

1976

Hal Laverne Cornell v. Delmar Larson, Sheriff of Salt Lake County, And Robert C. Gibson, Judge of Salt Lake City Court : Respondent's Brief

Utah Supreme Court

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IN THE SUPREME COURT
OF THE
STATE OF UTAH

HAL LAVERNE CORNELL, :

Petitioner- :
Appellant :

vs. :

Case No. 14570

DELMAR LARSON, Sheriff :
of Salt Lake County, and :
ROBERT C. GIBSON, Judge :
of Salt Lake City Court, :

Respondents- :
Appellees. :

RESPONDENT'S BRIEF

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STATEMENT OF THE NATURE OF THE CASE

This is an appeal from the denial of a Writ of Habeas Corpus of the Third Judicial District In and For Salt Lake County, the Honorable Ernest F. Baldwin, Jr., Judge, presiding.

DISPOSITION IN LOWER COURT

On the 12th day of January, 1976, an Order to Show Cause as to why probation should not be terminated and a commitment to the Salt Lake County Jail was issued. A Petition for Writ of Habeas Corpus was filed by appellant and was properly denied by the Honorable Ernest F. Baldwin, Jr., District Judge.

RELIEF SOUGHT ON APPEAL

Respondents seek an affirmance of the lower court denial of appellants Petition for a Writ of Habeas Corpus and a dismissal of the appeal.

STATEMENT OF FACTS

Appellant pleaded guilty to the crime of petty larceny in Salt Lake City Court on the 24th day of October, 1974. On that date he was sentenced to imprisonment for six months and ordered to pay a fine in the amount of \$150.00. The imposition of the jail sentence was stayed and appellant was placed on probation for one year. On August 27, 1975, the court ordered a

bench warrant to issue for the appellant based upon allegations of probation violation. On January 12, 1976, an Order to Show Cause was issued as to why probation should not be terminated and a committment issued. A hearing was held on January 27, 1976, before the Honorable Robert C. Gibson, and it was determined that petitioner had violated his probation and he was ordered committed to the Salt Lake County Jail to serve the original sentence of six months. A Writ of Habeas Corpus was filed and the committment stayed until a final determination could be made regarding the issue now before this Honorable Court.

POINT I

WHERE THERE IS NO STATUTORY AUTHORITY DEFINING MAXIMUM PROBATIONARY PERIODS, THE COURT IS PERMITTED TO EXERCISE DISCRETION AND PROVIDE A PROBATION THAT SERVES THE PURPOSE FOR WHICH IT WAS CREATED - TO WIT, THE REFORMATION AND REHABILITATION OF A DEFENDANT. THE TRIAL COURT ACTED WELL WITHIN STATUTORILY - PRESCRIBED DISCRETION IN PLACING PETITIONER-APPELLANT ON PROBATION FOR 1 (ONE) YEAR WHEN THE MAXIMUM PERIOD OF INCARCERATION FOR THE SAME OFFENSE WAS 6 (SIX) MONTHS.

The Utah State Legislature, in section 77-35-17, Utah Code Annotated, (1953), as amended, has enacted a probation statute that imposes no prescribed limitations of time for such probation and has clearly left such matters to the discretion of the court as seen below:

77-35-17

Suspension of sentence - Probation-Conditions of probation - Power of Court to dismiss or discharge defendant. Upon a plea of guilty or conviction of any crime or offense, if it appears compatible with the public interest, the Court having jurisdiction may suspend the imposition for such period of time as the court shall determine.

The court may subsequently increase or decrease the probation period, and may revoke or modify any condition of probation. While on probation, the defendant may be required to pay, in one or several sums, any fine imposed at the time of being placed on probation. The defendant may also be required to make restitution or reparation to the aggrieved party or parties for the actual damages or losses caused by the offense to which the defendant has pleaded guilty or for which conviction was had. Further the defendant may be required to provide for the support of his wife or others for whose support he may be legally liable. Where it appears to the court from the report of the probation agent in charge of the defendant or otherwise, that the defendant had complied with the conditions of such probation, the court may if it be compatible with the public interest whether upon motion of the County Attorney or of its own motion, terminate the sentence or set aside the plea of guilty or conviction of the defendant, and dismiss the action and discharge the defendant. Utah Code Annotated (1953), as amended (Emphasis added)

Throughout the statute, the Utah Legislature has provided the court with flexibility and discretion in the administration of the probation provision. The Court, by statute, is not only permitted to set the duration of probation, but also to modify any conditions of probation.

