1970

Albert Nolan Belt v. John W. Turner : Appellant's Brief

IN THE SUPREME COURT
OF THE
STATE OF UTAH

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ALBERT NOLAN BELT,

Plaintiff
and
Appellant,

vs.

JOHN W. TURNER,
(Warden, Utah
State Prison),

Defendant
and
Respondent.

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APPELLA[illegible]

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APPEAL FROM A [illegible]
SECOND JUDICIAL [illegible]
The Honorable [illegible]

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FILED

JUL 2

Clerk, Supreme Court

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APPELLANT'S BRIEF

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STATEMENT OF CASE

ALBERT NOLAN BELT, appellant herein, appeals from dismissal of his petition for writ of habeas corpus.

DISPOSITION AT DISTRICT COURT

On December 2, 1969, the Second

Judicial District Court, Weber County, State of Utah, after hearing appellant's evidence, granted respondent's motion to dismiss appellant's petition for writ of habeas corpus.

RELIEF SOUGHT ON APPEAL

Appellant respectfully submits that the District Court's order dismissing appellant's petition for a writ of habeas corpus should be reversed.

STATEMENT OF FACTS

On the 12th day of September, 1968, a complaint was filed against appellant for issuing a check against insufficient funds. On October 7, 1968, appellant waived his preliminary examination before City Judge Pro Tem Ronald O. Hyde. Judge Hyde set the appellant's bail at $2,500.00 and committed him to the Weber County

Sheriff (R. 1).

At the arraignment before Judge Charles C. Cowley on October 14, 1968, appellant entered a plea of guilty to issuing a check dated August 31, 1968, for $10.00 to K-Mart against insufficient funds (R. 3).

On October 28, 1968, Judge Cowley placed appellant on probation and provided that one of the terms of the probation was that appellant serve six months in the Weber County Jail. The Adult Probation Department was to report, and Imposition of Sentence was set for Monday, February 3, 1969.

Appellant was thereupon committed to the Weber County Jail for a term of six months with two days' credit for each day served if a model prisoner (R. 4).

Appellant failed to report under his probation agreement before the District Court on March 10, 1969. On March 25, 1969, an affidavit was filed with the District

Court by the Adult Probation Department alleging that appellant had violated the terms of his probation by leaving the State of Utah without knowledge or permission of his supervising probation officer prior to March 10, 1969 (R.8).

On September 25, 1969, appellant was arraigned on the affidavit before Judge Cowley, to which he entered a plea of guilty, and the Court reveked the probation and sentenced appellant to serve in the Utah State Prison a term not to exceed five (5) years (R. 12).

APPELLANT'S POSITION

The District Court's decision should be reversed and appellant's petition for habeas corpus granted upon the following grounds:

1. Appellant was sentenced under the wrong statute.

2. The District Court imposed a dual punishment upon appellant in excess of that provided by statute.

ARGUMENT

I. THE DISTRICT COURT ERRED IN NOT SENTENCING APPELLANT UNDER THE STATUTE AS IT EXISTED AT THE TIME OF SENTENCING.

The District Court sentenced appellant under Utah Code Annotated, Section 76-20-11, which, at the time the criminal offense was committed, read:

> "Any person who for himself . . . willfully, with intent to defraud, makes or draws or utters or delivers any check . . . for the payment of money . . . knowing at the time of such making . . . that the maker . . . has not sufficient funds in, or credit with, said bank . . . is punishable by imprisonment in the county jail for not more than one year, or in the state prison for not more than five years." (Emphasis added.)

However, before appellant was sentenced in the District Court, the 1969 Legislature amended this statute reducing

the punishment for the offense committed by appellant. The statute now reads as follows:

> "(2) Penalties for violating any provision of Subsection (1) of this section shall be as follows:
>
> "(a) If such check, draft, or order or a series of the same made or drawn in this state within a period not exceeding six months amounts to a sum of not more than $100.00, then a fine of not more than $299.00 or imprisonment in the county jail for not more than six months, or both.
>
> "(b) . . . exceeding $100.00 but not $2,500.00, then a fine of not more than $5,000.00 or imprisonment in the state prison for not more than five years, or both.
>
> "(c) . . . "

This statute became effective on the 13th day of May, 1969, sixty days after the close of the legislative session, as provided in Article VI, Section 25, of the Utah State Constitution.

> "All acts shall be officially published, and no act shall take effect until so published, nor until sixty days after the adjournment of the session at which it passed, unless the Legislature, by vote of two-thirds of all members elected to each house, shall otherwise direct."

It is the position of appellant that the District Court erred in not sentencing him under Section 76-20-11(2)(a) which was the law at the time he was sentenced. Appellant was sentenced on the 25th day of September, 1969, which was four months after the amendment became effective reducing the offense that appellant was charged with from a felony to a misdemeanor.

Appellant was placed on probation by the District Court on October 28, 1968, and it is conceivable that if he had appeared before the Court on the 10th day of March for his report, and had not left the state, he may not have been

sentenced under either statute. On the 25th day of September, 1969, appellant came before the District Court and was sentenced to imprisonment in the Utah State Prison for a term not to exceed five years, a sentence much greater than could be imposed on appellant under the law as it existed at that time.

The issue which this Court must decide is whether appellant should have been sentenced under the statute as it existed at the time the crime was committed or as it was when appellant was sentenced. This issue has been decided by two of our neighboring jurisdictions, California and New Mexico.

In the case of In re Estrada, 48 Cal Rptr 172, 408 P 2d 948, the California Supreme Court in 1965 said:

> "A criminal statute is amended after the prohibited act is committed but before final judgment by

> mitigating the punishment. What statute prevails as to the punishment -- the one in effect when the act was committed or the amendatory act? That is the question presented by this petition. In People v. Harmon, 54 Cal 2d 9, 4 Cal Rptr 161, 351 P 2d 329, this Court, in a 4-to-3 decision, held that the punishment in effect when the act was committed should prevail. We have determined to reconsider the holding in that case. Upon such reconsideration, we have come to the conclusion that on this point that decision should be disapproved. We hold that in such situations the punishment provided by the amendatory act should be imposed."

