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State of Utah v. Don Fedder : Appellant's Reply Brief

Utah Supreme Court

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CASE NO. 7899

IN THE SUPREME COURT
of the
STATE OF UTAH

- - -

STATE OF UTAH,

Respondent

-VS-

DON FEDDER,

Appellant.

- - -

APPELLANT'S REPLY BRIEF

- - -

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IN THE SUPREME COURT OF THE STATE OF UTAH

* * * * *

STATE OF UTAH,

Respondent,

-vs-

DON FEDDER,

Appellant.

Case No.
7899

* * * * *

APPELLANT'S REPLY BRIEF

* * * * *

The Respondent's brief is acknowledged and the Appellant submits this memorandum in reply thereto.

ARGUMENT IN REPLY TO RESPONDENT'S
POINT I.

At Page 5 of his brief, the Attorney General argues that there is no requirement that a formal adjudication of guilt of a defendant be entered before such defendant need be placed upon probation.

Under Section 105-36-1 of the Utah Code, The Trial Court is emphatically ordered to appoint a time for pronouncing judgment upon a plea or verdict of guilty, which time must be at least two days and not more than ten days after the verdict.

Under Section 105-36-11, Utah Code, it is further provided that if at the time of the appointed there is no legal cause why judgment should not be pronounced, it must thereupon be rendered.

Appellant takes the position that in this matter of pronouncing judgment the Court actually does two things, as follows:

- (1) To make a formal adjudication of guilt; and,
- (2) To either sentence the ten convicted defendant and order the execution of such sentence or suspend the imposition of sentence or impose sentence, suspend the execution thereof and place the convicted defendant on probation under terms and conditions prescribed by the Court by a written order as a part of the record of the case.

Now under the parole statute the Court has undeniable and unquestionable authority to do two things relative to the second part

- (1) The Court having jurisdiction may suspend the imposition of sentence and place the defendant on probation for such period of time as the Court may determine; or,
- (2) May impose sentence, but suspend the execution thereof and place the defendant on probation for such period of time as the Court shall determine.

Study Section 105-36-17, Utah Code, as you may, and you will find that there is no provision therein which authorizes the Court to withhold the pronouncement of the complete judgment. That is to say; there is nothing in the section which authorizes the Court to withhold that portion of the judgment which has to do with a formal adjudication of guilt.

It is to be noted that the Utah parole statute differs from the Idaho parole statute which is Section 19-2601, Idaho Code, and is cited at Page 32 of Appellant's opening brief. In the Idaho statute, the Trial Court is authorized to withhold judgment altogether. Under the Utah statute all that the Trial Court is authorized to do is to withhold or suspend the imposition or the execution of the sentence.

Had the parole statute, Section 105-36-17, Utah Code, provided for the withholding of the pronouncement of judgment as well as the suspension of the imposition or execution of sentence, we might well agree that under such a parole statute, the Court would have the power, jurisdiction, and authority to place a man on probation without ever formally adjudicating him guilty after having entered a plea of guilty. But such is not the case. Insofar as the pronouncement of judgment is concerned, that is, the formal adjudication of guilt, when a plea of guilty is entered, the statute provides that such pronouncement of judgment must be made not sooner than two days, but no later than ten days after the verdict.

And this is important, because up to the time that the judgment is actually pronounced, that is to say, up until the time that the case against the accused is formally concluded and all of his rights for a motion in arrest of judgment or suggestion of insanity, or motion for new trial or his application to

