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

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

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PAUL MANSELL,

Plaintiff and Appellant,

vs.

WARDEN JOHN W. TURNER,

Defendant and Respondent.

Supreme Court, Utah

Case No. 9891

BRIEF OF RESPONDENT

Appeal from the Judgment of the
Third District Court for Salt Lake County
Hon. Marcellus K. Snow

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IN THE SUPREME COURT
of the
STATE OF UTAH

PAUL MANSELL,

Plaintiff and Appellant,

vs.

WARDEN JOHN W. TURNER,

Defendant and Respondent.

} Case No. 9891

BRIEF OF RESPONDENT

STATEMENT OF NATURE OF CASE

The instant appeal is from a denial of appellant's petition for habeas corpus seeking his release from the Utah State Prison after being recommitted by the Board of Pardons when the appellant failed to comply with the terms of his conditional release.

DISPOSITION IN LOWER COURT

On October 16, 1962, the appellant filed his petition for a writ of habeas corpus in the Third Judicial District Court, Salt Lake County. On January 4, 1963, a return on the writ was filed, and on January 16, 1963, a hearing was held before the Honorable Marcellus K. Snow on the appellant's

petition. On February 5, 1963, the trial court entered findings of fact and conclusions of law based on the hearing, and further entered its order denying the appellant's petition for habeas corpus. On February 26, 1963, appellant filed notice of appeal from the trial court's decision

RELIEF SOUGHT ON APPEAL

The respondent submits that the decision of the trial court should be affirmed.

STATEMENT OF FACTS

The respondent submits the following statement of facts in supplement to those set out in the appellant's brief.

The appellant is presently confined in the Utah State Prison for the crime of second degree burglary. On August 21, 1962, the appellant was granted a conditional termination from his sentence, and released from the Utah State Prison by the State Board of Pardons upon condition that the appellant "immediately depart from the State of Utah." The termination order further provided "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 sentence." (T. 7). At the hearing before the Utah State Board of Pardons, prior to appellant's release, appellant requested super-

vised parole; however, the Board of Pardons rejected the appellant's request and afforded him an opportunity to accept a conditional termination upon the above mentioned condition. (T. 16, 17). Appellant accepted the termination and signed the order of termination, which provided:

"I, Paul Mansell, Hereby certify that I have read and understand the above Order of Conditional Termination and the legal import thereof has been explained to me. I agree to abide by this conditional termination and do so of my own free will."

The trial court found that the appellant accepted the conditional termination "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 custody of the Warden of the Utah State Prison for an additional period of time." (T. 17).

After being released, the appellant failed to leave the State of Utah. The trial court found that appellant had no intention of leaving the State although he had adequate means and opportunity to leave. (T. 17). Subsequent to his release, information was communicated to the Board of Pardons that appellant was consorting with ex-convicts and was in some other difficulties. (T. 17).

The appellant was arrested on August 30, 1962 by the Board of Pardons and remanded to the custody of the Warden of the Utah State Prison to

serve an additional year on his sentence of second degree burglary. The arrest was on the basis that appellant had violated the terms of his conditional release by failing to leave Utah and having no intention of leaving. (T. 17).

The trial court further found that the petitioner was a resident of Mississippi and that there was not a parole compact nor prisoner transfer agreement between Utah and Mississippi. (T. 17). The appellant had been previously convicted of a felony in Kentucky, and had been in difficulty in Wyoming and also while in the Armed Forces; but appellant had no difficulty while residing in Mississippi with his family. (T. 18).

The trial court ruled that the Board of Pardons' conditional termination of appellant was a legal and proper condition and exercise of the executive pardon and parole power, and that the appellant's recommitment for violation of the terms of his conditional release was warranted. (T. 18). The court also found that even if the Board of Pardons had acted in excess of its powers, the whole order of release was void and the appellant would still be lawfully in the custody of the Warden until expiration of his sentence or release. (T. 18).

ARGUMENT

POINT I.

THE CONDITIONAL RELEASE OF APPELLANT BY THE BOARD OF PARDONS FROM HIS TERM OF IMPRISONMENT UPON CONDITION THAT HE LEAVE UTAH AND NEVER RETURN IS A VALID CONDITION, NOT VIOLATING THE CONSTITUTIONS OF THE STATE OF UTAH OR THE UNITED STATES.

