EXTRADITION OF NON-FUGITIVE CRIMINALS

Johnson v. Burke,

148 N.E.2d 413 (Ind. 1958)

In a habeas corpus proceeding, petitioner challenged the power of the state of Indiana to extradite him to Arizona, contending that he was not a fugitive from justice since he had not been in the demanding state at the time of the commission of the crime with which he was charged.[1] The court refused to issue the writ, basing its decision upon the Indiana enactment of The Uniform Criminal Extradition Act.[2] This act confers upon Indiana the authority to extradite persons not physically present in the demanding state at the time of the commission of the crime. Upon appeal to the Indiana Supreme Court, petitioner urged that the constitutional grant of authority to the federal government to legislate on the subject of extradition pre-empted the field and thus the state statute is unconstitutional. The Supreme Court of Indiana rejected this argument and affirmed the decision of the lower court.

The extradition clause of the Constitution provides only for the extradition of "fugitives," *i.e.*, those who flee from the justice of the demanding state.[3] The federal statute enacted under the authority of this clause merely establishes the procedure.[4] Because neither the Constitution nor the statute provides for the extradition of non-fugitive criminals, several decisions of the United States Supreme Court, all antedating the passage of The Uniform Criminal Extradition Act, (hereinafter referred to as the Extradition Act), held that a person who had never been in the demanding state could not be extradited.[5] The Extradition Act provides for the extradition of persons who are *not* fugitives from justice.[6] It was created to meet the need for a means of extraditing criminals not physically present in the demanding state at the time of the commission of the crime and thereby not regarded as fugitives.[7] The constitutionality of the Extradition Act has been upheld in

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[1] Johnson v. Burke, 148 N.E.2d 413 (Ind. 1958).

[2] IND. ANN. STAT. § 9-419 to -448 (1956).

[3] U.S. CONST. art. IV, § 2, cl. 3. "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

[4] 18 U.S.C. § 3182 (1952).

[5] South Carolina v. Bailey, 289 U.S. 412 (1933); Innes v. Tobin, 240 U.S. 127 (1916); Hyatt v. People *ex rel.* Corkran, 188 U.S. 691 (1903); Robb v. Connolly, 111 U.S. 624 (1884).

[6] COUNCIL OF STATE GOVERNMENTS, THE HANDBOOK ON INTERSTATE CRIME CONTROL c. II (1955). "The governor of this state may also surrender . . . any person in this state . . . even though the accused was not in that state at the time of the commission of the crime, and has not fled therefrom."

[7] 1936 HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNI-

every state jurisdiction where the question has been raised. It has also been given the stamp of constitutional approval by the lower federal courts.[8] Now the highest court of the State of Indiana joins in this favorable judgment.

The Indiana court made reference to a California appellate decision rendered ten years before the principal case. In *Ex parte Morgan*,[9] petitioner, while in Los Angeles, conspired to commit a crime in Denver. He was awaiting extradition to Colorado, a state which he had never entered, when he sued for a writ of habeas corpus. The court said:

> Moreover, while state legislation impairing the full operation of the Constitution and laws of Congress would be void, yet a state may enact laws on the subject of interstate extradition at a stage prior to that which the Constitution and federal laws have designated as the time at which they take cognizance of it. No reason in law, expediency, or comity has been suggested why extradition should be limited to those who were physically present in the state at the time the crime was committed. Many crimes may be committed in a state while the culprit remains without its borders.[10]

The *Morgan* court recognized that there are two classes of persons who can be extradited. The federal law applies only to fugitives and the Extradition Act applies to non-fugitives. The decision of the California court was affirmed in both the federal district court and the court of appeals.[11] The United States Supreme Court denied certiorari.[12]

The validity of the Extradition Act depends upon whether or not the states have the power to legislate in this area. Although the United States Supreme Court has never ruled on this question of federal power, the issue seems to be as free from doubt as the unanimity of the state courts suggests. If analysis commences with the basic premise that the federal government is one of limited powers, then Congress would appear to be empowered to deal only with that type of extradition where the party sought is technically a fugitive from justice. Legislative

