1983

State of Utah v. David Riley Jacob : Brief of Respondent

Utah Supreme Court

Ginger L. Fletcher; Attorney for Appellant;
David L. Wilkinson; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 18173
DAVID RILEY JACOB,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

Appeal from the finding that appellant had not recovered from mental illness and order that he continue to be maintained at the Utah State Hospital by the Third Judicial District Court in and for Salt Lake County, the Honorable Christine M. Durham, Judge, presiding.

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with Aggravated Arson, a second-degree felony, under Utah Code Ann., § 76-6-103 (1953), as amended, as the result of a fire in an apartment building on September 21, 1979.

DISPOSITION IN THE LOWER COURT

On December 26, 1979, appellant was found competent to stand trial in the Third Judicial District Court, the Honorable Dean E. Conder presiding. Notice of intent to rely on the defense of insanity was filed by appellant on January 31, 1980. The facts of this case were entered by stipulation on April 15, 1980. Appellant was found not guilty by reason of insanity before the Honorable Christine M. Durham, sitting without a jury, on that date. Appellant was committed to the Utah State Hospital pending psychiatric examination to determine whether his sanity had been restored under Utah Code

Ann., § 76-24-15 (1953), as amended, repealed July 1, 1980. A hearing was held on July 18, 1980 to determine whether appellant's sanity had been restored. On January 30, 1981 the Honorable Christine M. Durham entered Findings of Fact and Conclusions of Law that appellant suffered from chronic paranoid schizophrenia that could be controlled by medication. The court found that appellant's condition under such medication met the test of sanity under § 76-24-15. Appellant was, therefore, ordered released under the supervision of Adult Probation and Parole on the specific condition that he be maintained on medication. Both Adult Probation and the Utah State Hospital declined to administer such a program due to a lack of statutory authority.

On June 2, 1981, appellant requested a hearing pursuant to § 77-24-16 to determine if his sanity had been restored. That hearing was held on July 22, 1981. The court issued a memorandum decision on August 7, 1981 vacating the previous order of conditional release. The court found that appellant had not recovered from his mental illness within the meaning of the Utah statutes and ordered that he be remanded to the custody of the Utah State Hospital.[1]

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[1]Although it is not entirely clear, the court's order of August 7, 1981 appears to be based on § 77-14-5. The wording of the order is consistent with that statute.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the order of the court below that appellant be confined to the Utah State Hospital until such time as he has recovered from his mental illness and denying appellant's request that he be released pursuant to former Utah Code Ann., § 77-24-16 (1953), as amended, repealed July 1, 1980.

STATEMENT OF FACTS

On September 21, 1979, a fire broke out on the third floor of an apartment building at 1310 East 200 South in Salt Lake City (R. 35). Appellant was a resident of the building and admitted to investigators at the scene that he had started the fire with crumpled newspaper in his own and another room (R. 36). The reason appellant gave for starting the fires what that he wanted to kill himself (R. 36). At the time appellant was interviewed, on the day after the fire, his thought processes were disrupted (R. 36, 39-50).

Over a period of ten years prior to the fire, appellant suffered from paranoid schizophrenia, a chronic mental disease (R. 36). Dr. Breck LeBegue interviewed appellant shortly after the fire and concluded that appellant was able to appreciate the wrongfulness of his conduct but lacked a substantial capacity to conform to the requirements of law (R. 37). Dr. Lewis G. Moench also examined appellant, reaching the same conclusion (R. 37).

Paranoid schizophrenia is caused by a genetic biochemical defect in the neurotransmitters of the brain (R. 137). There is no cure for this mental disorder, but it may be controlled with neuroleptic drugs (R. 137, 138). A patient who discontinues use of the drug prescribed will eventually begin to re-exhibit symptoms of paranoid schizophrenic behavior (R. 137). The dosage must be closely monitored because a patient's needs change with changing circumstances (R. 141). Dosages may need to be increased, for example, when the patient is exposed to stressful situations (R. 141).

