

SANDFORD vs. THE STATE.

In a criminal case, it is not sufficient to swear the jury "well and truly to try the issue joined, and a true verdict to render according to the evidence;"—the jury being the judges as well of the law as the facts, should be sworn to try the case according to both.

In an indictment for escape from the Penitentiary, the original conviction and sentence to the prison may be proven by a transcript of the judgment without the indictment—it appearing by the record entry that defendant was sentenced for the crime alleged in the indictment for the escape.

Writ of Error to Pulaski Circuit Court.

Richard Sandford, *alias* McCloud, *alias* Richards, was indicted in the Pulaski circuit court for an escape from the Penitentiary.

The indictment alleged that defendant, on the 16th October, 1848, who had been before then convicted and sentenced to the Penitentiary, in the Phillips circuit court, for the crime of larceny, for the term of two years, and was then undergoing confinement therein, &c., escaped therefrom, &c.

Defendant pleaded not guilty, whereupon, says the record, "Comes a jury, to wit: Joseph Borden, &c., &c., twelve good and lawful men of the county, who were duly empanelled, tried

and sworn well and truly to try the issue joined in this case, and a true verdict to render according to the evidence, and after hearing the evidence, &c. The defendant was convicted, moved for a new trial, which was overruled, and he excepted.

On the trial, the Attorney General offered to read to the jury the transcript copied below, to prove that defendant was convicted of larceny, and sentenced to the Penitentiary, as charged in the indictment, to which defendant objected, on the grounds that the transcript of a judgment without the indictment, &c., would be no evidence of a legal conviction, and that said transcript did not show that defendant was convicted of larceny, &c. But the court overruled the objections, and decided that it was competent evidence to prove the facts therein shown, and permitted it to be read to the jury, and defendant excepted. Here follows the transcript:

“STATE OF ARKANSAS, }
COUNTY OF PHILLIPS. }

At a circuit court begun and held at the court house in and for the county of Phillips, and State of Arkansas, on the 15th day of May, A.D. 1848, by the Hon. JOHN T. JONES, Judge, the following proceedings were had in and by said court, on the 18th day of said month, to wit:

State of Arkansas,

vs.

Richard Sandford, alias Mc-
Cloud, alias Richards.

INDICTMENT FOR LARCENY.

On this day came the said State of Arkansas, by the Attorney who prosecutes in her behalf, and, on his motion, it is ordered that the bill of indictment heretofore returned by the Grand Jury in this case be filed, and the cause placed upon the docket for trial; and it is further ordered that the sheriff bring said defendant into open court, to be arraigned upon said bill of indictment in this cause; and thereupon came into open court the said defendant, in custody of the sheriff of said county, and it being represented to said court that the said defendant was unable to employ counsel, the court thereupon assigned Bodham & Bruton, Esqs.,

as counsel for said defendant; and thereupon the said defendant having been arraigned upon said bill of indictment, for plea, in that behalf, says he is guilty in manner and form as charged in said bill of indictment; and, both parties waiving the necessity of a jury, by consent, the assessment of the punishment of said defendant was submitted to the court, and the court assessed his punishment at two years imprisonment in the jail and penitentiary house of this State, at the city of Little Rock, at hard labor.

It is therefore considered, by the court, that said defendant be confined at hard labor, in the jail and penitentiary house of this State, for the term of two years; and that the sheriff of Phillips county proceed, without unnecessary delay, to carry this judgment into execution; and it is further considered, by the court, that the said plaintiff have and recover of and from the said defendant all her costs, &c., and that said defendant be disfranchised," &c., &c.

Which transcript the clerk of the court certified to be a true and correct copy from the record, &c., under the seal of the court.

Brodie, a witness for the State, testified that, about the 1st of June, 1848, the defendant was delivered to him, as agent and keeper of the penitentiary, and lodged therein. That defendant was delivered to him by a person who represented himself as the deputy sheriff of Phillips county, and that, at the same time, he delivered to him the above transcript. That, on the 16th October, 1848, defendant was in the penitentiary yard at work, and scaled the wall by means of a plank and escaped, the guard being asleep at his post, and was re-captured in a few days.

The court charged the jury, of its own motion, that, if they believed, from the evidence, that defendant was convicted of larceny, and sentenced to the penitentiary, by the circuit court of Phillips county, and that he escaped therefrom, as charged in the indictment, they must find him guilty, if not, they must acquit.

Defendant's counsel asked the court to charge the jury—

1. To convince the defendant in this case, the State must have

proven that the defendant was convicted of larceny, as charged in the indictment, and sentenced to, and lodged in, the penitentiary in pursuance thereof.

2. The transcript read to the jury by the State is not sufficient to prove such conviction.

The court gave the 1st, but refused the 2d instruction, and defendant excepted.

ENGLISH, for the plaintiff, referred to the cases of *Patterson vs. The State*, (2 Eng. 59,) *Bell vs. The State*, (5 Eng. R.) to show that the jury were not legally sworn: and contended that the previous conviction of the defendant was a material allegation in the indictment, and must be proved; otherwise, an escape was no offence, (*State vs. Murphy*, 5 Eng. 4 *Phill. Ev. (Hill & Cow.)* 396-7); though the certificate of the conviction and judgment justified the keeper in detaining the prisoner, (*Dig., ch. 52, sec. 196*,) it was not sufficient evidence in a prosecution for an escape: the record of the indictment must be produced. *Russel on Cr., title Escapes.*

CLENDENIN, Att. Gen. The record evidence, showing that Richd. Sandford had been convicted of larceny, and the proof that he was delivered to the keeper of the penitentiary by the proper officer, were sufficient to warrant a conviction in this case.

Mr. Chief Justice JOHNSON delivered the opinion of the court.

It is not sufficient, in a criminal prosecution, to swear the jury "well and truly to try the issue joined, and a true verdict to render according to the evidence." The jurors, in such cases, are the judges as well of the law as the facts, and consequently should be sworn to try the case according to both, or at least it shall appear that they were regularly or duly sworn. See *Patterson vs. The State*, 2 Eng. 60, and *Bell vs. The State*, 5 Eng.)

The court below committed no error in receiving the transcript of the original conviction as evidence of that fact, and also of the particular offence of which he had been convicted. It ap-

pears, from the entry in the record, that the indictment upon which he was originally tried was for larceny, which entry was sufficient evidence of that fact without the actual production of the indictment, or a copy thereof. Although there is no error in this particular, yet as the swearing of the jury was clearly defective, the judgment of the circuit court must be reversed.

The judgment of the court below, in overruling the motion for a new trial is therefore reversed, and the cause remanded.