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FORM STATE LAWS 318. "The language of these sections of The Extradition Act was designed to cover cases not clearly reached by prior extradition laws. Prior to 1935 it was possible to extradite only those criminals who were held to be fugitives, that is, who had been physically present in the state in which the crime was committed and had fled therefrom. It has been held that one who commits a crime against the laws of a state by acts done outside of that state was not a fugitive from justice within the meaning of the extradition act. The uniform act was drafted to meet the need for authority to extradite in such cases." Chapman v. Hayward, 160 Neb. 664, 71 N.W.2d 201 (1955).

[8] COUNCIL OF STATE GOVERNMENTS, *op. cit. supra* note 6, at 38.

[9] *Ex parte* Morgan, 86 Cal. App. 2d 217, 194 P.2d 800 (1948).

[10] *Ibid.*

[11] 78 F. Supp. 756 (1948), 175 F.2d 404 (9th Cir. 1949).

[12] *Ex parte* Morgan, 338 U.S. 827 (1949).

power beyond this point would fall to the states. This is the general approach taken by a recent Ohio case[13] and by the New York case of *People ex rel. Waldman v. Ruthazer.*[14]

If federal power *is* deemed to reach all forms of extradition, by no stretch of the rules of statutory construction can the federal statute be interpreted as bearing a negative inference which would operate to prohibit state action where the person sought is a non-fugitive criminal. This is what the courts have meant by intimating that Congress has the power but has not pre-empted the field.[15] Pressing the doctrine of pre-emption to the extreme of prohibiting state action would far outdo the *Nelson* case,[16] itself subject to strong criticism.

The constitutional provision at issue constitutes a section of an article which abounds in provisions that establish *minimum* standards of interstate behavior. Found in this context, it is most logically susceptible to the interpretation that it establishes a minimum standard for extradition, *i.e.*, the states should *at least* extradite those who are fugitives from justice. This minimum standard concept gives rise to a countervailing argument for the criminal which is that the provision provides a minimum protection for him, *i.e.*, the states should extradite *only* if the person is a fugitive from justice. The courts have not accepted the minimum protection argument, but have given the Constitution a liberal construction in order to effectuate and expedite the administration of interstate justice. The result of such liberal interpretation is that the states should *at least* extradite fugitives, but they can, within the limits of due process, extradite all other criminals found in their jurisdiction.[17] It seems quite reasonable to assume that the authors of the Constitution would not have wanted to confer immunity upon certain types of interstate criminals. They desired to provide a summary proceeding whereby the states of the Union could promptly aid one another in bringing to trial persons accused of a crime in one state and found in another.[18] To draw a negative inference at the constitutional level, would not be consistent with the relatively great state concern compared with the rather minimal national interest. *Rick E. Marsh*

[13] Culbertson v. Sweeney, 70 Ohio App. 344, 44 N.E.2d 807 (1942).

[14] 144 N.Y.S.2d 428 (1955).

[15] Innes v. Tobin, *supra* note 5; McLarnan v. Hasson, 243 Iowa 379, 49 N.W.2d 887 (1951); *In re* Harris, 180 Mass. 309, 34 N.E.2d 504 (1941); *Ex parte* Arrington, 270 S.W.2d 39 (Mo. 1954).

[16] Pennsylvania v. Nelson, 350 U.S. 497 (1956). The United States Supreme Court, in a six to three decision, held that in view of the evident congressional purpose to pre-empt the field of anti-sedition legislation, the predominant federal interest in the field, and the danger of conflict between enforcement of state sedition acts and administration of the federal program, the Smith Act superseded the Pennsylvania Sedition Act, precluding enforcement of the Pennsylvania act against a person charged with acts of sedition against the federal government.

[17] *Ex parte* Morgan, *supra* note 9; English v. Matowitz, 148 Ohio St. 39, 72 N.E.2d 898 (1947).

[18] Biddinger v. Commissioner of Police, 245 U.S. 128 (1917).