

1976

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

Utah Supreme Court

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DATE DUE

IN THE SUPREME COURT
OF THE
STATE OF UTAH

WELL, :

itioner- :
ellant, :

Case No. L4570

Sheriff :
unty, and :
N, Judge :
ty Court, :

Respondent- :
Appellee. :

APPELLANT'S BRIEF

IN THE SUPREME COURT
OF THE
STATE OF UTAH

HAL LAVERNE CORNELL,	:	
Petitioner-	:	
Appellant,	:	
	:	
v.	:	Case No. L4570
	:	
DELMAR LARSON, Sheriff	:	
of Salt Lake County, and	:	
ROBERT C. GIBSON, Judge	:	
of Salt Lake City Court,	:	
	:	
Respondent-	:	
Appellee.	:	
	:	

APPELLANT'S BRIEF

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STATEMENT OF THE NATURE OF THE CASE

Appellant seeks to overturn the lower Court's order committing him to the Salt Lake County Jail.

DISPOSITION OF THE LOWER COURT

On the 12th day of January, 1976 an Order to Show Cause as to why probation should not be terminated and appellant committed to the Salt Lake County Jail issued. After a hearing on January 27, 1976, the Honorable Robert C. Gibson committed appellant to the Salt Lake County Jail. A Petition for Writ of Habeas Corpus issued and was denied. From the denial this appeal is taken.

RELIEF SOUGHT ON APPEAL

Appellant seeks to have the Writ of Habeas Corpus granted.

STATEMENT OF THE FACTS

Appellant pleaded guilty to the crime of petty larceny in Salt Lake City Court on the 24th day of October, 1974. He was sentenced to six months' imprisonment. Imposition of the sentence was stayed and appellant was placed on probation for one year. On January 12, 1976 an Order to Show Cause as to why probation should not be terminated and

a commitment issue; a hearing was held on January 27, 1974 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 for six months.

THE TRIAL COURT ERRED IN PLACING THE APPELLANT ON PROBATION FOR A PERIOD LONGER THAN APPELLANT COULD HAVE BEEN INCARCERATED AND, THEREFORE, THE TRIAL COURT LOST JURISDICTION OVER THE APPELLANT WHEN HE HAD SERVED SIX MONTHS OF HIS PROBATION--THE STATUTORY LIMIT FOR INCARCERATION FOR THE CRIME OF WHICH APPELLANT WAS CONVICTED.

This issue is a novel one in this jurisdiction. In almost all jurisdictions clear statutes exist which precisely define the limits placed on the judiciary by the legislature with respect to permissible lengths of probation. In those jurisdictions where such statutes do not exist, the determination of this issue has been a difficult one. Nevertheless, the weight of the case law indicates that there is only one possible answer to the question when no maximum limit is placed by the legislature on the duration of probation, the limit is the maximum length of time for which a defendant could have been incarcerated.

The Utah statute with respect to probation reads as follows:

"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 or the execution of sentence and may place the defendant on probation for such period of time as the court may determine.

'The court may subsequently increase or decrease the probation period, and may revoke or modify any condition of probation. (77-35-17 Utah Code Anno., 1953)."

As the statute is presently written no limit to the duration of probation appears on its face. Apparently the statute grants power to the judiciary to place appellant on probation for as long as the Court sees fit, even for the entire life of defendant, and to subsequently revoke probation and then impose a prison sentence. It is appellant's contention that such an interpretation of the statute is contrary to general principles of law and deprives defendant of important fundamental freedoms in an unconscionable manner.

In Oklahoma the question was first raised in Ex Parte Eaton, 29 Okla. Ct. App. 275, 233 P. 781 (1925). In that case the statute provided that a qualified defendant might be placed on probation and remain on probation provided that he was not later guilty of a violation of any law or condition of probation. Defendant had been sentenced to two years in prison, but imposition was stayed and defendant was placed on probation.

Three months after defendant had completed serving two years of probation, the trial court revoked the order of probation and ordered defendant incarcerated. The Oklahoma Supreme Court disallowed the order:

"It was certainly not the intention of the lawmakers to hold sentence over the head of the person paroled so long as he should live, but only during the pendency of the judgment. To hold otherwise would be contrary to the spirit and policy of the law. (233 P. at 782; emphasis added)

Ex Parte Eaton, supra, has been followed in many other cases in that jurisdiction: Ex Parte King, 40 Okla. Ct. App. 21, 266 P. 511 (1928); Ex Parte Anderson, 47 Okla. Ct. App. 363, 288 P. 503 (1920); In re Workman, 74 Okla. Ct. App. 225 (1942); Ex Parte Miller, 88 Okla. Ct. App. 441 (1949); Ex Parte Bell, 57 Okla. Ct. App. 257, 47 P.2d 886 (1935).

Though the Oklahoma statute dealt with minors, that point was immaterial to the Court. It interpreted its statute by saying: "If there is any ambiguity, it should be resolved in favor of the person sentenced." (233 P. at 782). It was the Court's considered opinion that probationary periods should not exceed statutory periods of incarceration unless the legislature affirmatively granted such a power to the judiciary in precise, defined terms.

