1976

State of Utah v. Lawrence H. Allmendinger : Brief of Appellant

Utah Supreme Court

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Vernon B. Romney; William W. Barrett; Attorneys for Respondent;
Larry R. Keller; Attorney for Appellant;

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
	:	
Plaintiff-Respondent		
	:	
vs.	:	
LAWRENCE H. ALLMENDINGER,	:	Case No. 14582
	:	
Defendant-Appellant		

BRIEF OF APPELLANT

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CASES CITED

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STATUTES CITED

STATEMENT OF FACTS

On May 2, 1975 appellant entered a plea of not guilty in the District Court of the Third Judicial District in and for Salt Lake County, State of Utah, to an information charging him with Unlawful Distribution for Value of a Controlled Substance (R.2-3). On June 2, 1975 appellant entered a plea of guilty to the lesser and included offense in the information of Unlawful Possession of a Controlled Substance, which under Utah Code Annotated §58-37-8(2)(b)(i) (as amended 1972), carries a penalty of not more than $299 or imprisonment in the county jail for not more than six months. (R.9)

On June 9, 1975, the Court suspended imposition of sentence and placed the appellant on probation for one year. (R.10)

On March 4, 1976, Judge Bryant H. Croft signed an order requiring the defendant to appear and show cause why his probation should not be revoked. (R. 11) This order came almost nine months after the order placing appellant on probation.

On March 17, 1976, counsel for appellant filed a motion to dismiss for lack of jurisdiction (R.29) and on March 30, 1976 the Court heard arguments on the motion (R.30). Both sides submitted memoranda and the Court, by memorandum decision of April 19, 1976, denied appellant's motion. It is this decision from which appellant pursues this appeal.

ARGUMENT

POINT I

WHERE THERE IS NO STATUTORY AUTHORITY FOR EXTENDING A PROBATIONARY PERIOD BEYOND THE MAXIMUM LIMITS FOR AN OFFENSE, THE COURT RETAINS JURISDICTION FOR ONLY THE PERIOD OF THE MAXIMUM SENTENCE AND CANNOT THEREAFTER TERMINATE THE PROBATION.

Utah Code Annotated §77-35-17, (1953) authorizes Utah courts to stay imposition or execution of a criminal sentence but does not specify the length of time for which a commitment may be stayed and the person placed on probation. Other than short stays for specified purposes, the only stays contemplated are those under that statute,[1] which provides:

> "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 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 being placed on probation; may 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; and 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 has complied with the conditions of such probation, the court may if it be compatible with the public interest either upon motion of the district 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."

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1. McPhie v. Turner, 10 Utah 2d 237, P 2d 91 (1960).

The Utah Supreme Court has not ruled directly on the issue of whether acourt may impose probation for a period longer than the maximum sentence allowed. There is ample authority from other jurisdictions, however, in support of Defendant's contention that where the statute authorizing probation fails to specify the maximum period of probation to which a person may be subjected, the maximum period allowed is the maximum sentence of imprisonment which could have been imposed. The general rule is stated in 21 Am. Jur. 2d Criminal Law §555:

> "Where the suspension of imposition of sentence is authorized, the court does not lose jurisdiction of the case and it may, after such suspension pronounce sentence at any time provided the maximum period for which sentence could have been imposed or probation granted has not elapsed." (emphasis added).

The most recent pronouncement on the issue comes from the New Mexico Court of Appeals in State v. Lard, 86 N.M. 71, 519 P.2d 307 (1974). In Lard the defendant attacked the propriety of the enhanced sentence directed by the lower court. Under New Mexico law a sentence may be enhanced according to a specific statute provid for such due to defendant's prior record. Defendant contended that the enhancement provision was improperly applied. The court decided against the defendant on this issue but stated in dicta the general rule that . . . "

> "The total length of a deferred or suspended sentence, or the time served on parole, cannot exceed the maximum authoriz sentence for the crime involved." (emphasis added) 519 P.2d a

