

1969

## **The State of Utah v. Emanuel O. Chima, Charles Powell, and Mrs. Pearl Powel : Brief of Responents**

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# IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

*Plaintiff-Respondent,*

vs.

EMANUAL O. CHIMA, CHARLES  
POWELL, and MRS. PEARL  
POWELL,

*Defendants-Appellants.*

Cases  
No. 11639  
No. 11640

## BRIEF OF RESPONDENT

Appeal from Appellants' Conviction for Disturbance of the Peace by an Assembly on Trial De Novo Entered in the District Court, First Judicial District, Honorable Lewis J. ... Presiding.

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POWELL,

*Defendants-Appellants.*

Cases  
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No. 11640

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## BRIEF OF RESPONDENT

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### STATEMENT OF THE NATURE OF THE CASE

Appeal from defendants' conviction for disturbing an assembly.

### DISPOSITION IN LOWER COURT

Defendants were tried and convicted in Logan City Court for disturbing an assembly and were fined \$35.00 each. They appealed to the District Court and were convicted by jury. They were sentenced to six months in the Cache County Jail.

## RELIEF SOUGHT ON APPEAL

The appellee submits that the judgment of the District Court should be affirmed.

### STATEMENT OF FACTS

Respondent stipulates to the facts as stated in appellants' brief with the following additions. Julia Brown is also a negro (T.55). After she answered Mr. Chima's question, she asked him to sit down so she could continue answering other questions, but he would not sit down (T.26), and in fact began to raise his voice and shout at her (T.47). At that point Mr. and Mrs. Powell joined in and began yelling at Mrs. Brown, the speaker (T.48). Mrs. Brown then attempted to read and answer a written question (T.48). She began to ask the writer a question, but when she realized the writer to be Mr. Powell, she withdrew her question (T.51). However, the three defendants would not sit down with the result that the meeting could not continue (T.48).

Defendants were tried and convicted in the Logan City Court and fined \$35.00 each. On their appeal to the District Court they were found guilty by the jury and sentenced to six months in the county jail (T.160). However, even before sentencing the defendants, the District Court Judge extended leniency and clemency, and said that it was not the intention of the Court that any punishment be actually imposed on them (T.160).

## ARGUMENT

### POINT I

SECTION 76-52-1, UTAH CODE ANNOTATED 1953, DOES NOT HAVE THE OBJECTIONABLE QUALITY OF VAGUENESS AND OVERBREADTH, NOR WAS IT UNCONSTITUTIONALLY APPLIED TO THE DEFENDANTS.

It is elementary that in construing statutes they be given a presumption of validity. This rule of construction also applies to state statutes falling within the realm of protections and prohibitions on First Amendment freedom of speech matters. *Fox v. State of Washington*, 236 U.S. 273 at 277 (1915) affirmed the validity of a statute making the wilful printing of matter encouraging a breach of the peace a misdemeanor and in so doing the court stated, "So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed: *United States v. Delaware and Hudson Co.*, 213 U.S. 366, 407, 408 (1908); and it is to be presumed that state laws will be construed in that way by the state courts." *United States v. Caroline Products Co.*, 304 U.S. 144 at 152 (1938), which is cited in appellants' brief, substantiates this point; only in a footnote does that court say, "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the constitution, such as those of the first ten amendments. . . ." However, the statute in question in the case at hand does not appear on its face to be within a specific prohibition of the Constitution.

The statute attacked in the instant case is itself concerned with the protection of the First Amendment right of freedom of speech and assembly. Freedom of assembly is a fundamental right not only to be protected by the United States Constitution, but also by individual state constitutions and statutes. Section 76-52-1, Utah Code Annotated, 1953, is such a statute. It is specifically and unambiguously worded to protect freedom of assembly. The interplay of ideas brought about through assemblies is essential to the proper functioning of our democratic system. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *N.A.A.C.P. v. Alabama*, 357 U.S. 449 at 460 (1958). By prohibiting wilful disturbances of lawful assemblies, Section 76-52-1 of the Utah Code protects this fundamental freedom of assembly.

*Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) upheld the following statute as not being so vague and indefinite as to make it unconstitutional:

"No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation." *Id.* at 569.

As this statute was held to be sufficiently narrowly drawn and limited to define and punish specific conduct within the domain of state power, surely the statute questioned in the instant case must also be so held.

A statute very similar to the one in question was held in *State v. Wiggins*, 272 N.C. 147, 158 S.E. 2d 37 (1967) to be sufficiently definite and specific so as not to violate limitations imposed upon the state by the First Amendment. In that case the pertinent statute read:

“If any person shall wilfully interrupt or disturb any public or private school . . . either within or without the place where such . . . school is held . . . he shall be guilty of a misdemeanor, . . .” *Id.*, at 42.

