1959

James R. McPhie v. John W. Turner : Brief of Appellant

Utah Supreme Court

Dudley M. Amoss; Attorney for Plaintiff and Appellant;

IN THE SUPREME COURT

OF THE STATE OF UTAH

JAMES R. McPHIE,

Plaintiff and Appellant,

vs.

JOHN W. TURNER, Warden of Utah State Prison,

Defendant and Respondent.

Case No. 9163

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

STATEMENT OF FACTS

On February 7, 1958, the District Court of Salt Lake County passed judgment and sentence upon Appellant of imprisonment "for the indeterminate term as provided by law for the crime of issuing

fictitious check as charged." A stay of execution was granted to April 18, 1958, and Appellant "was placed under supervision of the Adult Probation and Parole Department," and was released from custody (R. 5).

Appellant was granted a stay of execution of sentence from time to time until January 9, 1959, on which date he was committed to prison (R. 5) without a hearing (R. 15, 18-20).

On September 23, 1959, Appellant filed a petition for a writ of habeas corpus in the District Court of Salt Lake County (R. 1).

A hearing was held on this petition on September 23, 1959, and the petition was denied (R. 23).

Appellant filed a Notice of Appeal on October 23, 1959 (R. 24).

STATEMENT OF POINTS

I. APPELLANT WAS, IN FACT, ON PROBATION WHEN COMMITTED.

II. A HEARING MUST BE HELD UPON REVOCATION OF PROBATION.

III. APPELLANT WAS NOT GRANTED A HEARING, AND WAS THEREFORE DENIED DUE PROCESS OF LAW.

IV. APPELLANT SHOULD BE RELEASED FROM CUSTODY AND RETURNED TO THE STATUS OF PROBATION.

ARGUMENT

I

APPELLANT WAS, IN FACT, ON PROBATION WHEN COMMITTED.

The original judgment quoted in the Order of Commitment (R. 5), admitted by

Respondent as being a true copy (R. 13), states:

> "Defendant is granted a stay of execution of sentence to April 18, 1958, at 10:00 o'clock A.M. and placed under supervision of the Adult Probation and Parole Department and shall make restitution. Defendant is released from custody." (Emphasis supplied.)

Certainly the Trial Judge was not here trying to make up his mind what to do with Appellant, as suggested by the Court upon the hearing of this habeas corpus petition. Sentence had been passed, but defendant was released from custody and placed in charge of the officers of the Adult Probation and Parole Department. Human liberty should be jealously guarded and not curtailed for the sake of convenience to the Court; labeling probation "stay of execution" can lead to

such a curtailment. As pointed out by this Court in Baine v. Beckstead, ____ Utah ____, stay of execution is granted for two reasons. One reason is for the Court to ascertain facts in connection with the case, as was done in Demmick v. Harris, 107 Utah 471, 155 P.2d 170, the only case cited by Respondent in the instant matter. The other reason for granting probation is for reform and rehabilitation.

In the Demmick case, there was only one stay of execution, which was granted by the Judge in the hope that the Court could find out from the defendant what had actually taken place. When the Court was unable to ascertain additional facts, the prisoner was committed. An entirely different situation prevails in the instant case, where

Appellant was given four stays of execution, during which time he was under the supervision of the department of adult probation. Was this not, in reality, a status of probation -- indefinite during the period of good behavior? Was this not done for the purpose of reform and rehabilitation? Or was it, as concluded by the Court below, for the purpose of allowing the Trial Judge a year to make up his mind whether or not to commit Appellant to prison? The Court below recognizes the fact that petitioner was actually on probation (R. 21):

> "That is my view of it, that there was no necessity for showing cause; that it wasn't in effect a cancellation of your probation. It was merely that the Judge had taken so much time to consider what to do with you, and at the end of that time he decided the proper thing under

> the law was to commit you to prison and that is what he did; that it didn't need to have a showing of what you had done wrong in the way of - - breaking your parole or breaking your probation - - let me make that correction, and that your remedy now is to look into the terms under which you can get a parole from your sentence at the prison. * * * Then you will be paroled and on parole will be put under these same officers who supervised you when you were on probation." (Emphasis supplied.)

In Ex Parte Follett, 119 Utah 98, 225 P.2d 16, the Court tried to distinguish between the suspension of sentence for an indefinite term upon the condition that good behavior be maintained, as were the facts in State of Utah v. Zolintakis, 70 Utah 296, 259 Pac. 1044, and a series of stays of execution with the obvious purpose of rehabilitation. The Follett case reasoned that a

report to the Court on a date certain was one of the conditions of the probation, and in not reporting, the probationer had breached a condition of his probation and a hearing was not necessary prior to commitment. In the instant case, there is no indication that any condition of probation was breached.

