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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent

v.

CHARLES R. KNOWLES,

Defendant and Appellant.

Case No.
12038

APPELLANT'S BRIEF

**Appeal from Order Revoking Probation of the Defendant-
Appellant, in the Third Judicial District Court for
Salt Lake County
Honorable Merrill C. Faux, Judge**

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff and Respondent

v.

CHARLES R. KNOWLES,

Defendant and Appellant

Case No.
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APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

The Defendant - Appellant, Mr. Charles R. Knowles, having been convicted of obtaining property under false pretenses on the 13th day of September, 1967, was thereafter granted a new trial, which we assume was subsequently revoked, and instead of the new trial the Defendant was granted a stay of execution and placed on probation. Over two years later, on De-

December 17, 1969, a hearing was held wherein the Defendant was ordered to show cause why his probation should not be revoked.

The Defendant appeals from the result of this hearing and from certain errors in the proceedings which were a gross violation of the Defendant's right to due process in Judicial Proceedings.

DISPOSITION IN LOWER COURT

The hearing on the order to show cause why probation should not be revoked resulted in Defendant's probation being revoked and the Defendant being committed to the Utah State Prison. From this result the Defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the order revoking probation and reversal of the order committing him to prison where he is presently being held against his will.

STATEMENT OF FACTS

Mr. Charles R. Knowles, the Defendant-Appellant, was convicted on the 13th day of September, 1967, of obtaining property under false pretenses. Upon conviction, the trial court found sufficient grounds for granting a new trial. And the record shows no formal

revocation of this order for new trial, but, apparently, the judge was persuaded by the Deputy District Attorney to place the Defendant on probation rather than allow the new trial. During this time, Defendants counsel withdrew from the case, and the Defendant, being impecunious, was left without adequate counsel.

The Defendant was placed on probation subject to the supervision of the Adult Probation and Parole Department and remained in good standing with said Department for more than two years since the date of original conviction. On the 19th day of November, 1969, the Defendant was ordered to appear and show cause why his probation should not be revoked. The grounds for such order was an affidavit executed by Arthur J. Beverage, the Defendant's probation officer, wherein it was alleged that the defendant, ". . . did have in his home on or about November 13, 1969, stolen property valued at \$50.00, knowing the same to be stolen."

The matter came regularly on for hearing before the Honorable Merrill C. Faux, one of the judges of the Third Judicial District, at 10:30 a.m., on Wednesday, December 17, 1969. At said hearing, Salt Lake County Deputy Sheriff, Michael Hanks, testified that he telephoned the Defendant's wife and told her that Salt Lake County Deputy Captain, Pete Hayward was enroute to the Knowles' residence with a search warrant and that the Defendant's wife should remove from the house any stolen property. Said statement was made by Deputy Hanks, knowing the same to be false. The

The Defendant's wife instinctively trying to protect her husband and father of her five children from any possible trouble, (not knowing of anything stolen, but being led to believe by the phone call that there was some stolen property in the house), gathered up several articles which she did not recognize for sure as property of her husband or herself and placed them in a vehicle and drove away from the home.

While on the public street the vehicle was stopped and without probable cause or the formality of arrest, Deputy Hanks searched and seized the contents thereof.

At said hearing, Deputy Hanks was allowed to testify, over the objections of Defendant's Counsel, as to whether the property was in fact stolen and from whom it was stolen without personal knowledge as to these facts. Also, Deputy Hanks was allowed to testify over objections of Counsel, as to the actual value of the property in question, again, without personal knowledge of such facts.

The Defendant was denied requests to confront alleged owners of said property. Also, Defendant was denied request for production of said property in order to be able to rebut and refute allegations of the State. The Defendant was not even allowed to examine the alleged inventory list of the alleged stolen property.

Each attempt by the Defendant's counsel to object to abuses of due process in the judicial proceedings was overruled.

At the conclusion of the hearing, the Defendant's probation was revoked and his personal liberty was denied by his commitment to the Utah State Prison.

The Defendant appeals from this gross abuse and violation of his individual rights.

ARGUMENT

POINT I. THE COURT HAD NO JURISDICTION TO DECIDE IN PROBATION HEARING.

Part A. The court had no jurisdiction to hear or rule on the matter of Probation because a new trial had been granted and no revocation of order granting new trial appears in the record.

On the 13th day of September, 1967, Defendant was convicted of obtaining property by false pretenses. (Official Record p. 37) Because of certain irregularities at trial and because of new affidavits available which were contrary to testimony received in trial and on other grounds which the trial judge found sufficient, a motion for new trial was granted and the order for new trial was entered on 26th day of February, 1968. (Official Record p. 46.)

