TERRITORY V. BARRETT, 1895-NMSC-012, 8 N.M. 70, 42 P. 66 (S. Ct. 1895)

TERRITORY OF NEW MEXICO, Appellee,
vs.
JAMES BARRETT, Appellant

No. 591

SUPREME COURT OF NEW MEXICO

1895-NMSC-012, 8 N.M. 70, 42 P. 66

August 31, 1895

Appeal from the Fifth Judicial District Court, Eddy County.

The facts are stated in the opinion of the court.

COUNSEL

Edward L. Bartlett, solicitor general, for the territory.

JUDGES

Laughlin, J. Smith, C. J., and Fall and Collier, JJ., concur.

AUTHOR: LAUGHLIN

OPINION

*{*71}* **{1}** The defendant, James Barrett, was indicted by the grand jury of Eddy county, in the Fifth judicial district, at the November, 1893, term, for the crime of murder in the first degree of John Holihan, in said county, on the twenty-third day of July, 1893, and on the sixteenth day of November, 1893, was arraigned and entered his plea of not guilty as charged in the indictment; and on the next day, it being made to appear that the defendant was too poor to employ counsel, and to secure witnesses for his proper defense, the court assigned two members of the bar to defend him, and ordered compulsory process for the witnesses desired by the defendant. And the case was set down for trial on the twenty-first day of that month, and on that day defendant filed a plea in abatement under oath, alleging that two of the grand jurors who sat upon the cause and returned the indictment were not residents of Eddy county, but were at that time, and had been for six months previous thereto, residents and taxpayers of Lincoln county, but it does not appear from the plea *{*72}* that defendant did not know at and prior to the time he entered his plea of not guilty to the merits, that the two grand jurors were not legally qualified to act as such. On the same day he filed his plea in abatement

he also filed a motion for a change of venue in which he stated: "That your defendant only asks for a fair and impartial trial, and when he is given a county that is free from impressions as mentioned herein he is satisfied; that he suggests Lincoln county, because he thinks the people have had less opportunity to hear of this cause than those of Chaves county, and, as he has before stated herein, that is all he desires;" and the motion was granted, and the venue was changed for trial to Lincoln county. After the venue had been so changed, the defendant moved the court for leave to withdraw his plea of not guilty, and to quash the indictment, and to dismiss the case, which motion was, after argument by counsel, denied, to which ruling of the court the defendant excepted. At the March, 1894, term of the district court for said Lincoln county the case was called and set for trial for the second Tuesday of the term. On the day set for trial both parties announced themselves ready, and the trial proceeded, and after all the testimony was in, and the arguments were heard by the jury, and the case was closed, the court charged fully on the law of murder in the first degree only, and the jury, after consideration, found the defendant guilty as charged, and so returned the verdict. The defendant thereupon filed his motion in arrest of judgment, and set up that one of the grand jurors named in his first motion was not a resident of Eddy county, but was a resident of Lincoln county; and also a motion for a new trial, and another motion in arrest, -- all of which motions were denied by the court, and duly excepted to by the counsel for defendant. And the court thereupon passed sentence of *{*73}* death in legal form upon the defendant. From all of which rulings of the court the case is here on appeal, and it is made the duty of this court to seriously consider all the rulings of the court below material to the defendant.

{2} The first question for consideration is as to the refusal of the trial court to allow defendant to withdraw his plea of not guilty. This was a plea to the merits of the case, and was entered some five days before he filed his plea in abatement to test the qualifications of two members of the grand jury, and the motion for leave to withdraw his plea was not presented to the court until after the defendant had secured a change of venue to another county for the trial of the case, and in his motion for change of venue he stated that that was all he desired. The record does not show that he ever urged a hearing on his plea in abatement, and, if anything is shown by the record, it is that he had no faith in his plea, and had abandoned it, and did not wish to further pursue it; and it is here presumed that he did so abandon it. This presumption is further supported from the fact appearing in the record that when he filed his motion in arrest, after the verdict, he stated that only one of the two grand jurors named in his plea of abatement was disqualified by reason of non-residence in Eddy county. If the defendant had filed his plea in abatement as to the qualifications of members of the grand jury before he entered his plea to the merits, it would have been the duty of the territory to join issue, and the court to hear and determine the issue so made. People v. Kinsey, 51 Cal. 278; People v. Fuqua, 61 Cal. 377. But the defendant did not do this. He waited until the venue of the case had been changed to another county, and the jurisdiction over the subject-matter in that case in that *{*74}* county had virtually ceased before he moved for leave to withdraw his plea to the merits. And he did not renew his motion for leave before trial in Lincoln county, but announced that he was ready for trial on the merits. This, then, leaves nothing but the ruling of the court on the motion to withdraw the plea,

and this rested in the discretion of the court, and no circumstances are shown which would indicate that there was any abuse of that discretion. People v. Lee, 17 Cal. 76; People v. Shem Ah Fook, 64 Cal. 380, 1 P. 347. The defendant, after verdict, filed his motion in arrest on the ground of disqualification of one of the grand jurors, but this objection came too late, as he had waived that objection by going to trial on the merits. 1 Bish., Cr. Proc., secs. 875, 886, 887; Territory v. Abeita, 1 N.M. 545; Territory v. Baker, 4 N.M. 236, 13 P. 30; Anderson v. Territory, 4 N.M. 213, 13 P. 21.