change ~~not~~ to not guilty have
either been waived or asserted and over-ruled,
the Court does not have jurisdiction to impose
a pronouncement of judgment. Sections 105-36-1
and 105-36-11, Utah Code, provide for this
procedure. The first section required that a
time be appointed for the pronouncement of
judgment which must not be less than two nor
more than ten days, and the second section pro-
vides that if there is no sufficient legal cause
appearing why judgment should not be pronounced
it must thereupon be rendered. It is the purpose
of Section 105-36-1, Utah Code, to orderly provide
for a time for concluding the prosecution against
the accused. If within the time specified by the
Court under Section 105-36-1 Utah Code, the accused
does not exercise his rights for motion for new
trial, motion in arrest of judgment, suggestion of
insanity or withdrawal and change of plea, the
Court must under Section 105-36-11 Utah Code
formally cut off those rights by making a formal
adjudication of guilt and concluding the prosecu-
tion against the accused. After all, the right to
make a motion in arrest of judgment or motion for
change of plea may be exercised at any time prior
to the pronouncement of judgment particularly important in

ever make a formal adjudication of guilt until on July 3, the Court adjudicated the defendant guilty on his former plea after the alleged hearing was had to determine whether or not there had been a violation of the terms of probation (Page 30, Supplemental Transcript, and Page 36, Original Transcript. Order dated July 14, 1952.) and in this connection it is to be noted that this adjudication of guilt was made in the absence of the defendant and while he was not present in Court, and consequently such adjudication of guilt would not be valid. Therefore at the present status of this record the rights of the defendant to change his plea or to move in arrest of judgment has still never been cut off because even to date there as never been a valid adjudication of guilt or a pronouncement of judgment.

Under Section 105-36-3, Utah Code, the defendant must be personally present at the time of pronouncement of judgment in a felony case. This is so because under Section 105-36-9 Utah Code, it is incumbent upon the Trial Court at

of judgment to make

or not he has any legal cause why judgment should not be pronounced. In this reply argument, we have been trying to impress the Court with the notion that in the matter of pronouncing judgment, such judicial act involves two things:

- (1) adjudication of guilt; and
- (2) a judicial pronouncement as to what the sentence should be.

In the instant case, it is to be noted that even the Trial Court acknowledges these two separate and distinct aspects of a judgment, for on July 3, after the hearing, the Court made a formal adjudication of guilt on the defendant's former plea of guilty and then fixed a time, to-wit: the 7th of July at 2 o'clock as being the time for the sentencing of the defendant. (Original transcript, Page 36, Supplemental Transcript, Page 30.)

At Page 12 of Respondent's brief, the Attorney General argues to the effect that it is more compatible with the objects of the probation statute that the Trial Court not make

a formal adjudication of guilt because if the defendant complied with the terms of his probation, the Court could more expeditiously erase the finding of guilt. This argument is a falacy. Upon a complete reading of the parole statute, being Section 105-36-17, it is to be noted at the end of the section that if the accused does comply with the conditions of his probation, then the Court may terminate sentence or set aside the plea of guilty or conviction of the defendant and dismiss the action and discharge the defendant. In this section, the Court has been granted power not only to go back and erase the adjudication of guilt, but also to erase the conviction. Now what is a conviction?

This matter as to what constitutes a conviction was squarely raised in the case of State vs. O'Dell, 71 Idaho 64, 225 Pac. 2nd 1020, and the Court said:

"(1) 'Convicted' as ordinarily used in legal phraseology as indicating a particular phase of a criminal prosecution, includes the establishing of guilt

whether by accused's admission in open court by plea of guilty to the charges presented, or by a verdict or finding of a court or jury.

(2) In a more technical, legal sense, conviction means the final conclusion of the prosecution against the accused, including the judgment and sentence rendered pursuant to a verdict or plea of guilty, and it is frequently used to denote the judgment or sentence.

24 C.J.S., Criminal Law, § 1556, pages 16 and 17; 20 Ruling Case Law 539.

A person, after plea of guilty or verdict, has been convicted when the court decrees that he is guilty." (Emphasis supplied).

So the argument of the Respondent, at Page 12 of his brief is not reasonable, for under the parole statute, the Trial Court is specifically empowered to go back and set aside the sentence and the plea and the conviction and to dismiss the action and to discharge the defendant.