The Board of Pardons is a constitutionally established body with the power to exercise the pardon power that is exercised by the executive branch of government. Article VII, Section 12, Utah Constitution, provides that the Board of Pardons may:

“ * * * upon such conditions, and with such limitations and restrictions as they deem proper, may remit fines and forfeitures, commute punishments, and grant pardons after convictions, in all cases except treason and impeachments, subject to such regulations as may be provided by law, relative to the manner of applying for pardons; but no fine or forfeiture shall be remitted, and no commutation or pardon granted, except after a full hearing before the Board, in open session, after previous notice on the time and place of such hearing has been given. * * * ” (Emphasis is added.)

The Legislature has implemented the constitutional provision by statute. 77-62-3, U.C.A. 1953, provides:

“I shall be the duty of the board of pardons to determine by majority decision, when and under what **conditions, subject to the provisions of this act, persons now or hereafter serving sentences, in all cases except treason or impeachments, in the penal or correctional institutions of this state, may be released upon**

parole, pardoned, or may have their fines or forfeitures remitted, or their sentences commuted or terminated; * * *."

77-62-7, U.C.A. 1953, provides in its relevant part:

"* * * 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.**" (Emphasis added.)

77-62-15, U.C.A. 1953, provides:

"When the board of pardons shall release a prisoner on parole it shall specify in writing the **conditions of the parole**, and a certificate of parole setting forth such conditions shall be given to the parolee and shall be accepted and agreed to by him as evidenced by his signature affixed to a duplicate copy to be retained in the files of said board."

In the instant case the appellant's release was conditional. Whether a parole (unmentioned in the Constitution) or commutation or pardon, the Board of Pardons, by Article VII, Section 12, is empowered to attach what conditions and limitations as they deem proper. Article VII, Section 12. The conditional termination, parole, or pardon all emanate from the power of the executive to relieve a prisoner from the restraints imposed by the sovereign. 39 Am. Jur., Pardon, Reprieve and Amnesty, Secs. 2, 4, 5, 81 and 83. In **Cardisco v. Davis**, 91 Utah 323, 64 P. 2d 216 (1937), this court noted:

“The power to parole prisoners is included within the power to ‘remit fines and forfeitures, commute punishments, and grant pardons.’”

In the Cardisco case, the court recognized that the Board of Pardons has wide discretion to determine the conditions of imprisonment and pardon, and that the limitations upon the Board are only those limitations generally imposed by the constitutions of both the State, and where applicable, the Federal Government. Historically, conditions associated with the pardon power are limited only in that they may not be “illegal, immoral or impossible of performance.” In **Re McKinney**, 33 Del. 434, 436, 138 Atl. 649 (1927); **Guy v. Utecht**, 216 Minn. 255, 12 N.W.2d 753 (1943); 5 Utah L. Rev. 365, 370 (1957). This is merely another means of noting that the conditions of executive clemency may not exceed proper limitations. A person on parole is in the status of a prisoner. In **McCoy v. Harris**, 108 Utah 407, 160 P.2d 721 (1945), this court noted:

“From the above provisions, it is clear that a parole is in the nature of a grant of partial liberty or a lessening of restrictions to a convicted prisoner. Granting of a parole does not change the status of a prisoner; it merely ‘pushes back the prison walls’ and allows him the wider freedom of movement while serving his sentence. The paroled prisoner is legally in custody the same as the prisoner allowed the liberty of the prison yard, or of working on the prison farm. The realm in which he serves has been extended.

He is in the custody of the state and serving his sentence outside of the prison rather than within the walls. The parole system is reformatory and founded upon a plan and policy of helping the inmate to gain strength and resistance to temptation, to build up his self control, to adjust his attitudes and actions to social controls and standards; and it aims to extend his liberties and opportunities for normal living within the social fabric as his strength to meet new responsibilities grows and develops."

* * *

In the case of a parolee, the judgment is a sentence and commitment. The legal position conferred upon the party by such judgment is the obligation to serve the designated term in prison. Until that sentence is terminated, the judgment committing him to the custody of the prison authorities is still in effect. The additional liberty conferred by the parole is a result of action by the Board of Pardons, an administrative body. The parolee is still in custodia legis, and under the control of the State Board, though outside prison walls. * * *

The same is equally true of a conditional termination which is merely a parole with limited condition. 5 Utah L. Rev. 365, 373 (1957); Ops. Utah Att'y. Gen. 56-131 (1956). The question obviously is whether this condition imposed on a prisoner by executive authority is harmonious with the relevant constitutions. It is submitted that it is.

