

1963

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Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

UNIVERSITY OF UTAH

OCT 29 1963

THE STATE OF UTAH,
Plaintiff and Respondent,

LAW LIBRARY
No. 9856

vs.

BERNARD LAWRENCE ALEXANDER,
Defendant and Appellant.

FILED

JUN 28 1963

APPELLANT'S BRIEF

Clerk, Supreme Court, Utah

Appeal from the Judgment of
the 2nd District for Weber
County, Hon. Parley E. Norseth, Judge,

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IN THE SUPREME COURT
OF THE STATE OF UTAH

--ooOoo--

THE STATE OF UTAH,	:	
<u>Plaintiff and Respondent,</u>	:	
vs.	:	No. 9856
BERNARD LAWRENCE ALEXANDER,	:	
<u>Defendant and Appellant,</u>	:	

--ooOoo--

APPELLANT'S BRIEF

--ooOoo--

STATEMENT OF THE KIND OF CASE

This case concerns (1) the validity of an original sentence of "not less than one year" to the Utah State Prison for the offense of issuing a check against insufficient funds and (2) the subsequent modifications of that sentence on motion by the state, after it had been fully

served, to a sentence of "not less than five years" to the Utah State Prison.

DISPOSITION IN THE LOWER COURT

After the defendant had fully served the original sentence of not to exceed one year in the State Prison, the lower court, by a judge different from the one who had imposed the original one year sentence, resented the defendant, nunc pro tunc, to a term not to exceed five years and remanded him to the custody of the State Prison.

RELIEF SOUGHT ON APPEAL

The defendant seeks a determination (1) that the original sentence was a valid sentence for the maximum period of one year, (2) that the modification of that sentence to a sentence not to

exceed five years is void, and (3) that the defendant has fully served the lawful term imposed upon him.

STATEMENT OF THE FACTS

(The defendant-appellant will be referred to as defendant. "T" refers to the transcript of testimony. "R" refers to the record which is separate from the transcript of testimony and in which the papers do not appear to be in logical sequence. The few items in a Supplemental Record will be so designated.)

After being incarcerated in the Weber County jail for three months, most of which was spent in solitary confinement, (T. 11) the defendant pleaded guilty before Judge John F. Wahlquist to a charge of issuing a check against insufficient funds. (R. 21) Judge Wahlquist

requested a presentence report and set a date for sentencing. (R. 21)

On December 26, 1961, the date set for sentencing, the district attorney recommended a period of one year but had some reluctance with reference to the county jail because of the fact that the defendant had already spent three months in solitary confinement, and because there were unpleasanties in the jail. (T. 26)

In the discussion at this time among Court, counsel and defendant the problems incident to a one year sentence in the county jail were discussed. (T. 24-28) There is no mention in the record of intention or recommendation for a longer sentence. (T. 24-28)

Shortly before passing sentence, the Court said, "And I don't want you to be

in a long time this time. I want you to know you are going to get a fair chance. At the same time I can't put you back in the county jail. It isn't equipped to hold you. You will end up sitting in solitary the whole time. You won't see a radio nor a movie." (T. 27, 28) The Court then stated that he wanted to give the defendant a sentence of one year so that he could give an accounting of himself. (T. 28)

In the course of the discussion, the Court sentenced the defendant to one year in the state prison (T. 28, Line 16). As the final operative act in the record for that day, the Court pronounced the following sentence: "I sentence you to serve a term in the Utah State Prison not to exceed one year." (T. 28, Lines 27-29)

The document captioned "Judgment, sentence and commitment" is worded somewhat differently from the oral sentence pronounced in open court in that that document carries the additional comment (apparently inserted with a different typewriter) "the last four years of the 'not to exceed 5 years' contemplated by the statute is hereby suspended as an act of mercy because of the great injustices that were suffered by the defendant in the past." It carries the statement that sentence was to begin December 26, 1961. (R. 22)

The defendant immediately began serving his sentence. He did not appeal. The state did not appeal.

