

1992

Henry C. Hopkins v. Utah Board of Pardons : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Henry C. Hopkins; Appellant Pro Se.

Paul Van Dam; Utah Attorney General; Lorenzo K. Miller Assistant Attorney General; Attorneys for Appellee.

Recommended Citation

Brief of Appellant, *Henry C. Hopkins v. Utah Board of Pardons*, No. 920133 (Utah Court of Appeals, 1992).
https://digitalcommons.law.byu.edu/byu_ca1/3048

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH COURT OF APPEALS

BRIEF

UTAH

DOCKET NO.

K1 J

50

.A10

DOCKET NO.

920133-CA

IN THE SUPREME COURT STATE OF UTAH

HENRY C. HOPKINS

Appellant

V.

THE UTAH BOARD OF PARDONS

Appellee

*

*

*

*

*

*

Case No, 910580

910907125 HC

92-0133-CA

APPELLANT'S BRIEF

THIS IS AN APPEAL FROM THE THIRD DISTRICT COURT
ORDER DISMISSING APPELLANT'S HABEAS CORPUS COMPLAINT

UTAH SUPREME COURT
332 State Capital Building
Salt Lake City, UTAH 84114

ATTORNEY GENERAL OFFICE
Dept. of Corrections
6100 South 300 East
Murray. UTAH 84107

HENRY C. HOPKINS
Pro/se
C.U.C.F. P.O BOX 550
Gunnison, UTAH 84634

FILED

FEB 23 1992

RECORDED

LIST OF PARTIES

The appellant has not specifically Identified the parties in this action.

For the purposes of clarity, The parties are listed below:

1. Appellant/ Petitioner, Henry C. Hopkins, Inmate at the Central Utah Correctional Facility.
2. Appellee/ Respondent, The UTAH BOARD OF PARDONS.

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
JURISDICTION.....	1
ISSUES PRESENTED.....	1
STANDARDS OF REVIEW.....	1-2
STATEMENT OF THE CASE.....	2-3
SUMMARY OF ARGUMENT.....	3
ARGUMENT.	
I. Appellant/petitioner contends that the Utah Board of Pardons is treating his case as a Indeterminate life sentence, to which it is not. Also that the arbitrary decision made by the Board of Pardons is without reason(s) in departure of his five (5) year term of Imprisonment for a first degree felony set out by Utah's 1983 legislation, house bill 209, establishing Mandatory sentences on first degree sex offenses.....	3,4,5,6,7
II. Appellant/petitioner contends that the Information used in his sentenceing phase by the court to determine the actual term of Imprisonment, is also being used by the Board of Pardons. And that the reason for given him a rehearing needs to be more definite in factual Information for such a departure without reason.....	7,8,9
CONCLUSION.....	9

TABLE OF AUTHORITIES

PAGE

CONSTITUTION PROVISION:

U.S. CONST.	5-6
UTAH CONST.	2

STATUTORY PROVISIONS:

UTAH CODE ANN. 1988-89

"	"	76-3-201.(5)(a).	4
"	"	76-3-201.(5)(e).	4
"	"	76-3-201.(6)(b).	4
"	"	76-5-405.	2 5
"	"	77-27-9. (2)(a).	9

CASE CITATIONS:

<u>Allen v. Hadden</u> , Cited as 536 F.Supp. 586 (1982).	5-6
<u>Andrews v. Haun</u> , 779 P.2d 229 (Utah 1989).	3
<u>Board of Pardons,v. Allen</u> , 482 U.S. 369 (1987).	8-9
<u>Branam v. Provo School Dist.</u> , 780 P.2d 810,811 (Utah 1989).	1
<u>Fernandez v. Cook</u> , 783 P.2d 547 (Utah 1989).	7
<u>Foote v. Utah Board of Pardons</u> , 156 Utah Adv. Rep. 3 (1991).	3 7
<u>Greenholtz v. Inmates of the Nebraska Penal Corrections</u> , 442 U.S. 1,9-11, 99 S.ct. 2100,2104-2105, L.Ed 2d 668 (1979).	8
<u>Hayward v. U.S. Parole Commission</u> , 659 F.2d 857,862 (8 th Cir. 1981). ...	6
<u>Hatch v. Deland</u> , 790 P.2d 49 (Utah Ct. App. 1990).	3
<u>Joost v. U.S. Parole Commission</u> , 698 F.2d 418,419 (10 th Cir. 1983). ...	7
<u>Nephi City v. Hansen</u> , 779 P.2d 673,674 (Utah 1989).	1
<u>Maddox v. U.S. Parole Commission</u> , 821 F.2d 997,1002 (5 th Cir. 1987). ...	8
<u>Miller v. Florida</u> , 482 U.S. 423,435-36 (1987).	6
<u>Rodriguez v. U.S. Parole Commission</u> , 549 F.2d 170,173 (7 th Cir. 1979). 6	
<u>Specht v. Patterson</u> , 386 U.S. 605, 18 L.Ed 2d 326, 87 S.ct. 1209 (1967). 3	
<u>Townsend v. Sain</u> , 372 U.S. 293 (1963).	1-2