The Idaho Supreme Court had considered the identical questior presented there in Ex Parte Medley, 73 Idaho 474, 253 P.2d 794 (1953) In that case, the court was dealing with a statute

similar to Utah Code Annotated, §77-35-17. The Idaho statute provided:

> "Whenever any person shall have been convicted or enter a plea of guilty in any District Court of this State of Idaho, of or to any crime against the Laws of the State, except those of treason or murder, the court may in its discretion, commute the sentence, confine the defendants in the county jail, or if the defendant is of proper age in the State Industrial School, suspend the execution of the judgment, or withhold judgment on such terms and for such time as it may prescribe and may put the defendant on probation in charge of some proper person selected and designated by this court for that purpose and make such orders related thereto as the court in its sound discretion deems necessary and expedient."
> (emphasis added) Idaho Code §19-2601, (as amended 1949).

Notwithstanding statutory language allowing the court to order probation for "such time as it may prescribe" (identical to Utah's statute), the Idaho Supreme Court stated at 799:

> "The period of probation could have been for the maximum period for which petitioner might have been imprisoned or for a lesser, but not for a greater period."
> (emphasis added) 253 P.2d at 800.

The Idaho Supreme Court recently reaffirmed Ex Parte Medley in its holding in State v. Sandoval, 92 Idaho 853, 452 P.2d 350 (1969). In Sandoval appellant argued that one condition of probation constituted cruel and unusual punishment. In dismissing the Appellant's contention the court noted prior holdings concerning probation and stated:

> "The period of probation may last as long as the maximum period for which defendant might have been imprisoned."
> 452 P.2d at 358.

The Supreme Court of Kansas had also ruled that a judge may parole persons as he sees fit but he has no power to extend the conditions of the parole beyond the term of the sentence which could have been imposed. The Court held In re Carroll, 91 Kan. 395, 137 P.975 (1914) that where petitioners had been sentenced to six months in jail (the maximum penalty) and placed on parole by the sentencing judge for two years, the judge was not authorized to extend the term of parole beyond a maximum sentence. In language oft-quoted since this 1914 decision, the court stated:

> "But is there no limit to the period of parole? Can it have been the purpose of the legislature that a police judge, having imposed a sentence of imprisonment for ten days, can issue a parole upon the condition that the paroled person shall be under surveillance for ten years, or even longer and subject to be committed at any time for a violation of parole It is true the statute provides that the parole shall be granted upon such conditions as the police judge may see fit to impose, but the view of the court is that it was not the legislative intent that the parole period might be indefinitely extended . . . Although the statute. . . does not expressly declare a limit, one is doubtless contemplated and, since provision is made for imprisonment, that should be regarded as the limit of time for the termination of a parole and the absolute discharge of the paroled person. It is argued that a parole is a matter of grace and discretion but could it be regarded as a gracious act to hold over the head of a convicted person the unexecuted sentence for a lifet with the uncertainty that he might be recommitted to prison without notice at any time when the police judge chose to order it? 137 P. at 977.

In a situation similar to the case at bar, the Oklahoma Supreme Court ruled in 1925 that a judgment could be suspended only for the length of time of the maximum sentence. In Ex Parte Eaton,

29 O. Cr. 275, 233 P. 781 (1925) the Court was dealing with a statute similar to the Utah statute presently in issue. The Oklahoma statute did not specify a period for which a person's sentence could be suspended in lieu of probation or parole. The statute stated only that at any time during "pendency of the judgment" the stay could be revoked. The Court held that the judgment was only pending for the maximum period for which the person could be sentenced because: "It was certainly not the intention of the lawmakers to hold the sentence over the head of a person paroled so long as he should live . . . " 233 P. at 782.

