AUBREY LEE NICKELS v. STATE FLORIDA

98 So. 497 (1923) | Cited 24 times | Supreme Court of Florida | July 21, 1923

ELLIS, J. -- During the month of December, 1921, a young man about twenty-one years of age named Aubrey Lee Nickels came to the City of DeLand in this State. What business, occupation or trade he had the record does not disclose, but it does divulge the information that he soon formed an illegitimate traffic relation with one Robert Robinson called the "Hunchback" who had a lunch counter and cool drink stand in the city. The relation was that of purchasing agent for the "Hunchback" of "moonshine" whiskey for which purpose the "Hunchback" supplied Nickels with about one hundred and eighty-five dollars. Having obtained the money, he inquired of his patron for information concerning "sporting" women and was directed by that person to the prosecutrix. Having located her residence he effected an entrance under the false representation of being a plumber and desired to examine the water pipes for a pretended leak. After gaining an entrance into the house which he did by deceiving Mrs. Moore the occupant of the house and prosecutrix in this case, he inveigled her into the bath room under pretense of showing her the leaks and instructing her how to obtain the usual water supply without causing it to spray upon the varnished floor. When she came to the bath room he locked the door, struck her several times until she became unconscious and then effected his purpose of having sexual intercourse with her. When he completed that offense he tied his victim to a water pipe, went through the house, stole several pieces of jewelry consisting of rings and gold watches and left the house. According to his own story he effected his escape, from the sheriff and a posse which had been organized to assist the sheriff in finding him and arresting him, by the assistance of the "Hunchback" who concealed him until dark and then took him to Sanford where he boarded a train for Jacksonville. He was arrested in that city of short while after his arrival and identified by means of the stolen jewelry as the rapist who had fled from DeLand. Upon being confronted by the charge he confessed his guilt after being fully warned of the consequences of such confession and through no fear of injury nor hope of reward so far as any influence was exerted by those to whom he confessed was concerned.

On the 12th of April, 1922, Nickels was indicted by the grand jury of Volusia County for the rape upon Mrs. Moore. And on May the 1st, was arraigned and pleaded "not guilty." Not having procured counsel two members of the Daytona bar were assigned by the court to represent him. During the afternoon when the case was called for trial the defendant expressed a desire to withdraw his plea of not guilty and plead guilty to the indictment. After the fullest examination of the defendant by both Court and State Attorney as to the defendant's purpose in pleading guilty and as to his knowledge of the consequences of such plea, he was permitted to withdraw his plea of not guilty and interpose the plea of guilty.

The Court then took the testimony as to the circumstances. The testimony of Mrs. Moore was taken

as to the assault and the pretense under which the defendant secured an entrance into the house, the testimony of Mr. Moore, the husband of the prosecutrix, as to the condition of the house which had been ransacked for valuables, the torn condition of Mrs. Moore's clothing and bruises upon her body, particularly upon her legs and thighs and face, was taken, and the testimony of police officials of the City of Jacksonville and the Official Court Reporter of the Fourth Judicial Circuit as to the details and circumstances of the defendant's full, free and voluntary confession of his crime to the State Attorney.

When all this was done the Court sentenced the prisoner to death.

In November, 1922, nearly seven months after the judgment of the Court was entered, the defendant through counsel who had been employed in his behalf in the City of Jacksonville moved the Court for a writ of error coram nobis. The motion which contained the alleged grounds for the issuing of such a writ was sworn to by the defendant. To it was also attached the affidavits of Mr. Brass and Mr. Green, the two attorneys of the Daytona bar who had been appointed to defend the prisoner. There was also attached the affidavit of Mr. McCollum as to the excitement of the people and their indignation against the perpetrator of the crime on the day it was alleged to have been committed, and that such feeling continued "very strong against Nickels" after his arrest in Jacksonville to the day of trial. The affidavits of certain women were also attached to the effect that very soon after the commission of the alleged crime Mrs. Moore who had not entirely recovered from the attack sufficiently to put on fresh clothing and treat her wounds, said that she "was knocked unconscious and did not know whether she was raped or not." There was also another affidavit by the defendant purporting to fully set forth all the circumstances of his relations with Mrs. Moore and the "Hunchback," the smallest details of the transaction upon his last meeting with Mrs. Moore, the excitement of the people and their feeling against him when the rumor had gotten abroad that Mrs. Moore had been assaulted, his escape from the city with the aid of the "Hunchback," how his confession of the crime was extorted from him by the officers in Jacksonville who told him of the "feeling among the people in DeLand" being so strong against him; that these "men dressed in plain clothes" told him that if he confessed to the charge of rape "that he could not be hung for it and that would be the best way" for him to get out of the trouble; that B. J. Moore had said that he would "shoot this defendant off the witness stand if this defendant told anything against his wife at the trial." This language referred to Moore's wife as the defendant was not married. That he was not given any assistance by his counsel, whom, by inuendo the defendant charged with craven disloyalty.