Appellant has been treated with neuroleptic drugs since he was taken into custody (R. 139, 193, 217-218). The doctor's orders are for 1/2-cc. of prolyxin every two weeks, but appellant also may request extra medication if he feels it is necessary; i.e., if there are symptoms causing "troubles" (R. 194). While taking this drug, appellant has improved to the best extent possible. No symptoms of the mental disorder were manifested by appellant at the time of the hearing (R. 147, 210). According to Dr. Susan Miron, appellant possessed the capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the law at that time (R. 214-215).

Appellant has received medication for his illness on previous occasions (R. 204). Each time he has been released in the past, appellant discontinued use of the drug and became overtly psychotic (R. 139, 204, 219). Once he feels well,

appellant no longer recognizes the need for treatment and stops taking medication (R. 140). This is a manifestation that is common to both normal patients with other diseases and patients with schizophrenia. A schizophrenic, however, lacks the insight to understand the nature of the disease and the need to continue treatment (R. 140).

Among the manifestations of appellant's illness when not under medication were characteristics such as wanting to carve up women's bodies, transvestism, arson and shooting at police officers (R. 141). According to Dr. LeBegue, these symptoms would be continually displayed by appellant if he were not receiving medication (R. 142). Appellant is a threat to himself and others when he is delusional (R. 146). It was the personal opinion of Dr. Van Austin that appellant would not continue to take the drugs prescribed if he were released (R. 205).

There is not currently in existence a program that could assure appellant would continue treatment (R. 158). Both Adult Probation and Parole and the Utah State Hospital have declined to supervise a conditional release program (R. 114). Appellant would need to visit a mental therapist every two weeks, but clinics have no authority to force patients to keep appointments (R. 143, 158). There is no reliable way to test a patient's blood to determine that he is taking his medication because traces of these drugs remain in the body

long after the patient has ceased taking them (R. 159). Appellant claims, however, that he would continue treatment if released. When he stopped taking the drugs in the past, it was because he was not taking the proper drug and it produced side effects. Appellant believes he is taking the proper drug now (R. 219).

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY APPLIED § 77-14-5 RATHER THAN § 77-24-16.

Appellant claims that the application of Utah Code Ann., § 77-14-5 (1980) as the basis of the trial court's decision on August 7, 1981 was a violation of the constitutional provisions against ex post facto laws. This claim is based on the fact that when appellant committed the act of arson and pleaded not guilty by reason of insanity, another statute was in effect. Generally, however, statutes are not ex post facto merely because they operate on events antecedent to their effective dates. Calder v. Bull, 3 U.S. 386, 390 (1798). It is the effect that the statute will have that determines its validity with respect to ex post facto inhibitions. State v. Coleman, 605 P.2d 1000, 1010, cert. denied, 446 U.S. 970, reh. denied, 448 U.S. 914 (Mont. 1979). That effect must be to materially affect some substantial right of the defendant. Id. at 1011. A defendant does not

have a right to the application of the law in force at the time of the crime where the change is procedural and does not deprive him of a substantial right. Id.

Traditionally, courts have noted that ex post facto laws are stimulated by "ambition, or personal resentment and vindictive malice." They are statutes that make an act a crime that was innocent when done, increase the punishment for a crime after its commission or deprive an accused of a defense available at the time when the act was committed. Id. at 1010. Thus, the ex post facto prohibition applies only to penal statutes. Estate of Hofferber, 167 Cal. Rptr. 854, 28 Cal. 3d 161, 616 P.2d 836, 849 (1980). See also: Johannessen v. United States, 225 U.S. 227 (1912).

