

1943

Grover Thompson v. John E. Harris, Warden of the
Utah State Penitentiary and Carl Rolland Demmick
v. John E. Harris, Warden of the Utah State
Penitentiary : Brief of Defendant

Utah Supreme Court

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Grover A. Giles; Attorney General; Zar E. Hayes; Assistant Attorney General; Brigham F. Roberts; District Attorney; Attorneys for Defendants;

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6655

In the
SUPREME COURT
of the
STATE OF UTAH

GROVER THOMPSON,
Plaintiff,

vs.

JOHN E. HARRIS, Warden of the
Utah State Penitentiary,
Defendant.

Case No. 6655

CARL ROLLAND DEMMICK,
Plaintiff,

vs.

JOHN E. HARRIS, Warden of the
Utah State Penitentiary,
Defendant.

Case No. 6656

DEFENDANT'S BRIEF

GROVER A. GILES,
Attorney General

ZAR E. HAYES,
Assistant Attorney General

BRIGHAM E. ROBERTS,
District Attorney
Attorneys for Defendant.

FILED

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Defendant.

Case No. 6656

STATEMENT OF CASE

The Plaintiffs in each of these cases were convicted in a court of general jurisdiction of felonies and the punishment was enhanced in each case under the provisions of 103-1-18 R.S.U. 1933. Apparently their contention is that they are entitled to an immediate and unconditional discharge, and they apparently desire that this Court treat these proceedings in habeas corpus as an appeal.

The statement of the case contained in the Plaintiffs' brief sets forth verbatim the informations, verdicts, sentences and commitments in the cases in which the

Plaintiffs were committed to the custody of the Defendant herein. In view of the opinion in *Jensen vs. Sevy*, Utah, 134 P. 2d 1081, it is doubtful that these are properly before the Court at this time because the applications for the writ, wherein these matters are alleged, had served their purpose when the writ was issued and are now *functus officio*. We have no desire to raise any procedural matters and will consider that all of these things are properly before the Court. It is our position that in these habeas corpus proceedings only Point 2 contained in Plaintiff's brief is here material, that is, whether or not section 103-1-18, R.S.U. 1933, has been repealed.

It is also our position that the Plaintiffs cannot in any event be discharged even though this Court should hold the judgment void but they should be remanded to the Defendant herein to be taken before the District Court of the Third Judicial District in and for Salt Lake County, State of Utah, there to have imposed upon them a sentence for the felonies of which they were convicted without the enhancement of punishment provided for by said section 103-1-18. *Ex parte Folck, Folck vs. Watson*, 102 Utah 470, 132 P. 2d. 130 (1942).

Or this Court under the authority of *Mutart vs. Pratt*, 51 Utah 246, 170 P. 67, could hold the sentence imposed to be one for the indeterminate term as provided by law for felonies of which Plaintiffs were properly convicted.

POINTS INVOLVED

Point 1. In these habeas corpus proceedings the Court is limited to a determination of whether section 103-1-18, R.S.U. 1933 has been repealed.

Point 2. Section 103-1-18, R.S.U. 1933, has not been repealed by implication or otherwise.

Point 3. In each case it appears from the information that Plaintiffs herein had been each twice sentenced and committed to prison for terms of not less than three years previous to the crime charged therein.

Point 4. The verdicts in both cases here involved were proper and legal.

Point 5. Under section 103-1-18, R.S.U. 1933, it was not necessary that Plaintiffs had been convicted of three felonies before proceedings could be commenced to determine whether they were habitual criminals.

Point 6. The committment of Demmick was legal.

POINT 1

IN THESE HABEAS CORPUS PROCEEDINGS
THE COURT IS LIMITED TO A DETERMINATION
OF WHETHER SECTION 103-1-18, R.S.U. 1933 HAS
BEEN REPEALED.