Therefore, there is no sound reason to disrupt our fundamental rules and principles of criminal law and criminal procedure. There is nothing about the parole statute which changes the theory and fact that the pronouncement of judgment includes the doing of two things by the Court, that is:

- (1) To make a formal adjudication of guilt; and,
- (2) For the Court to do something regarding the imposition of sentence. That is to either impose the sentence or to impose the sentence and withhold its execution or to withhold the imposition of sentence altogether and put the defendant on probation.

Since the parole statute does not specifically authorize the Trial Court to withhold that portion of the pronouncement of judgment which has to do with the formal adjudication of guilt, then we must argue that the Court still must make its adjudication of guilt within not sooner than two days nor later than ten days and if the defendant does not show any legal cause as motion in arrest of judgment, motion for new trial, suggestion of insanity or change of plea, then the Court should at least go so far as to formally, finally, and actually cut off all those rights of the accused and to conclude the prosecution against him by formally and finally adjudicating him guilty. What may thereafter be done concerning the matters of sentence is covered by the parole statute.

This appellant takes the position, then, that the parole statute has only changed that portion of the judgment which has to do with the sentencing of the accused. It has had no effect upon changing the duty of the Court to finally conclude the prosecution by making an adjudication of guilt. Therefore, where a Court fails to conclude the prosecution against the accused and make a final adjudication of guilt and cut off all the rights of the accused to move for new trial, motion in arrest of judgment, suggestion of insanity, or change of plea, and to cut those rights off within the time provided by statute, the Court under the doctrine of the Flint Case and the Blackburn Case, cited and indexed in Appellant's opening brief has lost jurisdiction of the accused.

We suggested looking at this parole statute and analyzing it in a different light. All the parole statute authorizes the Trial Court to do is to suspend the imposition of sentence or to impose the sentence, and to suspend the execution thereof. When a defendant

enters a plea of guilty the Court does not at that time have a right to impose sentence until the Court first makes an adjudication of guilt because although a defendant did enter a plea of guilty, he may still make a motion in arrest of judgment or a suggestion of insanity, or move the Court to change the plea of guilty and enter a plea of not-guilty. Therefore, before the Court has any jurisdiction to impose sentence or to withhold the pronouncement of sentence the defendant must first be placed in a legal status where the Court has jurisdiction to deal with the defendant insofar as sentence is concerned.

It logically follows then that there must be a final conclusion of prosecution by an adjudication of guilt before the Court concerns itself with the matter of sentence or probation.

This should graphically illustrate that before the Trial Court can even concern itself with the matter of sentence or probation, it must first as an indispensable act, make a

formal adjudication of guilt so as to reduce

the accused to the status of a convicted person upon whom sentence may be imposed or to whom terms of probation may be extended as an alternative of punishment. The Trial Court under the parole statute is not authorized to withhold that portion of the judgment which has to do with the adjudication of guilt. The parole statute only authorizes the Trial Court to withhold the imposition of sentence or the execution of sentence.

At Pages 11, 12, 13 and 14 of Respondent's brief, the Attorney General argues that even though Section 105-36-1, Utah Code, mandatorily directs the Trial Court to appoint a time for the pronouncement of judgment, still the Attorney General argues that this section is not mandatory but is simply directory. The Attorney General then cites a number of cases wherein delay in imposing sentence has been justified and that on account of such delay in imposing sentence the Court did not lose jurisdiction of the accused.

The Attorney General just absolutely refuses

to acknowledge and to recognize that the judicial functions of the Court in pronouncing judgment involves the two aspects above argued. We agree with the Attorney General that where a Court concludes a prosecution against the accused and makes an adjudication of guilt that under a proper probation or parole statute a Court may withhold the pronouncement or imposition of sentence and not lose jurisdiction of the accused. But the authority of a Trial Court to withhold or delay the imposition of sentence under a parole or probation statute so authorizing does not carry with it the authority to the Trial Court to fail to conclude the prosecution against the accused by finding him guilty, nor does a probation or parole statute which authorizes the suspension of sentence excuse the Court's unwarranted failure to conclude prosecution against an accused by ^{Not} making a formal adjudication of guilt.

