

1952

State of Utah v. Don Fedder : Brief of Appellant

Utah Supreme Court

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Vernon K. Smith; Theodore Bohn; Attorneys for Appellant;

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CASE NO. 7899

IN THE SUPREME COURT
of the
STATE OF UTAH

- - - - -

STATE OF UTAH,

Respondent,

-VS-

DON FEDDER,

Appellant.

- - - - -

BRIEF OF APPELLANT

FILED

NOV 5 - 1952

VERNON K. SMITH

~~THEODORE BOHN~~

Clerk, Supreme Court, Utah

Attorneys for Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

STATE OF UTAH,)	
	:	
Respondent,)	
	:	Case No.
-vs-)	
	:	7899
DON FEDDER,)	
	:	
Appellant)	

* * * * *

BRIEF OF APPELLANT

* * * * *

The Information filed in the District Court of the Second Judicial District of the State of Utah, in and for Weber County, named and charged three persons as defendants, to-wit: Kenneth Denver, Don Fedder and Dell Allred.

This appeal, however, is an appeal by Don Fedder alone.

STATEMENT OF FACTS

On the 27th day of November, 1950, an Information was filed in the District Court of the Second Judicial District of the State of Utah, in and for Weber County, which Information

as follows:

"Kenneth Donver, Don Fedder and Dell Allred having heretofore been duly committed by Jack A. Richards, a committing magistrate Pro Tem of this County to this Court, to answer this charge, is accused by the District Attorney of this Judicial District, by this information, of the crime of Violation of Section 103-36-12, Utah Code Annotated, 1943, a felony committed as follows, to-wit:

That the said defendants for their own gain or to prevent the owner from again possessing its property did then and there wilfully, unlawfully and feloniously receive the following described personal property, to-wit: a quantity of women's clothing, exceeding \$50.00 in value, knowing the same to have been stolen; that said personal property was the property of Hilb and Company.

/S/ L. Roland Anderson
Asst. District Attorney,
Second Judicial District"

(Transcript, p. 9)

On the 4th day of December, 1950, the appellant, Don Fedder, appeared and entered his plea of not guilty, as follows:

"On this day personally appears defendants to plead to the charge of Violation of Sec. 103-36-12, Utah Code Annotated, 1943, a felony L. Roland Anderson, Esq., appearing as counsel for the State of Parley E. Norseth, appearing

as counsel for the defendants. It appearing that the information has heretofore been read to defendants and they having answered that they are being prosecuted by their true names, is now asked by the court wheather they plead guilty or not guilty to said charge, and defendants and each of them answer 'not guilty' which plea is entered accordingly. Thereupon the case is continued without date."

(Trenscript, p. 10)

On February 28, 1951, the appellant herein withdrew his plea of not guilty and entered a plea of guilty and the case was referred to James A. Larson, State Adult Probation Officer, as follows:

"On this day personally appears defendants for trial, L. Roland Anderson, Esq., appearing on behalf of the State, and Parley E. Norseth, Esq., appearing as counsel for the defendants. On motion of Assistant District Attorney the case against Dell Allred is dismissed, Thereupon Counsel for Defendants Denver and Fedder asks leave of the court to withdraw their former plea of not guilty and enter a plea of guilty as charged in the information. Thereupon the plea of guilty is duly entered in the court records. Thereupon the case is referred to James A. Larson, State Adult Probation officer, and defendants are remanded to the Sheriff to be kept in jail until report is made, and the case is con-

(Transcript, p. 11)

On March 19, 1951, the minutes of the Court show that the defendant was placed upon probation but that no conditions of such probation were prescribed, nor was any period of time specified, as follows:

"On this day personally appears defendants and both of them pursuant to court order for imposition of sentence. Glenn W. Adams, District Attorney appearing as counsel for the defendants. Thereupon the court orders that Kenneth Denver case be continued to April 2, 1951, for report of James A. Larson Adult Probation officer, and defendant is remanded to the custody of Mr. Larson to be kept in the county jail.

Don Fedder is placed on probation to the State Adult Probation department and the case is continued to April 30, 1951 at 10 o'clock A.M., for report."

(Transcript, p. 12)

Thereafter in the transcript, the title of the cause refers to Don Fedder alone as defendant and on April 30, 1951, the defendant Fedder's case was continued until August 13, 1951, at 10:00 o'clock a.m., as follows:

"On this day personally appears defendant pursuant to court order. The Court hears the report of James A. Larson Adult Probation officer, and it is ordered

(Transcript, p. 11)

On March 19, 1951, the minutes of the
show that the defendant was placed upon pro-
bation but that no conditions of such proba-
tion were prescribed, nor was any bond at that
time specified as follows:

On this day personally appears de-
fendants and both of them pursuant to
court order for imposition of sentence
Glen W. Adams, District Attorney ap-
pearing as counsel for the defendants.
Thereupon the court orders that Nor-
man Denver case be continued to April
2, 1951, for report of James A. Larson
Adult Probation officer, and defendant
is remanded to the custody of Mr. Lar-
son to be kept in the county jail.

