

1994

Martin V. Ontiveros v. Utah Board of Pardons, et al. : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MARTIN V. ONTIVEROS,)
)
Petitioner and Appellant,)
)
vs.)
) Case No: 940290-CA
UTAH BOARD OF PARDONS, et. al.,)
) Priority No: 3
Respondents and Appellees.)

BRIEF OF APPELLANT

**APPEAL FROM THE DENIAL OF APPELLANT'S
PETITION FOR WRIT OF HABEAS CORPUS
IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE MICHAEL MURPHY PRESIDING**

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Marilyn M. Branch
Clerk of the Court

No Addendum
Necessary

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 Petitioner and Appellant,)
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) Case No: 940290-CA
 UTAH BOARD OF PARDONS, et al.,)
) Priority No: 3
 Respondent and Appellees.)

BRIEF OF APPELLANT

**JURISDICTION OF THE COURT AND
AND NATURE OF THE PROCEEDINGS**

This is an appeal from a denial of Appellant's Petition for a Writ of Habeas Corpus entered in the Third District Court, in and for Salt Lake County, State of Utah.

This Court has jurisdiction to consider the Appellant's appeal pursuant to Utah Code Ann. § 78-2a-3(g) and Utah R. App. P. 3., as this Court has jurisdiction to review a final decision entered by a district court of the State of Utah.

**ISSUES PRESENTED ON APPEAL
AND STANDARD OF REVIEW**

1. Whether Appellant was Denied Procedural Due Process by the Utah Board of Pardons by Improperly Tolling the Time Appellant was Incarcerated in California.

2. Does the Board of Pardons have jurisdiction and authority to continue to incarcerate appellant after Appellant's statutory felony sentence expired?

STATEMENT OF THE CASE

A. Nature of the Case

The above-captioned case is a denial of Appellant's petition for a writ of habeas corpus.

B. Statement of the Facts

1. Appellant was convicted of Burglary, a Second Degree Felony, pursuant to Utah Code Ann. 76-6-202, and was sentenced on May 18, 1979, to serve a term of imprisonment of not less than one year nor more than fifteen years at the Utah State Prison. (See Record, File #00018.)

2. On December 22, 1987, Appellant was paroled by the Utah State Board of Pardons from the Utah State Prison. (See Record, File #00074.)

3. Subsequent to his release from prison, Petitioner was allowed to leave the State of Utah and to reside in the State of California under an interstate compact agreement, pursuant to

Utah Code Ann. § 77-28-1 et seq. (1953 as amended). (See, e.g., Record, File #00079.)

4. On February 16, 1988, Appellant was arrested by California police officers. (See Record, File #00112-228.)

5. On March 3, 1988, the Utah Board Pardons issued a Warrant of Arrest (Warrant) to detain Petitioner for alleged parole violations. (See Record, File #00013.)

6. The Warrant was for the "arrest of [appellant] and to cause him or her to be detained and returned to actual custody pending a determination whether there is probable cause to believe that [appellant] has violated conditions of his parole." (See id.)

7. Appellant was sentenced to serve six years at the California State Prison on March 30, 1988. (See Record, File #00014.)

DISCUSSION

I. WHETHER APPELLANT WAS DENIED PROCEDURAL DUE PROCESS BY THE UTAH STATE BOARD OF PARDONS BY IMPROPERLY TOLLING THE TIME APPELLANT WAS INCARCERATED IN CALIFORNIA

A. Standard

The Due Process Clause "is the source of three different kinds of constitutional protections." Daniels [v. Williams], 474 U.S. [327, 337 (1986) (Stevens, J. concurring in the judgment)] First, it provides a "guarantee of fair procedure, . . . referred to as 'procedural due process,'" in connection with any deprivation of life, liberty or property by a state.

