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Ersell Harris, Jr. v. Samuel W. Smith : Brief of Appellant

Utah Supreme Court

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

ERSELL HARRIS, JR.,

Plaintiff-Appellant,

vs.

SAMUEL W. SMITH, Warden
Utah State Prison

Defendant-Respondent.

Case No.

13859

BRIEF OF PLAINTIFF-APPELLANT ON APPEAL

APPEAL FROM DENIAL OF PETITION FOR WRIT OF HABEAS CORPUS IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE PETER F. LEARY PRESIDING.

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STATEMENT OF NATURE OF CASE

This case is an appeal from the denial of a Writ of Habeas Corpus filed by Petitioner Ersell Harris.

DISPOSITION IN LOWER COURT

Petitioner filed a Writ of Habeas Corpus in the District Court of the Third Judicial Distric Salt Lake County, Utah. The Honorable Peter F. Lea heard the argument, and denied petitioner's writ.

RELIEF SOUGHT ON APPEAL

The petitioner asks the court to grant the Writ of Habeas Corpus, thereby overruling the judgment of the District Court of the Third Judicial District, Salt Lake County, Utah.

STATEMENT OF FACTS

In 1967 petitioner Ersell Harris was charged with issuing a fictituous check. The State commenced prosecution in the Third Judicial District Court, Salt Lake County, Utah, Case No. 20544. The complaint was subsequently dismissed on the motion of the prosecution.

Three years later, in 1970, the State once agai brought charges against petitioner, such charges arising out of the same set of facts as the 1967 information. This action was brought in the District Court of Salt Lake County, State of Utah, Case No. 22177. Petitioner was charged with uttering a fictituous check in violation of Utah Code Ann. §76-26-1(1953), as amended. Petitioner was found guilty, and on or about September 29, 1970 was sentenced to a term of 1-20 years by the

Honorable Merrill C. Faux.

Petitioner appealed his conviction, and was released on bond pending the appeal. Approximately three years later, in a decision dated January 7, 1974, the conviction was sustained on appeal by the Supreme Court of the State of Utah, Case No. 12424, 30 Utah 2d 354, 517 P.2d 1313 (1974). Imposition of sentence followed the affirmance of the judgment of conviction, and petitioner is presently being held in the custody of the respondent in his capacity as Warden of the Utah State Prison.

Effective as of July 1, 1973, Utah adopted a new criminal code. Petitioner's appeal was pending at this time, and was not heard until six months after the effective date. Although the new criminal code was in effect at the time of the imposition of petitioner's sentence (January, 1974), the penalty imposed upon petitioner was based on the statutory provision in force at the time of petitioner's conviction (September, 1970).

POINT I

THE COMPLAINT FILED AGAINST ERSELL HARRIS WAS FATALLY DEFECTIVE IN THAT IT WAS INVALID AND INSUFFICIENT ON ITS FACE AND DID NOT GIVE THE COURT OR THE DEFENDANT ADEQUATE NOTICE OF WHAT OFFENSE WAS INTENDED TO BE CHARGED.

A. THE COMPLAINT FILED AGAINST ERSELL HARRIS WAS INVALID AND INSUFFICIENT ON ITS FACE.

In order to facilitate the job of the prosecutor and to insure criminal defendants fair and adequate notice of the charge against them, the Utah Code of Criminal Procedure has adopted standardized forms for complaints. These standard forms, as collected in Utah Code Ann. §77-21-47(1953), indicate what elements should be included in a criminal complaint before it is valid and sufficient on its face.

The complaint filed against Ersell Harris (Complaint #18348, contained in the record) did not meet the standards set forth in the statute and was, therefore, defective and insufficient

Utah Code Ann. §77-21-47(1953), supra., indicates that the words, "uttered as genuine a forged instrument," should be present when the offense of uttering a forged instrument is charged. In the Ersell Harris complaint, such words were omitted, as the complaint read as follows:

> That the said Ersell Harris, at the time and place aforesaid, did utter and pass a certain instrument, purporting to be a bank check, knowing the same to be forged, with the intent to defraud Buy-Rite, a corporation.

State v. Jensen, 103 Utah 478, 136 P.2d 949 (1943), supports the above conclusion that, absent the words "uttered as genuine" the complaint was defective. In Jensen, the Court analyzed the statutory language found in Utah Code Ann. §105-21-47 (1943), the predecessor statute to the present statute in question, Utah Code Ann. §77-21-47 (1953) The language in the two statutes was unchanged from the 1943 codification to the 1953 codification. In discussing the statute, the Court indicated that the words "uttered as genuine" must be used in order to make the complaint sufficient to invoke jurisdiction. Jensen at 955.

