3RD DIV. NO. 810

IN THE SUPREME COURT OF ALABAMA

EX PARTE M. L. KING, JR.

IN RE: M. L. KING, JR.,

APPELLANT

VS.

STATE OF ALABAMA,

APPELLEE

APPEALED FROM THE CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA

BRIEF AND ARGUMENT OF APPELLEE IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF APPELLANT

BRIEF AND ARGUMENT

OF

JOHN PATTERSON
ATTORNEY GENERAL

AND

GEORGE YOUNG
ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR APPELLEE

STATEMENT OF THE CASE

On the 22nd day of March, 1956 the appellant, M. L. King, was convicted of a misdemeanor in the Circuit Court of Montgomery County, Alabama (R. p. 10). He was sentenced on the same day, March 22, 1956, and also on this day he gave notice of appeal in open court to the Court of Appeals, State of Alabama (R. p. 11).

No motion for new trial was filed. No motion was made by the appellant for the trial court to extend the time for filing the court reporter's transcript of the evidence below. In the absence of a request, no order was made by the trial court extending the time for filing the court reporter's transcript of the testimony with the clerk of the circuit court. The court reporter's transcript of the evidence was filed with the Clerk of the Circuit Court, Montgomery County on July 31, 1956 (R. p. 579). The reporter's certificate recites that counsel on both sides were notified of the filing, however, no objections were interposed by counsel for either side within the ten day period allowed.

No motion was made by the appellant for the trial court to extend the time for filing the transcript of the testimony in the appellate court; nor did counsel for the appellant move the appellate court to extend the time for filing his record with the clerk of the appellate court. Therefore, no order of the trial judge or of the Court of Appeals was made or entered extending the time for the filing of the record in the appellate court.

The transcript of the record on appeal was filed with the Clerk of the Court of Appeals on August 10, 1956 which is 141 days from the date upon which notice of appeal was given, March 22, 1956.

The appellee, State of Alabama, filed a motion in the Court of Appeals to strike the court reporter's transcript of the testimony

on the grounds that the same was not filed within sixty days from the day upon which notice of appeal was given. The appellee further moved the Court of Appeals to strike the entire record on the grounds that the same was not filed in the Court of Appeals within sixty days from the date upon which the time expired for the filing of the court reporter's transcript of the testimony with the clerk of the circuit court. The appellee further moved the Court of Appeals that the appeal be dismissed.

On the 30th day of April, 1957 the Court of Appeals, through Judge Gates, granted the motion of the appellee to strike the entire record and dismiss the appeal. On the 14th day of May, 1957 the appellant petitioned the Court of Appeals for rehearing which was denied the appellant on the 13th day of August, 1957 with an extended opinion.

On the 26th day of August, 1957 the appellant filed a petition in this Honorable Court for certiorari to the Court of Appeals.

This brief and argument is submitted in opposition to the petition for writ of certiorari.

BRIEF AND ARGUMENT

The petitioner, M. L. King, Jr. is seeking to invoke the jurisdiction of this Honorable Court by way of certiorari to the Court of Appeals, State of Alabama, insisting that the Court of Appeals erred in its application to him of Act No. 886, General and Local Acts 1951, p. 1527, as amended by Act No. 97, Special Session 1956, approved February 10, 1956. This Act is now codified as Title 7, § 827(1) - (6), Code of Alabama 1940.

The petitioner's only insistence is, in substance, this:

> That the statute governing the time in which the transcript of evidence should be established in the trial court (Act No. 886, supra) is not to be applied to him because he is removed from its operation since he has raised a question of a denial to him of constitutional rights on trial.

The petitioner seeks review in this Honorable Court solely on the ground that the Court of Appeals did not undertake any discussion of the contention of the appellant that his transcript of evidence should be considered even though not established until more than two months after the time allowed by law. The Court of Appeals, in its opinion, merely made application of Act No. 886, supra, to this appellant without any provision of excepting this appellant from its operation. The Court of Appeals did note, however, that no extension of time had been sought in the trial court for a late filing of the transcript of the evidence as is provided for by law; they further noted that there had not been an extension of time sought in the Court of Appeals for the late filing of the record on appeal.

The appellee respectfully submits to this Honorable Court that a claimed denial of a constitutional right cannot, by any manner, operate as an excuse for the petitioner's failure to conform himself to the law and rules of court. If there had been a sound and just reason for such a delay in perfecting his appeal in the Court of Appeals, the real and only opportunity to protect it for review is provided for by law by way of an application for an extension of time.

