1967

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

In the Supreme Court of the State of Utah

DELBERT CHRIS CLARK,
Petitioner-Appellant,

v.

JOHN W. TURNER, Warden, Utah State Prison,
Respondent.

Case

BRIEF OF RESPONDENT

Appeal from the Judgment of the Third District
Salt Lake County, Hon. Marcellus K.

PHIL L. HA
Attorney Ge

GARY A. FRA
Assistant At

State Capitol
Salt Lake City,

Attorneys for R

JIMI MITSUNAGA
Legal Defender
231 East Fourth South
Salt Lake City, Utah

Attorney for Appellant

TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS (Continued)

CONSTITUTION AND STATUTES CITED

In The Supreme Court of the State of Utah

DELBERT CHRIS CLARK,
Petitioner-Appellant,

v.

JOHN W. TURNER, Warden, Utah State Prison,
Respondent.

Case No. 10684

BRIEF OF RESPONDENT

STATEMENT OF NATURE OF CASE

This is an appeal from a denial of a Petition for Writ of Error, construed by the trial court as a Writ of Habeas Corpus.

DISPOSITION IN LOWER COURT

On May 26, 1966, appellant filed a Petition for Writ of Error in the District Court of Salt Lake County, State of Utah (R. 3). A hearing was held on the 22nd day of June, 1966, before the Honorable Marcellus K. Snow, Judge. The trial court construed appellant's Petition for Writ of Error as a Petition for Habeas Corpus and denied the same.

RELIEF SOUGHT ON APPEAL

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

STATEMENT OF FACTS

On June 2, 1961, the appellant was convicted of second degree burglary, and then, pursuant to the second part of the same information, was found to be a habitual criminal (R. 9). Appellant was sentenced consecutively for the offenses of burglary in the second degree and of being a habitual criminal and subsequently, said sentences were made to run concurrently by the Utah State Board of Pardons (R. 9).

The trial court found, as a matter of law, that (1) the petition did not state a cause of action, and (2) the sentence received on both counts of the information was legal and proper (R. 9).

ARGUMENT

POINT I

THE ISSUE PRESENTED BY APPELLANT IN THIS APPEAL IS RES JUDICATA.

In this proceeding, appellant does not challenge the substantive merits of his conviction of burglary in the second degree or the finding that appellant had attained the status of a habitual criminal. Rather, appellant merely challenges the procedure

employed by the trial court in sentencing him after the unassailed jury verdicts were returned.

In discussing Utah R. Civ. P. 65B(f) (1), this court, in **Burleigh v. Turner,** 15 Utah 2d 118, 388 P.2d 412 (1964), stated at 15 Utah 2d 120, 388 P.2d 414:

> Habeas corpus is a civil remedy and should, therefore, generally be governed by our rules of civil procedure. That the doctrine of res judicata is applicable to habeas corpus proceedings is supported by Rule 65B(f) wherein a petitioner must allege, among other things, that the legality of the imprisonment has not been adjudged upon a prior proceedings.... The obvious purpose of this rule is to discourage successive applications based upon the same grounds and that the courts need not entertain them.

Appellant has appeared before this court on habeas corpus proceedings on three prior occasions. The language employed by this court in determining appellant's prior contentions establish this court's awareness of the sentencing procedure employed by the trial court and ratification of that sentence. As stated in **Clark v. Turner,** 15 Utah 2d 83, 387 P.2d 557 (1963), at 15 Utah 2d 84, 387 P.2d 557:

> Charged with the crime of burglary and with being an habitual criminal, he [appellant] was tried by jury, convicted on both counts, and sentenced to the statutory terms of one to twenty years for the burglary and for not less than fifteen years on the habitual criminal count. No appeal was taken.

This court, in **Clark v. Turner,** 16 Utah 2d 197, 398 P.2d 202 (1965), also noted the sentences im-

posed on the appellant by the trial court and then stated at 16 Utah 2d 198, 398 P.2d 203:

> We believe and hold that plaintiff [appellant] failed to sustain the onus of showing any facts justifying the issuance of this extraordinary writ.

Also, it is the Utah rule that not only issues that are tried, but issues that should have been tried, i.e. triable issues, will be barred if not prosecuted at the first opportunity. **Wheadon v. Pearson,** 14 Utah 2d 45, 376 P.2d 946 (1963); **East Mill Creek Water Co. v. Salt Lake City,** 108 Utah 315, 159 P.2d 863 (1945).

