

1953

State of Utah v. Don Fedder : Brief of Respondent

Utah Supreme Court

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E. R. Callister; Ken Chamberlain; Attorneys for Respondent;

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7899

IN THE SUPREME COURT

**of the
STATE OF UTAH**

FILED

JAN 27 1953

Clerk, Supreme Court, Utah

THE STATE OF UTAH,
Respondent,

— vs. —

DON FEDDER,
Appellant.

Case No.
7899

RESPONDENT'S BRIEF

Appeal from the Second Judicial District Court
Weber County, State of Utah
Hon. John A. Hendricks, Presiding

E. R. CALLISTER
Attorney General
KEN CHAMBERLAIN
Assistant Attorney General
Attorneys for Respondent

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STATE OF UTAH

THE STATE OF UTAH,

Respondent,

— vs. —

DON FEDDER,

Appellant.

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RESPONDENT'S BRIEF

STATEMENT OF FACTS

Guilt of the defendant, Don Fedder, is not at issue in the case at bar. Appellant bases this appeal upon procedural errors which allegedly arose during the trial and probation of the defendant.

On the 27th day of November, 1950, an Information was filed in the District Court of the Second Judicial District, State of Utah, charging the defendant, Don Fedder, with two others, with the crime of violating Section 103-36-12, Utah Code Annotated 1943, a felony. (Tr. 9-Suppl. Tr. 3, 4).

On December 4, 1950, defendant entered a plea of

"not guilty" to the Information. (Tr. 10-Suppl. Tr. 5). This plea was changed to "guilty" on February 28, 1951, after which the defendant was incarcerated and the case referred to the Probation Department, sentence to be imposed March 19th, 1951. (Tr. 11-Suppl. Tr. 6).

March 19th, 1951, trial court, based on the defendant's plea of guilty, placed the defendant on probation with the Adult Probation Department and ordered him to sign a Probation Agreement. Defendant was also ordered to obey all orders issued by the Probation Department during his probation period. The defendant acknowledged and consented in open court to sign the aforementioned agreement.

Imposition of sentence was continued from March 19th to April 30th, to August 13th, to November 19th. (Suppl. Tr. 7, 11) The defendant appearing and pursuant to favorable reports from the Probation Department, imposition of sentence was continued each time. Further continuances were had from November 19th to November 26th, to December 3rd, to December 17th and December 24, 1951. These continuances were granted by the court because the defendant failed to appear as ordered. (Suppl. Tr. 13, 14, 15, 16) On December 24, 1951, a bench warrant was issued for the defendant's arrest. (Suppl. Tr. 17)

On June 2, 1952, James A. Larson, District Agent of the Adult Probation Department filed an affidavit with the District Court in which he alleged the defendant had violated the terms of his probation and requested the court terminate said probation. (Tr. 20, 21). Based

upon the affidavit, an Order to Show Cause was issued whereby defendant was ordered to appear on June 30, 1952, to show cause why his probation should not be revoked and sentence imposed. (Tr. 22)

June 20th, defendant's attorney filed Objections and Motion to Quash, Set Aside and Vacate the Order to Show Cause. (Tr. 23, 24, 25, 26) After argument of counsel, on June 30th, the motion was denied. Thereupon July 3rd was set as time for hearing on the Affidavit In Reply to Order to Show Cause filed by the defendant. (Suppl. Tr. 18, 19, 26, 27, 28, 29, 30)

On July 3rd, after having heard evidence, the court found that defendant had violated the Probation Agreement and revoked his Order of Parole and issued a Bench Warrant for defendant's arrest. (Suppl. Tr. 24-Tr. 32, 33) The trial was continued until July 7th for imposition of sentence at which time the defendant again failed to appear.

On July 14, 1952, the trial court filed the written Order after the aforementioned hearing and stated therein that the defendant violated the terms of his probation and the trial court proceeded to find the defendant guilty of the crime charged. (Tr. 35, 36)

Appellant asserts, as one of his main arguments, that inasmuch as the court failed to specify the terms of probation, the court lost jurisdiction over the person of the defendant to subsequently find that he had violated his probation and to impose sentence. Appellant bases his argument on the ground that the minute entries of said court do not reveal the terms and conditions of probation

and as a result, appellant asserts that he was not placed on probation but rather was released outright.

