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No. 12106

IN THE SUPREME COURT
of the
STATE OF UTAH

THE STATE OF UTAH,

Plaintiff and Respondent,

v.

CHARLES EICHLER,

Defendant and Appellant.

APPELLANT'S BRIEF

Appeal from the District Court
of the First Judicial District
In and For Cache County
State of Utah
Honorable VeNoy Christoffersen, Judge

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Clerk, Supreme Court, Utah

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No. 12106

IN THE SUPREME COURT
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STATE OF UTAH

THE STATE OF UTAH,)
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Plaintiff and Respondent,)
)
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)
CHARLES EICHLER,)
)
Defendant and Appellant.)

APPELLANT'S BRIEF

This is an appeal from an order dated April 6, 1970 of the District Court of the First Judicial District of the State of Utah in and for the County of Cache ordering revocation of probation of Charles Henry Eichler on convictions of forgery and second degree burglary because of an alleged violation of Cache County and Box Elder County probation agreements.

STATEMENT OF FACTS

The following facts are taken from the reporter's transcript of proceedings in criminal actions No. 1497 and 1499 in the District Court of the First Judicial District of the State of Utah in and for the County of Cache, and the transcript of proceedings in criminal action No. 1216-17 in the District Court of the First Judicial District of the State of Utah in and for the County of Box Elder:

Charles H. Eichler, defendant and appellant herein, was arraigned before the Honorable Lewis Jones, District Judge, in the District Court of Cache County on the 14th day of April 1969, wherein appellant was represented by H. Preston Thomas, Esquire, on the charges of forgery and second degree burglary. Appellant pled guilty to the charge of forgery and not guilty to the charge of second degree burglary. On the 16th day of April

1969 appellant, represented by L. Brent Hoggan, Esquire, appeared before Judge Jones who pronounced a sentence of indeterminate term of not less than one year and not more than 20 years in the Utah State Prison, granting, however, a stay of execution upon the condition that appellant serve an indeterminate term in the county jail and, upon his release, that he be placed upon probation.

On the 27th day of May 1969 appellant again appeared before Judge Jones, now in the District Court of Box Elder County. He was not represented by counsel. Appellant pled guilty to a charge of second degree burglary and having expressed a desire to have sentence pronounced at that time, he was sentenced by Judge Jones to serve not less than one year and not more than 20 years in the Utah State Prison, granting, however, a stay of execution upon the condition that appellant serve

an indeterminate term of not less than six months in the Box Elder County jail and then be placed upon probation for two years. Judge Jones further ordered revocation of the Cache County probation agreement, directing that the Cache County sentence be ordered into execution, to be served in the Box Elder County jail concurrently with the Box Elder County sentence. Appellant was remanded to the custody of the Box Elder County Sheriff to serve a minimum of six months in the Box Elder County jail. Upon serving the time required, appellant was released from the Box Elder County jail on probation.

On March 16, 1970 appellant appeared before the Honorable VeNoy Christoffersen, District Judge in and for the County of Cache, on a hearing based upon an affidavit of John Holmes, probation officer, alleging probation violation. Appellant appeared in person, not represented by counsel. Upon a

specific request of appellant to obtain a court appointed lawyer, Judge Christoffersen refused the request. The hearing was continued until April 6, 1970 while appellant remained in custody in the Cache County jail, whereupon appellant was found in violation of two separate probation agreements, one originating in Cache County, the other originating in Box Elder County. The court revoked the two probations and stays of execution, ordering appellant incarcerated in the Utah State Prison for a period of from one to twenty years, both sentences to run concurrently.

NATURE OF RELIEF SOUGHT ON APPEAL

Appellant seeks to have the Supreme Court on review vacate the probation revocation ordered by the District Court of Cache County and reinstate the probation.

STATEMENT OF POINTS

I. THE APPELLANT WAS DENIED THE RIGHT TO

COUNSEL AT HIS PROBATION REVOCATION HEARING IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

II. THE DISTRICT COURT IN AND FOR CACHE COUNTY ERRED IN REVOKING THE CACHE COUNTY PROBATION AGREEMENT AND INCARCERATING APPELLANT, SINCE SAID PROBATION AGREEMENT HAD BEEN TERMINATED PREVIOUSLY BY ORDER OF THE DISTRICT COURT IN AND FOR BOX ELDER COUNTY.

III. THE DISTRICT COURT IN AND FOR CACHE COUNTY DID NOT HAVE JURISDICTION TO HEAR THE ALLEGED VIOLATION OF A BOX ELDER PROBATION AGREEMENT.

ARGUMENT

POINT I.

THE APPELLANT WAS DENIED THE RIGHT TO COUNSEL AT HIS PROBATION REVOCATION HEARING IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

On March 16, 1970, District Judge VeNoy

Christoffersen conducted a hearing on an alleged violation of probation for the appellant, Charles Henry Eichler. (Cache Co. Tr. 12). During the course of the probation revocation hearing the impecunious (R. 3) Mr. Eichler specifically requested court-appointed counsel, but his request was denied:

Mr. Eichler: Could I get an appointed lawyer?