It is stated in 25 Am. Jur. 159, Habeas Corpus, section 26, that:

“The primary and, ordinarily, the only ques-

tion involved in habeas corpus proceedings is one of jurisdiction—namely, whether the particular order, judgment or process whose validity is attacked is one coming within the lawful authority of the court or officer making or issuing it. As it may otherwise be stated, in the absence of statutory provision to the contrary, the scope of inquiry, where restraint is had by virtue of legal process, is ordinarily limited to the validity of the process on its face and the jurisdiction of the court by which it was issued. The writ does not lie to correct errors and irregularities committed in the exercise of jurisdiction; but cognizance is taken only of such defects as render absolutely void the proceedings under which the petitioner is imprisoned. In short, the writ reaches jurisdictional error only; it cannot properly be used to serve the mere purpose of an appeal or writ of error.”

Plaintiffs attack the proceedings under which they were committed to prison on the following grounds, (1) that the statute authorizing enhancement of sentence had been repealed, (2) the sentences and commitments in the previous convictions relied upon were not for not less than three years, (3) the verdicts were improper because of the defective information, (4) that the court could not try Plaintiffs until there had been a conviction of three felonies and (5) in the case of Demmick, that the committment could not issue without a hearing.

A punishment imposed pursuant to a statute that had been repealed would concededly be an act in excess of jurisdiction. But even if this is so we submit that

Plaintiffs are not entitled to an unconditional discharge. Under Point 2 herein we contend there has been no repeal of 103-1-18, R.S.U. 1933.

Under the second ground of attack certainly the trial court had the authority to construe the section 103-1-18 and to make a determination of whether the sentences and committments alleged in the informations as previous offenses came within the meaning of said section. Its determination might be error but that is not an act in excess of its jurisdiction. This Court has held that it was within the jurisdiction of a trial court to construe and make application of statutes. *Bleon vs. Emery*, 60 Utah 582, 209 P. 627 (1922) wherein it was said:

“Moreover, counsel, in his petition for a rehearing, entirely ignores the fact that in view that the decision is rendered in a habeas corpus proceeding this court was restricted to the question of whether the statute is valid or invalid. It is elementary that mere errors of construction or judgment, whether committed by a court or by some board or officer, cannot be reviewed in a habeas corpus proceeding.” 1 *Bailey on Habeas Corpus*, 30; *Bruce vs. East, Sheriff*, 43 Utah, 327, 134 Pac. 1175, and cases there cited.

If the Plaintiffs here were dissatisfied with the rulings made their remedy was to appeal.

Plaintiffs seem to take the position that this Court in these proceedings can make a determination of whether the sentences and committments alleged in the informa-

tions come within 103-1-18 on the theory that this Court can now determine whether the informations stated public offenses. Such cannot be done in habeas corpus. *Areson vs. Pincock* 62 Utah 527, 220 P. 503 (1923); *Bruce vs. East* 43 Utah 327, 134 P. 1175. In each of these cases contention was made that the pleadings under which punishment was imposed did not state public offenses but it was held that the courts wherein they were filed had jurisdiction to determine that matter and hence the failure to state a public offense was not grounds for discharge in habeas corpus.

This Court in *Areson vs. Pincock*, *supra*, in speaking of the sufficiency of a complaint stated:

“But the question is not one of jurisdiction, and may not be inquired into in habeas corpus proceedings. It cannot be denied that the court had jurisdiction generally to try the issues and make the order complained of. Habeas corpus takes cognizance only of defects of a jurisdictional character, which render the proceedings not merely voidable, but absolutely void. *Bruce vs. East*, 43 Utah, 327, 134 Pac. 1175. The rule is well settled and is supported by many cases. See annotation to *Ex parte Robinson*, L. R. A. 1918B, 1148. The following excerpt from the annotation above referred to indicates the extent to which the rule is applied:

“It has been said that, if from the accusations the court can deduce that the prosecutor intended to charge an act which is a crime, habeas

corpus will not lie, however defectively the act is described; also that if the indictment or information purports or attempts to state an offense, and the court has jurisdiction to pass upon the sufficiency of those statements, the defendants after conviction will not be released on habeas corpus; and that, 'if a criminal charge is colorable', or "sufficient to set the judicial mind in motion" or to call upon it to act, or makes some approach towards charging a criminal offense, or intimates the facts necessary to constitute the offense and a purpose to declare thereon, or tends to show a criminal offense, no matter how informal or defective, or has a legal tendency to prove each requirement of the statute, it will shield the proceedings from collateral attack. In a word, no errors or irregularities not going to the question of jurisdiction are reviewable on habeas corpus.' The rule has been laid down in several cases involving the sufficiency of complaints to charge misdemeanors, although probably the doctrine was not intended to be limited to this class of cases, that after trial and conviction for an alleged misdemeanor a prisoner will not be liberated on a writ of habeas corpus because of the insufficiency of the complaint, if, by any possible construction of the language employed therein, an offense against the law is thereby even defectively stated.'