Although some states by statute allow periods longer than the term of possible imprisonment, those states have some maximum stated and do not tolerate revocation after the maximum; e.g. Coleman v. Davis 106 So. 2d 79 (Fla. 1958). Further, where the judge fails to specify the period in those jurisdictions, it has been generally held to be for the maximum period for which the person could be sentenced. Coleman, supra; People ex rel. Berman v. Marsden, 162 N.Y.S. 993 (1957). For example, in Commonwealth v. Duff, 192 A. 2d 258 (Pa. 1963), the court stated:

> "Therefore, when the court suspends the imposition of sentence without fixing terms of probation, it may, for proper reasons impose a prison sentence . . . if it does so within the maximum term which could have been imposed for the offense. (emphasis added) 192 A.2d at 261-62.
>
> ". . . [W]e have considered such a suspension as containing an implied probation for the maximum period for which defendant could have been sentenced . . ." (emphasis added) 192 A.2d at 261.

Similar holdings emerge from California. In People v. Blakeman 170 Ca. 2d 596,339 P.2d 202 (1959) the District Court of Appeals, First District, Division 1 held that a revocation occurring eight months after probation was granted was invalid because it occurred after the maximum probationary period allowable. In Blakeman the defendant could have been sentenced to a maximum of six months. The Court there stated:

> "Here, no period of probation was specified in the order granting it. Accordingly, the six months maximum period of punishment (Pen. Code, Section 243) became the period of probation. In re Herron, 217 Cal. 400, 405, 19 P.2d 4; In re Goetz, 46 Cal. App. 2d 848, 851, 117 P.2d 47; People v. Sheeley, 159 Cal. App. 2d 578, 581, 324 P.2d 65. Plaintiff argues that when the court imposed a sentence of one year (excessive by six months) and immediately suspended it, the court indicated an intent to give probation for one year. We are not persuaded, particularly in view of the established principle that when the probationary period is not specified it is deemed to be for the maximum possible period of imprisonment." 339 P.2d at 204.

The Third District Court in and for Salt Lake County, State of Utah has considered the question three times previously in Petitions for Writ of Habeas Corpus. In Juliette Harris v. Dewey Fi[illegible] Case No. 187877, (1969) the petitioner alleged that the court lost jurisdiction over her after six months, the maximum sentence she could have been given for the offense committed. The case file contains no findings of fact or conclusions of law, however the record of actions indicates that the Writ was granted by Judge M.C. Faux on July 18, 1969. (See appendix A).

In a second case, Charles Franklin Himes v. Delmar Larson, Civil No. 188585 (1969), petitioner alleged that the court that had revoked his probation was without jurisdiction to do so. Judge Gordon R. Hall granted the Writ on September 9, 1969, signing conclusions of law stating that at the time of revocation of petitioner's probation, the court lacked jurisdiction over him. (See appendix B).

In the third case, Elizabeth Ann Smith v. Salt Lake City Court, Civil No. 227320 (1975), the City Court had revoked petitioner's probation. Judge Stewart M. Hansen, Sr. granted the Writ and made conclusions of law stating that the maximum length of probation could not exceed the maximum period of incarceration allowable for the offense. (See appendix C).

Judge Bryant H. Croft's memorandum opinion in the instant matter places him in the minority among Third District judges on this issue. Although this writer has nothing but the highest respect for Judge Croft, his decision overlooks the case law and more pursuasive arguments on the subject presented in this brief and accepted by his colleagues. Judge Croft bases his denial of appellant's decision on two grounds:[2]

(1) That in misdemeanor cases the maximum period of imprisonment is usually so short that a probationary period of the same length would be useless and therefore judges would give jail sentences where probation would otherwise be proper; and

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2. See Judge Croft's Memorandum Opinion, R. 74-78.

(2) That the problem in (1) above is accentuated where a defendant pleads guilty to a lesser offense after having been charged with a greater offense.

Appellant believes it is extremely difficult for any one judge to determine just how long a period of probation is necessary to rehabilitate an offender. While it would seem likely that a firs offender would need a lesser period than a repeat offender, such is not necessarily the case. Appellant agrees that a judge must be able to have the flexibility to deal with offenders on a case-by-case basis. To this extent, §77-35-17 grants the court the power to increase or decrease the probation period or to revoke or modify any condition of probation. Appellant sees this flexibility as essential to the rehabilitative process, however, suc power must be guided by a maximum limit to the period of probation. Several states have recognized this and enacted statutes specificall limiting the probation period, as discussed earlier. In some states where no limits are prescribed, courts have placed the statutory maximum for incarceration as the limit for probation. (See e. g. State v. Lard, supra and State v. Sandoval, supra.)