{3} In the motion of defendant for a new trial after sentence of death had been passed upon him he sets out seven grounds, only one of which will be considered, which is the sixth: "Because the court ruled the defendant to exhaust his peremptory challenges so far as he wished in regard to the members of the general venire before a special venire was drawn." If this statement for a new trial was true, and borne out by the record in the case, it would present a different question, as under our statute (Comp. Laws, sec. 2190) it becomes the duty of the court to examine all the record of the court below, and pass upon it. In this case none of the testimony or proceedings in the court below are incorporated in the record by bill of exceptions, and we have to take the record as we find it, with all the presumptions in favor of the regularity and legality of the proceedings in the court below. This court and the supreme court of the United States have decided in *{*75}* numerous cases that the overruling of a motion for a new trial is not sufficient grounds to reverse a decision in the court below. The above paragraph in the motion for a new trial is the simple statement, not under oath, of the attorneys for the defendant, while the record with reference to the impaneling of the jury, found at pages 12 and 13 of the transcript, does not anywhere show that any challenges, peremptory or otherwise, were asked or granted or refused by or against the defendant, as will be seen by the following copy of the transcript in that particular: "Now comes the territory, by her district attorney, and comes the defendant, James Barrett, in his own proper person, in the custody of the sheriff, and accompanied by counsel, and now, both parties announcing themselves ready for trial, come the following named persons, to wit [giving the names of nine], who, having been duly selected and examined and qualified as jurors for the trial of the issues joined in this cause pending, and it now appearing that there are nine duly qualified jurors aforesaid present from the trial of the issue in this cause pending; and it further appearing to the court that the regular panel of the petit jury for the present term of this court is exhausted by reason of the challenges exercised by the parties herein, and the jury for the trial of this cause not being complete, the court draws the names of twenty-four additional persons from jury box number 2, of the county of Lincoln, and doth order that a special venire issue for such persons as petit jurors, returnable on the incoming of court to-morrow evening, which is done accordingly. * * * And thereafter, on the twenty-third day of March, A. D. 1894, the following, among other, proceedings were had: 'Now, again, comes the territory, by her district attorney, and comes the defendant, James Barrett, in his own proper person in the custody of the sheriff, and accompanied by counsel, and come the nine jurors who *{*76}* have been heretofore duly examined, qualified, and accepted as jurors in this cause. And now comes the sheriff and returns into court the special venire heretofore, on the twenty-first day of March, 1894, issued, for petit jurors, which shows the following named persons to have been summoned by him to appear in open court, and, being

each duly examined under oath, are found to be qualified to serve as petit jurors at the present term of this court [here follows list of jurymen entered in venire]. And now the following named persons, to wit [naming three], are duly selected, examined, and qualified as jurors to complete the panel of the jury for the trial of the issues joined in this cause pending, and now the following jury, to wit [naming twelve], twelve good and lawful men taken from the county of Lincoln, having been duly selected, drawn, accepted, and impaneled, are sworn to well and truly try the issues joined in this cause pending, and a true deliverance make between the prisoner at the bar and the territory of New Mexico, and a true verdict render according to the law and the evidence.'" If the simple statement of counsel for defendant, not under oath, is to be taken in this court as contradicting the record of the cause, reversals of criminal cases in this court will only be limited by the ingenuity of counsel in framing statements of reversible error, which may only exist in his fertile brain. In this case the defendant was sentenced to death, and he had every inducement to present all the facts to this court upon which the judgment of the court below might possibly be reversed; and, if the challenges referred to in his motion for a new trial were, as a matter of fact, asked and refused, it is only reasonable to suppose that he would have incorporated the fact into this record in a bill of exceptions, and it would be here before the court for consideration in legal form. The only allusion contained in the record of this case as to challenging jurors *{*77}* is as follows, found at page 13 of transcript: "And it further appearing to the court that the regular panel of the petit jury for the present term of the court is exhausted by reason of the challenges exercised by the parties herein," etc. It can not be contended that this court must assume from this language all the facts stated in the defendant's six grounds for a new trial, which contradict the record itself, as well as the presumption always made in such cases that the action of the court was regular and legal. If the defendant had incorporated his motion for a new trial in arrest of judgment and for an appeal in the bill of exceptions, and had had the same allowed and signed by the judge in the court below, and then brought the same here on appeal in proper form, this court would have been bound to consider and pass upon all errors so appearing therein; and then, if it had then appeared in the bill of exceptions so allowed and signed by the judge that the defendant had been required to exhaust all the peremptory challenges he desired out of the regular panel before another venire was issued, and when a less number than twelve men were
in the box, this might be reversible error; because a defendant is not required to exercise and challenge for cause or peremptorily when a less number than a full panel of twelve men are in the jury box. If this were not the law, a defendant might be required to accept jurors out of the new panel which he would challenge if he had not been required to exhaust his right to challenges out of the regular panel, and he might be compelled to accept men to his prejudice, and thereby be deprived of a fair and impartial jury. But there is nothing to show any such state of facts in this case.

{4} Contents of motions, papers, and affidavits filed with the clerk by counsel, and not incorporated in a bill of exceptions, and so properly brought here, can not be considered by this court, it matters not what *{*78}* such contents are; and courts should not permit such papers to be filed with the clerk until the contents of the same are brought to the attention of the court; and clerks should not be permitted to copy any such papers, and

certify them to this court as any part of the record. It appearing from an examination of all the record of the proceedings in the court below that the defendant had a fair and impartial trial on the merits, at a place of his own selection, the judgment of the court below is affirmed. And it appearing that the order of this court affirming the judgment of the court below can not reach the sheriff of Eddy county in sufficient time for the execution of the death sentence on the day fixed by the lower court, it is here ordered that the execution of the sentence of the court below be carried into effect on the second Friday of September, the same being the fourteenth day of September, A. D. 1894; and it is further ordered that the sheriff of Eddy county, New Mexico, execute the death sentence upon the said defendant, James Barrett, in full compliance with the order of the court below, on the said second Friday of September, the same being the fourteenth day of September, 1894; and it is so ordered.