Since such words were not used in the instant case, the complaint was invalid and insufficient to invoke jurisdiction.

B. THE INVALID AND INSUFFICIENT COMPLAINT FILED AGAINST HARRIS DID NOT GIVE THE COURT OR THE DEFENDANT NOTICE OF WHAT OFFENSE WAS INTENDED TO BE CHARGED.

It is a fundamental principle under the Utah Code of Criminal Procedure that every person accused of a crime has the right "to be informed of the nature and cause of the accusation." People v. Hill, 3 Utah 334, 355, 3P. 75 ( ). This information must be given with sufficient certainty and completeness so that the court may know how to render judgement and the defendant may know what he must answer. This common-law principle was codified by the Utah Legislature in Utah Code Ann. §77-21-8(1), (1953), which states:

> The information or indictment may charge, and is valid and sufficient if it charges the offense for which the defendant is being prosecuted in one or more of the following ways:
>
> ...
>
> (b) By stating so much of the definition of the offense, either in terms of the common

> law or of the statute defining the offense or in terms of substantially the same meaning, as is sufficient to give the court and the defendant notice of what offense is intended to be charged.

The complaint filed against Harris did not meet either the common-law or the statutory requirements of certainty and notice. Harris was charged with forgery under Utah Code Ann. §76-26-1. Under this statute, one may be convicted of the crime of making the forged instrument, or of uttering as genuine an instrument known to be false, or of both making and uttering a forged instrument. State v. Gorham, 93 Utah 274, 72 P.2d 656 (1937). In addition, under Utah Code Ann. 76-26-7 (1953), an individual may be charged with making, or with uttering as genuine, or with both making and uttering fraudulent paper. State v. Jensen, 103 Utah 478, 136 P.2d 949 (1943). Since the simple crime of "passing a bad check" may be charged and prosecuted under either of the above statutes, and in any of the ways or combinations of the ways above indicated, an accused person must be informed of his charge with great specificity in order to have adequate notice. In addition, since the preparation

f an answer and a defense is contingent upon nowing exactly how one is charged, no flexibility an be allowed in the form of the complaint if he requirement of certainty and notice is to e met. Finally, since the kind of proof varies epending on the exact charge, the defendant must e adequately informed of the exact charge against im in order to assure a fair trial.

As demonstrated in Point A, supra., the complain n the instant case was invalid and insufficient n its face. By leaving out the words "uttered s genuine" the defendant was unable to know with ertainty the exact nature of the charge against im. Although the complaint indicated that the efendant was being charged with the general crime f forgery, the confused nature of the crime of orgery and the myriad ways in which it can be harged and prosecuted require that a specific omplaint be drawn. As such, the defects on the ace of the complaint were not cured under Utah ode Ann. §77-21-8(1)(b), supra., and the complaint emains defective. Since such defect goes to the

fundamental issue of notice to the defendant, it is contended that the complaint should be held void and insufficient, and the case reversed on grounds of no jurisdiction.

POINT II

PETITIONER IS ENTITLED TO BE RESENTENCED IN ACCORD WITH THE PROVISIONS OF THE NEW UTAH CRIMINAL CODE.

The new Utah Criminal Code became effective July 1, 1973, Utah Code Ann. §76-1-102 et seq. Prior to that date, petitioner had been tried, convicted and sentenced, but his appeal and commitment to prison occured subsequent to the effective date. State v. Harris 30 U2d 354, 517 P.2d 1313 (1974); TR, 2-3. On this basis, petitioner contends that his sentencing to the penalty under the repealed code is in error.

The law in Utah already enables individuals charged with criminal offenses which occured prior to the effective date of the new Criminal Code to be afforded the benefit of the lesser penalties under the amendatory statutes. The savings clause of the new Utah Criminal Code, Utah Code Ann.

76-1-103(2), mandates the application of any imitation on punishment under the new code where he defendant is tried after the effective date.

The case law in Utah has gone even further n determining the applicability of amendatory egislation. In State v. Tapp, 26 Utah 2d 392, 90 P.2d 334 (1971) and Belt v. Turner, 25 U.2d 180, 483 P.2d 425 (1971), this Court held that here the amended statute became effective prior to the date of sentencing, the amended statute controlled the punishment and the defendant was entitled to the benefit of the lesser penalty under the new Criminal Code. Thus, even if the trial and conviction occur prior to the effective date, the amended statute controls the penalty.

