1959

Frank Baine v. George Beckstead : Brief of Appellant

Utah Supreme Court

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In the

Supreme Court of the State of Utah

FRANK BAINE,
Appellant,

vs.

GEORGE BECKSTEAD, Sheriff,
Respondent.

Case No. 9049

APPELLANT'S BRIEF

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STATEMENT

On March 14, 1958, appellant was convicted on a check charge in the District Court of Salt Lake County and sentenced to a term in the Utah State Prison, but placed on probation under the supervision of the Adult Parole and Probation Department during good behavior and commitment stayed during such probation (R-1, 2nd paragraph and R-4, paragraph 1).

One of the provisions of the probation agreement was that appellant report to the court in person every 3 months, which he did (R-9).

On March 11, 1959, the probation officer filed an affidavit with the court alleging that on or about the 6th day of March, 1959, the appellant committed the crime of assault with a deadly weapon upon one Earlene Kennon, (Exhibit P-1), and thereupon the court issued an Order requiring appellant to appear on the 16th day of March and show cause (Exhibit P-2).

The hearing on said Order was continued to March 25th, at which time said Order to Show cause and affidavit was dismissed by the Court (R-14).

March 27th being the regular reporting date for appellant under the original sentence and probation agreement, the appellant reported to the Court at which time, without notice or an opportunity to be heard and without any charges being made against him in any form whatsoever, the Court made and entered the following Order:

> "Stay of execution of sentence terminated and execution to issue in accordance with sentence heretofore imposed. Commitment to issue forthwith. Van Cott, Jr., Judge."

Pursuant to this Order appellant was remanded to the custody of respondent for commitment to the Utah State Prison whereupon appellant applied for a writ of Habeas Corpus, (R-1). The writ was issued, (R-3), and upon hearing thereon the writ was dismissed (R-6). From the Order dismissing the writ, this appeal is prosecuted to this Court and as grounds for reversal assigns the following errors:

1. Error of the Court in dismissing the Writ of Habeas Corpus.

To sustain this appeal appellant relies on the following:

STATEMENT OF POINTS

POINT I.

NO PERSON SHALL BE DEPRIVED OF LIBERTY WITHOUT DUE PROCESS OF LAW.

POINT II.

PROBATION MAY NOT BE REVOKED WITHOUT NOTICE AND AN OPPORTUNITY TO BE HEARD.

ARGUMENT

POINT I.

NO PERSON SHALL BE DEPRIVED OF LIBERTY WITHOUT DUE PROCESS OF LAW.

Art. I, Sec. 7, Utah Constitution,

14th Amendment, U. S. Constitution,

State vs. *Bonza*, 150 P. 2nd 970.

As applied to the revocation of probation this Court defined due process with the following language in *State* vs. *Bonza*, supra, at page 972 Pacific citation:

> "A defendant out of prison on probation is accorded due process of law by the following steps; (1) The filing of a verified statement or affidavit in the case setting forth the facts which show a violation of the terms of probation. (2) The issuance of an Order to Show Cause, etc. (3) A hearing before the court on the question of violation of some

term or condition of probation and an opportunity to crossexamine witnesses. (4) A determination of the question (by the court) followed by the entry of an appropriate order."

The record now before this Court reveals that not one of the steps above suggested was even attempted to be complied with by the court. Not even the last requirement which requires that the court make a finding that the terms or conditions of the probation agreement had been violated. Further argument on this point would be a reflection on the intelligence of this Court.

POINT II.

PROBATION MAY NOT BE REVOKED WITHOUT NOTICE AND AN OPPORTUNITY TO BE HEARD.

Ex Parte Pollett, 225 P. 2nd 16,

State vs. *Hemler*, 102 So. 316,

State vs. *Zolantakis*, 259 P. 1044,

Demmick vs. *Harris*, 155 P. 2nd 170,

State vs. *Bonza*, 150 P. 2nd 970,

Chestnut vs. *Turner*, Case No. 120353, Dist. Ct. Salt Lake County.

The question presented by this appeal is not new to this Court. It has been before this Court on many occasions and all of the cases cited herein are Utah cases except the *Hemler* case.

The *Hemler* case is an early Louisiana case wherein the defendant had been convicted of being an habitual violator of the liquor laws of the state, sentenced to the state prison but placed on probation during good behavior. Subsequent thereto, the defendant was again arrested for a liquor law violation and charged therewith in a court of competent jurisdiction and while said action was pending the probation court revoked his probation and committed defendant to the State Prison and on appeal, the Supreme Court of Louisiana said:

> "The act of the judge in arresting the defendant and committing him was premature and unauthorized."

and reversed the commitment.

In the *Zolantakis* case this Court reviewed the authorities on this subject, including the *Hemler* decision, after which it reached this conclusion:

> "The purpose of the law permitting the suspension of sentence is clearly reformatory. If those who are to be reformed cannot implicitly rely upon promises or orders contained in the suspension of sentence, then we may well expect the law to fail in its purpose. Reformation certainly can best be accomplished by fair, consistant, and straightforward treatment of the person sought to be reformed. It would therefore seem, both upon authority and principal, that when a sentence is suspended during good behavior, without reservations, the person whose sentence is thus suspended has a vested right to rely thereon so long as such condition is complied with. The right to personal liberty is one of the most sacred and valuable rights of a citizen, and should not

> be regarded lightly. The right to personal liberty may be as valuable to one convicted of crime as to one not so convicted, and so long as one complies with the conditions upon which the right is assured by judicial declaration, he may not be deprived of the same. Such right may not be alternatively granted and denied without just cause."