Although it may well be true that some defendants cannot be rehabilitated within statutory maximums for misdemeanors, isn't it also true that the statutory maximum for imprisonment may not be long enough to alter a defendant's course of criminal conduct? All lawyers dealing with criminal cases are familiar with offenders

who have been imprisoned for statutory maximums in misdemeanor cases and then convicted again for other offenses. We may very well argue that a six month jail sentence is not enough time to rehabilitate or punish, but the important thing is that our legislature has fixed a maximum period of incarceration for both misdemeanor and felony offenses. The principle involved in probation periods is parallel. Although we may not be sure a statutory maximum sentence for imprisonment is a long enough limit for probation, our legislature has classified crimes by placing limits on penalties for those crimes. Just as some crimes are more serious than others, requiring longer maximum sentences, so too this distinction exists in the concept of rehabilitating persons convicted of those crimes. Some crimes require greater periods of rehabilitation because of their seriousness than others. In his memorandum decision, Judge Croft states that under Utah law some jail sentences cannot exceed ninety days, as for a Class C misdemeanor, "and a probationary period of such short duration hardly serves any useful purpose." However, more insight into Judge Croft's conclusion may be gained by looking at some crimes which are Class C misdemeanors.

Under Utah Code Annotated § 76-5-106 (as amended 1973), harassment is a Class C misdemeanor; under §76-6-106, Criminal Mischief where damage is below $250 is a Class C misdemeanor; under 76-6-206, Criminal Trespass of a non-dwelling is a Class C misdemeanor. The point is simply that our legislature has determined that criminal conduct in those cases is less serious than in others, therefore, the

penalties are less serious. Although it may be argued that three months probation may not be long enough to rehabilitate a person convicted of Harassment, it may also be argued that three months in jail may not be long enough to rehabilitate or punish such person either. After three months in jail, the offender may repeat his offense or commit another offense proving that three months was not long enough. Could it then be argued that the sentencing judge should have been able to sentence the offender for a longer period, despite the legislative recognition of the low level of seriousness of such offense? Appellant thinks not and asks this court to conclude that any court's sentencing power is guided by the legislature and not open to interpretation by each individual judge, whether that judge is considering imprisonment or probation.

As to the second reason for Judge Croft's denial of appellant's motion to dismiss, appellant feels that the preceding discussion adequately represents his view on the issue. Appellant would additionally point out to the Court that our notions of Due Process of Law require that a man be punished only for the crime he has been convicted of. Judge Croft seems to imply that a defendant should be punished for having been orginally charged with an offense greater than he is eventually convicted of. The implication is that a judge may be hesitant to give probation in plea-bargained cases if he is limited by the probation period in the lesser offense rather than being able to give the defendant the probation period which would

have been given if he had plead to the greater offense. Since a defendant is presumed innocent at all stages of a criminal proceeding prior to conviction, why should he be punished for an offense he was never convicted of? As this Court well knows, numerous considerations are involved in plea-bargaining, not the least of which is that prosecutors sometimes overcharge cases hoping to bring pressure upon a defendant to plead guilty to the crime he is really guilty of, and which carries a lesser penalty than the original charge. In such cases, the legislative determination as to the seriousness of the lesser offense should control a judge's power to sentence, both for imprisonment and probation.

In response to the point that judges may not accept plea bargains if the probationary period is limited to the period of imprisonment of the lesser offense, appellant would argue that if the court has <u>that</u> much concern then perhaps it should not accept the plea to a lesser offense anyway.

Although appellant understands Judge Croft's concern, appellant believes that the interpretation he suggests would best serve the legislative intent and the concept of Due Process of Law as discussed in Point II of this brief.