It is, therefore, respectfully submitted that the issue of the sentences imposed on the appellant by the trial court and which now constitutes the substance of this appeal is res judicata.

POINT II

THE SENTENCES IMPOSED BY THE TRIAL COURT VIOLATED NO CONSTITUTIONALLY PROTECTED RIGHT OF THE APPELLANT.

It must be emphasized that appellant presently challenges only the sentences imposed by the trial court and does not, in any manner, challenge the sufficiency or the substantive merits of either the conviction on the charge of second degree burglary or the finding that appellant is an habitual criminal. Therefore, even assuming arguendo that the sentencing procedure employed by the trial court in the instant case was erroneous, the status of the matter would be analagous to **Folck v. Watson,** 102 Utah

470, 132 P.2d 130 (1942), wherein this court stated at 102 Utah 473, 132 P.2d 132:

> **Folck [appellant] makes no attack upon any of the proceedings had against him except the sentence.... He cannot escape serving the sentence provided by law merely because the court has erred in pronouncing sentence.... The defect in the sentence does not adhere in the judgment of conviction.**

On this basis, the most that can be said of appellant's present complaint is that as to the second degree burglary conviction and the habitual criminal finding, that conviction and finding are valid, and appellant's only complaint goes to the sentences imposed as a result of that conviction and finding. There is no allegation raised by appellant that the court did not have jurisdiction over the subject matter and person of the appellant so as to render a valid judgment of conviction against the appellant.

Appellant alleges a violation of the double jeopardy clause of the Fifth Amendment of the United States Constitution and also Utah Const. art. I § 12. However, the United States Supreme Court, in **Holiday v. Johnston,** 313 U.S. 342 (1941), stated at 313 U.S. 349:

> **The erroneous imposition of two sentences for a single offense of which the accused has been convicted or as to which he has pleaded guilty, does not constitute double jeopardy.**

Also, in **Downum v. United States,** 372 U.S. 734 (1963), Justice Douglas stated at 372 U.S. 736:

> Harrassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches. . . . For the prohibition of the Double Jeopardy Clause is not against being twice punished; but against being put twice in jeopardy.

In the instant case, again assuming arguendo that the trial court erroneously imposed two sentences on the appellant for the same offense, the erroneous imposition of two sentences for a single offense does not constitute a violation of the constitutionally protected right against double jeopardy.

The only remaining question then becomes the remedial procedure employed by an accused who alleges such an occurrence. As stated in **Holiday v. Johnston,** supra, at 313 U.S. 349:

> His [appellant's] remedy is to apply for vacation of the sentence and a resentence in conformity to the statute under which he was adjudged guilty.

In **Kahl v. United States,** 204 F.2d 864 (10th Cir. 1953), the court stated at 204 F.2d 866:

> However, since Holiday v. Johnston. . . . the remedy for a sentence void in whole or in part is to apply for a vacation of the sentence and proper resentence in accordance with the statute under which the accused is judged guilty.

Kahl v. United States, supra, was cited with approval in **Roddy v. United States,** 296 F.2d 9 (10th Cir. 1961).

However, should this court determine that habeas corpus is a proper procedural vehicle with

which to obtain review of an allegedly erroneous sentence, the proper course of action is for this court to remand the case to the trial court for the sentencing in accordance with the statutory requirements. **Folck v. Watson,** supra. See also **Lee Lim v. Davis,** 75 Utah 245, 284 Pac. 323 (1929), wherein the court cited with approval **State v. Reed,** 138 Minn. 465, 163 N.W. 984 (1917), and stated at 75 Utah 251, 284 Pac. 325:

> We are confronted with the situation where the validity of the conviction is conceded but where the sentence is void. In such circumstances it was said in **State v. Redd** supra, a case which presents features in all respects essentially the same as the instant case: "Only the validity of the sentence is challenged; the validity of the conviction is conceded. Where the conviction is valid, but the sentence as imposed is void either in whole or in part, the weight of modern authority is to the effect that the prisoner cannot secure an unconditional discharge upon a writ of habeas corpus.
>
> . . . .
>
> "If the sentence is valid in part and void in part, and the two are not severable, or if it is wholly void because not such as the court was authorized to impose, the prisoner will be remanded for the imposition of a lawful sentence."