In Kansas a statute gave the judiciary the alternative of choosing probation under certain conditions. The statute then went on to say:

"Such judge may at any time, without notice to such persons, terminate such parole by simply directing execution to issue on the judgment." (Kansas Laws of 1909, C. 116, Sec. 2; emphasis added.)

In In re Carroll, 91 Kan. 395, 137 P. 975 (1914), the Court recognized the apparent grant of absolute discretion, yet the Court found it difficult to admit of such control by the judiciary. The case involved a misdemeanor punishable under statutory authority by no more than six months imprisonment. The Court argued strenuously that there had to be a limit to the Court's discretion to place a defendant on probation for extended periods of time;

"Although the statute relating to paroles (probation) granted by police judges does not expressly declare a limit, one is doubtless contemplated, and, since provision is made for imprisonment for a fixed time, that should be regarded as the limit of time for the termination of a parole (probation) and the absolute discharge of the paroled person." (137 P. at 977; emphasis and parentheses added.)

In re Carroll was followed by Simons v. Walston, 123 Kan. 574, 255 P. 975 (1926). It was not until the legislature amended the statute some 33 years later that the Kansas court altered its position because the

amended portion provided for probation of up to two years in the case of misdemeanors. Application of Young, 201 P.2d 140, 439 P.2d 142 (1968).

In Idaho, beginning with State v. Elkelberger, 71 Id. 282, 230 P.2d 696 (1951), the Idaho Supreme Court interpreted its 1947 probation statute which granted to the trial court the right to place on probation "for such time as it may prescribe." In spite of such broad and general language, the Supreme Court of Idaho has also refused to grant such enormous power to the courts without some legislative pronouncement.

"The period of probation and restraint of the liberty of the defendant extended for two years, while the crime which the defendant was found guilty of committing was punishable by imprisonment for a period of time not exceeding six months... The Court had the power to impose a judgment and order of probation for a period of six months. (230 P.2d at 701)

This case has been followed in Ex Parte Medley, 73 Id. 474, 253 P.2d 794 (1953) and in State v. Sandoval, 92 Id. 853, 452 P.2d 350, (1969).

The anomalies that would result from any other holding were discussed by the Florida Supreme Court as recently as six months ago. Watts v. State, _____ Fla. _____, 328 So. 2d 223 (1976):

"There is validity to not allowing probation to extend beyond the period of maximum sentences. First, a penal statute must be strictly construed in favor of those against whom it would operate; and second, to infer that a court could extend probation beyond such a maximum permitted punishment would lead to unacceptable results. For although the period of probation imposed here was only one year beyond the maximum sentence, the absence of any limit raises the possibility that a judge could direct many years of probation even for a misdemeanor, a concept which has the potential to inject further disparities into the corrective process." (328 So.2d at 223, emphasis added)

The Florida Court is correct. However small the disparities might appear for those of us never incarcerated, they would not be so for those forced to endure them. Forum shopping, though often the cry of "wolf," is a real possibility both for the defense seeking leniency as well as for the prosecution who might have a defendant on a minor charge but wish to keep him "out of circulation."

The Florida case is all the more significant because of the history of its probation statute. It was originally drafted in 1943 and provided for probation to exceed the incarceration limit by two years. In 1974 the statute was altered so as to contain no limits at all. The statute could have been construed so as to allow for a lenient and broad interpretation, but the Court rejected that approach, Watts v. State, supra.

In another recent case in Wyoming, Hicklin v. State, _____ Wyo. _____, 535 P.2d 743 (1976), the Court was quite concerned about the rights of a defendant and after a prolonged discussion of the problems, refused to grant such total discretion to the judiciary.

"A person on probation is not serving a sentence but is in a status something less than imprisonment that follows upon suspension of sentence. It connotes an absence of the rigors of confinement in a penitentiary, but at the same time is a substitute for complete imprisonment. It is imposed only upon convicted criminals, and results in a considerable restriction upon their liberty as well as intrusions upon their private lives. Fundamentally, it is a device for achieving the same social goals furthered by the more conventional penalty of society's desire for retribution and deterrence and its hope for rehabilitation. It is a loss of a part of cherished liberty in that freedom of movement and activity is restricted; the criminal is constantly under surveillance, must report his activities on a regular basis, and is deprived of intoxicants. In this case, twelve restraints are placed upon independence... A probationer is a convict without bars with a sword of threat hanging over his head, that for a deviation the doors may be slammed shut on him.

"We therefore conclude that probation is constructive confinement and the restraints of probation cannot exceed a period in excess of the maximum term of imprisonment authorized by the statute violated."
(535 P.2d at 753; emphasis added)

The Wyoming Supreme Court was not persuaded by arguments that probation is some sort of humanitarian grace period, some wonderful chance to be free and be pardoned, some light tap on the hand. It is not! It is in fact a kind of incarceration.

We are in fact discussing the restriction of a man's freedom, a penalty imposed on his conduct. Probation is not a gift. It is a better situation than the bars of a prison cell, but probation is also the restriction of fundamental freedoms.