By a letter dated November 29, 1926, the

defendant asked Judge Wahlquist if, in the event the Board of Pardons ignored the one year sentence, a Writ of Error Coram Nobis would be the appropriate remedy. Although this letter of the 29th of November, is included in the record on this appeal no minute entry was ever made in the trial court records concerning it, nor does it bear any identifying filing stamp.

By motion filed in the afternoon of December 19, 1963, the attorney general moved to modify the sentence. (R. 26) The record does not show service of this motion on the defendant, but the defendant was brought into court on the 24th of December, at which time Judge Wahlquist transferred the case to Judge Norseth's court. (R. 31) Judge Norseth continued

the case to the 27th of December. (R. 33)

At the hearing on the 27th of December, 1962, Judge Wahlquist, called as a witness, explained his reasons for the one year sentence: He said the defendant's record was almost fantastic. (T. 11) He had been in jail for six months before being brought to Utah on the present charge. (T.11) The defendant had spent most of the next three months before trial in solitary confinement; he had had difficulty with his attorney; and he was combatant by nature and had been done injustices in the past. (T.11) Mr. Tite, the Probation Officer who had prepared the presentence report, and Mr. Newey, the District Attorney, were satisfied that the defendant had served twice on convictions later set aside. (T. 13) In fact, he had served three times for

convictions which had been set aside.

(T. 13) He took these matters into consideration in sentencing defendant. (T. 13)

The probation officer believed the defendant somewhat combatant in nature and somewhat paranoid, (T. 14) but both he and the judge felt it would be best just once to deal fairly with the defendant and give him a better chance of getting by in society when he was released.

(T. 15) The judge talked with the probation officer for some time. (T. 15)

The probation officer felt the defendant was a source of trouble in the county jail, that the jailers had not been unfair with defendant, but nonetheless defendant had served the last three months in solitary. (T. 15, 16) The probation officer was concerned about

the defendant's mental health. (T. 16)

The judge testified that the district attorney recommended one year in jail, except for the reservation about the unpleasanties involved. (T. 16) The district attorney had no objection to the one year term. (T. 16)

The judge repeated that both he and the probation officer felt it was one time when obvious fair play might pay off. (T. 17)

The judge intended the one year to be served in the county jail, except for the report from the probation officer that the defendant was not getting along in the county jail. (T. 17)

The proceedings on the 18th of December, 1962, when the plea of guilty was

entered and the presentence report was requested, and the proceedings on the 26th of December, 1962, when the original sentence was pronounced were read by the court reporter. (T. 20-28) The defendant was examined and cross examined. (T. 3-9, 29-35) The presentence report was received in evidence (T. 13) as was a copy of the letter from Judge Wahlquist to the Board of Pardons. (T. 18)

At the termination of the hearing, Judge Norseth expressed the view that the original sentence was illegal. It was his opinion that he had no recourse but to resentence the defendant to a term not to exceed five years in the state prison. (T. 42, 43) He did not feel that he could legally sentence the

defendant to a term to the county jail nunc pro tunc. (T. 43) He declined to sentence the defendant to a sentence of not to exceed one year in the county jail to commence then. (T. 44) Judge Norseth resentenced the defendant to serve not to exceed five years in the state penitentiary, sentence to date from the original date of incarceration. (T. 43) The defendant was remanded to the state prison. (T. 44)

On December 31, 1962, Judge Wahlquist informed defendant, in effect, that counsel would be appointed for him. (R. 28) Twice the defendant wrote Judge Wahlquist to say that counsel had not appeared. (R. 30, 34) On February 20, 1963, no counsel having appeared to assist him, defendant filed his own notice of appeal.

ARGUMENT

POINT I. THE RESENTENCE TO A TERM OF NOT TO EXCEED FIVE YEARS IS VOID BECAUSE THE ORIGINAL SENTENCE OF NOT TO EXCEED ONE YEAR IN THE STATE PRISON WAS A VALID SENTENCE AS TO TIME, EVEN IF INCORRECT AS TO PLACE.