The savings clause, §Utah Code Ann. 76-1-103(2) also permits the limitation on punishment under the new code to be applicable where the defendant is retried after the effective date. Thus, even if the trial, conviction and sentence occur prior to the effective date, the amended statute controls the penalty where the defendant is retried subsequen to the effective date. In this regard, the savings

:lause expands on the holdings of this court in State v. Miller, 24 U. 2d 1, 464 P.2d 844 (1970), is well as State v. Tappand Belt v. Turner, supra. In Miller, the court held that the fact that the statute under which the defendant was charged was amended pending appeal did not require the case to be remanded for resentencing. In Tapp it was held that if the statute reducing the penalty had not become effective until after conviction and sentence, the sentence under the repealed statute stood. In Belt the court found that where the amendatory statute provides for a lesser penalty and becomes effective subsequent to sentencing but prior to final judgment, no constitutional question was involved.

All three cases are admittedly distinguishable from the present case as they were heard by this court prior to the effective date of the new criminal code, including the savings clause provisions. However, in the recent case of State v. Saxton, 30 U.2d 456, 519 P.2d 1340 (1974), this court held that the defendant, who was tried prior to the effective date of the new code but sentenced

fter, was entitled to the new, lesser sentence, otwithstanding the literal provisions of the avings clause. The court thus continued to respect he thrust of the new sentencing provisions. t follows that where trial, conviction, sentence, mposition of sentence, appeal, or retrial occur r are pending subsequent to the effective date f the amendatory legislation, the sentence is r should be that provided in the amended provisions.

Neither the savings clause nor the applicable ase law expressly address the issue in this case. Here, the appeal was pending on the effective date of the new code, the judgement of conviction was subsequently affirmed, and imposition of sentence occured after the effective date. Literally read, the savings clause is applicable in this situation only where the defendant is successful on appeal and granted a new trial. However, a narrow construction of the savings clause is both unnecessary and unwarranted as demonstrated by this court in State v. Saxton, supra., where this court did decline to read narrowly the savings clause here at issue. The court expressely rejected the state's

rgument that the language of the savings clause perated as a legislative overruling of the holdings n State v. Tapp and Belt v. Turner, supra, regarding he applicable penalty when sentencing occurs fter the effective date:

> The fact that the final "except" clause confers further assurance that anyone "tried or retried" after the effective date of the act shall also have the benefit of a change to a lesser penalty, should not be regarded as depriving this defendant of the benefit. 30 U.2d at 459, 419 P.2d at 1342.

hus this court has reasonably read into the savings lause rules of law which are not within the scope f its literal reading. The court's intent suggests hat application of the amendatory sentencing rovision is both reasonable and appropriate in he facts of this case as well as in Saxton, supra.

In Bell v. Maryland, 378 U.S. 226 (1964), he United States Supreme Court held that the ap- licability of a savings clause to a repealed riminal statute is a question of interpretation f legislative intent appropriate for determination y the state court. This court, in Belt v. Turner 5 u.2d 230, 479 P.2d 791 (1971) determined that new policy adopted by the legislature concerning unishment for an offense should inure to the

enefit the defendant, even though the offense as been committed prior to the amendatory legislatio hus in Utah the judicial position in the case f amendatory legislation reducing punishment avors lenity.

In the case of In Re Estrada 48 Cal. Rptr. 72, 408 P.2d 948 (1965), the California Supreme ourt elaborated upon the legislative intent con- erning amendatory penalty provisions:

> There is one consideration of paramount importance. It leads inevitably to the conclusion that the Legislature must have intended, and by necessary implication provided, that the amendatory statute should prevail. When the Legislature amends a statute so as to lessem the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final. This intent seems obvious, because to hold otherwise would be to conclude that the Legislature was motivated by a desire for vengeance, a conclusion not permitted in view of modern theories of penology. Id, 48 Cal. Rptr. at 175, 408 P.2d at 951; quoted in part in State v. Tapp, supra; cited in Beltz v. Turner, supra.

uch an interpretation is not only in accord with egislative intent; it is also consistent with ontemporary theories of the criminal sanction.

This point is elaborated in People v. Oliver, 51 N.Y.S. 2d 367, 134 N.E. 2d 197 (1956), where he lesser penalty of the amended statute was pplied to the defendant:

> This application of statutes reducing punishment accords with the best modern theories concerning the functions of punishment in criminal law. According to these theories, the punishment or treatment of criminal ofenders is directed toward one or more of three ends: (1) to discourage and act as a deterrent upon future criminal activity, (2) to confine the offender so that he may not harm society and (3) to correct and rehabilitate the offender There is no place in the scheme for punishment for its own sake, the product simply of vengeance or retribution. (citations omitted) A legislative mitigation of the penalty for a particular crime represents a legislative judgement that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law. Nothing is to be gained by imposing the more severe penalty after such a pronouncement; the excess in punishment can, by hypothesis, serve no purpose other than to satisfy a desire for vengeance. As to a mitigation of penalties, then, it is safe to assume, as the modern rule does, that it was the legislative design that the lighter penalty should be imposed in all cases that subsequently reach the courts. Id, 151 N.Y.S. 2d at 373, 134 N.E. 2d at 201-2; quoted in Belt v. Turner and In Re Estrada, supra.

