

1963

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

Utah Supreme Court

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IN THE SUPREME COURT

of the
STATE OF UTAH
FILED
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STATE OF UTAH,

Plaintiff-Respondent,

vs.

EUGENE THORPE BASSETT,
ARTHUR JEROME
PHILLIPS, and WILLIAM D.
MORRELL,*Defendants-Appellants.*

Clerk, Supreme Court, Utah

Case No. 9918

BRIEF OF RESPONDENT

Appeal from the Judgement of Conviction and
Sentence of the Third Judicial District Court
in and for Salt Lake County
Hon. Marcellus K. Snow, JudgeA. PRATT KESLER
Attorney GeneralRONALD N. BOYCE
Chief Assistant Attorney General
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EUGENE THORPE BASSETT,
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MORRELL,

Defendants-Appellants.

} Case No. 9918

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

The appellants were charged and convicted with attempting to escape from the Utah State Prison, and appeal from a judgment of guilty of the District Court of the Third Judicial District upon jury trial.

DISPOSITION IN LOWER COURT

The defendants were jointly tried in the Third District Court for Salt Lake County of the crime of attempted escape and of assault upon a prison guard. They were found not guilty of the crime of assault upon a prison guard but guilty of attempted escape.

RELIEF SOUGHT ON APPEAL

State contends that the conviction for attempted escape should be affirmed.

STATEMENT OF FACTS

The respondent adopts the Statement of Facts as set out in the appellant's brief, except submits the following additional supplement:

Appellants Arthur Jerome Phillips and William D. Morrell had both received dates for conditional termination by the State Board of Pardons to become effective on April 19, 1966. The order of the Board of Pardons terminating their sentences effective on the above-mentioned date was in effect at the time of their attempted escape. Appellant Eugene Thorpe Bassett had not been given any termination date, but was being held for expiration of sentence (R 63, 64). At the time of the attempted escape each appellant was confined in the State Prison pursuant to a sentence for the indeterminate period of five years to life for the crime of robbery (R-63).

ARGUMENT

POINT I.

THE APPELLANTS WERE NOT SERVING LIFE SENTENCES AT THE TIME OF THEIR ATTEMPTED ESCAPE WITHIN THE MEANING OF 76-50-2, UTAH CODE ANNOTATED 1953.

Each of the defendants in the instant case was serving an indeterminate sentence of five years

to life at the time of their attempted escape and their subsequent conviction for attempted escape, although two of the appellants, Arthur Jerome Phillips and William D. Morrell, had been given prospective termination dates by the State Board of Pardons. The appellants contend that, since several decisions of the Utah Supreme Court have held that a sentence for an indeterminate period, including life, is a sentence for the maximum term, they were, therefore, serving life sentences and could not be convicted of the crime of attempted escape. *Mutart v. Pratt*, 51 Utah 246, 170 P. 67; *Lee Lim v. Davis*, 75 Utah 245, 284 P. 323, 76 A.L.R. 460; *State v. Roberts*, 91 Utah 117, 63 P.2d 584; *Cardisco v. Davis*, 91 Utah 323, 64 P.2d 216.

Section 76-50-2, Utah Code Annotated 1953, provides:

“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 other-

wise 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."

This statute was enacted as part of the Laws of the State of Utah at the time of statehood. Revised Statutes 1898, Section 4114. At the time of its incorporation in 1898, it read as follows:

"Every prisoner confined in the state prison for a term less than for life, who escapes, or attempts to escape therefrom, is punishable by imprisonment in the state prison for a term not less than one year nor more than ten years; said second term of imprisonment to commence from the time he would have otherwise have been discharged from said prison."

The statute was amended in 1915, Laws of Utah 1915, Chapter 3, Section 1, to expand the circumstances when a convict's escape would be deemed escape from the prison to include convict camps and other places of confinement attendant to the State Prison. In addition, a clause was added relating to the procedural venue in such cases. No change was made in the provision relating to the type of person who was subject to conviction for escape at the time of the enactment of the provision relating to punishment for escape in 1898.

Robbery, the crime for which the appellants in

the instant case were confined, was punishable for a period of not less than three years nor for more than twenty years, at the time the escape statute was enacted. However, the indeterminate sentence law was not yet in effect. Offenses punishable by life imprisonment at the time were murder, Revised Statutes 1898, Section 4162, dueling, Revised Statutes 1898, Chapter 20, and rape, Revised Statutes 1898, Section 4217. These offenses were the only ones for which a trial judge could directly impose a maximum sentence of life imprisonment. In 1913 the Legislature passed the indeterminate sentence law, 77-35-20, U.C.A. 1953, and provided that it should become effective on May 12, 1919, Laws of Utah 1913, Chapter 100. This provided that the trial court would no longer make a specific sentence, but rather the sentence would be indeterminate, subject to the power of the Board of Pardons to determine the release date of the convict from the State Prison.