First, a distinction must be drawn between the

use of a condition like that imposed in a sentence as distinct from when such a condition is imposed by a pardoning authority. Thus, in 5 Utah L. Rev. 365, 369 (1957), it is noted:

“The most extensive use of banishment in this country has been by the executive branches of our state governments. This is frequently accomplished by granting a pardon on the condition that the convict leave the state. The courts which have considered the question are just as unanimous in upholding this practice as they are in denouncing the use of banishment in the form of a sentence. There has been but one case in which such a condition was held to be illegal and void, and it was subsequently disapproved.”

A similar conclusion was reached in an article in 111 Univ. of Pa. L. Rev. 758, 765 (1963), where the author comments:

“Judicial declarations invalidating banishment by courts do not purport to apply to executive pardon. The modern pardon power has been held to be analogous to that of the Kings of England and, therefore, almost absolute. Public policy places no limitations on the executive, who is usually not even required to state the reasons for his actions much less to justify them. Consequently, although banishment is uniformly condemned when connected with a judicial sentence, it is upheld with equal unanimity when attached as a condition to executive pardon.”

The general rule is noted also in 39 Am. Jur., Pardon, Reprieve, and Amnesty, Sec. 68:

“Some statutes authorize the governor to grant pardons on condition that the convicted person shall leave the state and never again return to it, but by the great weight of authority, even in the absence of any statute, such condition is valid, as is a condition requiring the prisoner to leave the United States and not return. * * *”

See also 60 ALR 1410, 1415.

The appellant has cited decisions from two states holding such conditions, when imposed by the judiciary as part of a sentence, illegal.¹ However, the courts of both states have upheld such conditions imposed incident to executive clemency. In *In Re Cammarata's Petition*, 341 Mich. 528, 67 N.W.2d 677 (1954), Cert. Den. 349 U.S. 953, the petitioner sought release from imprisonment on the grounds that his recommitment to prison was illegal. His imprisonment had been terminated by the Michigan Commissioner of Pardons and Paroles upon condition that he leave the United States and never return. The petitioner did return and was reimprisoned. The Michigan Supreme Court held the petitioner's rearrest and commitment proper, and the condition valid. The court first ruled the action of the Board of Pardons was proper under a similar Michigan constitutional provision² to that of Utah's.³ The court held that

¹ *Michigan v. Eva Baum*, 251 Mich. 187, 231 N.W. 95; *State v. Baker*, 58 S.C. 111, 36 S.E. 501.

² Art. VI, Sec. 9, Mich. Const.

³ Art. VII, Sec. 12, Utah Const.

reasonable conditions could be set on pardons and paroles. The court said:

“It is generally held that a condition that the convict leave the state and never return is a valid condition. (Citing authority).

It has also been held that a condition requiring the prisoner to leave the United States and not return is a valid condition. (Citing authority).

In our opinion the condition attached to petitioner’s commutation of sentence was valid.”

The South Carolina courts have also so ruled. **State v. Fuller**, 1 **McCord**, 178, 12 S.C. Law 178 (1821); **State v. Smith**, 1 **Bailey** 283, 17 S.C. Law 283 (1829); **State v. Addington**, 2 **Bailey** 516, 18 S.C. Law 516; **State v. Barnes**, 32 S.C. 14, 10 S.E. 611 (1890). These are not the only jurisdictions that have considered the matter.

In **People v. Potter**, 1 **Edm. Sel. Cas.** 235 (N.Y. 1846), the defendant was convicted of grand larceny and thereafter pardoned upon condition that he leave the United States and never return. He was thereafter found in Louisiana and reimprisoned. The court considered that authority for such a condition and noted substantial English precedent supporting similar conditions. The court commented:

“Banishment was first known in England as abjuration, where the party accused fled to a sanctuary, confessed his crime, and took

an oath to leave the kingdom and not return without permission. (4 Bl. Com. 333; 3 P. Williams, 37.) **This was not as a punishment, but as a condition of pardon.** After abjuration was abolished, and about the reign of Charles II., it became usual to grant pardons on condition of banishment, and that the original sentence should be revived on a violation of the stipulations of its remission. (Kel. pre. 4; Williams, J. Felony, VI.; 1 Ch. Cr. 789.) And it was usual to bind the criminal as an apprentice, and both he and his master were liable to severe penalties on his return. Afterward the performance of the stipulation of banishment was enforced by requiring security from him that he would leave the country, and finally the practice settled down to that adopted in this case, namely, that of granting pardons on condition, and enforcing the condition by inflicting the original sentence upon the party, in case of violation.

