1963

State of Utah v. Eugene Thorpe Bassett, Arthur Jerome Phillips and William D. Morrell : Brief of Appellants

Utah Supreme Court

A. Pratt Kesler; Ronald N. Boyce; Attorneys for Respondent;
Verl R. Topham; Stephen M. Hadley; Attorneys for Appellants;

OF THE STATE OF UTAH

te of Utah,

Plaintiff-Respondent,

v.

No. 9918

ene Thorpe Bassett,
hur Jerome Phillips
William D. Morrell,

Defendants-Appellants.

APPELLANTS' BRIEF

Appeal from the Judgment of the
3rd District Court for Salt Lake County
Hon. Marcellus K. Snow, Judge.

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STATEMENT OF CASE

Each of the defendants was charged with attempting to escape from the Utah State Prison and with assault on a guard. (R 2-3) The three defendants were tried together in a single case and each was found guilty of attempting to escape from the Utah State Prison, and each was found not guilty of the charge of assault upon a prison guard. Each of them was subsequently sentenced, for a term of not more than ten years, and recommitted to the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Defendants and each of them seek reversal of the judgment and sentence imposed in connection with the charge of attempting to escape from the Utah State Prison.

STATEMENT OF FACTS

On the 28th day of June, 1962, the three defendants were inmates of the Utah State

Prison, each having been sentenced to serve a term of five years to life in said prison upon prior convictions for the crime of robbery. (TR 63) Defendant Eugene Bassett had been given an expiration of sentence, which means he would definitely serve a life term. (TR 63) On the above date the alleged attempted escape took place. The defendants were found in an unauthorized area outside of the prison compound, but on prison property.

No useful purpose would be served by burdening the Court with the detail of the evidence presented to support the charges as it would have no bearing on the appeal. The evidence on the attempt to escape was essentially without dispute inasmuch as none of the defendants chose to testify in his own defense and the only witness called by the defendants testified primarily concerning the assault charge, on which all defendants were acquitted.

ARGUMENT

POINT I. AN INDETERMINATE SENTENCE IS A SENTENCE FOR THE MAXIMUM PERIOD, OR IN THIS CASE A SENTENCE FOR LIFE.

Each of the defendants here was serving an indeterminate sentence of five years to life at the time of their attempted escape. Section 76-50-2, U.C.A. 1953, the statute under which they were tried, is not applicable to them, as it specifically applies to individuals serving a term less than life.

In the case of Mutart v. Pratt, 51 Ut. 246, 170 Pac. 67, the petitioner had entered a plea of guilty to the offense of attempted robbery and had been sentenced to be "confined in the state prison in and for the State of Utah for a period of nine months." After serving nine months, the prisoner filed a writ of habeas corpus for a

release, and the warden claimed he could retain custody under the indeterminate sentence law. The petitioner attacked the indeterminate sentence law on grounds that it deprived the trial judge of judicial discretion to determine the length of the sentence. The court, in holding that the act did not deprive the court of any power or authority guaranteed by the constitution, stated:

> Neither is the sentence to be imposed under this act /indeterminate sentence act/ left in doubt as to its duration. It is, in effect, a sentence for the maximum period fixed by law subject to the rights to have the sentence reduced or terminated at an earlier date under rules established by the board of pardons, a body created by the constitution for that very purpose.

A holding to the same effect is found in State v. Empey, 65 Ut. 609, 239 Pac. 25. The defendant contended, inter alia, that a sentence to the county jail, "not exceeding one year," was erroneous. The

court held the contention was untenable and stated:

> The sentence imposed cannot be construed otherwise than as a sentence for one year. Such a sentence is entirely legal. True, it may be commuted by the Board of Pardons on application of defendant at any time before the year has expired, but unless so commuted the defendant must serve the time provided in the statute and as fixed in the sentence.

Just as the sentence in the Empey case could not be construed otherwise than as a sentence for one year, neither can the sentence under consideration be construed otherwise than as a sentence for life.

The case of Lee Lim v. Davis, 75 Ut. 245, 284 Pac. 323, has application here also. The prisoner had been sentenced previously under a plea of guilty to second degree murder to an indeterminate term of ten years to life. A statute expressly provided that the indeterminate sentence law

did not apply to cases of murder. Therefore, the defendant contended that he should have been given a definite sentence. It was the contention of the warden that, inasmuch as the statute fixed the minimum at ten years, the sentence was valid to that extent. The court rejected the contention of the warden and stated:

> In addition thereto such a contention seems to misapprehend the extent of an indeterminate sentence. The statute provides that such a sentence "shall continue in full force and effect until the maximum period has been reached, unless sooner terminated by the board of pardons." An indeterminate sentence is in law a sentence for the maximum prescribed by law for the particular offense committed, subject to the provisions of the statute that it may be sooner terminated by the board of pardons. (Emphasis added.)

