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State of Utah v. Sherrill Z. Chesnut : Brief of Appellant

Utah Supreme Court

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In the
Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff and Appellant,

vs.

Case No.

9258

SHERRILL Z. CHESNUT,

Defendant and Respondent.

FILED
JUN 17 1960

Clerk, Supreme Court, Utah

BRIEF OF APPELLANT

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In the
Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff and Appellant,

vs.

SHERRILL Z. CHESNUT,
Defendant and Respondent.

Case No.
9258

BRIEF OF APPELLANT

STATEMENT OF THE CASE

On the 5th day of February, 1960, the District Court in and for the Sixth Judicial District of the State of Utah, County of Sevier, denied the motion of the State of Utah for an order to show cause as to the defendant, Sherrill Z. Chesnut, respondent herein, said motion having been filed by the District Attorney for the Sixth Judicial District. This brief submitted herein is in support of an appeal by the Attorney General of the State of Utah from such order of the District Court in and for the Sixth Judicial District,

and is taken under and pursuant to Section 77-39-4, U. C. A. 1953, which states in part:

“An appeal may be taken by the state:
“* * *

“(3) From an order made after judgment affecting the substantial rights of the state. * * *

As a condition precedent to a discussion and development of the substantive law surrounding this appeal, it is, of course, a necessity to set forth the facts which serve as a basis for such discussion.

STATEMENT OF FACTS

Pursuant to a commitment, an information was filed on the 12th day of November, 1959, by the District Attorney for Sevier County, charging the respondent herein with the commission of acts against the State of Utah, to wit: Second Degree Burglary and Grand Larceny. The respondent, on the 7th day of December, 1959, after a continuance from December 3, 1959, plead “not guilty” to both counts and the case was set down for trial. On the 5th day of January, 1960, the respondent appeared before the court, withdrew his plea of “not guilty,” and substituted in place thereof the plea of “guilty to both counts” (R. 21 & 22). Having been advised by Chesnut that he would waive the time required by statute (see 77-35-1, U. C. A. 1953) for the pronouncement of judgment, the court entered judgment and sentenced the respondent in the Prison of the State of Utah for a term of not less than one year nor more than 20 years on the count of second degree burglary, and for a term of

not less than one year nor more than 10 years for the crime of grand larceny, said sentences to run concurrently.

The court thereupon suspended execution of the sentence in accordance with 77-35-17, U. C. A. 1953, and placed the respondent on probation. In doing so the court stated:

“The Court, however, in this case, suspends execution of sentence for a period at this time of sixty days until March 14, 1960, at the hour of 2:00 o'clock p. m. This suspension is on condition that you remain under the custody and supervision of your bondsman, Mr. McCarthy, and that except with his consent, I will say, that you remain outside of Sevier County, except with Mr. McCarthy's consent or in case you are summoned to appear here at any time in court and you will be required to appear, however, on March 14th and for such further action as the court might see fit to take.

“I will say frankly, this is a chance to make good without having to serve time in State Prison and if you make good on this, why there will be further extensions until you will have an opportunity to clear yourself of the matter, but that will depend on you entirely, of course. We want to give you this opportunity rather than to require you to serve, except if it becomes imperative, I will say. We see no other reasonable way, so we feel that everybody involved in this is doing it for what we feel is your best interest and that you will be duly appreciative of it and make every effort to make entirely good. Not only with us, but with your bondsman and everybody concerned, so at this time you are released to your bondsman and the bond will remain in force as it now is” (R. 22-23).

Subsequently, on or about the 4th day of February, 1960, the District Attorney for Sevier County filed with the court

a motion for an order to show cause why the suspension of the execution of sentence should not be terminated and incarceration follow forthwith. Attached to said motion were affidavits of two peace officers of the Salt Lake City Police Department, the general context of the affidavits being that this respondent had admitted to each of them his direct implication in a burglary in Salt Lake City on or about January 26, 1960. The District Court, after a consideration of the motion for the order to show cause and the affidavits upon which such motion was predicated, denied the District Attorney's request on the bases that:

“(1) That the attempted probation arrangement entered into in connection with said Stay of Execution was not within the pervue of the Statutes; that the implied obligations therof could not be legally fulfilled by the Court.