In *re Gregory*, 219 U. S. 210, 31 Sup. Ct. 143, 55 L Ed. 184, Mr. Justice Hughes, speaking for the court, in a case where colorable questions were presented by the information and evidence, stated the rule as follows:

'A habeas corpus proceeding cannot be made to perform the function of a writ of error and we are not concerned with the question whether

the information was sufficient or whether the acts set forth in the agreed statement constituted a crime, that is to say, whether the court properly applied the law, if it be found that the court had jurisdiction to try the issues and to render the judgment'."

In the annotation found at 57 A.L.R. 85 on "Habeas corpus to test the sufficiency of indictment or information as regards the offense sought to be charged," it is said:

"* * * it has been held that where a criminal proceeding is pending in a court of general jurisdiction, the indictment or information purporting or attempting to state an offense of which the court has jurisdiction, the question whether the facts charged are sufficient to constitute an offense of that kind will not be examined into on a collateral attack. In other words, if it can be deduced from the accusation that the prosecutor intended to charge an act or an omission which amounted to a crime known to the law, the court has jurisdiction and habeas corpus will not lie, however, defectively, the act or omission be described. But if the act or omission charged or attempted to be charged as an offense, is not a crime known to the law, then the court is without jurisdiction, and its judgment is a nullity."

In *Convey vs. Haynes*, 230 Iowa 485, 298 N.W. 647 (1941) it was held that a petitioner in habeas corpus cannot question the sufficiency of the indictment or information under which he was imprisoned unless the act charged does not constitute an offense because the stat-

ute is unconstitutional or where there is a total failure to allege any offense known to the law.

Certainly in the case at bar there is known to the law the offenses of burglary, grand larceny, and robbery and it is known to the law that punishments thereof are enhanced by the perpetrator thereof being an habitual criminal. This is what was attempted, at least, to be alleged in the informations involved. The courts in those proceedings had jurisdiction to determine whether the allegations were sufficient.

Ex parte Bailey, 60 Okl. Cr. 278, 64 P. 2d 278 (1936) cited by Plaintiffs does not aid them in this regard. There is no statute in Oklahoma using the words habitual criminal. The Penal Code there refers only to "Second Offenses." The judgment was for being an habitual criminal and the court stated it should have been for the offense of petit larceny, second and subsequent offense. In Utah our statute does refer to being an habitual criminal.

In the Thompson case, for instance, the information, the verdict, and the sentence were for robbery and being an habitual criminal. This could only mean under our statutes that he had committed robbery and had been twice previously convicted of felonies.

The verdicts in these cases follow the informations and the court certainly had jurisdiction to submit these to the jury.

Plaintiffs next contention is that there could be no finding that they were habitual criminals nor could proceedings be had to determine that question until after the third conviction. We submit that this is a mere matter of procedure and cannot be inquired into in habeas corpus. *Ex parte Hayes* 15 Utah 77, 47 P. 612 (1897); *Convey vs. Haynes*, *supra*; *in re Stone*, 295 Mich. 207, 294 N.W. 156 (1940); *In re Bates*, Idaho, 125 P. (2) 1017 (1942).