Common sense and logic dictate that where, as here, petitioner's appeal was pending on and his commitment to prison occured subsequent to the effective date of the new Utah Criminal Code, the ameliorating penalty provision of the amendatory statute applies. It should make no difference to the applicability of the amendatory penalty whether the direct appeal was successful or not in obtaining a new trial for the defendant. The Legislature apparently overlooked the situation where the commitment occured subsequent to the effective date or where the appeal was pending and subsequently lost. Its intent would appear to be however, to afford the lesser penalty in such situations, in accord with the preceding policy and theoretical considerations.

The preceding arguments are not novel; the case law elsewhere has been in substantial agreement In Bell v. Maryland, supra the court found that where the judgment of conviction has not become final, the proceeding is deemed pending. This has significance where the amended statute provides a lesser penalty. In Commonwealth v. Goodman, 311 A.2d 652 (1973), the Pennsylvania Supreme

inal prior to the adoption of the new act, the efendant is entitled to be resentenced under he latter act. The finality of a judgment of onviction does not vest upon conviction, sentence, r commitment necessarily. The rule, spelled ut, is thus:

> that a judgment is not final until the availability at appeal has been exhausted and the time for petition for certiorari has elapsed. Id, 311 A.2d at 655, quoted from Linkletter v. Walker 381 U.S. 618 (1965), at 622, n.5.

Thus, under the facts and circumstances of his case, petitioner's judgment of conviction as not final since his appeal was pending on he effective date of the new code and he had ot yet been committed. The same position, that he judgment is not final while the case is awaiting ppellate review, has been taken by the North arolina Court which has held that no subsequent unishment can be imposed under the repealed statute. ee State v. Pardon, 272 NC 72, 157 SE2d 698 (1967), ited in State v. Tapp, supra, this court noting hat Pardon was consistent with the Tapp holding; State v. Godwin, 13 N.C. App. 700, 187 SE2d 400 (1972 nd State v. Hart, 22 N.C. App. 738, 207 SE2d 766

74). In accord is Illinois, which has repeatedly
d that final adjudication has not been reached
re an appeal of the conviction is pending upon
effective date of the new legislation, and
refore that the defendant is entitled to be
entenced under the new law. See People v. Lucien,
Ill. App. 3d 289, 302 NE2d 371 (1973); People
McCall, 14 Ill. App. 3d 340, 302 NE2d 400 (1973);
ple v. Marin, 56 Ill. 2d 490, 309 NE2d 9 (1974);
ple v. Grant, 57 Ill. 2d 264, 312 N.E. 2d 276 (1974)
. People v. Holiday, 2111. App. 3d 796, 316 NE2d
(1974).

The Nebraska Supreme Court, while in agreement
it the amended statute mitigating punishment
applicable where the appeal is heard subsequent
its effective date, has further ruled that
ishment exceeding the maximum provided in the
nded act is excessive. See State v. Waldrop,
Neb. 434, 215 NW2d 633 (1974); State v. White,
Neb. 772, 217 NW2d 916 (1974); State v. Patterson,
Neb. 308, 220 NW2d 235 (1974); and State v.
es, 192 Neb. 548, 222 NW2d 831 (1974). Since
e maximum sentence under the controlling section

:he new code, UCA 76-6-501(4), is less than penalty appellant received under the old code ision, UCA 76-26-1, the penalty is excessive er the reasoning of the Nebraska courts.

The reasoning of In Re Estrada, supra, has n followed in California, permitting the defendant benefit of the lesser penalty where an appeal pending or final judgment had not been rendered of the effective date of the amended statute. In Re Corcoran, 50 Cal. Rptr. 529, 413 P.2d (1966); Bennett v. Procunier, 69 Cal. Rptr. , 262 Cal. App 2d, 799, (1968); and People v. nstone, 77 Cal. Rptr. 867, 273 Cal. App. 2d, (1969). Further, California has extended the licability of the benefit in its most recent e where the imposition of sentence occurred sequent to the effective date of the new law. ple v. Cloud, 81 Cal. Rptr. 716, 1 Cal App 3d .(1969).