<u>U.S. v. Miller</u> , 874 F.2d 466,471 (7 th Cir. 1989).	7
<u>Leaver v. Graham</u> , 450 U.S. 24 , 101 S.Ct 960,67 L.Ed 2d 17 (1981). .	6
<u>State v. Arroyo</u> , 770 P.2d 153,154-55 (Utah Ct. App. 1989).	1
<u>State v. Clark</u> , 632 P.2d 841 (Utah 1981).	7
<u>State v. Kelly</u> , Cited as 784 P.2d 144 (Utah 1989).	7
<u>State v. Lovell</u> , 758 P.2d 909 (Utah 1988).	7
<u>State v. McKenna</u> , 782 P.2d 984 (Utah 1986).	7
<u>State v. Michell</u> , 779 P.2d 1116,1118 (Utah 1989).	1
<u>State ex rel. Nicholson v, Boles</u> , 148 W va 229, 134 Se 2d 576.	4
<u>State v. Peterson</u> , 681 P.2d 1210 (Utah 1984).	7

OTHER PROVISIONS:

The Utah sentence and release guidelines of 1983-85, with house bill
209, Appx. H

JURISDICTION

This is an appeal from an order of the Third Judicial District court dismissing a petition for Writ of Habeas Corpus. Jurisdiction over this, appeal, pursuant to U.C.A. § 77-35-26 (2)(a) 1953 as amended and U.C.A. § 78-2-2 (3)(h) 1953 as amended.

ISSUES PRESENTED

- I. Appellant/petitioner contends that the Utah Board of Pardons is treating his case as a Indeterminate Life Sentence, to which it is not. Also that the arbitrary decision made by the Board of Pardons is without reason(s) in departure of his Five (5) year term of Imprisonment for a first degree felony, set out by Utah's 1983 Legislation, house bill 209, establishing Mandatory Sentences on first degree sex offenses.
- II. Appellant/petitioner contends that the Information used in his sentenceing phase by the court to determine the actual term of Imprisonment, is also being used by the Board of Pardons. And that the reason for given him a rehearing needs to be more definite in factual Information for such a departure without reason.

STANDARD OF REVIEW

When reviewing a District Court's order for a dismissal of Civil Habeas Corpus Complaint, for not being Meritorious.

The appellant court must determine whether a proper dismissal is the case. And if so, the appellant is to give deference to the lower court on all Issues of fact. Whether based on oral or documentary evidence, reversing the lower court's finding only when the record shows that those findings are clearly erroneous or wholly unsupported by the evidence. State v. Michell, 779 P.2d 1116,1118 (Utah 1989); State v. Arroyo, 770 P.2d 153,154-55 (Utah Ct. App. 1989); Nephi City v. Hansen, 779 P.2d 673,674 (Utah 1989); Branam v. Provo School Dist., 780 P.2d 810,811 (Utah 1989). See: Townsend v. Sain, 372 U.S. 293 (1963). In Townsend, The supreme court stated, A hearing is required for Inadequately developed evidence, this right is limited to cases in which the lack of evidence was not caused by petitioner's "Inexcusable

Neglect"; Townsend, 372 U.S. at 313,317 "Inexcusable Neglect" is, in turn, defined as petitioner's "Knowing and Intelligent Waiver" of the right to present the evidence. Id. 317.

IN THE PRESENT CASE

Appellant/petitioner requested a evidentiary hearing in his petition to put on evidence to show and prove substantial violations by the Utah Board of Pardons on September 18, 1991. And that the lower court denied his Utah Constitutional rights of Habeas Corpus and Due Process, the court Intentionally sheilded the Board of Pardons arbitrary actions.