A period of probation under Utah law should not as a matter of law, be limited to the maximum jail sentence that can be imposed. Under Utah law, some jail sentences cannot exceed 90 days, as for a Class C misdemeanor (Sec 76-3-204 (3)) and a probationary period of such limited duration hardly serves any useful purpose. It is in misdemeanor type offenses where probation may be most appropriate rather than a jail sentence. But if the supervision of such a wrongdoer is to be limited to the maximum jail sentence that can be served, probation in such cases becomes a meaningless gesture. The court in such cases, when given the alternative of a short jail sentence or a short and thus, less meaningful probation period, may well impose more jail sentences in subsequent cases. However, a supervised probation, if available, may well steer a defendant away from further criminal activity and would certainly decrease the defendant's chances of incarceration.

There is no clear delineation of case law in the United States. Nonetheless, the trend is decidedly toward the more enlightened utilization of probation beyond maximum incarceration periods. In 1970, the Maryland Legislature enacted the following:

"Upon entering a judgment of conviction, the court having jurisdiction, may suspend the imposition or execution of sentence and place the defendant on probation upon such terms and conditions as the courts deem proper. The court may impose a sentence for a period and provide that a lesser period be served on confinement, suspend the remainder of the sentence and grant probation for a period longer than the sentence but not in excess of five years.

Probation may be granted whether the offense is punishable by fine or imprisonment or both. If the offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to the imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation shall extend to the entire sentence and judgment. The court may revoke or modify any condition of probation or may reduce the period of probation." Code, Art. 27, §641A, 1 July 1970 (emphasis added)

Probation is a program recognized in the law as a means of rehabilitation and guidance for the public offender. Recognizing this humane concept, most jurisdictions permit the probationary period to exceed the maximum possible sentence if the circumstances dictate and such to do so would be in the interests of justice. The legislature in Utah by enacting Utah Code Annotated Section 77-35-17 has authorized the courts of this state to increase the period of probation originally fixed if it be in the public interest.

Defendants in many cases, through plea negotiation, plead to a lesser included offense and frequently do such in the

belief that a plea to the lesser offense may likely result in consideration for probation. If courts are limited to a brief probation period, then judges are placed in the position of either denying the plea to a lesser included offense or utilizing jail sentences as the only reasonable sentence remaining open. Certainly, the public interest is better served when a probation is ordered where there exists a reasonable chance for rehabilitation than incarceration.

Federal statutes (18 USC §3651) provide for an extended probation period and such as been supported by the United States Supreme Court in a line of cases, the principle of which is Frank v. United States, 395 U.S. 147, 23 L. Ed 2d 162, 89 S. Ct 1503 (1969). (Citations of other cases are set forth in 24 C.J.S. Criminal Law §1571 (4) Supplement) In Frank, Mr. Justice Thurgood Marshall expressed the interpretation of the court of such statutes as follows:

"Numerous federal and state statutory schemes allow significant periods to be imposed for otherwise petty offenses. For example, under federal law, most offenders may be placed on probation for up to five years in lieu of or, in certain cases in addition to a term of imprisonment.

.....
Therefore, the maximum penalty authorized in petty offense cases is not simply six months imprisonment and a \$500.00 fine. A petty offender may be placed on probation for up to five years and if the terms or probation are violated, he may then be imprisoned for six months," Frank, supra, at 167.

The American Bar Association has set forth similar guidelines in its Standards for Criminal Justice.

"1.1 Nature of sentence to probation.

(d) The court should specify at the time of sentencing the length of any term during which the defendant is to be supervised and during which the court will retain power to revoke the sentence for the violation of specified conditions. Neither supervision nor the power to revoke should be permitted to extend beyond a legislatively fixed time, which should in no event exceed two years, for a misdemeanor or five years for a felony." Standards, p. 21 Probation

The Committee's commentary adds the opinion that the limits on the length of a sentence to probation should be determined independently of the appropriate length of a prison sentence for the same offense and that a particular sentence to probation should be meted in consideration of the individual needs of the defendant. Standards p. 26

The ABA Standards on Sentencing Alternatives and Procedures further reflects on the current trend in purpose of probation in stating that the basic objective of law and government is to provide an orderly alternative to the adjustment of conflicts through self-help. (It is noteworthy that the Utah Code is cited as an example of non-institutional sentencing provisions.)