Appellant in *State v. Wiggins* attempted to challenge the constitutionality of the statute before the United States Supreme Court, but a writ of certiorari was denied. 390 U.S. 1028 (1968). Rather than protect orderly conduct in schools, the statute in the instant case can be said to protect an interest just as fundamental — that of freedom of assembly. A state in the interest of protecting this right can impose reasonable restraints on the exercise of speech and conduct by persons who without authority of law, wilfully disturb or break up lawful assemblies or meetings. The State of Utah had the right to protect Julia Brown and the persons attending the assembly. The statute in question is designed to afford this protection.

In construing statutes, words are to be given their plain and ordinary meaning unless the context, or the history of the state, requires otherwise. *State v. Wiggins, supra*. There is no word in Section 76-22-1, Utah Code Annotated, 1953, which when given its plain and ordinary meaning can be said to be vague and overly broad. The statute reads:

“Every person who, without authority of law, wilfully disturbs or breaks up an assembly or meeting, not unlawful in its character is guilty of misdemeanor.”

The term “wilfully”, as used in the statute, is synonymous with “intentionally.” 27 C.J.S. *Disturbance of Public Meetings*, § 1 p. 818. The common meaning of “disturb” can be found in Webster’s Dictionary to mean “to throw into disorder.” The rest of the statute is self-explanatory and the plain ordinary meaning of each word is not vague.

The statute in question was not applied unconstitutionally to the defendants. The evidence shows that Mr. and Mrs. Powell joined in with Mr. Chima and began yelling at the speaker, refusing to sit down, with the result that the meeting could not continue (T.48). Thus, the evidence does show that the three of them together did disturb the meeting. The statute was not applied in an arbitrary nor discriminatory manner to the defendants. The cases relied upon in appellants’ brief to substantiate their contention of an unconstitutional application of the statute in question are easily distinguishable from the case at hand. *Edwards v. South*

*Carolina*, 372 U.S. 229 (1963), dealt with a situation where negroes peacefully assembled without any violence or threats of violence on their part at the site of the State Government and were arrested for a breach of the peace when they did not disperse within fifteen minutes.

The facts of *Terminiello v. Chicago*, 337 U.S. 1 (1949) show that the guest speaker of a meeting in an auditorium was arrested and charged with violation of an ordinance forbidding any "breach of the peace." The Supreme Court of the United States held that the ordinance violated the petitioner's right of free speech. If Julia Brown (the guest speaker in the case at hand) had been arrested rather than the defendants, the above case may have been applicable, and Julia Brown's right to deliver her speech and conduct the assembly would be protected from hecklers in the auditorium. But when the defendants were convicted under Section 76-52-1, Utah Code Annotated 1953, for disturbing Julia Brown's lawfully conducted assembly, it cannot be said that there was a violation of any of their constitutional rights. On the contrary, they were convicted for violating the very right of freedom of speech and assembly which *Terminiello v. Chicago*, *supra*, sought to protect.

## POINT II

UTAH STATUTORY LAW AND THE  
CLEAR WEIGHT OF CASE AUTHORITY  
ALLOW A DISTRICT COURT IN A CASE  
TRIED ANEW FROM A JUSTICE OF THE  
PEACE COURT TO INCREASE THE SEN-

TENCE WITHIN THE LIMITS SET BY  
THE APPLICABLE STATUTE.

All cases cited in Points III, IV, and V of appellants' brief for the authority that the District Court violated the due process clause, and the equal protection clause of the Fourteenth Amendment of the United States and the constitutional protection against double jeopardy are meaningfully distinguishable from the instant case. *Patton v. State of North Carolina*, 381 F.2d 636 (1967) held that where a harsher sentence was imposed following a second conviction for the same offense, after the initial conviction had been vacated on constitutional grounds, it was a denial of equal protection and a violation of due process not to credit the petitioner for time served under the sentence imposed by the first trial. In the present case the defendants have not served any of the sentence imposed by the District Court, nor are they likely to as the Judge extended leniency and clemency to them (T.160).

Appellants cite only United States Supreme Court cases and federal decisions as authority for their contentions in Points III, IV, and V. The long established rule of *Palko v. Connecticut*, 302 U.S. 319 (1937) that immunity from double jeopardy established in federal decisions does not have to be applied through the Fourteenth Amendment to the States has recently been overruled in *Benton v. Maryland*, 37 L.W. 4623 (1969). In that case the defendant was first tried on the charges of burglary and larceny. He was found not guilty of larceny, but was convicted on the burglary count. Sub-

sequently, a Section of the Maryland State Constitution was struck down and as a result the defendant's case was remanded to be tried anew in the trial court. At this second trial the defendant was again charged with both larceny and burglary. This time he was found guilty of both charges. The Supreme Court held this a violation of the Double Jeopardy Clause of the Fifth Amendment and held it applicable to the States through the Fourteenth Amendment.

