

1981

## State of Utah v. Leonard Lipsky : Brief of Appellant

Utah Supreme Court

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### Recommended Citation

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH

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STATE OF UTAH

Plaintiff-Respondent,

vs.

LEONARD LIPSKY

Defendant-Appellant.

APPEAL FROM THE  
DISTRICT COURT  
OF UTAH, THE

DAVID WILKINSON

Utah Attorney General

Attorney for Plaintiff

236 State Capitol

Salt Lake City, Utah

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STATE OF UTAH

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STATE OF UTAH

Plaintiff-Respondent,

vs.

LEONARD LIPSKY

Defendant-Appellant.

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Case No. 17,513

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BRIEF OF APPELLANT

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STATEMENT OF NATURE OF CASE

Leonard Lipsky was originally charged with violation of §76-5-103(b) of the Utah Code. The information alleged that on or about the 16th day of October, 1978, he committed an aggravated assault upon the person of one Laurie Bacastow by attempting, with unlawful force or violence, to do bodily injury to Miss Bacastow by such means of force likely to produce death or serious bodily injury to Miss Bacastow.

FACTS AND DISPOSITION IN THE LOWER COURT

The Appellant was arraigned on November 3, 1978, and pleaded not guilty to the charge against him. However, at the set for trial, on November 14, 1978, he changed his plea to guilty as charged, which plea was accepted by the Honorable

Allen B. Sorensen. Time for pronouncement of the judgment was set for December 8, 1978, and the matter was referred to Adult Probation and Parole Department for pre-sentence investigation, pursuant to Utah Code Annotated §76-3-404.

On November 30, 1978, the Appellant requested the Court to order the disclosure of the pre-sentence report. At the time set for sentencing, December 8, 1978, the Court denied Defendant's request for disclosure of the report. The Defendant at that time was committed to the Department of Corrections for a ninety (90) day evaluation.

On March 8, 1979, the Appellant appeared for sentencing before the Honorable J. Robert Bullock in the District Court for the Fourth Judicial District in and for Utah County. At that time the 90-day diagnostic evaluation had been disclosed to the Appellant, but access to the pre-sentence report had been barred. The Appellant was then sentenced to be incarcerated in the Utah State Prison for a term not to exceed five years, and to make restitution to the victim in the sum of \$100.00.

Defendant was then extradited to the State of New York where he was tried for second degree murder of a person he had allegedly confessed to killing, which statements were taken while Defendant was in custody in the State of Utah. The New York Court dismissed the jury's guilty verdict, apparently for lack of evidence on March 24, 1980 and the Court entered a

verdict of acquittal. Defendant was thereafter returned to Utah State Penitentiary.

On appeal in this case the Utah Supreme Court ruled, in State v Lipsky, 608 P.2d 1241 (Utah 1980), that the Defendant's sentence be set aside and that he be resentenced after the State had disclosed him the contents of the pre-sentencing report. After receiving a copy of said report and undergoing supplemental psychological analysis, Defendant was resentenced to one to five years in the state penitentiary on August 29, 1980, in the Fourth Judicial District Court in and for the Utah County, the Honorable David Sam as Judge.

#### RELIEF SOUGHT ON APPEAL

The Appellant requests that his sentence be vacated, and that this Court enter a sentence equal to the time Defendant has already served.

#### ARGUMENT

#### I. FUNDAMENTAL FAIRNESS REQUIRES THAT THE INFORMATION A COURT RELIES ON IN SENTENCING A CRIMINAL DEFENDANT BE ACCURATE AND RELIABLE.

The U.S. Supreme Court in Townsend v Burke, 334 U.S. 736, 68 S.Ct. 1252 (U.S. 1948) held that because counsel was not present, the recital of charges for which the Defendant was not guilty by the Judge at a sentencing hearing was presumed to have influenced the sentence. The Court stated:

We find from the record that, on two other of the charges which the Court recited against the Defendant, he had also been found not

guilty. . . We are not at liberty to assume that items given such emphasis by the sentencing court, did not influence the sentence which the prisoner is now serving.

