No. 11,682

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MATTHEW WRUBLEWSKI, *Appellant,* vs. CAPTAIN S. X. MCINERNEY, Commanding Officer of United States Naval Receiving Station, Yerba Buena Island, San Francisco, California, and REAR ADMIRAL D. B. BEARY, United States Navy, Commandant 12th Naval District, San Francisco, California, *Appellees.*	

BRIEF FOR APPELLEES.

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Subject Index

Page

Jurisdictional statement 1

Statement of the case 2

Question involved 4

Is an alleged erroneous decision of a naval court-martial overruling a plea of former jeopardy, cognizable in habeas corpus in the civil courts? 4

Contention of appellees 4

Argument 5

An alleged erroneous decision of a naval court-martial, overruling a plea of former jeopardy, is not cognizable in habeas corpus in the civil courts 5

The actions of the navy court were not such as to constitute lack of due process under military law 8

The question of double jeopardy can not be raised by habeas corpus 16

Summary 18

Conclusion 19

Table of Authorities Cited

Cases

Pages

Clawans v. Rives (CCA-DC), 104 F. (2d) 840 17
Collins v. Loisel, 262 U. S. 426 14
Commonwealth v. Peters, 12 Met. 387 14
Crapo v. Johnston, 144 F. (2d) 863, 864, Cert. den. December 4, 1944 .... 17, 18

Daggart v. State, 93 S. W. 399 15
Deming v. M'Claughry, 113 Fed. 639 14

Grafton v. United States, 206 U. S. 334 10
Gravieres v. United States, 220 U. S. 338 11

Houston v. United States, 5 F. (2d) 497 14

In re Harron, 191 Cal. 457, 466 17

Johnsen v. United States (CCA-9), 41 F. (2d) 44 14

Kastel v. United States (CCA-4), 30 F. (2d) 687, 688 17

McCarthy v. Zerbst, 85 Fed. (2d) 640 12
Murphy v. Massachusetts, 117 U. S. 155 14

Palko v. Connecticut, 302 U. S. 320 13

Re Bonner, 151 U. S. 242 15

State v. Hoot, 120 Iowa 238 15
Stone v. United States, 167 U. S. 178 11

United States v. Ball, 163 U. S. 662 14
United States v. Ratagczak, 275 Fed. 558 14
United States v. Tyler, 15 F. (2d) 207 14

Wolkoff v. United States, 84 Fed. (2d) 17 .... 9, 14

Statutes

Title 18 U.S.C.A., Section 455 10
Title 28 U.S.C.A., Sections 451, 452 and 453 1
Title 28 U.S.C.A., Sections 463, 225 2

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BRIEF FOR APPELLEES.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called the "Court below", dismissing petition for writ of habeas corpus. (Tr. 16-21.) The Court below had jurisdiction of the habeas corpus proceedings under Title 28 U.S.C.A., Sections

451, 452 and 453. Jurisdiction to review District Court's order dismissing the petition is conferred on this Court by Title 28 U.S.C.A., Sections 463 and 225.

STATEMENT OF THE CASE.

The facts of this case are, as set forth by the Court below in its order and opinion dismissing petition for writ of habeas corpus, which reads in part as follows:

> "Petitioner, an officer of the United States Navy, seeks by his petition for the writ of habeas corpus to be released from the custody of naval authorities who hold him at the United States Receiving Station, Yerba Buena Island, in this district, after his conviction on July 30, 1946, by a court martial of the crime of voluntary manslaughter and subsequent sentence to five years imprisonment. The court issued an order directing the commanding officers of the Receiving Station to show cause why the writ should not issue. Respondents then moved to dismiss the petition. After argument and the filing of briefs, the motion has been submitted for decision.
>
> It appears from the petition that petitioner, on December 11, 1944, was tried before a Naval General Court Martial at Pearl Harbor, Hawaii, for two offenses, to-wit: The crime of murder alleged to have been committed on or about August 7, 1944, at the U. S. Naval Air Station, Oahu, Hawaii, and the crime of assault with intent to commit murder alleged to have been committed at the same time and place upon the same victim. The Naval Court adjudged petitioner guilty of

murder and not guilty of the charge of assault with intent to commit murder.

Upon review of the judgment, the Judge Advocate General, on Nov. 9, 1945, declared the judgment and sentence for the crime of murder illegal, in that the same was committed 'within the territorial jurisdiction of the United States' and thus beyond the jurisdiction of that court martial.* Petitioner was not, however, released from custody. On July 30, 1946, petitioner was brought to trial before another Naval General Court Martial upon two charges, to-wit, voluntary manslaughter and involuntary manslaughter. Both charges specified the same homicide for which petitioner was tried in the 1944 court martial. Conviction of the charge of voluntary manslaughter and sentence to five years imprisonment followed.

