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Article 11

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CONSTITUTIONAL LAW–RESTRICTION ON BAIL GRANTING POWER OF SUPREME COURT HELD INVALID

Defendant petitioned the Supreme Court of South Carolina for a writ of habeas corpus to secure his release on bail pending appeal from a rape conviction for which a fourteen-year sentence had been imposed. The defendant did not make a direct application for bail to the trial judge because of a South Carolina statute which forbade post-conviction bail where the sentence exceeded ten years.[1] The contention of the petitioner was that under the South Carolina Constitution,[2] the Supreme Court has inherent power to admit to bail one convicted of a crime in the exercise of its habeas corpus powers. The court decided, two justices dissenting, that it had an inherent power to grant bail which could not be abrogated by the legislature, and ordered that defendant be admitted thereto. *State v. Whitener*, 81 S.E. 2d 784 (S.C., 1954).

The majority of the court reasoned that while lesser state courts were bound by the prohibition of the statute, the Supreme Court, as the constitutional court, has the inherent power to set bond in any case either before or after conviction, and that the legislature may not abridge the habeas corpus and bail granting powers given the Supreme Court under the Constitution.

Attempting to justify their reasoning historically, the majority of the court pointed to the case of *State v. Satterwhite*,[3] which was decided by the court according to common law principles. In that case, it was held that a circuit judge had the power to admit a defendant to bail in all cases, even during pendency of an appeal after conviction.

The next case relied upon by the majority was *State v. Farris*,[4] wherein the court was confronted for the first time with the Act of 1887,[5] which provided that neither a circuit judge nor a supreme court justice could lawfully grant bail pending an appeal, to any person convicted of an offense punishable by death, life imprisonment, or any term exceeding ten years. The petitioner in that case was sentenced to a term of ten years and one month and sought release on bail pending his appeal under a writ of habeas corpus. The state resisted on the grounds that the court was without authority, since punishment exceeded ten years. In granting

[1] S.C. Code (1952) §§ 7 and 8.

[2] Art. V, § 4 provides that "The supreme court shall have power to issue writs . . . of habeas corpus. . . ."

[3] 20 S.C. 536 (1883).

[4] 51 S.C. 176, 28 S.E. 308 (1897).

[5] The Act of 1887 was omitted from the 1952 Code and is therefore no longer law.

the writ, the court cited the provision in the Constitution,[6] granting to the Supreme Court the power to issue writs, including habeas corpus, and then stated that it was the legislative intent to restrict the granting of bail by individual judges, leaving such bail-granting functions only to the Supreme Court sitting *en banc*. With this interpretation, the court skillfully avoided the question of abridgement of a constitutional power of the Supreme Court.

The instant case meets head on the constitutional question of whether the legislature could take away the court's power to grant bail. The majority felt that lesser courts were bound by the statute, but not the court of last resort. In very strong language, the majority concluded by stating:

> This court has the power to issue these writs and orders referred to in the Constitution. These fundamental remedies and safeguards upon which each individual in our society has the right to rely must be preserved by the courts. Otherwise, these procedural rights embodied in our Constitution to insure the individual against oppression will become nullities. This court, the judicial body of last resort in our state system of jurisprudence, has the inherent power to set bond in any case. Every defendant sentenced to ten years or less has the right to bail pending appeal. This court can grant bail, in its discretion, where the sentence exceeds ten years.[7]

The vigorous dissent contended, as the court held in the case of *In re Ferguson*,[8] that: "After a defendant is convicted of a felony, there is no constitutional or statutory right to bail."[9] It was also pointed out that a statute similar to the one here in question had been upheld as constitutional in another jurisdiction in the case of *Ex Parte Herndon*.[10] But in no case had it been contended, as in the instant case, that when granting bail, the writ of habeas corpus may be employed to override the statutes. The dissent further stated that the main purpose of the writ is to secure the liberty of one who is illegally detained. While bail is an incidental use thereof, the power residing in the Supreme Court as to bail is merely the common law power left to the court after the *Satterwhite* and *Farris* cases, which power has been lawfully restricted by the statute in question. The dissent concludes: "The fact that this court is a court of last resort adds nothing to its power with reference to bail."[11]

Under the common law, bail pending an appeal from a conviction was not granted as a matter of right.[12] The courts granted bail only upon a showing of probable error which would call for reversal of the judgment.

[6] South Carolina Const. Art. V, § 4.

[7] 81 S.E. 2d 784, 786 (S.C., 1954).

[8] 235 N.C. 121, 68 S.E. 2d 792 (1952).

[9] Ibid., at 122 and 793.

[10] 18 Okla. Cr. 68, 192 Pac. 820 (1920).

[11] 81 S.E. 2d 784, 788 (S.C., 1954).

[12] Rex v. Waddington, 1 East 143, 102 E.R. 56 (1800); Rex v. Wilkes, 4 Burr. 2527, 98 E.R. 327 (1770).

