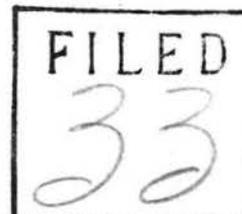


HABEAS CORPUS) Certiorari will not lie to review the circuit
CERTIORARI) court's order granting bail in habeas corpus
matters, there being no jurisdictional question
involved.

January 21, 1938

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Honorable M. Stanley Ginn
Prosecuting Attorney
Lawrence County
Aurora, Missouri



Dear Sir:

We acknowledge your request for an opinion dated January 13, 1938, which reads as follows:

"On the 5th of July, 1937, Franklin Grimes died as a result of gun-shot wounds which had been inflicted by Leo Mallonee, a few minutes previous. A preliminary hearing was held, and Leon Mallonee was bound over to the Circuit Court and ordered held without bail. An Information was filed in the Circuit Court, charging Leo Mallonee with murder in the first degree. No testimony was introduced at the preliminary hearing by the defendant, except four witnesses who testified that the defendant was of good character. The testimony introduced by the state at the preliminary hearing tended clearly and decisively to show a deliberate, intentional and unexcusable murder. Thereafter, on the 20th day of July, 1937, Defendant, by counsel, petitioned the Circuit Judge for a Writ of Habeas Corpus, and the Sheriff of Lawrence County duly filed his return thereto. When the matter came on for hearing before the Circuit Judge, the judge, without hearing any of the evidence presented at the preliminary hearing, or without permitting to be

introduced the subscribed and sworn testimony of the witnesses at the preliminary hearing which was reduced to writing and certified to by the witnesses, admitted defendant to bail for the reason that the transcript of testimony at the preliminary hearing certified to by the Justice of the Peace and subscribed to by the witnesses, failed to contain the testimony of the defense character witnesses. These defense witnesses refused and have continued to refuse to subscribe their testimony.

"Please inform if it would be possible for Certiorari before the Supreme Court to withdraw the case from the inferior court, and re-open the hearing as to whether or not the defendant should be admitted to bail.

"My reason for asking this is because it will be very difficult to bring the defendant to trial in this case as long as he is out on bond. At our last term of court, he was granted a continuance because of the absence of witnesses. Further, the testimony seemed to indicate that the defendant might have been intending to kill a different person, and of course the danger to that person's life would still be existent."

Section 1427, R. S. Mo. 1929 provides in part:

"Application for such writ shall be made by petition, signed by the party for whose relief it is intended, or by some person in his behalf, to some court of record in term, or to any judge thereof in vacation. *** "

Section 1463, R. S. Mo. 1929 provides:

"When the imprisonment is for a criminal or supposed criminal matter, the court or magistrate before whom the prisoner shall be brought, under the provisions of this article, shall not discharge him for any informality, insufficiency or irregularity of the commitment; but if, from the examination taken and certified by the committing magistrate, or other evidence, it appear that there is sufficient legal cause for commitment, he shall proceed to take bail, if the offense be bailable, and good bail be offered; if not, shall commit the prisoner to jail."

Section 1464, R. S. Mo. 1929 provides:

"When the offense is clearly and specifically set forth in the warrant of commitment, no evidence other than the examination taken and certified thereunto shall be received for or against the prisoner, unless such examination has not been taken and certified according to law, in which case the committing magistrate may be examined, if desired by the prisoner, as to the evidence on which the commitment was found, and thereupon the court or magistrate shall proceed to bail, discharge or remand the prisoner, as the circumstances of the case may require; and in the absence of all such evidence, the prisoner shall not be discharged, but may be bailed or remanded, according to the circumstances of the case."

In State vs. Hiatt, 112 Mo. App. 535, l.c. 538, 87 S. W. 35, the court said:

"The respondent is the judge of a court of record and, as such, has authority, in the vacation of his court, to issue writs of habeas corpus for persons alleged to be unlawfully restrained of their liberty, hear their applications for discharge and decide them. (R. S. 1899, sec. 3546.) Now, as the respondent was empowered to issue the writ and decide on the right of the petitioner to a discharge, he was empowered to decide erroneously as well as rightly. In other words, his jurisdiction of the subject-matter of the particular case was complete. The doctrine prevails in this State that if an inferior court grants the discharge of a prisoner in a habeas corpus proceeding when he is not entitled to be discharged, the decision is not subject to review by an appellate court, as it is favor of personal liberty. Of course, if some magistrate or court should undertake to grant the writ when he or it had no jurisdiction to do so, the proceeding might be prohibited or, perhaps, reversed on certiorari. *** The rule is that the decision of the tribunal where the case originated, if it was a tribunal enjoying jurisdiction of the cause, is allowed to stand whether right or wrong. *** "

The ruling in the Hiatt case was quoted and approved by the court in State vs. Westhues, 286 S. W. 396, l.c. 398.

In State vs. Skinker, 25 S. W. (2d) 472; 324 Mo. 955, l.c. 959, the court said:

"Relator seeks by our writ of certiorari to quash the judgment of the Circuit Court of Webster County, Missouri, in the habeas corpus proceeding of one Joe McBride, petitioner. The scope of our review under this writ is limited to jurisdictional matters and errors appearing on the face of the record in the habeas corpus proceeding which has been certified to us in this proceeding. *** We take the record as we find it, excluding the mere evidence, which can in the nature of things relate to the merits only."

CONCLUSION.

By the Skinker case, we see that certiorari is a remedy in Missouri to bring up the record of an inferior court in a habeas corpus case where such inferior court has rendered a judgment which shows on the face of the record that judgment was rendered without jurisdiction. Testimony heard by the trial court is not before the appellate court pursuant to certiorari. Nor are matters of exceptions in refusing to hear testimony.

Construing the statute, supra, the circuit court, being a court of record, has original jurisdiction to hear and determine habeas corpus matters. Its original jurisdiction is not inferior to the Supreme Court when on the face of the record it has jurisdiction over the person and the subject matter, as in this case. If the trial court having jurisdiction determines the offense to be a bailable offense, and if good bail be offered, it is then the trial court's duty to determine in what sum bail shall be given, and proceed to take the bail.

Hon. M. Stanley Ginn

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Since the ruling in the Hiatt case, supra, the decision of an inferior court with jurisdiction over the person and the subject matter, granting a discharge of a prisoner, pursuant to habeas corpus, is not subject to review by an appellant court. As the discharge of a defendant is in favor of personal liberty, so also is this court's order granting a bail, and the ruling of the Hiatt case should prevail.

Respectfully submitted,

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Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

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