

205VA 389

Record No. 5809

PETITION FOR WRIT OF PROHIBITION

In the
Supreme Court of Appeals of Virginia
at Richmond

ROY DAVID TYSON

v.

EDMUND W. HENING, JR.,
ET AL., ETC.

RULE 5:12 BRIEFS

§5. NUMBER OF COPIES. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. SIZE AND TYPE. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5809

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 13th day of June, 1963.

ROY DAVID TYSON,

Petitioner,

against

EDMUND W. HENING, JR., AND JOHN W. KNOWLES,
JUDGES OF THE CIRCUIT COURT OF THE CITY OF
RICHMOND, Respondents.

Upon a Petition for a Writ of Prohibition

On consideration of the motion of Roy David Tyson for leave to proceed herein *in forma pauperis*, the motion is granted.

On consideration of the petition of the said Roy David Tyson praying that a peremptory writ of prohibition do forthwith issue, to be directed to the Honorable Edmund W. Hening, Jr., and the Honorable John W. Knowles, Judges of the Circuit Court of the City of Richmond, prohibiting the said judges, or either of them, from conducting certain proceedings therein against the said petitioner, and for other relief as more fully set out in said petition, it is ordered that a rule do forthwith issue against the said Judge Edmund W. Hening, Jr., and Judge John W. Knowles, returnable to

Supreme Court of Appeals of Virginia

this court on or before July 18, 1963, to show cause, if any they can, why a writ of prohibition should not issue as prayed, with leave hereby granted the said petitioner to file a reply thereto within 14 days after the respondents' answer is filed.

VIRGINIA :

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 4th day of December, 1963.

ROY DAVID TYSON,

Petitioner,

against

EDMUND W. HENING, JR., AND JOHN W. KNOWLES,
JUDGES OF THE CIRCUIT COURT OF THE CITY OF
RICHMOND, Respondents.

Upon a Petition for a Writ of Prohibition

On December 2, 1963, came the petitioner, by counsel, and moved the court to docket this cause, which motion is granted and the cause is continued.

page 1 } In the Supreme Court of Appeals of Virginia
at Richmond.

ROY DAVID TYSON,
500 Spring Street
Richmond, Virginia

Petitioner

CIRCUIT COURT CITY OF RICHMOND,

Respondent.

PETITION FOR A WRIT OF PROHIBITION

To the Honorable Justices of this Honorable Court.

Your Petitioner respectfully represent. That he is *aggrieved* by a trial and a conviction in the Circuit Court of the City of Richmond, this sentence being rendered on the 14th day of December, 1960.

Petitioner will herewith proceed to allege that the Circuit Court of the City of Richmond, did not have Jurisdiction of this cause,

STATEMENT OF FACTS

1—Because the Court at Fredericksburg where Petitioner was first tried and convicted of breaking and entering and *sentenced* to the State Penitentiary for a term of two years, for the said offense, which conviction was rendered July 22, 1960. And that the Circuit Court of the City of Richmond did try, convict, and sentence Petitioner to one additional year.

2—That when the Circuit Court of the City of Richmond tried, convicted and sentenced Petitioner, that it was done without the assistance of counsel, and that the Court did not advise Petitioner of his right to counsel at the trial and did not advise him of the *seriousness* of the offense he was being tried for, which offense was the habitual criminal law, or otherwise the State of Virginia *Recedivist* Act, at which Petitioner was given the one year additional sentence.

3—Petitioner contends that the Circuit Court of the City of Richmond did not have jurisdiction to try him for the said habitual crime, for he did not commit such crime in the city of Richmond Virginia, and "If there was any jurisdiction" "For the Circuit Court of Richmond it was" completely lost "when Petitioner was put upon trial for such an offence" without the advice or guiding hand of counsel to protect in this cause.

4—Petitioner further contends that he did on the 25th day of February 1963, mail a Petition for a writ of *habeas corpus ad-subjicendum* to the Circuit Court of the City of Richmond for the Court to null and void, the said one year additional sentence that was imposed upon him, but the Circuit Court of the City of Richmond failed to act on the Petition.

page 2] 5—Petitioner contends and can prove that he did send a motion to the Circuit Court of the City of Richmond and *ask* for a change of venue of the trial which motion the court did *denie* and Petitioner also *ask* the honorable court for a trial by Jury, and by a Jury of 12 twelve qualified *jurors* from the jurisdiction of the Crime and this *to* was denied.

