

Powers Vs. United States

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Appeal No. : 223 U.S. 303

Appellant : Powers

Respondent : United States

Judgement :

Powers v. United States - 223 U.S. 303 (1912)

U.S. Supreme Court Powers v. United States, 223 U.S. 303 (1912)

Powers v. United States

No. 152

Argued January 22, 1912

Decided February 19, 1912

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ERROR TO THE DISTRICT COURT OF THE UNITED STATES

FOR THE WESTERN DISTRICT OF VIRGINIA

SYLLABUS

The objection that there was no *venire facias* summoning the grand jury is waived unless seasonably taken.

When the case gets to this Court, if the indictment shows that the grand jury was duly selected and sworn, it is enough to show the proper swearing of the grand jury. *Crain v. United States*, [162 U. S. 625](#) , distinguished.

Where the conviction is a general one, one good count is sufficient to warrant affirmance. *Dunton v. United States*, [156 U. S. 185](#) .

In this case, the statements in the record as to the calling and impaneling of the petit jury sufficiently disclose, upon proceedings in error, that the petit jury was sworn.

Where the accused voluntarily becomes a witness in his own behalf before a commission, it is not essential to the admissibility of his testimony that he be first warned that what he says may be used against him. *Wilson v. United States*, [162 U. S. 613](#) .

Where the record does not show that the accused on the preliminary hearing claimed his privilege under the Fifth Amendment or was ignorant of it, but does show that he testified voluntarily and understandingly, his testimony cannot be excluded when subsequently offered at his trial.

A defendant testifying voluntarily, thereby waiving his privilege, may be fully cross-examined as to the testimony given, and in this case *held* that the cross-examination did not exceed the proper limits.

Section 860, Rev.Stat., has no bearing on the introduction in the same criminal proceeding of testimony of accused given voluntarily. *Tucker v. United States*, [151 U. S. 164](#) .

The facts, which involve the validity of a sentence after conviction for violating 3258, 3279, 3281 and 3242 of the Revised Statutes of the United States, are

stated in the opinion.

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MR. JUSTICE DAY delivered the opinion of the Court.

Plaintiff in error (hereinafter called defendant) was convicted in the District Court of the United States for the Western District of Virginia under an indictment charging him with the violation of 3258, 3279, 3281, and 3242 of the Revised Statutes of the United States. He was sentenced to a fine of \$100 and to be imprisoned for a period of thirty days.

The indictment contained seven counts, charging the defendant substantially as follows: that he had in his possession a still and distilling apparatus for the production of spirituous liquors without having had such still and apparatus registered (first count); that he carried on the business of a distiller of spirituous liquors without having given bond (second count), and with the intent to defraud the United States of the tax on such liquors (third count), and also carried on the business of a retail liquor dealer without having paid the special tax therefor (seventh count); that he worked in a distillery for the production of spirituous liquors upon which no "registered distillery" sign was displayed (fourth count), and that he delivered raw material, namely, meal, to (sixth count), and conveyed distilled spirits from (fifth count), such distillery.

The case comes to this Court because of the alleged violation of a constitutional right in compelling the defendant to be a witness against himself. This contention is developed in the bill of exceptions, which shows that, at a preliminary hearing before a United States commissioner, after a witness for the government had testified that he had seen the defendant beating apples at a "still

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place" near the home of one Preston Powers, and about four miles from defendant's home, the defendant, without counsel, and not having been instructed by the commissioner, voluntarily, in his own behalf, testified that he had beaten

apples about thirty steps from the still place; that Preston Powers had hired him for seventy-five cents a day, and had set him to work beating apples, but that he had no interest in the apples, the product from them, or the still, and no control of the still, and had merely been hired by the day at a fixed price; that thereupon M. P. Colly, deputy marshal, asked him if he had not worked at a distillery within two years of the warrant in this case at another time and place, which question the defendant refused to answer until informed by the commissioner and by the deputy marshal that, unless he did so, he would be committed to jail, and he then testified that "he had worked at a distillery and made some brandy last fall, near his house, and he paid Preston Powers to assist him;" that, upon the trial of the case in the district court, that court, over the objection of the defendant, admitted the testimony of Colly, who repeated the proceedings before the commissioner, including the testimony of defendant, and that the court refused to strike out Colly's testimony, or to instruct the jury to disregard it, upon the motion of defendant's counsel, to all of which at the time, counsel for defendant duly excepted.