The court's attention is invited in particular to the transcript of proceedings of the district court (pages 1 to 31 inclusive). This transcript of proceedings in the district court was filed with this court pursuant to an Order obtained by the respondent herein, which transcript, rather than the minute entries, is the proper record for appeal. Said record will be referred to as "Supplemental Transcript."

STATEMENT OF POINTS

POINT I

THE TRIAL COURT, AFTER RECEIVING APPELLANT'S PLEA OF GUILTY, PROPERLY PLACED DEFENDANT ON PROBATION AND SUSPENDED IMPOSITION OF SENTENCE PENDING AN INVESTIGATION BY DISTRICT PROBATION AGENT.

1. There is no requirement that, upon a plea of guilty, judgment be pronounced and sentence imposed before the defendant may be placed on probation.
2. Pronouncement of judgment and sentence may be postponed to a day certain where it becomes incidentally necessary in the administration of justice or to enable the court to better determine proper punishment.
3. The trial court did not lose jurisdiction in exercising its discretion not to pronounce judgment and sentence within ten days after receiving defendant's plea of guilty.

POINT II

THE TRIAL COURT SUFFICIENTLY SET FORTH THE TERMS, CONDITIONS, AND LENGTH OF THE PERIOD OF PROBATION.

POINT III

THE TRIAL COURT DID NOT LOSE JURISDICTION OF THE DEFENDANT BY POSTPONING THE PRO-NOUNCEMENT OF SENTENCE NOR DID IT THEREBY DISABLE ITSELF TO REVOKE PROBATION AFTER FINDING THAT THE APPELLANT HAD VIOLATED THE TERMS THEREOF, WHICH FINDING WAS PROPER.

ARGUMENT POINT I

THE TRIAL COURT, AFTER RECEIVING APPELLANT'S PLEA OF GUILTY, PROPERLY PLACED DEFENDANT ON PROBATION AND SUSPENDED IMPOSITION OF SENTENCE PENDING AN INVESTIGATION BY DISTRICT PROBATION AGENT.

Appellant, in his brief, challenges the validity and enforceability of an order placing a defendant on probation after he has entered a plea of guilty to the Information and before judgment and sentence has been pronounced or there has been what appellant terms a "formal adjudication of guilt".

We agree with appellant that a plea of "guilty" may be compared to a jury verdict of guilty to the extent that proper motions well founded and taken, if sustained as to proof, might prevent the plea from ever becoming the foundation for a judgment and sentence. Following that reasoning we go further and contend that under Section 105-36-17 Utah Code Annotated 1943 (now 77-35-17 Utah Code Annotated 1953) the plea of guilty, under proper circumstances and conditions, may never become merged into the higher right of action of a judgment and sentence; but rather, that plea may be set aside upon the satisfactory compliance with the conditions of a probation

upon which the defendant may be placed after entering his plea of guilty. Section 105-36-17 (now 77-35-17) reads as follows:

“Upon a plea of guilty or conviction of any crime or offense, if it appears compatible with the public interest, the court having jurisdiction may suspend the imposition or the execution of sentence and may place the defendant on probation for such period of time as the court 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 to which the defendant has pleaded guilty or for which conviction was had; and may be required to provide for the support of his wife or others for whose support he may be legally liable. Where it appears to the court from the report of the probation agent in charge of the defendant, or otherwise, that the defendant has complied with the conditions of such probation, the court may if it be compatible with the public interest either upon motion of the district attorney or of its own motion terminate the sentence or set aside the plea of guilty or conviction of the defendant, and dismiss the action and discharge the defendant.”

It is entirely clear under that provision that the trial court may, after receiving a plea of guilty, and without further proceedings, place a defendant upon probation, suspending the imposition of sentence until such time as

the term and conditions thereof shall have been properly met and fulfilled, or until a breach of those terms and conditions requires, in the interest of justice, a revocation of the probation thus granted, the imposition of sentence, and the commitment of defendant to prison.