6—And that on the 10th day of April 1963 The Circuit Court of the City of Richmond recalled petitioner to the Court again for the second time and advised him that he was again being tried for the same offense which was the *recedivist* trial, and the Court did appoint counsel for petitioner but the counsel failed to act on behalf of petitioner at this trial and at which the Honorable Judge Carleton D. Mayes of the 4th

Judicial Circuit was presiding, the Honorable Judge *Mays* asked petitioner how he would plead, petitioner stated that he did not wish to enter any plea then the Honorable Judge *Mays* made the following statement.

I will continue this case until the 27 day of April which will be at my *convenience*, and at that time I will have a jury and *the* you will be sorry that you ever saw me and *wont* want to come before me again.

7—Petitioner further states that on the “24 day of April he again was taken before the court” but note that this is not the date that Judge *Mays* set the trial for but instead was 3 days earlier” and on arrival at the Court the Honorable Judge *Mayes* was not there but instead, the Honorable John Wingo Knowles. *Was* presiding and at that time he asked Petitioner how he would plead and Petitioner answered that he did not wish to enter a plea, and the Honorable Judge Knowles ask Petitioner if he knew the kind of jury that he would have, Petitioner then stated to the Honorable Judge that he had before made a motion and request for a change of venue of his case in that Court, to the Circuit Court of the City of Fredericksburg Virginia where the Court there would have *original* jurisdiction of his case, then the Honorable Judge asked Petitioner if he was represented by counsel and the Petitioner replied that his counsel that had before been appointed him was not there, and then the Honorable Judge Knowles said that he would appoint Mr. Baker an able and competent counsel to take care of his case. And that for Petitioner and Mr. Baker to see if they could get *together* and come to some *agreement* and that he would continue the case until the 29, day of May 1963.

page 3] *Petitioner* states that on the 24th day of April as aforesaid in the Circuit Court of the City of Richmond, he asked the Honorable Judge Knowles what happened to his Petition for a writ of *habeas corpus*, the Honorable Judge replied, that he did not know anything about a petition for a writ of *habeas corpus*, petitioner then presented to the Honorable Judge a Court order from the said Court: Showing that the Petition had before put on docket and the Court did ask Mr. W. K. Cunningham Jr. to show probable cause on or before the 27th of March 1963. Not later than 2^{PM}. Then the Honorable Judge asked the Clerk of the Court, if he had received such a petition, and then the clerk denied ever receiving such petition from the defendant. The Honorable Judge then asked the Clerk, if he was denying

his own hand writing, and the clerk continued to deny ever receiving any such petition. Then the Honorable Judge did order the clerk to have the petition in his office the following morning, and since that time petitioner has not been advised of what action was taken. . .

*** ARGUMENT ***

As your petitioner has presented in his statement of facts, he was tried July 22, 1960. In the Circuit Court of the City of Fredericksburg, Virginia, for breaking and entering, and was convicted and sentenced *to, two* years in the State Penitentiary.

The Court failed to inform that he was also to be tried again as a *habitual* criminal on his arrival at the State Penitentiary, which if so should have been alleged in the original indictment. And then he should have been tried on only one charge and the other charge should have been dropped.

"If the defendant is not informed of the accusation against him, it can only be *interpertead* as a complete denial of the *Fourteenth Amendment* of the United States constitution, and the "Due process clause." The *VI* amendment of the United States Constitution provides that: a person in a criminal prosecution shall enjoy the right to a speedy trial, and public trial, by an impartial jury of the State and district where the crime shall have been committed, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him. To have *compulsory* process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence also provided by Art, 1. Section 8, of the Virginia Constition. . .

