Supreme Court of The United States

October Term, 1934

No. 554

HAYWOOD PATTERSON,
Petitioner,

against

STATE OF ALABAMA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS E. KNIGHT, JR.,
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State of Alabama,

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Counsel for Respondent.

Wetumpka Printing Co., Wetumpka, Ala.

SUBJECT INDEX

BRIEF

STATUTES AND RULES OF COURT

ATTORNEY GENERAL
THOMAS E. KNIGHT, JR.

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL
MONTGOMERY

December 19, 1934

Hon. Samuel S. Leibowitz,
225 Broadway,
New York City.

In re: Haywood Patterson
against the State
of Alabama.

Dear Sir:

I am herewith enclosing copy of the brief which I have this day forwarded to the Supreme Court of the United States to be filed in connection with the above styled case.

Yours very truly,
Thos. Seay Lawson

Thos. Seay Lawson,
Asst. Attorney General.

TSL/C
encl.

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I

Opinion of the Court Below

The opinion has not yet been officially reported. It appears in the Southern Reporter advance sheet of October 25, 1934, 156 Southern 567 and at pages 788-794 of the record. An application for rehearing was denied without opinion (806).

II

Statement of the Case

Petitioner is one of nine Negro boys who is charged with having raped two white girls, Victoria Price and Ruby Bates. The crime is alleged to

have been committed while the parties were riding on a freight train through Jackson County, Alabama, on March 25, 1931.

The nine defendants were tried in Jackson County, Alabama, in the Spring of 1931 and all of them were found guilty of the crime of rape and their punishment fixed at death with the exception of one, Roy Wright, in whose case the jury was unable to agree and a mistrial was ordered by the court. Appeals were taken to the Supreme Court of Alabama which court affirmed the decision of the lower court as to all of the defendants except one, Eugene Williams (*Patterson vs. State*, 224 Ala. 531, 141 So. 201; *Weems et al vs. State*, 224 Ala. 524, 141 So. 215). Thereafter the defendants appealed to the Supreme Court of the United States which Court reversed the decision of the Supreme Court of Alabama on the theory of inadequate representation by counsel (*Powell et al vs. State of Alabama*, 287 U. S. 45).

After the cases had been remanded to the Circuit Court of Jackson County for retrial, a motion for change of venue was filed on behalf of the defendants which motion was granted and the cases transferred to the Circuit Court of Morgan County, Alabama.

The petitioner was tried in Morgan County in the spring of 1933 and was convicted and sentenced to death. Judgment of conviction was subsequently set aside by the trial judge.

There was a motion filed on behalf of all of the defendants to quash the indictment as well as the trial venire when the cases were called for trial before Judge Callahan in the Circuit Court of Morgan County, Alabama, in November of 1933. The State denied each and every allegation of the motion to quash the indictment as well as the motion to quash the venire. The ground on which the defendants based their claim that the indictment and the trial venire should be quashed was that Negroes had been arbitrarily and systematically excluded from the juries in Jackson County wherein the indictments were found and in Morgan County wherein the cases were tried. Many witnesses were called and much testimony placed before the trial judge who denied both motions.

The petitioner was found guilty on December 1, 1933 and on December 6, 1933 was sentenced to death. On December 29, 1933 petitioner filed in the office of the Clerk of the Circuit Court of Morgan County motions for a new trial (23, 26). On January 1, 1934 the Court without waiver or prejudice to the parties, continued the motions to January 26, 1934 (25). A similar order was entered by the Court on January 26, 1934 continuing the hearing on the motions until February 24, 1934 (25). On February 24, 1934 the State filed in open court a motion to strike the petitioner's motions for a new trial (24). On the same date the State's motion to strike the motions of petitioner for a new trial was granted (25). On March 5, 1934 the petitioner presented to the trial court the proposed bill of excep-

tions which was signed by the Court on May 2, 1934 (785). The cases were argued before the Supreme Court of Alabama on May 25, 1934 at which time the State filed a motion in that Court to strike the bill of exceptions or that which purported to be a bill of exceptions.