In this case, the application of § 77-14-5 to appellant does not fit within the definition of an ex post facto law. The statute does not make something criminal that was not, it does not eliminate a defense, nor does it increase the punishment for a crime. The confinement of a person found not guilty by reason of insanity or mental illness is not for the purpose of punishment. To say that it is for punishment purposes is to say that a court may punish a defendant who has been found not guilty under other defenses such as self-defense or justification. Rather, the verdict of not guilty by reason of insanity points out the need for a subsequent determination of the actor's mental condition, not for punishment purposes, but for treatment purposes and to protect

society and/or the actor from potential harm. Bailey v. State, 210 Ga. 52, 77 S.E.2d 511 (1953). Therefore, § 77-14-5 is not penal in nature although it appears within the criminal code and is triggered by the outcome of a criminal proceeding. The statute does not focus on the act committed by appellant, but on the presence of mental illness as demonstrated at the time of the hearing, not at the time of the act. It is not a crime to be mentally ill. Indeed, no state would likely attempt to make mental illness a crime. "[A] state might [however] determine that the general health and welfare require that the victims of these . . . afflictions be dealt with by compulsory treatment." Robinson v. California, 370 U.S. 660 (1962). Other courts have characterized commitment proceedings following a finding of not guilty by reason of insanity as non-criminal, and therefore not ex post facto. See, e.g., Bailey, supra; Ex parte Slayback, 209 Cal. 480, 288 P. 769, 771 (1930); Ex parte Clark, 86 Kan. 539, 121 P. 492 (1912).

Because the purpose of commitment to a mental facility after a finding of not guilty by reason of insanity is not to punish the actor, § 77-14-5 is not a criminal statute. Being a non-criminal statute, its application to appellant was not ex post facto. Therefore, § 77-14-5 was properly applied in this case.

POINT II

THE DISTRICT COURT PROPERLY DETERMINED THAT APPELLANT HAD NOT RECOVERED FROM HIS MENTAL ILLNESS.

A. THE ISSUE IS NOT WHETHER THE COURT PROPERLY DEFINED SANITY, BUT WHETHER THE COURT PROPERLY FOUND THAT APPELLANT HAD NOT RECOVERED FROM HIS MENTAL ILLNESS.

Appellant claims that the District Court's incorporation of the Findings of Fact and Conclusions of law dated January 30, 1981 into its order of August 7, 1981 caused the latter to be based on an improper definition of sanity. Had the proper definition of sanity been utilized, appellant would have been released from the Utah State Hospital. According to appellant, the proper definition of sanity is the opposite of the insanity defense. That is, that appellant have the capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirement of law (see Appellant's Brief, Points II and III).

This appeal, however, is not based on the hearing of July 18, 1980 or the order conditionally releasing appellant dated January 30, 1981. That hearing and order were pursuant to § 77-24-16 and were for the purpose of determining if appellant had been restored to sanity. This appeal is based on the hearing of July 22, 1981 and the order of August 7, 1981 which were based on § 77-14-5. That statute provides

as follows:

> (2) A defendant committed to the Utah State Hospital pursuant to subsection (1) may apply, . . . to the district court of the county from which he was committed, for an order of release on the grounds that he has recovered from his mental illness. . . .

Utah Code Ann., § 77-14-5 (1953), as amended. The determination made at the July, 1981 hearing and effected by the order of August 7, then, was whether appellant had recovered from his mental illness. The issue on appeal, therefore, is not whether the court applied the proper definition of sanity, but it is whether the court properly determined that appellant had not recovered from his mental illness. Appellant's argument to the contrary confuses the issue. To claim that § 77-14-5 was wrongfully applied in the order from which he appeals and then to claim that it was not actually applied, but that an improper interpretation of § 77-24-16 was applied, is inconsistent. Appellant appears to argue that the court may have applied both statutes in the order dated August 7, 1981 while the wording of the order is consistent only with § 77-14-5.[2]

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[2]The order states: "[T]his court cannot find that the defendant has recovered from his mental illness within the meaning of the Utah statutes. . . ." (R. 115) (emphasis added).

