1970

Albert Nolan Belt v. John W. Turner : Brief of Respondent

IN THE

SUPREME COU

OF THE

STATE OF U

ALBERT NOLAN BEL

Plaintiff

vs.

JOHN W. TURNER, W
State Prison,

Defendant

BRIEF O

Appeal from a Judgment
Court, in and for Webe
Charles G. Cowley, Pre

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

ALBERT NOLAN BELT,
Plaintiff-Appellant,

vs.

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

Case No. 11936

BRIEF OF RESPONDENT

NATURE OF THE CASE AND DISPOSITION IN LOWER COURT

Albert Nolan Belt appeals from the dismissal of his petition for a writ of habeas corpus by Judge Charles G. Cowley of the Second Judicial District Court.

RELIEF SOUGHT ON APPEAL

The respondent submits that the judgment of the lower court should be affirmed.

STATEMENT OF FACTS

Appellant's recital of facts is substantially correct. Respondent's additions and corrections appear hereinafter.

ARGUMENT

POINT I.

IT WAS NOT ERROR FOR THE TRIAL JUDGE TO SENTENCE APPELLANT UNDER THE STATUTE IN FORCE AT THE TIME THE OFFENSE WAS COMMITTED.

On October 14, 1968, appellant pleaded guilty to a charge that he violated Utah Code Ann. § 76-20-11 (1953), to-wit:

> "Any person who for himself . . . wilfully, 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."

Appellant was placed on probation, and when he violated the terms thereof by leaving the state without permission he was sentenced under the above statute on September 25, 1969. An amendment reducing the crime from a felony to a misdemeanor became effective on May 13, 1969.

> "(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." (Utah Code Ann. § 76-20-11 (Supp. 1969).)

Appellant was properly sentenced under the statute forming the basis of the charge against him. It is a well-entrenched rule of the common law that when there is nothing to indicate a contrary intent in a statute, it will be presumed that the legislature intended the statute to operate prospectively and not retroactively. This rule is codified in Utah Code Ann. § 68-3-5 (1953).

> "The repeal of a statute does not revive a statute previously repealed, or affect any right which has accrued, any duty imposed, *any penalty incurred,* or any action or proceeding commenced under or by virtue of the statute repealed." (Emphasis added.)

Appellant incurred his penalty at the time he was found guilty and sentenced, even though imposition of the sentence did not occur until his probation was revoked.

Appellant cited three cases from other states in which courts extended to appealing convicts the benefits of statutes passed by the legislature after the commission of the offense but before the judgment had become binding. (*In re Estrada,* 48 Cal. Rptr. 172, 408 P. 2d 948 (1965); *In re Kirk,* 48 Cal. Rptr. 186, 408 P. 2d 962 (1965); *State* v. *Mears,* 79 N. M. 715, 449 P. 2d 85 (1968). While recognizing that the law at the time of the commission of the crime could be properly applied, these courts felt that no purpose would be served by imposing a harsher sentence when the legislature had newly determined that a lighter sentence was appropriate.

Respondent submits that Justice Burke, writing for the dissenters in the 4-3 case, *In re Estrada, supra,* has the better of the argument.

> "The certainty of punishment has always been considered one of the strongest deterrents to crime. That certainty is best afforded when the punishment described by the law existent at the time of commission of the crime is promptly and inexorably meted out to those who violate the law. By changing the rules to make punishment uncertain the risk assumed by those contemplating committing a crime is substantially reduced. It is never enhanced since the ex post facto principles apply. Thus those contemplating and subsequently committing a crime have all to gain and nothing to lose by seeking every avenue of delay through appeals and legal maneuvers of all kinds, for, who knows, the legislature might in the meantime reduce the punishment. . . .
>
> "It has the effect of encouraging appeals and delays not related to guilt or innocence but employed solely to keep open the possibility of subsequent windfalls effected by a combination of an ameliorating legislative act and the application of the opinion of the majority in this case. . . . But what of the defendant who pleads guilty to an offense? His conviction promptly becomes final, thereby effectively shutting the door to his ever receiving benefit under the majority decision in this case. . . . As often as not, when compared with the person who pleads not guilty, the one pleading guilty may be the more deserving of the two." *Id.* at 56-57.

