

1970

# The State of Utah v. Juan P. Jaramillo : Brief of Respondent

Utah Supreme Court

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

THE STATE OF UTAH,

*Plaintiff*

vs.

JOHN P. JARAMILLO,

*Defendant*

BRIEF OF APPEAL

APPEAL FROM THE  
CRIME OF ROBBERY  
THE THIRD JUDGE  
OF LAKE COUNTY  
JUDGE ALDON J. AUSTIN

VERMONT

AND

LAUREN

CHIEF

225

Salt Lake

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IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

THE STATE OF UTAH, <i>Plaintiff-Respondent,</i>	}	Case No. 12259
vs.		
JUAN P. JARAMILLO, <i>Defendant-Appellant.</i>		

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The defendant-appellant, Juan P. Jaramillo, is appealing from a conviction by jury of robbery in violation of *Utah Code Ann.*, § 76-51-1 (1953), in the Third Judicial District in and for Salt Lake County, State of Utah, the Honorable Aldon J. Anderson, Judge, presiding.

DISPOSITION IN LOWER COURT

Appellant was found guilty by jury of the crime of robbery as charged and was sentenced to the Utah State Prison for an indeterminate term as prescribed by law, the sentence being five years to life, pursuant to *Utah Code Ann.*, § 76-51-2 (1953).

RELIEF SOUGHT ON APPEAL

The respondent asks this court to affirm the appellant's conviction.

## STATEMENT OF FACTS

Appellant was charged with the crime of robbery (R. 7). He originally pleaded not guilty, putting the burden on the State to prove beyond a reasonable doubt all the elements of the crime as charged. Shortly thereafter, he withdrew his plea of not guilty and entered a guilty plea and waived time for passing of sentence. He was sentenced for the indeterminate term as provided by law (R. 14). He served approximately twenty-seven and one-half months in prison and then was allowed to replead, pursuant to Judge A. Sherman Christensen's memorandum decision dated April 23, 1970, on the grounds his guilty plea was not valid.

Thereafter, appellant pleaded not guilty and was convicted by jury trial. The court imposed an indeterminate term as provided by statute (R. 42).

## ARGUMENT

## POINT I.

THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION TO SUBMIT EVIDENCE OF FORMER JEOPARDY TO THE JURY, NOR DID THE COURT ERR IN REFUSING TO INSTRUCT THE JURY ON THE ISSUE OF FORMER JEOPARDY, BECAUSE AS A MATTER OF LAW THE NEW TRIAL WAS NOT DOUBLE JEOPARDY.

Appellant argues that the issue of once in jeopardy is one of fact for the jury. *Appellant's Brief* at 5. He can-

not prevail on that argument, because his new trial after he had succeeded in having his original sentence set aside, was not double jeopardy. *North Carolina v. Pearce*, 395 U. S. 711, 89 S. Ct. 2072 (1969); *United States v. Ewell*, 383 U. S. 116, 86 S. Ct. 773 (1966); *United States v. Tateo*, 377 U. S. 463, 84 S. Ct. 1587 (1964).

“[W]hen a defendant obtains a reversal of a prior, unsatisfied conviction, he may be retried in the normal course of events.” *United States v. Ewell*, *supra*, at 121.

“The Fifth Amendment provides that no ‘person [shall] be subject for the same offense to be twice, put in jeopardy of life and limb. . . .’ The principle that this provision does not preclude the Government’s retrying a defendant whose conviction is set aside because of an error in the proceedings leading to conviction is a well established part of our constitutional jurisprudence.” *United States v. Tateo*, *supra*, at 465.

Furthermore, even though our statute provides that “[a]n issue of fact arises . . . [u]pon a plea of once in jeopardy,” *Utah Code Ann.* § 77-27-1 (1953), the trial court as a matter of law may find there is not a double jeopardy issue, and refuse to submit that “issue” to the jury. California, which has an identical provision in its penal code, *Deering’s California Code*, Penal, § 1041 (1961), has so held. In *People v. Greer*, 184 P. 2d 512 (Cal. 1947), the court said:

“[T]he plea of double jeopardy does not necessarily require a finding by the jury but may require a conclusion of law by the trial court. [Citations omitted.] *If, as a matter of law, the previous prose-*

*cution could not constitute double jeopardy, the trial court is not required to submit the question to the jury for a finding upon that plea." Id. at 516. (Emphasis added.)*

The Arizona Supreme Court has held likewise. *State v. Woodring*, 386 P. 2d 851 (Ariz. 1963).

The law is the same in Utah. The court does not have to present the issue of double jeopardy to the jury. In *State v. McIntyre*, 92 U. 177 (1937), the appellant complained that the trial court had refused to allow the jury to consider evidence concerning former jeopardy, pursuant to the Utah Statutes. The court in that case stated:

"The defendant has the burden of proving his plea of . . . former jeopardy, and the question as to whether he has offered sufficient evidence to raise an issue of fact upon which a jury can pass is a question of law for the court. *Id.* at 185.

