
Murphy v. The State.

MURPHY V. THE STATE.

1. NEW TRIAL: Newly discovered testimony.
A motion for a new trial for newly discovered testimony must show why the testimony was not produced at the trial.
2. TAX ON CRIMINAL CONVICTION: Not unconstitutional.
The tax imposed by Statute (Gantt's Dig., Sec. 5053) on each criminal conviction is a fee to the public and not a tax within the meaning of the clause of the constitution requiring all property to be taxed ad valorem.
3. CRIMINAL PRACTICE: Hiring out misdemeanor convicts.
Where there is no public county contractor for keeping and working misdemeanor convicts, under Sec. 5 of the act of March 22, 1881, the Circuit Court should direct, in the judgment for the fine and cost, that the convict be put to labor or hired out as provided by Sec. 4, Act of 10th of March, 1877; but the failure to make such direction is no ground for reversal. It may be corrected on application to the Circuit Court by amendment of the judgment; and on appeal this court will affirm the judgment for fine and costs, and certify the affirmance to the Circuit Court, that the correction may be made by a further order if desired.

ERROR to Chicot Circuit Court.

HON. T. F. SORRELLS, Circuit Judge.

Martin & Martin, and C. H. Carlton, for Plaintiff in Error:

There is no law making the \$3 tax any part of the fine

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and costs in a criminal case. Sec. 5053, Gantt's Dig., is the only Statute on the subject which provides that there shall be levied and collected a county tax, etc., a tax of \$3 on each criminal conviction. This act provides for the levy and collection of the \$3 as a tax—not as a part of the fine and costs, etc. The Circuit Court cannot levy a tax. That power, under Constitution of 1874, and by the Act in question, is conferred solely on the county court. The act of 1877 provides for imprisonment only, until the fine and costs are paid. Acts 1877, pp. 74-75.

Suppose the party were actually unable to pay the fine and costs, under the judgment in this cause, he would be held in custody until millenium's dawn.

If the fine and costs had been paid, could the sheriff hold him for tax?

The judgment is not in accordance with Sec. 4, Acts 1877, pp. 74-5.

C. B. Moore, Attorney-General, for Defendant in Error.

Secs. 1621 and 5053, Gantt's Dig., are the only law of this case, and they are too explicit to admit of argument.

ENGLISH, C. J. P. F. Murphy was indicted in the Circuit Court of Chicot county, at the July term, 1881, for playing cards on Sunday; he was tried at the January term, 1882, and the jury found him guilty, and assessed a fine of twenty-five dollars against him. He was refused a new trial, and judgment rendered against him for the fine assessed by the jury, and the further sum of \$3 as a tax imposed by Statute upon the conviction, and for costs; and it was ordered that the sheriff retain custody of defendant until the fine, tax and costs were paid. He took bill of exceptions and brought error.

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I. The first ground of the motion for a new trial was that the verdict was contrary to the evidence.

The testimony of two witnesses, introduced by the State, conduced to prove that plaintiff in error, and three other persons, played poker at the saloon of one McDaniel, in Lake Village, on the Sunday preceding the term of the court at which the indictment was found. No witness was introduced for the defense.

4. New Trial
For newly
discovered
testimony.

II. The second ground of the motion for new trial was for newly discovered evidence.

In the motion, unsupported by any affidavit, plaintiff in error stated that he could prove by the persons who played the game at cards, and by the saloon keeper, that he did not engage in the game. Why he did not have one or more of these persons at the trial is not known. The showing was insufficient, and not within the rule.

2. Tax on
criminal con-
viction con-
stitutional.

III. It is submitted for the plaintiff in error, that the tax of \$3 imposed by section 5053, Gantt's Dig., on each criminal conviction

and included in the judgment in this case, is in violation of the Constitution.

The tax is a fee to the public, and not a tax within the meaning of the clause of the Constitution requiring all property, etc., to be taxed ad valorem. *Lee County v. Abraham*, 34 Ark., 166.

It is a mode of making persons convicted of crime contribute to defray the expenses of public prosecutions.

IV. It is further submitted for plaintiff in error, that if he was unable to pay the fine and costs, he would, by the terms of the judgment have to remain in the custody of the sheriff until doomsday, as it does not direct that he put to labor on the public works, or hired out to satisfy the judgment.

Section 4 of the Act of March 10th, 1877 (Acts of 1877, p. 74), provides that when any person shall be convicted of

a misdemeanor, the judgment shall direct that such person shall be put to labor in any manual labor work-house, or on some bridge or public improvement or hired out until the fine and costs be paid.

But the failure of the judgment so to direct would not be ground of reversal; the judgment on the verdict for fine and costs would be valid, and the courts on application might amend by adding the direction required by the Statute.

At the time the plaintiff in error was convicted, however, the Act of March 22d, 1881, was in force, and by the 5th section of that Act it was the duty of the sheriff, if the fine and costs were not immediately paid or secured, as therein provided, to commit him to jail, to be by the jailer delivered to the public contractor, if a contract had then been made for keeping and working such convicts by the county court of Chicot county, as provided by the Act. But if no contract had been made, the court should have made the direction in the judgment required by the Act of March 10th, 1877. *Griffin v. The State*, 37 Ark., 437.

The judgment must be affirmed, and the affirmance certified to the court below that a further order may be made touching the fine and costs if required.