The Court: Not on a probation revocation. If this were another charge I would appoint one for you to defend the charge, but this is on probation revocation, and in view of the Appeals Court, the Federal Court of Appeals in response to Mr. Ritter's requirement, I think that that's been overruled, and I don't see a necessity on revocation, parole violation or probation revocation, to provide court-appointed counsel. (Cache Co. Tr. 17).

In view of the decisions of the United States Supreme Court and the United States Court of Appeals for the Tenth Circuit, appellant contends that the First District Court in and for Cache County improperly withheld his constitutional right to counsel.

The United States Supreme Court, in the landmark decision of Gideon v. Wainwright, 372 U.S. 335 (1963), held the Sixth Amendment guarantee of the right to counsel applicable to the states through the due process clause of the Fourteenth Amendment. The present case presents the precise question of whether the right to counsel arising under the United States Constitution is applicable to a hearing on probation revocation before a District Court of the State of Utah.

Recently the United States Supreme Court held that, as a matter of federal constitutional law, an individual is entitled to be represented by counsel whether the proceedings are labeled a revocation of probation or a deferred sentencing. Mempa v. Rhay, 389 U.S. 128 (1967), which was given retroactive effect in McConnell v. Rhay, 393 U.S. 2 (1968). Following Mempa's conviction for the offense of "joyridding," he was placed on probation for two years on the condition, among others, that

he spend thirty days in the county jail. The imposition of sentence was deferred pursuant to a Washington state statute. About four months later, Mempa's probation was revoked at a hearing at which he was not represented by counsel. _Mempa, supra_ at 130-31. In a companion case which was consolidated for purposes of argument, petitioner Walkling, following his conviction for second degree burglary, was placed on probation for three years, the imposition of sentence being deferred pursuant to the same statute. As a condition of probation, Walkling was required to serve ninety days in the county jail and to make restitution. At his hearing for probation revocation, he requested a continuance to enable him to retain counsel and was granted a week. However, the following week Walkling appeared without a lawyer. The court went ahead with the hearing in the absence of petitioner's counsel. He was not

offered counsel, nor would he have been appointed counsel had he requested it. Mempa, supra at 132. In holding that both petitioners' Sixth Amendment guarantee of right to counsel had been denied, the United States Supreme Court stated:

> [A]ppointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.
> Mempa, supra at 134.

> [A] lawyer must be afforded at this proceeding whether it be labeled a revocation of probation or a deferred sentencing.
> Mempa, supra at 137.

The probationary status is a part of the sentencing process since "substantial" rights may be affected through hearings involving revocation of that probation. If the probation agreement, which is part of the sentence, is to be altered in such a way as to affect the "substantial" rights, then the constitutional guarantee of a right to counsel must be met.

The United States Court of Appeals for the

Tenth Circuit held in *Alverez* v. *Turner*, 422 F.2d 214 (10th Cir. 1970), that the denial of a request for court appointed-counsel in a probation revocation hearing is a clear abuse of a federal constitutional right. The court carefully made the distinction between the *probation* revocation of Melany and the *parole* violations of the other petitioners:

> In No. 580, the appellee Melany alleged in his original petition . . . that he had been denied the assistance of counsel at the *judicial* proceedings that had resulted in the revocation of his *probation*.
>
> * * *
>
> The trial court . . . granted relief to Melany on the additional round [sic.] that *he had been denied counsel in the probation revocation hearing. Such denial is a clear abuse of a federal constitutional right.* *Mempa* v. *Rhay*, *supra*, given retroactive effect in *McConnell* v. *Rhay*, 393 U.S. 2, 89 S.Ct. 32, 21 L.Ed.2d 2. The judgment in No. 580 is thus affirmed.
> *Alverez*, *supra* at 220-21 (emphasis added).

However, the court noted that, unlike *probation* revocation hearings, proceedings for *parole* revocation were not judicial proceedings and hence

were not a part of the sentencing process which require court appointed counsel. Alverez, supra at 220-21.

The Utah Supreme Court, in a decision prior to the Alverez Case, intimated in dicta that the Mempa Case did not hold that counsel was required at a hearing for probation revocation. Beal v. Turner, 22 Utah 2d 418, 454 P.2d 624 (1969). The dicta in Beal confined the Mempa ruling to the facts, contending that the decision must be read in light of the Washington statutes providing for deferred sentencing. Beal, supra at 625. The decision apparently concluded that the proceedings for probation revocation are not a part of the "judicial proceedings" of a case:

> When a defendant has been tried and convicted and sentenced, and no appeal or other proceedings are pending to test the propriety of the guilty verdict, then the critical states of the proceeding are over, and the defendant has no constitutional rights to be placed on probation or parole. Beal, supra at 626.