It seems then that the practice of granting conditional pardons is sustained by the principles of the common law which we have adopted as the law of the land; by the practice of the country whose institution in this regard we have borrowed in totidem verbis; by the provisions of the Constitutions of the United States, and of most of the States of the Union; by the decisions of the courts of the United States, and of our own State, and of other States in the Union; by the enactments of our statute for over half a century, and by the practice of our executive since the formation of our government.

* * *

I ought not to dismiss this part of the

case without noticing an objection which was pressed upon me with much earnestness, to wit, that, banishment being a punishment unknown to our law, the imposition of it as a condition of the pardon was in violation of that provision of our bill of rights which forbids the infliction of cruel or unusual punishments. (1 R.S. 94, 17.)

There is no doubt that any immoral, impossible or illegal condition would be void. This is a principle of the common law well established (Com. Dig. Titl Condition, D; Pease's case, 3 John. Ca. 333; Watson's case, 9 Ad. & Ell. 731.)

“And the general language of the statute, that the governor may grant pardons ‘upon such conditions, and with such restrictions, and under such limitations as he may think proper,’ is to be taken subject to this principle. His conditions must not be immoral, impossible or illegal. No authority to impose such conditions has been or could be conferred upon him by the statute. Therefore the argument of the prisoner's counsel, drawn from the general language of the statute, that it was void because it authorized the governor to impose unusual or cruel punishments, necessarily falls to the ground. These barbarous practices are impliedly excluded from the enactment unless it should actually express them. (Pr Ld. Denman. 9 A. & E. 783.)

No principle is better established than this, that statutes must be so construed that all their parts, when in *pari materia*, shall be allowed to operate, and the effect of that rule on these statutes is simply that the gov-

ernor may grant a pardon on a condition which does not subject the prisoner to an unusual or cruel punishment. Banishment is neither. It is sanctioned by authority, and has been inflicted, in this form, from the foundation of our government. * * *

Thus the court noted the power was exercised not as punishment, but attendant to the executive authority - a conditional act of grace. **United States v. Wilson**, 32 U.S. (7 Pet.) 149, 160 (1833). In **Cooper v. Telfair**, 4 U.S. (4 Dall) 14 (1800), the United States Supreme Court passed upon a Georgia treason statute. Justice Paterson, in upholding the statute, noted:

“But the power of confiscation and banishment does not belong to the judicial authority, whose process could not reach the offenders; and yet, **it is a power that grows out of the very nature of the social compact, which must reside somewhere, and which is so inherent in the legislature, that it cannot be divested or transferred, without an express provision of the constitution.**” (Emphasis added.)

Thus the Supreme Court, speaking shortly after the adoption of the Constitution and the first ten amendments, found nothing wrong with such power as was exercised in the instant case, and felt it so inherent as to require express rejection before being deemed illegal. Thus, historically, courts have felt that the use of such conditional termination, as is present here, is proper. 111 Univ.

Pa. L. Rev. 758, 768 (1963).⁴ **Ex Parte Marks**, 64 Cal. 29, 28 Pac. 109 (1883); **Pippin v. Johnson**, 192 Ga. 450, 15 S.E.2d 712 (1941); **Ex Parte Lockhart**, 12 Ohio Dec. Rep. 515 (1855); **Commonwealth v. Haggerty**, 4 Brewster 326 (Pa. 1869); **Flavell's Case** 8 W & S 197 (Pa. 1844); **State ex rel Davis v. Hunter**, 124 Iowa 569, 100 N.W. 510 (1904); **State ex rel O'Connor v. Wolfer**, 53 Minn. 135, 54 N.W. 1065 (1893).