Id. This is "the most familiar office" of the Clause. Collins v. Harker Heights, [sic] 112 S. Ct 1061, 1068 [sic] (1992). Second, the Clause contains a substantive component "that protects individual liberty against 'certain government actions regardless of the procedures used to implement them.'" Id. (quoting Daniels, 474 U.S. at 331 [sic]. This substantive component is referred to as substantive due process. Id. Third, the Clause incorporates the specific protections of most of the Bill of Rights against the states. These, too, are referred to as "substantive" rights, and are comprised within the "liberty" provision of the Clause. Planned Parenthood of S.E. Pa v. Casey, [sic] 112 S. Ct. 2791, 2804 [sic] (1992). See Daniels, 474 U.S. at 337. [Other citation omitted.]

See Doyle v. Oklahoma Bar Association, 998 F.2d 1559, 1567-68 (10th Cir. 1993). Appellant asserts that the first source of constitutional protection, the procedural due process protection, is applicable to Appellants issue.

B. Procedural Due Process

"[P]rocedural due process questions [are examined] in two steps: the first asks whether there exists a liberty or property interest which has been interfered with by the state; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." See Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 460 (1989). In conducting its analysis, a court must look to two sources from which liberty interest may arise--the Due process Clause itself and the laws of the states." See Meachum v. Fano, 427 U.S. 215, 223-27, 96 S. Ct. 2532, 2537-39 (1976). Hewitt v. Helms, 459 U.S. 460, 466,

103 S. Ct 864, 868 (1983). Appellant is not asserting a property interest in this proceeding and, therefore, Appellant will discuss whether he had a federally created liberty interest or, alternatively, a state-created liberty interest.

C. Federally Created Liberty Interest

The Appellant will concede that, with respect to this particular issue, he does not have a federally created liberty interest.

D. The State's Argument at the Lower Court

The State has argued that

[o]n May 18, 1979, the court placed Petitioner under an "affirmative obligation" to serve his entire fifteen-year sentence at the Utah State Prison, unless that time was or is shortened by order of the Board. See Beal v. Turner, 454 P.2d 624, 626 (Utah 1969); McCoy v. Harris, 160 P.2d 721, 723 (Utah 1945). Thus, unless state law specifically creates a right for Petitioner to receive credit, against his sentence of imprisonment, for time spent outside of confinement at the prison, Petitioner has no constitutional entitlement to receive credit for such time while confined outside the State of Utah by order of a foreign jurisdiction.

(See Record, File # 00165.) (Emphasis provided.)

E. State-Created Liberty Interest

The United States Supreme Court has "recognized that a state may create a liberty interest protected by the Due Process Clause through its enactment of certain statutory or regulatory measures.'" See Hansard v. Barrett, 980 F.2d 1059, 1062 (6th

Cir. 1992) (quoting Hewitt v. Helms, 459 U.S. 460, 469 (1983)). In addition, "[t]he Court further explained that, by the use of 'language of an unmistakably mandatory character, requiring that certain procedures 'shall,' 'will,' or 'must' be employed," a state may create in its prisoners a protected liberty interest." Id. (quoting Hewitt, 459 U.S. at 471). Further, "'a State creates a protected liberty interest by placing substantive limitations on official discretion.'" See Doyle 998 F.2d at 1569 (quoting Olim, 461 U.S. at 249). See also Connecticut v. Board of Pardons v. Dumschat, 452 U.S. 458, 467 (1981) (Brennen, J. concurring) (liberty interests in inmates if "particularized standards or criteria guide the State's decisionmakers."). Finally, "only state law can create [a] 'legitimate entitlement [to a liberty interest];" the federal constitution protects such claims, but does not create them." See Inmates v. Ohio State Adult Parole Authority, 929 F.2d 233, 235 (6th Cir. 1991) (alteration inserted).

F. State Law Giving Rise to Appellant's Liberty Interest

The relevant Utah Statute giving rise to Appellant's liberty interest is set forth in Utah Code Ann. § 76-3-202(3)(c) (Supp. 1989), which provides that "[a]ny time spent in confinement awaiting a hearing before the Board of Pardons or a decision by

the board concerning revocation of parole constitutes service of the sentence." Id.