At Page 15 of his brief, the Attorney General cites the case of Boykin vs. State, 190 Pac.2nd, 471, as authority for the proposition that if the Court at the beginning of the case has jurisdiction of

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of the person of the

defendant there is a presumption of law that such jurisdiction continues.

Upon a closer reading of this case, it is to be noted that the Oklahoma statute involved in that case is altogether different from the Utah statute, Section 105-36-1, Utah Code, involved in this case for the Court stated at Paragraph 1, Page 475 as follows:

"We have no statute providing that the judgment and sentence of a criminal case must be pronounced at any definite time. The only statutory limitation upon the authority of the Court is that the judgment and sentence cannot be pronounced for at least two days after the verdict."

In this same case of Boykin vs. State, cited by the Attorney General, the Court continued at Page 475 in italics as follows:

"***and the general rule has been laid down that where there is a valid conviction the power of the Court is not exhausted, nor its duty completed, until sentence is pronounced and the cause remains pending and stands continued with the unfinished business from term to term"

but who can say in this Fedder case that there has been a valid conviction? It is perfectly true that Fedder entered a plea of guilty but it is not until such time as

the Court pronounces judgment upon that plea, he still has an absolute right to move in arrest of judgment, which if granted, would prevent the Court from ever pronouncing judgment, or he may move to withdraw his plea of guilty and to be tried upon the merits of the case. Until there is an adjudication of guilt then, there is no valid conviction. See State vs. O'Dell supra.

REPLY ARGUMENT POINT II

At Page 16 and following, the Attorney General argues that the trial court sufficiently set forth the terms, conditions and length of period of the probation. From an examination of the record in this case there is no record whatsoever concerning the terms and conditions of probation in the record except that such terms and conditions were introduced into the record of this case at that alleged hearing which was had on July 3, 1952 for the purpose of revoking and terminating the probation.

There is now pending before the Honorable Supreme Court a motion on the part of the Appellant to strike from the record on appeal all those transcribed notes of the reporter beginning at

Supplemental Transcript on appeal and the reason for appellant's motion to so strike these proceedings is based upon the statutes of this state which require the accused to be personally present at every stage of the proceedings against him when he is charged with a felony. It is to be noted that on Page 30 of these proceedings the Trial Court after this pretended hearing in the absence of the accused, even attempted to make an adjudication of guilt of this accused, when the defendant was not personally present. This is in open and flagrant violation of Section 105-36-3 Utah Code. These proceedings and this attempt on the part of the Trial Court to make an adjudication of guilt was further in open and flagrant violation of Section 105-36-1 Utah Code, which requires the Trial Court before pronouncing judgment to make inquiry as to whether or not there is any legal cause why judgment should not be pronounced.

Of course, the Attorney General will argue that the accused had a right to be present and that the opportunity to be present was accorded to him but that he voluntarily absented himself.

The facts of the matter are that this appellant

had

It is his constitutional and statutory right under both the Federal law and the State law of the State of Idaho to resist extradition if he so desires, and he did so elect to resist extradition.

It is no answer for the State of Utah to say that since this defendant did not voluntarily appear at this pretended hearing that the trial court of the State of Utah is excused in its flagrant violation of the Utah statutes to conduct hearings in his absence.

The State of Utah had its remedy to extradite the accused and to return him to the State of Utah and before the Trial Court in Weber County, and until such time as the appellant in this case was personally present before the Court, the Court had no right under Utah statutes to conduct this hearing.