The proper procedure for seeking review of a perceived defect in the 1980 hearing and subsequent order would have been to take an appeal from that order pursuant to the provisions in Utah Code Ann., § 77-35-26(d)(1) and (j) (1953), as amended. Appellant, however, did not appeal from that order. Instead, appellant demonstrated acquiescence by waiting nearly a full year and requesting a new hearing not based upon the original hearing, but to determine if appellant had been restored to sanity as of the date of the new hearing. Appellant may not now claim error based on the hearing of July 18, 1980 or the court's subsequent order.

B. THE COURT APPLIED THE PROPER STANDARD IN DETERMINING THAT APPELLANT HAD NOT RECOVERED FROM HIS MENTAL ILLNESS.

The Utah code requires that a person found not guilty by reason of insanity must be committed to the state hospital until such time as he has recovered from his mental illness, Utah Code Ann., § 77-14-5 (1953), as amended. There are no standards listed in that statute for determining whether a person has recovered from his mental illness. However, the general rules of statutory construction require that this Court construe statutory language in a way that comports with constitutional restraints while carrying out the purpose of the law. This Court said in Greaves v. State, Utah, 528 P.2d 805, 807 (1974) that:

> In determining whether the statute carries out [its] purpose, it should not be given any tortured or strained application to conjectured or hypothetical situations, but should be understood and applied in a fair, realistic and practical manner to the situation confronted, and in the awareness that all of the law is not stated in one sentence or one paragraph, but a statute is to be construed and applied in relation to other requirements of the law.

Thus, statutes must be construed in a manner that is sensible and gives practical effect to their provisions. Id. To determine the meaning of § 77-14-5, then, this Court must examine the purposes behind the section in context with other provisions of the law while giving fair import to its terms so as to effect those purposes.

The fair import of the phrase "recovered from his mental illness" in § 77-14-5 is that an appellant must be free from mental illness or insanity and, therefore, sane. It follows that a person who is dangerous to himself or others as a result of mental illness is not recovered from his mental illness. A determination that a person remains dangerous to himself or others, then, is a determination that he has not recovered from his mental illness.

Appellant asserts that the fair import of the statute is the requirement that a person have the capacity to recognize the difference between right and wrong and to conform his conduct to the requirements of law in order to be

recovered from mental illness. This is not the same as no longer being dangerous according to appellant. Appellant suggests that clearly a person who has that capacity is not dangerous as a result of his mental illness. Appellant further contends that a mere risk of future danger is not sufficient to establish that a person has not recovered from his mental illness or that he is dangerous and cannot conform his actions to law and, therefore, he may not be confined under § 77-14-5.

To read § 77-14-5 in a manner that precludes the court from considering factors other than whether the appellant knows the difference between right and wrong or can conform himself to the requirements of law is to ignore the purposes behind the statute. One of the purposes behind the statute is to provide treatment for persons who have demonstrated a need for treatment by committing an illegal act. A second goal is to protect such a person from himself or to protect society from acts harmful to others. Consistent with these goals is a reading of § 77-14-5 that allows the trial court to consider whether appellant may become violent in the future as a result of his mental illness, even though he may have the capacity to know the difference between right and wrong and to conform his actions to law at that point in time.

Other courts have considered these factors in deciding whether to maintain a person such as appellant in

custody. In Clark v. State, 151 Ga. App. 853, 261 S.E.2d 764 (1979), Clark was found not guilty of murder by reason of insanity. He was committed to a state hospital pursuant to that determination and applied for release on the grounds that he was not mentally ill because he did not meet the standards for involuntary commitment. Those standards were that a person must present a substantial risk of danger to himself or others manifested by recent acts or threats. In holding that Clark met the standard the court took into account the fact that persons with schizophrenia are subject to a relapse if they discontinue use of prescribed medication and that they are frequently reluctant to take medication. The court also considered relevant the fact that Clark had discontinued taking medication in the past and that he had refused medication only two weeks prior to the hearing.