The Circuit Court City of Richmond, Commonwealth of Virginia, tried Petitioner December 14th, 1960. Without the assistance of counsel, or advise of counsel, at this trial in which he was convicted and sentenced to one additional year in the State Penitentiary,

This was a violation of the fourteenth amendment of the United States Constitution? In which is guaranteed to him, and cannot be denied by any court in the land. Your Petitioner did not have counsel of his own, and the Court did not inform him of his right to aid of counsel for his defense, in which can be only *interpreted* as a complete denial of his right to aid of counsel.

page 4] The representation by counsel could be better ex-

plained in *Commonwealth v. Richards* 111. Pa. *Supra*, 124, "As juoted by Justice Keller" in *Commonwealth v. Smith* 1A, 2d 656, 139, Pa. *supra* 357, 1940,

The right to be represented by counsel is a fundamental right going to the very basis of the administration of criminal law, and places the trial judge, the ones to inform the defendant of his right, and to assist him in obtaining the benefit of counsel, the failure of the Court to inform him of his rights amount to a denial of the rights, and a denial of "due process of law."

It was also held in *Crusen v. State*, 10 Ohio St. 258 at page 270: The Court says it is the undoubted Constitutional right of a party accused to be present with counsel. At every stage of his trial, but the right to the presence of counsel is in the nature of a personal *privilage*, if may be waived it is no part of the business of the Courts to *compell* the attendance or to force the vigilance of counsel it is their right to attend at the trial and his right is to be in no way obstructed or denied. In *Matthews J. Addyston v. Liddle*, N. E. 2d 877, 54 Ohio.

Michies Jurisprudence Vol 1, page 387,

"For an attorney owes to his client the high duty to *deligent*-ly, faithfully and legitimately, perform every act necessary to protect conserve and advance the interest of his client,"

Montague v. Commonwealth 10 Gratt, 767 (1853) where any of the legal rights has been denied to a party of trial for a criminal offense or where any of the *safe guards* thrown around him by the law, for his protection *have* been *dis-reguarded*, it is not for the Court to say this or that might, not ~~have been~~ the effect upon the case of the accused, the law will intend to prejudice, if it be necessary, to enable the accused to express his right to have the judgment of the Court reviewed in *applate* tribune, and will hold it impossible to say that a fair and impartial trial has been had. .

Justice Holt, In Quoting Justice Black, in *Chambers v. Fla.* 309 U.S. 227, (1940)

It may be that it is the most obnoxious thing in *it's* mildest and least repulsive form, but *illig itimate* and unconstitutional practices get their first footing in that way namely, by silent *approches* and slight deviations from the legal modes of

procedure. This can be *obitiated* by *adhearing* to the rule that constitutional provisions for the security of persons and property should be liberally construed, a close and literal constitution deprives them of half this *effiancy* and leads to the *gradul deperication* of the right, as if it consisted of more in sound than in substance. It is the duty of the Court to be ever watchful for the constitutional *right's* of the citizen and against any stealthy encroachment thereon. Their motto should be *obstra* principles.

page 5] We find in.

Boyd v. U. S. 116 U.S. 616 *Powell v. Commonwealth* 189 S.E. 433, 110 A.L.R. 90, 167 Va. 558 (1937) *Dixon v. Commonwealth* 161 Va. 1098. 172 S.E. 278

That which the law makes essential involving the *Deperation* of life cannot be dispensed with, or effected by the consent of the accused, much less by his mere failure, when on trial and in custody to object to such unauthorized methods.

It has been well settled by the Court of the land that, the *Court's* may lose jurisdiction over the accused, if the Court fails to inform the accused of his constitutional *right's*, your petitioner did not commit any crime in the city of Richmond Va, and therefore the Circuit Court of the City of Richmond, did not have jurisdiction to try him for being a *repater*, the principle charge involved, your petitioner was convicted of was in the Circuit Court of the City of Fredericksburg Virginia, if he was to be tried for a second offense or another crime, it should have been charged in the original indictment with the principle charge, and upon conviction of one charge if it be the habitual criminal charge, then the original charge should have been discharged, and these charges should have been charged in the indictment, and tried and disposed of in the Circuit Court of the City of Fredericksburg Virginia. Therefore any additional sentence can only be explained as double jeopardy, "It is a Constitutional Right that the accused be informed of the *accusion* against him, "Which the Circuit Court of the City of Fredericksburg did not inform him of being tried again on his *arrivial* at the penitentiary it cannot be said that "Due Process of Law" was ever carried out. And was *compleatley* denied in the Circuit Court of the City of Richmond.

Jurisdiction in criminal cases 19-161 of the Code of Virginia.

