

BISIGNANO V. MUNICIPAL COURT OF DES MOINES

Application for Stay
Hearing on October 9, 1946

Al Bisignano vs. Municipal Court of the City of Des Moines,
Iowa, and Harry B. Grund, Respondents.

The application presented to me on Wednesday, October 9th, by counsel for petitioner Bisignano in person was for a further stay pending the filing of a petition for certiorari in this Court and action thereon. Upon denial of petitioner's petition for rehearing by the Supreme Court of Iowa, that court issued a stay order, this action being taken en banc. The order was conditioned several ways, one of which was that the petitioner should file in this Court his petition for certiorari within twenty days. The time for filing petition for certiorari and therefore the stay expires on October 13th, since the stay order was issued September 23d. The order was made in exact accordance with the petitioner's request, including the twenty-day condition. The request was made, according to counsel's statement, in the belief that printed copies of the record were available and could be procured for filing here. However, after the order was entered it was discovered that the seventeen copies of the record which had been filed in the Supreme Court of Iowa had been distributed to various law schools and others interested after that court had taken its final action on the ease. Counsel apparently were relying upon having these copies made available for filing here. They did not anticipate having to have the record printed again. Upon discovery of the fact that the existing copies had been distributed and would not be available, counsel found it impossible to secure a printer who could do the work of printing the record in time for the required number of copies to be filed here within the twenty days allowed by the stay. Thereupon counsel applied to Chief Justice Garfield of the Supreme Court of Iowa on October 2d for an extension of the time for operation of the stay. According to counsel's statement made to me in chambers, Justice Garfield denied the stay for the reason that, although he had power to extend the time for its operation, he did not feel that he should

do so since the entire court had acted upon petitioner's original application and had granted the relief thereby sought in exact accordance with the terms of the application. It was stated to me that Chief Justice Garfield did not state any other reason for his denial of the application for extension, either orally or formally in his order of denial.

The sentence which was imposed in this case was a fine of \$500 and six months imprisonment. The time for filing the petition for certiorari in this Court will not expire until sometime in December, around the 13th. Further time will be required for action by this Court and if the petition should be granted and the cause set for argument it is entirely possible that unless the extension is granted petitioner would have served his full term before the cause is finally disposed of here.

In my judgment the petition raises a substantial federal question, although I have some doubt whether the question was raised in time in the courts of Iowa. An examination of the record and of the various papers upon which the case was considered in the Supreme Court of Iowa discloses that if the federal question was raised as such in the contempt proceedings before the Municipal Court of course it was more incidentally with reference to the state grounds argued there than as independent and distinctive separate federal grounds. There are suggestions in the record of violation of federal rights, but the assignments with respect to them were certainly not clear and definite.

The same thing is true also with reference to the original application for certiorari, that is, the petition, which was filed in the Supreme Court of Iowa. Most of the specific assignments of error relate to alleged deviation from state statutory and constitutional requirements. The latter include the alleged deprivation of the right to trial by jury pursuant to the provision of the Iowa constitution cited in this respect. There are suggestions also in this petition that the effect of the proceeding may be to have denied petitioner's federal constitutional right as a matter of due process and also perhaps as one of equal protection of the laws. However, these suggestions seem to have been made as incidental to and supporting reasons for the basic and clearcut assignments with reference to alleged deviations from state law. And at the end of the petitioner's brief in argument before the Supreme Court of Iowa it is said that that court should reverse the decision and thus secure to the petitioner his alleged right to trial by jury under the Iowa constitution, in order that he may not be required to

rest his case upon his federal constitutional rights to due process and equal protection. It is thus doubtful whether the federal questions were squarely raised either in the Municipal Court or by the original petition for certiorari and the briefs in the Supreme Court of Iowa.

However, the petitioner filed various other papers in the Supreme Court of Iowa, including a reply to the brief of the respondents, and also filed a petition for rehearing and later an amended petition for rehearing. The amended petition for rehearing clearly and squarely raised the federal question. It is not clear that the original petition for rehearing was basically different in this respect from the original petition for certiorari. Moreover, in its opinion denying certiorari the Supreme Court of Iowa does not squarely rule on the federal constitutional questions. But it does not appear from the record at any rate by any positive evidence that in passing upon the petition and the amended petition for rehearing it did not rule on these questions. Nothing in the order granting the stay of procedure or in the further order of Chief Justice Garfield denying an extension of the stay suggest that the court did not pass upon the federal constitutional question, at any rate in disposing of the petition for rehearing. On the contrary, it would seem that when the court en banc allowed the stay order in exact accordance with the petitioner's application for that relief it in effect and implicitly confirmed the fact that federal questions had been presented and determined in the court's action. Justice Garfield's action in refusing to extend the stay does not negative this in any way, nor do his asserted reasons for taking that action do so.

In short, I am not too clear that the petitioner raised his federal questions clearly and distinctively as such appropriately and in time in the state court. I am inclined to think that if the Supreme Court of Iowa had denied his stay or refused to extend the time for the stay to operate on the ground that he had raised the federal question too late, that is, on his amended petition for rehearing, I would feel bound by their action under our authority in that respect. But in the absence of anything to indicate that the Iowa Supreme Court acted on this ground, I am inclined to think that the question has been timely raised and, if so, I have no doubt that the matter is of sufficient importance that the petition for certiorari will be at least sufficiently meritorious to be presented to this court for its action and, as presently advised, I would think that the petition should be granted and set for argument here.

In short, I think that in all probability the petition for certiorari should be and will be granted, and if any question should be raised by the respondent as to the timeliness of the raising of the federal question that question also should be set down for argument here.

Being of these views, it seemed to me that the stay order should be extended in order to allow the petitioner sufficient time to perfect his application here and that a failure to extend the order might in substance have the effect of rendering the case moot, if not entirely, then at any rate so with respect to the application of the portion of the penalty which requires imprisonment. It is my judgment also that, inasmuch as the Supreme Court of Iowa felt that bond should be given to indemnify the respondent on account of costs and so forth, a similar condition should be imposed here. Accordingly, I have today signed an order for extending the time for operation of the stay, conditioned upon the filing of a satisfactory bond in the sum of \$2000 and upon the filing of the petition for certiorari within the statutory time.