1960

State of Utah in the interest of Carl Everett Lindh : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, in the interest of:
CARL EVERETT LINDH,
an alleged delinquent child,
Appellant.

Case
No. 9318

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

STATEMENT OF FACTS

This appeal is from an order made by the Fifth Juvenile District Court for Grand County, State of Utah, on June 28, 1960, committing the appellant to the State Industrial School.

The Record on Appeal consists of the entire file of the Juvenile Court in said matter. The proceedings before said Court were not transcribed. Said file discloses that Appellant appeared before said Juvenile Court on six separate occasions over a period extending from December 10, 1958, to June 28, 1960. At the time of the first hearing, a probation agreement in regular form was signed by the child, his parents, and the Court officers. Probation was continued at each hearing thereafter and

custody remained with the parents until the final hearing on June 28, 1960, when commitment occurred. At the fifth hearing, on June 16, 1960, the Court found appellant to be a delinquent child and ordered

> "the child be committed to the State Industrial School, but suspended on condition that said boy does not get into further trouble and lives up to all terms and conditions of his probation, and that his probation be continued."

On June 22, 1960, Summons and Notice to Parent was issued preparatory to the hearing on June 28. Said Summons and Notice set forth certain alleged violations of law by appellant followed by the statement

> "that by reason of the foregoing, the said child did violate the terms and conditions of his probation order and agreement with this Court."

No express notice was contained in said Summons and Notice for the parents to show cause why the suspension of the commitment to the Industrial School should not be revoked, or that such action would be considered at said hearing.

Said Summons and Notice was served upon William Droegemeier, the stepfather, on June 24, 1960, and both he and the child's mother, Mildred Droegemeier, appeared at the hearing on June 28th. At the conclusion of said hearing, the Court made the following order:

> "1. That the above named child be and is hereby declared delinquent.
>
> 2. That in the best interest of said child, subject to the continuing jurisdiction of this Court, he be

and is hereby: the Court finds the said child has violated the terms and conditions of his Probation Agreement and that suspension of the commitment be *refused* and that the suspension of Court upon the commitment of Carl Everett Lindh to the Industrial School hereto made is hereby *refused* and that the said child is ordered commited to the State Industrial School forthwith until he is 21 years of age unless sooner released.'' (Emphasis added)

At none of the proceedings before said Juvenile Court was appellant or his parents represented by legal counsel.

STATEMENT OF POINTS

Point 1

ADEQUATE NOTICE OF THE SCOPE OF THE HEARING TO BE HELD ON JUNE 28, 1960, WAS NOT GIVEN AND THE COURT CONSEQUENTLY LACKED POWER TO REVOKE THE SUSPENSION OF THE COMMITMENT TO THE INDUSTRIAL SCHOOL AND SAID COMMITMENT IS THEREFORE VOID.

Point 2

THE ORDER OF THE JUVENILE COURT IN THE DECREE DATED JUNE 28, 1960, IS SO INDEFINITE AND UNCERTAIN AS TO BE UNENFORCEABLE.

ARGUMENT

Point 1

ADEQUATE NOTICE OF THE SCOPE OF THE HEARING TO BE HELD ON JUNE 28, 1960, WAS

NOT GIVEN AND THE COURT CONSEQUENTLY LACKED POWER TO REVOKE THE SUSPENSION OF THE COMMITMENT TO THE INDUSTRIAL SCHOOL AND SAID COMMITMENT IS THEREFORE VOID.

At the hearing on June 16, 1960, the Court found the boy to be a delinquent child and ordered him committed to the State Industrial School, but then suspended the execution of said order and continued the probation, leaving the boy in the custody of his parents. The Summons and Notice to Parent subsequently served on June 24, while listing alleged violations of law and making a general allegation that the child had violated the terms and conditions of his probation agreement, did not contain any notice or statement to the effect that revocation of the suspension order would be considered at the hearing on June 28. The parents had no notice that such revocation would be an issue and consequently were denied the opportunity to prepare to meet same and have their "day in court."

Section 7, Article I of the Constitution of Utah provides that no person shall be deprived of life, liberty, or property without due process of law. This right applies to juvenile as well as to civil and criminal proceedings. The Utah Supreme Court in *Christiansen* v. *Harris,* 109 Utah 1, 163 P. 2d 314 (1945) at page 317 lists the minimum essentials of "due process" in depriving a person of liberty and among them states:

> "(c) notice to the person of the inauguration and *purpose of the inquiry* and the time at which such

person should appear if he wishes to be heard''; (Emphasis added)

It is submitted that in the case at hand notice of the *purpose of the inquiry* was not given in such manner as to clearly apprise the participants that revocation of the suspension order would be considered at the hearing.

In *State* v. *Bonza,* 106 Utah 63, 150 P. 2d 970 (1944), the Utah Court was again called upon to determine what constitutes ''due process'' in a revocation of probation case. The Court stated at page 972 as follows:

> ''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 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 conditions of probation. (4) A determination of the question, followed by entry of an appropriate order.'' (Emphasis added)

It is submitted that in the case at hand no notice to show cause why the order suspending commitment should not be revoked was given or notice otherwise stating that such action might be taken at said hearing.