As a matter of fact, this very appeal and the reasons assigned for this appeal plainly indicate that Don Fedder, during the Month of July, 1952, regarded himself as being beyond the

jurisdiction of the District Court of Weber County for the reason that said District Court because of its own voluntary and unwarranted proceedings had lost jurisdiction of him. Don Fedder was perfectly justified in regarding himself as being in the same identical position as was Flint and was Blackburn, in those two monumental decisions of this Supreme Court. He was perfectly justified under the ^{STATUS} ~~statutes~~ of this record in assuming that he had no duty and no obligation to return to the District Court on July 3 for the holding of any hearing on probation and with ^{SUCH} ~~so~~ just cause and reason, this appellant, Don Fedder was perfectly justified in refusing and resisting extradition which he did do.

Of course, as a matter of fact, the extradition proceedings in the State of Idaho were never concluded. When resistance was shown, the District Attorney of Weber County proceeded to hold the hearing in the absence of the accused.

With these thoughts and arguments in mind, this appellant sincerely and conscientiously urges

th ~~the~~ ~~motion~~ to strike from

do not know because upon an examination of these proceedings on July 3 beginning at Page 20 through 31 of the Supplemental Transcript had in the absence of the accused, we find no inference that the accused ever violated that portion of the agreement if the agreement has any legal force or effect at all in the first place.

But getting back to this matter of the Court's prescribing the conditions and the length of time of probation, as we understand this parole statute the Legislature of the State has delegated to the District Court the power to exercise this function and in doing so we know of no authority whereby the District Court can delegate that judicial function to some non-judicial officer.

In the record of this case, the only record concerning this matter of probation is the minute entry of March 19 at Page 12 of the Transcript wherein it is succinctly related:

"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."

At Page 7 of the Supplemental Transcript, being the stenographer's notes as to what occurred on that date, the Court orally related from the bench that it was going to place the accused upon probation and asked him if he would sign a contract and obey all orders of the Probation Department.

No place in the record did the Court itself ever prescribe the conditions or prescribe the terms of the probation and reduce the same to a written order signed by the Court.

We again direct the attention of this Court to the case of *In re Grove*, 43 Idaho 775, 254 Pac. 519, cited in appellant's original brief for an intelligent and legalistic discussion of the necessity for the Court itself to prescribe the terms and the conditions of the parole and to reduce the same to writing and to make it a part of the record. We submit that if this Supreme Court is going to condone this practice of the Trial Court to delegate to some non-judicial officer the power of prescribing the

terms and conditions of parole, we are practically destroying the fundamental purposes of the probation statute as the same has been discussed in the Zolantakis Case, 70 Utah. 569, 259 Pac. 1044.

As was set forth in the Zolantakis Case, probation to an accused is not going to work unless the matter is handled fairly and with safeguards. We do not mean to imply herein that the Adult Probation Officer set forth any unreasonable conditions, but what we do contend is that if this practice of delegating to a Probation Officer the power to determine the conditions in the first instance, then we are opening the door to the possibility of abuses. If this practice is to be condoned, then what is to prevent the non-judicial officer from imposing conditions which are wholly and completely unreasonable, even to the point of reducing an accused to personal servitude to such non-judicial officer.

As we understand the function of any Supreme Court, its duty is not to decide any particular

case upon its own particular merits but instead it is the function of the Supreme Court to establish principles of law and to see to it that those principles of law are applied to the given case and let the chips fall where they may.

The question here then is under the parole statute are the conditions of parole and the period of parole to be prescribed by written order, by the judicial officer, namely, the District Court, or is this Court going to condone the practice of the District Court's delegating that authority to some non-judicial officer.

REPLY TO RESPONDENT'S POINT III

Commencing at Page 19, respondent argues that the case of Williams vs. Harris, Warden, 106 Utah 387, 149 Pac. 2nd 640, is a case in point on all fours with the facts in this case AND ~~4n~~ that the Williams vs. Harris case should control.

At the outset, the cases are not on all fours. In the Williams case, it does not appear from the decision that the Court failed to adjudicate the defendant guilty.