In **Ex Parte Hawkins**, 61 Ark. 321, 33 S.W. 106 (1895), the accused sought discharge by habeas corpus after being committed for violation of a conditional pardon requiring that he leave Arkansas and not return. The Arkansas Constitution prohibited exile. Even so, the Arkansas Supreme Court held the condition properly within the power of the executive. It noted:

“* * * When a citizen of another state or country commits a crime in this state, it might, under some circumstances, be to the best interest of all concerned that a pardon be granted on condition that he leave the state and never return. One can readily conceive of other instances when, to prevent the possibility of future strife between the convicted person and those against whose persons or property he had committed a crime, it would be proper to impose this as a condition of the pardon. We think the constitution

⁴“* * * most courts have summarily dismissed the idea that banishment might be cruel and unusual.” 111 Univ. Pa. L. Rev. 758, 777 (1963).

does not deprive the governor of the power to grant pardons on such conditions. * * *

More recently in **Kavalin v. White**, 44 F. 2d 49 (10th Cir. 1930), the Federal Court affirmed a similar conditional release, where the exclusion was from the United States. The court noted:

Petitioner further contends that the condition annexed to such pardon was illegal and that the pardon was absolute * * *. The power to grant a pardon includes the lesser power to grant a conditional pardon. The condition may be either precedent or subsequent * * *. The condition imposed may be of any nature, so long as it is not illegal, immoral or impossible of performance * * *. The condition that the person pardoned shall depart from and remain without the state is not illegal."

The Tenth Circuit has most recently reaffirmed this position. **Vitale v. Hunter**, 206 F.2d 826 (10th Cir. 1953). The Oklahoma Criminal Court of Appeals in **Ex Parte Sherman**, 159 P.2d 755 (Okla. 1945) upheld a conditional termination of a prisoner's sentence where it required he leave Oklahoma and never return. In **Ex Parte Snyder**, 159 P.2d 752 (Okla. 1945), a similar condition was approved. The court noted:

"* * * In the instant case, there was no involuntary transportation of the petitioner out of the State. The parole, with all of the conditions set forth therein, was a matter which the petitioner could accept or reject. He gave his written acceptance and, pursuant to its terms, voluntarily left the State.

In 39 Am. Jur. 576, Section 89, it is stated:

‘It is a well-established rule that a parole must be accepted by the convict before it becomes effective to secure to him his liberty; that is, it is for him to elect whether he will accept the parole with its conditions or reject it and remain in prison.’

The authorities from other jurisdictions seem to hold that a condition inserted in a pardon or parole that the convict shall leave the state and never return is good. * * *’

It seems clear that the judicial authorities that have considered the issue here presented have unan-
imously affirmed conditions the same as or similar to those imposed in the instant case. An analysis of their reasoning, and the reasoning favoring such action supports such use.

First, historically there has been no objection to the use of exclusionary conditional releases or pardons. Consequently, they could not have been considered to be contrary to state or federal constitutional provisions. **Cooper v. Telfair**, 4 U.S. (4 Dall) 14 (1800); **State v. Fuller**, 1 McCord, 178, 12 S.C. Law 178 (1812); **United States v. Wilson**, 32 U.S. (7 Pet) 149 (1833).

Secondly, such conditions have not been deemed cruel or unusual, **People v. Hotter**, 1 Edm. Sel Cas. 235 (N.Y. 1846). Cases subsequent to the Fourteenth Amendment have also so held. See especially **Legarda v. Valdez**, 1 Philippine 146 (1902), rejecting the con-

cept that such activity is cruel or unusual, See also **State v. Woodward**, 68 W. Va. 66, 69 S.E. 385 (1910); **Ex Parte Sheehan**, 100 Mont. 244, 49 P.2d 438. Indeed, it is difficult to see how such a condition could be deemed a punishment. The normal penal restraints are lifted and the prisoner set free. As far as restrictions on his liberty are concerned, he is in an improved position. Secondly, the purposes of such action are manifold, and not connected with punishment. A pardon authority may be motivated by limited custodial or parole staff; a belief that removal from the criminal environment which resulted in confinement would be appropriate, **Ex Parte Hawkins**, 61 Ark. 321, 33 S.W. 106 (1895); a feeling that the community is thereby better protected; simple incapacitation⁵; and a recognition that such remedial exclusion may motivate changes away from criminal habits. All of these are factors which are more likely to motivate a pardons authority than retribution.⁶

Third, it is generally recognized that if the restriction on an individual's liberty has some reasonable relationship to a proper governmental pursuit, then it is proper. The State in the instant case is exercising a reasonable function of its police power. Appellant has cited in his brief cases which indicate that there is a right of a citizen

⁵ Sterilization is nothing more. 64-10-1, U.C.A. 1953; *Skinner v. Oklahoma*, 316 U.S. 535.

