The Burger Court Opinion Writing Database

Colten v. Kentucky

407 U.S. 104 (1972)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 9, 1972

Re: No. 71-404 - Colten v. Kentucky

Dear Byron:

Please join me.

Regards,

WEB

Mr. Justice White

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-404

6/15/72

Lewis Colten, Appellant,
v.
Commonwealth of Kentucky.
On Appeal from the Court of Appeals of Kentucky.

[June —, 1972]

MR. JUSTICE DOUGLAS, dissenting.

This case arose in the aftermath of a visit of the President's wife to Lexington, Kentucky, where nothing untoward happened. After her plane had left, petitioner and a group of his friends got into "some six to ten cars" and started down the access road leading from the airport to the main highway. The lead car was stopped by the police because of an expired license plate and at the officer's request, pulled onto the shoulder of the access road. Petitioner who followed also pulled onto the shoulder as did the other cars in the group. So there were no cars belonging to petitioner's group blocking traffic.

The people in the cars, however, walked around, some talking with the police and petitioner talking mostly with the driver of the lead car. Petitioner claimed that he only wanted to advise the man who was getting the citation of his rights and to help arrange for the driver and passengers in the lead car to get to Lexington. The Court of Appeals of Kentucky, however, said that "Colten's real intent was simply to aggravate, harass, annoy and inconvenience the police, for no purpose other than the pleasure of aggravation, harrassment, annoyance and inconvenience." 467 S. W. 2d 374, 376.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 6, 1972

RE: No. 71-404 - Colten v. Kentucky

Dear Byron:

I agree.

Sincerely,

Mr. Justice White

cc: The Conference

B
W

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 6, 1972

71-404 - Colten v. Kentucky

Dear Byron,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

1st DRAFT

Circulated: 6-5-72

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SUPREME COURT OF THE UNITED STATES

No. 71-404

Lewis Colten, Appellant, *v.* Commonwealth of Kentucky. | On Appeal from the Court of Appeals of Kentucky.

[June —, 1972]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case presents two, unrelated questions. Appellant challenges his Kentucky conviction for disorderly conduct on the ground that his conviction and the State's statute are repugnant to the First and Fourteenth Amendments. He also challenges the constitutionality of the enhanced penalty he received under Kentucky's two-tier system for adjudicating certain criminal cases, whereby a person charged with a misdemeanor may be tried first in an inferior court and, if dissatisfied with the outcome, may have a trial *de novo* in a court of general criminal jurisdiction but must run the risk, if convicted, of receiving a greater punishment.

Appellant Colten and 15 to 20 other college students gathered at the Blue Grass Airport outside Lexington, Kentucky, to show their support for a state gubernatorial candidate and to demonstrate their lack of regard for Mrs. Richard Nixon, then about to leave Lexington from the airport after a public appearance in the city. When the demonstration had ended, the students got into their automobiles and formed a possession of six to 10 cars proceeding along the airport access road to the main highway. A state policeman, observing that one of the

B/

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To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: White, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

Recirculated: 6-8-72

No. 71-404

Lewis Colten, Appellant,
v.
Commonwealth of Kentucky.

On Appeal from the Court of Appeals of Kentucky.

[June —, 1972]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case presents two, unrelated questions. Appellant challenges his Kentucky conviction for disorderly conduct on the ground that the conviction and the State's statute are repugnant to the First and Fourteenth Amendments. He also challenges the constitutionality of the enhanced penalty he received under Kentucky's two-tier system for adjudicating certain criminal cases, whereby a person charged with a misdemeanor may be tried first in an inferior court and, if dissatisfied with the outcome, may have a trial *de novo* in a court of general criminal jurisdiction but must run the risk, if convicted, of receiving a greater punishment.

Appellant Colten and 15 to 20 other college students gathered at the Blue Grass Airport outside Lexington, Kentucky, to show their support for a state gubernatorial candidate and to demonstrate their lack of regard for Mrs. Richard Nixon, then about to leave Lexington from the airport after a public appearance in the city. When the demonstration had ended, the students got into their automobiles and formed a possession of six to 10 cars proceeding along the airport access road to the main highway. A state policeman, observing that one of the

pp 12, 13

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

From: White, J.

Circulated: _____

Recirculated: 6-9-72

SUPREME COURT OF THE UNITED STATES

No. 71-404

Lewis Colten, Appellant,
v.
Commonwealth of Kentucky.
} On Appeal from the Court of Appeals of Kentucky.

[June 12, 1972]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case presents two, unrelated questions. Appellant challenges his Kentucky conviction for disorderly conduct on the ground that the conviction and the State's statute are repugnant to the First and Fourteenth Amendments. He also challenges the constitutionality of the enhanced penalty he received under Kentucky's two-tier system for adjudicating certain criminal cases, whereby a person charged with a misdemeanor may be tried first in an inferior court and, if dissatisfied with the outcome, may have a trial *de novo* in a court of general criminal jurisdiction but must run the risk, if convicted, of receiving a greater punishment.