We believe that on the record before us it is evident that this uncounseled Defendant was either overreached by the prosecution's submission of misinformation to the court or was prejudiced by the court's own misreading of the record. Counsel, had he been present, would have been under a duty to prevent the court from proceeding on such false assumptions and perhaps under a duty to seek a remedy elsewhere if they persisted. Consequently, on this record we conclude that while disadvantaged of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result whether caused by carelessness or design, is inconsistent with the due process of law, and such a conviction cannot stand. (emphasis added) 68 S.Ct. at 1255.

Although the Townsend decision may historically apply more directly to the Defendant's right to counsel, it clearly expresses the strong policy of the court's in favor of obtaining accurate and reliable information to be used in sentencing a criminal Defendant. Although that Court found that the severity of a sentence which is within statutory limits is not in itself grounds for relief that court also spoke of a "duty to prevent the court from proceeding on false assumptions" in the sentencing process. Anytime it can be shown that a judge in fact relied on false or erroneous information in pronouncing a sentence on a criminal Defendant, that sentence should be subject to review and revised to comport with the truth about the Defendant.



In Williams v New York, 337 U.S. 241, 69 S.Ct. 1079 (U.S. 1949), the Supreme Court emphasized a trial court's wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within the limits of the law. The Court stated it was well aware that such a broad discretionary power was susceptible of abuse, but that such abuse could be corrected because appellate courts have the "power to reverse for abuse of discretion or legal error in the imposition of the sentence." 69 S.Ct. at 1085. Clearly anytime a sentencing court relies on erroneous information when deciding the nature and extent of the punishment, or when the sentencing court abuses its discretion in imposing punishment, appellate courts have a duty to intervene and declare void or readjust the Defendant's punishment.

In United States v Picard, 464 F.2d 215 (1st Cir. 1972), the court of appeals vacated the Defendant's sentence for a conviction of selling heroin because the trial court relied in part on a presentence report that it refused to allow the Defendant to examine. The obvious danger that the contents of the unseen report were erroneous compelled the First Circuit Court of Appeals to invalidate the sentence. The Court said:

A court may rely, in imposing sentence, on responsible unsworn or out of court information relative to the circumstances of the crime and to the convicted person's life and

characteristics. (Citations omitted) We also know that this relaxation in the traditional evidentiary rules and procedure applicable to the guilt-determining stage during the penalty-determining stage is not unlimited. The clearest limitation is that a sentence must not be founded, even in part, upon misinformation of constitutional magnitude. 464 Fed.2d at 219.

Although the First Circuit allows a variety of evidence to be presented at the sentencing hearing which would be inadmissible at trial, there cannot be a total absence of safeguards which might result in the consideration of misinformation as a basis for setting the Defendant's sentence.

Of course this Court has announced the same policy in a prior appeal in this case. State v Lipsky, 608 P.2d 1241 (Utah 1980). The Court decided there that presentence reports should be disclosed to the Defendant prior to sentencing for the reason that the exercise of a sentencing discretion should be based upon accurate information, and the Defendant should have the opportunity to bring any inaccuracies to the Court's attention. The Court stated that the Defendant had a "right to be sentenced on the basis of information that is accurate". (at 1248) To that end this Court vacated the sentence which the trial court had given to Defendant upon his guilty plea and instructed the state to provide the Defendant with a copy of his presentencing report. Armed with knowledge of the information in said

report, Defendant again appeared before the Court for resentencing on the 29th day of August, 1980.

II. THE TRIAL COURT IMPROPERLY RESENTENCED THE DEFENDANT BASED PARTLY UPON UNPROVEN STATEMENTS IN THE PRESENTENCING REPORT REGARDING OTHER ALLEGED "CRIMES" TO WHICH DEFENSE COUNSEL OBJECTED AND FOR WHICH THE DEFENDANT HAD BEEN ACQUITTED.

In the prior appeal this Court held that:

"Rudimentary fairness" requires that a Defendant be allowed to examine his presentence report and be given an opportunity to be heard on those items in the report which the trial court would consider in sentencing. At 1248.

