IN THE CRIMINAL COURT FOR HAMILTON COUNTY, TENNESSEE

In re: State of Tennessee v. Ed Johnson : No. 231240
: Division I

ORDER

Before the Court is the petition of Pastor Paul McDaniels ("the petitioner"), as next friend of Ed Johnson ("the defendant"), deceased, to expunge the public records of Hamilton County, Tennessee of the record of the defendant's 1906 conviction for rape. The matter was heard on 25 February 2000, at which hearing the petitioner prayed instead that the Court set aside the conviction on the ground that, while his appeal from the dismissal of his petition for a federal writ of *habeas corpus* was pending in the United States Supreme Court, through the actions and omissions of the sheriff of Hamilton County, Tennessee, a state agent, the defendant was lynched. The state does not oppose the petition. For the reasons set forth in the accompanying memorandum, the Court finds that, upon the defendant's death by lynching on 19 March 1906, during the pendency of his appeal to the United States Supreme Court, his prosecution for rape abated *ab initio* and that therefore the action should be dismissed.

The Court therefore ORDERS that the action of the State of Tennessee against Ed Johnson, in which, on 9 February 1906, the defendant was convicted of rape and sentenced to death, be dismissed, restoring to the defendant the presumption of innocence that he enjoyed before his conviction. SO ENTER on this 12th day of June, 2001 *nunc pro tunc* 25 February 2000.

Douglas A. Meyer

Douglas A. Meyer
Criminal Court Judge

1369

IN THE CRIMINAL COURT FOR HAMILTON COUNTY, TENNESSEE

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MEMORANDUM

Before the Court is the petition of Pastor Paul McDaniels ("the petitioner"), as next friend of Ed Johnson ("the defendant"), deceased, to expunge the public records of Hamilton County, Tennessee of the record of the defendant's 1906 conviction for rape. The matter was heard on 25 February 2000, at which hearing the petitioner prayed instead that the Court set aside the conviction on the ground that, while his appeal from the dismissal of his petition for a federal writ of *habeas corpus* was pending in the United States Supreme Court, through the actions and omissions of the sheriff of Hamilton County, Tennessee, a state agent, the defendant was lynched, resulting in the abatement of the appeal. The state does not oppose the petition. The Court finds that the death of the defendant during the pendency of his appeal abated his prosecution for rape *ab initio* and that therefore the action should be dismissed.

I. Procedural history[1]

On 25 January 1906, the sheriff of Hamilton County arrested the defendant, an African-American man, for the 23 January rape of a Caucasian woman. That night, a large mob attacked the Hamilton County jail but did not find the defendant, the sheriff having, late in the afternoon, removed him from Chattanooga. Until 6 February, the day of his trial, the defendant was kept away from Chattanooga for fear that he would be lynched.

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[1] Most of the case history comes from the opinions of the United States Supreme Court in United States v. Shipp, 203 U.S.563 (1906) and 214 U.S. 286 (1909) and its order in Johnson v. State of Tennessee, 214

On 9 February, the defendant was convicted of rape and sentenced to death in Division I of the Criminal Court for Hamilton County, Tennessee. On 3 March, the defendant filed a petition for a writ of *habeas corpus* in the United States Circuit Court, sitting in Tennessee, alleging, *inter alia*, that African Americans "had been excluded, illegally, from the grand and petit juries; that his counsel had been deterred from pleading that fact or challenging the array on that ground, and also from asking for a change of venue to secure an impartial trial, or for a continuance to allow the excitement to subside, by the fear and danger of mob violence; and that a motion for a new trial and an appeal were prevented by the same fear." On 10 March, after an evidentiary hearing, the petition was dismissed and the defendant was remanded to the custody of the sheriff of Hamilton County for detention for ten (10) days to allow the defendant to appeal the dismissal of the petition and, in default of an appeal within that time, for further proceedings by the state court under the sentence.

On 17 March, Justice Harlan allowed the defendant's appeal to the United States Supreme Court, and, on 19 March, a similar order issued from the court. All proceedings against the defendant were thereby stayed, and the sheriff of Hamilton County was ordered to retain custody of the defendant pending the appeal. Before 6 o'clock in the evening of the same day, the sheriff had been notified of the order by telegraph and the evening newspapers of the city of Chattanooga had published and circulated a full account of the order.

Later that evening, however, the defendant was removed by a mob from the Hamilton County jail to a bridge, where he was murdered. From the petition, it appears

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U.S. 485 (1909). This Court takes judicial notice of the findings of fact therein pursuant to Tenn. R. Evid. 201.

that the defendant met his death bravely, his last words having been, "God bless you all, I am an innocent man."

On 24 May 1909, the United States Supreme Court found the sheriff of Hamilton County, one of his deputies, and four members of the mob guilty of contempt because of their acquiescence or participation in the lynching of the defendant.[2] On the same day, the court announced the abatement of the defendant's appeal and dismissed the case.