However, the instant case does not fall under the holding of *Benton v. Maryland*. Rather, it falls within the holding of *State of North Carolina v. Pearce*, 37 L.W. 4601 (1969). In that case the defendant's conviction in his first trial was overturned on constitutional grounds. When retried, he was convicted and sentenced to a prison term, which, when added to his time already spent in prison for that offense, was a longer total sentence than that originally imposed. The court held that the defendant must be fully credited with the time already served for the same offense, but also held that neither the Double Jeopardy provision nor the Equal Protection Clause impose a bar on the trial judge in giving a more severe sentence upon reconviction. The instant case falls squarely within the holding. The district court judge did have the authority to increase the sentence imposed by the justice of the peace. This has long been the established rule:

“And at least since 1919, when *Stroud v. United States*, 251 U.S. 15, was decided, it has been settled that a corollary of the power to retry a defendant is the power, upon the defendant's

reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction." 37 L.W. 4601 at 4603.

The fact that in the instant case the district court judge does have the authority to increase the defendants' sentences is also in keeping with the prevalent philosophy of modern penology. It is the duty of the sentencing judge to consider a wide ambit of factors in arriving at a just sentence. If he finds from these considerations that defendant merits a harsher sentence, it should be imposed, as the punishment should fit the offender and not merely the crime.

*Bott v. Bott*, 22 Utah 2d 368, 453 P.2d 402 (1969) is a recent decision of this court to be noted. That case was a divorce proceeding where the husband was ordered committed to the County Jail for five days when found in contempt. The order was overturned by the Supreme Court, and the trial court, hearing the same case on the same merits, increased the sentence to fifteen days. It was argued on appeal that increase in punishment deprived the appellant of equal protection, due process, and violated his protection against double jeopardy. But the court held that the appellant's contentions relating to "double jeopardy and unlawful increase in the sentence are without merit." *Id.*, at 403.

Defendants in the instant case appealed their action from the justice of the peace court to the district court under the authority of Sections 77-57-38, 77-57-39, and

77-57-43, Utah Code Annotated 1953. Section 77-57-43, Utah Code Annotated 1953, states that in an appeal duly perfected from a justice of the peace court to a district court the action shall be tried anew. Other states have similar statutes, and the clear weight of case authority shows that in a trial de novo from a city or justice of the peace court the entire matter will be tried as if it were being tried for the first time. "Usually on the trial de novo the court cannot exceed the limit of punishment which the magistrate could have imposed, but may within that limit impose a lighter or a heavier penalty than was adjudged below." 16 C.J.S. § 709(9), p. 385. This has been affirmed by numerous state decisions. The Supreme Court of Wyoming has held:

"The motion to dismiss was made upon the theory that the court might impose a larger penalty than that which had been imposed by the justice of the peace. The court affirmed the fear of counsel for defendant. But it had the right to impose a larger penalty." *State v. Franklin*, 70 Wyo. 306, 249 P.2d 520 at 522 (1952).

The only state to hold that in an appeal from a city court to a district court the matter of sentencing shall not be tried anew is the State of Louisiana. The Majority Rule is set out explicitly by the Maryland court as follows:

"In other states, where a statute permits an appeal from a magistrate to a court of superior jurisdiction and directs that the case should be heard de novo, it has been held consistently that the upper court hears the case as if it were being tried for the first time, and considers the entire matter of verdict, judgment and sentence as

though there had been no trial below." *Moulden v. State of Maryland*, 217 Md. 351, 142 A.2d 592 at 598 (1958).

That case cites numerous cases of other states with similar holdings. That case was affirmed in *Hobbs v. State*, 231 Md. 533, 191 A.2d 238 (1963).

### POINT III

APPELLANTS WERE GRANTED CLEMENCY AND HAVE NOT SERVED ANY SENTENCE; THUS, THEIR APPEAL SHOULD BE DISMISSED AS THEY HAVE SUFFERED NO INJURY.

It is a fundamental premise in law that where there is no injury there can be no remedy. In the instant case, the transcript shows that even before the district court judge sentenced the defendants, he granted them clemency (T.160). The defendants have suffered no injury; they have not, nor are they going to serve any of the sentence imposed upon them. The weight of case authority shows that even in instances where a defendant has accepted a suspended sentence together with probation or parole, he waives his right to appeal. 117 A.L.R. 929; *State v. Miller*, 225 N.C. 213, 34 S.E. 2d 143 (1945); *People v. Boyce*, 87 Cal. App. 2d 828, 197 P.2d 842 (1948); *People v. Collis*, 344 S.App. 539, 101 N.E. 2d 739 (1951).

The present case is even stronger for the proposition that the defendants waived their right to appeal by accepting the clemency granted by the trial judge.

The present defendants have not even the possibility of complaining that in lieu of serving a sentence, they were placed on probation or parole. They have been granted clemency; it was the intention of the trial court judge that no punishment ever be actually imposed. Their appeal should be dismissed.

### CONCLUSION

The defendants' convictions in the First Judicial District of the State of Utah should not be set aside. The statute under which they were convicted, Section 76-52-1, Utah Code Annotated, 1953, is not vague or overly broad on its face, nor was it unconstitutionally applied to the defendants. Neither should the sentence of the District Court be set aside. Utah statutes and the weight of case authority show that it was within the District Court's power to impose a heavier sentence as long as the sentence did not exceed the limit of punishment which the justice of the peace could have imposed.

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