Don Hedger is placed on probation to
the State Adult Probation Department
and the case is continued to April
30, 1951 at 10 o'clock A.M. for re-
port."

(Transcript, p. 12)

Thereafter in the transcript, the title
of case refers to Don Hedger alone as de-
fendant. On April 30, 1951, the defendant Hedger
case was continued until August 13, 1951, at
10:00 o'clock A.M. as follows:

that the case be continued to August 13, 1951 at 10 o'clock A.M."

(Transcript, p. 13)

On August 13, 1951, the case was continued again, as follows:

"On this day personally appears defendant for imposition of Sentence, pursuant to court order. The court hears the statement by William E. Boyington, and good cause appearing the case is continued to November 19, 1951, at 2 P.M. for further report."

(Transcript, p. 14)

On November 19, 1951, a further order was made, as follows:

"The defendant is ordered to report in person on November 26, 1951, 10 o'clock a.m."

(Transcript, p. 15)

On November 26, 1951, the case was further continued, as follows:

"The report of the defendant is continued to December 3, 1951."

(Transcript, p. 16)

On December 3, 1951, the case was further continued, as follows:

"The report of the defendant is continued to December 17, 1951."

On December 17, 1951, a further order of continuance was made, as follows:

"Good Cause appearing the report in the above entitled case is hereby continued to December 24, 1951 and the Clerk is ordered to notify defense counsel to have defendant appear at that date at 10 o'clock, or a Bench Warrant will issue forthwith."

(Transcript, p. 18)

On December 24, 1951, a bench warrant was ordered to be issued, as follows:

"It is hereby ordered that a Bench Warrant issue returnable forthwith for the arrest of the defendant."

(Transcript, p.19)

On the 2nd day of June, 1952, the Adult Probation Officer, James A. Larson, filed an affidavit with the said District Court of the Second Judicial District of the State of Utah, in and for Weber County, wherein he claimed that the defendant had violated certain terms of his probation and requested that an order to show cause be issued citing the defendant in to appear and show cause "why the aforesaid continuance of sentence should not be revoked

forthwith committed to the Utah State Prison."
(Transcript, pp. 20, 21).

Pursuant to said affidavit, an ORDER TO SHOW CAUSE was issued citing the defendant, Don Fedder, to appear at the hour of 10:00 o'clock a.m. on the 30th day of June, 1952, "then and there to show cause, if any he has, why the suspension of the continuance of sentence of the said defendant should not be revoked by the Court and why the said Defendant should not be forthwith committed to the Utah State Prison."
(Transcript, p. 22)

There is no proof of service of either the AFFIDAVIT or the ORDER TO SHOW CAUSE upon the defendant, but the said defendant, having learned of the existence of such attempt, employed counsel in the State of Idaho and thereupon the defendant filed his OBJECTIONS AND MOTION TO QUASH, SET ASIDE AND VACATE ORDER TO SHOW CAUSE and to dismiss the information, setting forth in detail his grounds for such motion, as follows:

"

I

On the 28th day of February, 1951, this
of the 28th day of February, 1951, of guilty, and
On the 28th day of February, 1951, of guilty, and

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on said day said plea of guilty was ordered entered in the court records. That as appears from the records, files and minutes of this said cause, this Honorable Court has never at any time since the 28th day of February, 1951, pronounced judgment finding the defendant guilty of the offense charged in the information, but that nevertheless, on the 19th day of March, 1951, this Honorable Court made an order placing the defendant on probation to the State Adult Probation Department. That the order of this said Honorable Court placing the defendant on probation was void and of no force or effect for the reason that at said time said defendant, Don Fedder, had not been adjudged guilty of the offense charged, and the court had no jurisdiction at said time to sentence said defendant or to suspend sentence or to place said defendant on probation.

II

On the 19th day of March, 1951, this Honorable Court placed this defendant on probation, but by the terms of its order this said Honorable Court did not prescribe any rules or conditions for such probation, nor did this Honorable Court in its order authorize the State Adult Probation Department to prescribe the terms and conditions of such probation, and that by reason thereof, the alleged violations by the defendant of his probation claimed by James A. Larson in his affidavit dated the 2nd day of June, 1952, and upon the basis of which the said Order to Show Cause was issued, are not violations of a Honorable

III

On the 28th day of February, 1951, this defendant entered a plea of guilty, which said plea was duly entered in the court records. That as appears from the records, files and minutes of this said cause, this Honorable Court did not, within the period of not less than two days nor more than ten days, pronounce judgment finding the defendant guilty of the charge alleged in the information, as required by Sec. 105-36-1 Utah Code, and as a matter of fact, this Honorable Court never has, up to the date hereof, made any order pronouncing judgment finding said defendant guilty of the offense charged in the information, and by reason thereof this Honorable Court has lost its jurisdiction to now recall the defendant for the purpose of pronouncing judgment of guilty and imposing sentence for the alleged violation of probation, if any violation of probation has in fact occurred

IV

That in addition to the failure of this Honorable Court to pronounce judgment upon said defendant finding him guilty of the offense charged, this said Honorable Court has never made any order suspending the pronouncement of sentence, nor has it ever made any order pronouncing sentence and suspending the execution thereof, as provided for by Sec. 105-36-17 Utah Code, and that by reason thereof, this Honorable Court has lost its jurisdiction of said defendant to now recall him and to impose sentence for the alleged violations of probation, if

any violation of probation has in fact occurred.

