

1990

# State of Utah v. John Fisher : Brief of Respondent

Utah Court of Appeals

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R. Paul Van Dam; Attorney General; William J. Albright; Assistant Utah Attorney General;  
Attorneys for Plaintiff/Appellee.

Roger K. Scowcroft; Salt Lake Legal Defender Association; Attorney for Defendant/Appellant.

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO.

900093-CA

IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
Plaintiff/Appellee :  
v. : Case No. 900093-CA  
JOHN FISHER, : Priority No. 2  
Defendant/Appellants. :

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Appeal from Judgment of  
THE THIRD JUDICIAL CIRCUIT COURT  
Salt Lake County, State of Utah  
Honorable Paul G. Grant

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BRIEF OF RESPONDENT

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Honorable R. PAUL VAN DAM  
Attorney General, State of Utah  
WILLIAM J. ALBRIGHT  
Special Assistant Attorneys General  
341 South Main Street, Suite 202B  
Salt Lake City, Utah 84111  
Telephone (801)533-6000  
Attorneys for Plaintiff/Appellee

ROGER K. SCOWCROFT  
Salt Lake Legal Defender Association  
424 East 500 South, #300  
Salt Lake City, Utah 84111  
Attorney for Defendant/Appellant

**FILED**

MAY 25 1990

COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	:	
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BRIEF OF RESPONDENT

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Honorable R. PAUL VAN DAM  
Attorney General, State of Utah  
WILLIAM J. ALBRIGHT  
Special Assistant Attorneys General  
341 South Main Street, Suite 202B  
Salt Lake City, Utah 84111  
Telephone (801)533-6000  
Attorneys for Plaintiff/Appellee

ROGER K. SCOWCROFT  
Salt Lake Legal Defender Association  
424 East 500 South, #300  
Salt Lake City, Utah 84111  
Attorney for Defendant/Appellant

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## **I. JURISDICTION**

Jurisdiction is conferred upon this court pursuant to §78-2a-3(2)(d), Utah Code Ann. (Supp. 1989), whereby a defendant in a criminal case may take an appeal to the Court of Appeals from a final judgment in a Circuit Court.

## **II. NATURE OF THE PROCEEDINGS**

This case represents an appeal from defendant's sentencing on January 23, 1990, after pleading guilty to the charge of possession of a controlled substance inside a correctional facility, a class B misdemeanor, in the Third Circuit Court in and for Salt Lake County, State of Utah, Salt Lake City Department, the Honorable Paul G. Grant presiding.

## **III. ISSUES PRESENTED FOR REVIEW**

The threshold question is whether Judge Grant's sentencing of appellant for a class "A" misdemeanor on the 16th of November, 1989, was a valid sentencing, and if so, did Judge Grant order this sentence to run consecutively with the prison sentence appellant was already serving?

The state concurs with appellant that he is entitled to credit for time served from November 16, 1989, to January 23, 1990.

**IV. CONSTITUTIONAL AND STATUTORY PROVISIONS CONSIDERED  
DETERMINATIVE**

None

**V. STATEMENT OF THE CASE**

On November 16, 1989, defendant/appellant plead guilty to a class A misdemeanor. It was subsequently determined by appellant's counsel, and stipulated to by the plaintiff/appellee that the class A charge was incorrect and not supported by the facts of the case. It is disputed as to whether appellant was given concurrent or consecutive sentence.

Upon appellant's motion for resentencing, the class A misdemeanor was amended to the proper charge, a class B misdemeanor, and upon this corrected charge defendant was sentenced and given six months jail to run consecutively with defendant's prior prison commitment.

**VI. STATEMENT OF FACTS**

Appellee is satisfied with appellant's statement of the facts, with the following exception: (1) Appellant states that regarding the November 16, 1989, sentencing "Judge Grant did not order that the term of sentence run consecutively with the sentence Mr. Fisher is already serving." Appellant's brief page 1.

## VII. SUMMARY OF ARGUMENT

Appellant's sentencing for a class A misdemeanor on November 16, 1989, was invalid and of no effect because it was based on facts which did not give rise to a class A misdemeanor. Because it was invalid it cannot now be used by Appellant to show that a subsequent sentencing was more severe in effect.

In the alternative, Appellee further contends that Judge Grant's sentencing of November 16, 1989, for a one year commitment, was to run consecutive to Appellant's existing prison sentence and therefore, a subsequent sentence for a six month commitment on a class B misdemeanor would result in a lesser penalty, and not a "more severe" penalty as Appellant argues.

## VIII. ARGUMENT

### POINT 1

JUDGE GRANT'S SENTENCING OF NOVEMBER 16, 1989, WAS NULL AND VOID AND THEREFORE CANNOT BE USED BY APPELLANT TO SHOW THAT A SUBSEQUENT SENTENCING WAS "MORE SEVERE".

Judge Grant's sentencing on November 16, 1989, was after appellant had pled guilty to a class A misdemeanor. As Appellant counsel states, "Some time after November 16, 1989, defense counsel realized that Mr. Fisher had been incorrectly charged with a class A misdemeanor, and that based on the facts of this case he should have been charged with a class B misdemeanor . . ." Appellant's brief page 2.