STATEMENT OF CASE

On September 18, 1991. Appellant/petitioner went before the Utah Board of Pardons, on a original hearing, after serving three years of his mandatory five (5) year term of Imprisonment, for a mitigating offense of Sec. 76-5-405. Of the U.C.A. Only to recieve an arbitrary decision by the board member's in his case.

That the board member's stated that they had in thier possession a committment order by the court, for a fifteen (15) years to life and that his Guidelines was 110 months, because he was in the catagory of poor. And thus the board members were considering a rehearing in ten (10) years, with an alienist report to determine whether it would be appropriate to parole him at that time.

Appellant/petitioner contested that Information the best he could. By stating that he should be granted a parole date in September of 1993. to a halfway House in the salt lake area. for the following reasons;

- 1) It would not detract from the seriousness of the crime.
- 2) It would not Jeaperdize the public.

Appellant/petitioner made other allegations, that he was being denied due process, in the hearing, that he was not recieveing a full and

fair hearing by three Imparial members, also that the Information being used was false or fraudulent upon him.

The board member's set his case under advisement. Meanwhile, appellant/petitioner obtained and sent the following legal document(s) (1) original committment order (2) classification reassessment. the only two legal documents he could use in his defense, which in turn had a few defects in them, also a letter stating he had been prujudice by the board member's that day Sept. 18, 1991.

Appellant/ petitioner recieved a notice from the Board of Pardons stating, based on the Information submitted to them in the record, by the appellant/ petitioner. No Change, rehearing in May of 1995.

SUMMARY ARGUMENT

Because the appellant/ petitioner did not recieve a full and fair hearing by the Utah Board of Pardons, in that the board members refused to hold the standards set out by the Utah Supreme Court, in Foote v. Utah Board of Pardons, 156 Utah adv. rep. 3 (1991). The Supreme Court, stated:

It is the province of the Judiciary to assure that a claim of the denial of due process by an arm of Government be heard and, if Justified, that it be vindicated. What may constitute due process in any given circumstance may very, but assuredly, the parole board is not outside the constitutional mandate that the actions of the Government must afford due process of Law.

Hatch v. Deland, 790 P.2d 49 (Utah Ct. App. 1990); cf. Andrews v. Haun, 779 P.2d 229 (Utah 1989).

ARGUMENT

In the present case, appellant/petitioner also contends that he has been denied the equal protection of the Law, and thus may constitute due process in any given circumstance. Specht v. Patterson, 386 U.S.

605, 18 L.Ed 2d 326, 87 S.ct 1209 (1967).

POINT I

Appellant/petitioner contends that the Utah Board of Pardons is treating his case as a Indeterminate Life sentence, to which it is not. Also that the arbitrary decision made by the Board of Pardons is without reason(s) in departure of his five (5) year term of Imprisonment for a first degree felony, set out by Utah's 1983 Legislation, house bill 209, establishing Mandatory Sentences on first degree sex offenses.

Indeterminate sentence is Invalid where the controlling statute prescribes a sentence for a definite term. State ex rel. Nicholson v. Boles, 148 W va 229, 134 Se 2d 576.

The Utah Sentence and Release Guidelines, 1983-85 Legislation, house bill209, Appx. H. Where ineffect states:

U.C.A. 1988-89. 76-3-201. Sentencing.

(5)(a) If the statute under which the defendant was convicted mandates that one of three stated minimum terms shall be Imposed, the court shall order Imposition of the term of middle severity unless there are circumstances in aggravation or mitigation of the crime.

The Utah Board of Pardons is in conflict with Utah's 1983 Legislation, establishing mandatory sentences, for those convicted of first degree sex offenses. Similarly,

If mitigating circumstances can be established, the basic mandatory (middle severity) term of ten (10) years, should be reduced to the five (5) year term. (The truth in sentencing).

The Legislation also stated in house bill 209 states; "The responsibility to weigh aggravating and mitigating circumstances in case rests with the Individual Judge." not the board of pardons.

However, The record in appellant/petitioner sentencing hearing in State v. Hopkins, Sept. 23, 1988. Togather with relevant factual Information supplied to the Judge, to determine a Just sentence. Indicates that the Judge found that there was only mitigating circumstances.