II

A HEARING MUST BE HELD UPON REVOCATION OF PROBATION.

In the Baine case, the Court indicated that a hearing should be held upon whether or not the probationer breached the terms of his probation, but that under the facts of the Follett case, it seemed obvious to the Court that the probationer had, in fact, breached the conditions of his probation and

a hearing would be expensive, time consuming, and would accomplish nothing. However, even in the Follett case, the Court recognizes the possibility of circumstances beyond the control of the probationer prohibiting him from appearing on the date set for a renewal of his stay of execution. The Court said that in an event such as this, the prisoner's remedy is to petition the Court to set aside the Order of Commitment; such a procedure could be more cumbersome than a hearing prior to commitment. In many habeas corpus proceedings such as this, the Courts of other jurisdictions have spoken grandly of the granting of grace to a convicted felon, but is this entirely true in the granting of probation? Does not probation go further than the mere granting of grace? This Court

stated in the Baine case that it is for the purpose of reform and rehabilitation. Is this not for the good of society as a whole, rather than just for the convicted felon? Merely because a person has been convicted of a crime, he should not therefore be denied a presumption of innocence as regards the keeping of probation conditions. A hearing need not be costly or time consuming, but should be held before the commitment of any probationer, regardless of the facts of the case. If the facts are such that the probationer did, in fact, breach the conditions of his probation, it would be a simple matter to issue the Order of Commitment. If, however, there were circumstances beyond the probationer's control, the Court should want to know what these conditions were.

III

APPELLANT WAS NOT GRANTED A HEARING, AND WAS THEREFORE DENIED DUE PROCESS OF LAW.

In the Baine case, this Court indicated that if a person were, in fact, on probation, regardless of the label used in the Order, he is entitled to a hearing prior to commitment; however, the Court found that the petitioner had had his hearing, after which the Trial Court had seen fit to commit him, and therefore due process had not been denied. In the instant case, there was no hearing. Indeed, this was admitted by the State (R. 15):

> Mr. McPhie: "Well, the thing was, I - - while I was on probation I never committed any crime or anything of any serious

nature and I was just wondering the cause of my - - no further stay on my probation, the reason for it."

The Court: "Well, we'll let Mr. Romney explain to the Court further."

Mr. Romney: "Your Honor, I think there is no question about the facts on this case. I think the only thing as (sic) a matter of law, and if the Court would desire now to hear the reference from the case of Demmick v. Harris, I would like to read it in regard to this problem." (Emphasis supplied.)

Again, at (R. 17), Mr. Romney:

"So the problem is simply this, to the State's way of thinking: If he was given indefinite status during the period of good behavior, as a probationer, then I think he was entitled to a hearing. On the other hand, I am quite sure that this case (Demmick) holds that if he was merely given a stay date or a date certain, even though that

> date might be continued from time to time, then he was not in a situation where he had a constitutional right to a hearing before he was committed to prison."

Again, at (R. 19), Mr. Romney:

> "Your Honor, I don't believe the record - - minute entries, disclose any reason why he was placed - - why he was committed to the prison. However, as you say, the record is simply that he was given a stay date, which stay date was set and continued for a period of time, I might say several occasions, then finally terminated at the end of the last period On that date he was committed. The record shows clearly that there was, in fact, no hearing." (Emphasis supplied.)

IV

APPELLANT SHOULD BE RELEASED FROM CUSTODY AND RETURNED TO THE STATUS OF PROBATION.

The State has stipulated that Appellant did nothing to warrant termination of his probation (R. 15):

Mr. McPhie: "Well, the thing was, I - - while I was on probation I never committed any crime or anything of any serious nature and I was just wondering the cause of my - - no further stay on my probation, the reason for it."

The Court: "Well, we'll let Mr. Romney explain to the Court further."

Mr. Romney: "Your Honor, I think there is no question about the facts on this case. I think the only thing as (sic) a matter of law, * * * " (Emphasis supplied.)

However, regardless of whether or not Appellant breached the conditions of his probation, he was entitled as a matter of right to a hearing prior to commitment and not having had this hearing is now entitled as a matter of right to be released from custody and returned to the status of probation.

CONCLUSION

Probation is a two-way street redounding to the benefit of society as well as to the benefit of the convict. If the probationer complies with the rigorous standards set for him throughout the required number of years, society has saved money. If, in the Trial Court's opinion, the convict is worthy of salvage by way of probation, then he is worthy of a hearing upon revocation of probation. If, on the other hand, the Trial Court does not consider the placing of a convict on probation to be in the best interests of society, then the convict should not be placed on probation and the burden of a contemplated hearing, if the necessity of revoking the probation arises,

should have no bearing on the Trial Court's decision.

Respectfully submitted,

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