POINT II

THE UTAH LEGISLATURE INTENDED THAT THERE BE PROPORTIONATE LIMITS ON PROBATION POWERS OF UTAH COURTS.

As has been seen, Utah Code Annotated §77-35-17 (1953) gives the courts power to place a defendant on probation "for such period time as the court shall determine"; but it is the position of appella that this phraseology was not intended to give courts unlimited juris diction over a probationer's liberty. Appellant alleges that whateve period of time is involved must be consistent with other law on the subject. He, therefore, urges this Court to adopt the more reasonab interpretation that the legislature intended to allow for a probatio period consistent with the Utah Criminal Code, and an individual's right to Due Process of Law under the Constitutions of the United States and the State of Utah, by limiting a Court's jurisdiction for probationary periods.

Jurisdiction is a common-law creature expressly embodied in both the United States and Utah Constitutions. The authority of District Courts in Utah flows from the jurisdiction granted them by the State Constitution[3] and legislative enactments in harmony with such grants of power. See Rocky Ford Canal Co. v. Cox, Judge. 92 U. 148, 59 P. 2d 935 (1936).

It is clear that the legislature has the power to prescribe and define the forum in which a civil or criminal matter must be commenced and therefore to set limitations on the jurisdiction of

3. Art. VIII Sec. 7 Constitution of Utah

District Courts.[4] In fact, the legislative power to prescribe penalties for crimes necessarily requires a maximum period of incarceration for such crimes whether the sentences are determinate or indeterminate.[5]

Appellant contends that it is a matter of Constitutional doctrine that the legislature provide jurisdictional limits for probation or parole just as it provides limits for incarceration. In fact, the Utah legislature, in adopting a complete revision of Utah's criminal code which was effective July 1, 1973, adopted a statute which clearly establishes the intent of the legislature to jurisdictionally limit periods of probation for criminal offenses. Utah Code Annotated §76-3-201 (as amended 1973) provides:

> "(1) Within the limits prescribed by this chapter, a court may sentence a person adjudged guilty of an offense to any one of the following sentences or combination of such sentences:
> (a) to pay a fine; or
> (b) to removal from and/or disqualification of public or private office; or
> (c) to probation; or
> (d) to imprisonment; or
> (e) to death."
>
> (emphasis added)

It would appear that it is the declared policy of the legislature to prescribe jurisdictional limits for probation; and further that such limitations appear within that chapter (Chapter 3, Punishments). Utah Code Annotated §77-35-17 (1953) appears as

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4. State v. Johnson, 100 U. 316, 114 P.2d 1034 (1941)

5. Utah Code Annotated §76-3-203-206, (as amended 1973).

part of the Code of Criminal Procedure which is found in an entirely different Title (let alone chapter) than §76-3-201, which is part of Utah's Criminal Code. Since that Section was enacted in 1953, it would seem that the 1973 provision (76-3-201) was intended by the legislature to be controlling on the question of jurisdictional limitations on a court's power to determine time periods for probation in criminal cases. This argument is even more persuasive when considered from the point of view that since §77-35-17 allows probation "for such period of time as the court shall determine" the legislature, due to the absence of specific jurisdictional standards, intended that that period of time be consistent with the limitations imposed by other relevant statutes and that those limitations are the maximum period of time to which a defendant may be sentenced to incarceration (now under Chapter 3 of the Criminal Code).

It seems logical to conclude that the legislature intended (through 76-3-201) to place limitations on the period of time for which a defendant may be placed on probation, but since Chapter 3 does not specifically delineate such limitations, the legislature must have intended the maximum terms of imprisonment to also be maximum terms for probation.

Such reasoning would be consistent with the overall policy of Utah's Criminal Code expressed in Utah Code Annotated §76-1-104 (as amended 1975):

> The provisions of this code shall be construed in accordance with these general purposes: . . . (3) Prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition or difference in rehabilitation possibilities among individual offenders.