It is frequently difficult to determine the exact scope of a United States Supreme Court decision such as the Mempa Case, particularly where federal constitutional rights are made applicable to the states through the Fourteenth Amendment. It becomes necessary, therefore, to examine subsequent decisions which interpret the holding of the United States Supreme Court on a particular issue.

The most recent pronouncement of the United States Court of Appeals for the Tenth Circuit, within which Utah is situated, is Alverez v. Turner, supra. The court in that case specifically held that denial of counsel at the judicial proceedings that resulted in the revocation of his probation was a "clear abuse of a federal constitutional right," Alverez, supra at 220-21, concluding that a hearing for revocation of probation, regardless of whether or not it involves a deferred sentencing procedure, requires that the accused be

afforded counsel.

The probation revocation in this case was effectuated in open court after the presentation of evidence by the state's attorney. Appellant asked for counsel but was denied, thus rendering appellant helpless to refute improper testimony or challenge its admissibility. Without counsel the substantial rights of an individual in his probation revocation hearing are open to abuse. Unlike a parolee who is responsible to the Parole Board, an administrative body, the probationer falls under not only the jurisdiction of the probation officer, but also the jurisdiction of the court. It is only the latter relationship which the law demands that counsel be provided. Justice requires that even the indigent be entitled to representation when his substantial rights are to be affected.

POINT II

THE DISTRICT COURT IN AND FOR CACHE COUNTY

ERRED IN REVOKING THE CACHE COUNTY PROBATION AGREEMENT AND INCARCERATING APPELLANT, SINCE SAID PROBATION AGREEMENT HAD BEEN TERMINATED PREVIOUSLY BY ORDER OF THE DISTRICT COURT IN AND FOR BOX ELDER COUNTY.

On April 6, 1970 the defendant appeared before the District Court of Cache County wherein an affidavit was filed alleging that he had violated two separate probation agreements, one executed in Cache County and one executed in Box Elder County. (Cache Co. Tr. 17-18). After hearing the state's evidence the District Court concluded that the defendant had in fact violated the terms of both probation agreements and, accordingly, withdrew the stays of execution and revoked the two separate probations, ordering the defendant to be incarcerated in the Utah State Prison for a period of from one to twenty years on each violation. (Cache Co. Tr. 18-24). The sentences were to run concurrently. (Cache Co. Tr. 24).

However, prior to the aforesaid action of the District Court of Cache County, the District Court in Box Elder County, on May 27, 1969, revoked or terminated the Cache County probation agreement:

> The Court: . . . I propose to revoke the probation over in Logan [Cache County] with your consent here and sentence you to serve a period in the Box Elder County jail concurrent with that in Logan. Now you've got to consent to that.
>
> Mr. Eichler: Alright.
>
> The Court: Alright, the probation is revoked in the Logan matter, the sentence is ordered into execution, but the sentence is to be served in the Box Elder County jail concurrent with the one I'm going to impose on you now. (Box Elder Co. Tr. 3).

The defendant was thus convicted of violating the Cache County probation agreement which had previously been terminated by the District Court of Box Elder County. Certainly, the appellant cannot be imprisoned for a violation of a probation agreement which the court itself previously rendered void.

POINT III

THE DISTRICT COURT IN AND FOR CACHE COUNTY DID NOT HAVE JURISDICTION TO HEAR THE ALLEGED VIOLATION OF A BOX ELDER PROBATION AGREEMENT.

Because the Cache County probation agreement had been terminated prior to the probation revocation hearing in Cache County, the sole question is whether the Cache County District Court had jurisdiction to hold a hearing on an alleged violation of the remaining probation agreement of Box Elder County.

The Constitution of the State of Utah in dividing the state into Judicial Districts specifically provides that:

> All civil and criminal business arising in any county must be tried in such county unless a change of venue be taken in such cases as may be provided by law. Utah Cons. Art. VIII §5.

Further, Utah Code Annotated 77-8-1 provides that the jurisdiction for criminal offenses "shall be in the county in which the offense is consummated."

The Utah Supreme Court held in State v. Cox, 147 P.2d 858 (1944) that:

> The jurisdiction is determined by the County and not by the district it is in.. . . Thus it is evident that there is no district court which covers the whole district but only a district court for each county and its territorial jurisdiction is within the boundaries of the county.
>
> State v. Cox, supra at 860, 861.

The only probation agreement remaining in force at the time of the Cache County probation revocation hearing was the agreement executed pursuant to the District Court of Box Elder County order. Therefore, the District Court of Box Elder County, not Cache County, had exclusive jurisdiction to hear the matter. Accordingly the order of the District Court of Cache County had no jurisdictional basis and must be vacated.

CONCLUSION

The entire proceedings in this matter were handled in such an unorthodox and improper manner

so as to substantially impair the constitutional rights guaranteed the appellant, both under the Constitutions of the United States and the State of Utah, requiring the probation revocation to be vacated and probation reinstated.

Respectfully submitted,

STEPHEN G. BOYDEN

Attorney for Appellant.