The State agreed, and stipulated to Mr. Fisher withdrawing his plea and entering a guilty plea to the correct charge, a class B misdemeanor.

Appellant now argues that the sentence was "more severe" than the November 16, 1989, sentence. However, as all parties have agreed, the November 16, 1989, sentencing was not based upon a proper charge, and therefore, the sentence was improper.

In State v. Lee Lin, 7 P.2d 825 (1932), the Utah Supreme Court discussed the effect of invalid judgments and sentences. The issue before the court was whether the District Court had jurisdiction after an invalid sentence had been imposed. The court stated:

"Here the conviction was valid, but the sentence was void. The void sentence created no rights, nor did it impair or affect any right. The case stood as if no sentence had been imposed, and jurisdiction of the district court continued until a valid judgment was imposed. . ." State v. Lee Lin, 7 P.2d 825, 827. Emphasis added.

The Court further commented regarding the defendant's argument that an invalid sentence should release him from further prosecution by stating:

"A void judgment (sentence) does not operate to divest a court of jurisdiction of the cause in which it is rendered. It is a mere nullity, and is ineffective for any purpose." State v. Lee Lin, supra at 827. Emphasis added.

In summary, Appellant's November 16, 1989, sentence is null and void and "ineffective for any purpose". Therefore, appellant's due process rights have not been violated.

POINT II

JUDGE GRANT'S ONE YEAR SENTENCING ON NOVEMBER 16, 1989, WAS TO RUN CONSECUTIVE, AND THEREFORE, THE SIX MONTH CONSECUTIVE SENTENCE ON JANUARY 23, 1990, WAS A "LESSER" SENTENCE, NOT "MORE SEVERE" AS APPELLANT ARGUES.

Assuming, arguendo, that the November 16, 1989, sentencing is considered for due process analysis, the record reflects that Judge Grant did advise appellant that a consecutive one year sentence was ordered.

The November 16, 1989, transcript (hereinafter "NT") shows Judge Grant specifically stated concurrent time would not be given:

THE COURT: Okay, It'll be a year, you can also serve that time at the prison, if you want. That's what I'd suggest you do. I don't think you want to sit in jail on it, do you?

MR. FISHER: Oh, no.

MR. SCOWCROFT: Would your Honor allow him to serve that time concurrently with the sentence he's now serving at the prison?

THE COURT: "Well, as soon as I sentence him and he opts to go to prison, it's the Board of Pardons you need to talk about, not me. I never give concurrent time, so I figure you commit them one at a time, you pay for them one at a time. . ." NT, pg.5, line 6-20. See Addendum A.

Judge Grant correctly stated that once appellant elected to serve the year at the prison the Board of Pardons would then decide how much time appellant would actually serve. See Utah Code Ann. §78-27-5(1)(a)(Supp. 1989).

Because the November 16, 1989, sentence was a consecutive one year sentence for a class A misdemeanor, the January 23, 1990, consecutive six month sentence for a class B misdemeanor cannot be said to be "more severe".

**IX. CONCLUSION**

Based upon the argument and authorities presented, and upon the record, appellee seeks affirmance of the decision of the trial court, with the exception that appellant be given credit for time served from November 16, 1989, to January 23, 1990.

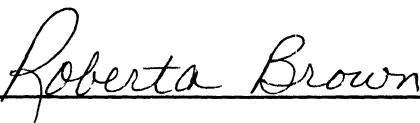
R. PAUL VAN DAM  
Utah Attorney General  
WILLIAM J. ALBRIGHT  
Special Asst. Atty. General  
By:

  
\_\_\_\_\_  
Attorney for Respondent

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent was hand delivered this twenty-fifth day of May, nineteen hundred and ninety to:

Roger K. Scowcroft  
Salt Lake Legal Defender Association  
424 East 500 South, #300  
Salt Lake City, Utah 84111  
Attorney for Appellant

  
\_\_\_\_\_

**ADDENDUM A**

1 THE COURT: Us guys didn't threaten anybody.

2 MR. FISHER: Well, the way the lawyer ran it down to  
3 her, that's how it came out, is either she pled to a Class A  
4 or she was going to jail on a third-degree felony charge.  
5 And my--

6 THE COURT: Okay. It'll be a year, you can also  
7 serve that time at the prison, if you want. That's what I'd  
8 suggest you do. I don't think you want to sit in jail on it,  
9 do you?

10 MR. FISHER: Oh, no.

11 MR. SCOWCROFT: Would your Honor allow him to serve  
12 that time concurrently with the sentence he's now serving at the  
13 prison?

14 THE COURT: Well, as soon as I sentence him and he opts  
15 to go to the prison, it's the Board of Pardons you need to talk  
16 about, not me. I never give concurrent time, so I figure you  
17 commit them one at a time, you pay for them one at a time, so  
18 that's the reason I suggest, one, you don't want to go to jail,  
19 and two, if you want concurrent consideration, you want to get  
20 out to the Board and do your work, that's your best shot.

21 MR. FISHER: So, it's up to the Board then?

22 THE COURT: It's up to the Board, between you and the  
23 Board, how much time you serve is between you two.

24 MR. FISHER: So, they'll have to give me one Board  
25 date and then take me back in front of the Board again?