It would seem clear that if the legislature determined for example, that theft of property under $100.00 was only serious enough to warrant imprisonment for six months, that any period of probation provided in lieu of imprisonment should not be any longer. If a serious felony is committed, it seems logical that the period of probation should be proportionate to the period of incarceration. If the legislature determines that aggravated assault requires a 0-5 year sentence of imprisonment, the seriousness of that offense also requires a longer period of probation than in a less serious theft case, if probation is granted in lieu of imprisonment.

It seems to be a fact of the criminal justice system that probation, so often construed as a "privilege," is in fact to some extent, a penalty. The limitations on one's privacy and freedom of movement and association are such that one is clearly "penalized" for one's criminal conduct even through not imprisoned, and this is certainly the way it should be. This view was supported by Justice Crockett in Brimhall v. Turner, 28 Utah 2d 321, 502 P.2d 115 (1972):

> "Even though he has been placed on parole, he is deemed to be actually serving the sentence imposed, and is in a sense in the extended custody of prison authorities."
> 502 P.2d at 117.

Although a petitioner's parole status was the subject of that appeal, the principle certainly can be related to the status of probation as well. A defendant on probation is, in a sense, in the extended custody of the Court. He is required as a condition of probation

to follow the instructions of his probation officer. Among other things those instructions uniformly include:

(a) Maintaining employment;
(b) Notifying probation officer of change of address;
(c) Getting permission of probation officer to leave the state or to marry;
(d) Not associating with known felons.

No one, least of all appellant, can argue that such restrictions are too severe or unnecessary where one has been convicted of a crime and is on probation in lieu of total loss of his liberty. Appellant simply points out these restrictions to remind the court that probation is, in and of itself, to some extent a penalty. Is it not logical to conclude then, that the stated legislative purpose of prescribing penalties which are proportionate to the seriousness of offenses requires the interpretation that maximum terms of imprisonment were also intended to be maximum terms for probation?

That a defendant has certain rights, as well as responsibilities while on probation, is a concept that has been established through a long line of Utah Supreme Court cases. The landmark case on the issue was State v. Zolantakis, 70 Utah 296, 25 P. 1044 (1927). In a scholarly and frequently quoted opinion, Justice Elias Hansen writing for the majority said:

> "The purpose of the law permitting the suspension of sentence is clearly reformatory. If those who are to be reformed cannot implicitly rely upon promises or orders contained in the suspension of sentence, then we may well expect the law to fail in its purpose. Reformation can certainly best be accomplished by fair, consistent, and straighforward treatment of the person sought to be reformed."
> 259 P. at 1046.

This Court then, announced as early as 1927 that the legal concept of probation is not to be treated lightly

in this State. In fact, this opinion, decided 45 years prior to the heralded United States Supreme Court case of Morrisey v. Brewer, 408 U.S. 471, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972) established the principle that a probationer was entitled to Due Process of Law before his probation could be revoked, and that such Due Process required:

> ". . . a hearing upon the question of whether or not he has complied with the conditions imposed; that such hearing must be according to some well recognized and established rules of judicial procedure; that defendant is entitled to have filed either an affidavit, motion or other written pleading setting forth the facts relied upon for a revocation of the suspension of sentence; that the defendant should be given an opportunity to answer or plead to the charge made; that a hearing should be had upon the issues stated; and that the defendant as well as the state be given the right of cross-examination."
> 259 P. at 1047.

Justice Hansen made crystal clear this Court's attitude toward those requirements when he concluded the point by declaring:

> "If we are correct in our conclusion that the defendant has a vested right to his personal liberty during good behavior when so ordered without reservation in the original sentence, any proceeding failing in these essentials is error." 259 P. at 1047.

Lawyers and judges alike have agreed that the United States Supreme Court's holding in Morrissey in 1972 was a step forward in the administration of the American concept of Constitutional justice. But isn't it interesting that the Utah Supreme Court recognized the same rights for probationers at a time when most states allowed probation revocations at the whim and caprice of the sentencing judge?