After spending almost three months in solitary confinement in the Weber County Jail, the defendant pleaded guilty before Judge Wahlquist to the offense of uttering a check against insufficient funds, a violation of Utah Code Anno. 1953, 76-20-11, as amended. This section provides that such an offense "is punishable by imprisonment in the county jail for not more than one year, or in the state prison for not more than five years."

In addition to this choice the trial court has wide discretion vested in him by virtue of Utah Code Anno. 1953, 77-35-17, to suspend the imposition or the execution of a sentence and place the defendant on probation, if it appears compatible with the public interest. The only conditions which are expressly statutorily stated as conditions of the probation refer to the payment of fines, restitution and reparation, and support of dependents. However, the imposition of other conditions has been approved by the courts and it is customary practice to impose such conditions to the probation as to the court may deem desirable, including the condition that the defendant spend some time in confinement.

In the instant case the trial court had available the various alternatives sanctioned expressly by the statute and by customary usage, which included, the one year in the county jail, the five years in the state prison, or the suspension of the imposition or execution of the sentence and the placing of the defendant on probation under such conditions as the trial court may have deemed appropriate, including the condition that the defendant spend some time in confinement as a condition precedent to the probation.

There is vested in the Board of Pardons the power to permit prisoners in the county jail or state prison to go on parole. Utah Code Anno. 1953, 77-62-9.

In the instant case the trial court sought and received the counsel

and assistance of the Adult Parole and Probation Department. (R. 21) The district attorney was present at and participated in the proceedings to determine the sentence.

The trial judge, upon the advice and with the assistance of the presentence report, determined that a one year confinement would be appropriate in the case. (R. 24-28) This was also the district attorney's recommendation. (R. 26) The record allows of no question but that the trial court intended to impose a one year sentence upon the recommendation of the probation officer, and the district attorney. (R. 28) It was felt that it would be far better that for once in his life the defendant be treated fairly, that he be given a

chance at rehabilitation while incarcerated and an opportunity upon release to take his place in society. (R. 15, 17) The Court felt a five year term, under the peculiar circumstances of the case, would not accomplish this end. The probation officer felt the same way. The district attorney concurred. (R. 16)

However, because of the peculiar circumstances involved in this case, circumstances which have not come to our attention in any other case which we have read, the Court felt that it would be better for the defendant to serve this year in the state prison rather than in the county jail. (R. 17)

Considering the wide discretion lodged in the sentencing court, the discretion to choose between alternative sentences,

the power to suspend imposition of the sentence, the power to suspend execution of the sentence, the power to impose conditions upon his probation, including the condition that the defendant spend time in confinement, the sentence to a term not to exceed one year was a valid sentence for that period of time. The fact that it was imposed in the prison rather than the county jail should not alter this conclusion.

The statute authorizing punishments provides for two punishments, one punishment less onerous than the other in both time and place. Time, of course, is more significant in determining the degree of burden imposed by a sentence; place, while not to be ignored, is

subordinate to time. In the instant case the Court had the power to sentence to the less onerous term as to both time and place and desired to do so. Because of circumstance unique to this case, the Court, the probation officer and the district attorney felt that the place authorized for the less onerous combination would be inappropriate. Accordingly the sentence was for the less onerous time. The sentence in this case was a sentence of not to exceed one year in the state prison. (T. 28, lines 27-29)

The sentence is the oral pronouncement of the punishment imposed by the judge. State v. Dowthard, 92 Ariz. 44, 373 P.2d 357 (1962). Utah Code Anno. 1953, 77-35-3, provides that in

the case of felony, the defendant must be personally present, but in the case of a misdemeanor, judgment may be pronounced in his absence. Utah Code Anno. 1953, 77-35-11, provides that if, at the time set for sentencing, no sufficient cause is alleged or shown as to why it should not be pronounced, sentence must thereupon be rendered. It was, and it was a sentence to "a term in the Utah State Prison not to exceed one year." (T. 28, lines 27-29) Accordingly, the comment on the order of commitment concerning the suspending of the last five years of the sentence as an act of mercy cannot alter the oral sentence's validity any more than one party to a written contract can alone alter the contract by written comments after the contract is entered into.