The Defendant did have an opportunity to be heard regarding the contents of the presentencing report at the re-sentencing hearing below. Defense counsel vigorously objected to the Court's consideration of any statements contained in the presentencing report which referred to Defendant's alleged admission to a murder in New York, or the fact that the Defendant had been charged with that murder in that State. (Transcript of sentencing, Criminal No. 7144, at 3). However the Court below found as follows:

It does appear to me, counsel, that any matter given by the Defendant to the Adult Probation and Parole Department is a matter that is to be appropriately considered by the sentencing court, and that matter having been given it does appear to me that it is a matter that is in the record. (Transcript of Sentencing at 7, 8)

The Court then notes that Defendant was found innocent in New York of murder charges, and asserted that that fact had been also appropriately considered. In addition, to

giving weight to those factors, the court then stated it would proceed to consider the matter of the offense committed in the State of Utah. (Transcript at 8).

Thus it appears that the Court did give weight to the Defendant's alleged confession to the murder in New York. However, it was but one of several considerations which the Court considered. The fault in this approach is that the Court has absolutely no basis for determining whether or not the allegations regarding Defendant's statements are accurate. The allegation that the Defendant in fact did confess to some murder in New York is an unsworn statement by an officer of the Adult Probation and Parole Board. Although the state was not required to formally introduce and prove the veracity of such statement, they should be presented in a manner and a fashion to assure their validity. Even assuming, arguendo, that the Defendant did make such statements to officers of the Adult Probation and Parole Department, no evidence was presented or recited as to the circumstances under which such statements were made. The extremely unfavorable report about the Defendant which the report gives is in large part based on this alleged admission. The sentencing court below may have attempted to discount any probative worth of such alleged admissions by Defendant, but certainly did in fact follow the recommendation of the Adult Probation and Parole in denying Defendant's probation. And certainly the sentence

of one to five years in the state penitentiary was in part based upon the recommendation of that same body. This Court in the Lipsky case, stated:

The sentencing philosophy of the criminal law is that the punishment should not only fit the crime but the Defendant as well. It is essential that the fairness and sentencing both be perceived as such by the public and the Defendant and, in fact, be fair. The information about the Defendant must be accurate if society and the individual are to be properly served. Id. at 1249.

In spite of defense counsel's objections that the alleged statements by the Defendant to the Adult Probation and Parole be not considered, the Court did consider the board's recommendations. And such information was used without any guarantee that the information therein was accurate. This Court's decision in the prior Lipsky case was an effort to mold a procedure which would "shore up the soundness and reliability of the factual basis upon which the Judge must rely in the exercise of that sentencing discretion." Id. at 1249. Appellant here contends that the Judge abused his discretion in considering an inaccurate factual basis in determining the sentence of the Defendant in this case.

The Fifth Circuit Court of Appeals considered an application for relief from a sentence by a prisoner who was convicted of transporting a stolen motor vehicle across state line. The appellant there agreed that the sentence was void because the presentence report before the Judge

revealed the appellant had raped a minor and been convicted of burglary. Appellant denied the veracity of these charges and contended his sentence was influenced by this information. The trial court had denied his application, and had made extensive findings of fact and conclusions at law to the effect that even if the supposed erroneous items were deleted, no modification of the sentence was appropriate. The trial court listed, and the appeals court concurred in factors to be considered in determining whether false information did influence the sentencing judge or affect the sentence. The false statements went:

Make the description of the defendant character, criminal properties, and prospects for rehabilitation, significantly were detrimental to his interest, and . . . [form] the foundation of his sentence. Putt v United States, 363 F.2d 369 (5th Cir. 1966)

In the instant case the presentencing report by Larry G. Firnouns and Grant S. Farnsworth concluded:

After evaluating all of the factors involved in this case, including the seriousness of the present offense and the possible murder charge pending in New York, he would have to be classified as an extremely poor candidate for probation. RECOMMENDATION: It is respectfully recommended by the Division of Corrections that the Defendant be denied the privilege of probation and that he be committed to the Utah State Prison as provided by statute. (90-day Diagnostic Evaluation of Adult Probation and Parole, at 9.)

The recommendation to deny the appellant here probation was based to a great extent on the New York situation.

This description of the Defendant was significantly more detrimental and clearly formed the foundation for the sentence in the court below. In Putt, the trial court expressly disavowed any reliance on the disputed information. But in the case at bar, the sentencing court, as noted above, expressly found that the disputed information was being considered. Such an open reliance upon the disputed information accentuates the abuse of discretion which the sentencing court exercised.