The United States Supreme Court has recognized the penal qualities of the probation sentence. Korematsu v. United States, 319 U.S. 432, 63 S. Ct. 1124, 87 L. Ed. 1497 (1943).

"...incidents of probation emphasize that a probation order is 'an authorized mode of mild and ambulatory punishment, the probation being intended as a reforming discipline.'" (319 U.S. at 435)

See also Cooper v. United States, (5th Cir.), 91 F.2d 195 (1937). In that case the Court goes on to say:

"We do not agree with appellant's contention that probation, like pardon, may be refused by the convicted person. The act vests a discretion in the Court, not a choice in the convict." (91 F.2d at 199, emphasis added)

Probation cannot be looked at as anything less than
a sentence of limited incarceration. Authority for sentencing

must come from the legislature. Hicklin v. State, supra; Affronti v. United States, 350 U.S. 79, 76 S. Ct. 171, 100 L. Ed. 62 (1955); Andrus v. Turner, (10th Cir.), 421 F.2d 290 (1970); In re Gutierrez, 82 Ariz. 21, 307 P.2d 914, (1957) cert. den. 355 U.S. 17, 78 S. Ct. 79, 2 L. Ed. 2d 23; State v. Perez, 15 Ariz. App. 300, 488 P.2d 505 (1971); Pete v. State, _____ Ala. _____, 379 P.2d 625 (1963); State v. Smith, 83 Okla. Ct. 188, 174 P.2d 932 (1946).

Furthermore, a large body of law stands for the proposition that probation can only exist if the legislature acts. Affronti v. United States, supra; People ex rel Lindauer v. O'Donnell, 37 Cal. App. 192, 174 P. 102 (1919); Williams v. State, 162 Ga. 327, 133 S.E. 843 (1926); Ex Parte Eaton, supra; In re Hall, 100 Vt. 197, 136 A. 24 (1927); Pickman v. State, _____ Fla. _____, 155 So. 2d 646 (1963); State v. Duncan, _____ Ore. _____, 514 P.2d 1367 (1973).

On the basis of all the above case law, it is clear that in the absence of a statute clearly defining the limits to which a court may go in imposing probation, a trial court may not impose a probation sentence for a period longer than the statutory period for incarceration. To the same effect are several proposed criminal codes.

The American Bar Association and several other groups have proposed model codes as suggestions for State Legislators in the area of probation. Groups such as the

ABA have suggested statutes which allow courts to order probation for periods longer than the stipulated period for incarceration. ABA Project on Standards for Criminal Justice - Standards Relating to Probation. On the other hand, the National Advisory Committee on Criminal Justice, Standards and Goals (Corrections) §16.11 advises that probation not exceed the prescribed limits for incarceration. No uniform opinion on the subject is therefore apparent. States have chosen both types of statutes. With such disparity over an issue involving personal freedoms surely the courts ought to function with judicial restraint and allow the legislature to perform its proper function and make a determination of the pressures and philosophical questions involved in a forum best suited to that process.

Secondly, the fact that many states have adopted one or the other of the proposed statutes or revised versions of these model codes cannot impute to the Utah Legislature a statute it has not adopted no matter what the national trend. More importantly, whatever the trend of other State Legislatures, certainly their considered and debated opinions should not influence courts to take upon themselves a legislative function by choosing one of the two alternative statutes.

Thirdly, although the ABA certainly advocates a broader statute, it does not advocate court adoption of its model statute.

"(a) The legislature should authorize the sentencing court in every case to impose a sentence of probation."
(Part I. General Principles. 1.1 Nature of sentence of probation, emphasis added)

At the outset, the ABA recognizes the Legislature's authority and prerogative in this area. The ABA is quick to acknowledge that courts must receive permission to impose this sentence.

To further emphasize this principle at (d) of the same provisions, the ABA states:

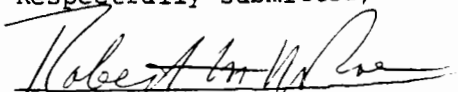
"Neither supervision nor the power to revoke should be permitted to extend beyond a legislatively fixed time."
(emphasis added)

The ABA is not asking courts to do anything. It recommending quite strongly that Legislatures allow courts to function in this area and that Legislatures maintain a firm control over the subject, presumably to avoid abuse and ensure a proper functioning of the system with useful, practical, and equitable standards.

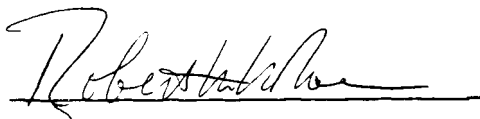
CONCLUSION

Appellant petitions this Court to vacate the order of incarceration entered by the lower Court on the 27th day of January, 1976, and grant appellant's Writ of Habeas Corp.

Respectfully submitted,


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Mailed two copies of the foregoing Brief to the
Office of the Attorney General, Utah State Capitol, Salt
Lake City, UT 84114 this 3d day of September, 1976, postage
prepaid.

A handwritten signature in dark ink, appearing to read "Robert H. Allen", is written over a horizontal line.