"In that regard a plea of former jeopardy . . . differs from a plea of not guilty. A defendant is presumed innocent until the state, which has the burden of proof to the contrary, has established his guilt to the satisfaction of the jury beyond a reasonable doubt . . . *On a plea of . . . former jeopardy, there is no presumption in favor of defendant. He has the burden of proof and unless he offers evidence which raises an issue of fact, the court should not submit the matter to the jury."* *Id.* at 186. (Emphasis added.)

## POINT II.

THE COURT BELOW DID NOT ERR IN IMPOSING AN INDETERMINATE TERM WITHOUT SUBTRACTING THEREFROM THE PER-



IOD OF APPELLANT'S PRIOR IMPRISON-  
MENT.

Appellant argues that when the trial court imposed his present sentence, the time previously spent in prison was not credited to him, and therefore the court erred. He cites *North Carolina v. Pearce*, 395 U. S. 711 (1969) to support his contention.

Appellant has not properly expressed the issue in *Pearce*. He points out in his brief at page 6 that Mr. Pearce was tried and sentenced, and then retried and resentenced. The second sentence, when added to the time already served, amounted to a longer sentence than had been imposed at Pearce's first trial. The stricter sentence on retrial presented one issue in that case, but is *not* the same issue appellant raises in case at bar. Pearce had been credited at his second sentencing with the time he had already served. However, *Rice*, whose matter before the Supreme Court was also decided in *North Carolina v. Pearce, supra*, did raise the issue whether in computing a new sentence after retrial, credit must be given for time already served, which is the issue appellant in case at bar does raise.

Rice received a sentence of 25 years on his retrial, but had served two and one-half years, pursuant to his initial 10 year sentence for which he had received no credit. The Court held "that the Constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully 'credited' in imposing sentence upon a new conviction for same offense." *Id.* at 718.

However, *Pearce, supra*, does not help the appellant in case at bar because appellant here does not come under the *Pearce* ruling.

In case at bar, appellant was not sentenced to a definite term, as was Rice, from which the court could nicely subtract the time he had already spent in prison. His statutory sentence is five years to life; how could the court have subtracted twenty-seven and one-half months from a life sentence? However, that does not mean the time appellant has been in prison will be "wiped off the slate."

Concerning sentencing, our statute provides:

"Whenever any person is convicted . . . and the judgment provides for punishment in the state prison, the court shall not fix a definite term of imprisonment; but the sentence and judgment of imprisonment in the state prison shall be for a period of time not less than the minimum and not to exceed the maximum term provided by law . . ." *Utah Code Ann.*, § 77-35-20 (Supp. 1963).

Under this indeterminate sentence law, the trial court does not impose a definite sentence, and the sentence is construed as a sentence for the maximum period prescribed, "subject to the right of the Board of Pardons to determine the release date of the convicted person from incarceration." *State v. Bassett*, 14 U. 2d 412, 414 (1963).

The Board of Pardons has the duty to determine "when and under what conditions . . . [prisoners] . . . may be released upon parole, pardoned, . . . or [have] their sentences commuted or terminated. . . ." *Utah Code Ann.*, § 77-62-3(a) (1953).

The Board of Pardons, in dealing with a prisoner sentenced to an indeterminate term receives information from the judge and prosecuting attorney setting forth, inter alia, "any . . . information that will aid the board of pardons in passing upon the application for the termination or commutation of such sentence, or for parole pardon." *Utah Code Ann.*, § 77-62-8(c) (1953).

Since the trial court could not have subtracted the twenty-seven and one-half months from a life sentence, and the indeterminate sentence here is construed as a life sentence, *State v. Bassett*, *supra*, the issue of whether appellant has not been credited for time already served is not presently before the court.

If the Board of Pardons does not consider the time appellant served prior to his present sentence, the issue then might come before the court. *State v. Perfetto*, ..... U. 2d ..... (Case No. 11914, Oct. 1970).

Appellant also argues that the court below erred in not subtracting from his sentence the time spent in jail prior to trial, and that therefore his sentence was prolonged on the grounds he had no money to pay bail. The United States Supreme Court held in *Williams v. Illinois*, 90 S. Ct. 2018, 2023 (1970), "that the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status." Neither the holding nor the underlying policy in *Williams* was violated in case at bar. The trial court did not extend appellant's sentence as much as one second on the ground he did not make bail.

## CONCLUSION

Respondent submits that this Court should affirm the judgment and sentence of the court below.

The trial judge did not err in refusing to allow the issue of former jeopardy to go to the jury, nor did the court below err in imposing the statutory indeterminate sentence without subtracting therefrom the time appellant already had spent imprisoned.

None of appellant's statutory nor constitutional rights were violated.

Respectfully submitted,

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