At his trial on the manslaughter charges, petitioner pleaded 'former jeopardy', in that he had previously (in 1944) been acquitted of the crime of assault with intent to commit murder upon the same victim. In support of this plea, petitioner alleged that the crime of assault with intent to commit murder was a lesser included offense of the crime of manslaughter and that acquittal of the former barred subsequent prosecution for the greater offense. The court martial overruled the plea and the judgment was later confirmed by the Judge Advocate General.

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*Naval Courts Martial have jurisdiction of the crime of murder only when committed outside the territorial jurisdiction of the U. S. A. 34 USC s 1200 Art. 6.

> Because of the alleged 'former jeopardy' (Const. Amdt. V), petitioner claims the Navy court, in the 1946 trial, was without jurisdiction and hence the writ should issue."

The Court below based its order denying appellant's application for writ of habeas corpus on the sole ground that the appellant, being a member of the Naval service of the United States, was not entitled to the protection of the specific guarantees of the Fifth Amendment to the Constitution, which amendment contains the prohibition against placing a person twice in jeopardy. From the order dismissing petition for writ of habeas corpus, appellant now appeals to this Honorable Court. (Tr. 21.)

QUESTION INVOLVED.

Is an alleged erroneous decision of a Naval Court-martial overruling a plea of former jeopardy, cognizable in habeas corpus in the civil courts?

CONTENTION OF APPELLEES.

The answer to the above stated question is: NO.

ARGUMENT.

AN ALLEGED ERRONEOUS DECISION OF A NAVAL COURT-MARTIAL, OVERRULING A PLEA OF FORMER JEOPARDY IS NOT COGNIZABLE IN HABEAS CORPUS IN THE CIVIL COURTS.

In denying appellant's application for habeas corpus the Court below said as follows:

> "Unless it appears that the Navy court lacked jurisdiction, this court may not review its judgment. U. S. v. Grimley, 137 U.S. 147; Swaim v. U. S., 165 U.S. 553; Mullan v. U. S., 212 U.S. 516; Ex parte Mason, 105 U.S. 696; Ex parte Reed, 100 U.S. 13; Carter v. McClaughry, 183 U.S. 365. To resolve the jurisdictional issue, it is not necessary to decide whether a court martial conviction of the crime of manslaughter, where there has been a previous trial of the crime of assault with intent to commit murder, amounts to double jeopardy. This is for the reason that the specific guarantees of the 5th amendment to the Constitution relating to criminal prosecutions may not be invoked in 'cases arising in the land or naval forces' of the United States. Ex parte Quirin, 317 U.S. 43; Ex parte Milligan, 71 U.S. 2, 123; U. S. ex rel. Innes v. Crystal (2 Cir.), 131 Fed. (2d) 576; Ex parte Benton, 63 Fed. Supp. 808. The Naval court's decision denying the plea of double jeopardy may have been erroneous. But such errors of law by courts martial are not of themselves reviewable or correctible in the civil courts." (Tr. 18.)

The Court below then went on to say that if the decision of the court-martial violated the " 'basic doctrine of fairness' under the due process clause of the

Constitution'', such action on its part would divest it of any jurisdiction, and accordingly any conviction resulting from such a decision would be void. (Tr. 19.)

The Court below then asked itself the question as to whether or not the treatment given the appellant by the Navy court was so "unfair'' as to constitute a lack of due process under military law. The Court below answered the question adversely to appellant in the following language:

> "Petitioner was represented by counsel during both courts martial. No claim is made of any unfairness in the conduct of his trials. It is not claimed that he was denied the right to produce witnesses or to cross examine witnesses. Nor is any conduct of the court itself complained of. The contentions made here were urged, both at his second court martial and upon review by the Judge Advocate General. They were determined adversely to him. Under military law, the decisions may have been wrong. But we may correct them here, only if the errors amount to a denial of due process.
>
> It is a reasonable inference, as it would be in the civil courts, that the charge of assault with intent to commit murder was added to the charge of murder at the first court martial in order to provide for the exigencies of proof. Obviously acquittal of the assault charge was in the nature of a dismissal of that charge, because of the finding of guilt of murder. The entire record of petitioner's case negatives the assumption that he may have been acquitted of assault with intent to commit murder due to a lack of the required degree of proof to establish the commission by

him of any assault upon the deceased at all, or of an intent to kill. Indulgence in this assumption would require complete disregard of the fact that the court martial believed and found him guilty of the greater crime of murder.