V

That on the 19th day of November, 1951, this defendant did appear in the office of James A. Larson and was then and there informed that he did not have to appear in court on that day. That the order made on the 19th day of November, 1951, requiring this defendant to appear on the 26th day of November, 1951, was not made in open court and in the presence of this defendant, and that by reason thereof, this said defendant is not in default for his non-appearance on the 26th day of November, 1951, or for his non-appearance on any other date following the 26th day of November, 1951."

(Transcript, pp. 23, 24, 25)

Concurrently with the filing of the above motion, appellant filed a comprehensive affidavit in reply to the ORDER TO SHOW CAUSE, from which affidavit it plainly appears that the appellant had never in fact been placed on probation because he had never been formally convicted, and that there was no written order prescribing either the conditions or the period of time for the probation, but that even the pretended probation and the terms thereof had

be

Following an oral argument on the MOTION TO QUASH, SET ASIDE AND VACATE ORDER TO SHOW CAUSE and to dismiss the information, such motion was denied and the minutes show for June 30, 1952, as follows:

"State's Order to show Cause Comes on for Hearing, Glenn W. Adams, District Attorney appearing as counsel for the State, and Vernon K. Smith and Theodore Bohn, Esqs., appearing as counsel for the Defendant. Mr. Smith is granted the right as an Idaho attorney to Appear in Utah Court. the counsel for defendant enters a motion to quash plaintiff's motion on the grounds that judgment was not entered according to law. The motion is argued, and being submitted, defendant's motion is denied. The case is continued to July 3, 1952 at 2 P.M. for hearing on the affidavit filed."

(Transcript, p. 31)

On the 3rd day of July, 1952, a formal order was made denying the motion which provided, among other things, as follows:

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the motion and objections filed by the defendant be and the same are hereby denied."

(Transcript, p. 32)

Thereupon, in the absence of the defendant, on the 3rd day of July, 1952, a hearing was had

for the revocation of his probation, and the same was revoked, as appears from the minutes, as follows:

"This case comes on for further hearing on the affidavit of the Probation Department. Glenn W. Adams, District Attorney appearing as counsel for the State, and Theodore Bohn, Esq. as counsel for the defendant. James A. Larson is sworn and testifies, on behalf of the State, And counsel for defendant renews his motion to Quash which is denied and the cause being submitted, it is found that the defendant violated his probation agreement and the Court revokes his order of parole. A Bench Warrant is to be issued for the arrest of the defendant and the case is continued to July 7, 1952 at 2 o'clock P.M. for imposition of sentence."

(Transcript, p. 34)

On July 14, 1952, a formal order was made which, among other things, made certain findings of fact and formally proceeded to find the defendant guilty on his plea of guilty to the charge filed herein (Transcript, pp. 35, 36). It is to be noted that this untimely adjudication of guilt was finally pronounced by the Court on the 14th day of July, 1952, which said date was one year, four months and sixteen days

after the plea of guilty was entered (Transcript, p. 11) and on the eleventh day following the verdict of adjudication that the defendant had violated his alleged parole agreement (Transcript, p. 34). It is also to be specifically noted that at the time of this hearing on the said 3rd day of July, 1952, and at the time of the alleged pronouncement of judgment of guilty, the defendant was not personally present before the Court (Transcript, pp. 34, 35, 36).

Thereafter, the defendant, Don Fedder, appealed to the Supreme Court of the State of Utah from the following orders and judgments of the said District Court of the Second Judicial District of the State of Utah, in and for Weber County, as follows:

"(1) From that certain order announced by the above entitled court on the 30th day of June, 1952, and subsequently reduced to writing and filed on the 3rd day of July, 1952, by which said order the above entitled court denied this defendant's OBJECTIONS AND MOTION TO QUASH, SET ASIDE AND VACATE ORDER TO SHOW CAUSE dated the 2nd day of June, 1952, and denied defendant's motion to dismiss the Information; and

(2) From that certain judgment of conviction made and announced by the above entitled court in open court in the absence of the defendant on the 3rd day of July, 1952, and subsequently reduced to writing and filed on the 14th day of July, 1952, whereby the above entitled court adjudged the defendant guilty to the charge herein filed."