1. **There is no requirement that, upon a plea of guilty, judgment be pronounced and sentence imposed before the defendant may be placed on probation.**

We cannot agree that, before a defendant may be placed on probation there is a requirement for "formal adjudication of guilt". The language of Section 105-36-17 (77-35-17) clearly indicates that after a plea of guilty and prior to the "adjudication of guilt", the proper circumstances being present, the court may place a defendant on probation. The express wording of the statute

"Upon a plea of guilty * * * the court having jurisdiction may *suspend the imposition* or the *execution of sentence* and may place the defendant on probation * * *" (Italics added).

would permit no other construction than that the court may suspend the pronouncement of judgment and sentence for "such period of time as the court shall determine."

The terms "judgment" and "sentence" have been used in the law and in legal writings interchangeably, alternatively, and synonymously. The term "judgment", when used in speaking of the judgment rendered against a defendant in criminal proceedings, means the proceeding of declaring the defendant's *punishment*. *Bugbee vs. Boyce*, 35 A. 330 66 Vt. 311; the "judgment" is the *sentence* of the court upon the verdict or finding of guilty.

People vs. Markham, 99 N.Y.S. 1092, 114 App. Div. 387. A "judgment" has been described as the "sentence of the law". See Words and Phrases, Perm. Ed. Vol. 23, Page 164, 165 and pages 212, 213.

Appellant in his brief asserts that there must be a formal adjudication of guilt before a defendant may be placed on probation, and if there is no formal adjudication of guilt, by a postponement of the imposition of sentence, the court loses jurisdiction of the defendant. The appellant cites no authority for the language in page 17 of his brief which he describes as being the proper mechanics for an adjudication of guilt. Appellant cites *State ex rel Echtle vs. Card* and *State ex rel Sallee vs. Card*, 268 Pac. 869. These cases have no application here and do not stand, as cited by appellant, for the proposition that all orders of stay or suspension must be based upon a formal adjudication of guilt, but rather those cases hold that all orders, to be valid, must be written, not orally pronounced, thus having no bearing here.

A construction of the phrase "suspension of imposition of sentence" is all that is required in order to meet appellant's contentions in this regard. Words and Phrases, Perm. Ed., Vol. 20, Page 278, defines the phrase, "suspending imposition of sentence" as follows: "Suspend" meaning to seize for a time; hinder from proceeding, interrupt; stay; delay; *to hold undetermined*. "Impose" means to lay on, and "imposition" a placing or laying on; "imposition of sentence" the laying on of sentence on defendant or the act of sentencing. *Kriebel vs. United States*, C.C.A. Ill. 10 Fed. 2d 762 and 763. Therefore,

to suspend the imposition of sentence is equivalent and commensurate to the postponement or arrest of judgment. Words and Phrases, Perm. Ed., Vol. 40, Pages 927 and 928, construes suspension of the sentence as being a suspension of judgment which contemplates the postponement of rendition of judgment. "Suspension of the sentence" postpones the *judgment* of the court while the conviction and liability following it, together with disabilities, remain to become operative upon sentence being given. *People vs. Stickle*, 121 N.W. 497, 156 Mich. 557, *Huggins vs. Caldwell*, 3 S.W. 1101, 223 Ky. 468, Ex parte Dearo (California), 214 P. 2d. 585.

The appellant's argument therefore, that there must be a separate adjudication of guilt preceding probation, is entirely without merit.

It should be noted that appellant cites Section 105-36-17 (now 77-35-17) also, but cites said section prior to its amendment. We respectfully submit that as a result, all appellant's argument based thereunder is defective and lacks any force whatsoever, because the subsequent amendment changed the statute completely with respect to the instant facts. The amendment of this statute brought about several major changes which, when compared with the statute prior to its amendment, are controlling in the case at bar. Prior to the amendment and as cited by appellant, the statute allowed the invocation of probation by the court:

Upon *conviction* of any crime or offense * * *. After the amendment, probation could be invoked by the court:

Upon a *plea of guilty* or conviction of any crime or offense * * * (Italics added).