The Supreme Court of Alabama on the 28th day of June, 1934, rendered its decision in this case granting the State's motion to strike the bill of exceptions, this being the only point decided by the Supreme Court of Alabama.

III

Basis of Lower Court's Decision

The decision of the Supreme Court of Alabama is based entirely on a question of State appellate procedure. No Federal question is involved. The decision of the lower Court follows rules that have been laid down by that Court for many years. In order that we might more effectively present our contention in regard to the decision of said Court, it is best that we deal with the State's motion to strike the petitioner's motions for a new trial which motion was filed in the Circuit Court of Morgan County on February 24, 1934 and which was granted by that court on the same date.

On page 19 of the Record, it affirmatively appears that the petitioner was adjudged guilty of the crime of rape, on December 1, 1933. Section 6667, Code of Alabama, 1923 specifies the terms of the Circuit Courts of the several counties of Alabama. The terms of Court in Alabama run from first Monday in January to and including the last Saturday of June of every year and from the first Monday after July 4th to and including the last Saturday before Christmas day of every year. Under the above provision of law this Court judicially knows that the 1933 Fall term of the Circuit Court of Morgan County, Alabama expired on December 23, 1933. The petitioner's motions for a new trial were filed in the office of the Clerk of the Circuit Court on December 29, 1933, (21, 23).

Section 6670, Code of Alabama, 1923 deals with the time in which a motion for a new trial must be filed and provides as follows:

> 6670. After the lapse of ten days from the rendition of a judgment or decree, the plaintiff may have execution issue thereon, and after the lapse of thirty days from the date on which a judgment or decree was rendered, the court shall lose all power over it, as completely as if the end of the term had been on that day, unless a motion to set aside the judgment or decree, or grant a new trial has been filed and called to the attention of the court, and an order entered continuing it for hearing to a future day.

On February 24, 1934, the date on which the petitioner's motions for a new trial were to be heard, the attorneys representing the State of Alabama filed the aforementioned motion to strike petitioner's motions for a new trial on the ground that the

motions came too late in that the Circuit Court of Morgan County had lost jurisdiction over the case because of the fact that the term of court during which the judgment was rendered had expired.

The State's position was based on Sections 6667 and 6670, *supra*, and on decisions of the Supreme Court of Alabama construing those sections in cases practically identical with the one at hand.

We hereafter set out a quotation from the case of *Morris vs. Corona Coal & Iron Co.* 215 Ala. 47, 109 So. 278 which case we respectfully insist is direct authority for the position that in Alabama a motion for a new trial, even if filed within thirty days from the date of the judgment, is filed too late if the term of Court during which the judgment is rendered has expired by operation of law.

The verdict and judgment was of date, December 19, 1924, the acceptance of service of motion for new trial was of date December 27, 1924, and the motion was called to the attention of the Court on that date and duly passed to January 5, 1925, for hearing. On that date: 'The case was called for hearing on the motion when defendant appeared and objected to any action being taken by the court on the motion, on the ground, among others, that the same was not filed until after the expiration of the term in which the cause was tried and verdict returned and judgment rendered. The case was then taken under advisement by the court and passed to January 12, 1925. And now on this day after consideration, the court is of the opinion that the objection interposed by defendant

to action on the motion is well taken and that this court is without jurisdiction to hear and pass upon plaintiff's motion for a new trial. Accordingly, it is the order and judgment of the Court that said motion for a new trial is null and void, and that the same be and it is hereby stricken from the files in this cause. This January 12, 1925.'