(Transcript, p. 37)

STATEMENT OF POINTS

I.

The trial court erred in denying appellant's MOTION TO QUASH, SET ASIDE AND VACATE ORDER TO SHOW CAUSE AND TO DISMISS THE INFORMATION. (Transcript, pp. 31, 32, 33)

II.

The trial court erred in finding that the appellant violated the alleged probation. (Transcript, p. 36)

III.

The trial court erred in revoking the alleged probation. (Transcript, p. 36)

IV.

The trial court erred in attempting to pronounce judgment to adjudicate the appellant guilty after the court had lost jurisdiction

of the defendant. (Transcript, p. 36)

The four points above enumerated are so closely related to each other and interdependent upon each other that any attempt to separate the argument as it applies to each separate point would necessarily require repeating much of the argument. Therefore, the four points relied on for reversal are argued together.

ARGUMENT

At the outset of the consideration of this appeal, we refer to the fundamental procedure in any criminal proceedings from accusation to punishment.

Though the court is frequently thought of as being the judge alone, in actuality the court is made up of jury and judge, the jury being the triers and finders of the facts, and the judge being that component part of the court which interprets and rules upon matters of law and imposes judgment of conviction and sentence.

For instance, where a defendant is charged with a public offense and he enters a plea of

not guilty and stands trial for the same, a verdict of guilty by the jury does not amount to a conviction, for certainly at that time a motion in arrest of judgment or a motion for new trial might well be granted under certain circumstances and a judgment of conviction never be entered. A verdict of guilt by a jury, then, does not amount to a conviction but becomes the foundation for the judgment of conviction to be pronounced and entered by the court, and the judgment of conviction then becomes a formal adjudication of guilt plus a pronouncement by the court as to what the punishment shall be.

In the case where a defendant pleads guilty to the crime charged in the information, the plea of such guilt takes the place of the verdict by a jury, so to speak. But certainly it cannot be said that a plea of guilty amounts to a judgment of conviction, for even after entering such a plea of guilty, the Utah statutes recognize the right to withdraw that plea under certain circumstances and, even then, a motion in arrest

of judgment would lie upon such grounds that the court had no jurisdiction of the offense, that the information did not charge any public offense, or, possibly, that the statute under which the accused was being charged was unconstitutional and void, or that the defendant was insane. In order to effect a conviction on a plea of guilty, it is indispensable that the court make a finding of guilt or an adjudication of guilt. So fundamental is this reasoning that it has become a universal practice in our American courts to make this adjudication in language as follows, or of similar import:

"The defendant having entered his plea of guilty to the crime charged in the information, and no legal cause having been shown why judgment should not be pronounced, it is therefore the judgment of this court that you are guilty of the offense charged in the information, and that you be sentenced to serve etc., etc."

As the Oklahoma case of *Washington vs. State* (Okla.), 32 Okla. Cr. 392, 241 Pac. 350 (351), puts it:

"To pronounce judgment is the adjudication of guilt and the fixing of the punishment."

Two somewhat instructive cases on this matter of necessity of a formal adjudication of guilt on a plea of guilty are the companion cases of

State ex rel Echtle vs. Card, and
State ex rel Sollee vs. Card, cited
Vol. 268 Pac. 869.

In those cases, the court had made an oral order from the bench sentencing the defendants and then suspending the sentences without formally adjudicating them guilty on their plea. Subsequently, the court obtained information which led it to believe that the nature of the offense was much more grave than had originally been represented to it and determined to inflict a more severe punishment and that it be executed. Upon appeal, the Supreme Court of the State of Washington concluded that there must be a formal finding or adjudication of guilt by the court which must precede pronouncement of sentence and that such adjudication of guilt, together with the pronouncement of sentence, must be reduced to writing as a formal judgment and be signed by the judge, and that the oral

pronouncements referred to in the minutes are in no way binding upon the court.

In the State of Utah, we have a statute which imperatively sets forth the duties of the trial court regarding the pronouncement of judgment either upon a plea or a verdict of guilty. Sec. 105-36-1 of the Utah Code Annotated provides as follows:

"After a plea or verdict of guilty, the Court must appoint a time for pronouncing judgment which must be at least two days and not more than ten days after verdict." (Emphasis supplied)

Also, Sec. 105-36-11 Utah Code Annotated provides:

"If no sufficient cause is alleged or appears to the court why judgment should not be pronounced, it must thereupon be rendered."

From a closer analysis of this statute, it appears that the legislature regarded a plea of guilty the same as a verdict of guilty, or in other words, it is plain that the legislature considered that the plea of guilty simply took the place of the verdict of guilty and that before the conviction would become final, the

court was required to appoint a time to pronounce judgment, and that time for the pronouncement of such judgment must not be more than ten days after the verdict. That the legislature used the words "not more than ten days after verdict" rather than "not more than ten days after verdict or plea" clearly indicates that the plea of guilty simply takes the place of a verdict of a jury and that until judgment is pronounced on such a plea of guilty, there would be no conviction.