“(2) That even assuming said attempted probation arrangement to be generally valid, the terms and conditions thereof as disclosed by the record are so lacking and so indefinite and uncertain as to be unenforcible” (R. 17).

The court then ordered that the stay of execution be extended and continued until June 14, 1960, or until such time as the court may determine. This appeal is taken and directed to that order of the court denying the issuance of the order to show cause.

STATEMENT OF POINTS

POINT I.

THE DISTRICT COURT, IN PLACING THE
RESPONDENT UNDER THE CUSTODY AND

SUPERVISION OF HIS BONDSMAN, DID NOT POSITION THE RESPONDENT WITHOUT THE JURISDICTION OF THE COURT, AND IT HAD, THEREFORE, FULL AUTHORITY TO ENTERTAIN AND ISSUE AN ORDER TO SHOW CAUSE, TO TERMINATE PROBATION THEREAFTER AND COMMIT THE PROBATIONER.

POINT II.

EVEN WERE IT ASSUMED THAT THE ORDER SUSPENDING EXECUTION OF SENTENCE WAS INVALID, VOID OR UNCERTAIN, SUCH ORDER DOES NOT AFFECT THE FINALITY OR VALIDITY OF THE JUDGMENT AND SENTENCE PREVIOUSLY ENTERED BY THE COURT.

POINT III.

THE ORDER DENYING THE STATE'S MOTION FOR AN ORDER TO SHOW CAUSE IS TANTAMOUNT TO A PARDON, THE RESULT OF WHICH LIES WITHOUT THE PROVINCE, POWER OR AUTHORITY OF THE JUDICIARY.

ARGUMENT

POINT I.

THE DISTRICT COURT, IN PLACING THE RESPONDENT UNDER THE CUSTODY AND SUPERVISION OF HIS BONDSMAN, DID NOT

POSITION THE RESPONDENT WITHOUT THE JURISDICTION OF THE COURT, AND IT HAD, THEREFORE, FULL AUTHORITY TO ENTERTAIN AND ISSUE AN ORDER TO SHOW CAUSE, TO TERMINATE PROBATION THEREAFTER AND COMMIT THE PROBATIONER.

The first statement that should be made, and one which is subject to little debate, is that the intention of the District Court in suspending execution of sentence was to place Chesnut on probation. The pronouncement of the court is in every way consistent and in accord with the normal and usual address wherein the convicted defendant is placed on conditional probation. The language of the court is in harmony with no other observation:

“THE COURT: I will say frankly, this is a chance to make good without having to serve time in State Prison and if you make good on this, why there will be further extensions until you will have an opportunity to clear yourself of the matter, but that will depend on you entirely, of course. We want to give you this opportunity rather than to require you to serve, * * *.

* * *.

“MR. CHAMBERLAIN: Your Honor, I would like the record to show that he is under the strict supervision and control of his bondsmen with respect to whatever—

“* * *

“THE COURT: With respect to what he does and his course of conduct. That is what I really intended—under the control and supervision.

“* * *

“THE COURT: But if the thing is justified, we will make the extensions longer. It depends entirely on, I would say, your course of conduct, which we hope will be in every way satisfactory” (R. 23-24).

To profess that the intent of the District Court and the effect of the afore-quoted language was otherwise than to place Chesnut on probation is to admit that the respondent is subject to immediate commitment to the State Prison. There is no basis to contradict the principle that a district court, in suspending sentence or execution of sentence, must proceed under and pursuant to the statutory legislation of the State of Utah.

Justice Hansen, writing for this Court in the case of *State v. Zolantakis*, 70 Utah 296, 259 Pac. 1044, 1027, stated that the district courts of this state have no power to suspend indefinitely execution of sentence. The cases in the State of California are also parallel in effect to that in Utah, in holding that the authority of a court to suspend the execution of sentence is dependent wholly upon statutory authorization, *People v. Brown*, 244 P. 2d 702 (Cal. App. 1952), that a court has no power to suspend execution other than by granting probation, and that an attempt of the court to do otherwise is void. *People v. Cravens*, 251 P. 2d 717 (Cal. App. 1953). See also *In Re Clark*, 70 Cal. App. 643, 234 Pac. 109.