"We judicially know that the term of the court at which the case was tried expired by operation of law on the last Saturday before Christmas of the year 1924 and that the next term began on the first Monday in January, 1925. Code 1923, Sec. 6667; *Lewis v. Martin*, 210 Ala. 401, 98 So. 635; *Kyser vs. American Surety Company*, 213 Ala. 614, 105 So. 689. The motion was made and called to the attention of the court during the recess thereof or after expiration of the term at which the judgment was rendered. Had the motion been filed before or on the date of the general order of continuance by the court of pending causes, it would not have kept alive the motion for new trial or rehearing. It follows from the statute or the circuit court rule, and constructions thereof, that the action of the trial court was without error. Circuit Court Rule 22, Code 1923, Vol. 4, Page 901; *Lewis v. Martin* 210 Ala. 401, 98 So. 635; *Mt. Vernon Woodbury Mills v. Judge*, 200 Ala. 168, 75 So. 916; *Shipp v. Shelton*, 193 Ala. 658, 69 So. 102; *Ex parte Schoel*, 205, Ala. 248, 87 So. 801; *Ex parte Margaret*, 207 Ala. 604, 93 So. 505; *Southern Ry Co. v. Griffith*, 177 Ala. 364, 58 So. 425; *Ex parte H. A. & B. R. Co.*, 105 Ala. 221, 17 So. 182. The statute provides that after the lapse of thirty days from the date on which the judgment or

decree was rendered the court shall lose all power over it as completely as if the end of the term had been on that day; and, we add, unless the motion therefor was filed, called to the attention of and passed by, the court before the adjournment of the term, and before the finality of the judgement or decree as provided by the statute after a lapse of thirty days from the date of its rendition. The provision of the statute for the lapse of thirty days as to such motion did not extend the term of the court as fixed by law, though the thirty days from rendition of a valid judgment or decree had not expired. See *Ex parte Bozeman*, 213 Ala. 223, 104 So. 402; *Ex parte Brickell, Judge*, 204 Ala. 441, 86 So. 1; *McCord vs. Rumsey*, 19 Ala. App. 62, 95 So. 168. *Monroe County Growers Ex. v. Harper*, 20 Ala. App. 532, 103 So. 600."

Section 6433, Code of Alabama, 1923 provides that bills of exceptions may be presented to the judge or the clerk at any time within ninety days from the day on which the judgment is entered and not afterwards; ..... presentation of bill of exceptions within ninety days after granting or refusing of the motion for a new trial shall be sufficient to preserve for review the rulings of the trial court on the trial of the original cause as well as the ruling of the court on the motion for a new trial.

Inasmuch as the motions for a new trial had been filed too late, they did not invoke the jurisdiction of the court and consequently the last part of Section 6433, above referred to, could have no application to this case. This is, of course, based on the assumption that the trial court's action in striking

the motions for a new trial was correct. Therefore, the date on which the statutory period of ninety days began to run was the date on which the judgment was rendered which date was December 1, 1933 (19). This Court judicially knows that ninety days from December 1, 1933, was March 1, 1934, which day was the last day on which the petitioner could present to the trial judge or to the clerk of the Circuit Court of Morgan County his bill of exceptions.

Section 6434, Code of Alabama, 1923 provides that an appellate court may strike a bill of exceptions because not presented or signed within the time required by law but that the court cannot do so ex mero motu but only on motion of the party to the record or his attorney.

On page 785 of the printed record, it affirmatively appears that the bill of exceptions or that which purports to be a bill of exceptions was presented by the petitioner to the trial judge on March 5, 1934 which was the ninety-fourth day since the date the judgment in this case was entered. The State of Alabama, under authority of Section 6434, supra, on the day the case was set for argument before the Supreme Court of Alabama and prior to the submission of the case moved that the bill of exceptions be stricken from the record in view of the fact that it had not been presented to the trial court within the time required by law (797-798).

It is on this motion that the opinion or decision of the lower court is based entirely. This was not a case of first impression as the decision of the Ala-

bama court contains a citation of numerous authorities in support of its ruling.

In construing Section 6433, supra,, it was held in the case of *Lewis vs. State*, 194 Ala. 1, 69 So. 913, that the time within which a bill of exceptions must be presented to the trial judge runs from the date when the judgment was rendered and entered and not from the date of sentence. Likewise, it has been held that the date on which the verdict is brought into court is not necessarily the day on which the ninety day statute begins to run but the day on which the judgment is entered.—*Lewis vs. Martin*, 210 Ala. 401, 98 So. 635; *Russell vs. State*, 202 Ala. 21, 79 So. 359.

