

1953

## State of Utah v. Don Fedder : Petition for Rehearing

Utah Supreme Court

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

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CASE NO. 7199

IN THE SUPREME COURT

of the

STATE OF UTAH

\* \* \* \* \*

STATE OF UTAH,

Respondent,

-VS-

DON PEDDER,

Appellant.

\* \* \* \* \*

PETITION FOR RE-HEARING

\* \* \* \* \*

VERNON K. SMITH

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FILED

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IN THE SUPREME COURT OF THE STATE OF UTAH

\* \* \* \* \*

STATE OF UTAH,

Respondent,

-vs-

DON FEDDER,

Appellant.

CASE NO.

7899

\* \* \* \* \*

PETITION FOR RE-HEARING

\* \* \* \* \*

Comes now the above-named appellant, Don Fedder, and moves this Honorable Supreme Court for a re-hearing upon the following points, to wit:

Point I.

That as appears from the Opinion of this Honorable Court in the above-entitled action, filed on the 30th day of October, 1953, it is stated as follows:

"Appellant's contention that the trial court erred in revoking the probation is not argued in his brief and we find nothing in the record indicating that the hearing on the affidavits of

the parole officer and appellant was not properly conducted. The determination that he had violated his probation is clearly indicated by the evidence."

That said point and contention was discussed at length in APPELLANT'S REPLY BRIEF commencing at Page 16, under Reply Argument, Point II. and continuing through page 24 and again at page 33, thereof.

#### Point II.

That as appears from the record, a Motion was made by the respondent after the appeal was perfected to Augment the record to include the stenographer's notes taken at the alleged hearing for revocation of probation.

A Motion was made by the appellant to Strike pages 20 through 31 of such augmented record for the reason that such alleged proceedings were had in the absence of the appellant in violation of the Utah Statutes requiring the accused to be present at every stage of the proceedings.

This Motion was noticed for hearing at the time of argument of appeal on its merits, and was argued at pages 16, et. seq. of Appellant's Reply Brief.

Neither this Motion to strike, nor the irregularities of this alleged proceedings were determined in the Decision.

### Point III.

That the evidence and proceedings had on the 3rd day of July for Revocation of Probation, if not stricken upon appellant's motion filed in this action on the grounds that the accused was not present, still does not support the finding by the Honorable Court that:

"That the determination that he had violated his probation is clearly indicated by the evidence."

(Opinion of Supreme Court, page 3.)

### Point IV.

As appears from the Record (Transcript pp. 34, 35, and 36, and Supplemental Transcript 4th paragraph p. 20, and 4th paragraph



24  
p. 29) the alleged hearing on Revocation of Probation the Adjudication of Guilt was had in the absence of the defendant.

This point was discussed fully in the Appellant's Reply Brief commencing at page 16 through 24, and again at pages 33 through 34, where it was contended, as follows:

"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 Section 105-36-1 and 105-36-3, Utah Code, he must 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 the District Court attempted to make an adjudication of guilt. Therefore, in the event that the Court 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

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coming in and making a motion of arrest of judgment or making a motion to withdraw his plea of guilty and stand trial on the merits of the case."

In the opinion of this Honorable Supreme Court, it is stated, as follows:

"Appellant insists that there must be a formal adjudication of guilt even though the Court has the power to suspend imposition of sentence. This argument is based upon a technical and needless distinction between the words "judgment" and "sentence" which is not observed at the common law nor in this juris-

diction. In the technical legal sense, sentence is ordinarily synonymous with judgment, and denotes the action of a court of criminal jurisdiction formally declaring to the accused the legal consequences of the guilt which he has confessed or of which he has been convicted. 24 C.J.S., Criminal Law § 1556, citing cases from Conn., D.C., Ill., Kan., Ky., Mo., Mass., Mich., N.C., N.Y., Ore., Pa., Vt., Wash., W. Va., & U. S. Very obviously, because of the interchangeable use of the terms "sentence" and "Judgment", our Code of Criminal Procedure was compiled with this common law definition in mind."

"As we have discussed the meaning of judgment supra, the trial court's act in later adjudging Fedder guilty was an unnecessary act, and hence cannot be held to be in error.

Our statute, U.C.A. 1943, 105-36-3 (U.C.A. 1953, 77-35-3) requires: "For the purpose of judgment, if the conviction is for a felony, the defendant must be personally present; if for a misdemeanor, the judgment may be pronounced in his absence." It is the majority view that a defendant cannot waive his presence at the time of sentence under a statute such as this by voluntarily absenting himself at the time set, 15 Am. Jur., Criminal Law, § 456. Thus, although the court has committed no error, the court must use the means available to it for bringing the defendant before the court for

argued by appellant, it is suspected that possibly through clerical inadvertance Appellant's Reply Brief was not distributed to the members of this Honorable Court.