This high regard for the purpose and fairness of the very concept of probation has been reiterated in numerous Utah Supreme Court decisions through the years. See Thompson v. Harris, Warden, 106 Utah 32, 144 P.2d 761 at 767 (1943); Williams v. Harris, Warden, 106 Utah 387, 149 P.2d 640 at 642 (1944); State v. Fedder, 1 Utah 2d 117, 262 P.2d 753 (1953); Baine v. Beckstead, 10 Ut. 2d 4, 347 P.2d 554 (1959); State v. Eichler, 25 Ut. 2d 421, 483 P.2d 887 (1971); Brimhall v. Turner, 28 Ut. 2d 321, 502 P.2d 116 (1972).

In the Brimhall case, supra, the Utah Supreme Court expanded the due process requirements of Zolantakis in reviewing a parole revocation attacked by virtue of a habeas corpus proceeding. Writing for the majority, Justice Crockett said:

> " . . . (W)e acknowledge the mere fact that there has been an accusation of crime should give rise to no presumption adverse to plaintiff." 502 P.2d at 117.

Although Zolantakis and the cases following implied that a probationer should be afforded the presumption of innocence when accused of a new violation of law, Justice Crockett's pronouncement was the first express declaration of this important principle. Thus, through a long series of cases, this Court has recognized that probat have rights as well as responsibilities. It seems logical to conclu that the state legislature intended to follow these forward-looking due process consepts by limiting the period of probation to the maximum period of imprisonment provided for in the statute describing a crime, whether that statute is found in Utah's Criminal Code, it's Motor Vehicle Act, or its Controlled Substances Act.

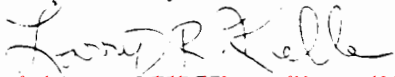
CONCLUSION

It seems to be such a small and logical step for this Court to conclude that where there is no specific legislative pronouncement as to the length of a probationary period, that justice and fairness dictate that the maximum period of imprisonment be controllin as the maximum period of probation also. By drawing such a conclusion, this Court would be following the wise pronouncement of policy in probation cases as expounded by Justice Hansen almost 50 years ago when he said:

> "Reformation can certainly best be accomplished by fair, consistent and straightforward treatment of the person sought to be reformed." 259 P. at 1046.

Would it not be fair to allow a person convicted of a crime to know that the maximum limit of his period of probation will be no longer than that of anyone else convicted of the same crime? Wouldn't it remove the bitterness and counterproductive attitude that sometimes develops when a person can see that he is not being treated consistently with others in his same circumstance? Would it not be straightforward for the law to adequately inform a defendant that he will be required to undergo the severe limitations probation often requires for a set and established period of time; a period whose maximum is dictated by the legislature and not the sometimes inexact evaluation of the judge who sentences him?

Respectfully submitted,



LARRY R. KELLER
Attorney for Appellant

APPENDIX "A"

In the District Court of the Third Judicial District, in and for Salt Lake County, State of Utah

JULIETTE HARRIS

Plaintiff

vs.

DEWEY FILLIS

Defendant

ENTERED ORDER
MINUTE ENTRY

CASE NUMBER 187877

DATED July 18, 1969

MERRILL C. FAUX, JUDGE

The Petition for Writ of Habeas Corpus comes now on regularly before the Court for hearing. The Plaintiff appearing in person and being represented by John O'Connell as counsel. The Defendant being represented by Clinton Balmforth as counsel. Whereupon, said Writ is argued to the Court by respective counsel and submitted. The Court having considered and now being fully advised in the premises orders said Writ be and the same is hereby granted.

