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INDIANA UNIVERSITY
Maurer School of Law
Bloomington

HABEAS CORPUS

EXHAUSTION OF STATE REMEDIES IN INDIANA

Prisoner petitioned trial court for writ of error coram nobis, alleging that his conviction after plea of guilty violated constitutional guaranties of jury trial, right to counsel, and adequate time to prepare a defense. Upon hearing, writ was denied. In attempting an appeal, the papers were delayed in the state prison or the mails, arriving with the Clerk of the Indiana Supreme Court after the 90-day appeal period had expired. On petition for writ of habeas corpus, the federal district court assumed jurisdiction. Held: on appeal, petitioner had exhausted his judicial remedies in the state courts, and the federal district court properly assumed jurisdiction although the Attorney-General of Indiana offered to waive the 90-day rule of the Indiana Supreme Court. *Williams v. Dowd*, 153 F. (2d) 328 (C.C.A. 7th, 1946).

The opinion makes no reference to a requirement that the petitioner exhaust his remedy of habeas corpus in the Indiana courts before petitioning the federal district court. This is consistent with the decision of the same court in *Potter v. Dowd*,¹ although not with the dicta that it was not to be "a holding generally, that habeas corpus in Indiana is a futile thing and need not be resorted to before coming to a federal court."² Federal Courts thus have recognized in practice that the writ of habeas corpus is not the appropriate remedy for a person alleged to have been illegally convicted in the Indiana courts.³

District courts of the United States have jurisdiction by habeas corpus to discharge from custody one being restrained in violation of the federal Constitution.⁴ But as a matter of judicial policy, federal courts interfere as little as possible with prosecutions in state courts,⁵ using their discretion to require a convicted prisoner to exhaust his state remedies before proceeding in the federal courts.⁶ Whether the peti-

19. For some of the injustices that might and do occur under the present laws, see *Scharringhaus v. Hazen*, 269 Ky. 425, 107 S. W.(2d) 329 (1937), and *Brockelbank*, "The Nature of a Promise to Marry—A Study in Comparative Law" (1946) 41 Ill. L. Rev. 199.

1. 146 F. (2d) 244 (C.C.A. 7th, 1944).

2. *Id.* at 247.

3. *State ex rel. Dowd v. Superior Court of LaPorte County*, 219 Ind. 17, 36 N.E. (2d) 765 (1941); *State ex rel. Kunkel v. LaPorte Circuit Court*, 209 Ind. 682, 200 N.E. 614 (1939); *Stephanson v. State*, 205 Ind. 141, 179 N.E. 633 (1933).

4. *Rev. Stat. § 751* (1875), 28 U.S.C.A. § 451 (1928).

5. *Ex parte Royall*, 117 U.S. 241 (1886).

6. *Ex parte Hawk*, 321 U.S. 114 (1944); *Ex parte Davis*, 317 U.S. 592 (1942); *Davis v. Dowd*, 119 F. (2d) 338 (C.C.A. 7th, 1941); *Stephan-*

tioner has exhausted his remedies is a matter for decision of the federal court in each individual case with reference to the remedies afforded by the particular state.⁷

Although the Constitution of Indiana provides⁸ that "The privilege of the writ of habeas corpus shall not be suspended . . . , " the writ cannot issue from a court of a county other than the county in which the petitioner is restrained⁹ and not from any other court than the one in which the petitioner was convicted,¹⁰ unless the proceeding or judgment is void on its face.¹¹ In practice, therefore, habeas corpus is an adequate remedy only to a prisoner confined within the county in which he was convicted.

Prior to *Potter v. Dowd*,¹² a petitioner did not exhaust his state remedies until he had petitioned for a writ of habeas corpus in the state court and pursued it by appeal through the Indiana Supreme Court.¹³ The recent cases appear to abandon that requirement where the state remedy is practically ineffectual.

Thus, for one adequately to exhaust his remedies in the Indiana courts, he must first properly appeal from the decision of the trial court to the Indiana Supreme Court;¹⁴ then he must petition for writ

son v. Daly, 21 F. (2d) 625 (N.D. Ind. 1927); Note (1944) 88 L. Ed. 576.