⁶ Cf. 111 Univ. Pa. L. Rev. 758 (1963). The assumption that retribution is the motive is hardly supportable.

to travel uninhibited by State restrictions. However, these cases are not applicable to the instant situation. In **Edwards v. California**, 314 U.S. 160 (1941), the California anti-migrant statute was held unconstitutional, but only because of a violation of the commerce clause. If appellant's argument were valid, that he has an absolute right to travel, pardon or parole restrictions prohibiting a prisoner from leaving a state, or going into certain areas, i.e., bars, brothels, casinos, would also be illegal. The case of **Crandall v. Nevada**, 73 U.S. (6 Wall) 35 (1868), striking down Nevada's tax on persons leaving the state, is equally inapplicable. See **Williams v. Fears**, 179 U.S. 270 (1900).

Courts have consistently recognized the right, pursuant to the police power of a state to impose reasonable restrictions on travel or activity. In **Ex Parte Brown**, 243 S.W.2d 167 (Tex. Crim. App. 1951) a conditional release upon condition that a person enter the Armed Services was upheld, even though such condition would obviously inhibit a convict's liberty of travel or action. In **Huff v. Aldredge**, 192 Ga. 12, 14 S.E.2d 456 (1941), a condition that the individual join the C.C.C. was allowed as proper. If as this court noted in the case of **McCoy v. Harris**, 108 Utah 407, 160 P.2d 721 (1945), parole conditions do not change the fact that a convict is still a prisoner, it is equally true that a conditional release does not change a prisoner's status. Since restrictions on liberty and movement are

inherent in and indigenous to a prisoner-sovereign relationship, a restriction conditioned as the instant one was, is proper. Indeed, Congress has itself passed many laws restricting the right of travel, i.e. fugitive felon law, passports laws. In exercise of the war power, the Supreme Court of the United States has upheld detention and relocation of segments of the citizenry. **Korgmatsu v. United States**, 323 U.S. 214 (1944); **Hirabayashi v. United States**, 320 U.S. 81 (1943). In 111 Univ. of Pa. L. Rev. 758, 774 (1963), the author notes the limitations on the right to travel argument:

“This argument, however, may go too far. Of chief concern is the possible effect of such a doctrine on useful restrictions analogous to parole. For instance, the administration of the Interstate Compact might be affected. Any program limiting the right to travel would seem to be jeopardized regardless of penological considerations. If an attempt were made to protect the parole system on the ground that the right to travel is no more applicable to a parolee than to an imprisoned convict, the same reasoning could be applied to a banished convict. * * *”

If there is a reasonable relationship between the powers properly exercised by the sovereign and any restrictions on individual liberty, i.e. travel, etc., the restrictions are proper. In **Shachtman v. Dulles**, 225 F.2d 938 (1955), the court noted in a passport application case:

“The right to travel, to go from place

to place as the means of transportation permit is a natural right **subject to the rights of others and to reasonable regulation under law.**" (Emphasis added.)

See also **Worthy v. Herter**, 270 F.2d 905 (D.C. Cir. 1959) and **Porter v. Herter**, 278 F.2d 280 (D.C. Cr. 1960), upholding executive restrictions incident to the power to control foreign relations and compare it with the reasoning in **Ex Parte Hawkins**, 61 Ark. 321, 33 S.W. 106 (1895), upholding the same power incident to executive police power. Conditional pardon has a reasonable basis, incapacitation, rehabilitation, see **Biddle v. Perovich**, 274 U.S. 480 (1927), environmental change, and community protection, all historically recognized, and logically proper.

With the obvious legal support⁷ as well as practical application by the Board of Pardons, it is difficult to see on what basis it could now be claimed that the conditional procedure imposed here would violate constitutional guarantees.