By /s/ Hal Ruechert
Deputy Clerk

STATE OF UTAH
COUNTY OF SALT LAKE } SS

I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH, DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT FILED IN MY OFFICE AS SUCH CLERK.
WITNESS MY HAND AND SEAL OF SAID COURT THIS [illegible] DAY OF [illegible] 19[illegible]
W. STERLING EVANS, CLERK
BY [illegible] DEPUTY

APPENDIX "B"

[illegible]

[illegible] OF THE THIRD JUDICIAL DISTRICT,

[illegible] COUNTY, STATE OF UTAH

[illegible]	[illegible]	FINDINGS OF FACT AND CONCLUSIONS OF LAW
	[illegible]	[illegible]

[illegible]

[illegible] Attorney for [illegible]

[illegible] heard and based

[illegible]

FINDINGS OF FACT

[illegible]

[illegible]

[illegible]

[illegible]

the m[illegible] penalty under law for the crime [illegible],

(b) The sentencing Court was with [illegible] jurisdiction to further [illegible] modification.

Dat[illegible] 9th day of September, 1[illegible].

BY THE COURT:

[illegible]

ATTEST
STERLING EVANS
CLERK

[illegible]
Deputy Clerk

I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF SALT LAKE COUNTY, UTAH DO HEREBY CERTIFY THAT THE ANNEXED AND FORE[illegible] IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT [illegible] FILE IN MY OFFICE AS SUCH CLERK

WITNESS MY HAND AND SEAL OF SAID COURT THIS [illegible] DAY OF [illegible] 19[illegible]

W. STERLING EVANS, CLERK

BY [illegible] DEPUTY

LEEDY & BOWN
Attorneys at Law
203 South 2nd East
Salt Lake City, Utah 84111

APPENDIX "C"

FILED IN CLERK'S OFFICE
Salt Lake County, Utah

JUN 4 1975

W. Sterling Evans, Clerk 3rd Dist. Court
By [illegible]
Deputy Clerk

[illegible]
Salt Lake [illegible] Defender Association
[illegible] [illegible]
[illegible]
Salt Lake [illegible] 84102
Telephone [illegible]

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ELIZABETH [illegible] SMITH,

Petitioner,

vs.

SALT LAKE [illegible] MORTLAND, ROBERT [illegible] HEGGI,

Respondents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Civil No. 227320

The above entitled matter having come on regularly for hearing on the 22nd day of [illegible] 1975, at 9:00 A.M., the petitioner was present and was represented by [illegible], Attorney at Law. The respondent was not present but was represented by Donald Sawaya, Assistant County Attorney for Salt Lake County. Evidence was taken and arguments were heard and based [illegible] the following:

FINDINGS OF FACT

[illegible] allegations contained in paragraphs one through five, [illegible] paragraphs [illegible], seventeen, eighteen, nineteen and twenty-five [illegible] Petition for Writ of Habeas Corpus are true as alleged.

[illegible] above Findings of Fact the Court makes the following:

CONCLUSIONS OF LAW

[illegible] is illegal for the following reasons:

[illegible] person who is guilty or is convicted of a crime may [illegible] of time in excess of the period of [illegible] for the offense, and

[illegible] guilty of a crime for which the maximum

incarceration available was six months, and hence the maximum period for which she could be placed on probation was six months, and

(c). The Salt Lake City Court having placed the petitioner on probation November 27, 1973 that Court lost all jurisdiction over the petitioner six months later on May 27, 1974, and

(d). The probation the petitioner is presently on in Case No. 57788 is therefore invalid and without force of law.

HONORABLE STEWART M. HANSON

ATTEST
W. STERLING EVANS
CLERK

Deputy Clerk

Mailed a copy of the foregoing to the County Attorney, the City Clerk, Clerk [illegible] C. Gibson, and Misdemeanant Probation on the _____ day of June, 1975.

STATE OF UTAH
COUNTY OF SALT LAKE } SS

I, THE UNDERSIGNED, CLERK OF THE DISTRICT COURT [illegible] COUNTY, UTAH DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND [illegible] COPY OF AN ORIGINAL DOCUMENT [illegible] MY OFFICE AS SUCH CLERK.
WITNESS MY HAND AND SEAL OF SAID COURT

THIS 2 DAY OF _____ 19__

W. STERLING EVANS, CLERK

BY _____ DEPUTY