These arguments are equally applicable to the instant case, where nearly a year elapsed between the plea and sentencing. Respondent submits that the California and

New Mexico rule is bad law which should not be followed by this court; when the consistency and deterrent effect of the law are undermined by caprice, the public is not served. Further, in the instant case, where appellant's sentence by the district judge is not contrary to law, respondent respectfully submits that the parole board, with its staff of trained psychologists, is the best agency to determine if appellant should have the benefit of a reduction of time in the state prison.

POINT II.

THE TRIAL JUDGE PROPERLY SENTENCED APPELLANT TO SERVE UP TO FIVE YEARS IN THE STATE PRISON EVEN THOUGH APPELLANT HAD ALREADY SERVED SIX MONTHS IN THE COUNTY JAIL AS A CONDITION OF PROBATION.

After appellant pleaded guilty, Judge Cowley placed him on probation upon condition that he would spend six months in the Weber County jail and pay $559.04 in restitution. Appellant served this time and then left the State without permission contrary to another condition of probation. The Judge revoked his probation after he was recaptured, and sentenced him to serve up to five years in the Utah State Prison.

Appellant argues that this was improper since Utah Code Ann. § 76-20-11 (1953) provides for imprisonment in the state prison *or* in the county jail—not both. Appellant misconstrues the action of the trial judge: The six months

in the county jail was not imposed as a *sentence* for commission of a crime, but as a *condition of probation.* The California Supreme Court in *People* v. *Banks,* 53 Cal. 2d 370, ..., 348 P. 2d 102, 112 (1959) reasoned as follows:

> "Of course when probation is granted, that is an act of discretion and (a) stay of execution of any judgment that has been pronounced is an incident of probation; requiring service of some time in a county jail as a condition of probation does not constitute *imposition of sentence* to a county jail."

In *Ex parte Hays,* 120 Cal. App. 2d 308, 260 P. 2d 1030 (1953), defendant had been put on probation for manslaughter with an automobile upon condition that the first eight months of probation be served in the county jail. After six months in jail, defendant's probation was revoked because of condition violations, and a full one year sentence, the maximum for the crime, was imposed. The Court affirmed this action in these words:

> "An Order placing defendant on probation, even though it includes as a condition a period of detention in the county jail, is not a judgment and sentence. There is no finality to an order for probation; it imposes no penalties but is an 'act of clemency.' A defendant has the undoubted right to refuse probation — a necessary safeguard against the possibility that probationary conditions may be more onerous than sentence . . . . Having accepted probation, and thus having voluntarily served this period, defendant is hardly in a position to enter an objection thereto. And had Mr. Hays complied with the other terms of probation, which he did

> not, then there would have been no further imprisonment." *Id.* at 1032.

Accord: *Peterson* v. *Dunbar,* 355 F. 2d 800 (9th Cir. 1966); *People* v. *Caruse,* 174 Cal. 2d 624, 345 P. 2d 282 (1959).

There is no doubt that under the Utah statutes a trial judge has the necessary discretion to impose a term in the county jail as a condition of probation.

> "The Court may subsequently increase or decrease the probation period, and *may revoke or modify any condition of probation.*" Utah Code Ann. § 77-35-17 (1953). (Emphasis added.)

The power to modify any condition is meaningless without the power to make any condition. As was observed above, a defendant is free to reject probation with its attendant conditions if he chooses. If the appellant is correct in his argument that the trial judge may only impose the conditions which are expressly authorized by the statute, he could also object to the condition, imposed on him by Judge Cowley, that appellant not leave the state without permission. This contention, if accepted, could undermine the state's entire probation-parole procedure. Respondent submits that the only rational interpretation of the statute is to construe it as authorizing the trial judge to impose any reasonable conditions, including those expressly mentioned.

CONCLUSION

Appellant was properly sentenced under the statute under which he was convicted. By accepting six months imprisonment in the county jail as a condition of probation, appellant voluntarily ran the risk that the maximum sentence could later be imposed if his probation were revoked.

Respectfully submitted,

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