Nothing in the record presented by the petition indicates a violation of the basic doctrine of fairness. It is true that much fumbling and delay by the Naval authorities is disclosed. At least, from the civil viewpoint, it may be so characterized. But I may not issue the writ for such reasons. In fact, nothing about this case bestirs any judicial urge to invoke the great writ of habeas corpus. Moreover, it may not be amiss to point out that the plight of petitioner, under all the circumstances, is not too unfortunate. Indeed he may have been more severely dealt with in the first instance had not the Naval authorities made the jurisdictional mistake of charging him with murder.

My conclusion is that the showing made fails to demonstrate a breach of the broad and basic doctrine of fairness under the due process clause." (Tr. 19-20.)

The appellees are in complete accord with the ruling of the Court below, that the specific guarantees of the Fifth Amendment are not available to the appellant because he is a member of the armed forces and urges that the Court below be upheld in its decision. The appellees of course adopt the authorities cited by the Court below in reaching the conclusion which it did.

THE ACTIONS OF THE NAVY COURT WERE NOT SUCH AS TO CONSTITUTE LACK OF DUE PROCESS UNDER MILITARY LAW.

As to the question of whether or not the proceedings before the Naval Court were so unfair as to constitute a lack of due process under military law, the appellees herein, in support of the Court below, will now amplify this phase of the case.

As indicated, appellant contends that the second court martial lacked jurisdiction over the crime of manslaughter because of a previous acquittal of a lesser included offense by what the appellant terms a "fully constituted naval general court martial". It is significant that appellant was tried for manslaughter at the second trial only because the Navy lacked jurisdiction in the first instance of the charge of murder. At the first trial the main charge was murder and the charge of assault with intent to commit murder was preferred only to provide for the contingencies of proof. The facts in the case warranted a finding of guilty on a charge of murder and it was then necessary to make a disposition of the minor charge of assault with intent to commit murder. The acquittal on minor charge went merely to the exigencies of proof since there could be no assault with intent to commit murder where the intent had been consummated. When the first trial, proceedings, findings and sentence were set aside for lack of jurisdiction over the crime of murder the effect was to nullify the whole process from its inception. In answer to the contention by the appellant that there

was an acquittal of a lesser included offense in the first trial by a fully constituted naval general court martial which barred the trial and conviction for the crime of manslaughter at the second trial, appellees assert that the first court, lacking jurisdiction, was a nullity and that appellant was not duly tried and acquitted of any offense at that time. No practical injustice was inflicted on the accused in this case since the so-called acquittal on the charge of assault with intent to commit murder in the first trial would not have resulted if there had been any question at that time of the illegality of the charge of murder for which petitioner was tried.

It is well established that second jeopardy does not attach where a Court has no jurisdiction of the offense charged. In the case of

Wolkoff v. United States, 84 Fed. (2d) 17,

the Court held appellant not in double jeopardy upon reindictment and trial resulting from faulty indictment in the first instance. The Court said the two essentials of legal jeopardy are that Courts have jurisdiction and that indictment be valid.

The appellant objects to his confinement following a determination that the first court-martial lacked jurisdiction over the crime of murder. When the first trial was set aside for lack of jurisdiction over the crime of murder, the Navy Department continued to have jurisdiction over petitioner and his confinement was in order until his case was disposed of by a Court of competent jurisdiction.

The case of

Grafton v. United States, 206 U. S. 334,

is relied on by the appellant to support his plea of second jeopardy. That case can be distinguished from the facts in this case. In the *Grafton* case the accused was tried twice, first by court-martial, and later by the Philippine Civil Courts, both of which Courts owed their existence wholly to the United States. The acquittal, therefore, by the general court-martial precluded a second trial by the Philippine Civil Courts for the same offense. This, obviously, was double jeopardy since the first Court had jurisdiction over the crime and the person. Jurisdiction over the crime charged was lacking in the present case in the first trial.