In the Harris case, it was the contention of the accused that the Trial Court had lost jurisdiction of him because, so he contended, the Trial Court had placed the accused on probation for a definite time and that during that period the terms of probation had been complied with. In this case, it is our contention that the Trial Court never in the first instance had jurisdiction to place the accused on probation because the accused had never yet been convicted. That is to say, the Court had no right to place a man on probation until the accused stands in the status of being convicted of the charge after a formal adjudication of guilt. It is further our contention that since there is no specific authority given to the Trial Court to withhold pronouncing a judgment of guilt, but only to suspend or withhold the imposition or execution of sentence, that since the Court unwarrantedly failed to conclude the prosecution with^{IN} the time specified by statute that the Trial Court thereupon lost jurisdiction to thereafter return the accused for an adjudication of sentence after so

Another point of dissimilarity between the Williams vs. Harris case and the case at bar is that in the Williams vs. Harris case the decision recites that the Trial Court made orders suspending imposition of sentence. It does not appear from the decision whether these orders were written orders or oral orders, but we assume that they must have been written orders because under the doctrine of the cases of State ex rel Echtle vs. Card, and State ex rel Sallee vs. Card, 263 Pac. 869, an order to be valid must be a written order and not by oral pronouncement.

In our case there is a violent conflict in the record as to what actually did occur on these various days.

At Page 12 of the Original Transcript, being the minutes of Court of March 19, 1951, the minutes record as follows:

"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."

At the bottom of Page 7 of the Supplemental Transcript, being the reporters notes as to what

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

At the hearing on July 3, which was conducted in the absence of the defendant, it appears that the District Attorney assumed that the Court never did order the case continued for imposition of sentence but instead continued the case for report as appears at Line 19, on Page 22, as follows:

"Q. Do you have a record which shows the date following March 19 when the defendant was to appear and report?

A. Yes.

Q. What date was that?

A. He was first to appear April 30, 1951.

Q. Did he appear on that date?

A. Yes, he appeared.

Q. Before this Court?

A. He did.

Q. On that date, did the Court fix a time for his - - strike that.

Q. On March 19, when the defendant was placed on probation, did the Court at that time fix a time for the defendant to next report and fix the day as April 30?

The minute entries for April 30, 1951, then records as follows:

"On this day personally appeared defendant pursuant to Court order. Court hears the report of James A. Larsen, State Adult Probation Officer, and good cause appearing it is ordered that the case be continued to August 13, 1951, at 10 o'clock A.M."

The stenographer's notes for the date of April 30, being page 11 of the Supplemental Transcript, record as follows:

"THE COURT: How long to you want to continue it to?

MR. LARSEN: Oh, I think probably until August 13th.

THE COURT: All right. The case is continued for imposition of sentence to August 13, 1951, at 2 P.M."

Again, at the hearing of July 3, the District Attorney assumed that the case had been continued for a hearing, rather than imposition of sentence for the stenographer's notes recorded at Page 23 of the Supplemental Transcript read as follows:

"Q. On April 30 ^{when} ~~with~~ the defendant appeared in Court, at that time did the Court fix a day for further hearing, and order the defendant to appear on that date, which date was August 13. Is that correct?

A. That is correct."

the original transcript then recorded as follows:

"The Court hears the statement of William P. Boynton, and good cause appearing the case is continued to November 19, 1951, at 2 p.m. for further report."

The stenographer's notes as of August 13 do not appear in the Supplemental transcript, but at the hearing of July 3, the District Attorney asked the questions at Page 23 as follows:

"A. And on August 13 did the defendant appear?

A. He appeared.

Q. Did the Court on that date fix the time for further appearance as November 19?

A. That is correct."

At the time of preparing this reply brief, the original transcript is not before the writer, although it is the recollection of the writer that the original transcript including the minutes and orders of the Court bear the signature or facsimile signature of the District Judge. The supplemental transcript was not prepared and submitted as part of the original record but was brought up on augmentation of the record after the appeal had been taken.