The Supreme Court of Alabama, under a long line of decisions, is vested with no discretion in connection with the refusal or granting of a motion to strike a bill of exceptions where the motion is properly made and where it seasonably invokes the jurisdiction of the court.—*Baker vs. Central of Ga. Ry. Co.*, 165 Ala. 466, 51 So. 796; *Box vs. Southern Ry. Co.* 184 Ala. 598, 64 So. 69; *Ex parte Hill*, 205 Ala. 631, 89 So. 58.

Petitioner refers to the case of *Stover vs. State*, 204 Ala. 311 wherein is discussed Section 9459, Code of Alabama, 1923. This case is cited by him in connection with the statement that the Supreme Court of Alabama should have considered the evidence offered in connection with the motions to quash the venire and the indictment even though the bill of exceptions was stricken. We quote from that case:

> ". . . . But we did not there hold, and do not now hold, that the exceptions to the ruling upon motion in writing, or the rulings thereupon, must be shown by the bill of exceptions *though we may now say it would perhaps be necessary to set out the evidence in support of same by a bill of exceptions.*"

The decision of the Court of Appeals of Maryland in the case of *Lee vs. State*, 163 *Md.* 56 is cited by petitioner as authority for the position that the Alabama Court erred in not passing on the federal question even though the bill of exceptions was stricken because of the fact that the bill of exceptions is not the exclusive means of presenting to the appellate court the evidence in the case in the nisi prius court. With the decision of the learned Chief Justice of the Maryland Court, we have no complaint; we do submit, however, that the decision of a court of a sister state dealing with questions of state practice and procedure and construing statutory regulations can have no binding effect on a Supreme Court of another state who is also dealing with matters of state practice and procedure and statutory enactments.

IV

JURISDICTION

Jurisdiction to review the decisions of the highest Courts of a State is conferred on the Supreme Court of the United States by Section 237 (B) *as amended by Act of February* 13, 1925, 43 *Stat.* 937. *The decisions of this Court are uniform in holding that said section of the Judicial Code does not confer*

upon it jurisdiction to review the decision of the highest court of a State where the decision is based on a non-federal question, particularly on a question of appellate procedure.

If we understand paragraph 3 of rule 7 of this Court, a respondent can no longer move to dismiss a petition for a writ of certiorari because of want of jurisdiction, but the question of jurisdiction of this Court must be dealt with in the brief in opposition to the granting of the writ. We, therefore, in this brief insist that this Honoranble Court is without jurisdiction to review the decision of the Supreme Court of Alabama in this case because of the fact that the decision is based upon a question of State practice and procedure and there is no federal question involved.

The present statute dealing with the jurisdiction of this Court over the decisions of the Courts of the several states is practically the same as the original or first statutory enactment on the subject the twenty-fifth section of the Judiciary Act of 1789.

In the case of *Crowell vs. Randell*, 10 Peters 398, Mr. Justice Story reviewed all of the cases which this Court had previously decided in which the above section was construed and said:

> "that to bring a case within the twenty-fifth section of the judiciary act, it must appear upon the face of the record: 1st. That some one of the questions stated in that section did arise in the State Court. 2nd. *That the question was decided by the State Court*, is required in the same section. 3rd. That it is not necessary that the question should appear on the record to have been raised, and the decision made in direct and positive terms, ipsissimis verbis; but that it is sufficient if it appears by clear and necessary intendment that the qu estion must have been raised, *and must have been decided in order to have induced the judgment.* 4th. *That it is not sufficient to show that a question might have arisen or been applicable to the case;* unless it is further shown, on the record, that it did arise, and was applied by the State Court to the case."

We most respectfully submit that this Honorable Court after examining the decision of the Supreme Court of Alabama will come to the same conclusion as was reached in the Crowell case, supra, and will say as Justice Story said:

> *"If with these principles in view we examine the record before us, it is very clear that this Court has no appellate jurisdiction. No question appears to be raised or discussion made by the State Court within the purview of the twenty-fifth section."*

This Honorable Court in numerous cases has laid down the principle that to give the Supreme Court of the United States jurisdiction over a decision of the highest Court of a State, it must appear affirmatively not only that the federal question was presented for decision but that its decision was necessary to a determination of the cause, and that it was actually decided, or that the judgment could not have been given without deciding it.