The statutes of this state evidence no other conclusion. 77-35-17, U. C. A. 1953, provides in part:

“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.

“The court may subsequently increase or decrease the probation period, and may revoke or modify any condition of probation. * * *” (Emphasis added.)

Once the court determines that it is in the public interest to suspend the execution of sentence, probation and probationary status follow a fortiori. This interpretation is cemented by the *Zolantakis* decision in holding that:

“Trial courts are not given authority to suspend sentences as a matter of favor or grace, but only when ‘it appears compatible with the public interest’.”

In this connection it is well to consider the recent holding of *Baine v. Beckstead*, . . . Utah . . . , 347 P. 2d 555 (1959), wherein it was declared:

“It is to be kept in mind that *deferments of commitment* of persons convicted of crime are of two distinct types: One is probationary, the other is not.”

It would be a mistake not to say that the District Court intended, as its object in postponing commitment under the judgment pronounced in the case at bar, to place the respondent on the level of probation with the objective of achieving some measure of rehabilitation.

The order of the District Court denying the State’s motion for an order to show cause as to this respondent

indicates that the District Court felt that it no longer had jurisdiction to entertain further proceedings relative to the probationary status of respondent or subsequent commitment thereunder. After the hearing of January 5, 1960, wherein the probationary status was fulfilled, the District Court retained and still retains the legal custody of the respondent. 77-62-29 sets forth that:

“The legal custody of all probationers is vested in the chief agent and the court having jurisdiction of the offender.”

The fact that Chesnut was placed under the custody and supervision of his bondsman, Mr. McCarthy, is of no moment in considering the primary question of the District Court's jurisdiction to proceed in the case.

By all odds, the proceedings before the court on January 5, 1960 resulted in Chesnut being placed on probation, however uncertain the terms of probation may have been. This was the understanding of the court; it was the understanding of the District Attorney; it was the understanding of the bondsman, Mr. McCarthy, and it was the understanding of the respondent. Subsequently, it was disclosed to the District Attorney by officers of the Salt Lake City Police Department that Chesnut was seriously implicated in the burglary of a business establishment in Salt Lake City (R. 13, 14, 15, 16) on January 26, 1960, barely 21 days after the hearing before the District Court. Such information constituted the basis for the motion, upon behalf of the State, for an order to show cause why probation should not be revoked and commitment issue. Said motion, taken together with the accompanying affidavits, is entirely in

accord with the procedural steps outlined by this Court as a requisite to due process of law:

“A defendant out of prison on probation is accorded due process of law by the following steps, all of which were followed in this case: (1) The filing of a verified statement or an affidavit in the case setting forth facts which show a violation of the terms of probation. (2) The issuance of an order to show cause and citation thereon requiring the defendant to appear and show cause why probation should not be revoked, apprising defendant of the ground or grounds on which revocation is sought, and specifying a proper time for hearing. (3) A hearing before the court on the question of violation of some term or condition of probation, at which the defendant has the opportunity to cross-examine witnesses against him and also to present evidence to refute the claimed violation of the condition of probation. (4) A determination of the question, followed by entry of an appropriate order. *State v. Zolantakis*, *supra*.” (*State v. Bonza*, 106 Utah 553, 150 P. 2d 970, (1944).

The failure, therefore, of the District Court to grant and forthwith issue the order to show cause injures and seriously restricts the effective administration of the criminal law in this state, and amounts to reversible error subject to review by this Court.

POINT II.

EVEN WERE IT ASSUMED THAT THE ORDER SUSPENDING EXECUTION OF SENTENCE WAS INVALID, VOID OR UNCERTAIN, SUCH ORDER DOES NOT AFFECT THE FINALITY OR VALIDITY OF THE JUDG-

MENT AND SENTENCE PREVIOUSLY ENTERED BY THE COURT.