Similarly, the court in State v. Maik, 60 N.J. 203, 287 A.2d 715, 722 (1972) said:

> It would depart from the justification for the recognition of insanity as a defense to view the psychotic explosion in isolation from the underlying illness. To do so would fail to protect the citizens from further acute episodes. The protection must be equal to the risk of further violence. An offender is not "restored to reason" unless he is so freed of the underlying illness that his "reason" can be expected to prevail. Hence the underlying or latent personality disorder, and not merely the psychotic episode which emerged from it, is the

> relevant illness, and the statutory requirement for restoration to reason as a pre-condition for release from custody is not met so long as that underlying illness continues.

In this case, appellant's past history of release, discontinuation of drugs and then relapse is a relevant factor to his release. Appellant has demonstrated that he is unwilling and/or unable to conform his behavior to the requirements of law when he is not under medication. He has demonstrated at no time in the past the ability to maintain a treatment program to control his behavior. Appellant's previous behavior cannot be separated from his underlying illness so as to say that when a period of violence has been ended by treatment, so too has the mental illness disappeared. This is not the case; appellant will in all likelihood never be rid of that underlying illness or its manifestations characterized by unwillingness to continue treatment and low stress tolerance. Because that underlying illness remains, appellant remains mentally ill and dangerous although he exhibits no symptoms at the present time.

Although this is a case of first impression in Utah, other courts have considered whether a person need only meet the test suggested by appellant in this case in order to be released. In People v. Mallory, 254 Cal. App. 2d 151, 61 Cal. Rptr. 825 (2d Dist. 1967), the appellant claimed the refusal

of the trial court to apply the M'Naughten test[3] to determine if his sanity had been restored was error because the M'Naughten test was used in rendering the verdict of not guilty by reason of insanity. The appellate court, in determining that M'Naughten was not the proper standard, said:

> it is apparent . . . that the question is not merely whether the defendant has recovered from the state of insanity he was in when he committed the criminal act, that is, the mental state of not knowing right from wrong, but the question is whether he has fully recovered his sanity.

Id. at 828. Thus the court appears to state that a person may be able to distinguish between right and wrong but still remain insane for purposes of release. Similarly, in People v. Giles, 192 Colo. 240, 557 P.2d 408, 411 (1976), the Colorado court said that:

> Both the "right and wrong" and "irresistible impulse" tests of legal insanity refer to the defendant's mental condition at the time the alleged crime was committed. Those tests are standards to aid in determining accountability for acts which constitute crimes when done by one who is of sound mind. A leading authority has stated that the issue to be determined at that time is essentially a moral one--whether the defendant was

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[3]The M'Naughten test is defined in LaFave and Scott, Handbook on Criminal Law at p. 275: The accused suffers from a defect of reason, from a disease of the mind such that he does not know the nature and quality of his act or that the act was wrong.

> sufficiently aware of the wrongful nature of his act and adequatley in control of his impulses to be held accountable for that act. J. Macdonald, Psychiatry and the Criminal 62 (3d ed. 1976).
>
> Even though the statutory standard for the defense of insanity concerns itself solely with the defendant's mental state when the allegedly criminal conduct occurred, the defendant argues that he was denied due process by the trial court's refusal to apply that standard to govern his application for release more than four years after the time to which that standard refers. The statutory test for release following commitment after a successful insanity defense, however, concerns itself with the defendant's mental state at the time he seeks release. Its purpose is to determine whether a person who previously claimed he was criminally insane, and therefore not accountable for actions which otherwise would be crimes, should be set free.

In the instant case it is also not relevant to apply the standard used at the time appellant was found not guilty by reason of insanity. The Court is no longer concerned with the same issues as were present at that time. What is important now is whether a person who has been found mentally ill and therefore not responsible for his criminal actions may now be released. The policy issue to be considered is not culpability for past crime but potential for future aberrant behavior as a result of continuing mental illness. The only reasonable way to determine that potential is to take into consideration all of those factors that remain present that contributed to such behavior in the past and that indicate

the presence of mental illness. These factors include: (1) the disease appellant suffers from is biocheical and cannot be cured, (2) one manifestation of the disease is to refuse or discontinue treatment, (3) appellant has discontinued treatment in the past, (4) there is no statutory power to force appellant to continue treatment once he is released, and (5) environmental factors such as stress may increase the dosage of prolyxin necessary to maintain appellant and such factors are not easily controlled outside a structured setting.