The judge denied the motion. In that order there was no error. The writ of error coram nobis which issues for the correction of a judgment entered in ignorance of certain matters of fact which if they had been known to the Court rendering the judgment it would not have been entered, will not be allowed as of course, but only upon its being made to appear with reasonable certainty that there has been some error of fact. In some cases it has been held that the discretion of the trial judge in refusing the writ is not reviewable. See 2 R.C.L. pp. 305-310; Sanders v. State, 85 Ind. 318, 44 Am. Rep. 29; Tyler v. Morris, 20 N.C. 487, 34 Am. Dec. 396 Note. The writ will not reach facts actually

determined in the original proceedings. See Howard v. State, 58 Ark. 229, 24 S.W. Rep. 8; Holford, v. Alexander, 12 Ala. 280; Asbell v. State, Kan. 209, 61 Pac. Rep. 690.Nor will it lie when a proper remedy is afforded by appeal or ordinary writ of error. 2 R.C.L. 306; Saunders v. State, supra. Nor will it lie for false testimony at the trial, nor newly discovered evidence. State ex rel. Davis v. Superior Court of Pierce County, 15 Wash. 339, 46 Pac. Rep. 399; Asbell v. State, supra. See also 26 Standard Proc. 602. The writ has issued where an accused person who through fear of mob violence is forced to plead guilty and who upon such plea is sentenced to prison. See Alder v. State, 35 Ark. 517, 37 Am. Rep. 48; Sanders v. State, supra; State v. Calhoun, 50 Kan. 523, 32 Pac. Rep. 38, 34 Am. St. Rep. 141, 18 L.R.A. 838.

The fact emphasized by the defendant in his application for the writ, is the fear he had of mob violence at the trial which impelled him to plead guilty. The affidavits attached to the motion recite other facts evidentiary as it is supposed of the defendant's state of mind. There were his youth and inexperience; the representations by the "Hunchback" as to the excitement of the people and the eagerness of the posse; the precautions taken by the sheriff in removing the defendant from the Duval County jail to DeLand for trial, pulling down the curtains in the car of the railroad train as it passed through DeLand because the sheriff did not want people upon the outside to see the defendant who was taken to Sanford and then by automobile back to DeLand during the night; the reported threat of the husband of the assaulted woman that he would shoot the defendant "off the witness stand" if he said anything against Mrs. Moore; and the alleged disloyalty and cowardice of the two lawyers appointed to defend him. So far as the defendant's affidavit is of concern it is full in every detail necessary to completeness. He accused the woman whom he is alleged to have outraged of disloyalty to her husband, of unchastity and disgustful vulgarity and theft, to which was added the speech and manner of a low vulgarian and termagant, and then in explanation possibly of the bruises upon the woman's face, accused himself of unfeeling brutality by affirming that he struck the woman in the face with his fist when she applied an offensive epithet to him, and in the "fight" which followed she proved "about as good a man" as the defendant, but not quite so good, as he succeeded in getting a knife from her with which she had armed herself. He admitted obtaining money from the "Hunchback" with which to purchase for the latter "Moonshine liquor" and then proceeded to give it to the woman to "keep for him."

He accused the officers of the law with an abuse of their obligations and deceit in obtaining his confession; the citizens of DeLand with the spirit of mob violence, and the husband of the woman with murderous intentions toward him, and he accused his counsel of unfaithfulness and treachery.

Outside of this affidavit, however, there was not the slightest evidence of any such conditions except the affiant's own criminal and lawless character. The affidavits of the two attorneys who were appointed by the Court to defend the accused showed that they acted in accordance with a correct conception of their duties and obligation as lawyers. They instructed the defendant that the plea of not guilty was the proper one to interpose, but that was before they had an opportunity to confer with him. That when they did have a conference with him and asked whether he had made a