In this case at bar, the appellant entered a plea of guilty to the charge on the 28th day of February, 1951. The minutes indicate (Transcript, p. 11) that the plea was entered in the court records, but at no time was any judgment of conviction announced or made. Plainly and clearly, the trial court did not even attempt to comply with Sec. 105-36-1 or Sec. 105-36-11 of the Utah Code Annotated. Prior to the enactment of Sec. 105-36-17 Utah Code Annotated, it was the law in the State of Utah, by the decisions of:

and

In re Flint, 25 Utah 338, 71
Pac. 531

that if a trial court attempted to postpone pronouncement of judgment beyond a reasonable time after the verdict or plea, that the court would lose jurisdiction of the defendant to later pronounce sentence.

In the Flint case, the court said as follows:

"In fact, there are many exigencies that could arise which might, in the interests of justice, require a postponement of the time for sentence beyond that first fixed by the court. In such cases the court may, in order to protect the interests of the state, and give the defendant ample time and opportunity to avail himself of every safeguard guaranteed him by law, suspend sentence from one designated time to another. But we know of no rule or principle of law whereby a court can indefinitely suspend sentence, keep the defendant in a state of suspense and uncertainty, and, long after he has been discharged from custody, have him rearrested, and impose a sentence of either fine or imprisonment upon him. A suspension of sentence for an indefinite period is, in effect, an exercise of the functions of the pardoning power, which belongs exclusively to the board of pardons, -- a separate and distinct department of the state government, with the

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And in the Blackburn case, the court further interpreted the matter of loss of jurisdiction, as follows:

"After conviction the trial court may undoubtedly suspend judgment temporarily for stated periods, from time to time. It may be proper to do so to allow the defendant time to move for a new trial, to perfect an appeal, to present a petition for pardon, and to allow the court time to consider and determine the sentence to be imposed. But when a defendant stands convicted, and all the remedies provided by law for testing the correctness of the conviction have been exhausted or waived, we have no doubt it is the duty of the court to keep control of the case, and within a reasonable time to proceed to give judgment, and, in doing so, to exercise such discretion as the statute governing the particular offense commits to the courts."

It is of interest to note that at the time of the decision in the Flint case above cited, the pertinent statute having reference to the pronouncement of judgment was then Sec. 4905, Rev. Stat. of 1898, and provided as follows:

"After a verdict of guilty * * * if the judgment is not arrested or a new trial granted, the court must appoint a time for pronouncing judgment which must be at least two days after the verdict if the

court intends to remain in session so long; or, if not, as remote a time as can reasonably be allowed."

This above section is the predecessor of the present Sec. 105-36-1, and in amending the old section to the new section, the court has narrowed down the responsibility of the trial court with reference to pronouncement of judgment and in the present statute, mandatorily declares that the court must appoint a time for the pronouncement of judgment and that that time must be at least two days and not more than ten days after verdict.

This amendment of the statute relating to the duty of the court to appoint a time for the pronouncement of judgment on a plea or verdict of guilty gives an added and stronger significance to the effect and meaning of the doctrine announced in the Flint case. In the Flint case, the statute acknowledged that judgment could be pronounced at a time as remote as could be reasonably allowed, and the court held there that the pronouncement of judgment and sentence

on the 5th day of January, 1903, following a

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conviction on the 25th day of February, 1902, was so long after and so remote that the court had lost jurisdiction.

On this point of loss of jurisdiction of defendant resulting from a delay in pronouncing judgment and sentence, see also:

State ex rel Dawson vs. Sapp (Kans.),
125 Pac. 78

Willard vs. State (Okla.), 94 P.2d 13

Ex parte Coley (Okla.), 94 P.2d 968

In the meantime, however, a new statute has been added to the statute books, which is Sec. 105-36-17, commonly referred to as the parole statute. This section is as follows:

"Upon 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 of 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 for which conviction was had; and may be required to provide for the support of his wife or others for which support he may be legally liable." (Emphasis supplied)

(The writer was under the impression that this statute had been amended in some particulars but by which the general sense of this statute was not changed. However, the amendment, if one exists, could not be located in the Idaho State Law Library.)

