McPHERSON v. STATE.

Crim. 3849

Opinion delivered September 25, 1933.

1. COURTS—CORRECTION OF RECORD.—A court of record may correct mistakes in its record not arising from judicial acts of court but from mistakes of its recording officer.
2. COURTS—CORRECTION OF RECORD.—A court may correct its record at a subsequent term in criminal as well as civil cases.
3. CRIMINAL LAW—SENTENCE NUNC PRO TUNC.—Evidence *held* to justify a *nunc pro tunc* order sentencing defendant for arson on a plea of guilty entered before defendant served a term in the penitentiary on conviction under other indictments.
4. CRIMINAL LAW—EFFECT OF PLEA OF GUILTY.—Where defendant pleaded guilty to nine indictments for arson, but was sentenced on only seven, the court, in rendering judgment on the remaining two pleas, after defendant had served the sentence on the other seven pleas, could not consider defendant's demurrer, his plea of former conviction, or his plea that more than two terms of court had elapsed since return of the indictment without defendant being brought to trial.
5. CRIMINAL LAW—PLEA OF GUILTY—FAILURE TO ENTER JUDGMENT.—Where defendant pleaded guilty to nine indictments for arson, and was sentenced on only seven, he was not prejudiced by the court's delay in entering judgment on the remaining two indictments until after he had served a sentence under the other seven indictments.
6. CRIMINAL LAW—WITHDRAWAL OF PLEA OF GUILTY.—Where defendant pleaded guilty to nine indictments for arson, and was sentenced on seven and served the sentence, it was not an abuse of discretion to refuse to allow defendant to withdraw his plea of guilty to the two remaining indictments and to plead not guilty.

Appeal from Franklin Circuit Court, Ozark District; *J. O. Kincannon*, Judge; affirmed.

STATEMENT BY THE COURT.

On the 22d day of February, 1926, nine indictments were returned against appellant charging him with arson in burning nine different buildings in the town of Ozark. It appears certainly that he pleaded guilty to seven of the indictments and was sentenced to imprisonment in the penitentiary on each of them. After having served six years and eight months on the sentences, he was released, and the principal question on this appeal is as to whether or not appellant pleaded guilty to the other two indictments upon which he was sentenced by the court after being refused permission to withdraw the pleas of guilty and plead not guilty thereto.

The record entries concerning these two indictments upon which he was not sentenced in 1926 reflects the cases were stricken from the docket pending his return from the penitentiary.

The prosecuting attorney filed a petition asking a *nunc pro tunc* order correcting the record in the two cases to speak the truth—to show that appellant pleaded guilty to each of the indictments but was not sentenced at the time.

A demurrer and an answer were interposed to the petition for an order *nunc pro tunc*, and upon a hearing the court found that the record should be corrected in accordance with the prayer in the petition, which was done.

Dave Partain, prosecuting attorney at the time the indictments were returned, testified that appellant pleaded guilty to all of them, but that the court only sentenced him on the pleas in seven cases. The court reporter at the time and Jeff McElroy, who was deputy clerk, testified to the same facts, and Cheatham, the county clerk, testified that nine fees were paid the prosecuting attorney in the cases of *State of Arkansas* v. *Les McPherson*.

Appellant and the attorney who represented him in 1926 testified that he did not plead to the two indictments involved herein. The then prosecuting attorney denied that he made any agreement that appellant should plead

guilty in seven cases and that he would *nol pros.* the other two.

From the sentences imposed upon him on the pleas of guilty, this appeal is prosecuted.

Mark E. Woolsey, for appellant.

Hal L. Norwood, Attorney General, and *Robert F. Smith,* Assistant, for appellee.

KIRBY, J., (after stating the facts). It is uniformly held that a court of record may correct mistakes in its record which did not arise from the judicial acts of the court but from the mistakes of its recording officers. *Smith* v. *Wallis-McKinney Coal Co.,* 140 Ark. 218, 215 S. W. 385. It is also thoroughly settled that it is within the court's discretion to enter a *nunc pro tunc* order correcting the record at a subsequent term in criminal as well as civil cases. *Richardson* v. *State,* 169 Ark. 167, 273 S. W. 367; *Goddard* v. *State,* 78 Ark. 226, 95 S. W. 476; *Bowman* v. *State,* 93 Ark. 168, 129 S. W. 80, and *Hydrick* v. *State,* 103 Ark. 4, 145 S. W. 542.

The evidence was ample to justify the court in making the order *nunc pro tunc* sentencing the appellant on the pleas of guilty already long entered, and it does not appear that any discretion was abused in so doing. It was established that appellant had pleaded guilty to the two indictments in question, and it is not necessary to consider the demurrer or any plea of former conviction or the plea that more than two terms of court had elapsed since the return of the indictments without appellant having been brought to trial. The pleas of guilty formerly entered precluded any consideration of the questions attempted to be raised by these three pleas at the time of the rendition of the judgment.

It is true the judgment did not follow until long after the pleas of guilty were entered in these two cases, but the prosecution had not been abandoned nor the cases dismissed, as appears from the testimony, and appellant could not have been prejudiced by the failure of the court to sooner enter judgment and sentence against him. *Stocks* v. *State,* 171 Ark. 835, 286 S. W. 975.

Neither was any showing made of abuse of discretion in refusing to allow the defendant to withdraw his pleas

of guilty and enter pleas of not guilty to the said indictments. *Estes* v. *State,* 180 Ark. 633, 22 S. W. (2d) 36.

It may be that appellant had the impression at the time the pleas of guilty were entered that these two cases against him would be dismissed or *nol prossed* upon entry of judgment in the other seven cases in which pleas of guilty were made, but the evidence herein discloses that there was no such agreement made by the State at the time or any conduct that would warrant such belief on his part, and, there being no error in the record, the testimony being amply sufficient to support the court's findings, the judgment must be affirmed. It is so ordered.