On 12 January 2000, more than ninety (90) years after the supreme court's announcement of the abatement of the defendant's appeal effectively dissolving the stay and terminating the court's exercise of jurisdiction in the case, the petitioner filed the subject petition to expunge the public records of Hamilton County, Tennessee of the defendant's conviction for rape on the ground that the conviction never became final. The matter was heard on 25 February, at which hearing the petitioner prayed instead that the Court set aside the defendant's conviction on the ground that the validity of his conviction was never determined because, while his appeal in the United States Supreme Court was pending, through the actions and omissions of a state agent, the sheriff of Hamilton County, he was lynched. The state, which was represented at the hearing by the district attorney general, did not oppose the petition.

II. Law and analysis

Tennessee is among those jurisdictions, state and federal, in which the death of a defendant in a criminal case during the pendency of a direct appeal from his conviction

[2] As a preliminary matter of law, the court had already decided that, even if the circuit court lacked jurisdiction to entertain the defendant's petition for a writ of *habeas corpus* and the court itself lacked jurisdiction of the defendant's appeal from the inferior court's dismissal of the petition, the court alone had jurisdiction to decide whether the case was properly before it and that, until it declined jurisdiction, it had authority to issue orders to preserve existing conditions, which orders could not be contemned with impunity. Shipp, 203 U.S. at 572-73.

1372

abates, i.e., renders non-existent, all proceedings against him *ab initio*, i.e., all proceedings in the prosecution from its inception. Carver v. State, 398 S.W.2d 719, 720-21 (Tenn. 1966). *See also* United States v. Noel, 609 S.W.2d 740, 741-42 (Tenn. Ct. App. 1980), *perm. to app. denied* (Tenn.1981) (relying upon Carver in holding that death of criminal defendant abated unsatisfied judgment for fine imposed upon decedent during his lifetime by a federal court).

In Carver, the Supreme Court of Tennessee reasoned that the death of an accused during the pendency of a direct appeal withdraws an accused from the jurisdiction of the court and leaves no apportionment of jurisdiction in the trial and appellate courts. 398 S.W.2d at 720. Therefore, the action against the accused abates *in toto* or not at all. Id. Because the death of the accused frustrates the premise of criminal law to punish the guilty for unlawful acts, leaving "the determination of [an accused's] guilt or innocence" to "the ultimate arbiter of all human affairs" and relieving the accused "of all punishment by human hands", the court concluded that it abates a prosecution altogether. Id.

In its order announcing the abatement of the defendant's appeal from the dismissal of his *habeas corpus* petition and dismissing the case, the United States Supreme Court did not affirm or reverse the judgment of the trial court. Nor did it remand the case to the trial court with instructions to vacate the judgment and dismiss the indictment. Thus, the matter has rested for more than ninety (90) years, neither the validity of the defendant's conviction having been determined nor sentence having been executed.

Under Tennessee law, had the pending appeal been a direct one, the defendant's death clearly would have abated not only his appeal but all proceedings in the case

against him *ab initio*. In the circumstances, however, that the pending appeal in the defendant's case was indirect, having been an appeal from the denial of a petition for a writ of *habeas corpus*, the Court does not find a controlling distinction.

The pending appeal was the defendant's only recourse to meaningful appellate review in the circumstances. He had been deterred from a direct appeal by the threat of mob violence, the reality of which prior and subsequent events proved. Moreover, the sheriff of Hamilton County and one of his deputies, who were responsible for the safekeeping of the defendant, were convicted of contempt in the United States Supreme Court for their acquiescence in the lynching of the defendant, thus implicating the state in the frustration of the defendant's indirect appeal.

The opinion in Carver contains a quotation from a 1934 case from the supreme court of Iowa, State v. Kriechbaum, 258 N.W. 100:

> "'Defendant's right of appeal inhered in the prosecution from the beginning. His right of appeal was as inviolable as any right of defense. Also his right of suspension of the judgment of the trial court until after the appeal had been heard. The judgment below could not become a verity until the appellate court made it so by an affirmance. If the appeal had been sustained, all the proceedings in the trial below would fall. The question of the defendant's guilt was therefore necessarily undetermined at the time of his death.'"

398 S.W.2d at 720. The Court decides that the reasoning of Carver applies in the defendant's case and that therefore the action against him should be dismissed.

The Court observes that dismissal of the defendant's case in these circumstances is not an adjudication of innocence. Upon dismissal, however, the legal presumption of innocence applies to the defendant, though posthumously, no less than it applied to his fellow citizens and, before his conviction, to him more than ninety (90) years ago.

III. Conclusion

The Court concludes that, upon the death of the defendant during the pendency of his appeal from the dismissal of his petition for a federal writ of *habeas corpus*, his prosecution for rape abated *ab initio*. Accordingly, an order will enter announcing the abatement of the action and dismissing it.

Douglas A. Meyer
Criminal Court Judge

1375