When statutes of this type were first being enacted, such statutes were attacked on the theory that such a statute was an attempt to convey upon the courts the power of pardon and parole which had always belonged to the executive branch of the government. Over the years of litigating these statutes, however, their validity has generally been accepted, but the doctrine has developed that in view of the fact that such statutes tend to encroach the powers of the judiciary upon the powers of the executive branch, that all statutes relating to pardon and parole are to be strictly followed. This history is particularly described in 15 Am. Jur., beginning at page 134, through page 150,

and particularly see Sec. 498, page 148, as follows:

"Statutes, state and Federal, provide for and regulate the suspension of sentence or the stay of the execution thereof; and wherever such statutes are in operation, they must be strictly followed. Courts in some jurisdictions are authorized by statute to release a defendant, after conviction, upon probation. In some jurisdictions statutes permit or empower the jury in certain cases and under prescribed conditions to recommend a suspension of the sentence to the court." (Emphasis supplied)

Under the Utah statutes, the power to suspend imposition or execution of sentence is vested with the court, but, following the doctrine of strict application, an analysis of Sec. 105-36-17 Utah Code Annotated strictly requires and prescribes four conditions:

- (1) Since the statute confers this power upon the court upon conviction, it is apparent that the power of the court to suspend the imposition or the execution of sentence must not be exercised until there has actually been an adjudication of guilt. That is to say, the power of the court to suspend imposition or to withhold execution of a sentence could not be exercised on a verdict of

guilty by a jury. The statute contemplates that there must be an adjudication of guilt by the court. There must be a conviction. Likewise, this power to suspend the imposition or execution of sentence could not be exercised on a plea of guilty alone. The statute contemplates a conviction. That is to say, the rights to move in an arrest of judgment and all other rights which might be exercised by a defendant after a plea of guilty must have been cut off, so to speak, and the defendant be convicted, so the statute says, and then and only then can the power be exercised.

(2) The power may not be exercised capriciously, but must be exercised only when the exercise thereof is compatible with public interest.

(3) The statute contemplates that a court prescribe a period of time during which the defendant shall be placed on probation, for the statute says:

"* * * and may place the defendant on probation for such period of time as the court shall determine."

(4) The statute contemplates that a court shall prescribe the conditions with which the defendant must comply during such probation period, for, as the statute says:

"The Court may subsequently increase or decrease the probation period and may revoke or modify any condition of probation."

Upon studying the transcript in this case, it is apparent that the trial court did not comply with the probation statute at all. In the first place, there has never been any formal adjudication of guilt so as to give the trial court jurisdiction in the first instance to place this appellant on probation. Secondly, the court did not prescribe any condition of the probation, and, thirdly, it did not specify any period of time during which appellant was to be placed on probation. All the court did was to state:

"Don Fedder is placed on probation to the State Adult Probation Department and the case is continued to April 30, 1951, at 10 o'clock A.M. for report."

Note also that on April 30, 1951, the case was continued again to August 13, 1951, without any time or condition of probation ever being stated. Also, on August 13, 1951, the case was continued again to August 13, 1951, without any time or condition of probation ever being stated. Also, on August 13, 1951, the case was continued again to August 13, 1951, without any time or condition of probation ever being stated.

record is a long series of continuations.

The language of the case of *In re Flint*, 25 Utah 338, 71 Pac. 531, is particularly appropriate in this regard, for there the court said:

"But we know of no rule or principle of law whereby a court can indefinitely suspend sentence, keep the defendant in a state of suspense and uncertainty, and, long after he has been discharged from custody, have him rearrested and impose a sentence of either fine or imprisonment on him."

Or, as was said by the Kansas court, in the case of *State vs. Sepp*, 125 Pac. 78 (79):

"It was competent for the court temporarily to suspend judgment for the purpose of hearing motions for a new trial and in arrest of judgment, also to gain information that would enable the court to impose a just sentence on the defendant, to give the defendant an opportunity to perfect an appeal, or for proper relief; but an indefinite suspension, or the holding of the sentence over the head of the defendant, to be executed from time to time as the court may see fit, is wholly unauthorized."

Or, as was said by the Supreme Court of the State of Oklahoma, in the case of *Willard*

"If such power can be exercised by a judge, it incorporates into our administration of the criminal law the ticket of leave system of the English judicature, without its surveillance and checks, and places the criminal at the caprice of the judge, subject to be called up for sentence at any time. If the judge can delay sentence one year, I do not see why he may not fifteen years. An exercise of such power in this age would be no less revolting to our sense of justice than was the exercise of such power in the reign of James I, when he sent Sir Walter Raleigh to the block fifteen years after his conviction."

If the district judge in this particular case is to be authorized, without adjudging the appellant guilty, to place the appellant on probation without specifying any time during which the probation is to extend, but, on the contrary, is to be empowered to place a man on probation and continue the case from time to time, then what is to prevent a judge from placing a man on probation and continuing the case for fifteen years, as was suggested in the Willard case? This becomes particularly important and of concern to this court when even the conditions of probation are not

specified. Was the appellant Fedder in this case to understand that he was placed on probation and that this probationary period could be continued indefinitely, and that the conditions of his parole, insofar as an order of the court was concerned, were apparently left to whatever whim or fancy the court might have in the years to come?