In view of the wide discretion granted the trial court by law and by customary practice, the sentence of "not to exceed one year" to the state prison is a valid sentence. The imposition of punishment to a place other than that literally authorized by the statute does not make the sentence void, but at most merely voidable as to the excess, particularly where, as here, the defendant has served the sentence without complaint or appeal.

The rule is well established that a sentence excessive as to some part is a valid sentence but that the excessive part is void or voidable.

Abeyta v. People, 112 Colo. 49, 145 P.2d 884 (1944);

In re Chase, 18 Idaho 561 110 Pac. 1036 (1910).

In Ex parte Tani, 29 Nev. 385, 91 Pac. 137 (1907), the defendant was sentenced to, and incarcerated in, the state prison when it should have been the county jail. On a writ of habeas corpus he demanded release on the ground the sentence was void. The Court rejected this argument, holding that the error in the place of commitment may be rejected as surplusage and directing that the defendant be delivered to the county jail to serve the balance of his time.

Even more so than in Tani, it would be appropriate here to disregard as surplusage the incorrectness as to place where the defendant has fully served a lawfully authorized term, even though in a place of confinement more onerous

than that literally called for by the statute.

POINT II. ASSUMING THE MOTION TO MODIFY THE SENTENCE TO BE APPROPRIATE, IT WAS PREJUDICIAL ERROR FOR THE SECOND JUDGE TO RESENTENCE THE DEFENDANT CONTRARY TO THE INTENTION OF THE ORIGINAL SENTENCING JUDGE THAT THE IMPRISONMENT NOT EXCEED ONE YEAR.

The record does not explain why the original judge did not hear the second proceeding. The judge who did resentence, a year after the original sentence, did not honor the intentions and lawfully authorized discretion of the original sentencing judge. It would appear from the record that this was done by the

second trial court upon the erroneous assumption that there was no alternative but to so do, for it is clear, without question, that the original sentencing judge intended incarceration for a period not to exceed one year. The second sentencing judge could have effected this intention by a modification of the sentence to read county jail in place of state prison, or by other means, but he chose not to do so and instead resentenced the defendant to a term four hundred per cent greater than the term he had already fully served.

This instance is similar to the situation in Saldana v. U. S., 365 U.S. 646 (1961) where the first judge clearly intended to impose a 5-year sentence but a second judge imposed a 20-year sentence.

The Supreme Court said that the defendant had, by this action, been deprived of the fair administration of justice. They reduced the sentence to the originally intended five year term.

We submit that the integrity of the judicial process requires that, in those few cases where a second judge must pass sentence on, or resentence, a prisoner, the second judge follow the intentions of the first judge in all instances where it is manifest what the first judge's intentions were and where such objectives can be lawfully accomplished. This could have been accomplished in the instant case by any of several means, including the modification of the sentence to have read "not to exceed one year in the county jail" nunc pro tunc, thus having fully and completely met the

express intention of the first judge as to the lawfully authorized sentence he desired that the defendant serve.

POINT III. THE FOUR HUNDRED PERCENT INCREASE OF DEFENDANT'S SENTENCE AFTER THE ORIGINAL SENTENCE HAD BEEN FULLY SERVED VIOLATES THE FORMER JEOPARDY AND THE DUE PROCESS PROVISIONS OF THE STATE AND FEDERAL CONSTITUTIONS.

The second judge was obligated to treat the sentence of the defendant as fully served not only because of the express intent of the first judge that the defendant serve not more than one year, but also because the Utah and the federal constitutions prohibit the

enlargement of a sentence in this manner.