7. The United States Supreme Court has stated the rule: "Where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, either because the state affords no remedy . . . or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate . . . a federal court should entertain his petition for habeas corpus, else he would be remediless. In such a case he should proceed in the federal district court for habeas corpus before resorting to this Court by petition for habeas corpus." *Ex parte Hawk*, 321 U.S. 114, 118 (1944).
8. Art. 1, §27.
9. Ind. Acts 1881, c. 38, § 780, Ind. Stat. Ann. (Burns, Repl. 1946) § 3-1905, State ex rel. Bevington v. Myers, 220 Ind. 149, 41 N.E. (2d) 358 (1942), *Murphy v. Daly*, 206 Ind. 179, 188 N.E. 769 (1934).
10. Ind. Acts 1881, c. 38, § 790, Ind. Stat. Ann. (Burns, Repl. 1946) § 3-1918, State ex rel. Barnes v. Howard, 65 N.E. (2d) 55 (Ind. 1946), State ex rel. Cook v. Howard, 64 N.E. (2d) 25 (Ind. 1945), *Dowd v. Anderson*, 220 Ind. 6, 40 N.E. (2d) 658 (1941), State ex rel. Dowd v. Superior Court of LaPorte County, 219 Ind. 17, 36 N.E. (2d) 765 (1941), *Swain v. Dowd*, 215 Ind. 256, 18 N.E. (2d) 928 (1939).
11. *Wood v. Dowd*, 221 Ind. 702, 51 N.E. (2d) 356 (1943); *Dowd v. Anderson*, 220 Ind. 6, 40 N.E. (2d) 658 (1942); State ex rel. Cook v. Howard, 64 N.E. (2d) 25, 26 (Ind. 1945).
12. 146 F. (2d) 244 (C.C.A. 7th, 1944).
13. *Jones v. Dowd*, 128 F. (2d) 331 (C.C.A. 7th, 1942); *Marks v. Dowd*, 46 F. Supp. 388 (N.D. Ind. 1942); *Ex parte Lynch*, 18 F. Supp. 673 (N.D. Ind. 1937). See Major, J., dissenting in *Potter v. Dowd*, 146 F. (2d) 244, 247 (C.C.A. 7th, 1944); *Howard v. Dowd*, 25 F. Supp. 844 (N.D. Ind. 1938).
14. *Ex parte Lynch*, 18 F. Supp. 673 (N.D. Ind. 1937).

of certiorari¹⁵ or appeal¹⁶ to the United States Supreme Court if a federal question has arisen and been properly presented. If new material appears¹⁷ and time for an appeal has expired,¹⁸ a petition for writ of error coram nobis should be filed¹⁹ in the trial court.²⁰ From the decision on this petition, an appeal must be prosecuted to the Indiana Supreme Court;²¹ then he must petition for writ of certiorari²² or appeal²³ to the United States Supreme Court, if the federal question has been properly saved. These procedures failing, one may then petition the federal district court for a writ of habeas corpus based upon federal questions which the United States Supreme Court has previously neither reviewed nor declined to review.²⁴

MUNICIPAL CORPORATIONS

RIGHT OF BOARD OF COUNTY COMMISSIONERS TO FILL VACANCY

Incumbent township trustee was committed to the state hospital for insane. The Board of County Commissioners appointed X to fill the vacancy.¹ On appeal by taxpayers, Circuit Court declared appointment void. Appellate Court affirmed on the ground that insanity of an office-

15. 43 Stat. 936 (1925), 28 U.S.C.A. § 344 (b) (1928); Rule 38 (1939) Rules of the Supreme Court, 306 U.S. 716.
 16. 43 Stat. 936 (1925), 45 Stat. 54 (1928), 28 U.S.C.A. § 344 (a) (1928); Rule 36 (1) (1939) Rules of the Supreme Court, 306 U.S. 714. See *Stephanson v. Daly*, 1 F. Supp. 865 (N.D. Ind. 1932).
 17. Sufficiency of a petition for writ of error coram nobis and of evidence to sustain it are tested by the rules pertaining to motions for a new trial because of newly discovered evidence. *Swain v. State*, 215 Ind. 259, 18 N.E. (2d) 921 (1939); *Hicks v. State*, 213 Ind. 277, 11 N.E. (2d) 171, 12 N.E. (2d) 501 (1938); *Berry v. State*, 212 Ind. 294, 165 N.E. 61, 173 N.E. 705 (1930).
 18. The trial court has no authority to grant a writ of error coram nobis while a petition for rehearing or an appeal is pending. *Partlow v. State*, 191 Ind. 657, 134 N.E. 483 (1922); *Westfall v. Wait*, 161 Ind. 449, 68 N.E. 1009 (1903); *State ex rel. Terre Haute v. Kolsem*, 130 Ind. 434, 435, 29 N.E. 595 (1892).
 19. *Ex parte Botwinski*, 314 U.S. 586 (1942); *Jones v. Dowd*, 128 F. (2d) 331 (C.C.A. 7th, 1942); *Davis v. Dowd*, 119 F. (2d) 338 (1941).
 20. Writ of error coram nobis must be brought in the court rendering judgment. See *State ex rel. Kunkel v. LaPorte Circuit Court*, 209 Ind. 682, 687, 200 N.E. 614, 616 (1936); *Partlow v. State*, 191 Ind. 657, 658, 134 N.E. 483, 484 (1922).
 21. *Ex parte Davis*, 318 U.S. 412 (1943); *State ex rel. Kunkel v. LaPorte Circuit Court*, 209 Ind. 682, 687, 200 N.E. 614, 616 (1936). See Rules of the Indiana Supreme Court, Rule 2-40, adopted May 29, 1945, for procedure on appeal from an order on a petition for a writ of error coram nobis.
 22. See n. 14 supra.
 23. See n. 15 supra.
 24. *Ex part Hawk*, 321 U.S. 114, 118 (1944).
1. Appointment made in accordance with Ind. Stat. Ann. (Burns, 1933) § 65-106.