In *Ex parte Hayes*, *supra*, the petitioner in habeas corpus contended that the sentence or judgment by virtue of which he was in confinement was void for the reason his trial was not conducted in pursuance of law in that the jury was not chosen pursuant to a valid law. The petition was of course denied, this being merely a matter of procedure. The court stated:

“The important and decisive question, which confronts us at the outset, is, can this court, in a collateral proceeding by habeas corpus, look beyond the judgment, and determine questions which arose during the trial of the case, and which, if they had been presented in the record on appeal, might have resulted in a reversal of the judgment? We think not. The warrant appears fair and regular on its face, and that the district court in which the case was tried had jurisdiction of the person and subject-matter is not, and cannot be successfully, questioned. This being so, and that court being a court of record, its judgment is binding upon all the world until reversed in a regular way by appeal. *A fortiori*

is this so after the judgment has been affirmed by this court. Such a judgment is final, and pronounces the law of the case. With what propriety, then, can this court, by means of habeas corpus, substantially reverse a judgment which the law has placed beyond our control? The prisoner's detention under the judgment, the commitment being regular on its face, cannot be unlawful unless that judgment is absolutely null and void; and it cannot be null and void, when the court had general jurisdiction of the person and subject-matter, even though it may have erred in its proceedings during the trial. Irregularities and mere errors in proceedings will not render a judgment an absolute nullity, although they may render it voidable, and when voidable only it is conclusively presumed to be valid until reversed, and it cannot be reversed by habeas corpus, because habeas corpus does not authorize the exercise of appellate jurisdiction; and 'no inquiry,' says Chancellor Kent, 'is to be made into the legality of any process, judgment, or decree, * * * where the party is detained under the final decree or judgment of a competent court.' 2 Kent, Comm. 30. The district court being a court of general jurisdiction, the offense charged against the prisoner was cognizable in that court, and it was competent to inflict the punishment provided by law for the offense of which the prisoner was convicted; and its judgment, not being reversed, has all the obligation which the judgment of any tribunal can have.

“If the judgment be voidable only, and hence obligatory, because not reversed, we cannot look beyond it on habeas corpus. If it be absolutely void, the officer who detains the prisoner and obeys the judgment is guilty of false imprison-

ment. Would counsel for the prisoner in this case undertake to maintain the position that the officer is guilty of false imprisonment? Clearly, the detention is authorized by the judgment and warrant and the imprisonment is not illegal. 'The habeas corpus is undoubtedly an immediate remedy for every illegal imprisonment. But no imprisonment is illegal where the process is a justification of the officer; and process, whether by writ or warrant, is legal whenever it is not defective in the frame of it, and has issued, in the ordinary course of justice, from a court or magistrate having jurisdiction of the subject-matter, though there have been error in the proceedings previous to the issuing of it.' *Com. vs. Lecky*, 1 *Watts*, 66."

In the committment of Demmick it should be noted that when judgment was rendered execution was stayed until January 4, 1943. On that day execution issued. No hearing was necessary and no question of jurisdiction can be involved.

Counsel for plaintiffs herein cite and quote from *Atwood vs. Cox*, 88 *Utah* 437, 55 *P. 2d* 377 (1936) to the effect that where the pleading shows on its face that the subject matter in regard to which jurisdiction is attempted to be invoked is one over which the court has no jurisdiction then the court has no jurisdiction to go any further than to decide to refuse to take cognizance.

What is the subject matter of the Thompson criminal prosecution? He was charged with robbery and being an habitual criminal. That is of necessity the subject matter.

In the Atwood case jurisdiction is said to be:

“* * * the power or capacity given by law to a court, tribunal, board body or officer to entertain, hear and determine certain controversies.”

The controversy in the Thompson case was whether Thompson was guilty of robbery and being an habitual criminal. Certainly the District Court, a court of general jurisdiction had the power to determine this controversy. If that court did not have that power, then under the Utah constitution and statutes no court had that power.

The same is, of course, true in the case against Demmick.

It should also be remembered that the Atwood case concerned a writ of prohibition and the opinion indicates that the courts have somewhat broadened the scope of that writ because of a feeling that the remedy of appeal was ineffectual in some cases and the writ was issued to prevent inferior courts from acting in a way that injury might be done and which could not be corrected. This Court has held that prohibition will issue where the complaint against a public officer to remove him from office does not state a course of action. This is apparently accounted for on the theory that any order made under such complaint would directly affect the property right of such officer in his office and unless the writ issue there is no other available or adequate remedy to protect him.