"The second general principle, (regarding probation) is that the specific term thus fixed should be statutory limitation not be permitted to exceed five years in the case of a felony or two in the case of a misdemeanor. The five year limit in felony cases is found in many current statutes. See e.g., Alaska Stat. §12.55.090 (c) (1962); Ark. Stat. Ann. §43-2331 (1965 Supp); Colo. Rev. Stat. Ann. §39-16-6 (1) (1963); Fla. Stat. Ann. §775.14 (1965); Hawaii Rev. Laws §258.53 (1965 Supp.); Ill. Ann. Stat. c. 38, §117-1(b) (Smith-Hurd 1964) (two year extension authorized); Kan. Gen Stat. Ann. §62-2243 (1964) (five year extensions authorized; period cannot exceed authorized prison term); La. Code Crim. Proc. §893 (1967); Neb. Rev. Stat. §29-2219(1) (1964); N. E. Rev. Stat. Ann. §504.1 (1955); N. J. Stat. Ann. §2A:168-1 (1953); N. M. Stat. Ann. §40A-29-17 (1964); N. Y. Penal Law §65.00(3) (eff. Sept. 1, 1967); Ore. Rev. Stat. §137.510(1)(b) (1963); 18. U.S. C. 3651 (1964); Wyo. Stat. Ann. §7-315 (1957); The five year limit is also recommended by the Special Committee on Correctional Standards appointed to assist the President's Criminal Commission. See President's Comm'm Corrections, Appendix A, p. 207.

.....
 "The limitation on the term for a misdemeanor is not so common, although it is found in at least four states and in the Model Penal Code, See Colo. Rev. Stat. Ann. §39-16-6(1) (1963) (one year limit); La. Code Crim. Proc. §894 (1967); Mich. Stat. Ann. §28:1132 (1954); Neb. Rev. Stat. §29-2219(1) (1964); Model Penal Code §301 2(1), Appendix B. infra. In addition to the reasons which are applicable to felonies, the limit for misdemeanor stems in part from the position taken in section 2.6 infra, that supposedly ameliorative sentences should in general not exceed the time limits placed on the prison term authorized for the offense. Both this section and section 216(b) contain limited exceptions to this general principle, authorizing two year sentences for misdemeanors while expecting that the typical jail term could not exceed one. In both cases, the exception is warranted in order to permit a sufficient length of time for rehabilitative programs to take hold." Standards p. 71 (Emphasis added)

Another section of the Utah Code, §58-37-9 (10), which deals with penalties for possessing marijuana, among other things, provides that the court may place a defendant on probation upon "any reasonable terms and conditions as may be required." It is apparent, therefore, that the legislature intended to give the courts certain limited discretion in granting probation. The legislature has thus provided all-important flexibility in the administration of the humane prerogative of probation. The court may set the duration of probation and modify any conditions thereof. This is consistent with the overall policy of the Utah Criminal Code as expressed in Utah Code Annotated §76-1-104 (as amended 1975):

"The provisions of this code shall be construed in accordance with these general principles:...

(3) prescribe penalties...which permit recognition of difference in rehabilitation possibilities among individual offenders." (Emphasis added)

Courts in Colorado, like Utah, may grant probation for whatever period as they deem best suited to the needs of the defendant and consistent with the interests of society. (C.R.S. §16-11-202). Other states allow the trial court to set probation within some limit that has no relation to the possible incarceration period. In Nevada for example, probation may be extended for as long as five years (NRS 176.215). Hawaii, like Nevada places a five year limit on probation, even for misdemeanors (HRS, §711-77). Appellant cites Oklahoma as a state in which case law supports his

position. Note the date of Ex Parte Eaton, 29 Okla. Ct. App. 275, 233 P781 (1925). Oklahoma in fact permits probation to extend up to two years (OSA 22 §991c) and such became law in 1970 rendering Eaton impotent and without force.