The parole statute in the State of Utah has been up before this Supreme Court for consideration and, insofar as the terms and conditions of a parole are concerned, this Supreme Court has declared that an accused has a vested right in his parole, both as to the terms thereof and the period thereof. In the case of

State vs. Zolentakis, 70 Utah 569,
259 Pac. 1044.

the Court stated as follows:

"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 straightforward treatment of the person sought to be reformed. It would therefore seem, both upon authority and principle, that when a sentence is suspended during good behavior, without reservations, the person whose sentence is thus suspended has a vested right to rely thereon so long as such condition is complied with. The right to personal liberty is one of the most sacred and valuable rights of a citizen, and should not be regarded lightly. The right to personal liberty may be as valuable to one convicted of a crime as to one not so convicted, and so long as one complies with the conditions upon which such right is assured by judicial declaration, he may not be deprived of the same. Such right may not be alternately granted and denied without just cause."

Sec. 105-36-17 of the Utah Code Annotated is very similar, though not identical, to Sec. 19-2601 of the Idaho Code, which reads as follows:

"Whenever any person shall have been convicted, or enter a plea of guilty in any District Court of the 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 defendant 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, at such time or any time during the term of sentence in the county jail, prescribe and may put the defendant on probation in charge of some proper person selected and designated by the court for that purpose, and make such orders relative thereto as the Court in its sound discretion deems necessary and expedient."

The Supreme Court of the State of Idaho,
in the case of

In re Grove, 43 Idaho 775, 251
Pac. 519

had before it the interpretation of the parole statute as regards what is required of a district court in placing a defendant on probation. In that case, on January 30, 1923, a plea of guilty was entered to the crime charged and the district judge made, entered and signed a judgment or order adjudging the petitioner guilty, and further provided as follows:

"Whereupon said district judge
stated to the defendant that

because of defendant's youth, and it appearing to the said court that restitution of the value of the stolen property had been made, and the complaining witness in this case had indicated his satisfaction that leniency be shown, the pronouncement of sentence at this time was withheld and the defendant, Leslie Grove, was then by said court released upon his own recognizance and his bondsmen exonerated."

In passing upon the validity of this probation, the Court said:

"A reference to that portion of the order set forth shows that the court did not, on January 30, 1923, prescribe any terms or any time for withholding judgment, but unconditionally released the defendant from custody and indefinitely withheld the pronouncement of judgment. The parole statute undoubtedly requires that the terms on which, and time for which, judgment is withheld be made a part of the order in writing. It is apparent that, in the foregoing order, the court made no attempt to comply with the parole statute."
(Emphasis supplied)

Concluding then that the probation order was void, the Idaho Supreme Court regarded the Grove case in about the same light as the Utah Supreme Court regarded the Flint case, and said as follows:

"Since the decisions in the Peterson and Ensign cases relate to the suspension of a sentence already entered, they are not strictly in point on the precise question here presented, to wit, the power to indefinitely withhold the pronouncement of judgment on a plea of guilty. However, those decisions indirectly sustain the proposition that the courts possess no such power, for like the power to indefinitely suspend the execution of judgment, the power to indefinitely withhold the pronouncement of judgment is nothing more or less than the power to perpetually prevent punishment, which the courts do not possess.

(1) Irrespective, however, of these decisions, a consideration of our statutes and the decisions of other courts have led us to the conclusion that, while the court, on a plea of guilty, may postpone the pronouncement of judgment for a reasonable time for a proper purpose, such as to enable it to examine the facts and circumstances with respect to the commission of the crime, and thereby determine the proper penalty to be imposed, it cannot indefinitely withhold the pronouncement of judgment, discharge the defendant, permit him to go his way, and, 3½ years afterward, hale him into court and enter such judgment as might have been originally pronounced."

8 R.C.L. 250; 16 C.J. 1291; In re Flint, 25 Utah 338, 95 Am. St. 853, 71 Pac. 531; In re Beck, 63 Kan. 57, 64 Pac. 971; State v. Sapp, 87 Kan. 740, 125 Pac. 78, 42 L.R.A., N.S.

See, also, *Exparte United States*,
242 U. S. 27, 37 Sup. Ct. 72, 61
L. ed. 129; L.R.A. 1917E, 1178;
note to *State v. Abbott*, 33 L.R.A.,
N.S. 112; note to *Lucero v. Mc-*
Manus, L.R.A. 1918C, 551; *Fuller*
v. State (Miss.), 57 So. 6, 39
L.R.A., N.S., 242 and note; *Vinson*
v. State, 16 Ala. App. 536, 79 So.
316; *Neel v. State*, 104 Ga. 509,
69 Am. St. 175, 30 S.E. 858, 42
L.R.A. 190.

(2) The motive of the court, in indefinitely withholding judgment was, without doubt, based entirely on what then appeared to be for the public good; but if the court, under such circumstances, has power to pronounce judgment 3½ years after the entry of a plea of guilty, the same thing could be done any number of years later. The courts of this state do not possess such power. Therefore the judgment of September 17, 1926, under which petitioner is detained, was unauthorized by law and is void."