The California Supreme Court, in the case of In re Kirk, 48 Cal Rptr 186, 408 P 2d 962, a habeas corpus proceeding almost identical to the instant case, found in favor of the petitioner where the statute ameliorating the punishment was passed after the criminal act was committed but before the judgment of conviction became final. The Court found that:

"At the time of rendition of the judgment of conviction for issuing the checks, subdivision (b) of section 476a of the Penal Code provided that, if the total amount of all checks that the defendant is convicted of issuing does not exceed $50, the offense is punishable only by imprisonment in the county jail for not more than one year. Under subdivision (a) of the section the penalty for other violations of the section is imprisonment in the county jail for not more than one year or in the state prison for not more than fourteen years. Prior to the affirmance of the conviction by the District Court of Appeal in April of 1964, subdivision (b) was amended by increasing the amount from $50 to $100. Under the present statute a person such as petitioner who is convicted of issuing checks totaling $75 would be subject to imprisonment in the county jail only and would not be subject to imprisonment in state prison.

"[1] The problem is thus precisely the same as the one involved in the Estrada case, supra. The statute imposing the penalty for issuing the checks was amended prior to final judgment by ameliorating the punishment. Under the rule announced in that case the petitioner is entitled to the benefits of the amendatory statute."

In the instant case, appellant

pleaded guilty to issuing a $10.00 check without sufficient funds. If he is sentenced under the statute in effect at the time of sentencing, then the maximum punishment would have been "a fine of not more than $299.00 or imprisonment in the county jail for not more than six months or both", not imprisonment in Utah State Prison for a term not to exceed five years.

It is not necessary for the 1969 amendment to be retroactive to apply to appellant, for he was sentenced after the statute became effective.

In the case of State v. Mears, 79 N.M. 715, 449 P 2d 85, 86, the New Mexico Supreme Court in 1968 stated:

> "Allowing credit upon the sentence for the pre-sentence confinement time, although such time occurred before the effective date of the Act, would not require retroactive application of the Act; the reason being that the conviction

and sentence occurred after the Act became effective, and pre-sentence confinement would constitute merely an occurrence upon which the Act would operate.

"Defendant was convicted and sentenced after Section 40A-29-25, supra, became effective. Under the statute, he is entitled to credit on his sentence for time spent in pre-sentence confinement in connection with the worthless check charge of which he was convicted."

II. THE DISTRICT COURT ERRED IN SENTENCING APPELLANT TO SERVE BOTH IN THE WEBER COUNTY JAIL AND THE UTAH STATE PRISON.

In the event that this Court finds that appellant should be sentenced under the statute as it existed at the time the offense was committed, then the Court must determine whether the District Court imposed a dual punishment upon appellant in excess of that provided by statute. If appellant was sentenced by the District Court on October 28, 1968, when he was

placed in the Weber County Jail as a condition of his probation, then the District Court, through the guise of probation, imprisoned him in the county jail and then subsequently revoked his probation and sentenced him to the Utah State Prison contrary to the statute existing at the time appellant committed his offense. The statute, prior to the 1969 amendment, provided that an offender could either be punished "by imprisonment in the county jail for not more than one year; or in the state prison for not more than five years," not imprisonment in both as was done in the instant case.

While our statute gives the District Court Judge a great deal of latitude, it does not provide that one of the conditions of probation can be a jail sentence. Section 77-35-17 details what the District Court Judge can do, yet it does not say

that the Judge can place the offender in the county jail as a condition of probation. It reads as follows:

> "Upon a plea of guilty or conviction of any crime or offense, if it appears compatible with the public interest, the court having jurisdiction may suspend the imposition or the execution of sentence and may place the defendant on probation for such period of time as the court shall determine.
>
> "The court may subsequently increase or decrease the probation period, and may revoke or modify any condition of probation. While on probation, the defendant may be required to pay, in one or several sums, any fine imposed at the time of being placed on probation; may be required to make restitution or reparation to the aggrieved party or parties for the actual damages or losses caused by the offense to which the defendant has pleaded guilty or for which conviction was had; and may be required to provide for the support of his wife or others for whose support he may be legally liable. Where it appears to the court from the report of the probation agent in charge of the defendant, or otherwise, that the defendant has complied with the conditions of such probation, the court may if it be compatible with the public interest either upon motion of the district attorney or

> of its own motion terminate the sentence or set aside the plea of guilty or conviction of the defendant, and dismiss the action and discharge the defendant."

The statute specifically points out that an offender, while on probation, may be ordered to make restitution, pay any fine imposed, or support his family. It does not give the District Court any authority to impose a jail sentence as a condition of probation. It is the position of appellant that this statute does not provide a means whereby the District Court can extend the jail sentence beyond that provided for violation of the actual statute.

In the instant case, the District Court, by using a jail sentence as a condition of probation, was able to extend the sentence six months in excess of the maximum jail sentence provided by the statute which was violated. The

District Court, having sentenced appellant to serve six months in the Weber County Jail, had no jurisdiction to subsequently sentence him to the Utah State Prison for a term not to exceed five years.

CONCLUSION

1. Appellant should be sentenced under the statute as it existed at the time of sentencing, and his petition for habeas corpus should be granted.

2. In the event the Court finds that appellant was sentenced prior to the amendment of the statute, then this petition for habeas corpus should be granted since the Court had no jurisdiction in sentencing him to both the Weber County Jail and the Utah State Prison.

Respectfully submitted,

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