Further, the amendment was supplemented with the following language not present in the statute prior to amendment and as cited by appellant:

* * * Where it appears to the court from the probation agent in charge of the defendant or otherwise that the defendant has complied with the conditions of such probation, the court may, if it be compatible with the public interest, either upon motion of the District Attorney, or of its own motion, terminate the sentence or set aside the plea of guilty or conviction of the defendant and dismiss the action and discharge the defendant.

Prior to amendment, the sole enabling condition to the imposition of probation upon a defendant was "*upon conviction* of any crime or offense * * *." Under the amended section, probation may be invoked upon a *plea of guilty* or conviction, and by adding the following matter to the section:

* * * [after successful probationary period] the court may * * * (1) *terminate the sentence* or (2) set aside the plea of guilty.

the legislature has provided correlative means of expunging the record of defendant's guilt if he stands (1) guilty by conviction, judgment, and sentence or (2) guilty by plea.

By providing those two avenues of expurgating the record as to a defendant's guilt and removing the disabilities incident to his guilt, the legislature, in amending the statute, has clearly evidenced its intent to allow

courts the discretion of formally passing judgment on defendant and suspending the *execution* thereof or, in the alternative, to suspend the *proceeding* for the judgment and sentence of defendant by not applying to the finding of guilt the adjudication and sentence following that finding.

It is definite and certain under Section 105-36-17 (77-35-17) that judgment and sentence is not a condition precedent to probation.

2. Pronouncement of judgment and sentence may be postponed to a day certain where it becomes incidentally necessary in the administration of justice or to enable the court to better determine proper punishment.

The authorities are ample in support of the proposition that, the administration of justice requiring it, pronouncement of sentence may be postponed beyond the number of days fixed by a regulatory statute for procedure. Appellant contends that the trial court failed to comply with Section 105-36-1 (now 77-35-1)

After a plea or verdict of guilty, or after a verdict against the defendant on a plea of a former conviction or acquittal or once in jeopardy, 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 and not more than ten days after the verdict.

and in failing so to do, lost the power and jurisdiction to adjudicate the guilt and sentence, and predicate upon that adjudication an order for probation. Appellant asserts the more serious consequence of entirely losing jurisdiction over the appellant for all purposes. The question of

the necessity of an order for probation being based upon judgment of guilt or sentence has been treated under sub-heading 1 in the argument of this point. Many of the considerations here are the same.

Upon the premises that adjudication of guilt need not precede an order for probation, and that one of the compelling reasons for that rule is to more expeditiously erase the finding of guilt after a defendant responds with satisfaction to probation, then it would clearly follow that there would be no need to enter the judgment and sentence formally during the investigatory and supervisory period. If the subject of probation is found unfit for, or fails to respond satisfactorily to, the probation so ordered, then, upon the happening of that, the condition subsequent, would be the proper time to impress upon the record the judgment and imposition of sentence.

However, upon grounds much stronger and yet wholly unrelated to the foregoing considerations, the courts have been declared to have the authority to suspend or postpone pronouncement of judgment indefinitely and, *a fortiori*, to a day certain. In *Ellerbrake vs. King*, 116 Fed. 2d 168, the imposing of sentence eight months after the defendant pleaded guilty was within the discretion of the court when it was deemed advisable to investigate the surrounding circumstances in order to obtain information as to the principals in a series of interstate freight thefts. The Circuit Court of Appeals in holding that the District Court was vested with power to suspend imposition of sentence indefinitely without losing jurisdiction said:

Although the Rules of Practice and Procedure in Criminal Cases promulgated by the Supreme Court of the United States on May 7, 1934, requiring that sentence be imposed without delay * * * do not affect this proceeding [as having been concluded in the District Court prior to that promulgation]. Even under those rules an exception is noted where there should be an investigation in the interest of justice before sentence is imposed.