The appellant contends also that the assault with intent to commit murder charged at the first trial is a lesser included offense of the charge of manslaughter preferred at the second trial. As pointed out above it is the position of the appellees that the first trial was a nullity in its entirety and therefore of no effect. Assuming, but not admitting, that some effect must be given the acquittal at the first trial on the basis of a relation between assault with intent to commit murder and manslaughter, it is the further contention of the appellees that the two charges are separate and distinct as a matter of law. In this connection it should be noted that under the Federal statute dealing with assaults, a clear cut distinction is made between simple assault and assault with intent to commit murder, 18 USC 455. The appellant fails

to note the above distinction, a distinction which is adopted in Naval Courts and Boards. This distinction is important because while simple assault of its nature is a lesser included offense under either murder or manslaughter, assault with intent to commit murder is not a lesser offense under manslaughter. It is well established that an acquittal in one indictment is not a defense for another action based on the same set of facts where the second action is a separate and distinct charge from the first indictment.

Stone v. United States, 167 U.S. 178.

In the case of

Gravieres v. United States, 220 U.S. 338,

it was held that a conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another unless the evidence required to support conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. The plea (double jeopardy) will be vicious if the offense as charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in point of fact. Gravieres was convicted under an ordinance prohibiting drunkenness, and rude and boisterous language, and the Court held that he was not put in double jeopardy by being subsequently tried under another ordinance for insulting a public officer although the latter charge was based on the same conduct and language as to the former. In the

instant case, even assuming that the first trial was not a nullity, which appellees contend it was, for lack of jurisdiction, the charge of manslaughter preferred at the second trial, while growing out of the same facts, was a distinct and separate charge in point of law and cannot be barred by a plea of former jeopardy.

In the case of

McCarthy v. Zerbst, 85 Fed. (2d) 640,

the general rule for establishing jeopardy was announced substantially as follows: Where a person has been placed on trial on a valid indictment or information before a Court of competent jurisdiction, has been arraigned and has pleaded, and the jury has been impaneled and sworn, he is in jeopardy, but until all these things have been done, jeopardy does not attach. The general rule presupposes all of the above ingredients including a trial before a Court of competent jurisdiction. By the appellant's own admission the naval court-martial in the first instance had no jurisdiction over the crime of murder. The plea of double jeopardy must therefore fail since the entire proceedings of the first court were set aside including the disposition of the minor charge of assault with intent to commit murder, which went only to the exigencies of proof.

The second court-martial proceedings in this case being necessary because of jurisdictional error which nullified the first proceedings, the rule as announced in the case of

Palko v. Connecticut, 302 U.S. 320,
is applicable. In that case it was held that where a new trial is ordered because of error and the accused is placed on trial a second time, it is not the sort of hardship to the accused that is forbidden by the 14th Amendment. In the *Palko* case the defendant was tried and found guilty of the crime of murder and sentenced to life imprisonment. The State of Connecticut appealed under a statute permitting appeal in criminal cases. The Supreme Court of Errors found procedural error and ordered the defendant to be retried. He pleaded double jeopardy. The Court overruled the plea, found him guilty and sentenced him to death. The Supreme Court affirmed the proceedings, using the following language:

> "Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our policy will not endure it? Does it violate those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions? The answer surely must be 'No'. * * * It (the statute) asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error.
>
> "If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary to purge the vicious taint.
>
> "The conviction of appellant is not in derogation of any privileges or immunities that belong to him as a citizen of the United States."

In the case of

Murphy v. Massachusetts, 117 U.S. 155,

the Court went even further. It held that a sentence and conviction after reversal of a former judgment on application of the accused, who had alleged that the judgment was imposed under a statute passed after the offense was committed and therefore unconstitutional, does not violate the constitutional provision against double jeopardy although the accused had served an invalid sentence before the judgment was reversed, including confinement. The case of

Commonwealth v. Peters, 12 Met. 387,

held that an acquittal before a Court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void and therefore no bar to subsequent indictment and trial in a Court which has jurisdiction of the offense. To the same effect see also

United States v. Ball, 163 U. S. 662;
Deming v. M'Claughry, 113 Fed. 639;
United States v. Ratagczak, 275 Fed. 558;
Houston v. United States, 5 F. (2d) 497;
United States v. Tyler, 15 F. (2d) 207;
Johnsen v. United States (CCA-9), 41 F. (2d) 44;
Wolkoff v. United States, supra.

