1967

Delbert Chris Clark v. John W. Turner, Warden Utah State Prison : Brief of Appellant

IN THE SUPREME COURT
of the
STATE OF UTAH

DELBERT CHRIS CLARK,

Petitioner-Appellant, : CASE NO.

vs. : 10684

JOHN W. TURNER, Warden
Utah State Prison,

Respondent. :

BRIEF OF APPELLANT

Appeal from the Judgment of the Third District Court for Salt Lake County, State of Utah, Honorable Marcellus K. Snow, Judge.

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STATEMENT OF NATURE OF CASE

This is an appeal from a denial of a petition for writ of error, construed by the local court as a writ of Habeas Corpus.

DISPOSITION IN LOWER COURT

A hearing was held before the Honorable Marcellus K. Snow, Judge, Salt Lake County, Utah, on June 22, 1966. The court

treated the petitioner's Writ of Error as a Petition for Writ of Habeas Corpus and denied the same.

RELIEF SOUGHT ON APPEAL

The appellant seeks reversal of the judgment of the lower court.

STATEMENT OF FACTS

The appellant filed a petition for writ of Error alleging that on June 2, 1961 he was convicted of second degree burglary and of the status of being a habitual criminal. The sentencing court sentenced the appellant uder the second degree burglary statute and imposed a separate sentence under the habitual criminal statute which provides for a

term of not less than fifteen years. The appellant claims a violation of the Due Process and double jeopardy.

No evidence was presented at the hearing. However, it was agreed that the petitioner was sentenced to two separate sentences, one for second degree burglary and habitual criminal. (R-4) (R-8). These sentences were later commuted to run concurrently.

ARGUMENT #1

THE SENTENCING COURT VIOLATED THE DOUBLE JEOPARDY RIGHTS SECURED UNDER THE FIFTH AMENDMENT IN IMPOSING TWO SEPARATE SENTENCES ON THE PETITIONER FOR THE THIRD SUBSTANTIVE OFFENSE AND HABITUAL CRIMINAL STATUS.

It is respectfully submitted that the

sentencing court violated the petitioner's right secured under the double jeopardy clause of the Fifth Amendment, Untied States Constitution and Utah Constitution, Art. 1 sec. 12, which prohibits any person from being twice put in jeopardy for the same offense.

The habitual criminal statute is set forth in UCA 76-1-18 as amended (1953) and 76-1-19 as amended (1953) and clearly sets forth the procedure whereby one is charged, tried, and sentenced as having the status of a habitual criminal. The conduct of the trial on the third substantive offense and on the issue of being a habitual criminal status is clearly set forth in State vs. Stewart, 110 Utah 203, 171 p2d 383 (1946) and State vs. Zeimer, 10 Utah 2d 45, 347 P2d 1111, 79

ALR2d 84 (1960). The statute is, however, silent as to the precise manner in which the defendant should be sentenced, consequently we must look to motive and purpose of the habitual criminal law for enlightment.

It is clear that the habitual criminal statute does not invoke a separate crime but rather a status, to wit the status of being a habitual criminal criminal. See 58 ALR 102, 82 ALR 379, 116 ALR 236. Zeimer vs. Turner, 14 Utah 2d 232, 381 P2d 721 (1963). State vs. Wood 2 Utah 2d 34, 268 P2d 998 (1954). The habitual criminal statute does not inflict additional or further punishment for the prior conviction or impose a new punishment therefor. It only serves to invoke a more severe punishment for the last of subsequent offense which might be imposed

because of the previous convictions. 24B CJS sec 1958. Based upon this proposition the habitual criminal statute in other states has been sustained as against the attack for violating the double jeopardy concept. Sec. 58 ALR 23, 82 ALR 348, 116 ALR 212.

A typical statement by the courts is found in Kelley vs. State (1933) 204 Ind. 512, 185 NE 453 wherein the court said:

> "The statute does not impose an additional penalty on crimes for which the defendant has already been convicted. It simply imposes a heavier penalty for the commission of a felony. The punishment is for the new crime only."