That case is infinitely strong in derogation of appellant's contention, for in the instant case the continuances and attending investigations were solely for the benefit and behoof of, and not for the purpose of finding aggravated charges against the appellant. He may not now complain of the continuance which was in no way prejudicial, but contrarily, beneficial to himself. In *Hayden vs. Warden United States Penitentiary, McNeil Island*, 124 Fed. 2d, 514, the facts were almost identical to those in this case. The defendant there was indicted, and on March 26, 1934, entered a plea of guilty, at which time a motion for probation was filed. The Federal District Court granted a continuance to April 26th and thereafter granted further continuances. The defendant, while free on his *recognizance*, was apprehended for commission of another crime. On August 6th he was sentenced by the Federal District Court on the charges contained in the original indictment. On appeal the Circuit Court held, as against the contention that the District Court had no power to postpone imposition of sentence, that since the postponements were for continuances for a definite time that contention was not well taken.

In *Gillespie vs. Walker*, 296 Fed. 330, the Circuit Court of Appeals for the Fourth Circuit said:

Federal Courts, as compared with what has been the invariable custom since the establishment of the present judicial system, had been greatly restricted in their action on the subject of suspending sentences and postponing the rendition of their judgments and the execution of their sentences * * * (Citing cases) with a view of paroling or pardoning an accused; they may nevertheless do so where it becomes incidentally necessary in the administration of justice, * * * for a period during the term at which the case is tried, or to a fixed day or days during the next term of court.

Such is the rule in the Federal Courts.

3. **The trial court did not lose jurisdiction in exercising its discretion not to pronounce judgment and sentence within ten days after receiving defendant's plea of guilty.**

The arguments here are similar to those contained under sub-heading 2 of this point. However, there is a line of uncontradicted authority holding that the regulatory statute providing the time within which sentence shall be pronounced is not mandatory but merely sets out the procedure for prompt action. *Ex parte Hardeman*, 36 Atl. 213, 131 N.J.L. 257, construes the New Jersey statute which reads:

It shall be the duty of the trial court to impose sentence upon defendant within forty-five days after such defendant shall have been convicted of a crime.

The court said that although it is a presumption that the word "shall" is imperative and not directory, however,

in this instance, it is merely set out as a procedure for prompt action not depriving the court of its discretion nor occasioning the loss of jurisdiction over the defendant's person if not strictly complied with.

In *Williams vs. State*, 152 A. 775 9 N.J. Misc. 66, sentence was not imposed within the statutory period as prescribed. The court there said:

It is argued that the affect of this legislative enactment is to require the court to impose sentence within thirty days after rendition of verdict, and that although the defendant in this case was seeking to have his conviction set aside, the court must impose sentence within the time required by law, although it was considering the matters in regard to defendant's motion and thereby lost its power to impose sentence. Thus, the defendant could, by trick, defeat the state of its remedy. The court has wide discretionary power in performing the duty of imposing sentence in criminal cases.

and went on to hold that the defendant's contention was untenable. In *Boykin vs. State*, 190 Pac. 2d, 471, the court held that where a court in the beginning of a case has jurisdiction of the subject matter and person of defendant, there is a presumption of law that such jurisdiction continues and the burden is on the defendant to show that the court had lost jurisdiction to pronounce judgment and sentence and that the trial court may delay pronouncement of judgment for the purpose of determining motions for new trial, in arrest of judgment, or for other causes.

POINT II

THE TRIAL COURT SUFFICIENTLY SET FORTH THE TERMS, CONDITIONS, AND LENGTH OF THE PERIOD OF PROBATION.

Appellant asserts that inasmuch as the court failed to specify the terms of probation, its lost jurisdiction over the person of the defendant to subsequently find that he had violated his probation. On March 19, 1951, the trial court, after receiving a plea of guilty, placed the defendant on probation and ordered the defendant to sign a probation agreement and to obey all orders made by the Probation Department (Suppl. Tr. 7). At that time the defendant was asked by the court whether he was willing to accept and do those things and he answered in the affirmative (Suppl. Tr. p. 7). Pursuant to the court's Order, a probation agreement was executed by the defendant on that date, which agreement specifically sets forth the terms and conditions of the probation. This agreement was offered and accepted by the trial court as the "State's Exhibit A" and reads as follows:

States Ex. A

A G R E E M E N T

Date March 19, 51

Upon my release I agree to accept the following terms and conditions:

To make regular reports to the Agent in charge by the fifth of each and every month, or more often if requested to do so.