The King's Bench had the power to admit a defendant to bail after, as well as before, conviction, as pointed out in Hurd on Habeas Corpus:[13]

> Bail is only proper where it stands indifferent whether the party be guilty or innocent of the accusation against him, as it often does before trial, but where that difference is removed, it would, generally speaking, be absurd to bail him.[14]

State courts have uniformly taken the view that the constitutional provisions, to the effect that all persons shall be admitted to bail except for capital offenses where the proof is evident or the presumption great, have to do with right to bail before trial, and do not confer a right to bail pending an appeal from a conviction.[15] In thus concluding, the courts state that it is not illogical to restrict or deny the right to bail pending appeal from conviction, because prior to conviction, one charged with a crime is clothed with a presumption of innocence. However, these courts go on to say that the presumption of innocence is rebutted by a verdict of guilty, and there then arises the presumption that the conviction is just and the defendant guilty.[16] Constitutional provisions for the freedom preserving remedies of bail and habeas corpus were prompted by the recognition of abuses in pre-trial confinement of the accused rather than to aid those clearly convicted after a trial.[17]

The federal courts agree with state courts and their interpretation of the constitutional provision for bail by holding that bail pending appeal from conviction is not a matter of right.[18]

In Illinois, the state constitution sets forth the standard guarantee that all persons shall be bailable by sufficient sureties except in cases involving capital offenses where the proof is evident or the presumption great.[19] This constitutional provision and a statute to the same effect[20] guarantee the right to bail before conviction.

Another statute provides that on appeal from a conviction for a bailable offense, when the court is of the opinion that there is reasonable cause for believing that the judgment will be reversed, it shall be the

[13] Hurd, Habeas Corpus, p. 430 (2d ed. 1876).

[14] Ibid., at 431.

[15] Sioux Falls v. Marshall, 48 S.D. 378, 204 N.W. 999 (1925).

[16] Parker v. State Highway Dept., 224 S.C. 263, 78 S.E. 2d 382 (1953).

[17] Ex Parte Herndon, 18 Okla. Cr. 68, 192 Pac. 820 (1920).

[18] Fed. Prac. & Proc. Vol. 4, § 2503, Rule 46(a)(2) relating to bail upon review. U.S. v. Motlow, 10 F. 2d 657 (C.A. 7th, 1926) where in a statement drafted by the senior circuit judges in conference upon call of the Chief Justice of the U.S. Supreme Court which included the declaration: "the right of bail after conviction is not a matter of constitutional right."

[19] Ill. Const. Art. II, Sec. 7.

[20] Ill. Rev. Stat. (1953) c. 38, § 609.

duty of the judge to admit the defendant to bail until the determination of a writ of error.[21] This statute restates the common law rule and makes no attempt to restrict the exercise of judicial discretion.

Generally, the states do not legislate on the question of bail after conviction, but leave such questions to the sound discretion of the courts. Practically all decisions have been concerned with whether the prisoner has the right to bail after conviction, and not whether the court has the power to grant bail if it so desires. The court in the *Ex Parte Herndon* case[22] upheld a statute similar to South Carolina's as being constitutional. It should be remembered, however, that in the instant case, the court stated that the lower courts of the state are bound by the statute, and that only the Supreme Court, by virtue of its constitutional authority, is above the statute. The court agreed with the general rule that the convicted man has no right to bail, but it maintained that the discretionary power of the Supreme Court to allow bail cannot be hampered by legislation.

Thus the Supreme Court has made the granting of bail after conviction a function of the court, reserving under the doctrine of separation of powers this power to them alone, not to be regulated by the legislature. This constitutional reservation of the bail question to the Supreme Court seems to be a unique view as to the control of bail in American constitutional law.

DOMESTIC RELATIONS–WIFE'S REMARRIAGE AUTOMATICALLY TERMINATES ALIMONY

On October 8, 1945, plaintiff obtained a decree of divorce. Plaintiff was awarded custody of four children and defendant was ordered to pay $125.00 per month for support of plaintiff and the children. Soon after, plaintiff left the state with the children, and a year later remarried. Plaintiff tried to conceal her second marriage from defendant. He, however, learned of it, and went to see plaintiff and the children. At this time plaintiff told defendant that she wished no further support and told him to take the children. From that date until the commencement of this action, defendant had custody of the children most of the time. Also, from the date of plaintiff's refusal of further support, defendant has paid only for the support of one or more children when they were with their mother. Plaintiff instituted this proceeding to compel defendant to pay all the arrears of alimony. The trial court awarded plaintiff a small portion of the amount she sought. The Supreme Court of Utah affirmed, holding

[21] Ill. Rev. Stat. (1953) c. 38, § 774.

[22] 18 Okla. Cr. 68, 192 Pac. 820 (1920).