

1963

Paul Mansell v. John W. Turner : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

FILED
APR 24 1963

PAUL MANSELL,

Appellant.

vs.

Warden JOHN W. TURNER,

Respondent.

)
) Clerk, Supreme Court, Utah
)
)
) Case No. 9881
)
)
)
)
)

BRIEF OF APPELLANT

Appeal From The Judgment Of The
Third District Court For Salt Lake County
Hon. Marcellus K. Snow

PAUL MANSELL
Appellant, Prop. Per.
Utah State Prison
Box 250
Draper,
Utah

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UNIVERSITY OF UTAH

MAY 3 - 1965

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IN THE SUPREME COURT
OF THE STATE OF UTAH
10th
court

PAUL MANSELL,

Appellant.

Plaintiff.

139251, vs.

Case No. 9891

Warden JOHN W. TURNER,

Respondent.

BRIEF OF APPELLANT

On Appeal From The Judgment Of The
Third District Court For Salt Lake County
Hon. Marcellus K. Snow

STATEMENT OF CASE

October 16, 1962, plaintiff-appellant
petitioned the District Court for the Third
Judicial District in and for Salt Lake County,
State of Utah, Hon. Marcellus K. Snow, for the
writ of habeas corpus. (See Writ, Civil No.
139251.)

Civil No. 139251 came on for hearing the

16th day of January, 1963, and aforesaid court having heard both plaintiff and defendant took said cause under advisement.

Uta. February 5, 1963, an Order denying plaintiff's petition for habeas corpus in Civil No. 139251, together with the Findings of Fact and Conclusions of Law in support of said order was entered and filed. (See Order, Findings of Fact and Conclusions of Law.)

February 19, 1963, appellant filed Notice of Appeal. (See Notice.)

February 25, 1963, appellant filed Designation of Record, Motion for Waiver of Bond and Affidavit of Impecuniosity. (See Designation of Record.)

DISPOSITION IN LOWER COURT

Civil No. 139251 denied February 5, 1963. Order, Findings of Fact and Conclusions of Law entered and filed February 5, 1963.

RELIEF SOUGHT ON APPEAL

Appellant seeks to reverse order of lower court denying writ and discharge from custody of defendant-respondent.

STATEMENT OF FACTS

Appellant originally was confined in the Utah State Prison pursuant to sentence imposed February 1, 1961, for the crime of Second Degree Burglary.

Subsequently, August 21, 1962, the Utah State Board of Pardons discharged appellant upon Conditional Termination. The Order Granting Conditional Termination, Case No. 2321, contained the sole stipulation, condition and order, to wit:

" IT IS FURTHER ORDERED that the said PAUL MANSELL will thereafter immediately depart from the State of Utah and that if he should ever again enter the State of Utah for any purpose whatsoever then this Order of Conditional Termination becomes null and void and the said PAUL MANSELL will be subject to arrest and reimprisonment in the Utah State Prison to serve the remainder of his term." (See Order Granting Conditional Termination, Case No. 2321.)

August 30, 1962, appellant not having departed the State of Utah, aforesaid Board of Pardons issued and caused to be executed an Order and Warrant of Arrest in Case No. 2321 whereupon appellant forthwith was reimprisoned to serve out the remainder of his term. (See

Order and Warrant of Arrest.)

STATEMENT OF POINTS

POINT I.

Under Constitution of the State of Utah and Constitution of the United States, the Utah State Board of Pardons is without authority to banish and exile appellant from the State of Utah.

ARGUMENT

POINT I.

UNDER CONSTITUTION OF STATE OF UTAH
AND CONSTITUTION OF UNITED STATES,
UTAH STATE BOARD OF PARDONS IS WITH-
OUT AUTHORITY TO BANISH AND EXILE
APPELLANT FROM THE STATE OF UTAH.

Section 77-62-7, Utah Code Annotated 1953,
Powers of Board - Rules and regulations -
Extent of Power, mandates:

" The board of pardons is empowered
and authorized to adopt rules and
regulations, not inconsistent with
law, for its government, its meet-
ings and providing for the parole

and pardon of prisoners and the commutation and termination of sentences. Said board is further empowered and authorized to promulgate reasonable rules and regulations, not inconsistent with law, which shall establish the general conditions under which parole shall be granted and revoked."