Not to change my place of residence nor to leave the bounds of this State or any other State in which I am permitted to live, nor to change my

place of employment without first obtaining permission from the Agent in charge.

Not to drink whiskey, beer, gin, wine, or other intoxicating beverages; or frequent places where the foregoing are sold; and not to use narcotic drugs or marijuana.

Not to associate with any person, or persons of bad repute.

Not to have on my person, at any time, deadly, dangerous, or concealed weapons.

To obey all laws, and refrain from all illegal transactions.

If I am permitted to leave the State of Utah I will report to the proper officials immediately upon arrival at my destination, and will notify the Utah Office of my arrival.

I do solemnly promise and agree to abide by the foregoing conditions; and hereby acknowledge that my failure to comply with any of them may be considered a violation of my parole, probation for which I am subject to be returned as a parole, probation violator.

Signed (s) *Donald Fedder*
Street No. *3935 Evelyn Drive*
City *Ogden, Utah*
State *Utah*

Respondent submits that the trial court defined the terms of probation by ordering the defendant to execute a probation agreement and obey the orders of the Probation Department, thereby fully complying with the probation statute. The signature of the defendant on the probation agreement executed pursuant to the court's

Order and the defendant's acceptance in open court of the terms of probation is conclusive proof, sufficient to offset the arguments of the appellant.

Section 105-36-17 (77-35-17) provides that the court may place a defendant on probation for such period of time as the court shall determine. It is respectfully submitted that in this instance the court granted the continuances to appellant in order to fully investigate his eligibility for probation, and in so doing, gave consideration to the possibility of the appellant's full rehabilitation within a short period of time. This is evidenced by the trial court's statement (Suppl. Tr. Page 7 and 8) :

Don Fedder's case is continued to April 30th for the imposition of sentence, and he is in your jurisdiction, (Mr. James A. Larson of the Probation Department) to decide whether he is to be held longer or turned loose.

and as evidenced by the Supplemental Transcript, Page 11:

THE COURT: "How long do you want it continued to?"

MR. LARSON: (District Probation Agent)
"Oh, I think probably until August 13th."

THE COURT: "Alright then, this case is continued for imposition of sentence to August 13, 1951."

Thereafter, all continuances were occasioned by the appellant's failure to appear within the time set by the court. It is clear that the terms of the probation, both with respect to the performance of things required in the probation agreement, and as to the length of the time of

probation, as stated in terms of continuances during the investigatory period, were definite and certain so as to fully apprise the appellant of his obligations.

POINT III

THE TRIAL COURT DID NOT LOSE JURISDICTION OF THE DEFENDANT BY POSTPONING THE PRO-NOUNCEMENT OF SENTENCE NOR DID IT THEREBY DISABLE ITSELF TO REVOKE PROBATION AFTER FINDING THAT THE APPELLANT HAD VIOLATED THE TERMS THEREOF, WHICH FINDING WAS PROPER.

Williams vs. Harris, Warden 106 Utah 387, 149 P. 2d 640, is a case on all fours with the facts of the case before us. In that case the defendant, one of four informed against, entered a plea of guilty in the Third District Court, on December 12, 1932, and the court then stated:

Well, the court will suspend the imposition of sentence in the case of the four of you, who have entered a plea of guilty, until Monday, February 6th, 1933, at which time you will report back here, or Mr. Childs (the probation agent) can report for you, as to your conduct. I will place you in custody of Mr. Childs and it is up to you gentlemen to straighten up. If you don't straighten out you will have to come in and be sent to the penitentiary, where they will straighten you out.