The essential question for determination by this court is whether the provision "term less than life" as used in 76-50-2, U.C.A. 1953, should encompass those crimes which have a maximum limit of life imprisonment but are actually indeterminate in nature. It is submitted that it should not. At the time of the enactment of the escape statute a specific term of imprisonment by the trial court for life was necessary before an individual was serving

a life sentence. The obvious intention of the Legislature was to make unnecessary the trial and punishment of individuals who were already under mandatory sentence for the rest of their lives. Such, however, is not the case with an individual who is serving an indeterminate sentence, for several reasons. First, as a practical matter, these individuals can be terminated at any time and usually are long before they die in prison. Secondly, the indeterminate sentence, although being subject to a maximum limit of life, is directed towards allowing the Board of Pardons substantial flexibility in treating the needs of any individual prisoner. Consequently, it is submitted that what the Legislature contemplated by the provision in the escape statute of a term less than life was that a life term be a specific term, and consequently that only individuals serving life sentences under first degree murder, dueling, kidnapping, etc., should be deemed as being individuals serving sentences of life imprisonment.

Conceding as above noted, that several Utah cases have said that an indeterminate sentence is a sentence to the maximum term, in *State v. Nemier*, 106 Utah 307, 148 P.2d 327, this court had occasion to consider whether or not an individual who was serving an indeterminate sentence for robbery from five years to life was serving a life sentence as that term was used in Section 103-7-12, U.C.A.

1943, which made an assault with a deadly weapon upon a guard subject to a mandatory death sentence. In that case this court noted that a person serving such indeterminate sentence was not serving a life sentence within the meaning of the substantive statute. The court stated:

“Our convict assault statute now 103-7-12, U.C.A. 1943, first appeared as Chapter 10, page 8, Laws of Utah 1909, it was prior to the enactment of the indeterminate sentence law, now Section 105-36-20, U.C.A. 1943, which first appeared as Chapter 100, page 192, Laws of Utah 1913. At that time the court was required in all cases to pass a definite sentence within the limits provided by the statute. Under the law as it then existed a person convicted of a crime carrying a minimum penalty of less than life and a maximum penalty of life, would not undergo a life sentence, unless the trial judge, in view of all of the facts and circumstances brought to his attention, pronounced a definite sentence of life imprisonment. Such cases were no doubt comparatively few. But under the indeterminate sentence law, except in murder and treason cases, the trial court cannot fix a definite term, but must pass sentence of imprisonment for a period of not less than the minimum and not more than the maximum provided by law. Thus if all persons serving a sentence, the maximum term of which is for life, are undergoing a life sentence under the convict assault statute, the number of persons coming within that statute was greatly enlarged by the enactment of the indeterminate sentence law. If, however, we take the other view,

that only such persons who are serving a definite life term are undergoing a life sentence, then all cases under the indeterminate sentence which carries a minimum of less than life cannot possibly come within the provisions of this statute, although some of them might have under the law before the enactment of the indeterminate sentence law. The argument that the death penalty was provided in this statute because there is no other punishment that can be inflicted on a person undergoing a life sentence is not tenable because the Board of Pardons can and does commute death penalty and life sentences, as well as those of less severity, and in considering each case, the behavior of the applicant while serving his term is an important factor. The fact that the death penalty was made mandatory indicated that this statute was intended to apply to only the most hardened criminals, and was not intended to be extended to all cases where the maximum penalty is life imprisonment.

"In the recent case of *State v. Walsh*, 106 Utah 22, 144 P.2d 757, we held that an indeterminate sentence of from one to ten years, is not a sentence of not less than three years, as that term is used in the habitual criminal statute. Practically all of the reasons there given for that decision apply with equal force to the facts of this case. We therefore hold that a person serving a sentence of from five years to life under our indeterminate sentence law, is not undergoing a life sentence as that term is used in Sec. 103-7-12 and that this decision must therefore be reversed. Since the offense denounced in section 103-7-11, U.C.A. 1943, would be an included offense

within the offense denounced in section 103-7-12, the case is remanded to the district court for a new trial."

The same reasons applicable to the situation in *State v. Nemier*, supra, and *State v. Walsh*, 106 Utah 22, 144 P.2d 757, are applicable here.