Not having complied with the law governing the time for filing the transcript of the evidence with the clerk of the trial court by either seasonably filing such transcript or acquiring an order of the Court extending his time, we submit, precludes any consideration of the transcript of evidence by the appellate court.

Without a transcript of the testimony legally established the only thing before this Court for review is the record proper and the grossly late filing of the entire record in the Court of Appeals certainly justified its being stricken and the appeal dismissed.

In the Court of Appeals, the appellee, State of Alabama, expounded on the applicability of Act No. 886, supra, to this petitioner and also on the inapplicability of the cases cited by him for the proposition that a "bill of exceptions" would be considered, even though filed late, when there is a question of whether constitutional rights of the defendant have been secured to him. We further expounded on the attempt of this petitioner to apply the holding of these cases to the situation at hand, i. e., the contention that even a statute of the state may be ignored when a constitutional question is raised.

In opposition to the present petition for certiorari, we respectfully submit our theories advanced in the Court of Appeals:

I

It is now well established that the court reporter's transcript of the testimony must be filed with the clerk of the circuit court "within sixty days from the date upon which the appeal was taken, or within sixty days from the date of the court's ruling on the motion for new trial, which ever date is later".

Act No. 886, General and
Local Acts 1951, p. 1527
as amended by Act No. 97,
Special Session 1956, approved February 10, 1956

Title 7, § 827(1), 1955
Cumulative Pocket Part,
Code of Alabama 1940

Watkins v. Kelley
262 Ala. 524
80 So.2d 247

Clark v. State
___Ala. App.___
82 So.2d 805

Eidson v. State
___Ala. App.___
82 So.2d 814

II

The time for filing the entire record on appeal in the appellate court should be calculated from: (1) The actual date of the establishment of the transcript of the evidence when such transcript has been validly and legally established in the court below within the time prescribed by law or (2) The date upon which the time expired for establishing a transcript of the evidence in the court below; and (3) Such time cannot be calculated from the time that a transcript of the evidence is filed late and illegally in the court below.

Rule 37, Revised Rules of the Supreme Court, effective June 1, 1955

Rule 37, Revised Rules, supra, as amended February 16, 1956

Lane v. State
___Ala. App.___
87 So.2d 668

Clark v. State
___Ala. App.___
87 So.2d 669

Napolean Duke v. State
264 Ala. 624
89 So.2d 102

III

The prerogative of extending the time for filing a transcript of the evidence in the trial court below is vested

solely with the trial court by the legislature. A transcript of the evidence not established according to law amounts to no filing.

Act No. 886, General and
Local Acts 1951, p. 1527,
as amended by Act No. 97,
Special Session 1956, approved February 10, 1956

Title 7, § 827(1), 1955
Cumulative Pocket Part,
Code of Alabama 1940

Watkins v. Kelley
262 Ala. 524
80 So.2d 247

ARGUMENT

It requires little argument to show that the law now requires that the court reporter's transcript of the evidence must be filed with the circuit clerk "within sixty days from the date on which the appeal was taken, or within sixty days from the date of the court's ruling on the motion for a new trial, which ever date is later." In the case at bar we have no motion for new trial and the judgment entry plainly indicates that petitioner gave his notice of appeal in open court on the 22nd day of March, 1956. In such a case, all of the authority of this Honorable Court is to the effect that the court reporter's transcript must be filed within sixty days from the date of the appeal. Watkins v. Kelley, supra; Eidson v. State, supra.

The sixtieth day and the last day within which the petitioner could have filed his court reporter's transcript of the testimony with the circuit clerk was May 21, 1956. However, this was not done until more than two months after the time expired for the petitioner to file his transcript of the testimony with the circuit clerk.

Although the statute allows the trial court to extend the time for the court reporter's filing of the transcript of the testimony with the circuit clerk, it does not appear that counsel for the petitioner made any such motion nor that the Court entered any order granting an extension of time.

It is obvious, therefore, that the court reporter's transcript of the testimony filed on the 31st day of July, 1956, and more than two months after the expiration of the time for filing the same (May 21, 1956) was late justifying its being stricken.

