

1960

James R. McPhie v. John W. Turner : Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES R. McPHIE,
Plaintiff and Appellant,

—vs.—

JOHN W. TURNER, Warden of
Utah State Prison,
Defendant and Respondent.

Case No.
9163

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MAY 6 - 1960

Clerk, Supreme Court, Utah

PETITION FOR REHEARING

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PETITION FOR REHEARING

PRELIMINARY STATEMENT

On April 19, 1960, the Supreme Court reversed the ruling of the Third Judicial District Court which denied plaintiff McPhie's petition for habeas corpus. This Court remanded the case to the District Court for such further proceedings as are "deemed advisable and not inconsistent with this opinion."

Respondent believes this decision to be of grave and far reaching consequence and therefore petitions the Court for rehearing based on the facts and points which follow.

STATEMENT OF FACTS

McPhie was sentenced to prison on conviction of issuing a fictitious check February 7, 1958, with execution of sentence delayed to April 18, 1958, then thrice successively to January 9, 1959, at which time the District Court committed defendant without hearing, no good cause appearing to it for a further stay.

STATEMENT OF POINTS

POINT I.

McPHIE WAS NOT GRANTED PROBATION DURING GOOD BEHAVIOR, NOR WAS HE ACTUALLY PUT ON PROBATION AT ALL, EVEN THOUGH TEMPORARILY PLACED UNDER THE SUPERVISION OF THE PAROLE AND PROBATION DEPARTMENT.

POINT II.

THE COURT FAILED TO CONSIDER THE HOLDING OF DEMMICK V. HARRIS, WHICH COVERS THE INSTANT CASE.

POINT III.

THE DECISION DOES NOT CLEARLY INDICATE THE CURRENT STATUS OF DEFENDANT McPHIE.

POINT IV.

DISTRICT COURT JUDGES WILL NOW BE FORCED TO DETERMINE WHETHER OR NOT TO PUT DEFENDANTS ON PROBATION WITHOUT ADEQUATE TIME FOR EXAMINATION OF CIRCUMSTANCES.

POINT V.

IN EFFECT, A DEFENDANT NOW WILL HAVE TO BE FOUND TO HAVE COMMITTED TWO VIOLATIONS IN ORDER TO BE IMPRISONED.

POINT VI.

THE DECISION IS NOT IN ACCORD WITH THE UTAH STATUTE.

ARGUMENT

POINT I.

McPHIE WAS NOT GRANTED PROBATION DURING GOOD BEHAVIOR, NOR WAS HE ACTUALLY PUT ON PROBATION AT ALL, EVEN THOUGH TEMPORARILY PLACED UNDER THE SUPERVISION OF THE PAROLE AND PROBATION DEPARTMENT.

McPhie was never given probation during good behavior. Therefore, he does not qualify under the holding of the leading case, *State v. Zolantakis*, 70 Utah 296, 259 Pac. 1044, 54 LRA 1463. That case, Respondent respectfully submits, should not have been relied upon by the Court in arriving at its decision in *Baine v. Beckstead*, Utah, 347 P.2d 554, upon which, in turn, the Court seems to base its decision in the instant case.

In *Zolantakis*, the petitioner actually was placed on probation during good behavior and his stay was revoked. It did not expire. Here, on the contrary, the Respondent has been unable to find anything in the record or minute entries which even suggests such status was conferred upon McPhie, nor was he committed until the actual expiration, by its own terms, of the extended stay date. We submit that the actual order of the Court should be the controlling factor in determining whether a probationary status was granted, and in the absence of an order no such status should be assumed.

It was only a normal and proper thing furthermore,

for the Judge to have the probation department assume some supervisory control over the defendant. The court said in the case of *Demmick v. Harris*, 107 Utah 471, 155 P.2d 170:

“Nor do we see anything improper in the court’s action in this case in requiring compliance with conditions usually imposed on those placed on probation during good behavior as a condition to keeping in force a stay order until the date of its expiration.”

POINT II.

THE COURT FAILED TO CONSIDER THE HOLDING OF DEMMICK V. HARRIS, WHICH COVERS THE INSTANT CASE.

The decision made no reference whatsoever to the holding in *Demmick v. Harris* (citation above) quoted extensively in appellant’s brief. The Court, in *Demmick*, held:

“But here we are met by respondent’s contention that the use of the writ of habeas corpus is restricted to the correction of jurisdictional errors and errors so gross as in effect to deprive one of constitutional substantive or procedural rights. *Thompson v. Harris*, 107 Utah 99, 152 P. 2d 91, opinion on petition for rehearing. We shall assume for the purposes of this case that it would constitute such deprivation of appellant’s rights, if Judge Ellett on November 28, the date of sentence, placed appellant on probation during good behavior; and, thereafter revoked such order without notice and hearing.