C. THE LEGISLATURE HAS RECENTLY INDICATED THAT A PERSON SUCH AS APPELLANT DOES NOT FIT THE STANDARD OF HAVING RECOVERED FROM HIS MENTAL ILLNESS.

Utah Code Ann., § 77-14-5 was recently amended by the legislature. That section now reads:

> (1) When a jury renders a verdict of "not guilty by reason of insanity", the court shall then conduct a hearing within five days to determine if the defendant is presently mentally ill. . . .
> (2) After the hearing and upon consideration of the record, if the court finds by clear and convincing evidence that the defendant is still mentally ill and because of that mental illness presents a substantial danger to himself or others, the court shall order him committed to the Utah state hospital. The defendant shall not be released from confinement therein until the court which comitted [sic] the defendant shall, after hearing, find that the defendant has recovered from his mental illness. . . .

> For purposes of this section, a person affected with a mental illness which is in remission as a result of medication and hospitalization shall remain committed to the Utah State Hospital if it can be determined within reasonable medical probability that without continued medication and hospitalization the defendant's mental illness will reoccur, thereby making the person a substantial danger to himself or others.

1983 Utah laws, H.B. No. 225; Utah Code Ann., § 77-14-5 (1983). Under this section, appellant clearly would not be eligible for release. This section, coupled with the fact that no statutory guidelines existed previously for release of persons such as appellant, indicates that the legislature intended that appellant and others like him would not be released under the old § 77-14-5. Clearly, the legislature intended that appellant's dangerousness or potential for danger should be considered when determining if he had recovered from his mental illness under § 77-14-5 along with the fact that he must be maintained on medication.

POINT III

SECTION 77-14-5 IS CONSTITUTIONAL BOTH ON ITS FACE AND AS APPLIED TO APPELLANT.

A. THE CONSTITUTIONALITY OF SECTIONS 77-24-15 and 77-24-16 NEED NOT BE CONSIDERED BY THIS COURT.

Appellant argues that former § 76-24-15 and § 76-24-16 are void for vagueness.[4] This argument is

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[4]See Appellant's Brief, Point III, p. 16 and Point II, p. 11.

based on the fact that no definition of sanity or standards for restoration to sanity are supplied within the statute. Because no definitions or standards are supplied, appellant contends that the judge was free to apply the statute in an arbitrary and discriminatory manner. No case law is cited supporting this theory or demonstrating that similarly situated persons have been released in this state. Furthermore, these statutes were not applied to appellant in the hearing and order from which he appeals. As argued above, the statute applied in the hearing and order from which appellant appeals was § 77-14-5. An argument that § 76-24-15 and § 76-24-16 are void for vagueness, then, is not relevant. Aside from the fact that these statutes are irrelevant is the fact that they have been repealed. Appellant asks this Court to declare unconstitutional statutes that have been repealed and no longer carry any force. This is an exercise in futility.

B. SECTION 77-14-5 IS NOT VOID FOR VAGUENESS.

The general and well established rule is that statutes are presumed to be valid and should not be declared unconstitutional by a reviewing court if they may be found constitutional on any reasonable basis. Unless a statute is found to be unconstitutionally vague beyond a reasonable doubt, it will be upheld. Greaves v. State, Utah, 528 P.2d 805, 806 (1974); State v. Packard, 122 Utah 369, 250 P.2d 561 (1973). In fact, the:

> prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. Many statutes will have some inherent vagueness, for in most English words and phrases there lurk uncertainties.

Rose v. Locke, 423 U.S. 48, 49 (1974). Where the language of the statute is in words of common understanding, even though "marked by flexibility and reasonable breadth, rather than meticulous specificity," the statute will be upheld if it "defines boundaries sufficiently distinct for citizens, policemen, juries and appellate courts," Grayned v. City of Rockford, 408 U.S. 104, 112, 114 (1972), and is "sufficiently clear and definite" for "persons of ordinary intelligence" to understand its meaning. Greaves, at 806.