On May 18, 1979, Appellant began an obligation to serve an indeterminate sentence of one to fifteen years. On December 22, 1987, Appellant was paroled by the Board from the Utah State Prison on December 22, 1987. Subsequently, Appellant was permitted to leave the State of Utah to be supervised by California authorities pursuant to Utah Code Ann. § 77-27-24 (Supp. 1980). While being supervised by the California authorities, on February 16, 1988, Appellant was arrested by the California authorities. Finally, on March 3, 1988, the Utah Board of Pardons, issued a warrant to detain Petitioner for alleged parole violations.

The State has argued that § 76-3-202(3)(c) "does not address [Appellant's] case because he was not awaiting a parole revocation hearing or decision of the Board." (See Record, File #00167.) However, this is incorrect. The Warrant specifically called for the Appellant to be detained and returned to actual custody pending a determination whether there is probable cause to believe that Appellant violated conditions of his parole. (See Record, File #00013.) Accordingly, Appellant has a state created liberty interest in having his time spent awaiting a parole revocation hearing counted toward his full sentence.

The State has also argued that § 76-3-202(4) directly applies to Appellant's case. (See Record, File #00168.) This section states that "[w]hen any parolee without authority from the Board of Pardons absents himself from the state or avoids or evades parole supervision, the period of absence, avoidance, or evasion tolls the parole period." See § 76-3-202(4).

The first part is inapplicable because Appellant was not absent from this State without the Board's approval. With respect to either "avoids" or "evades," it is difficult to see how Appellant was avoiding or evading supervision by the Board of Pardons. This is especially true in light of the fact that the Board knew of his arrest and confinement by the California authorities. Moreover, it was the Board who issued the Warrant for Appellant.

In addition, contrary to the State's argument, the Board was not without complete authority to regain custody over the Appellant. See § 77-27-24 (c) (providing that the sending state can retake a parolee, after a parolee has a pending charge in the receiving state, if consent from the receiving state is obtained). Accordingly, had the Board wanted Appellant back, then it should have sought consent from California to bring Appellant back to serve any addition sentence, as deemed

appropriate, before Appellant began serving his sentence in California.

**II. WHETHER THE BOARD OF PARDONS HAS JURISDICTION
AND AUTHORITY TO CONTINUE TO INCARCERATE APPELLANT
AFTER APPELLANT'S STATUTORY SENTENCE HAS EXPIRED**

Utah Code Ann. § 76-3-202 (2) requires that a person be discharged when his maximum sentence has expired. In this matter, Appellant's full sentence has expired. Accordingly, any further incarceration against appellant amounts to nothing less than double punishment. "'By forbidding that no person shall "be subject for the same offense to be put twice in jeopardy of life or limb," [the safeguard of the Fifth Amendment against double punishment] guarded against the repetition of his history . . . punishing [a man] for an offense when he had already suffered the punishment for it.'" See North Carolina v. Pearce, 395 U.S. 711, 729 (1969) (citation omitted) (alterations in original) (ellipsis in original).

Again, because Appellant's full sentence has expired, any further incarceration by the Board of Pardons amounts to double punishment crime

CONCLUSION

Based upon the foregoing Appellant should be granted the relief requested.

DATED this 30 day of November, 1994.

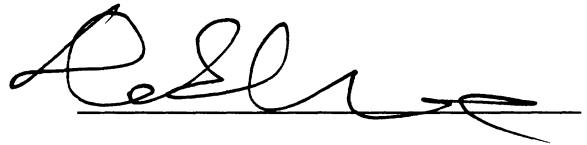
A handwritten signature in black ink, appearing to read "David L. Grindstaff". The signature is written in a cursive style with a large, stylized initial "D".

David L. Grindstaff
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that four true and correct copies of the foregoing **APPELLANT'S BRIEF** was **MAILED**, postage prepaid this 30th day of November, 1994.

Jan Graham
Attorney General
Lorenzo Miller
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SLC, Utah 84111

A handwritten signature in black ink, appearing to read "Lorenzo Miller", is written over a horizontal line.