Virginia in criminal cases "The Circuit Court's except where otherwise provided, shall have exclusive original jurisdiction" for the trial of all presentments "*indictment's*" "*information's* for offences committed within the counties and within the City which may not have Corporation Court's of their respective Circuit's Code 1919 Sec 4893.

point 11

Your petitioner mailed a petition for a writ of *habeas corpus ad-subjicendum* to the Circuit Court of the City of Richmond. And within the time of *it's arrival* to the Court petitioner was notified by mail that he was to be tried on a new bill of information, the 10th day of April 1963,

And before the bar of the Court, the Commonwealth Attorney told the Court, that he was under orders from the Assistant Attorney General, Mr. Reno Harp III. To proceed with the bill of information, and to disregard the petition of *habeas corpus*, "The records of the Court will show the above statement the Assistant Attorney General did not have the authority to disregard the *habeas corpus* proceeding. That was the duty of the Honorable presiding Judge, of the said Court.

page 6] Your petitioner mailed a motion for a change of venue, and a trial by jury, to the Circuit Court of the City of Richmond, and asked for the trial to be held in the City of Fredericksburg, in that Circuit Court. The Honorable Judge asked petitioner, "was he *familier* with the Jury that was provided by the Circuit Court City of Richmond, for the identification of habitual criminals: In which is five men or women to identify the accused only, and that the Court would set the sentence. "This is a complete violation and a denial of due process of law" and in violation of the fourteenth amendment of the United States Constitution, and also in violation of Article 1, Section 8, of the Virginia Constitution.

Section 19-182 of the code of Virginia

"In every case of a felony there shall be selected from the persons summoned as aforesaid, a panel of twenty persons free *fromm* exception, from which panel the Commonwealth may strike four and the accused four, the remaining twelve shall constitute the jury for the trial of the accused, the striking off of *juriors* shall be done alternately, the Commonwealth *begining*, if either the accused or the attorney for the

Commonwealth, fail to strike off any, or if they strike off a less number than allowed, twelve of the panel or of those remaining thereon, shall be selected by lot who shall constitute the jury. Code 1919 Section, 4900; 1948. Page 634.

Can the Court retry the accused on an unconstitutional law

Ex Parte Seibold 100 U. S. 371, 376, 377. The Validity of the judgment is assailed on the ground that the Acts of Congress under which the indictment was found unconstitutional. If this position is well taken, it effects the foundation of the whole *proceeding's* an "unconstitutional law is void and is as no law" an offense created by it is not a crime or conviction under it. It is not merely *erroneous* but is illegal and void, and cannot be a legal cause of imprisonment, it is true if not where an error lies, the judgment may be final in the sense that there may be no means of reversing it, but personal liberty is of so great a movement in the eye of the law that the judgement of an inferior Court effecting it is not deemed so conclusive but that the question of the Court's Authority to try and imprison the party may be *revuied* on *habeas corpus*...

CONCLUSION

The Petitioner herewith contends that he has complied with section 88 of the rules of the Supreme Court of Appeals of Virginia, in that he has presented recorded information illegal and unlawfully in the nature, relative to his trial and conviction, aforesaid therefore your petitioner humbly prays into this Honorable Court. That the writ of prohibition, to be issued out, and from under the hand and seal of this Honorable Court, directed to the Circuit Court City of Richmond. For the illegal proceedings to be stopped and the sentence declared nullities under the true cause. And your petitioner discharged from any further proceedings in this cause herein presented.

Whereupon petitioner prays for general relief. Leave is reserved to amend this petition and response.

Respectfully submitted,

PETITIONER ROY DAVID TYSON

page 7] Petitioner having already been in compliance
with section 14-180 of the Code of Virginia, and

Supreme Court of Appeals of Virginia

with permission from the Circuit Court of the City of Richmond, to proceed in *Forma Pauperis*, he asks this Honorable Court to allow him to proceed in *Forma Paupers* in this cause herewith presented, and prays into this Honorable Court that:

This Court will appoint him an able and competent attorney at law to represent his cause herewith presented:

FOR JUSTICE THE PETITIONER
FOREVER PRAYS

Respectfully submitted

PETITIONER ROY DAVID TYSON

PROFF OF SERVICE

I, Roy David Tyson, certify that I have on this, 20th day of May, 1963. Mailed a true copy of the foregoing proceeding to the office of the clerk of the Circuit Court of the City of Richmond.