There is no doubt that the status of the law in Utah on the point here contended is that an indeterminate sentence is a sentence for the maximum period designated.

Utah does not stand alone in this position. In Ex Parte Lee, 177 Cal. 690, 171 Pac. 958, the defendant had been convicted of manslaughter and sentenced to an indeterminate sentence under the California laws for a term of one to ten years. The constitutional questions were raised of a violation of separation of powers and of a deprivation of judicial discretion. The court, after noting the purpose of the indeterminate sentence law, stated:

> It has uniformly been held that the indeterminate sentence is in legal effect a sentence for the maximum term. It is on this basis that such sentences have been held to be certain and definite and therefore not void for uncertainty. State v. Perkins, 143 Iowa, 55, 60, 120 N.W. 62, 21 L.R.A. (N.W.) 931; 20 Ann Cas. 1217, and cases there cited; State v. Tyree, 70 Kan. 203, 209, 78 Pac. 525, 3 Ann Cas. 1020; Woods v. State, 130 Tenn. 100, 113, 169 S.W. 558, L.R.A. 1915F, 531; Commonwealth v. Kalek, 239 Pa. 533, 87 Atl. 61, and cases there cited.

If it should be held that the sentence here in question is for a term of less than life, then such a sentence would be vague, ambiguous and unconstitutional because of uncertainty.

Another case in support of appellants' position, In Re Conditional Discharge of Convicts, 73 Vt. 414, 51 Atl. 10, 56 L.R.A. 658, states:

> Although such a sentence is in terms, indeterminate, it is, in law, for the maximum term; for until the expiration thereof a convict is in the custody of the law under his sentence, and in confinement unless he can be and is paroled by the board of prison commissioners, under the provisions of this act, after the expiration of the minimum term of his sentence. Oliver v. Oliver, 169 Mass. 592, 48 N.E. 843; Murphy v. Comm., 172 Mass. 264, 52 N.E. 505, 43 L.R.A. 154, 70 Amn St. Rep. 266.

From the foregoing cases it is evident that the courts are in harmony with the proposition here contended by appellants. Each of the defendants is serving a life sentence as a matter of law. The statute

under which they were tried is not applicable to them since it applies only to persons serving a term of less than life. To hold that they are serving a term of less than life, would make their sentence indefinite and, therefore, subject to constitutional attack for uncertainty.

By statutory rules of construction, each word and phrase must be given a meaning, and to hold as the lower court has so held would destroy the legislative intent and render meaningless the phrase "serving a term less than life."

The statute under which the defendants were convicted is 76-50-2, U.C.A. 1953, and reads as follows:

> 76-50-2. Escapes - By prisoners in state prison. --Every prisoner confined in the state prison for a term less than life, and every such prisoner, while in custody of the warden, deputy warden or any keeper or guard in any convict camp, or any other place where he may be at work or

> housed or kept while outside the state prison walls, who escapes or attempts to escape from such prison, convict camp or place of work, or from any keeper or guard, or from any other place where such prisoner may be kept, shall be imprisoned in the state prison for a term of not more than ten years; such second term of imprisonment to commence from the time he would otherwise have been discharged from said prison. An information filed under this section shall be filed in the county in which the alleged offense is committed, and the case shall be tried in such county, unless a change of venue is allowed as provided by law.

The obvious purpose of this section is to discourage escapes and to provide a punishment for those who attempt to escape by lengthening the time they will be required to serve in prison. That the legislature foresaw the problem which now confronts us is evident from the wording of the statute. Adding a few years to a life term is hardly a deterent. Under our indeterminate sentence law, a prisoner

serving an indeterminate sentence with a maximum of life can be released only at the discretion of the Board of Pardons, which Board releases only those men who show by their behavior while in prison that they are capable of returning to society. There being no need therefore to sentence a prisoner to a term for ten years following an indeterminate sentence with a maximum of life. The legislature has, in an attempt to save the state and its officers the time, trouble and expense of trying such prisoners and sentencing them to a term of not more than ten years for escape, provided that only prisoners serving terms less than life can be tried for escape and that "such second term of imprisonment /is/ to commence from the time he would otherwise have been discharged from said prison." A man serving a term of five years to life has

no time at which he would be discharged from prison and may be discharged only at the discretion of the Board of Pardons and any date of termination given him would be conditioned upon his good behavior and could be rescinded at any time by that Board.

CONCLUSION

The words of the statute are clear and unambiguous, the purpose and intent appear plain, the conclusion that these defendants were improperly charged is inescapable. Consistent with the weight of authority, the conviction and judgment entered herein should be reversed.

Respectfully submitted,

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