Appellant respectfully submits that the order of the Utah State Board of Pardons, said order entitled Order Granting Conditional Termination, Case No. 2321, issued and executed by said Board on the 21st day of August, 1962, and ordering and requiring that appellant "will thereafter immediately depart from the State of Utah and that if he should ever again enter the State of Utah for any reason whatsoever will be subject to arrest and reimprisonment in the Utah State Prison to serve the remainder of his term" (emphasis supplied) constitutes banishment and exile from the State of Utah and is an order and condition inconsistent with law within the meaning of Section 77-62-7, Powers of Board - Extent of Power, Utah Code Annotated 1953, and is violative of and repugnant to the Constitution of the State of Utah, Article I, Sec'ts. 3, 9 and 26 and, further, said Order of the Board of Pardons imposing such highly penal and punitive condition upon appellant is

violative of and repugnant to the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

Article I, Sec't. 26, Constitution of the State of Utah, provides:

" The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."

Article I, Sec't. 3, Constitution of the State of Utah, provides:

" The State of Utah is an inseparable part of the Federal Union and the Constitution of the United States is the supreme law of the land."

Article I, Sec't. 9, Constitution of the State of Utah, provides:

" Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishment be inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor."

Amendment V, United States Constitution, provides:

" No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in

the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI, United States Constitution, provides:

" In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence."

Amendment XIV, Sec't. 1, United States Constitution, provides:

" All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities

of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The case at bar presents but one issue - the constitutionality of banishment and exile.

Appellant seeks to show that the Utah State Board of Pardons has exceeded its governmental authority, not only under Sec't. 77-62-7, Utah Code Annotated 1953, but under the Utah Constitution and the United States Constitution, by imposing a condition of release upon him which orders, on pain of added punishment, that ' the said Paul Mansell will thereafter immediately depart from the State of Utah and that if he should ever again enter the State of Utah for any purpose whatsoever ,....the said Paul Mansell will be subject to arrest and reimprisonment in the Utah State Prison to serve the remainder of his term.'

The fact, if such be a fact, that appellant agreed or did not agree, either voluntarily or under duress or coercion, to depart the State of Utah and never again enter the State of Utah for any purpose whatsoever is wholly irrelevant and immaterial. Appellant submits

that the Utah State Board of Pardons has no lawful right to impose upon him any order or condition which abridges the privileges and immunities of citizenship guaranteed him by the Constitution of the State of Utah or the Constitution of the United States.

The lower court found that appellant 'did sign an agreement, agreeing to abide by and accept the said conditional release and that he did so voluntarily and without any coercion or duress other than the fact that if he failed to accept the conditional release, he was to remain in the custody of the warden of the Utah State Prison for an additional period of time. The said Paul Mansell did accept the conditional release.' (See Findings of Fact, 3.)

As far back in statehood in the history of Utah jurisprudence - April 25, 1898 - Mr. Justice Harlan, delivering the opinion of the Utah Supreme Court in *Thompson vs. State of Utah*, ruled:

"....the natural life, says Blackstone, cannot legally be disposed of or destroyed by any individual, neither by the person himself nor by any other of his fellow creatures, merely upon their own authority. 1 Bl. Comm. 133. The public has an interest in his life

" and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life and liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods."

In the present instance, the lower court found ' that the order of the Board of Pardons, releasing the petitioner, Paul Mansell, upon condition that he forthwith leave the State of Utah and never return, (emphasis added) was a legal and proper exercise of the executive power to pardon and parole.' (See Conclusions of Law, 1.)

Appellant respectfully submits that the rights of individuals, as guaranteed by our constitution, are not to be so lightly considered. The framers of our constitutions, Federal and State, realized that laws affecting the liberty of men must be safeguarded since the wisdom of ages has taught that unrestrained official conduct in respect to depriving men of their liberties would soon amount to a total loss of those liberties. This conclusion is fortified by the following excerpts from Goulded vs. United States, 255 U.S. 298, 41 S. Ct.

" It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in Boyd vs. United States, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746; in Weeks vs. United States, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652, L.R.A. 1915B, 834, Ann. Cas. 1915c; and in Silverthorne Lumber Co. vs. United States, 251 U.S. 385, 40 S. Ct. 182, 64 L. Ed. 319 (24 A.L.R. 1426) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the constitution.