There is no timely or formal order revoking or withdrawing the order for new trial in the Official Record filed with the Clerk of Supreme Court of Utah, 24th day of March, 1970. Thus, it appears the court granted a new trial but none was ever had. Instead, the De-

fendant was placed on probation, which the court at that point had no jurisdiction or power to do because in fact a new trial had been granted returning the Defendant to position in which he was before the original trial on conviction. Utah Code Annotated 77-38-2 states that "The granting of a new trial shall place the parties in the same position as if no trial had been had." Consequently, without jurisdiction to deal with the probation of the Defendant, the hearing and its determination are void.

Part B. Once a new trial has been granted, Revocation of order granting new trial is error as it is beyond the power of the Trial Judge.

Admittedly, various jurisdictions are divided on the issue of trial court's power to revoke, modify, or, in general, tamper with original order granting new trial once it has been formally entered. However, it was early established in this jurisdiction in the case of *Luke v. Coleman*, 38 U. 383, 113p 1023, (1911), that the Court has no power to reopen the question of granting a motion for new trial after once disposing of it. In the *Luke v. Coleman* case, supra, the Court cited various California cases as similar to ours and stated that in California, the trial court does not have the power to reopen the question of granting or denying a motion for new trial after previously disposing of it.

The California Court has since had the opportunity to rule on and refine this point of law several times, and the result is expressed in the case of *People v. Pay-*

sen, 123 Cal. App. 396, 11 pbd 431, 193, (1932), and *People v. Hanks*, 35 Cal. App. 2d 290, 95 P2d 478, (1939). *People v. Hanks*, supra, states, "It is well settled in this State, that once a motion for a new trial has been ruled upon in a criminal case and an order made either granting or denying such application . . . the Court is without authority to entertain a subsequent motion the object of which is to change or vacate the former order."

And the Texas Court in *Jones v. State*, 51 Tex. Crim. Rep. 3, 100S.W. 150, (1907), held that after a motion for a new trial has been granted by the trial court "the case stands as it originally stood, that is, for trial," and the trial court is without authority to revoke its order for the new trial. The Texas Court arrived at the same conclusion in *Ex Parte Alexander*, 129, Tex. Crim. Rep. 500, 89 SW 2d. 411, (1936).

POINT II. THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW WAS VIOLATED BY THE MANNER IN WHICH THE HEARING FOR REVOCATION OF PROBATION WAS CONDUCTED.

Part A. The trial court erred in admitting evidence which was obtained in violation of Defendant's Fourth and Fourteenth Amendment Right of Protection from unreasonable Search and Seizure.

The articles of property which the State alleged as stolen were taken from the Defendant's wife without

probable cause and without arrest or warrant for such search and seizure. Deputy Michael Hanks testified at p. 64 of the record that he stopped the Defendant's wife and seized certain articles from the back of the vehicle which Defendant's wife was driving, and that he did not have a search warrant.

In *Chimel v. California*, 395 U.S. 752, (1969), the court held that a search without a warrant could not go beyond the area wherein the person might have obtained a weapon or obtained evidence that might be used against him.

In the instant case the Defendant's wife was not arrested, the officer had no probable cause to arrest, no search warrant was had, and Defendant's wife was not advised of any of her rights. This conduct was "unreasonable" under the *Chimel v. California*, *supra*, doctrine and the Fourth and Fourteenth Amendments to the Constitution. And the use of the articles of property obtained by this illegal seizure as evidence in the hearing was a violation of the Defendant's rights.

Part B. The court erred in admitting hearsay testimony prejudicial against the Defendant.

Throughout the hearing, Deputy Michael Hanks was allowed to testify, over the objection of Defendant's Counsel, as to what items were in fact 'stolen' and what value the items had, when he had no personal knowledge of this fact. Also, the officer was allowed to testify as to the truthfulness of the State's allegations when in fact he had no personal knowledge as to the

truthfulness, but, rather, he was relying upon the out of court testimony of persons not produced at the hearing.

The testimony by Officer Hanks was allowed by the trial court over numerous objections by Defendant's Counsel. And, in effect out of court statements and facts which were not established in court were permitted by the trial court to be admitted a proof of the truthfulness of the matters asserted in the testimony.

This hearsay testimony was definitely prejudicial to the defendant as it was not possible to cross-examine or effectively rebut such testimony.

Part C. The Defendant was denied his Sixth and Fourteenth Amendment Right to confront the witnesses against him.

The Court refused to order the alleged owners of the property to appear and be confronted by the Defendant. The court even refused to allow the Defendant to see any of the allegedly stolen items, or even a list of such items. Thus, the Defendant was denied his constitutionally guaranteed right to confront witnesses against him.

In effect, the Defendant was denied opportunity to refute the allegations of the State due to the unconstitutional way in which the hearing was conducted.