Some states have different probation period limitations depending on whether the defendant was convicted of a felony or a misdemeanor. Kansas specifies five years for felonies and two years for misdemeanors. Again, appellant cites Kansas as a supporting state. Note In re Carroll, 91 Kan. 395, 137 P. 975 (1914). Carroll, however, is a 1914 case and has long since been overturned by legislative action. In Application of Young, 201 Kan. 140, 439 P. 2d 142 (1968), the Supreme Court of Kansas explains:

" The parole authority of a police court was considered in Carroll. The statute then in effect (Laws of 1909, Chap. 116, Sec. 2) was examined and since it provided no limit on the term of a parole granted thereunder, this court held that a police court had no power to grant a parole for a term longer than the sentence imposed. . . The statute was amended in 1947. . . under which a police court is specifically authorized to grant a parole for a term extending beyond the sentence. . .

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The language of K.S.A. 20-2312 is plain and unambiguous. . . . The statute supercedes any case law pertaining to the subject. (43P P.2d at 143, 145)

Furthermore, felony probation in Kansas may be later extended five additional years and misdemeanor probation may be extended an additional two years. The statute, however, goes on to provide that, in any case, felony probation can not be extended past the sentence limit (KSA 21-4611). Obviously, such is not true for misdemeanors. In Kansas, a misdemeanant may receive only a year's incarceration (KSA 21-4502). Therefore, in Kansas, a misdemeanant may be placed on probation for up to four years-three years beyond the maximum possible incarceration!

Appellant relies heavily on Idaho cases in his argument, particularly State v. Sandoval, 92 Idaho 853, 452 P.2d 350 (1969), and Ex Parte Medley, 73 Idaho 474, 253 P.2d 794 (1953). Respondents contend that neither case applies to the case before the court. In Idaho, although probation can be four times longer than imprisonment for a misdemeanor, the rule is different for felonies where probation is limited by the maximum period of incarceration. Both the Sandoval and Medley decisions involve felony convictions and not a misdemeanor conviction as in the instant case, and therefore, neither case can be considered as authority for appellant's position. The Idaho statute in fact, is similar to that in Kansas. A misdemeanant may be placed on probation for up to two (2) years (IC 19-2601(7)), although the maximum sentence is six (6) months imprisonment (IC 18-113).

Again, note appellant's reliance upon the 1951, State v Eikelberger case for support.

California extends probation well beyond most jurisdictions. In that state, a misdemeanor who could only be incarcerated for ninety (90) days may be place on probation for as long as three (3) years (California Penal Code, §1203a and People v. Heath, 72 Cal. Rptr. 457 (1968)).

The state of Oregon directs that a defendant may not be placed on probation for less than one year (ORS 137.010). Among the fourteen (14) western states, only Arizona, New Mexico and Washington restrict probation by the maximum length of sentence (ARS 13-1657, NMSA 4 OA-29-19 and RCW 9.95.200).

There are many policy reasons for allowing a trial judge the discretion to extend probation for a reasonable length of time even if it may be for longer than the maximum possible sentence.

Probation is an attempt to give first offenders and some others a chance to demonstrate their capacity to overcome their errors. Another reason for sustaining extended (but not excessive) probation is to permit the trial judge the discretion to extend probation beyond a six month period in order to permit a defendant to meet other probationary conditions such as restitution, reparation, or fine. To fail to permit such would

be tantamount to requiring incarceration without any humane provision to consider individual circumstances.

Respondents strongly urge this court to affirm the decision of the lower court. Appellant would seek to apply very rigid standards in an area that has a special need for discretion. A trial judge, at the time of sentencing and with the information available to effectively analyze the needs of the defendant and the best interests of society has the greater overview to evaluate the needs of an individual than has the legislature. The legislature recognized this and provided the statutory grounds to support the trial judge. The legislature unequivocally endowed the trial court with broad discretion which respondents ask this court to sustain. Appellant's authority for his position that probation should be limited by statutory sentencing provisions demonstrates the minority view.

CONCLUSION

Thus, it may be seen that not only are the probation requirements a function of the sound discretion of the trial court but also, that the probation period may occasionally exceed the statutory sentencing requirement of incarceration. Support for such a position is found by majority in recent case law and represents the trend of the viewpoints of many jurisdictions throughout the United States and without a legislative prohibitive

to the contrary, such should be the position of Utah courts in light of 77-35-17, Utah Code Annotated (1953), as amended. Respondents respectfully submits that the denial of appellants Petition for a Writ of Habeas Corpus should be affirmed and this appeal denied.