In the instant case where the petitioner had been in difficulty in Utah, where his immediate environment on release was such that he would be in trouble, and where parole supervision in his home state was impossible, it is not unreasonable for the Board to have pursued the remedy they did. In the absence of a contrary showing, it must be

⁷ In addition to case law the Utah Attorney General ruled that such action of the Board of Pardons was proper. Ops. Utah Att'y Gen. 56-131 (1956).

presumed they acted reasonably. The appellant could have rejected the condition, and although the bargaining position of appellant was not equal with that of the Board of Pardons, inequality of bargaining position occurs daily, but is no grounds to avoid a contract, absent fraud or duress, which is not present here. **Ex Parte Snyder**, 159 P.2d 752 (Okla. 1945).

Finally, appellant relies upon a recent United States Supreme Court case, **Kennedy v. Mendoza-Martinez**, Oct. Term, 1962, Nos. 2 & 3, where the Supreme Court struck down the forfeiture of citizenship where an individual left the country to avoid military service. The court did not hold that expatriation wasn't a proper sanction in an appropriate case, quite to the contrary, Sec. 401 (j) of the Nationality Act of 1940 was declared unconstitutional because the procedural requirements leading up to expatriation did not satisfy procedural due process of law. The court stated:

“We hold §§ 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. * * *”

It further implied that once procedural safeguards were met, expatriation would be proper, p. 39:

“* * * Our conclusion from the legislative

and judicial history is, therefore, that Congress in these sections decreed an additional punishment for the crime of draft avoidance in the special category of cases wherein the evader leaves the country. It cannot do this without providing the safeguards which must attend a criminal prosecution."

The Supreme Court has previously recognized that expatriation may be a proper remedy, where a person votes in a foreign election, **Perez v. Brownell**, 356 U.S. 44 (1958), and implied it to be a proper sanction for voluntarily enlisting in a foreign military force. **Nishikawu v. Dulles**, 356 U.S. 129 (1958). Expatriation, if punishment, may be excessive in some instances, **Trap v. Dulles**, 356 U.S. 86 (1958); however, the conditional release is not punishment, but control, and if reasonable under the circumstances, is clearly not cruel or unusual punishment. **Legarda v. Valdez**, 1 Philippine 146 (1902).

The instant case involves no claim of expatriation. Citizenship still is afforded appellant, he has not been deprived of all civil rights; only a limitation attendant to his past conduct and directed towards possible future conduct is imposed against him.

It must be concluded that there is no basis to appellant's claim that his constitutional rights have been infringed, or that the Board of Pardons imposed unconstitutional conditions upon him.

POINT II.

EVEN IF APPELLANT'S CONDITIONAL RELEASE WAS IMPROPER, HE MAY NOT OBTAIN RELEASE BY HABEAS CORPUS.

The trial court ruled that even if the appellant's conditional release, upon condition that he leave the state, were illegal, the order of the Board of Pardons would be null and void in total, and he would, therefore, still be legally held under his original commitment. It is submitted the trial court ruled correctly.

Whether an unconstitutional exception or condition in a statute voids the whole statute depends upon whether it is such a material provision of that statute that it is inseparable from the essential content of the statute, such that, but for such exception or condition, the Legislature would not have passed the act. **Smith v. Carbon County**, 95 Utah 340, 81 P.2d 370 (1938); Sutherland, Statutory Construction, Sec. 2403. It is submitted a similar construction should be applied in determining the conditions applied to parole or termination by the Board of Pardons. Instruments of pardon are subject to rules of construction applied to instruments and contracts in general, 67 C.J.S., Pardons, Sec. 11. It is a general rule of contract law that if a condition in a contract is void, and if that condition is essential to the very heart of the contract and inseparable therefrom, that the whole contract is void. It is submitted that applying the above rules

of construction to the order of the Board of Pardons in this case, that if the condition of release is void, the whole order is void. It is obvious that where the Board of Pardons refused a more controlled parole and offered the appellant conditional release or nothing, that if the Board had felt the condition void, it would not have released the appellant. Consequently, habeas corpus will not lie to release the appellant since the order of the Board of Pardons, if the condition of release is void, is itself void and appellant is still imprisoned on his original commitment.

CONCLUSION

Appellant's contentions, when examined in the light of previous judicial declarations, and the obvious motivations of the Board of Pardons, provide no basis for a claim that the Board of Pardons exceeded the limits of its constitutional powers. Even so, appellant would have no basis for relief by habeas corpus.

It is submitted the judgment of the trial court should be affirmed.

Respectfully submitted

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