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The State of Utah v. Lawrence H. Allmendinger : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, Plaintiff-Respondent vs. LAWRENCE H. ALLMENDINGER, Defendant-Appellant	: : : : : : :	Case No. 14582

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ARGUMENT

THE STATE'S RESPONSIVE BRIEF FAILS TO PERCEIVE THE ISSUE IN THIS CASE THAT IN ABSENCE OF A LEGISLATIVE MAXIMUM, PROBATION PERIODS FOR MISDEMEANORS IN UTAH ARE LIMITED BY THE PERIOD OF PUNISHMENT FOR THE OFFENSE IN QUESTION.

Appellant believes that the majority of the arguments presented by respondent in its brief are answered by the original brief of appellant in this case. However, it is clear that respondent has missed the thrust of the argument presented by appellant: that because the Utah legislature has not established a maximum limit for probation in misdemeanor cases, the maximum must be the period of incarceration for the offense in question. In support of this position, appellant cite in its original brief numerous cases which held that where no legislative maximum for probation occurred, the probationary period was limited by the period of incarceration established by the State legislature. See Appellant's Brief pp. 3-14.

Respondent admits that these cases may have had that holding

but asserts they were overruled by subsequent legislative action. For example, respondent argues that "Kansas law now allows probation for up to four times the maximum incarceration period. . ." and that In re Carroll, 91 KAN. 395, 137 P. 975 (1914) ". . .has long since been overturned by legislative action." Respondent's Brief pp. 10-11. Appellant argues that respondent's phraseology is grossly misleading. In the Carrol case, the Kansas Supreme Court struggled with the issue in absence of a legislatively prescribed maximum or limit for probation. When, in 1947, the Kansas legislature provided such a law, the case rule became moot, but it was not "overturned." The Kansas Supreme Court recognized a void in the law in 1914 and filled it with its opinion in Carrol. Subsequent legislation was in harmony with the Court's opinion. Rather than being overturned or reversed, Carrol stands for the proposition that the concept of Due Process of Law requires a maximum limit for probation just as it requires a maximum limit for imprisonment; and that where the legislature has failed to establish such a maximum limit, that limit will be determined by the legislative limit on incarceration for the offense in question.

Respondent uses this same reasoning in misinterpreting appellant's use of the Oklahoma case of Ex Parte Eaton, 29 OKLA. CRIM. 275, 233 p. 781 (1925). Respondent argues that because the Oklahoma legislature acted and set a two year limit on misdemeanor probation that Eaton does not apply to our situation. Respondent's Brief p. 12. Eaton like Carrol stands for the proposition that the judiciary must move to fill the vacuum where a state legislature has not established

limits on probation; and further, that the judiciary should adopt the statutory punishment limit as the probation limit. The subsequent enactment by the Oklahoma legislature does not affect this case as being authority for appellant's proposition.

Respondent observes that the Idaho cases cited by appellant involve felonies and then smugly dismisses them as "obviously not authority for appellant's position" (sic) Respondent's Brief p. 12. Idaho's statute is virtually identical to Utah's (Appellant's Brief p. 5) and the Idaho Supreme Court observed in two different cases that where no statutory maximum for probation is prescribed, the maximum is determined by the penalty for the offense. Respondent does not explain and appellant does not understand how the fact that felonies were involved can alter that principle developed by our sister state, and appellant urges this Court to reject that sort of unsupported assertion.

Respondent asks this Court to reject the case of People v. Blakeman, 170 Ca. 2d 596, 339 P.2d 202 (1959) because it involved a case where the trial judge failed to set a limit, not where a statutory limit was lacking. Although correct, respondent fails to grasp the principle reiterated by the California Court that "when the probationary period is not specified it is deemed to be for the maximum possible period of imprisonment." 339 P.2d at 204. And see Appellant's Brief p. 8.

Respondent cites the United States Supreme Court case of Frank v. United States, 395 U.S. 147, 23 L. Ed. 2d 162, 89 S. Ct. 1503 (1969) for the proposition that probation periods can be longer

than maximum periods for incarceration. Again respondent misses the thrust of appellant's argument. Mr. Justice Marshall, in the segment of his opinion quoted by respondent at page 6 of its brief, points out that a federal statute specifically provides for a longer period of probation than the period of imprisonment. See 18 U.S.C. §3653. The Frank case therefore, does not address itself to the issue involved in the instant appeal because no legislative vacuum, such as exists in Utah, exists in the federal system.

Finally, respondent cites the American Bar Association's Standards for Criminal Justice as authority for the proposition that probation terms may be longer than jail terms. Respondent states "The American Bar Association suggests two years probation for a misdemeanor and up to five for a felony". Respondents brief page 7. Respondent has misconstrued and overlooked the American Bar Association true position on the question. The sub-section referred to by respondent reads in its entirety as follows:

> "(d) The court should specify at the time of sentencing the length of any term during which the defendant is to be supervised and during which the court will retain power to revoke the sentence for the violation of specified conditions. Neither supervision nor the power to revoke should be permitted to extend beyond a legislatively fixed time, which should in no event exceed two years for a misdemeanor or five years for a felony."
>
> A.B.A. Standards for Criminal Justice, Standards Relating to Probation, Approved Draft 1970, §1.1

It should be clear that rather than recommending two years probation for a misdemeanor and five years for a felony, the Standards urge an absolute maximum of those terms. Most important for purposes of this appeal however, is the fact that the Standards urge that probation not be allowed to extend beyond a legislatively fixed

maximum. It is clear that the American Bar Association Standards fully support appellant's position that all states should have such a legislative maximum. What that maximum is should be up to the state legislatures. However, where the legislature has not established such a maximum period for probation, appellant urges this court to accept the uncontradicted weight of authority and fill the void by limiting probation to the maximum period for incarceration.

It may very well be that if the Utah legislature acts on this issue they would adopt the positions of other Western States and legislatively establish the limit for probation as being the same as the limit for incarceration. Whether or not that happens, however, is immaterial to this appeal. The fact is, a legislative void exists which must be filled by this Court.

CONCLUSION

Respondent has failed to cite a single authority which refutes appellant's position that where no maximum period for probation is fixed by the legislature, the maximum should be the same as the limit for incarceration. Subsequent legislative action pursuant to the numerous court decisions which stand for that proposition, have in no way affected the proposition even though that respective legislature may have chosen to make the maximums different. There seems to be no conflict among the authorities that

such a maximum period for probation is a necessity to our precepts of Due Process of Law. In our sister state Idaho, whose statute was almost exactly the same as ours, the Idaho Supreme Court established the position taken by appellant. The American Bar Association Standards support the necessity for such a maximum and virtually every court which has moved to establish a maximum where a legislative void existed has used the maximum period of incarceration as the standard. Appellant strongly urges this Court to follow the great weight of authority and established logic and adopt the same standard.

DATED this 23 day of September, 1976.

Respectfully submitted,

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Attorney for Appellant