The Legislature obviously intended that individuals be brought before the courts to determine their criminal responsibility for escapes rather than to have an administrative determination made by the Board of Pardons. Close constitutional questions would rise on the horizon were this court to hold to the contrary. Although the Board of Pardons would undoubtedly have authority to extend the indeterminate commitment to whatever degree it felt necessary within the maximum limits of the sentence, the procedures attendant to court trial with the right to jury trial and legal counsel make a court procedure more compatible with due process of law. It is submitted, therefore, that a narrow construction should be given the phrase "less than life," not only for the purpose of maintaining prison discipline, but also for the benefit of the prisoner who may be suspected or accused of escape, to make certain that he is, in fact, guilty of the crime of escape before his chance of termination is disregarded. A substantial argument in favor of a narrow construction of the phrase "less than life" can be made apart from the legislative and judicial considera-

tions argued above, the most obvious reason being that prison discipline and control are better maintained. Individuals serving indeterminate sentences with life maximum are given clear warning that misconduct will result in judicial proceedings and a firm sentence being imposed against them to begin after their present sentence ends. These factors contribute substantially to the internal discipline of the prison and obviously must have motivated the Legislature at the time of statehood.

In *McCoy v. Severson*, 118 Utah 502, 222 P.2d 1058, a petition was filed by a prisoner who was convicted of the crime of robbery and the crime of murder. The murder sentence was commuted to 25 years by the Board of Pardons, and the petitioner argued that the sentence should be deemed to run concurrently with the sentence for the robbery conviction, since, if the murder sentence, which was originally to life, had been deemed to run consecutively to the robbery sentence, the prisoner would be serving two terms of life imprisonment, one to run subsequent to the other. This court analyzed the legislative history and concluded that there was nothing inconsistent between the statute requiring that, in the absence of specific direction, sentences run consecutively, and the indeterminate sentence law. The court made it clear that the indeterminate sentence law does not cover all situations. The court stated:

“The indeterminate sentence law does not cover all situations. Here, the petitioner was convicted of two distinct offenses and two separate judgments were imposed. While the board of pardons might require him to serve for the duration of his natural life under the robbery conviction, there are situations where the maximum term provided by law for one sentence is not of sufficient length to adequately punish a defendant for committing numerous offenses. If the legislature intended that the indeterminate sentence act should repeal the other provisions of the statutes dealing with imprisonment, it did not say so. * * *”

The court determined, based on certain California cases, that merely because an individual is under a judicial sentence of life imprisonment he should not be immune from punishment for subsequent misconduct. This court, commenting on the California cases and adopting their reasoning stated:

“Similar reasoning is applicable in this case to establish that petitioner was not serving two sentences, each of which compelled him to be incarcerated for the remainder of his natural life. The Constitution and statutes of this state provide that the board of pardons may ‘commute punishments and grant pardons after convictions, in all cases except treason and impeachments.’ Section 67-0-1, U.C.A. 1943, and Const. Art. VII, Sec. 12. Under the authority of those enactments the board of pardons was given authority to make certain that which was uncertain and to lessen the period of confinement on life sentences. *A realistic approach to the problem*

suggests that neither a sentence for life nor a sentence of from five years to life means that a defendant will serve his natural life in prison There would have been no occasion to permit the termination or commutation of sentences if the legislature intended that the terms could not be made less. For all practical purposes, a sentence for life must be considered in connection with the powers of the board of pardons to commute the sentence to a fixed and shorter period. * * *

The reasoning of the *McCoy* case is directly applicable to the instant circumstances. Certainly, as a practical matter, a sentence to an indeterminate term for life is not a sentence to life imprisonment, and unless a specific life term is given, such as a first degree murder, substantial reason exists for prosecuting an escape. It is submitted, therefore, that the trial court's determination that an indeterminate term of five years to life was not a life term within the meaning of 76-50-2, U.C.A. 1953, was correct.

POINT II.

APPELLANTS ARTHUR JEROME PHILLIPS AND WILLIAM D. MORRELL HAVING BEEN GIVEN CONDITIONAL TERMINATION DATES ON THEIR ORIGINAL INDETERMINATE SENTENCES BY THE BOARD OF PARDONS WERE NOT SERVING LIFE SENTENCES AT THE TIME OF THEIR ATTEMPTED ESCAPE.

The record discloses that two of the three appellants, Arthur Jerome Phillips and William D. Morrell, had at the time of their attempted escape

received conditional termination dates from the Board of Pardons. It was clear, therefore, that the Board, having exercised its jurisdiction, had in effect limited their sentences to a term for years terminating in 1966. In such an instance it is submitted that the individual is certainly no longer serving a life term within the meaning of 76-50-2, U.C.A. 1953, and consequently, appellants Arthur Jerome Phillips and William D. Morrell should not be considered as having been subject to life sentences if the court determines that the respondent's argument in Point I of this brief should be rejected.

CONCLUSION

It is submitted that the Legislature did not intend an individual serving an indeterminate sentence under law, even though that sentence may carry a maximum limit of life, to be deemed to be an individual serving a term less than life as that provision is used in the statute making criminal, escapes from a State Prison. Proper judicial administration, statutory construction and sound reasons of public policy dictate to the contrary. It is submitted the decision of the trial court should be affirmed.

Respectfully submitted,

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