And therefore sentence him to the mandatory term of five (5) years,
(which may be for Life or to Life).

The above statutory language, " which may be for Life or to Life," is the operational of house bill 209, in the offense severity rateings of the mandatory matrixs, calls for three (3) years for each prior conviction. (Life, if more then 2) prior conviction(s) of the following violations of; child kidnapping, 76-5-301.1; rape or attempted rape of child, 76-5-402.1; object rape or attempted object rape of child, 76-5-402.2; sodomy of child, 76-5-403.1; aggravated sexual abuse of child, 76-5-404.(3); or aggravated sexual assualt, 76-5-405.

The above clearly shows and proves that this appellant/petitioner is not on a life sentence, either, indeterminate or mandatory. Nor is he serving additional sentence for prior convictions of the same.

Furthermore, the board of pardons should utilize the guide lines in all it's hearings. It should consider the sentence imposed by the Judge as the minimum term if the sentence is consistent, with the guide lines, If the sentence differs from the guide_lines, the board should evaluate the aggravating and mitigating circumstances noted by the Judge.

If the board feels differently about these circumstances, then the court, they should notify the court of the reason for the disagreement and the action taken by the board. (citation original).

The actions of the Board of Pardons to Intentionally to change the statutory guide lines, that is regulated by the Utah Sentence and Release guide lines and house bill 209 of 1983-85 legislation. To compensate their feelings or belief, is in violation of the ex post facto clause. Allen v. Hadden, cited as 536 F.Supp. 586 (1982). The Tenth Circuit Court stated; That a problem arises when the commission changes the guide lines between the date an offense is committed and the date of a prisoner parole determination. regulations, like statutes,

are covered by the ex post facto clause, U.S. Const. Art. I, § 9. cl. 3 Rodriguez v. U.S Parole Commission, 549 F.2d 170,173 (7th Cir. 1979). In Weaver v. Graham, 450 U.S. 24, 101 S.ct. 960, 67 L.ED. 2d 17 (1981). The U.S. Supreme Court, established a two-part test to determine if a Law is ex post facto: It must be retrospective, that is, it must apply to events occuring before its enactment, it must disadvantage the offender affected by it. Id. 29, 101 S.ct. (citations omitted). The Law need not, however, Impair a "vested right" to violate the ex post facto prohibition. Id.

Critical to relief under the ex post facto clause is not Individual's right to less punishment, but lack of fair notice and governmental restraint, when the legislature increases punishment beyond what was prescribed when the crime was consummated.

Id. at 30, 101 S.ct. at 965. Thus, the parole commission may not retrospectively apply a new regulation if the result would be more onerous to the prisoner. Rodriguez v. U.S. Parole Commission, 594 F.2d at 173 - 76; See: Hayward v. U.S. Parole Commission, 659 F.2d 857- 862 (8th Cir. 1981). If the new regulations would have a more onerous effect at the time he committed the crime(s), the commision must apply the earlier regulation. Miller v. Florida, 482 U.S. 423,435-36 (1987). The defendant in Miller, convicted of sexual battery, recieved a seven year sentence through application of five and one half to seven-year sentencing range in florida's newly revised sentencing guide lines. Id. at 428. previous guide lines effective at the time of defendant's criminal act provided for a three and one half to four year sentence. Id. The Supreme Court held that the application of the revised guide lines to the defendant change the legal consequences of his act and thus constituted an ex post facto violation. Id. at 435-36.

IN THE PRESENT CASE

The appellant/petitioner was sentence by the court in strict compliance of house bill 209, of the Utah Sentence and Release Guidelines 1983-85. And that the Utah Board of Pardons cannot abuse Judicial powers State v. Kelly, cited as 784 P.2d 144 (Utah 1989).

In this Jurisdiction, it is the settled rule that the sentence Imposed is within the discretion of the trial court, so long as the sentence dose not exceed the prescribed statutory limits or the Judge's authority.

State v. Lovell, 758 P.2d 909 (Utah 1988); State v. McKenna, 728 P.2d 984 (Utah 1986); State v. Peterson, 681 P.2d 1210 (Utah 1984); State v. Clark, 632 P.2d 841 (Utah 1981). We will reverse only for abuse of that discretion. Fernandez v. Cook, 783 P.2d 547 (1989).