Article 1, Section 12 of the Utah Constitution provides that no person "shall . . . be twice put in jeopardy for the same offense." The Fifth Amendment to the United States Constitution, which applies to state action through the Fourteenth Amendment, similarly provides "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Article 1, Section 7 of the Utah Constitution contains a similar due process provision to that of the Fourteenth Amendment to the United States Constitution.

One of the rights of individuals protected by both the double jeopardy provisions and the due process provisions of the state and federal constitutions

is that once a person has begun serving a valid sentence, that sentence shall not be augmented or increased. If this rule applies to an accused upon beginning the execution of his sentence, it must also apply to the accused who has fully served his sentence.

While it may be that immediate rectification of an error in the sentence may be valid as against constitutional attack, Bozza v. U.S., 330 U.S. 160 (1947), it is equally clear that to alter a sentence by increasing its severity after the defendant has commenced serving it is proscribed by the constitutional prohibitions against double jeopardy for these prohibitions apply to double punishment as well as to a second trial. Ex parte Lange, 85 U.S. (18 Wall.) 163 (1874).

We are not unmindful of the decisions from a few state courts and the early decision from this court in Mutart v. Pratt, 51 Utah 246, 170 Pac. 67 (1917), which until carefully analyzed and compared with the facts of the instant case, the statutes involved in the instant case, and the constitutional protections afforded by the state and the federal constitutions might superficially appear to justify the action of the resentencing judge. However, they do not hold up under examination.

For example, Mutart v. Pratt involved an entirely different factual and legal situation. The statute there involved did not require the sentencing judge to pronounce a sentence as to time in any manner whatsoever, but in fact

prohibited his so doing. In addition, in that case there was absolutely no discretion in the sentencing judge to choose between different degrees of punishment. While it may be that the decision in that case could have been justified on grounds not stated in the opinion, it is clear that the extension of the unnecessary, implied dicta in that case concerning the non-necessity of the state to comply with even minimum standards of procedural due process in the matter of sentences would be violative of both the double jeopardy and the due process clauses of the state and the federal constitutions if applied here.

Two recent cases do suggest some guidelines in this area. In Tahash v. Clements, 234 Ind. 197, 125 N.E.2d 439 (1955), the defendant was sentenced to

a 2-year sentence although the statute required an indeterminate sentence of from 2 to 5 years. The Court cites § 9-1827, Burns' 1942 Replacement (now § 9-1827, Burns' 1956 Replacement) which provides (similar in effect to our Utah Code Anno. 1953, 77-35-20) that an erroneous determinate sentence which should have been indeterminate shall be deemed to be the correct indeterminate sentence. The Supreme Court of Indiana said, at page 440:

The only constitutional interpretation of this statute would be that it authorizes the correction of an erroneous sentence, but the proper procedure must include notice to the prisoner and his presence in court when the change of sentence is ordered. His day in court includes this appearance. The statute, taken alone, cannot change a sentence by the court. The handing down of a sentence is not a ministerial act, but is a judicial act.

The Court did not spell out what proper notice was but from the tenor of the case it is quite unlikely that notice given only a week prior to the expiration of the full sentence would meet the applicable constitutional test, particularly where the matter was not heard until after the actual end of the full sentence.

In Spanton v. Clapp, 78 Idaho 234, 299 P.2d 1103 (1956) the Idaho Court, despite extremely harsh earlier cases, held that to apply the Idaho indeterminate sentence law literally would deprive the defendant of his valuable right to appeal, and that although an erroneous sentence could be corrected by a timely motion by the state or an appeal from an adverse ruling, where

the prisoner had served his sentence without either the timely motion or the appeal from a denial of such motion, the prisoner would be discharged although the statute called for a much longer sentence.

We respectfully submit that the state and federal double jeopardy and due process provisions limit the power of the legislature and prevent its calling black white and white black without regard to the concepts of procedural due process as suggested in Tahash and Spanton.