It would certainly be a sorry state of affairs if this Court holds that the sufficiency of an information can be tested by habeas corpus. A person held under an information and awaiting trial could have the information tested in this Court and trial would not likely be held until such matter was decided. At any time after conviction proceedings of this kind could be maintained. Criminal litigation would never be completed.

We submit that under the foregoing argument and authorities the proceedings here instituted by Plaintiffs can only require a determination of whether 103-1-18, R.S.U. 1933 has been repealed.

POINT 2

SECTION 103-1-18, R.S.U. 1933 HAS NOT BEEN REPEALED BY IMPLICATION OR OTHERWISE.

This point is in answer to point 2 of Plaintiff's brief.

That repeals by implication are not favored needs the citation of no authorities. It is only when necessity requires such a holding that the courts hold there has been a repeal by implication.

Section 103-1-18 was re-enacted by the Legislature in 1933, along with section 105-36-20. See *State Tax Commission vs. Backman*, 88 Utah 424, 55 P. 2d 171 (1936). Both sections must be given effect. There is no inconsistency between them that requires disregard of one of them. This Court has held that an indeterminate sentence is a sentence for the maximum period provided

by law for the particular offense involved. *Mutart vs. Pratt*, 51 Utah 246, 170 P. 67 (1907); *Lee Lim vs. Davis*, 75 Utah 245, 284 P. 323, 76 L.R. 460 (1929); *State vs. Roberts*, 91 Utah 117, 63 P. 2d 584 (1937). If the maximum term is for three years or more, it is a term for not less than three years. *Haley vs. Hollowell* 208 Iowa 1205, 227 N.W. 165 (1929).

If we are to speculate on legislative intent it can certainly be said that the legislature by the Indeterminate Sentence Law knew that it was providing that each sentence thereunder was for the maximum term and desired that the habitual criminal statute should apply thereto because it did not mention that statute and did not repeal it.

We submit that counsel for plaintiffs misconceive the effect of the Indeterminate Sentence Law. The Board of Pardons was not given by that act any power which it did not already possess by virtue of the Constitution. The Board both before and after had the power to commute punishments (which includes the power of parole, *State ex rel. Bishop vs. State Board of Corrections*, 16 Utah 478, 52 P. 1090 (1898)) grant pardons, etc. Time served under a so-called "judge-made" sentence could be cut down by the Board.

Counsel also states that "No sentence was definite within the permissible minimum and maximum limits." This Court has held that indeterminate sentences are

definite, they are for the maximum term. What the Board of Pardons does or may do is not a part of the sentence. It can not alter the fact that a person has been sentenced and committed for the maximum period.

We submit that said section 103-1-18 has not been repealed by implication or otherwise.

POINT 3

IN EACH CASE IT APPEARS FROM THE INFORMATION THAT PLAINTIFFS HEREIN HAD BEEN EACH TWICE SENTENCED AND COMMITTED TO PRISON FOR TERMS OF NOT LESS THAN THREE YEARS PREVIOUS TO THE CRIMES CHARGED THEREIN.

This point is in answer to point 1 in Plaintiffs' Brief except we will not here consider the jurisdictional question there mentioned. We believe that this has been disposed of under Point 1 hereof.

In the Thompson case the previous sentences and commitments relied on were an Idaho sentence and commitment for a term of not less than one or more than fifteen years and a Utah sentence and commitment for a term of not less than five years to life.

In the Demmick case the previous sentences and commitments relied on were a Utah sentence and commitment for a term not exceeding five years and a California sentence and commitment for a term of not less or more than fifteen years.

Under the cases heretofore cited these were all sentences and commitments for the maximum terms therein specified. In each instance the maximum was for not less than three years. See Point 1, Respondent's Brief in State vs. Walsh, Case No. 6643.

POINT 4

THE VERDICTS IN BOTH CASES HERE INVOLVED WERE PROPER AND LEGAL.

This is in answer to Point 3 contained in Plaintiffs' Brief.