Cleveland and Pittsburgh R. R. Co. vs. City of Cleveland, Ohio, 235 U. S. 50.
Chesapeake and Ohio Ry. Co. vs. McDonald Administrator, 214 U. S. 191.
Western Union Telegraph Co. vs. Wilson, 213 U. S. 52.
Sayward vs. Denny, 158 U. S. 180.

In *Williams vs. Oliver*, 53 U. S. (12 How) 111, it is said:

> "In order to give this Court jurisdiction on writ of error to the highest Court of a State in which a decision could be had, it must appear affirmatively not only that a Federal question was presented for decision by the highest Court of the State having jurisdiction but that its decision was necessar yto the determination of the cause, that it was actually decided or that the judgment so rendered could not have been given without deciding it, *and where the decision complained of rests on independent grounds not involving a federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this Court without considering any federal question that may also have been presented.*"

Likewise a number of cases definitely settle the proposition that a decision of a State Court resting on grounds of State procedure does not present a Federal question.

French vs. Hopkins, 124 U. S. 524.
O'Neil vs. Vermont, 144 U. S. 323.
Tripp vs. Santa Rosa St. R. Co. 144 U. S. 126.

Thorington vs. Montgomery, 147 U. S. 490.
Loeber vs. Schroeder, 149 U. S. 580.
McNulty vs. California, 149 U. S. 645.
Wood vs. Brady, 150 U. S. 18.
Northern Pacific R. R. Co. vs. Patterson, 154 U. S. 130.
Gibson vs. Mississippi, 162 U. S. 565.

The case of *Maria Mathison et als vs. The Branch Bank of the State of Alabama*, 7 Howard 260, we most respectfully submit is direct authority for the contention of the State of Alabama that this Honorable Court will not review the decision of the Supreme Court of Alabama in this case. Mr. Justice Taney delivering the opinion of the Court in the Mathison case, supra, wherein it appeared that the Supreme Court of Alabama had dismissed the appeal on the grounds that the transcript of the record in the Circuit Court had not been filed in the Supreme Court, said:

> "This cause came on to be heard on the transcript of the record from the Supreme Court of th the State of Alabama, and was argued by counsel. On consideration whereof and it appearing to the Court upon an inspection of the said transcript that there is nothing in the record which this Court is authorized to review, it is thereupon now here ordered and adjudged by this Court, that this cause be and the same is hereby dismissed, for want of jurisdiction."

In the case of *Chesapeake and Ohio Ry. Co. vs. McDonald, Administrator*, 214 U. S. 191, this Court held:

"Where the State statute provides that an appeal from an order refusing to remove a cause to the Federal Court must be taken within two years, and no appeal is taken, and the highest Court of the State decides that an appeal from the judgment in the case taken more than two years after entry of the order refusing to remove does not bring up that order for review, the Federal question has not been properly preserved and this Court has no jurisdiction."

We would also like to call to the Court's attention to the case of *Harding vs. Illinois*, 196 U. S. 78, wherein it is held:

"This Court has no general power to review or correct the decisions of the highest State Court and in cases of this kind exercises a statutory jurisdiction to protect alleged violations, in State decisions, of certain rights arising under Federal authority; and if the question is not properly reserved in the State Court the deficiency cannot be supplied in either petition for rehearing after judgment or the assignment of error in this Court, or by the certification of the briefs which are not a part of the record by the clerk of the State Supreme Court.

"This Court will not reverse the judgment of a State Court holding an alleged Federal constitutional objection waived when the record discloses that no authority was cited or argument advanced in its support and it is clear that the decision was based upon other than Federal grounds and the constitutional question was not decided."

In the case of *Jacob Newman et al vs. Harry B. Gates*, 204 U. S. 89, the following principle is stated:

"There has been no decision of the Federal question in the highest Court of the State in which a decision in the suit could be had, which is essential to sustain a writ of error from the Supreme Court of the United States, where the highest State Court dismissed an appeal in the suit because of a defect in the parties to such appeal."