" The effect of the decisions cited is: that such rights are declared to be indispensable to the "full enjoyment of personal security, personal liberty and private property;" that they are to be regarded as of the very essence of constitutional liberty; and that the guarantee of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen - the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or "gradual depreciation" of the rights secured by them, by imperceptible practice of courts, or by well-intentioned, but mistakenly over-zealous executive officers." (Emphasis supplied.)

That no power can exist in a state to

obstruct the right of a citizen of the United States to enter or leave any of the states at will was determined nearly a hundred years ago by the United States Supreme Court in Crandall vs. Nevada, (1868) 6 Wall. 35, 18 L. Ed. 745, wherein the Court ruled:

" Error to the Supreme Court of Nevada.

....That government has a right to call to this point any or all of its citizens to aid in its service, as members of Congress, of the courts, of the executive departments, and to fill all its other offices; and this right cannot be made to depend upon the pleasure of a state over whose territory they must pass to reach the point where these services must be rendered. The government, also, has its offices of secondary importance in all other parts of the country. On the seacoasts and on the rivers it has its ports of entry. In the interior it has its land offices, its revenue offices, and its sub-treasuries. In all these it demands the services of its citizens, and is entitled to bring them to those points from all quarters of the nation, and no power can exist in a state to obstruct this right that would not enable it to defeat the purposes for which the government was established. (Emphasis supplied.)

" But if the government has these rights on her own account, the citizen also has correlative rights. (Emphasis added.) He has the right to come to the seat of government to assert any claim he may have upon that government, or to trans-

" act any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its sea-ports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and this right is in the nature independent of the will of any state over whose soil he must pass in the exercise of it." (Emphasis added.)

Yet, despite the plain mandate of the United States Supreme Court in 1868, supra, from time to time over the years, ' well-intentioned but mistakenly over-zealous executive officers ' have sought to encroach upon the rights of the individual. Such was the case in Michigan vs. Eva Baum, 251 Mich. 187, 231 NW 95, in which it was held:

" A sentence, banishing from the state a person convicted of crime is impliedly prohibited by public policy intending to invite dissension among states, provoke retaliation, and disturb that fundamental equality of political right among the several states which is the basis of the Union."

Nor do courts have power to banish or exile as was held in State vs. Baker, 58 S.C. 111, 36 S.E. 501, to wit:

"....When we come to the fourth excep-

"tion, we are bound to sustain it. After the prisoner was convicted of grand larceny, the circuit judge imposed the following sentence upon him: 'The sentence of the court is that you, DeVillius Baker, be confined in the State penitentiary, at hard labor, for the term of seven years. After you have served five years, you will be released, with the understanding that you leave the state, and never set foot in it again. If you do return, after notice on you by the state and a cause shown, you will be called back to serve out the full term (additional two years), so as to make seven years; otherwise, you will be discharged after service of five years.' We do not recognise the circuit judge as possessing any right to impose such a sentence as is involved in the perpetual banishment of the defendant from the state set out in the sentence." (Emphasis supplied.) (See also McCue vs. Commonwealth, 78 Pa. 191, and People vs. Lopez, 81 Cal. App. 199, 253 P. 169.

In the case at bar, the Utah State Board of Pardons elected to terminate appellant's term of imprisonment but, in its order and condition terminating said term, banished and exiled appellant from the State of Utah. Appellant submits that the Board of Pardons has no such power.

February 18, 1963, the United States Supreme Court (October Term, 1962) in Robert F.

Kennedy, Attorney General of the United States
vs. Francisco Mendoza-Martinez and Dean Rusk,
Secretary of State vs. Joseph Henry Cort, held
banishment and exile to be cruel and unusual
punishment. Mr. Justice Goldberg, speaking for
the majority, stated:

" We recognise that draft evasion, particularly in time of war, is a heinous offense, and should and can be properly punished." But, he added, " Dating back to Magna Carta....it has been an abiding principle governing the laws of civilized men that no free man shall be taken or imprisoned or desseized or outlawed or exiled....without the judgment of his peers or by the law of the land. What we hold is only that in keeping with this cherished tradition, punishment cannot be imposed without due process of law. Any lessor holding would ignore the constitutional mandate upon which our essential liberties depend." (Emphasis added.)