II

As demonstrated beyond question, the court reporter's transcript of the testimony was filed with the circuit clerk in this cause more than two months after the expiration of the sixty days allowed from the date of the appeal and was, therefore, illegal. It is also clear that not only was the court reporter's transcript of the testimony properly stricken, but also the transcript of the entire record on appeal.

While the Court of Appeals, through Judge Gates, took the view that when a transcript of testimony is not established in the sixty days running from the notice of appeal, the sixty days for filing the entire record in the appellate court ". . . runs concurrently with the sixty days under Act No. 97, supra", we took the position in the Court of Appeals (which we continue to maintain here) that the sixty days allowed the petitioner to get his record filed with the clerk of the appellate court dates from either (1) the actual establishment of the transcript of the testimony in the court below, or (2) if no transcript is established or if it is established

too late (which amounts to the same thing), the sixty day period for filing in the appellate court begins to run at a theoretical date, i. e., the date upon which the time expired for the filing of the transcript of testimony with the clerk of the court below.

As provided by law in establishing the transcript of the testimony below, ample provision is made in Rule 37, as amended, supra, for both the trial court and the appellate court to also extend the time for filing the record on appeal. In the instant case no application was made to either the trial or appellate court to have the time extended for the filing of the record on appeal. It is true that the transcript of the record on appeal filed on August 10, 1956, was within sixty days of the date of the actual filing of the court reporter's transcript of the testimony with the circuit clerk. But certainly it cannot be held that the time should be calculated from a date, July 31, 1956, which was more than two months after the expiration of the time for filing the court reporter's transcript with the circuit clerk.

If the time for filing the record in the appellate court may be calculated from the time of an actual filing of the transcript of the evidence, which is beyond the time allowed by law, then an appellant with his client out on bond could wait years to have the transcript of the evidence filed with the circuit clerk and then file his record on appeal in the appellate court sixty days from said late filing date and get a review of his case. Such was evidently not the intention of the framers of Rule 37, as amended, supra.

Therefore, it is respectfully submitted that Rule 37, supra, requires that the sixty day period for filing the record on appeal in the appellate court begins on the actual date of filing the transcript

of the evidence with the circuit clerk when that filing is a valid and legal filing within the time required by law. If there is no valid or legal filing of the transcript of the evidence, or if there is a late filing not sanctioned by an order of the trial court duly made by an application for an extension of time as provided for by the statute, or if there is no filing at all of a transcript of the evidence, then the time for filing with the appellate court begins to run at a theoretical date, i. e., the last date upon which the transcript of the evidence could have been filed or should have been filed by the court reporter with the circuit clerk. In the instant case that date was May 21, 1956, and according to Rule 37 the last day for filing in the appellate court was July 21, 1956, and not August 10, 1956.

While this is not the position taken by the Court of Appeals as far as the time required for filing the record on appeal when there is no transcript of the evidence or a late transcript of the evidence, we think this is the more equitable theory, and also the intendment of the framers of Rule 37, supra. An adoption of this theory, however, would not change the result in the instant case as this appeal was filed too late under any interpretation of the rule.

III

In opposition to the motion of the State of Alabama to dismiss the present appeal the petitioner relies in brief on cases holding, inter alia, that the appellate court is not required to strike a "bill of exceptions" not filed and presented within the prescribed period (Title 7, § 827, Code of Alabama 1940), but rather, it is discretionary depending upon a consideration of whether the defendant's constitutional rights have been secured to him. See Jones v. State, 237 Ala. 614, 188 So. 384; Clark v. State, 239 Ala. 10, 193 So. 320; Rutherford v. State, 237 Ala. 613, 188 So. 388 and other cases cited in brief of petitioner.

The respondent respectfully calls attention to the fact that these cases relied on in brief of petitioner are based upon Title 7, § 827, Code of Alabama 1940 prior to passage, in 1951, of Act No. 886, General Acts of Alabama 1951, page 1527, as amended by Act No. 97, Special Session 1956, approved February 10, 1956, now codified as §§ 827(1) through 827(6) of Title 7, Code of Alabama 1940.

By this 1951 Act, the legislature abolished bills of exceptions and substituted in lieu thereof a transcript of the evidence. They further provided for the methods by which the transcript of the evidence was to be prepared by the court reporter and the time within which the transcript of the evidence must be established in the trial court. Another important provision of this enactment (as has been pointed out) is that the trial court may extend the time for such filing for good cause shown.

