FILED
DEC 21 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

GREGG ANTHONY KLEES, JOHN WAYNE SCHMOLDT, NANCY CHARMAYNE O'BRINE, LOWELL LEROY LAVERLY, and FRANCIS ELMER BUKER,

Petitioners,

vs.

LYNNE E. BRADY, ASSOCIATE DISTRICT COURT JUDGE, LINN COUNTY, IOWA,

Respondent.

Filed December 21, 1978

675
2-60850

Certiorari to the Linn District Court - Lynne E. Brady, Judge.

Certiorari proceeding challenging the authority of respondent to proceed further with a criminal prosecution against petitioners initiated by county attorney's information approved by a judicial magistrate. Writ annulled.

Robert C. Nelson, of Cedar Rapids, for petitioners.

Richard C. Turner, Attorney General, Raymond W. Sullins, Assistant Attorney General, and Eugene Kopecky, Linn County Attorney, for respondent.

Submitted to Oxberger, C.J., and Snell, Carter and Johnson, JJ. Donielson, J., takes no part.

PER CURIAM

Petitioners proceed by certiorari to challenge the authority of respondent to proceed further with a criminal prosecution against them initiated by county attorney's information approved by a judicial magistrate. We uphold the jurisdiction and authority of the respondent to so proceed and annul the writ of certiorari previously issued in this cause.

I. Initially, we conclude that petitioners Laverly and Buker have no standing to urge the only issue presented by petitioners. The information against Laverly was approved by a district associate judge (respondent) so he does not have available to him the issue which we consider on behalf of the other petitioners. Buker has no standing to litigate that issue either, because he has not previously raised the point in the court below, and there is no ruling in his case which we can review.

II. The issue presented by those petitioners who are properly before us involves application of State v. Thompson, 253 N.W.2d 608 (Iowa 1977). That case held that a judicial magistrate has no authority to approve a county attorney's information because § 769.8, The Code, 1977 requires that such informations be approved by either a district judge or a district associate judge. Petitioners entered pleas of guilty to informations approved by a judicial magistrate charging them with OMVUI, contrary to § 321.281, The Code. Subsequent to said plea, but prior to judgment, they moved to withdraw their pleas and to dismiss the information. The basis for both motions was their assertion that because the informations had not been approved as required by § 769.8, the court was without jurisdiction to enter judgment against them. The respondent denied the motions, relying on the language of § 769.18, The Code, 1977, which provides that motions to set aside a county attorney's information "must be made before a plea is entered by the accused." That statute further provides that "if not so made, the objection shall be deemed waived."[1]

In State v. Thompson, supra, the defendant had filed a motion to vacate the information before entering a plea and the supreme court reversed the trial court and ordered the information to be dismissed. In all of the instances now before us, a plea had been entered before the motion to set aside the information was made. We conclude that

[1]One of the statutory grounds for the motion contemplated by § 769.18 is "when the information has not been approved as required." Section 769.17(5), The Code, 1977; State v. Fortunski, 200 Iowa 406, 204 N.W. 401 (1925).

under such circumstances the respondent properly applied the waiver provisions of § 769.18 to petitioners' belated motions. This is in accord with the result reached as to the same or similar issues in State v. Fortunski, 200 Iowa 406, 408, 204 N.W. 401 (1925). In so holding, we necessarily reject the claim that the defect complained of is jurisdictional, as did the court in State v. Fortunski, supra.

The writ of certiorari is annulled.