On February 6, 1933, the defendant appeared in court with Mr. Childs and the latter made a favorable report regarding the boy's conduct. At this time the District Attorney stated to the court: "I do not want your Honor to lose jurisdiction of the boys." The court then made another order *suspending imposition* of sentence until

April 24, 1933 and on that date made a similar order. Several of these were made from a definite date to a definite date. On October 22, 1933, defendant was brought before the Judge who had made the previous orders, who asked defendant regarding his plea to the charge of burglary and if he had not been sentenced to the Utah State Prison recently for a crime committed in Utah County while under the court's order of probation. Defendant admitted that this was correct. The Judge then sentenced defendant to be imprisoned for a term of not less than one nor more than twenty years.

This court, after considering the decisions of *People vs. Blackburn*, 6 Utah 347, 23 P. 759, and *In Re Flint*, 25 Utah 338, 71 P. 531, so heavily relied upon by appellants herein, and which cases were decided long before the enactment of the present statute (105-36-17) (now 77-35-17) stated:

It is apparent that 105-36-17 gives the court much greater latitude and power in suspending imposition of sentence than was previously had. * * * The purpose of this section is clearly reformatory. * * * We are of the opinion that the court purposely continued suspension of sentence from a day certain to a day certain. * * * We are of the opinion the trial court acted within the powers granted by the statute, and that it had jurisdiction to pronounce sentence to the State Prison as was done.

In deciding the Williams case, this court affirmed the theory now adopted by this writer, and expressly ruled, point by point, against the arguments now urged again by this appellant. First, that the issues in the

Flint and Blackburn cases, regularly cited in appellant's brief, have long since become moot by the enactment of a statute expressly authorizing courts to *suspend the imposition of sentence* and grant probation, a prerogative not vested in the courts at the time of those two decisions, the absence of which moved the Utah Supreme Court to invalidate proceedings in which there had been a palpable attempt to exercise a power not theretofore granted trial judges. Second, the facts surrounding the granting of successive continuances, and the form, substance, and terms of the orders providing for those continuances being in the Williams case substantially identical with the continuances and the form, substance, and terms of the orders for continuance in the case now considered, this court approved and affirmed those proceedings. Third, this court approved and ratified the imposition of terms and conditions of probation of a much more indefinite character, stated with less particularity than the terms and conditions imposed by the trial court in the instant case. At 149 Pacific 2nd, page 642 [8], this court ^{ANALYZED} ~~reiterated~~ those terms imposed upon Williams:

We do not believe that the judge when he placed the boys in the custody of Mr. Childs (the probation agent) expected the time fixed then to be a full period of probation. The trial judge was carefully feeling his way with these boys. He was endeavoring to save the youths from the stigma of prison. From what was said and done, we must conclude that this appellant and the other boys were released *from time to time* under the condition that they straighten up, that they do not violate the law. * * * We are of the opinion

that the court purposefully continued suspension of sentence from a day certain to a day certain * * *. We are of the opinion the trial court acted within the powers granted by the statute (103-36-17) and that it had jurisdiction to pronounce sentence to the State Prison as was done. (Emphasis added).

It is respectfully submitted that the terms and conditions set out by the trial court in the case at bar (Suppl. Tr. p. 7) were more definite, particular, and better calculated to apprise appellant of what was incumbent upon him to maintain imposition of sentence in suspension. The probation agreement signed by appellant (State's Exhibit "A") implemented the oral instructions. As to the length of the probation period, these terms were at least commensurate to those in the Williams case. The record here shows uncontrovertibly that all continuances were from a day certain to a day certain. That there were no laches on the part of the state operating to prejudice appellant, entitling him to believe his liberty was not in jeopardy if he violated any stated conditions. It is submitted that weaker facts in the Williams case gave rise to a decision which should control the instant, stronger case.

All other proceedings in the Williams case were similar to those here. All things that appeared to be irregularities at first blush in the case at bar, and grasped by appellant in his attempt to deprive the trial court of jurisdiction, were treated in the Williams case with a resultant affirmance, ratification, and declaration of the regularity thereof: The absence of a sentencing

of the defendants—referred to by appellant as “judgment of guilt;” the continuances of the respective cases from fixed days to fixed days; the question of the sufficiency, definiteness, and particularity of the terms and conditions of the probation; and principally, the power under the statute granting to a trial court the wide discretion in suspending the imposition of sentence. The inescapable result, respondent submits, is that the Williams case, in June, 1944, effectively concluded all of the issues now raised and urged upon the same court by appellant.