This decision has been before this Court for review in all of the other cases cited herein and many more and has been criticized, even by members of this Court, and the last expression on the soundness of this decision is found in the *Pollett* case wherein it is said:

> "If we are correct in our conclusion that a defendant has a vested right to his liberty during good behavior when so ordered without reservation in the original sentence, any proceeding failing in these essentials is error."

After analyzing the problems that may arise in cases of this type, the Court continued:

> "But the question of whether a judge suspending a sentence during good behavior retains unbridled power to change his mind on more mature thought with or without evidence of any conduct which would warrant such change of mind, may well await a case where the facts of the *Zolantakis* case are repeated before determining whether we desire to entirely overrule it.
>
> "It is not to be presumed that a judge, having absolute discretion to grant or deny probation, will arbitrarily revoke a defendant's probation or refuse to grant a further stay of execution when he has abided by the terms of his agreement with the court and probation department."

In *State* vs. *Bonza*, this Court made the following ruling without criticism.

> "Where the commission of a subsequent offense is made the basis of an application for termination of probation, and a complaint or information has been lodged charging probationer with its commission, action by the probation court may well abide the determination of his guilt or innocence in the court before which the prosecution is conducted."

In most of the cases to reach this Court the revocations have been upheld on distinguishable factual situations. In the *Demmick* case the court granted a stay for the purpose of allowing the defendant to make certain disclosures of other parties involved in crime. The defendant failed to make the disclosures and he was committed without a hearing, which this Court upheld. In one case the defendant was placed on probation and required to report to the court on a day certain. The defendant failed to report and the court revoked the probation without a hearing and this Court held that the burden rested on the defendant to justify his failure to report. In the *Bonza* case the defendant was placed on probation and subsequently was convicted of petty offenses and on one occasion became involved in a felony in Tooele County for which he was not prosecuted, and upon notice and hearing his probation was revoked and upheld by this Court. We have already pointed out the distinguishing features of this case, as pointed out by this Court.

In the case at bar it is admitted that the appellant was placed on probation during good behavior, (R-1 and 4). An

affidavit was filed with the court alleging that defendant had committed a felony by assaulting Earlene Kennon with a deadly weapon. As heretofore pointed out, it was made to appear that there was an action then pending wherein the appellant was formally charged with said offense, which action is now still pending, and thereupon the affidavit and Order to Show Cause was dismissed.

Afterwards on appellant's regular reporting day, without notice and without any complaint of any kind or nature whatsoever being made against appellant, and without any finding of any cause whatsoever, the court summarily revoked probation and ordered appellant committed, and thus the question posed in the *Pollett* case is now forthrightly before this Court for determination, namely:

> "But the question of whether a judge suspending a sentence during good behavior retains unbridled power to change his mind on more mature thought with or without evidence of any conduct which would warrant such change of mind, may well await a case where the facts of the *Zolantakis* case are repeated before determining whether we desire to entirely overrule it."

The Order to Show Cause and Affidavit having been dismissed, there was nothing before the court upon which the court could act, except upon his own volition and without cause.

Appellant contends that such action is inconsistent with our American concept of individual liberty and freedom as guaranteed by both State and Federal Constitutions.

For illustrative purposes let's assume that Earlene Kennon had appellant hemmed in a corner with a meat knife at his throat threatening to cut his head off and appellant had no other apparent means of escape, and therefore, struck her in the face with his fist, knocking her down and then jumped over her prostrate body and fled. Upon regaining consciousness Earlene called police and lodged this complaint against appellant. Can it be said that because appellant was on probation he had no right to defend himself with reasonable force? The answer is obviously no. Had appellant been given a chance to be heard he may have been able to completely refute the charges made against him, and it is the position of appellant that the proper place for such defense is in the court where the charge is pending. See cases herein above cited.

Chestnut vs. *Turner* is a case decided by the same court, but by a different judge, on April 23, 1959, wherein it was determined that Chestnut was held in the state prison by Turner, as warden, pursuant to a commitment from the Seventh District. The evidence shows that Chestnut had been convicted of burglary in the Seventh District and placed on probation. Subsequent thereto the District Attorney reported to the Court that Chestnut had committed another crime by the theft of an automobile and the court revoked the probation and committed Chestnut without a hearing. Judge Larson granted the writ and ordered Chestnut discharged. Thus we have the same court making opposite rulings on the same question, which is a very unhealthy atmosphere to impose upon society as a whole. If

such condition is allowed to exist in Salt Lake County, then the citizens thereof will be subject to rule by man rather than rule by law.

CONCLUSION

We have shown herein wherein appellant was deprived of his liberty without due process of law as defined by this court and in violation of both state and federal constitutions. In this we humbly submit that this Court should deny trial judges the unbridled power to toy with the lives of men like a kitten playing with a mouse and reverse the Order dismissing the Writ, with costs to appellant.

Respectfully submitted,

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