In sum, it appears that the resentencing in the instant case was done as an exercise in form over substance. The Defendant was originally convicted upon his guilty plea and sentenced to one to five years in the state penitentiary. Feeling the sentence unduly severe for a first offender under such circumstances the Defendant sought and obtained through the appellate process a copy of the presentencing report which formed the basis for his first sentence. Upon resentencing the Court admitted that it gave weight to the Adult Probation and Parole Department's recommendation and to Defendant's alleged "admission" to that body. However, the Court ignored Defendant's objections to such allegations, and imposed an identical sentence from the first instance. Although the Defendant's right to be sentenced upon accurate information was the basis of the Utah Supreme Court's order that he be provided with a copy of his presentencing report, the sentencing

court itself apparently felt it merely needed to give the Defendant an opportunity to contest the allegations in said report. Nevertheless, the sentencing court considered the same information as was considered in the first sentencing exercise, and arrived at the same result. It is Appellant's contention that the factual basis upon which the Defendant was resentenced was inaccurate, and an inappropriate basis upon which to sentence Defendant in this case. That sentence should therefore be vacated.

III. BY FORWARDING IMPROPER ALLEGATIONS TO THE PAROLE BOARD THE STATE HAS UNJUSTLY LENGTHENED THE DEFENDANT'S TERM OF IMPRISONMENT.

Utah Code Annotated, 1953, §77-18-5 provides as follows:

In cases where an indeterminate sentence is imposed, the Judge and prosecuting attorney may, within 30 days, mail a statement to the Board of Pardons setting forth the term for which the prisoner ought to be in prison together with any information which might aid the board in passing on the application for termination or conutation of the sentence or for parole or pardon.

The report of the Adult Probation and Parole is typically furnished to the Parole Board of the State of Utah. As such it furnishes a foundation, together with consideration of the prisoners actions while in prison, for determination whether the prisoner should be granted a parole. The Defendant has now been incarcerated for the period of approximately 28 months or 2 1/2 years. In spite of the finding by the sentencing court below that the Defendant was a "model



prisoner" (Transcript of Sentencing Criminal No. 7144, at 11) the Parole Board has failed to grant the Appellant parole. In light of the fact, and the consideration that this is Defendant's first offense, it would have to be considered highly unusual that the Defendant has not been released on parole. In all likelihood any decision as to whether or not to release Defendant on parole has been adversely affected by the information forwarded by the Adult Probation and Parole which refers to the alleged New York murder by Defendant herein. Every policy which argues for providing that accurate information is relied on in the sentencing, applies equally to a determination as to whether or not to release a Defendant on parole. All of this becomes aggravated in light of the fact that the Defendant was acquitted of the murder charges in the State of New York. Any reliance by the Parole Board on the fact that Defendant was charged with murder is clearly misplaced. Likewise any reliance by the Parole Board on the fact that Defendant allegedly admitted the murder to an office of the Adult Probation and Parole Board is likewise an improper basis upon which to decide whether parole should be granted. The forwarding of the damaging and erroneous information to the Parole Board has aggravated and prolonged the Appellant's incarceration in a state penitentiary.

CONCLUSION

This is a case where the Defendant was sentenced and has been denied parole upon the basis of unproven, unconfirmed and inaccurate information. This Court has established that the Defendant in criminal cases has the right to be sentenced on the basis of accurate information. In the case at bar, this Court must now decide whether the information expressly relied on by the sentencing Court must be accurate in fact, or at least utilized only when its accuracy can be reasonably assured, or whether the sentencing Court must merely note the Defendant's objections to the allegedly false information upon which that Court bases its sentence. Clearly there needs to be more than a mere opportunity to contest such information, and if the information is false to have a sentence based thereon likewise declared void and of no effect. Therefore, counsel for the Appellant respectfully requests that this Court vacate the sentence declared by the sentencing Court on August 29, 1980, and commute that sentence to time already served by the Defendant herein.

RESPECTFULLY SUBMITTED this \_\_\_\_ day of March, 1981.

\_\_\_\_\_  
W. Andrew McCullough  
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I mailed two copies of the foregoing.

Brief of Appellant, to the Utah Attorney General, David  
Wilkinson, at 236 State Capitol, Salt Lake City, Utah 84114,  
this \_\_\_\_ day of March, 1981.

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