Appellant raises a point in his reference to

In *Re Grove*, 43 Idaho 775, 254 Pac. 519 worthy of passing comment. In his quotation from the case on page 34 of appellant’s brief, there appears the following:

The court did not * * * prescribe any terms or any time for withholding judgment, but unconditionally released the defendant from custody and indefinitely withheld the pronouncement of judgment. * * *

It immediately appears that this case presents the identical problem disposed of in the case of *State vs. Zolantakis*, 70 Utah 569, 259 Pac. 1044, the overruling of which by subsequent decisions (*Follett vs. Severson*, 225 Pac. 2d 116; *Demmick vs. Harris*, ¹⁵⁵~~116~~ Pac. 2d 170) has been seriously considered by this court. As it remains on our books, however, that case only holds, insofar as is material here, that if the probation is one *without* any *prescribed terms or conditions*, and for an *indefinite* time, it is a probation upon “good behavior,”

and in order to revoke the same and to deprive the parolee or probationer of his liberty, he must be given an opportunity to be heard and to cross examine at a hearing appointed for the purpose of revoking his liberty. That segment of the case becomes immaterial here, even, especially when it appears that the defendant was given notice, of a hearing upon an order to show cause why his probation should not be revoked, sufficient to apprise him of the possible consequences thereof, and adequate enough to enable him to enter a general appearance in that proceeding by procuring counsel who represented him there, and by filing an affidavit supporting a motion to quash, set aside, and vacate the order. (Tr. p. 23-30, Suppl. Tr. p. 18).

Appellant raises, but neither argues nor cites authority for, his point number II, assigning as error the finding of the court that appellant violated probation.

In *State vs. Bonza*, 106 Utah 553, 150 P. 2d 970, this court held:

A defendant out of prison on probation is accorded due process of law by the following steps * * *: (1) the filing of a verified statement or an affidavit in the case setting forth facts which show a violation of the terms of probation [fully met, Tr. 20, 21] (2) the citation thereon requiring the defendant to appear and show cause why probation should not be revoked, apprising defendant of the grounds upon which revocation is sought, and specifying a proper time for hearing. (3) a hearing before the court on the question of violation of some term or condition or probation, at which the defendant has the opportunity to cross exam-

ine witnesses against him and also to present evidence to refute the claimed violation of the conditions of probation [Tr. p. 34, Suppl. Tr. pp. 20-31, showing the hearing at which appellant generally appeared, filing his affidavit in answer (Suppl. Tr. 26-30) and was represented by counsel] (4) a determination of the question, followed by entry of an appropriate order [Tr. pp. 35, 36].

Those requirements were re-affirmed in substance in *Christiansen v. Harris*, 109 Utah 1, 163 P. 2d 314. There clearly was no procedural error in the proceedings upon which the order was based. The evidence presented by the probation agent both in his affidavit and upon the hearing, uncontroverted, was sufficient upon which to base the trial court's finding. (Tr. pp. 20, 21, Suppl. Tr. 20-31)

CONCLUSION

Respondent respectfully submits that all things and conditions required to be done, both in *acquiring* and *maintaining* jurisdiction over the subject matter and the person of the appellant, and in effectively providing a proper and enforceable probation, have been had, done, and met by the trial court. That the trial court has committed no error, nor has it deprived itself of the power and prerogative to sentence the appellant for the crime to which he has entered a plea of guilty. That the defendant is subject to the jurisdiction of the court to answer to the charges contained in the information filed in this case, and that no part thereof has lapsed, abated, or been lost. That the court committed no error in fail-

ing to quash, vacate, or set aside the order to show cause, or in finding that there was no cause for which the probation ought not to be revoked, and committed no error in revoking the probation.

Respectfully submitted,

E. R. CALLISTER

Attorney General

KEN CHAMBERLAIN

Assistant Attorney General

Attorneys for Respondent