See also the Idaho case of:

State vs. Insign, 38 Idaho 539

In the light of the Zolentakis case, wherein the Utah Supreme Court has unconditionally declared that a defendant is to be dealt with fairly in these probation matters so that he may understand the term and the conditions of his parole, and in the light of the expressions of the Supreme Court of the State of Idaho in the Grove case under a similar statute to the effect that there must be a judgment of conviction before probation is ordered, and that the probation period should be a definite specified period of time and the conditions thereof should be specified by the court, and that the same should all be reduced to writing and signed by the judge, then the proceedings of the trial court in this case on March 19, 1951, regarding placing the defendant on probation in the manner used, were a nullity and void.

If this be true, and we think that the conclusion is irresistible, then Fedder in this case is practically in the same position as Flint was in the case of *In re Flint*. The

court has released the appellant from custody and did attempt to place the appellant on probation for an indefinite and unprescribed period of time without specifying any conditions of the pretended parole. In effect, what the court did was what the court did in the Flint case, and that was to suspend any imposition of sentence and to permit the appellant to go on his recognizance. By the time that this brief is filed, nineteen months have expired, and, under the doctrine of the Flint case from the State of Utah and the Grove case from the State of Idaho, the trial court has lost jurisdiction of this appellant.

Nor can it be contended with any persuasive effect that the case of

State vs. Lee Lim, 79 Utah 68, 7
Pac.2d 825

militates against the conclusions herein urged. In the Lim case, the majority opinion held that the court did, within the ten-day period, attempt to sentence the defendant. Subsequently the Supreme Court of the State of Utah held that
sent _____ the defendant

on writ of habeas corpus. The defendant was returned to be re-sentenced and he then appealed to the Supreme Court from this second judgment of conviction and sentence. Upon appeal the Supreme Court of the State of Utah said that the trial court had a right, even after the ten-day period, to reassume jurisdiction of the case for the purpose of imposing a valid judgment of conviction and sentence when the first judgment of conviction and sentence was void.

In reading the Lim case, it is clear that the Supreme Court of the State of Utah was dealing with a particular set of facts and that the decision was meant to apply only to that set of facts or a similar set of facts. The decision was not meant to nor can it be interpreted to mean that the doctrine of loss of jurisdiction has been repealed, for in the decision in State vs. Lee Lim, commencing at the bottom of page 831 of Vol. 7, Pac.2d, the court reconsidered the Flint case and reaffirmed it

s follows:

"It is strongly urged that the Flint case is in point, and therefore decisive of the question we are now considering, but the case rests upon a state of facts so different from the facts of the case at bar that it ought not to be controlling on us in reaching a correct solution of the question before us. The effect of that decision should be restricted to those facts, and not extended to another situation resting upon entirely different facts. The result of the decision in the Flint Case was to give effect to the order of suspension and the discharge of the defendant. This result usually does not follow the entry of a void judgment. The court did not say that the order was void, but held that the trial court divested itself of jurisdiction over the defendant and the case by the order of suspension and discharge of the defendant. This being true, it would undoubtedly follow, as was there held, that the trial court was without power to make another or different order or to thereafter pronounce judgment. There the trial court reached the conclusion that the defendant should not be made to suffer for his crime the punishment provided by statute, at least not presently or during good behavior, and thereupon suspended the imposition of sentence and discharged the defendant. Here the trial court concluded the defendant should suffer the punishment imposed by the statute, and attempted to pass sentence in compliance with the statutory mandate, but, because

of an erroneous interpretation of the law, it imposed a void sentence. Nothing here was intentionally done by the court looking to the discharge of the convicted defendant. The reasons underlying the decision in the Flint Case, the cases cited therein for support, and the cases thereafter decided following the same rule, are pertinent to the facts of such cases, wherein sentence was indefinitely suspended and the defendant discharged, and explain and support the holding that the court in such cases lost jurisdiction to impose a valid sentence. These reasons are wholly foreign and inapplicable to the facts of a case such as this, wherein sentence was imposed, but, because of mistake, the sentence was void. The reasons given in those cases and by text-writers sufficiently indicate that they are inapplicable to this case. In 8 R.C.L. 251, the rule is stated as follows: 'In those jurisdictions wherein the rule prevails that a trial court has no power to grant an indefinite suspension of sentence, the court, by granting such suspension, loses its jurisdiction and cannot pronounce sentence at a subsequent time. In such case, having completed its judicial functions, it has voluntarily surrendered all further control over the case and person, and if the defendant is re-arrested is entitled to be discharged.'" (Emphasis supplied)

CONCLUSION

We respectfully submit in this case that

since the trial court did not comply with the

statute relating to placing a defendant on probation, the probation was, in fact, a nullity, and that the case reverts to the status of facts found in the Flint case; that the Flint case is still good and controlling law in the State of Utah in a case with applicable facts and that this is such a case having similar and applicable facts; and that the trial court, for the reasons herein stated, has divested itself of any jurisdiction over this appellant.

Respectfully submitted,

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