Although not mentioning "due process of law" or other constitutional guaranties, *State* v. *Zolontakis*, 70 Utah 296, 259 Pac. 1044 (1927), is an authoritative Utah case holding that due notice and hearing are essentials to revocation of suspension of sentence or probation, at least in a fact situation paralleling that in the instant case. In the Zolantakis case the defendant's sentence to the state prison was suspended "during the good behavior of the defendant." Thereafter a citation was issued requiring the defendant to appear at a time certain and show cause why the suspended sentence should not be vacated and set aside. Said citation was returned unserved, but he was subsequently picked up on a bench warrant. While in custody a new citation to show cause why the suspended sentence should not be vacated was issued. Both citations and the bench warrant were issued without any affidavit, complaint, or other instrument being made or filed charging defendant with any lack of good behavior. At the hearing the suspension of sentence was set aside and defendant was imprisoned. On appeal the Court reversed, holding that a person having received a suspended sentence during good behavior had a vested right to rely thereon and is entitled to a hearing according to "well recognized and established rules of judicial procedure" upon the question of whether or not he has complied with the conditions imposed. In amplification of what is meant by "well recognized and established rules of judicial procedure," the Court said at page 1047:

> "that defendant is entitled to have filed either an affidavit, motion, or other written pleading setting forth the facts relied upon for a revocation of the

> suspension of sentence; that the defendant should be given an opportunity to answer or plead to the charge made; that a hearing should be had upon the issues joined; and that the defendant as well as the state be given the right of cross-examination. If we are correct in our conclusion that the defendant has a vested right to his personal liberty during good behavior when so ordered without reservation in the original sentence, any proceeding failing in these essentials is error."

Implicit in the requirement that notice be given of the facts relied upon for a revocation of the suspension of sentence is the requirement that notice be given that such revocation shall be the subject of inquiry at said hearing. Such notice was not given in the case at hand, and as a consequence appellant's opportunity to defend or present evidence in his behalf was severely curtailed.

A case holding that an order made by a Juvenile Court based upon evidence presented in a hearing but which order was not within the scope of the notice given for the purpose of the hearing is *In Re Olsen,* 113 Utah 365, 180 P. 2d 210 (1947). In this case a petition was filed alleging a child to be dependent and neglected. Summons was served on the father who appeared at the hearing with counsel and sought custody of the child. The Court ruled the father had neglected the child and awarded custody to a third party, and ordered the father to pay $30.00 monthly for the support of the child. On appeal the Supreme Court reversed the order as to support even though testimony was given indicating that he had the ability to make such payment for the reason that no notice was given in the summons that the court might inquire into his

ability to support or make such an order. The Court said at page 216:

> "In this case appellant was given no notice that the court would inquire into his present ability to support the child or to contribute something to her support. Apparently, the order made was based upon evidence which was presented incidental to neglect. No doubt the summons might have included such notice of inquiry and a statement that the court might enter some order requiring the father to support his daughter, but *failure to give such notice in effect deprived appellant of his day in court on that issue.* There should have been some petition or other form of pleading to outline the scope of the inquiry on the matter." (Emphasis added)

It might be argued in the instant case that the fact that the Summons and Notice served on the parents alleged that the child violated the terms and conditions of his probation order and agreement with the court by inference gave notice that the court would make inquiry into the question of revocation of the order suspending commitment. It should be kept in mind, however, that said court was dealing with lay people without training in the law or particular knowledge or understanding of legal language or procedures and who were not at any time during said proceedings represented by counsel, and as such could not reasonably be expected to make such an inference or receive such an understanding from the language used. Also several Summons and Notices had been issued and served in connection with the prior hearings, containing the allegation that the child had vio-

lated the terms and conditions of his probation, but in each instance probation was continued and insofar as the record reveals, commitment to the State Industrial School was not a factor or consideration. Where such circumstances prevail the Court assuredly has an additional responsibility to see to it that such language is used in its notices as is necessary to convey to the ordinary person with clarity and certainty the information to be given. It is not to be assumed from the record in this matter that the parents to whom the Summons and Notice was directed, in the absence of clear and unambiguous language so stating, understood that the court might take the kind of action which it did at said hearing.

Point 2

THE ORDER OF THE JUVENILE COURT IN THE DECREE DATED JUNE 28, 1960, IS SO INDEFINITE AND UNCERTAIN AS TO BE UNENFORCEABLE.

The Decree by which appellant was committed to the Industrial School reads as follows:

> "1. That the above named child be and is hereby declared delinquent.
>
> "2. That in the best interest of said child, subject to the continuing jurisdiction of this Court, he be and is hereby: the Court finds the said child has violated the terms and conditions of his Probation Agreement and that suspension of the commitment be *refused* and that the suspension of Court upon the commitment of Carl Everett Lindh to the Industrial School hereto made is hereby *refused* and that the said child is ordered committed

to the State Industrial School forthwith until he is 21 years of age unless sooner released." (Emhasis added)

It is submitted that the provision "that suspension of the commitment be *refused* and that the suspension of court upon the commitment of Carl Everett Lindh to the Industrial School hereto made is hereby *refused*" is ambiguous, indefinite, uncertain, and not susceptible of clear and concise meaning and is therefore without force or effect.

CONCLUSION

It is respectfully submitted that the Juvenile Court did not give adequate notice that it would make inquiry into the question of revocation of the order suspending commitment at the time set for hearing, that by reason of said omission the Court failed to observe "due process of law" and consequently lacked power or jurisdiction to make such an order and that the commitment of appellant to the State Industrial School is therefore invalid and he should be released.

Or if such order be deemed to be within the power of said court to make in said circumstances, the actual order made is so indefinite and uncertain by its terms as to be unenforceable.

Respectfully submitted,

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