 85 N.W. 1046 (1901).

[15]See Portnoy v. Superior Court, 20 Cal. 2d 375, 125 P.2d 487 (1942).

[16]Ex parte Bell, 19 Cal. 2d. 488, 122 P.2d 22, 26 (1942).

tioned. This approach that does provide relief to a petitioner who ordinarily would be without relief, such as the one in this case, merits consideration.

Pennsylvania issued the habeas corpus in the principal case under an old rationale quite different from any of these theories. An examination of the authorities cited in *Commonwealth ex rel. Levine v. Fair* indicates that the fundamental legal basis justifying the issuance of the writ is the supervisory power of the court over lesser courts and magistrates.

In an early case, *Gosline v. Place*,[17] the petitioner was jailed upon the finding of a county judge that he was disposing of his property in fraud of creditors. He obtained a writ of certiorari to bring the proceedings up for review and then applied also for a habeas corpus to obtain his immediate release. The court denied the habeas corpus, pointing out that "there is sufficient evidence of fraud, to justify a requisition on him that he shall give bail to purge himself of the fraud in the regular way...."[18] The use of the writ, however, was expressly sanctioned in the following language of the court:

> "If a *habeas corpus* at common law issues, and the return to it shows that the prisoner is held by virtue of proceedings in a court, or before a magistrate, over which the court issuing the *habeas corpus* has a supervisory authority, the said court may issue a *certiorari* to bring up the record; and may thereupon hear and decide the case, or review and correct the proceedings, in order to give efficacy to the writ of *habeas corpus*. If a *certiorari* be issued to bring up a case into a higher court for hearing or review, the court may also issue a *habeas corpus* to bring up the defendant...."[19]

In *Commonwealth ex rel. Wadsworth v. Shortall*,[20] also relied on in the principal case, a soldier, guarding a private home in an area affected by strike violence, and in the execution of his orders, shot an intruder. Upon a finding by a coroner's inquest that the shooting was "hasty and unjustifiable," he was arrested, but successfully petitioned the Supreme Court of Pennsylvania for a writ of habeas corpus:

> "This court, either sitting as a committing magistrate or by virtue of its supervisory jurisdiction over the proceedings of all subordinate tribunals... has the authority and the duty, on habeas corpus in favor of a prisoner held on a criminal charge,

---

[17]32 Pa. 520 (1859).
[18]Id. at 528.
[19]Id. at 524.
[20]206 Pa. 165, 55 Atl. 952 (1903).

> to see that at least a prima facie case of guilt is supported by the evidence against him .... If the case was before a jury, we should be bound to direct a verdict of not guilty, and to set aside a contrary verdict if rendered."[21]

Notwithstanding the authorities cited by the majority opinion in *Commonwealth ex rel. Levine v. Fair* which support in general terms the proposition that habeas corpus is available to secure a prisoner's liberty in extraordinary cases, the primary legal rationale for the use of the writ rests upon the court's superintending control.[22] This is an ancient concept dating back to the time, shortly after the Norman Conquest, during which the King did, in fact, sit in the King's Bench.[23] Although the assizes and other inferior tribunals were separate and independent in their general functioning, they were, of course, always subject to the overriding mandates of the monarch, and the King's Bench retained this supervisory jurisdiction after it ceased to be directly controlled by the Crown.[24] The concept of appeal and error developed from this superintendence by the King. There also developed a "jurisdiction to amend 'misdemeanours extra judicial,' partly by its process of contempt, but chiefly by means of the prerogative writs."[25]

A similar power of superintending control has been granted to the high courts of many of the states by their constitutions, and it is also said that the power is inherent in the supreme tribunals of those states that have adopted the common law.[26] The Supreme Court of the United States, in *Kendall ex rel. Stokes v. United States*,[27] commented:

> "And the power to issue this writ in this case, mandamus is given to the King's Bench only, as having the general supervising power over all inferior jurisdictions and officers, and is co-extensive with judicial sovereignty. And the same theory prevails in our State governments, where the common law is adopted, and governs in the administration of justice; and the power of issuing the writ is generally confided to the highest court of original jurisdiction."[28]

---

[21]Commonwealth ex rel. Wadsworth v. Shortall, 206 Pa. 165, 55 Atl. 952, 957-58 (1903).

[22]For a comprehensive examination of superintending control and its status in the various states up until the turn of the century see Annot., 51 L.R.A. 33 (1901).

[23]2 Bacon's Abr., Courts and Their Jurisdiction in General (A) *95; 3 Blackstone, Commentaries *41.

[24]1 Holdsworth, History of English Law 211-12 (1931).

[25]Id. at 226.

[26]Annot., 51 L.R.A. 33, 34-35 (1901).

[27]37 U.S. (12 Pet.) 594 (1838).

[28] Id. at 621.

Habeas corpus was one of the early high prerogative writs[29] and was utilized by the King's Bench in the exercise of its superintending control.[30] American courts, however, apparently have been reluctant to issue this writ in assistance of their supervisory powers, such control usually being carried out through mandamus, prohibition, and certiorari.[31] Alabama, oddly enough in view of the fact that under that state's statutes the petitioner is entitled to present evidence to show lack of probable cause for detention, appears to be one of the few, if not the only jurisdiction with a historical rule similar to that of Pennsylvania.[32] In *Ex parte Croom & May*,[33] petitioners were improperly held on a charge of murder until after the close of the term of court, and upon being denied bail by a circuit judge, they petitioned the Alabama Supreme Court for certiorari and habeas corpus. This court issued the habeas corpus under a rationale not unlike that of the Pennsylvania court in *Gosline v. Place,* holding it to be the court's duty to adopt a practice which would assure its complete control in the exercise of a "general superintendence of inferior jurisdictions...."[34] The correct practice was said to be for the prisoners "to petition this court for the writ of habeas corpus, and such other remedial process as shall be necessary to render its control effectual...,[35] in this instance certiorari.

Although the occasion may be rare that a man, unjustly imprisoned, is without adequate relief under the law, *Commonwealth ex*

[29]Cohen, Habeas Corpus Cum Causa—The Emergence of the Modern Writ, 18 Can. B. Rev. 10 (1940); Jenks, The Story of Habeas Corpus, 18 L.Q.R. 64 (1902).

[30]9 Holdsworth, History of English Law 109-11 (1926). Blackstone states, "Indeed, if the party were privileged in the courts of common pleas and exchequer, as being an officer or suitor of the court [King's Bench], an habeas corpus ad subjiciendum might also by common law have awarded from thence...." 3 Blackstone, Commentaries *131.

[31]See the authorities grouped by states in Annot., 51 L.R.A. 33, 37-70 (1901). The commentator therein remarks that not only is the use of habeas corpus in the exercise of superintending control rare, but also illogical, because it is addressed to an individual, rather than to the inferior tribunal. Annot., 51 L.R.A. 33, 38 (1901). The control exercised, however, would appear to be quite effective where it serves to remove the prisoner from the control of the inferior court. It may also be noted that when habeas corpus has been so utilized, it has often been in combination with some other writ, i.e., certiorari. Holdsworth notes an instance as early as 1412 where certiorari was probably used with a habeas corpus cum causa to defeat the proceeding of an inferior court and further comments that this convenient method was probably abused in that "unscrupulous and litigious age." 9 Holdsworth, supra note 30, at 109.

[32]Annot., 51 L.R.A. 33, 38 (1901).

[33]19 Ala. 561 (1851).

[34]Id. at 566.

[35]Ibid.