Furthermore, we shall assume—and the proposition must be conceded—that the mere summary

summoning of one on probation to the chambers of the sentencing judge to be there cross-examined concerning his conduct either before or after the order granting probation, would fall short of according him the hearing the law prescribes. The primary question, therefore, is: Was appellant, on the date of sentence, granted an indefinite stay of execution and placed on probation during good behavior.

The question must be answered in the negative. The order, itself, specifically makes the stay one until a definite time. * * *

Whether one convicted of crime, and subject to punishment therefor, should be placed on probation is a matter in such court's discretion. It would be but salutary procedure in the exercise of such discretion for a trial judge who is doubtful whether the granting of probation during good behavior is compatible with the public interest, to make such investigation as his judgment dictates as to the attitudes of the person convicted. ***"

The essential facts here are the same as in the Demmick case, and the legal reasoning applied to them by the court there applies here also.

POINT III.

THE DECISION DOES NOT CLEARLY INDICATE THE CURRENT STATUS OF DEFENDANT McPHIE.

In its decision the Court has given no guidance to the District Court as to McPhie's current status. In the eyes of the law:

Is he on probation, or is he completely free?

If he is on probation, is it probation during good behavior?

May the Court now hold a hearing to determine whether or not his probation should be revoked and he be committed?

There may be other inmates in the Stae Prison whose circumstances parallel those of McPhie. Thus, if these must now be released upon petition, with no strings attached, especially if they are beyond the right of the courts to recommit them for violation of probation, the result may well prove disastrous.

These questions are vital and Respondent respectfully submits that they should be answered by the Supreme Court in order that the district courts might not be at a loss as to what, if anything, they may now do with defendants.

POINT IV.

DISTRICT COURT JUDGES WILL NOW BE FORCED TO DETERMINE WHETHER OR NOT TO PUT DEFENDANTS ON PROBATION WITHOUT ADEQUATE TIME FOR EXAMINATION OF CIRCUMSTANCES.

While Respondent agrees with the opinion of this Court to the effect that District Court Judges are men of undisputed integrity, completely loyal to their oath of office, still Respondent believes that the majority decision has so limited the Court's discretion as to make impossible an adequate investigation of whether a person should be placed on probation or not. The Court used as a reasonable measurement of time "a week or so."

It is not clear how much more time a judge might have in which to make an investigation even where he expresses that intention at the time of granting a stay to a date certain.

Thus, judges may now feel it necessary in the best interests of the public, where no adequate examination can be made, to commit persons convicted of crimes immediately without taking a chance that they might not properly commit them at all.

POINT V.

IN EFFECT, A DEFENDANT NOW WILL HAVE TO BE FOUND TO HAVE COMMITTED TWO VIOLATIONS IN ORDER TO BE IMPRISONED.

In effect, the Court must now find the defendant has committed two violations before he can be imprisoned, unless the commitment is made in the original instance or within whatever short additional time may be allowed under the present decision. Such person first would be convicted of the main charge, then he would have to be granted a hearing to determine whether or not he violated the terms of his supposed "probation during good behavior" before he could be committed. This is a result never contemplated by the Legislature in enacting its criminal procedural statutes.

POINT VI.

THE DECISION IS NOT IN ACCORD WITH THE UTAH STATUTE.

Our statute, 77-35-17, U.C.A. 1953, provides in part as follows:

“Upon a plea of guilty or conviction of any crime or offense, if it appears compatible with the public interest, the court having jurisdiction *may suspend the imposition or the execution of sentence* and *may* place the defendant on probation for such period of time as the court shall determine.” (Emphasis added).

The reasonable meaning of the statute would seem to be that the judge may suspend execution of the sentence to any date he may name, with or without placing defendant on probation, and that the date he sets is controlling without resort to further hearing. The Court has not seen fit to so conclude, however.

Respondent submits, furthermore, that the Court, through judicial legislation, has added a limitation (pre-commitment hearings) not contemplated by the Legislature, and has impressed upon it the conclusive stamp of constitutional due process.

It having done so, the field has been closed to the Legislature and it may forever be denied the opportunity of amending the statute to correct the situation.

The next portion of the above quoted section says:

“The Court may subsequently increase or decrease the probation period, and may revoke or modify any condition of probation.”

So, even if McPhie was on probation, the judge had the right to revoke it, according to the statute.

CONCLUSION

Respondent earnestly asks the Court to grant a rehearing for the reasons raised above because of the serious consequences the decision portends.

Dated this 6th day of May, 1960.

Respectfully submitted,

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