Appellant has challenged the imposition of the habitual criminal sentence on the grounds that the second degree burglary sentence had previously been imposed. Appellant argues that this renders the imposition of the sentence void as going beyond the jurisdiction of the trial court. **State v. King,** 18 Wash. 2d 747, 140 P.2d 283 (1943). The logical continuation of appellant's argument is that when the

habitual criminal finding had been made, the trial court was mandatorily obligated under the Utah Code Ann. § 76-1-18 (1953) to sentence appellant to a minimum term of confinement of fifteen years rather than imposing the indeterminate second degree burglary sentence. The argument would be that whatever felony is relied on by the state as the third felony bringing the defendant within the purview of the habitual criminal statute, the only sentence that could properly be imposed on conviction of that third felony would be a sentence for a minimum of fifteen years imprisonment. To allow an indeterminate sentence on the third felony conviction and also an independent sentence on the finding of habitual criminality would be invalid because habitual criminality is a status and not a crime, **State v. Zeimer,** 10 Utah 2d 45, 347 P.2d 1111, 79 A.L.R.2d 84 (1960), and a sentence may not be imposed unless for a crime. This argument, if sustained, would render erroneous both sentences imposed by the trial court.

To avoid circuity of action in the form of yet another proceeding and appeal, it is respectfully submitted that this court, if appellant's argument is sustained, remand this matter to the trial court with instructions to impose a senence in conformity with the statutes under which the appellant was convicted. This sentence would be the imposition of a minimum of fifteen years in the Utah State Penitentiary imposed on appellant's conviction of second degree burglary as enhanced by the habitual criminal statute. Such a procedure would appear to be

in conformity with the dictum contained in **State v. Zeimer,** supra, and **Thompson v. Harris,** 106 Utah 32, 144 P.2d 761 (1943).

It must also be noted that the cases cited in appellant's brief do not, in fact, support appellant's contention. In **Kelly v. State,** 204 Ind. 512, 185 N.E. 453 (1933), the Indiana Supreme Court did not discuss the multiple sentences imposed on the defendant by the trial court. Rather, the court was merely answering the defendant's challenges as to the constitutionality of the habitual criminal statute. The case was reversed and the defendant was granted a new trial for reasons other than the sentences imposed by the trial court. In **Gameron v. Jones,** 148 Neb. 645, 28 N.W. 2d 403 (1947), the defendant was sentenced to two years for chicken stealing, first offense, which was statutorily subject to a one year sentence, and to ten years for habitual criminality. At the habeas corpus hearing, the trial court held the excess of the one year sentence for chicken stealing, first offense, void. On appeal, the Supreme Court held that the defendant could properly have been sentenced to a minimum term of ten years and the sentence was erroneous in failing to impose the statutory minimum term. The court held, however, that the sentence was valid to the extent pronounced. Also, in **Ex Parte Walt,** 73 S.D. 436, 44 N.W.2d 119 (1950), the South Dakota habitual criminal statute was interpreted in such a manner that the imposition the normal statutory penalty or of the enhanced penalty was within the discretion of the trial court. After that discretion had been exercised

by the trial court and a sentence was imposed that did not reflect the enhanced penalty, error would be committed if the valid first sentence was then increased in severity.

One additional factor of some importance in the case at bar is the lack of any prejudice to this defendant resulting from the trial court's pronouncement of sentence. Should this court determine that the trial court erred in the sentences imposed on the appellant, it must be recognized that this error did not prejudice the appellant. The record is clear that the Utah State Board of Pardons acted to reduce the sentences from consecutive to concurrent terms. Such action on the part of the Utah State Board of Pardons was within that body's statutory authority. **State v. Walsh,** 106 Utah 22, 144 P.2d 757 (1943); **Thompson v. Harris,** supra.

CONCLUSION

It is respectfully submitted that the sentencing procedure employed by the trial court did not violate any constitutionally protected right of the appellant. However, should this court conclude that the imposition of the two sentences by the trial court was erroneous, the matter should be remanded for proper sentencing.

Respectfully submitted,

PHIL L. HANSEN
Attorney General

GARY A. FRANK
Assistant Attorney General
Attorneys for Respondent.