It is quite obvious that there is a violent

conflict between the minutes of the Court and the

ographer's notes insofar as recording whether
as the order of the Court to continue the case
further report or to continue the imposition of
sentence. It would seem that in view of this
dict, that the minute entries of the Court which
is the Court signature or facsimile signature
is the one which should control. In no place do the
minute entries record that the case was continued
imposition of sentence.

In the case of Williams vs. Harris, it does
appear from the decision in the case whether
orders sustaining the imposition of sentence
were written orders or oral orders, but since the
decision in that case by this Supreme Court
gives respect to those orders, we are justified
in assuming that those orders in the Williams case
sustaining the imposition of sentence were written
orders signed by the Court and made a part of the
record, all in accordance with the sound principles
of law as set forth in this case of State vs. Card
ra, 268 Pac. 369.

In those cases, the Court rather intelligently
held that oral orders are not valid, but that an

and not orally pronounced. The case of Williams vs. Harris is not a precedent for decision in this matter. In the case of Williams vs. Harris, there was no contention that the Court failed to pronounce judgment within the time required by statute to the extent of formally adjudicating guilt and finally concluding the prosecution against the accused. That point was never raised. The case went to the Supreme Court on an altogether different question and that was that the accused claimed that he had been placed on probation for a definite period of time, that he had complied with the conditions of his probation and also that therefore the Court had lost jurisdiction of him. Also, in the case of Williams vs. Harris, it appears that the Court made specific orders in order to retain jurisdiction. In our case, the minute orders of the Court as the same appear from the original transcript never at any time reserve jurisdiction by continuing the case for imposition of sentence, but instead continue the case merely for report.

CONCLUSIONS

In conclusion, this appellant submits the following contentions:

That under the laws and statutes of the State of Utah, the Court is required to finally conclude the prosecution against the accused not later than ten days. This simply means that the Court must make a final adjudication of guilt although under the parole statute the Court may withhold the imposition of sentence or may impose sentence and withhold the execution thereof and place the accused on probation. But before the Court has any jurisdiction to place the accused on probation at all, it must first make a final adjudication of guilt so as to place the accused in a legally convicted status wherein the Court has jurisdiction to impose sentence or place the accused on probation. Having failed to do this, it is the contention of this appellant that he stands in the same place as did the accused in the Flint or the Blackburn cases. That the Court has lost jurisdiction of him altogether and can no longer return him for the purpose of now adjudicating

Secondly, under the doctrine of the Grove case cited in appellant's brief if a Court is to exercise its directives in granting probation, the Court itself must do so by prescribing not only the terms and conditions, but the time for the probation and to reduce the same to writing and to make it a part of the Court record. This again the trial court did not do, but instead the Trial Court delegated its strictly judicial prerogative to a non-judicial officer, a practice which if condoned by this Court may well establish a precedent for unconscionable abuses in the future. Consequently it is the argument of this appellant that if he did violate the terms and conditions of the pretended probation prescribed by a non-judicial officer, such violation does not amount to a violation of any probation actually prescribed by written order by the Court.

In the main, it is the object of this appellant to advance the argument that the Court has wholly and completely lost jurisdiction of him, but should the court arrive at a different conclusion on this point, then this appellant contends that under the statutes of the State of Utah, and in particular

be personally present at every stage of the proceedings upon a charge of felony and that he was not personally present on the 3rd day of July, 1952, at the time that the District Court attempted to make an adjudication of guilt. Therefore, in the event that the Court ~~entends~~ ^{Concludes} that the Trial Court has not lost jurisdiction, then it would seem that the case would have to be remanded to the Trial Court with the order that that pretended adjudication of guilt which occurred on the 3rd day of July, 1952, be expunged from the record so that the defendant would still be in a position of coming in and making a motion in arrest of judgment or making a motion to withdraw his plea of guilty and stand trial on the merits of the case.

Respectfully submitted.

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