The first court-martial of appellant being void for lack of jurisdiction over the crime of murder, all of the proceedings in that trial were void. In

Collins v. Loisel, 262 U.S. 426,

it was held that a discharge, because of irregular proceedings under a writ of habeas corpus of one arrested

in extradition proceedings, was not *res adjudicata* beyond issues necessarily involved in the conclusion that the accused was illegally in custody at time of discharge, so as to prevent subsequent arrest for extradition for the same alleged offense. In the case of

Re Bonner, 151 U. S. 242,

it was held that one on whom an unlawful sentence has been imposed, upon being discharged on habeas corpus, may be sentenced in accordance with law on the subject. All of the foregoing cases unequivocally show that the plea of double jeopardy is not available as a sham to obscure justice. In denying the validity of the second trial the petitioner is attempting to traverse the mechanism of judicial procedure by setting up a bar which the law never intended as a means to defeat justice.

The case of

Daggart v. State, 93 S.W. 299,

cited by the appellant, does not apply because in that case there had been a trial by a Court of competent jurisdiction in the first instance, which is not a fact in our case. The language in the case of

State v. Hoot, 120 Iowa, 238,

as cited by the appellant, has no application here since it also presupposes action by a Court of competent jurisdiction in relation to a charge of assault with intent to commit murder.

The contention by the appellant that the Judge Advocate General denied the appellant the right of

review in rendering an opinion that the second court-martial did not constitute double jeopardy is wholly unfounded. The appellant has never been denied the right of review. Accordingly this complaint is completely without merit.

To summarize this phase of the case, appellees believe that it has been shown conclusively the treatment given the appellant by the Navy Court was not so unfair as to constitute lack of due process under military law. In fact appellees repeat what the Court below said:

> "Moreover it may not be amiss to point out that the plight of petitioner, under all the circumstances, is not too unfortunate. Indeed he may have been more severely dealt with in the first instance had not the naval authorities made the judicial mistake of charging him with murder." (Tr. 20.)

THE QUESTION OF DOUBLE JEOPARDY CAN NOT BE RAISED BY HABEAS CORPUS.

The appellees have concerned themselves in this brief with the question as to whether or not an erroneous decision by a naval court-martial overruling a plea of double jeopardy is cognizable in habeas corpus in the civil Courts. The appellees under authority of this Honorable Court can go further and assert that the defense of double jeopardy is never cognizable in habeas corpus, whether the party asserting it be complaining of the action of a civil or a military tribunal.

See

Crapo v. Johnston, 144 F. (2d) 863, 864, certiorari denied December 4, 1944,

where this Honorable Court said:

> "There is no merit in the appellant's claim that the trial court is without jurisdiction or that he has suffered double jeopardy for the same offense, although the latter question can not be raised by habeas corpus."

To the same effect see

Kastel v. United States (CCA-4), 30 F. (2d) 687, 688.

For a contrary view, however, see

Clawans v. Rives (CCA-DC), 104 F. (2d) 840.

The Supreme Court of California, in the case of

In re Harron, 191 Cal. 457, 466,

has held that habeas corpus is an available remedy only where it is sought upon the claim that the prisoner has been placed in jeopardy for the identical offense, and not where it is merely contended that a prior conviction or acquittal on a particular charge or on particular facts is a bar to a new charge. In our case at bar the appellant's grievance is not predicated on his being twice placed in jeopardy for an identical offense, but on an allegation of a second trial for an included offense. It should be called to the attention of this Court that the problem involved in

Crapo v. Johnston, supra,

was that of included offenses, although the Court drew no distinction between a grievance predicated on

a prisoner being twice placed in jeopardy for an identical offense, rather than on an allegation of a second trial for an included offense. In any event, the appellant can find no comfort in the holding of this Court in

Crapo v. Johnston, supra.

SUMMARY.

A member of the armed forces is not entitled to the protection of the Fifth Amendment, which contains a prohibition against "double jeopardy". A member of the armed forces is entitled to redress in the civil Courts only if the treatment accorded him by the court-martial was of such a nature as to constitute a denial of the "basic doctrine of fairness" under the due process clause of the Constitution.

The treatment accorded to appellant was extremely fair.

Assault with intent to commit murder and manslaughter are not included offenses, but even if they were, an erroneous decision by the court-martial would not constitute a denial of due process as might a refusal of the court-martial to entertain and pass upon the plea of former jeopardy, if interposed.

The original court-martial lacking jurisdiction over the crime of murder committed within the territorial limits of the United States, the entire proceedings before it may properly be considered a nullity.

Finally, the defense of former jeopardy is not cognizable in habeas corpus, and more particularly where

the defense is interposed on the ground of a prior acquittal of an included offense, as contrasted with a prior acquittal of an identical offense.

CONCLUSION.

In view of the foregoing, it is respectfully urged that the order of the Court below is correct and should be affirmed.

Dated, San Francisco,
November 24, 1947.

Respectfully submitted,

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