PETITIONER ROY DAVID TYSON

CITY OF RICHMOND.
STATE OF VIRGINIA

Subscribed to and sworn before me, a notary public, in and for the City of Richmond, State of Virginia, and given under my hand and seal this 20th day of May 1963.

My Commission Expires April 10, 1966

my commission expires the _____ day of _____ 19__.

RAYMOND L. CHEVRETTE
Notary Public

Rec'd 5-22-63

H. G. TURNER, Clerk.

page 1]

Recd. 7/5/63

A. L. L.

★ ★ ★ ★ ★

ANSWER

Now comes the respondents, Edmund W. Hening, Jr., and John W. Knowles, Judges of the Circuit Court of the City of Richmond, by counsel, and in conformity with the order of this Court of June 13, 1963, files his answer to the petition for a peremptory writ of prohibition filed by Roy David Tyson, and says:

1. A peremptory writ of prohibition will not lie to restrain an inferior court proceeding in a particular case, if it has jurisdiction in cases of that kind. *Carter's Adm'r v. Kelly, Judge*, 69 Va. 787.

2. Respondents say that if the court or judge has jurisdiction to enter an order in the proceeding sought to be prohibited, the writ of prohibition does not lie. *Grief v. Kegley*, 115 Va. 552, 79 S.E. 1062.

page 2] 3. Respondents say jurisdiction is vested in the Circuit Court of the City of Richmond to impose additional punishment, where an accused has been previously convicted of a felony. § 53-296 of the Code of Virginia. *McCallister v. Commonwealth*, 157 Va. 844, 116 S.E. 67.

4. Respondents say that § 53-296 of the Code of Virginia is constitutional. *Sims v. Cunningham*, 203 Va. 347, 354.

5. Respondents say that the Circuit Court of the City of Richmond has acted in accordance with the decision of the United States Supreme Court in *Chewning v. Cunningham*, 368 U.S. 443, by appointing an attorney to represent the petitioner when he was brought before the court to be tried as a second-time offender as provided for in § 53-296 of the Code of Virginia.

6. Respondents appointed Thomas A. Williams, Jr., an able and competent attorney to represent the petitioner when he was brought before the court on April 10, 1963, and the petitioner refused to plead, and his case was continued until April 24, 1963.

7. Respondents appointed E. Ballard Baker, an able and competent attorney to represent the petitioner when he was

brought before the court on April 24, 1963, and the petitioner refused to plead. The case was again continued until May 29, 1963, continued again until June 28, 1963, and now the case of the petitioner, who is still represented by E. Ballard Baker, has been continued generally pending an order of this Court.

8. Respondents say that it was decided by the Circuit Court of the City of Richmond in the case of *Otey Dooley v. W. K. Cunningham, Jr.*, and the case of *Edward Lewis Sprouse v. W. K. Cunningham, Jr.*, that the informations are
page 3] valid, remain in force, serve as detainers, and that the Commonwealth may proceed to try the accused once again.

9. Respondents deny each allegation set forth in the petition which are not expressly admitted.

Wherefore, respondents pray that the petition for a peremptory writ of prohibition be denied and dismissed.

EDMUND W. HENING, JR., and
JOHN W. KNOWLES, Judges of the
Circuit Court of the City of Richmond

By: CURTIS R. MANN
Counsel

Reno S. Harp, III
Assistant Attorney General

Curtis R. Mann
Assistant Attorney General
Supreme Court — Library Building
Richmond 19, Virginia

CITY OF RICHMOND, To-wit:

I, Charlotte R. Gasser, a Notary Public in and for the City aforesaid, do hereby certify that Curtis R. Mann, Assistant Attorney General, whose name is signed to the foregoing writing, this day personally appeared before me in my City aforesaid and made oath that the statements contained therein are, to the best of his knowledge, information and belief, true.

Given under my hand this 5th day of July, 1963.

My commission expires July 2, 1967.

CHARLOTTE R. GASSER
Notary Public

CERTIFICATE OF SERVICE

I certify that, on the 5th day of July, 1963, I mailed a copy of the foregoing Answer to Roy David Tyson, No. 78154, Virginia State Penitentiary, 500 Spring Street, Richmond, Virginia.

CURTIS R. MANN
Assistant Attorney General

A Copy — Teste:

H. G. TURNER, Clerk.



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