Since there is no separate crim of being a habitual criminal, there can be no separate sentence under the habitual criminal law. The lower court, in the

instant case, sentenced the defendant on two separate offenses, i.e., on the second degree burglary statute and on the habitual criminal law. Consequently, the lower court ignored the nature and purpose of the habitual statute and, in fact, did not enhance the punishment of the third substantive offense, but rather inflicted punishment twice for the same offense. By sentencing the defendant on two separate charges, to run consecutively, the defendant was being punished not only for the burglary charge, but also for being a habitual criminal, which included as a condition, the finding guilty on the third substantive burglary offense charge. Thompson vs. Harris, 106 Utah 32, 144 P2d 761 (1944). The end result of the lower court's sentencing

procedure would be that the defendant would be forced to serve the sentence on the burglary charge and after the termination or commutation of that charge, he would serve the new sentence under the habitual criminal charge. It seems evident that the lower court considered that two separate offenses had been committed when it not only inflicted two separate sentences, but ruled that the sentences were to run consecutively (R-9). Moreover, it would appear that the lower court had in mind UCA 76-1-33 as amended (1953) which provides for consecutive sentences where a person has been convicted of two or more crimes and sentences had been pronounced on one at the lower court sentenced the defendant in the instance case. McCoy vs. Severson _____ U _____, 222 P2d

1056 (1950). In so doing, the trial court violated the double jeopardy clause of the state and Federal constitutions. The sonstitutional provision is broad enough to mean that no one can lawfully be punished twice for the same offense and is designed to protect the accused from double punishment as much as to protect him from two trials. 24B CJS sec. 1990 (a). Moreover, a cursory examination of the Utah cases indicate that the proper procedure is imposition of one sentence. See Thompson vs. Harris, 107 Utah 99, 152 P2d 91, (1943). rehearing denied 106 Utah 32, 144 P2d 761, (1944). State vs. Wood, Supra

In the alternative, it is respectfully submitted that the sentence on the habitual charge is void and without effect. In the case of Ex parte Walt 73 S.D. 436, 44 N.W.

2d 119, (1950) the lower court sentenced the defendant on the count one for grand larceny, count two for burglary and upon the information charging him as being a habitual criminal to life imprisonment. The appeal court held that the lower court had exhausted his power and jurisdiction to pass any further sentence on the defendant by stating that the lower court had attempted to pass a third sentence upon the petitioner, not to augment the punishment for the crime of being "a habitual criminal". There being no such crime, the court held that the sentence attempted to be passed upon was beyond the jurisdiction of the trial court and void. To the same affect, Gameron vs. Jones 148 Neb 645 28 N.W. 2d 403, (1947) where the separate

sentence was ruled void.

Generally, the majority rule in such cases states that on a conviction under an indictment alleging prior convictions there can be but one judgment or sentence imposed. Sec. 248 CJS sec 1971 (a). An illustration case is found in State vs. King, 140 P2d 283, 18 Wash 2d (1943), wherein teh Washington court summarized the Washington cases with regard to sentencing as follows:

> "The case then hold (1) that if, contrary to the prescribed procedure, sentence is imposed for substantive offense which the habitual criminal proceeding is still pending and undetermined, the judgment imposing such sentence is premature and beyond the power of the court to enter; and further, (2) that if the sentence is imposed solely upon the habitual charge, such sentence also is void, and the defendant shoudl then be resentenced as for the first time,

> upon the latest, substantive offense, taken in connection with the habitual criminal adjudication; but (3) that if found sentence be once imposed upon the defendant for the substantive offense prior to the institution of a habitual criminal procedure, such defendant is subsequently adjudged to be a habitual criminal, he cannot thereafter be again sentenced for the original substantive crime taken in correction wiht the subsequent adjudication of his habitual criminal status."

This same court stated that the correct procedure would be to after the adjudication of the habitual criminal matter to sentence the defendant for the commission of the substantive crime, with the increase penalty exacted because of the adjudication of the defendant's habitual criminal status.

The appellant respectfully submits that the action of the lower court in

imposing separate sentences on the third substantive offense and on the habitual matter to run concurrently, if permitted to stand, violates the double jeopardy provisions of the state and federal constitution. In the alternative, the appellant suggests that the sentence on the substantive charge is valid and the other sentence is void, consequently, the appellant's request that the sentence on the habitual criminal charge be vacated as being void or that the case be remanded for proper sentencing in light of the purpose of the haibtual criminal statute and in conformity to the position urged by the appellant.

Respectfully submitted,

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