In the Mendoza-Martinez and Cort cases, supra, the Congress of the United States had enacted into law a Federal statute which provided for banishment and exile and revocation of the citizenship of native-born Americans if they left the country to evade the draft during time of war or national emergency. The Supreme Court held that the statute was unconstitutional. In the case at bar, no state statute

vests authority in the Utah State Board of Pardons to banish or exile any person, for any cause, from the State of Utah.

The following excerpts from Mendoza-Martinez and the Cort cases, supra, are pertinent and controlling in the case at bar. The Supreme Court stated:

" It is fundamental that the great powers of Congress to conduct war and to regulate the Nation's foreign relations are subject to the constitutional requirements of due process. The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guaranties which, it is feared, will inhibit governmental action. 'The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.' Ex parte Milligan, 2 Wall, 2, 120, 121. The rights guaranteed by the Fifth and Sixth Amendments are "preserved to everyone accused of crime who is not attached to the army, or navy, or militia in actual service. Ex parte Mason, 105 U.S. 696; Kahn vs. Anderson, 255 U.S. 1, 8-9; Ex parte Quirin, 317 U.S. 1, 29, 38-46.

" We hold Sec'ts. 401 (j) and 349 (a) (10) invalid because in them Congress has plainly employed the sanction of deprivation of nationality as a punishment - for the offense of leaving or remaining outside the country to evade military service - without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments. Our forefathers "intended to safeguard the people of this country from punishment without trial by duly constituted courts. And even the courts to which this important function was entrusted were commanded to stay their hands until and unless certain tested safeguards were observed. An accused in court must be tried by an impartial jury, has a right to be represented by counsel, (and) must be clearly informed of the charge against him." United States vs. Lovett, 328 U.S. 303, 317. See also: Chambers vs. Florida, 309 U.S. 227, 235-238.

"This being so (forfeiture of citizenship) the Fifth and Sixth Amendments mandate that this punishment cannot be imposed without a prior jury trial and all its incidents, including indictment, notice, confrontation, jury trial, assistance of counsel, and compulsory process for obtaining witnesses. If the sanction these sections impose is punishment, and it plainly is, the procedural safeguards required as incidents of a criminal prosecution are lacking. We need go no further."

That banishment and exile, forfeiture of citizenship, deprivation of any of the rights

er immunities of citizenship is punitive and penal in nature, the United States Supreme Court further noted:

" The punitive nature of the sanction here is evident under the tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character, even though in other cases this problem has been extremely difficult and elusive of solution. Whether the sanction involves an affirmative disability or restraint (Ex parte Garland, 4 Wall 333, 377; United States vs. Lovett, 328 U.S. 303, 316; Flemming vs. Nestor, 363 U.S. 603, 617), whether it has historically been regarded as a punishment (Cummings vs. Missouri, 4 Wall. 277, 320-321; Ex parte Wilson, 114 U.S. 417, 426-429; Mackin vs. United States, 117 U.S. 348, 350-352; Wong Wing vs. United States, 163 U.S. 228, 237-238), whether it comes into play only as a 'scienter' (Helwig vs. United States, 188 U.S. 605, 610-612; Child Labor Tax Case, 259 U.S. 20, 37-38), whether its operation will promote the traditional aims of punishment - retribution and deterrence (United States vs. Constantine, 296 U.S. 287, 295; Trop vs. Dulles, supra, 356 U.S., at 96 (opinion of the Chief Justice); id., at 111-112 (Brannan, J., concurring), whether the behavior to which it applies is already a crime (Lipke vs. Lederer, 259 U.S. 557, 562; United States vs. La Franca, 282 U.S. 568, 572-573; United States vs. Constantine, supra, 296 U.S., at 295), whether an alternative purpose to which it may rationally be connected is assignable for it (Cummings vs. Missouri, supra,