In the case of *State v. Zolantakis*, 70 U. 296, 259 p. 1044, (1927), this court has recognized that, "In a judicial investigation the right of cross examination is an absolute right and not a mere privilege of the party

against whom the witness is called.” And the court held that it was prejudicial error not to allow cross-examination. In this same case the court said that the hearing must be conducted in accordance to well recognized and established rules of judicial procedure.

The Defendant was denied this opportunity to cross-examine witnesses in accordance to accepted judicial procedure.

Part D. The Defendant’s Right to Due Process was violated by the manner in which the proceedings of the Hearing were conducted.

It is well established in Utah that a judicial hearing must be held before revocation of probation. Some of the requirements of due process which must be met at such hearing are set forth in *State v. Bonza*, 106 U. 553, 150 P2d 970, (1944).

The case of *McPhie v. Turner*, 10 U2d 237, 351 P2d 91, (1960), held that a judicial hearing is required to fulfill the requirements of due process.

Some courts, and evidently the trial court in this case, (see record of hearing at p. 12), rationalize that the Defendant’s probation is a privilege and that Constitutional rights do not attend the proceedings. However, it is clear from Utah decisions that, that is not the rule in Utah. (As stated, supra, *McPhie v. Turner*). Because as the trial judge stated and enforced his own ideas of due process requirements, rather than those asserted as necessary in the Utah cases, the Defendant in this case was denied due process in the hearing. This is evident by the trial judge’s statement on the record

at p. 11, that the hearing was conducted relative to probation which was a privilege granted to Defendant.

The trial judge's contention is not only contrary to Utah decisions, *supra*, but is also illogical. If a hearing must be held to provide Defendant with his Constitutional rights to due process of law, then the hearing, once held, cannot be conducted in a manner that would deprive the Defendant of his Constitutional rights to due process. There is a definite contradiction in the trial judges reasoning. And this has resulted in the Defendant's rights to due process of law being violated. If the hearing is not conducted in accordance with acceptable judicial standards (as required in *State v. Zolantakis, supra*) and in accordance with due process of law (as required in *McPhie v. Turner, supra*) then the Defendant is in effect denied a judicial hearing.

State v. Zolantakis, supra, states that the right to personal liberty, ". . . may not be alternately granted and denial . . .", (as by revoking probation), ". . . without just cause." Mr. Knowles, the Defendant has had his rights to personal liberty denied without just cause. The required "just cause" could not have been established in a hearing conducted in the manner in which the Defendant's hearing was conducted. "Just cause" must be determined in a court of law where the Defendant is allowed due process of law.

The hearing for revocation of probation was conducted in a manner which flagrantly abused and violated the Defendant's right to due process of law.

CONCLUSION

The Defendant has had his freedom denied by a court which did not have proper jurisdiction or power to make such denial. The granting of the new trial has never been formally revoked and certainly there are time limits for such revocation, if in fact it can be made. Even in civil cases 10 days is the maximum. (Utah Rules of Civil Procedure 6(b), 59(d)).

And alternatively, the revocation of the order granting new trial in criminal cases is not proper. Certainly, when the court has found sufficient grounds for granting new trial, a mere letter from the prosecution objecting to new trial, (as was case in Defendant's trial), cannot be "just cause" which is required by State v. Zolantakis, supra, in order to deprive a person of his right to personal liberty.

In addition, the Defendant was denied the necessary due process of law protection which must be afforded to every individual. Defendant's case was prejudiced by illegal search and seizure and by hearsay testimony. Defendant was also denied the Sixth Amendment right of confrontation of witnesses. And, in total, the necessary requirements of due process of law recognized as necessary to deprive an individual of his personal liberty were notably absent, or grossly abused and violated.

As Justice Hansen stated in the Zolantakis case, supra, "the right to personal liberty is one of the most

sacred and valuable rights of a citizen, and should not be regarded lightly. The right to personal liberty may be as valuable to one convicted of a crime as to one not so convicted, . . ." Accordingly, this right should be vigorously protected by the courts in probation hearings where the Defendant is subject to having his personal liberty denied.

Utah decisions such as *State v. Zolantakis*, *State v. Bonza*, and *McPhie v. Turner*, all supra, have protected the Defendant's rights by requiring a judicial proceeding which must determine if there is just cause for revoking probation. It is inherent in a judicial proceeding that the Defendant's rights to due process are upheld and protected, lest the proceedings become a mockery of justice. A judicial hearing without the requirements of due process of law, is no hearing at all. The Defendant in this case was, in effect, denied a judicial hearing because he was denied due process of law protection.

The Defendant urgently petitions this court to uphold his Constitutional Rights and restore his personal freedom which has unjustly been denied him.

Respectfully submitted,

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