The contentions of the defendant are that the judgment should be reversed for the following reasons:

1st. There was no *venire facias* summoning the grand jury which found this purported indictment.

2nd. The said grand jury was not sworn, and consequently could not find an indictment.

3rd. The indictment was defective, and the demurrer should have been sustained to the fourth and sixth counts.

4th. The petit jury that tried this case was not sworn nor summoned.

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5th. The testimony of Colly was illegal and incompetent testimony, and should have been rejected when offered, and, if received, stricken out on counsel's motion.

As to the first, that there was no *venire facias* summoning the grand jury, there is nothing in the record to show that this objection, if tenable at all, was taken before plea, or, indeed at any time during the trial. Objections of this character are waived unless seasonably taken. *United States v. Gale*, [109 U. S. 65](#) ; *Agnew v. United States*, [165 U. S. 36](#) ; *Rodriguez v. United States*, [198 U. S. 158](#) ; *McInerney v. United States*, 147 F. 183.

The same observation applies to the second assignment of error, that the grand jury is not shown by the record to have been sworn. The indictment recites that the grand jury was selected, impaneled, sworn, and charged, and that they on their oaths present, etc. At this stage of the proceedings, this is enough to show the proper swearing of the grand jury. In *Crain v. United States*, [162 U. S. 625](#) , cited by counsel for defendant, the record was destitute of any showing that the accused was arraigned or pleaded to the indictment. See *Pointer v. United States*, [151 U. S. 396](#) , [151 U. S. 418](#) .

As to the assignment of error that there were certain defective counts in the indictment, the conviction was a general one, and, even if the counts were defective, as alleged, one good count, sufficient to sustain the sentence, is all that is required to warrant the affirmation of a judgment in error proceedings. *Dunbar v. United States*, [156 U. S. 185](#) .

As to the objection that the petit jury was not sworn: the record discloses that they were "called and impaneled," and,

"being selected and tried in the manner prescribed by law, the truth of and upon the premises to speak, and having heard the evidence, the arguments of counsel, and charge of the judge, retired to consider their verdict, and upon their oaths do say,"

etc. We

think that this sufficiently discloses, upon proceedings in error after conviction, that the petit jury was duly sworn.

The chief objection contended for in argument concerns the admission in the district court of the testimony of the defendant before the commissioner. The admission of this testimony is claimed to have worked a violation of the defendant's constitutional rights under the Fifth Amendment to the Constitution, which protects him against self-incrimination. It appears from the bill of exceptions that the defendant voluntarily took the stand and testified in his own behalf. This he might do under the federal statute (March 16, 1878, 20 Stat. 30, c. 37, U.S.Comp.Stat. 1901, p. 660) making the defendant a competent witness "at his own request, but not otherwise." We are of the opinion that it was not essential to the admissibility of his testimony that he should first have been warned that what he said might be used against him. In *Wilson v. United States*, [162 U. S. 613](#) , Wilson was charged with murder. Before a United States commissioner, upon a preliminary hearing, he made a statement which was admitted at the trial. He had no counsel, was not warned or told of his right to refuse to testify, but there was testimony tending to show that the statement was voluntary. At pages [162 U. S. 623](#) -624, this Court said:

"And it is laid down that it is not essential to the admissibility of a confession that it should appear that the person was warned that what he said would be used against him, but, on the contrary, if the confession was voluntary, it is sufficient, though it appear that he was not so warned. Joy, Confessions, *45, *48, and cases cited."

". . . He [Wilson] did not testify that he did not know that he had a right to refuse to answer the questions, or that, if he had known it, he would not have answered. . . . He did not have the aid of counsel,

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and he was not warned that the statement might be used against him, or advised that he need not answer. These were matters which went to the weight or

credibility of what he said of an incriminating character, but, as he was not confessing guilt, but the contrary, we think that, under all the circumstances disclosed, they were not of themselves sufficient to require his answers to be excluded on the ground of being involuntary as matter of law."