These verdicts were in compliance with the charges contained in the informations. By these verdicts the jury found beyond a reasonable doubt that Plaintiffs herein committed the crimes charged in the informations and that each had been twice previously convicted, sentenced and committed as alleged in said informations. These verdicts were necessary in order that the court could impose the enhanced punishment provided for by said section, 103-1-18. State vs. Findling, 123 Minn. 413, 144 N.W., 142, 49 L.R.A. (N.S.) 499 (1913).

POINT 5

UNDER SECTION 103-1-18, R.S.U. 1933 IT WAS NOT NECESSARY THAT PLAINTIFFS HAD BEEN CONVICTED OF THREE FELONIES BEFORE PROCEEDINGS COULD BE COMMENCED TO DETERMINE WHETHER THEY WERE HABITUAL CRIMINALS.

This is in answer to Point 4 of Plaintiffs' Brief, except the jurisdictional problem covered herein under Point 1.

As we understand Plaintiffs' argument, it is their contention that until after the conviction of Plaintiffs' on the third felony no proceedings could be had under said section 103-1-18. This is but a matter of procedure. From all that appears here Plaintiffs' did not raise this question in the trial of these cases. If this were an appeal there is nothing in the record to show that this matter could be raised. They may have consented to this procedure.

However, we submit that the proper procedure was here followed and the Plaintiffs were properly informed of the nature and cause of the accusation against them and were tried by a jury on the issues raised by their pleas. See Point 2, Respondent's Brief, State vs. Walsh, Case No. 6643.

Section 103-1-18, R.S.U. 1933 provides:

"Whoever has been previously twice convicted of crime, sentenced and committed to prison, in this or any other state, or once in this and once at least in any other state, for terms of not less than three years each, shall, *upon conviction* of a felony committed in this state, other than murder in the first or second degree, be deemed to be an habitual criminal, and shall be punished by imprisonment in the state prison for not less than fifteen years; provided, that if the person so convicted shall show to the satisfaction of the

court before which such conviction is had that he was released from imprisonment upon either of such sentences upon a pardon granted on the ground that he was innocent, such conviction and sentence shall not be considered as such under this section."

Counsel for Plaintiffs contend that the word "upon" means after. If the Legislature meant after why did it not use the word after? Then, too, how long after.

Upon conviction here means at the time of conviction. At the time of conviction of the third felony he shall be deemed to be an habitual criminal. At the time of that conviction something must precede it in the way of a determination that he had been twice previously convicted before he can be deemed an habitual criminal. How else that determination can be made in a court of law other than upon pleading and proof we do not know. Counsel does not enlighten us. If the statute indicates any procedure it is the procedure here followed:

POINT 6

THE COMMITMENT OF DEMMICK WAS LEGAL.

This is an answer to Point 5 of Plaintiffs' Brief.

At the time Demmick was sentenced on November 28, 1942, he was granted a stay of execution only until January 4, 1943. No further stay was granted and commitment issued on that date.

This case is entirely different from *State vs. Zolantakis*, 70 Utah 296, 259 P. 1044, 54 A.L.R. 1463. There sentence was suspended during good behavior. There was no fixed date to which it was suspended. It was an indefinite suspension. The court held that in order to revoke this suspension it was necessary that a pleading be filed for such purpose, issues drawn and a hearing held. In the case at bar there was nothing to revoke, the stay granted expired and the committment issued.

CONCLUSION

This is not an appeal. Only jurisdictional problems can be determined in habeas corpus.

We submit that section 103-1-18 has not been repealed and that that is the only problem here involved. However we believe that there is not even error in the other matters raised by Plaintiffs and that the foregoing authorities and arguments confirm this statement.

Even though error was committed, Plaintiffs are not entitled to an absolute discharge. They were still convicted of the felonies of robbery, burglary and grand larceny and should be sentenced therefor. Under *Murtart vs. Pratt*, *supra*, even though the sentences here are erroneously set forth in the judgment, this Court can consider them as the sentence provided by law for the felonies of which they were properly convicted. In any event they should be remanded for proper sentence as was done in *Ex parte Folck*, *Folck vs. Watson*, *supra*.

We submit that the writ should be denied.

Respectfully submitted,

GROVER A. GILES,

ZAR E. HAYES

BRIGHAM E. ROBERTS.