That if such was the fact, appellant's appeal on its full merits should and ought to be re-examined in the light of all cases cited and arguments advanced in Appellant's Reply Brief.

#### ARGUMENT

RE: Point I, II, and III

In the Court's Opinion filed in the above-entitled action on the 30th day of October, 1953, this Honorable Supreme Court stated as follows:

"Appellant's contention that the trial court erred in revoking the probation is not argued in his brief and we find nothing in the record indicating that the hearing on the affidavits of the parole officer and appellant was not properly conducted. The determination that he had violated

his probation is clearly indicated by the evidence."

The observation of the Court is somewhat disturbing to the appellant for the reason that the appellant at page 16, of APPELLANT'S REPLY BRIEF did argue extendedly in support of a MOTION to strike the entire TRANSCRIPT OF PROCEEDINGS OF THE ALLEGED HEARING FOR REVOCATION OF PAROLE, said transcript being pages 20 through 31 of the Supplemental Transcript.

The background of this Motion to strike arose as follows, according to the recollection of the writer: We say "recollection" for the reason that many of our office copies are not dated and marked with a filing stamp. However, according to our recollection, the appellant perfected his appeal from the Order overruling appellant's OBJECTIONS AND MOTION TO QUASH, SET ASIDE AND VACATE

original Transcript) and the ORDER revoking appellant's probation and adjudicating him guilty (pp. 35 through 36 original Transcript). The appellant then filed his original brief on the basis of the original Transcript. In the meantime, according to the recollection of the writer, respondent moved to augment the record by bringing up to the Supreme Court a Supplemental Transcript which included the transcribed notes of the Court reporter at the purported hearing which was had in the absence of the appellant for the purpose of revoking the probation of the appellant.

Immediately the appellant moved this Honorable Supreme Court to strike pages 20 through 31 of this Supplemental Transcript and assigned as the grounds, therefore, the reason that the defendant was not personally present at the hearing. Appellant noticed this Motion up for hearing at the time of the hearing of the ap-



Granted, this matter was not argued at the time of the oral argument, as counsel for the appellant was only accorded ten meager minutes to discuss before the Court the many serious errors complained of in the record. However, this Motion was advocated and argued extensively commencing at page 16 of APPELLANT'S REPLY BRIEF.

The decision of this Honorable Supreme Court, however, was silent on this Motion to strike these proceedings which were had in the absence of the defendant and in flagrant violation of the Utah statutes and case law:

Sections: 105-28-3, Utah Code  
105-36-1, Utah Code  
105-36-3, Utah Code  
105-28-3, Utah Code

State vs. Mannion

19 Utah 505,  
57 Pac. 542,  
45 L.R.A. 638  
75 Am.St.Rep. 753.

Instead the Court announced, "Appellant's contention that the trial court

erred in revoking the probation is not argued in his brief and we find nothing in the record indicating that the hearing on the affidavits of the parole officer and appellant was not properly conducted. The determination that he had violated his probation is clearly indicated by the evidence."

Appellant feels justified in insisting that the Court make a forthright decision on whether or not a trial court can even conduct a hearing for revocation of probation in absence of the defendant-probationer.

Certainly the very fundamental theories of safeguards which have been set up in the Constitution of the State of Utah, the statutes of the State of Utah, and the decision of this Honorable Supreme Court are founded upon the notion that an accused in a felony case is entitled to be present at every stage of the proceedings. It may be very true that



Fedder voluntarily absented himself from the hearing on this parole violation. The presence of the accused, however, is of jurisdictional essence. If this Honorable Court is going to hold that a hearing for revocation of probation in a felony case can be had in the absence of the accused, then this Honorable Court is opening the door to a further enlargement of conducting proceedings in a felony case in the absence of the accused, which could fritter away and destroy the fundamental safeguards in criminal proceedings which the Utah Constitution, statutes and Supreme Court decision have zealously built up over the years.

On the other side of the picture, how can the state be harmed by following the ordinary established legal procedure of returning an accused to the District Court in Ogden, Utah, through the power of a writ of extradition, then with the

accused personally present, to conduct a hearing for an alleged violation of probation, confronting the accused therein with witnesses as is the custom and fundamental practice of criminal law, and giving the accused the right of cross-examination of all such witnesses, and the further right to refute by other and further witnesses and evidence the claim of the state.