In *Chappell Chemical, etc. Co. Virginia Sulphur Mines Co.*, 172 U. S. 472, it was held that no Federal question was disposed of by a decision of the Court of Appeals of Maryland, the language of that Court being as follows:

"The appeal in this case having been prematurely taken, the motion to dismiss it must prevail. The defendant, long after the time fixed by the rule of the Court, demanded a jury trial, and without waiting for the action of the Court upon his motion, and indeed before there was any trial of the case upon its merits and before any judgment final or otherwise, was rendered, this appeal was taken from what the order of appeal calls the order of Court of the 6th of February, 1896, denying the defendant the right of a jury trial; but no such order appears to have been passed. On the day mentioned in the order of appeal there was an order passed by the Court below fixing the case for trial, but there was no action taken in pursuance of such order until subsequent to this appeal. There is another appeal pending here from the orders which were ultimately passed. Appeal dismissed."

We have carefully examined the cases cited by petitioner in his brief heretofore filed in this Court

and we respectfully submit that none of those cases is authority for the proposition that this Court will review a decision of the Supreme Court of a State in a case where the decision is based purely on a non-federal ground and particularly in a case where the Supreme Court of the State, under the statutes and former decisions of the Court, had no discretion in the matter on which the ruling was based.

CONCLUSION

It is, therefore, submitted that this Court is without jurisdiction to review the decision of the Supreme Court of Alabama in this case. Decisions of this Court are uniform in holding that the Supreme Court of the United States will not review a decision of a State Court based on a question of State practice and procedure.

Respectfully submitted,

THOMAS E. KNIGHT, JR.,
Attorney General of Alabama.

THOS. SEAY LAWSON,
Assistant Attorney General of Alabama,
Attorneys for Respondent.

APPENDIX

6433. Bills of exceptions may be presented to the judge or clerk at any time within ninety days from the day on which the judgment is entered, and not afterwards; and all general, local, or special laws or rules of Court in conflict with this section are repealed, abrogated and annulled. The judge or clerk must indorse thereon and as a part of the bill the true date of presenting, and the bill of exceptions must, if correct, be signed by the judge wtihin sixty days thereafter. When the bill of exceptions is presented to the clerk, it shall be his duty forthwith to deliver or forward it to the judge. Presentation of the bill of exceptions within ninety days after the granting or refusing of a motion for a new trial shall be sufficient to preserve for review the rulings of the trial Court on the trial of the original cause, as well as the ruling of the Court on the motion for a new trial.

6434. The appellate Court may strike a bill of exceptions from the record or file because not presented or signed within the time required by law, but shall not do so ex mero motu, but only on motion of a party to the record or his attorney; the object and effect of this statute being to allow parties to waive or consent for the time of signing bills of exceptions.

6667. The Circuit Courts of the several counties of the State shall be open for the transaction of any and all business, or judicial proceedings of every kind, from the first Monday in January to and including the last Saturday of June of every year; and from the first Monday after the fourth of July too,

and including, the last Saturday before Christmas day of every year.

6670. After the lapse of ten days from the rendition of a judgment or decree, the plaintiff may have execution issued thereon, and after the lapse of thirty days from the date on which a judgment or decree was rendered, the Court shall lose all power over it, as completely as if the end of the term had been on that day, unless a motion to set aside the judgment or decree, or grant a new trial has been filed and called to the attention of the Court, and an order entered continuing it for hearing to a future day.

Rule 22. Reasons in arrest of judgment, and reasons for new trial, and the affidavits in support thereof if any are relied on, shall be filed with the clerk, and notice thereof be given to the adverse party, one day before the argument. If the cause is tried on the last day of the term, the notice shall be given when the motion is entered. The party making such motion is entitled to the opening and conclusion of the argument. All such motions not acted on, or continued by order of the Court, are to be considered as discharged of course on the last day of the term.

Rule 7—(Par. 3) No motion by respondent to dismiss a petition for writ of certiorari will be received. Objections to the jurisdiction of the Court to grant writs of certiorari may be included in briefs in opposition to petitions therefor.