confession of the crime to the officers in Jacksonville and he replied in the affirmative, they told him frankly that "they did not know of any defense that they could make for him." And when he expressed a desire to plead guilty they told him that the judge would take testimony to ascertain the degree of his guilt and impose the sentence of death or life imprisonment; but that if the defendant pleaded not guilty and the jury should find him guilty and recommend him to mercy the sentence would be life imprisonment, while if the jury should not recommend him to mercy the court would be bound by the law to sentence the accused to death. That when the accused asked them how he should plead, whether "guilty or not guilty," they declined to advise him, preferring to leave the determination of that question to him. They told the defendant that public sentiment in DeLand was strong against him, but they believed a jury could be obtained that would render a fair and impartial verdict. What duty toward their client did those two lawyers neglect? They stood ready to secure for the accused as fair trial so far as they were able to do so, but they did not propose to resort to any pretense or deception to secure an acquittal. They told their client as accurately as they knew what his situation was in view of his confession of the crime and the state of public feeling and the court's duty under the law and the effect of either plea, and left the matter to the defendant's sense of right, his conscience or his judgment as to expediency. This was all they were called upon to do in their capacity of lawyers having a high sense of their duties and obligations. The accused did not at that time inform his counsel that he intended to plead guilty through fear of mob violence; if he had, doubtless those two, evidently deserving, lawyers would have so informed the judge and prevented the injustice. The decision was evidently made by the defendant through a sense of his own guilt and a resolution to place himself and his cause at the discretion of the court as to the penalty to be imposed. If he was afraid of mob violence or the alleged threat of Mr. Moore to shoot him and that fear was upon him when he pleaded, he did not so advise either his counsel or the court which it was his duty both to himself and the State to do. So far as the record shows outside of the petition and affidavit of the accused no such condition existed. That there may have been a strong feeling amounting to indignation in the community against the perpetrator of such a crime as that with which the accused was charged was most natural in a community of respectable and law-abiding citizens, but that such a community intended to take the law in its own hands and defile the temple of justice with such brutality as the accused now pretends to have feared is not a presumption that can be indulged to the end that the judgment rendered in the case may be nullified.

The affidavit of Mr. McCollum as to a "mob of at least fifty men" which had gathered and were hunting for the "one who had raped Mrs. Moore" related to the day upon which the alleged offense was committed, while the use of the word "mob" in the affidavit does not quite convey the idea of a "tumultuous lawless rabble" when it is applied to "at least fifty men" in a community the size of DeLand. The language of the affidavit is much more temperate when applied to the conditions at the trial about five months later at which time according to the affiant, there was in DeLand "strong feeling against the said Nickels." The affidavits of the women Mrs. McCollum, Mrs. Dreggors, Mrs. Downs and Mrs. Heyser, which were attached to the motion are merely inferentially in contradiction of a fact determined in the original proceedings and in so far as those ladies affirmed that Mrs. Moore said to them that she did not know whether she had been outraged as she was "knocked

unconscious," such statement is consistent with the idea that Mrs. Moore declined to be made by her own words to them the heroine of a repulsive scandal.

On the same day, November 20, 1922, the defendant by his counsel made an extraordinary motion for a new trial. That motion the Court overruled, and such order is assigned as the first error. The motion was made after more than six months had elapsed after the judgment in the case was entered. The motion contained no ground except the averment of newly discovered evidence which could not have been presented to the court in a motion for a new trial within the time prescribed by the statute. See Baxley v. State, 72 Fla. 228, 72 South. Rep. 677; Kirkland v. State, 70 Fla. 584, 70 South. Rep. 592; Koon v. State, 72 Fla. 148, 72 South. Rep. 673.Recitals in a motion for a new trial are not evidence of the facts stated. Counsel may embody in such motions what statements they please, but no court will regard such statements as evidence. See Broward v. State, 9 Fla. 422; Dukes v. State, 14 Fla. 499; McNealy v. State, 17 Fla. 198; Richardson v. State, 28 Fla. 349, 9 South. Rep. 704. Nor should the motion be granted upon the unsupported affidavit of the defendant when it rests upon the ground of newly discovered evidence. See Jones v. State, 35 Fla. 289, 17 South. Rep. 284.

All the necessary facts should be supported by affidavits.See Thompson v. State, 58 Fla. 106, 50 South. Rep. 507; Young v. State, 70 Fla. 211, 70 South. Rep. 19.

The contention that Section 2810, Revised General Statutes, 1920, Section 1608, General Statutes, 1906, does not apply because there was no jury trial in this case and therefore no verdict, is without merit. The purpose of the statute was to require the motion for a new trial to be made during the term at which the trial was held. The common law rule required the motion to be made during the term, but even in the absence of any strict limitation by statute an application must be made within a reasonable time under the circumstances of the particular case. See 20 R.C.L. 393; Dodge v. People, 4 Neb. 220; Hubbard v. State, 72 Neb. 62, 100 N.W. Rep. 153, 9 Ann. Cas. 1034 and Note; State v. Adams, 73 S.C. 435, 53 S.E. Rep. 538.

Some authorities hold that a motion for a new trial on newly discovered evidence made after judgment is addressed to the sound discretion of the Court.

In the Kirkland case, supra, this court held that the statute above referred to applied to criminal cases. There was no error in overruling the motion.