When this matter was originally presented to this Honorable Court, it was the contention that the entire probation order and agreement was a nullity for the reason that the Trial Court did not conclude the prosecution against Fedder by adjudicating him guilty, so as to thereby obtain jurisdiction to place him on probation, and that thereafter the Trial Court's lost jurisdiction to further proceed in the case. However, this Honorable Court has decided against appellant on that theory and argument. But in its de-

cision the Court went even further by stating:

"\*\*\* The determination that he had violated his parole is clearly indicated by the evidence."

Appellant contends herein that the evidence at the hearing, does not clearly indicate any such violation at all.

The conditions of this parole as appears from the Court minutes of March 19, 1951, (p. 12 of the original Transcript) were as follows:

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

According to the notes of the Court reporter for March 19, 1951, (p.7 of the Supplemental Transcript) those notes recite,as follows:

"\*\*\*Don Fedder's case is continued to April 30, 1951, for imposition of sentence, and he is in your jurisdiction (Mr. James A. Larson of the Probation Dept.) to decide whether he is to be held longer or turned lose."

In any event on this same date, to wit, March 19, 1953, Don Fedder signed an agreement for probation which appears at page 31 of the Supplemental Transcript.

Originally it was our vehement contention that this attempt to place Fedder on probation was an absolute nullity for the reason that there had never been an adjudication of guilt so as to give the Trial Court jurisdiction in the first place to place him on probation, and for the further reason that it is the duty of the Court to prescribe the conditions of parole, and not to leave that up to some lay-man such as a probation officer. By its decision filed the 30th day of October, 1953, the Court apparently took a different view. For the purpose of this argument, however, we must conclude then that the terms of probation which were given to Fedder were the terms as set forth in the Probation Agreement appearing

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mental Transcript.

In other words, the order of the Court to report from time to time was not a condition of probation for the reason that in the last paragraph of this so-called Agreement it is provided, as follows:

"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 Don Fedder  
St. No. 3935 Evelyn Dr.  
City Ogden, Utah  
State Utah "

Now, did the proceedings show that Fedder had clearly violated the terms of this probation? Our answer is that the proceedings emphatically do not show that he clearly violated the terms of the probation. We take this Agreement apart paragraph by paragraph. Paragraphs 1 & 2 state, as follows:

"To make regular reports to the agent in charge by the fifth of each and e often if re-

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"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."

Now, at the hearing, (p. 20 through 31 of the Supplemental Transcript) there was evidence to the effect that Fedder did not make monthly reports to Mr. James A. Larson, and there was some evidence to the effect that he had left the state without Mr. James A. Larson's permission. There is nothing in that record of the hearing for Revocation of Probation (p. 20 through 31 of the Supplemental Transcript) which indicates who the agent in charge was. It may be perfectly true that Fedder did not report to James A. Larson, but the Agreement did not require him to report to Larson, it required Fedder to report to the agent in charge.

The next three paragraphs of the Agreement provide, as follows:



"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."

There is nothing in the Transcript which would even indicate or imply that Fedder drank whiskey, beer, gin or any other intoxicant or that he used any narcotic or marijuana, or that he associated with any persons of bad repute, or that he had at any time had any deadly or concealed weapon upon him.

The next paragraph of the Agreement provided, as follows:

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

At page 27 of the Supplemental Transcript there is some hearsay evidence by witness Larson to the effect that he "had heard on the radio that Fedder had been arrested in Las Vegas". Certainly a

mere arrest is not evidence of disobedience to the laws, nor is it evidence of failure to refrain from all illegal transactions.

The next paragraph of the Agreement provided, as follows:

"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."

There is no evidence in this Transcript that the agent in charge ever gave permission to leave the state, or refused such permission. Throughout the hearing (pp. 20 through 31 of the Supplemental Transcript) witness Larson spoke of some side agreements regarding the making of restitution, etc. This is the very thing that this appellant was so violently complaining about (pp. 33-34 BRIEF OF APPELLANT and pp. 19-20 APPELLANT'S REPLY BRIEF) when appellant contended that the terms of probation should be prescribed by the Court, itself, and not by some lay-man, and further that the terms so actually pre-



probation.

We sincerely submit that in the face of this insufficient record of proof of violation, and in the face of this hearing having been conducted in the absence of the accused, that the Court should re-consider its decision and remand this case for further hearing on the Motion to Revoke Probation.

#### ARGUMENT

##### RE: Point IV

We re-direct this Honorable Court's attention to Point IV, Supra page 3, in the interest of shortening up this Petition.

In the present status of this decision, we understand that the case is to be remanded, but it is not clear precisely what proceedings are to be had in the District Court upon the Remittitur.