Appellant Colten and 15 to 20 other college students gathered at the Blue Grass Airport outside Lexington, Kentucky, to show their support for a state gubernatorial candidate and to demonstrate their lack of regard for Mrs. Richard Nixon, then about to leave Lexington from the airport after a public appearance in the city. When the demonstration had ended, the students got into their automobiles and formed a possession of six to 10 cars proceeding along the airport access road to the main highway. A state policeman, observing that one of the

No. 71-404 - Lewis Colten v. Commonwealth of Kentucky

MR. JUSTICE MARSHALL, dissenting.

In my view, North Carolina v. Pearce, 395 U.S. 711 ( ) requires a reversal of this case.

In this case the Court correctly evaluates Kentucky's proc edure: "A defendant convicted after a trial or plea in an inferior court may not seek an ordinary appellate review of the inferior courts ruling. His recourse in the trial de novo." From this the conclusion is reached that the "trial de novo" is not an appeal. What, then, is it?

The pertinent Kentucky statute provides:

12.02 Manner of Taking

(1) An appeal to the circuit court is taken by filing with the clerk thereof a certified copy of the judgment and the amount of costs, and causing to be executed before the clerk a bond to the effect that the defendant will pay the costs of the appeal and perform the judgment which may be rendered against him on the appeal; whereupon, the clerk shall issue an order to the judge or the justice rendering the judgment, to stay proceedings thereon, and to transmit to the office of said clerk all the original papers in the prosecution.

(2) The applicable provisions governing bail shall apply to the bond provided for in subsection (1).

(3) After the service of the order to stay proceedings no execution shall be issued from the inferior court. and any officer on whom the order is served shall return the execution in his hands as suspended by appeal.

B

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 7, 1972

Re: No. 71-404 - Colten v. Kentucky

Dear Byron:

Please join me.

Sincerely,

H.A.B.

Mr. Justice White

cc: The Conference

April 19, 1972

MEMORANDUM TO THE CONFERENCE:

Re: No. 71-404 COLTEN v. KENTUCKY

The second issue in this case involves the two-stage Kentucky procedure with respect to misdemeanors, the first being a preliminary trial in a police-type court and the second - if desired by the defendant - a full, de novo trial in a court of record.

As we have this system in Virginia, and as I think it has genuine merit, I write this memorandum to share my own observation of the system with members of the Conference.

The system operates to the advantage of defendants and also facilitates the economical and expeditious administration of criminal justice. The first "trial" is the familiar type of informal treatment of minor criminal offenses. It is true that justice is "mass produced" with the result that many defendants are not afforded a fair trial at this level. Yet, for each such defendant whose rights may be infringed, there are perhaps hundreds of routine cases in which satisfactory justice is rendered swiftly and at little expense either to the defendant or the state. On a typical day in my city of Richmond the police court

will handle several dozen such cases, excluding routine traffic offenses which go to a special traffic court.

If, however, a defendant is dissatisfied with the disposition of his case, he may appeal - as a matter of right - to a court of record where his case is tried de novo before a jury (unless waived). There is little or no chance - as in Pierce - that the judge or jury in the trial de novo will have a desire to penalize a defendant for appealing. The appeal is to an entirely different court, with a different judge and of course with a jury which is not informed as to the penalty imposed below.

As counsel stated in the argument of Colten, a typical lower court trial in Kentucky takes about 10 minutes whereas the de novo trial of Colten in the court of record took an entire day - with a substantial number of witnesses. The evidence and issues developed at a 10-minute trial cannot be compared with what transpires at a full-blown trial. What may have seemed an appropriate sentence at the first trial may be entirely inappropriate after a full hearing.

I see no Pierce problem in this type of procedure, which is designed essentially for the benefit of defendants - providing, in effect for alternative or dual opportunities for trial. I can conceive of no constitutional reason and certainly none in terms of public policy - for extending the Pierce doctrine to this entirely different situation.

If the trial de novo were subject to the limitation that the penalty could not exceed that imposed below, I would think the type of hearing below - certainly in cases deemed by the prosecution to be of any importance - would drastically change. No conscientious prosecutor would be content with a 10 or 15-minute hearing in the police court, if he knew that the state would be bound by the police judge's sentence. Conversely, a well-counseled defendant, understanding the importance of minimizing sentence at that level, would be likely to insist upon a far more elaborate trial initially. In short, a system which now operates in effect as a "screening process" would be converted into a true dual system of trials, imposing additional burdens upon both defendants and the state. The principal problem with criminal justice today is court congestion and delay. I would not wish to exacerbate this situation, unless the Constitution clearly requires it.

L. F. P., Jr.

(B)

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 9, 1972

Re: No. 71-404 Colten v. Kentucky

Dear Byron:

Please join me.

Sincerely,

L. Lewis

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 6, 1972

Re: No. 71-404 - Colten v. Kentucky

Dear Byron:

Please join me.

Sincerely,

Mr. Justice White

Copies to the Conference