The statute in this case could be no more clear than it is already. Persons of ordinary intelligence understand what it is to be mentally ill, they are not required to guess at the meaning of these words as suggested by appellant. Furthermore, if this Court follows the legislative intent of the statute, as demonstrated by the recent amendment, it must find that the statute is not vague. The statute was interpreted by the trial court to include factors of dangerousness and the need for future treatment just as the legislature intended. Section 77-14-5 is, therefore, not rendered void due to excessive vagueness.

C. APPELLANT IS NOT UNCONSTITUTIONALLY INCARCERATED BECAUSE OF HIS STATUS.

Appellant claims that he is required to show that he is permanently sane in order to be released and that there is nothing more he can do to prove himself sane (see Appellant's Brief, Point IV). Therefore, to continue to confine him to the Utah State Hospital is incarceration based on appellant's status as "a sane person with schizophrenia, a mental illness for which he bears no responsibility" (Appellant's Brief, p. 23).

Appellant misconstrues the purpose behind his confinement to the hospital. It is not for the purpose of punishment that appellant is forced to remain there, but for treatment of a disease he admittedly suffers. The argument is also contradictory in that it would appear to be impossible by definition to be a sane person with a mental illness. Appellant himself admits this by stating that:

> [A] person is either restored to sanity or not restored to sanity. A person is either able to appreciate the wrongfulness of his conduct and conform his conduct to the requirements of the law or he is not.

(Appellant's Brief, p. 18).

To support his position that he is incarcerated on the basis of status, appellant cites Robinson v. California, 370 U.S. 660 (1962). In that case, a drug addict was

convicted and imprisoned under a statute making it a crime to be a drug addict. The United States Supreme Court held that it was unconstitutional to punish a person merely because he was a drug addict. The Court, however, distinguished between punishment for status and confinement for treatment purposes. The Court stated:

> It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally il, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration.

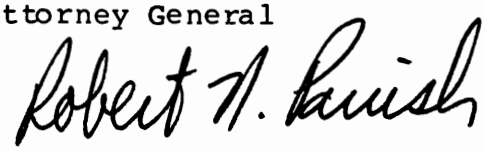
Id. at 666. It is a proper exercise of authority for this state to determine that persons such as appellant are dangerous to society and therefore that they must remain confined so long as they suffer from mental illness. To be released, a person need only show that he no longer suffers from the particular mental illness for which he was confined. Appellant can and should be released only when he can demonstrate that he is free from this mental illness. He need not show that some other mental illness will never affect him again; only that this mental illness will not. Because he cannot show that he is free from mental illness at this time and because he is confined for treatment rather than punishment purposes, appellant has not been incarcerated on the basis of status.

CONCLUSION

The application of § 77-14-5 to determine if appellant had recovered from his mental illness does not meet the definition of an ex post facto law and does not punish him on the basis of status because the statute is not criminal in nature. The trial court properly applied that section and properly defined it so as to include factors such as dangerousness and possibility of relapse. This is further indicated by the fact that the legislature recently amended the statute along those same lines. Because this definition could easily be reached by persons of ordinary intelligence, the statute is not void for vagueness due to the lack of these specific standards in the original version. For these reasons, the order of August 7, 1981 confining appellant to the Utah State Hospital should be affirmed and his request for release pursuant to former § 77-24-16 should be denied.

Respectfully submitted this 2nd day of May, 1983.

DAVID L. WILKINSON
Attorney General



ROBERT N. PARRISH
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed three true and exact copies of the foregoing Brief, postage prepaid, to Ginger L. Fletcher, Attorney for Appellant, Salt Lake Legal Defender Assoc., 333 South 200 East, Salt Lake City, Utah, 84111, this 2nd day of May, 1983.

Susan Patton