As the matter now stands, when this appellant is brought before the District Court for further proceedings, this

appellant feels at this time that the pretended adjudication of "guilt" appearing from the Order dated the 14th day of July, 1952, (p. 36 of the original Transcript) was void and of no force and effect for the reason that Utah statutes specifically require the accused to be present at the pronouncement of judgement.

105-36-3, Utah Code

The appellant will, therefore, contend at the time that he is brought before the Trial Court for the purpose of further proceedings in this matter, that he is entitled to have the inquiry made by the Court before pronouncing judgment of guilt, as to whether or not there is any legal cause why judgment should not be pronounced.

105-36-1, Utah Code.

At such time this appellant will contend that he has the right to suggest insanity, make a Motion in arrest of judgment, or even change his plea from that

105-36-3, Utah Code  
105-36-9, Utah Code  
105-36-10, Utah Code  
105-25-3, Utah Code

As this decision now stands, it is not clear whether the further proceedings should include the formal adjudication of guilt together with the imposition of sentence, or merely provide for the imposition of sentence.

In the interest of preventing the necessity for further proceedings in this matter, appellant respectfully requests this Honorable Court to clarify its decision as to just what proceedings are to be had when the case is remanded, and we ask the following questions:

1. Was the hearing held in absence of accused valid? Or, is appellant entitled to a hearing on revocation of parole in his presence with opportunity for producing evidence?

2. If not, is the judgment of guilt, heretofore entered, to be set aside so that the appellant can show legal cause why a judgment of conviction should not be entered?

3. Or, is the appellant merely to be arraigned for imposition of sentence, without opportunity to make a suggestion of insanity, move in arrest of judgment or withdraw former plea, and be tried on the merits?

Point V.

In view of the Court's remark that, "Appellant's contention that the trial court erred in revoking the probation is not argued in his \* \* \*

And, in view of the fact that the appellant had discussed this matter rather extensively on page 16 of the APPELLANT'S REPLY BRIEF, the appellant suspects that possibly the Court did not have the APPELLANT'S REPLY BRIEF before them at the time of writing this opinion.

If perchance this was the case, appellant respectfully requests this Honorable Court to re-consider its entire decision in the light of the APPELLANT'S REPLY BRIEF, and this PETITION FOR RE-HEARING.

Respectfully submitted,

THEODORE BOHN

Theodore H. Bohn  
by VKS

VERNON K. SMITH

Vernon K. Smith

Attorneys for Appellant.

AFFIDAVIT OF MAILING

STATE OF IDAHO)  
County of Ada } ss.

Frances C. Barrett being first  
duly sworn deposes, and says:

I am secretary to the attorney,  
Vernon K. Smith, for Don Fedder, the  
above-named appellant, that on the 17th  
day of November, 1953, I enclosed three  
copies of the enclosed Petition for Re-  
Hearing in an envelope addressed, as  
follows:

Attorney General  
State Capitol Building  
Salt Lake City, Utah

And I enclosed <sup>two</sup> ~~three~~ copies in  
another envelope, addressed, as follows:

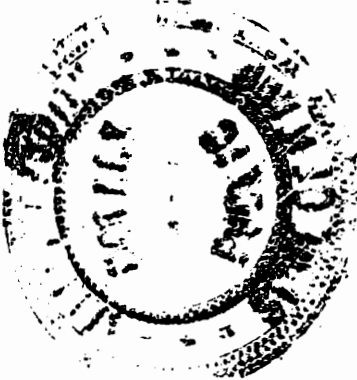
Rolland Anderson  
District Attorney  
Weber County  
Ogden, Utah

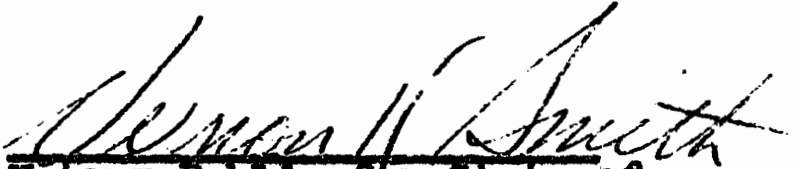
And, after enclosing the same in  
such envelopes, so addressed, I sealed the  
same, affixed sufficient postage thereto,

and deposited the same in the United States mail at Boise, Idaho. Affiant further says that there is a regular daily mail delivery between Boise, Idaho, and Ogden Utah.

  
Frances C. Barrett

Subscribed and sworn to before me  
this 17<sup>th</sup> day of November, 1953.



  
Notary Public for State of  
Idaho,  
Residing at Boise, Idaho