POINT II

II. Appellanat/petitioner contends that the Information used in his sentenceing phase by the court to determine the actual term of Imprisonment, is also being used by the Board of Pardons. And that the reason for given him a rehearing needs to be more definite in factual Information for such a departure without reason.

Appellant/petitioner recieved a notice from the board of pardons in that there was a listing of fourteen (14) aggravating factors used in determination of there decision. Also that the expiration of his sentence stated Life, to which it is not; appellant/petitioner also states that some of the aggravating factors, have no basis, and he contends that they do not have material relevancy to them, or to him. Also some of the aggravated factors are Identical to those use in his sentenceing phase by the court to determine the actual term of Imprisonment. Footte v. Utah Board of Pardons, 156 Utah Adv. Rep. 3; U.S. v. Miller, 874 F.2d 466,471 (7th Cir. 1989); In Joost v. U.S. Parole Commission, 698 F.2d 418,419 (10th Cir. 1983)(per curiam). Parole Commission must furnish more then standard reason to Justify parole denial that exceeds guide lines and must show good cause for continued

Incarceration. However, many courts prohibit the parole commission from using factors to Justify exceeding the guide lines recommands for a parolee if those were used in determining the severity or salient factor score. Such practice is called "double counting" and is an Impermissible abuse of discretion. Maddox v. U.S. Parole Commission, 821 F.2d 997,1002 (5th Cir. 1987). See: Greenholtz v. Inmates of the Nebraska Penal and Corrections, 442 U.S. 1,9-11, 99 S.ct. 2100,2104-2105, L.Ed. 2d 668 (1979). The U.S. Supreme Court consider a state parole system. The court noted that a parole-release decision "depends on an amalgam of elements, some of which are factual but many of which are purely subjective appraisal by the board members..." Id. at 10, 99 S.ct. at 2105. Although the court undertook an analysis of statutory language, the majority noted that [F]our members of this court are of the view that the existence of a Liberty Interest in parole release is not solely a function of the wording of the governing statute". Id. at 373 n.3. Justice Marshall, Brennan, and Stevens have argued that "all prisoners potentially eligible for parole have a Liberty Interest of which they may not be deprived without due process, regardless of the particular statutory language that Implements the parole system." Grenholtz, 442 U.S. at 22 (emphasis in original). Justice Powell has stated that "the presence of a parole system is sufficient to create a Liberty-Interest, protected by the constitution, in parole-release decision." Id. at 19. See: Board of Pardons v. Allen, 482 U.S. 369 (1987). In Allen, The Supreme Court found that the language of the Montana statute governing parole eligibility created a protected Liberty Interest. Although the statute directed that the Board "Shall" release prisoners "When" the criteria are met, while the statute in Greenholtz stated that prisoners "Shall"

be released "Unless" certain reasons require Imprisonment, the court saw no difference in the mandatory character of the language.

IN THE PRESENT CASE

Appellant/petitioner request this court to Interpret the mandatory language of their statutory law of the Utah Code of Criminal Procedure Sec. 77-27-9. (2)(a) Parole Proceedings:

Not withstanding any other provisions of Law, a person sentence to prison for a felony of the first degree Involving... is not eligible for release on parole by the board of pardons untill the offender has fully completed serving the minimum mandatory sentence Imposed by the court.

CONCLUSION

Based upon all the above Information submitted in pro/se to the Utah Supreme Court, it is hereby requested that this court remand the appellant/petitioner case to the district court, for relief sought in his petition.

ORAL ARGUMENT IS NOT REQUESTED.

NO REPLY BRIEF WILL BE FILED IN THIS MATTER.

Dated this 2 day of FEB., 1992

Henry C. Hopkins
Henry c. Hopkins Pro/se

CERIFICATE OF SERVICE

The undersigned hereby certifies that on the date below-noted a true copies of the foregoing (Appellant Brief) was mailed postage prepaid on the 21ST day of FEB., 1992. To the following parties.

UTAH SUPREME COURT
c/o Clerk
Mr. Geoffrey J. Butler
332 State Capital Building
Salt Lake City, UTAH 84114

ATTORNEY GENERAL OFFICE
Dept. of Corrections
6100 South 300 East
Murray, UTAH 84107

Henry C Hopkins
Henry c. Hopkins