To summarize, many jurisdictions confronted ch the applicability question of sentencing visions guarantee the defendant the benefits

the lesser penalties. Petitioner's judgment conviction was not final in that it was pending eal on and he had not been committed to prison il subsequent to the effective date of the Utah Criminal Code. Therefore, petitioner entitled to be resentenced under the amendatory tutes with the benefit of the lesser penalty.

POINT III

THE SAVINGS CLAUSE OF THE NEW UTAH CRIMINAL CODE OPERATES AS A DENIAL OF EQUAL PROTECTION OF LAW AS APPLIED TO PETITIONER, AND IS VIOLATIVE OF THE UTAH AND FEDERAL CONSTITUTIONS.

Article I, §2, of the Utah Constitution and e Fourteenth Amendment of the United States nstitution contain essentially the same guarantees equal protection under the law. The savings ause in the new criminal code, UCA §76-1-103(2) eates two classes of criminal defendants which e not treated alike. Both classes consist of rsons who committed their offense prior to the fective date of the amendatory legislation and o had appeals pending from their judgment of

viction at that date. The class of defendants
ch prevails on appeal and is granted a retrial
afforded the benefit of the lesser penalties
er the new code upon reconviction, regardless
the grounds for reversal; the other class,
sisting of those defendants unsuccessful on
eal, is not afforded this benefit and must
ve the sentence provided by the old penalty.
s the applicability in this situation of the
provisions depends not on when the offense,
al, conviction, sentence, final judgment, or
nitment occur, but upon the resolution of the
eal. Such a construction cannot stand constitu-
nal scrutiny. Petitioner, by not being afforded
benefit of the lesser penalty under the amendatory
tute, is unconstitutionally denied equal pro-
tion of the law.

The facts of this case and the language of
Utah Savings Clause distinguish it from other
es where no denial of equal protection has
n found in imposing a previously longer sentence
a crime for which the penalty has been legis-
vely changed. In those cases attacking the

titutionality of savings clauses per se, a
ing for those attacking them would have established
edent or an essentially impossible burden
he states to adjust all existing sentences
equent to the change. In this case, however,
Utah legislature did not adopt a wholesale
ngs clause, but rather created exceptions
ts operation. It thus recognized that, with
e exceptions, contemporary penal policy and
ry underlying the criminal sanction suggest
amendatory lessening of penalties should
e to the benefits of the defendant even where
offense is committed prior to the amendatory
slation becoming effective. While the Utah
slature should be commended for its progressive
dpoint, it has, through these exceptions,
ted petitioner and those similarly situated
the protection of the new policy, perhaps
istake. The probable legislative intent,
the constitutional requirement of equal protection
aw, require that all persons having their
ment of conviction pending on direct appeal
he effective date of the new Utah Criminal

e be afforded the lesser penalty of the amendatory
.slation. This conforms with the legislative
.cy in the realm of criminal law not to apply
es of strict construction, but rather to construe
law according to the fair import of its terms
to effect the objectives and purposes of the
inal sanction: See generally UCA §76-1-106,
§76-1-104. To the extent that it contravenes
savings clause, the policy of the Utah legislature
the constitutional requirement of equal protection
.aw, Belt v. Turner 25 U.2d 380, 483 P.2d 425
'1) must be either modified or overruled. The
er Utah case law on this subject is distinguishable
reasons stated in Point II.

Petitioner must be resentenced in accord
. the new Utah Criminal Code, to make constitu-
.al the savings clause which has permitted
state to prosecute persons for offenses under
old law subsequent to the effective date of
al; otherwise, under the common law rule enunciated
ell v. Maryland, supra, all pending criminal
eedings would have to be dismissed.

CONCLUSION

The vagueness and uncertainty in the language the complaint filed against petitioner as to t offense with which it was intended that he be rged operated as a denial of adequate notice. ther, the complaint was insufficient to envoke jurisdiction of the court. Under these contions, the complaint being fatally defective, itioner's judgment of conviction must be resed and his release ordered.

When the new Utah Criminal Code became effective, petitioner's appeal from his conviction pending, and his sentence was not imposed until er this court affirmed his conviction. Petitioner therefore entitled to be sentenced under the visions of the amendatory legislation, either ler a theory of legislative intent, case law, and icy regarding the criminal sanction, or under a ory of constitutional mandate by virtue of the al protection clauses of the Utah and United tes Constitutions. Under these contentions, itioner's sentence under the old code must be

ted and his case must be remanded for resen-

ing under the new Utah Criminal Code.

Respectfully submitted,

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