It was held in Watkins v. Kelley, 262 Ala. 524, 80 So. 2d 247 that this enactment was in conflict with, thus prevailed over, Supreme Court Rule 48 which allows a discretion to be exercised by this Court in determining whether they will consider a transcript of the evidence filed late. This, then, poses the question as to whether Act No. 886 is similarly in conflict with and prevails over Title 7, § 827 which, in the same manner, allows a discretion to be exercised by the appellate court in granting a motion to strike a transcript unseasonably filed.

If it be determined that Act No. 886 is in conflict with § 827, which is apparently the basis for Supreme Court Rule 48, the result would be that the appellate court is no longer armed with any discretion in considering a transcript of the evidence which has not been established as required by law. The result would be that any purported excuse or reason must be directed to the trial court in an application for an extension of time in order to conform with the mandatory provisions of Act No. 886. Watkins v. Kelley, supra.

Although not specifically stated in the opinion of Justice Simpson in the Watkins v. Kelley case it would reasonably follow that Act No. 886 would also supersede § 827 necessarily removing any "discretion" from the appellate court. This reasoning is seemingly supported by the Watkins v. Kelley opinion in view of the fact that prior to the passage of Act No. 886 the trial court was without authority to make an order extending the time for presenting a bill of exceptions. Smith v. State, 166 Ala. 24, 52 So. 396. If not presented within the time required by law § 827 allowed parties to waive or consent for the time of filing bills of exceptions, or, the appellate court could strike such on motion of a party to the record, or his attorney. Now, since the power to extend time for cause has been given fully to the trial court by the legislature and since this power has been held to conflict with the discretionary right of the appellate court (Rule 48 and § 827) the latter legislative enactment must prevail. Watkins v. Kelley, supra. This is substantiated further by the fact that affidavits were offered the appellate court in the Watkins v. Kelley case tending to excuse the petitioner from the operation of the rule, however, the Court stated:

> "Appellant submits affidavits to this court showing an excuse for not having the transcript filed on time. It cannot be considered. Such information should have been imparted to the trial court in an application for an extension of time."

Query: Why could the court not consider the affidavits if any discretion remained with them in considering a transcript filed late? Surely, the only answer is that the trial court is authorized by law to consider excuses and reasons for any inability to file the transcript on time, and if it considers an extension of time warranted by the facts, it has the authority to do so. Apparently this prerogative is now invested solely with the trial court and when the methods for

completing and filing a transcript of the evidence as required by Act No. 886 is not complied with, this court should have no other alternative but to strike such transcript on motion.

So we conclude that since (1) bills of exceptions have been abolished and a transcript of the evidence substituted in lieu thereof; and (2) the trial court is provided by law with the authority to extend the time for filing the transcript of the evidence for good cause shown; and (3) Act No. 886 apparently conflicts with Supreme Court Rule 48 and Title 7, § 827; then Act No. 886 necessarily prevails and the appellate court is without any discretion to look into any purported reason or excuse for a belated transcript of the evidence.

Speaking generally, there are an ever increasing number of appeals wherein constitutional questions are raised. Almost any appellant can raise a constitutional question by mere averment or pleading. An appellant may always claim a denial of due process or similar encroachment upon his constitutional rights and if this fact in itself removed the appealing defendant from the operation of the rule governing the manner in which appeals are perfected, the purpose and effect of such rule would be entirely obliterated.

Therefore, in view of what has been said, and also in view of the previous holdings of this Honorable Court, we submit that the entire record filed in this cause was properly stricken by the Court of Appeals and the appeal properly dismissed. We, therefore, respectfully request this Honorable Court to deny the present petition for certiorari to the Court of Appeals, State of Alabama, since, under the facts of the instant case, the filing of record on appeal in the Court of Appeals 141 days after notice of appeal was too late under any interpretation of Supreme Court Rule 37, supra.

Respectfully submitted,

John Patterson
JOHN PATTERSON
ATTORNEY GENERAL

George Young
GEORGE YOUNG
ASSISTANT ATTORNEY GENERAL

I, George Young, as Assistant Attorney General for the State of Alabama, do hereby certify that I have mailed, properly stamped and addressed a copy of the foregoing brief to Fred D. Gray, attorney for appellant, 113 Monroe Street, Montgomery, Alabama on this the 25th day of September, 1957.

George Young
GEORGE YOUNG
ASSISTANT ATTORNEY GENERAL