1963

Bernard Lawrence Alexander v. John W. Turner : Petition for Rehearing

Utah Supreme Court

A. Pratt Kesler; Stephen L. Johnston; Attorneys for Respondent;
Robert L. Schmid; Lester J. Mazor; Attorneys for Appellant;

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

BERNARD LAWRENCE ALEXANDER,

Plaintiff and Appellant,

vs.

JOHN W. TURNER, Warden, Utah State Prison,

Defendant and Respondent.

Case No. 9856

PETITION FOR REHEARING

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BASIS FOR PETITION FOR REHEARING

The respondent, State of Utah, respectfully submits that the decision of the court rendered herein November 7, 1963, remanding the case with directions to the Second District Court and ordering appellant's release does not properly appraise the significant and important legal issues involved in the case. Respondent further contends that this court should grant this petition for rehearing and reconsider its previous decision.

ARGUMENT

POINT I.

THE OPINION OF THE COURT IGNORES THE ISSUES RELEVANT TO THE CASE AND THE PREVIOUS PRECEDENT GOVERNING THOSE ISSUES.

It is strongly urged by the State that the sole question in this case is whether or not a sentence whereby an erroneous place for incarceration is designated is void or whether it is only voidable. If it is void—which the State contends —the action of Judge Norseth, in denying Alexander's petition for a writ of habeas corpus and convening a new sentencing hearing wherein relevant material to appellant's sentence was adduced, was correct. Bear in mind that the Judge, at that time, approached the question of punishment as a de novo matter and it was totally within his discretion to sentence Alexander to one year in the Weber County Jail, give him credit for the time served under the void sentence, and then to order his release. However, with all of the facts in his possession, the Judge exercised his *exclusive* discretion and sentenced Alexander to the State Prison.

If the original sentence by Judge Wahlquist was not void, but only an error, it was only correctable on appeal by the State and the subsequent action by Judge Norseth of resentencing Alexander would be an absolute nullity and correctable on review by this court. In this light, the State of Utah again strongly urges that the question of whether or not a sentence designating the improper place

is void has been answered on two previous occasions by this very court. The majority opinion in the instant case states, after reviewing and reciting the sentence imposed by Judge Wahlquist:

> "The sentence for that term was a lawful and proper one for the crime charged. Of lesser and subordinate importance is that it designated the State Prison instead of the County Jail as the place it should be served. This was an impropriety which could be corrected at the instance of either the defendant or the state."

In support of this statement, the majority opinion cites the case of *Ex Parte Tani,* 29 Nev. 385, 91 Pac. 137, (1907). Such a conclusion appears to fly in the face of the previously established law on this point as laid down by this very court in *Frankey* v. *Patten,* 75 Utah 231, 34 Pac. 318 (1929), and *Folck* v. *Watson,* 102 Utah 471, 132 P. 2d 130 (1942).

In the *Frankey* case, the petitioner was convicted of violating a city ordinance and was ordered imprisoned in the county jail in default of paying the fine imposed. The statute applicable provided for imprisonment in the city jail. It was held that the sentence was void. The prisoner was discharged from imprisonment in the county jail, but without prejudice to the right of the city further lawfully to proceed in the cause or to the legal right of the petitioner to object to whatever further proceedings might be pursued or invoked by the city. The court said:

> "Where the law prescribes a place of imprisonment, the court cannot direct a different place. To order that a person be imprisoned and confined in

> a place where the law does not allow the court to imprison him, said Mr. Justice Field in the case *Re Bonner* (1894), 151 U. S. 258, 38 L. Ed. 152, 14 S. Ct. 326, is unauthorized and 'to deny the writ of habeas corpus, in such a case, is a virtual suspension of it.' To the same effect are also the cases of *In Re Mills* (1890), 135 U. S. 263, 34 L. Ed. 107, 10 S. Ct. 762; *Lemmon* v. *State,* (1908), 77 Ohio St. 427, 83 N. E. 608; *Davis* v. *Davis* (1919), 42 S. Dak. 294, 174 N. W. 741; *Moulton* v. *Commonwealth* (1913), 215 Mass. 525, 102 N. E. 689. The court being unauthorized to order the imprisonment of the petitioner in the county jail and a judgment in such particular void. The detention and imprisonment of the petitioner by the sheriff in a county jail is unlawful and a petitioner entitled to be discharged therefrom. That is what he seeks by his petition, and holding as we do that his detention and imprisonment by the sheriff is unlawful and it is our bounden duty to discharge him therefrom."

To the same effect is the *Folck* case, wherein appellant was convicted in the City Court of Ogden City. On appeal appellant entered a plea of guilty in the District Court for Weber County to a charge of operating a motor vehicle upon a public street while under the influence of intoxicating liquor, in violation of an ordinance of Ogden City. The District Judge sentenced appellant to be "imprisoned in the City Jail of Weber County for six months, and said defendant is ordered imprisoned in said County Jail." The ordinance under which appellant was convicted provided:

> "Any person convicted of a violation of this section shall be punished by imprisonment in the *City Jail* for not less than thirty days nor more than six months * * *." (Emphasis added.)

Defendant applied for a writ of habeas corpus in the District Court of Weber County and contended that the punishment imposed upon him was invalid in that the sentencing court went beyond its jurisdiction in sentencing him to a place of confinement other than provided for in the ordinance, to-wit, the City Jail. To this the Supreme Court held:

> "* * * The contention is well founded, where the law prescribed the place of imprisonment, the court is without jurisdiction to direct imprisonment elsewhere. *Frankey* v. *Patten,* 75 Utah 231, 84 Pac. 318, and cases cited therein. * * *
>
> "Weber County and Ogden City maintain jointly a building, two floors of which are devoted to a jail. The City Jail is on the eleventh floor, the County Jail on the twelfth floor, and many of the facilities employed in the care and detention of the prisoners are common to both jails. This proceeding is avowedly for the purpose of securing from the court an announcement of the respective duties and obligations of the city and county in this so-called 'joint' jail and to secure a definition of the rights and powers of the officers in charge thereof. This court can pass only on questions presented to it involving controversies. The validity of the sentence pronounced is here involved and nothing else * * *. (Folck) is entitled to be discharged from serving a sentence *which is herein declared void,* but as he plead guilty to the charge *and it is only the sentence and not the judgment of conviction which is void, it follows that the lower court has jurisdiction to impose a proper sentence."* (Emphasis added.)

Of further interest is an annotation to the celebrated Utah case of *Lee Lim* v. *Davis,* 75 Utah 245, 284 Pac. 323

(1929), found in 76 A. L. R. at page 510, wherein the text states:

> "It is generally held that where the law prescribes a place of imprisonment, the court cannot direct a different place, and if it does so, the sentence is void and the prisoner is entitled to a discharge, at least from that particular sentence. Accordingly, in the following cases the prisoner was given either an absolute discharge or was discharged from the particular sentence and remanded for a new sentence."

Numerous cases are then cited, among them the case of *Frankey* v. *Patten,* referred to above. In summary, it is the position of the State that the whole question in this case is whether or not the original sentence was void. It is respondent's position that this point has been well settled in the State of Utah and in the overwhelming majority of other states, and in the federal courts, that it is. It follows from this hmypothesis that the subsequent proceeding whereby the prisoner's petition for a writ of habeas corpus was denied, and wherein his sentence was corrected, was absolutely appropriate and consistent with law. The State does not see how any other conclusion can be drawn in the light of the authorities extant in the State of Utah and elsewhere.

Respectfully submitted,

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