In the present case, it does not appear that the witness claimed his privilege, or was ignorant of it, or that, if he had known of it, would not have answered -- indeed, the record shows that his testimony was entirely voluntary and understandingly given. Such testimony cannot be excluded when subsequently offered at his trial.

As to the contention that the cross-examination before the commissioner, shown in the bill of exceptions, was improperly extorted from the witness under threat of commitment, an examination of the bill of exceptions, we think, requires an answer overruling this exception. There is some difference of opinion expressed in the authorities, but the rule recognized in this Court is that a defendant who voluntarily takes the stand in his own behalf, thereby waiving his privilege, may be subjected to a cross-examination concerning his statement. "Assuming the position of a witness, he is entitled to all its rights and protection, and is subject to all its criticisms and burdens," and may be fully cross-examined as to the testimony voluntarily given. *Reagan v. United States*, [157 U. S. 301](#) , [157 U. S. 305](#) . The rule is thus stated in *Brown v. Walker*, [161 U. S. 597](#) :

"Thus, if the witness himself elects to waive his privilege, as he may doubtless do, since the privilege is for his protection, and not for that of other parties, and discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure. 1 Greenl. Ev. 451; *Dixon v. Vale*, 1 C. & P. 278; *East v. Chapman*,

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2 C. & P. 570, s.c., M. & M. 46; *State v. K____*, 4 N.H. 562; *Low v. Mitchell*, 18 Me. 372; *Coburn v. Odell*, 30 N.H. 540; *Norfolk v. Gaylord*, 28 Conn. 309; *Austin v. Prince*, 1 Sim. 348; *Commonwealth v. Pratt*, 126 Mass. 462;

Chamberlain v. Willson, 12 Vt. 491; *Lockett v. State*, 63 Ala. 5; *People v. Freshour*, 55 Cal. 375."

"So, under modern statutes permitting accused persons to take the stand in their own behalf, they may be subjected to cross-examination upon their statements. *State v. Wentworth*, 65 Me. 234; *State v. Witham*, 72 Me. 531; *State v. Ober*, 52 N.H. 462; *Commonwealth v. Bonner*, 97 Mass. 587; *Commonwealth v. Morgan*, 107 Mass.199; *Commonwealth v. Mullen*, 97 Mass. 545; *Connors v. People*, 50 N.Y. 240; *People v. Casey*, 72 N.Y. 393."

But it is contended by the defendant that the bill of exceptions shows that the alleged cross-examination was entirely irrelevant and improper, and not a legitimate cross-examination of the defendant's testimony in his own behalf. It appears that Powers testified, being charged with illegal conduct concerning the distillation of spirits, as already stated, that he was at a place about thirty steps from the still, beating apples, as testified by the government's witness; that Preston Powers had hired him to work for him at the price of seventy-five cents a day, and that he put him to beating apples; that the witness had no interest in the apples or the product thereof, and no interest in the still, but was merely hired to work by the day at the price of seventy-five cents. Having taken the stand in his own behalf, and given the testimony above recited, tending to show that he was not guilty of the offense charged, he was required to submit to cross-examination, as any other witness in the case would be, concerning matter pertinent to the examination in chief. The cross-examination, in the answer elicited, tended to

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show that defendant had worked at a distillery the fall before with Preston Powers, the man he alleged he was working for at beating apples on the occasion when the government witness saw him near the still, and had made brandy near his house, and had paid Preston Powers to assist him. This, we think, might be regarded as having some relevancy to the defendant's claim as to the innocent character of his occupation at the time charged. It had a tendency to show that defendant knew the character of the occupation in which he was then engaged,

having worked before with Preston Powers at a distillery and made brandy with him, and did not exceed the limits of a proper cross-examination of the witness. As to the suggestion that 860 of the Revised Statutes prevented the introduction of the testimony given by defendant before the commissioner, that section, providing that no pleading, nor any discovery or evidence obtained from a party by means of a judicial proceeding shall be used in evidence against him in a criminal proceeding, can have no bearing where, as in the present case, the accused voluntarily testified in his own behalf in the course of the same proceeding, thereby himself opening the door to legitimate cross-examination. See *Tucker v. United States*, [151 U. S. 164](#) , [151 U. S. 168](#) .

Judgment affirmed.