POINT IV. THE APPEAL WAS TIMELY BECAUSE THE RESENTENCE AFTER THE EXPIRATION OF THE ORIGINAL SENTENCE IS EITHER A "FINAL JUDGMENT OF CONVICTION" OR "AN

ORDER MADE, AFTER JUDGMENT, AFFECT_
ING THE SUBSTANTIAL RIGHTS OF" THE
DEFENDANT.

Upon request of the Court we are
briefing the question of the timeli-
ness of the appeal.

On the 27th of December, 1962, the
defendant, after having fully served
his original one-year term, was sen-
tenced to a term not to exceed five
years. Despite requests for aid and
an assurance of appointment of counsel,
none appeared. (R. between 27 and 28,
28, 30, 34) Within the two months pro-
vided for filing notices of appeal in
criminal cases the defendant filed his
notice himself. (Supplemental Record)

Judge Wahlquist called the case a

matter of motion to modify sentence.

(R. 31) Judge Norseth called it a hearing on a writ of habeas corpus.

(R. 32) Defendant called it a writ of habeas corpus or a coram nobis proceeding. (Supplemental Record)

We long ago dispensed with the notion that mislabeling a pleading or other paper was fatal and have adopted the view that it is the substance of a matter that counts, not the name it may erroneously be given by counsel, or by the Court, let alone by a layman.

The question is not whether this was in whole or in part a habeas corpus or coram nobis proceeding, but whether it comes within the scope of the statute authorizing appeals in criminal matters. Utah Code Anno. 1953, 77-39-3, provides

"An appeal may be taken by the defendant:
(1) From a final judgment of conviction.
(2) From an order made, after judgment, affecting the substantial rights of the party." We submit that the resentencing comes within both of these provisions.

It is clear from the record that the resentencing procedure could only have been prompted by the State's motion to modify. It cannot be denied that the defendant was at this time given an opportunity to present his side of the matter, which he did, but this was equally in opposition to the State's motion as well as, if at all, a procedure in the nature of a writ of habeas corpus or coram nobis.

The term judgment of conviction refers to the sentence. State v. Fedder, 1 Utah 2d 117, 262 P.2d 753 (1953).

In State v. Sawyer, 54 Utah 275, 182 Pac. 206 (1919) the verdict was rendered on May 17, 1918, but sentence was not pronounced until Sept. 21. Notice of appeal was filed the same day and was held timely. Had the time run from the rendering of the verdict, it would have been too late. The Court said: "[T]he judgment upon the verdict was not rendered and entered until September 21, 1918, . . . Therefore this appeal was taken in time."

In any event, the resentencing to a term four hundred percent greater than the original sentence, after it had been fully served, must come within the scope of an order made after judgment (if it not be deemed a judgment) affecting the substantial rights of the

party. See Adamson v. Brockbank, 112 Utah 52, 185 P.2d 264 (1947).

Even if the Court should find that this case is a civil and not a criminal matter, serious constitutional problems under both the state and the federal constitutions may exist because of the failure to provide the defendant with counsel in time to perfect his appeal. Section 12 of Article 1 of the Utah Constitution protects the right of convicted persons to an appeal. Such a right would also come under the due process clause of Section 7 of Article 1 of the Utah Constitution. That such a right to counsel on appeal in state cases is also protected by the United States Constitution has recently been affirmed in the case of Douglas v. California, 9 L.Ed.^{2d} 811 (1963).

We submit that failure to provide counsel in time to perfect an appeal from the resentence comes within the ambit of the Utah and the federal constitutions and, were it to result in the loss to the defendant of his one right to appeal from the resentence, it would deprive him of a most valuable right protected by both constitutions.

CONCLUSION

The defendant respectfully submits that the trial court erred in sentencing him to a term not to exceed five years in the state prison for the reason that he had already served a valid sentence of not to exceed one year for the same offense.

Defendant prays that this court determine that the original sentence was a valid sentence of a term not to exceed one year, that the resentence to a term not to exceed five years is void, and that the defendant has fully served the lawful term imposed upon him.

Respectfully submitted,

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