" 4 Wall., at 319; Child Labor Tax Case, supra, 259 U.S., at 43; Lipke vs. Lederer, supra, 259 U.S., at 561-562; United States vs. La Franca, supra, 282 U.S., at 572; Trop vs. Dulles, supra, 356 U.S., 96-97; Flemming vs. Nestor, supra, 363 U.S., at 615-617), and whether it appears excessive in relation to the alternative purpose assigned (Cummings vs. Missouri, supra, 4 Wall., at 318; Helwig vs. United States, supra, 188 U.S., at 613; United States vs. Constantine, supra, 296 U.S., at 295; Rex Traylor Co. vs. United States, 350 U.S. 148, 154. But cf. Child Labor Tax Case, supra, 259 U.S., at 41; Flemming vs. Nestor, supra, at 614, 616 and p. 9), are all relevant to the inquiry, and may often point in different directions. Absent conclusive evidence of congressional intent as to the penal nature of the statute, these factors must be considered in relation to the statute on its face. Here, although we are convinced that application of these criteria to the face of the statutes supports the conclusion that they are punitive, a detailed examination along such lines is unnecessary, because the objective manifestations of congressional purpose indicate conclusively that the provisions in question can only be interpreted as punitive (Compare Cummings vs. Missouri, 4 Wall. 277, 320, 322; United States vs. Lovett, 328 U.S. 303, 308-312; Wormuth, Legislative Disqualifications as Bills of Attainder, 4 Vand. L. Rev. 603, 608 (1951); Note, Punishment: Its Meaning in Relation to Separation of Power and Substantive Constitutional Restrictions and Its Use in the Lovett,

" Trop, Perez, and Speiser Cases. 34 Ind. L.J. 231, 249-253 (1959); Comment, The Communistic Control Act of 1954, 64 Yale L.J. 712, 723 (1955)."

In the instant case, the banishment and exile proposed to be inflicted upon appellant constitutes a deprivation of the rights and immunities of citizenship guaranteed him by the Constitution and the Bill of Rights. On this subject, the Supreme Court in the Mendoza-Martinez and Cort cases, *supra*, noted:

" A number of state court judicial decisions rendered shortly after the Civil War lend impressive support to the conclusion that the predecessor of Sec't. 401 (j) and 349 (a) (10), Title 21 of 1865 statute, was a criminal statute imposing an additional punishment for desertion and draft evasion. The first and most important of these was Huber vs. Reilly, 53 Penn. St. 112, (1866), in which, as in most of the cases which followed, the plaintiff had brought an action against the election judge of his home township alleging that the defendant had refused to receive his ballot on the ground that plaintiff was a deserter and thereby disenfranchised under Sec't. 21, and that such refusal was wrongful because Sec't. 21 was unconstitutional. The asserted grounds of invalidity were that Sec't. 21 was an *ex poste facto* law, that it was an attempt by Congress to regulate suffrage in the States and therefore outside Congress' sphere of power, and that it proposed to

" inflict pains and penalties without a trial and conviction, and was therefore prohibited by the Bill of Rights. (Emphasis added.) In an opinion by Justice Strong, later a member of this Court, the Pennsylvania Supreme Court first characterized the statute in a way which compelled discussion of the asserted grounds of unconstitutionality:

' The Act of Congress is highly penal. It imposes forfeiture of citizenship and deprivation of the rights of citizenship (emphasis added) as penalties for the commission of a crime. Its avowed purpose is to add to the penalties which the law had previously affixed to the offence of desertion from the military or naval service of the United States, and it dominates the additional sanctions provided as penalties.'" (53 Penn. St., at 114-115.)

CONCLUSION

Appellant submits that the order complained of herein, said order entitled Order Granting Conditional Termination, Case No. 2321, issued and executed on the 21st day of August, 1963, the sole stipulation and condition thereof being ' that the said Paul Mansell will thereafter immediately depart from the State of Utah and that if he should ever again enter the State of

Utah for any reason whatsoever....said Paul Mansell will be subject to arrest and imprisonment in the Utah State Prison to serve the remainder of his term ' constitutes unlawful banishment and exile from the State of Utah; that said banishment and exile from the State of Utah constitutes cruel and unusual punishment within the rule laid down by the United States Supreme Court in the Mendoza-Martinez and Cort cases, supra; and, further, that the act of the Utah State Board of Pardons imposing said banishment and exile upon appellant unlawfully seeks to add to the penalty lawfully imposed upon appellant for the crime of Second Degree Burglary without affording him the due process of law demanded by our Constitutions.

WHEREFORE, on grounds and lawful reasons hereinbefore submitted, appellant prays for an Order from this Court to issue reversing the order of the lower court denying his petition for the writ of habeas corpus and, further, for an Order directing his discharge from the custody of the respondent forthwith.

Respectfully submitted,

PAUL MANSELL, Appellant,
Prop. Per.