On the same day the defendant's counsel moved the Court to take oral testimony in support of the extraordinary motion for a new trial. The testimony which the defendant desired was that of Dr. J.E. Taylor, who it was averred was a practicing physician and treated Mrs. Moore on the day the crime was alleged to have been committed and examined her body and person at the time, and that he would testify that from such examination and "from what he learned from the said Irene Moore" it was his opinion that she "had not been raped" on December 8th, 1921, nor for more than twenty-four hours before. The motion recites that Dr. Taylor refused to made any such affidavit or give to the

defendant or his attorney "anything in writing concerning the case." The defendant made an affidavit to the truthfulness of the statements contained in the motion, but it was unsupported by any other affidavit. The affidavit is defective in not stating how the defendant acquired the information that Dr. Taylor would so testify, but the motion upon the contrary shows upon its face that Dr. Taylor refused to make such an affidavit when he was requested to do so by defendant's counsel. Only by inference of a most uncertain and unwarrantable character can it be supposed that Dr. Taylor, presumably a reputable physician, would withhold information which he alone possessed and callously see a man condemned to death for a crime which he had not committed. The only strength of the affidavit consists in this insinuation against the attending physician and that is not sufficient to convince the Court of an abuse of discretion even if in this jurisdiction it had the power to grant the extraordinary motion for a new trial. There was no error in denying that motion.

After these motions were made and overruled the defendant through his counsel sought to disqualify the presiding judge by an affidavit of the defendant that the judge "by reason of a fixed and settled opinion as to the guilt of this defendant has an interest in this cause and is disqualified to entertain any motions in said cause other than to have the same tried by a qualified tribunal." The defendant's counsel certified that the affidavit of the defendant was made in good faith, and two affidavits, one by L. H. Norman and H. P. Bane, were dated and filed November 21st, 1922, to the effect that Judge James W. Perkins was biased and prejudiced against the defendant and that such prejudice would influence him in any ruling or decision that he might make in the case.

The document called a "motion of disqualification of the judge" was dated the 1mth day of November, 1922, the certificate of counsel was dated the 15th day of November, the affidavit of the defendant in support of the motion was dated the 1mth day of November. The motion was filed on the 20th day of November and was heard by the judge on the 27th day of January, 1923, and the affidavits of the two citizens as stated were dated November 21st, 1922. Upon the same day the State Attorney filed the affidavit of H. P. Bane, and on the 24th day of the same month the affidavit of L. H. Norman, each affiant deposing that he signed the first affidavit as to the judge's disqualification under a misunderstanding induced by representations of defendant's counsel as to the purpose of the affidavit and neither one of them understood that they were swearing to the judge's prejudice against the defendant which they did not believe to be the case, and which opinion they disaffirmed; but were under the impression that their affidavits so obtained would procure a new trial for the defendant. One of the affiants, L. H. Norman, stated that he was opposed to capital punishment, and from the representations made to him by the defendant's attorney affiant understood that the effect of his affidavit would secure a new trial for the defendant.

Such a showing does not effect the disqualification of a judge under our statute. The Statute, Section 2674, Revised General Statutes, 1920, requires the affidavit of the defendant to state the "facts and the reasons for the belief that any such bias or prejudice exists," and must be filed ten days before the beginning of the term of the court or good cause shown for failure to so file same within such time. And that the facts stated as a basis for making the affidavit shall be supported in substance by

affidavit of at least two reputable citizens of the county not of kin to the defendant or counsel for the defendant. Neither the affidavit of Norman or Bane negatives the idea of kinship to the defendant or his counsel, and neither affidavit purports to affirm any facts given as a basis for making the affidavit of prejudice. Nor does the affidavit of the defendant state the "facts and reasons for his belief that any such bias or prejudice existed." The affidavit consists of mere repetitions of the assertion that the judge was "prejudiced" or "biased" and had "formed and expressed a fixed and settled opinion as to the guilt of this defendant." That the judge had "discussed freely the question of the guilt of this defendant with other persons and had formed and expressed a fixed and decided opinion as to the guilt of this defendant." If having an opinion as to the guilt or innocence of an accused person on trial would disqualify a judge, no judge could well try the same case twice. Such was not the purpose of the statute. It is in derogation of the common law and was designed to secure for accused persons and litigants in civil cases trials by judges against whom the charge could not be reasonably made that by reason of some fact germain to the proceedings or relating to the transaction the judge's sympathy, bias or prejudice was unduly created against the movant. It was not intended by the statute to put it within the power of a person accused of crime or a litigant who was disinclined to come to trial to defeat justice and procure delays by arbitrarily asserting his belief in the judge's unfairness without any supporting fact to sustain it. The affidavits were insufficient under the statute and failed of their purpose.

Aside from this the Court was without jurisdiction to grant the motions for the writ of coram nobis and new trial and had no power under the circumstances to sign and certify a bill of exceptions. It is also true that the order he made allowing the correction of a date in the indictment as it appeared in the bill of exceptions was of no material injury as the record proper contains a copy of the indictment and no error in it is apparent.

No error was shown to have been committed, so the judgment of the Court is hereby affirmed.

TAYLOR, C. J., AND WHITFIELD, WEST AND TERRELL, J. J., concur.

BROWNE, J., not participating.