The order of the District Court in its deferment or stay of execution under the judgment, as announced, required the respondent to remain within the control and supervision of Jack McCarthy, his bondsman. Even were it to be assumed that this segment of the order was ineffective or void as being inconsistent and against the provisions of 77-62-29, U. C. A. 1953, such has no effect upon the validity and enforcibility of the valid and enforceable portion of the judgment. As to the latter, the judgment and sentence may be carried into effect and further proceedings may be had relative to the station of the respondent. *Reese v. Olsen*, 44 Utah 318, 139 Pac. 941. The Supreme Court of Idaho, in passing upon a case of similar identity, stated:

“* * * By the great weight of authority where the court makes an unauthorized order suspending the execution of the sentence imposed by the judgment, such order does not prevent the subsequent enforcement of the valid portion of the sentence at a later date.” (*Ex Parte Jennings*, 267 Pac. 227 (Idaho 1928)).

The basis for this holding is, of course, that the invalid suspension of the execution of sentence in no way affects the finality and validity of the judgment of the court, which, in this case, imprisoned Chesnut in the State Prison of Utah for a term of not less than one nor more than 20 years for the crime of second degree burglary, and for the term of not less than one nor more than 10 years for the crime of grand larceny, such sentences to be concurrent.

The Supreme Court of Colorado, by decision, is also devoted to the proposition that the judgment and sentence may be executed subsequently notwithstanding a previous invalid effort to suspend execution of sentence. *In Re Nottingham*, 268 Pac. 587 (Colo. 1928). Citing 16 C. J., p. 1335, the Colorado Court said:

“The invalidity of the attempt to suspend execution of the sentence does not affect the validity of the sentence of imprisonment; that sentence may be enforced even after the expiration of the court term, and even after the expiration of six months from the date of sentence, which was the time of imprisonment specified in the sentence.”

The majority rule is also stated as above in 24 C. J. S., Sec. 1618b(10) (b).

The District Court is therefore within its province, if probation be void or ineffective, to issue a commitment forthwith, for the judgment of the District Court can only be fulfilled judicially by satisfying its requirements. *Ex Parte Jennings*, supra.

POINT III.

THE ORDER DENYING THE STATE'S MOTION FOR AN ORDER TO SHOW CAUSE IS TANTAMOUNT TO A PARDON, THE RESULT OF WHICH LIES WITHOUT THE PROVINCE, POWER OR AUTHORITY OF THE JUDICIARY.

If the view entertained by the District Court herein be accurate with respect to Chesnut in its denial of the

State's motion for an order to show cause, and if the court fails or refuses to exercise its continuing jurisdiction over the respondent, the final product would be to award to the latter a pardon of not one, but of both offenses to which he had formerly plead guilty. The rule is so well established in this state that the pardoning power is the exclusive function of the Board of Pardons, that it is only for the purpose of the record that authorities be listed. *Cardisco v. Davis, et al.*, 91 Utah 323, 64 P. 2d 216; *State ex rel. Bishop v. State Board of Corrections*, 16 Utah 478, 52 Pac. 1090; Utah Constitution, Art. VII, Sec. 12. As a necessary corollary to this principle, *State v. Blackburn*, 6 Utah 347, 23 P. 759, holds that the authority to relieve a party from the conviction of a crime does not reside with the judiciary.

The status of probation which Chesnut has attained is not a game of "hide and seek" played by and between the State of Utah and the probationer. The underlying theory of probation is rehabilitation and establishment as a law-abiding citizen and is so proclaimed in the *Baine and Zolantakis* cases, *supra*. In the event that the probationer proves unfaithful to his trust and the obligations to the court and society, it becomes the duty of the District Court to inquire into such unfaithfulness; it would only meet the test of substantial justice and serve the legitimate enforcement of the criminal law in this state for the order of the District Court denying the State's motion to be reversed and the case remanded to the lower court for further proceedings under a show cause order.

CONCLUSION

The deferment of execution of sentence as to Sherrill Chesnut under proceedings had in open court on January 5, 1960, effectually placed the latter on probation subject to the continuing jurisdiction of the District Court to review, modify or revoke such probation on proper showing. Upon application and motion of the District Attorney for an order to show cause why further stays should not be granted and commitment issue, coupled with the affidavits of the officers of the Salt Lake City Police Department, the District Court should issue a show cause order as to the probationer and inquire into the faithfulness of his conduct.

If this Court shall determine that the suspended execution of sentence was void, ineffective, or so uncertain as to be unenforcible, then the District Court should be directed to order that the respondent be committed to the State Prison, State of Utah, pursuant to and in accordance with the judgment and sentence of the District Court.

Respectfully submitted,

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