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In the

Supreme Court of the United States

RICKEY LEE DURST, ET AL.,
Petitioners,
Vs
UNITED STATES,
Respondent.

No. 76-5935

Washington, D. C.
December 5, 1977

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RICKEY LEE DURST, ET AL., Petitioners,	:	
v.	:	No. 76-5935
UNITED STATES, Respondent.	:	

Washington, D. C.

Monday, December 5, 1977

The above-entitled matter came on for argument at 1:41 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

MICHAEL S. FRISCH, ESQ., Assistant Federal Public Defender, 101 West Lombard Street, Baltimore, Maryland 21201, for the Petitioner.

WADE H. McCREE, JR., ESQ., Solicitor General of the United States, Department of Justice, Washington, D. C. 20530, for the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-5935, Durst against United States.

Mr. Frisch.

ORAL ARGUMENT OF MICHAEL S. FRISCH, ESQ.,

ON BEHALF OF THE PETITIONER

MR. FRISCH: Mr. Chief Justice, and may it please the Court:

The issue presented by this case is whether a fine or requirement of restitution may be imposed upon one sentenced to probation under the terms of the Federal Youth Corrections Act, 18 U.S.C., Sec. 5010(a).

Each Petitioner entered a plea of guilty to a misdemeanor violation of Federal law before a United States Magistrate in Maryland and each was placed on probation under the terms of the Youth Act, Petitioner Rice being sentenced under the terms of that Act which extends it to young adult offenders. Each was ordered to pay a fine to the United States and, additionally, Petitioner Durst was ordered to make restitution on a stolen check.

The District Court in this case and the other lower federal courts which have held fines to be permissible under the Youth Act, have essentially relied upon two sections of the statute and inferred from these two sections a Congressional intent to permit fines

The first of these sections is Section 5023(a) of Title 18, which in effect incorporates the adult probation statute, Section 3651 of Title 18, into the Youth Act, and, of course, have reasoned that since fines are a permissible condition of probation for adults, they are also permissible under the Youth Act.

What we respectfully suggest that this argument ignores is that the power to impose a fine does not originate with Section 3651, rather it originates with the substantive statute under which a person is convicted.

We respectfully suggest to the Court that when one is sentenced under the Youth Act, once a finding of benefit is made under that Act, once one is deemed to be worthy of the treatment and rehabilitation provided for by that Act, they are no longer punished for the offense, as provided for by Rule 3651, rather they are made subject to the treatment and rehabilitation of the Act. And, as a result of that, we suggest that reference to 3651, which cannot be read as a penalty provision, within itself, can in no way be read in such a way as to permit fines under the Youth Act.

Now, the question might naturally arise, what was the purpose of enacting 5023(a) by Congress if it were not to impose fines? And, unfortunately, the legislative history, with regard to the Act, is not really very helpful in this regard. There are, perhaps, however, a number of reasons why 5023 may

have been enacted rather than to permit fines. I think, perhaps, the best of these reasons has to do with the nature of the Youth Act itself. Congress knew when it enacted the Youth Act that it did not create any specialized programs of treatment and rehabilitation for Youth Act probationers, as opposed to those sentenced under the imprisonment provisions of 5010(b). Realizing that, Congress made it quite clear by enacting 5023(a) that whatever programs of treatment and rehabilitation were available to adults, under 3651, are made equally available to youth offenders by the operation of 5023(a).

Additionally, the argument has been made and adopted by a number of judges in the District Court in Maryland that as a result of the operation of 5023(a) in the incorporation of the General Probation statute, that a split sentence can be imposed under the Youth Act. That is to say a sentence of imprisonment of up to six months to be followed by a period of probation,and by doing this it gives a court, in effect, the middle ground between 5010(a) and 5010(b), without requiring the indeterminant sentence of up to four years.

Additionally, a fair reading of 3651,which we suggest to this Court, demonstrates that an intent to fine does not exist, fairly clearly -- well, absolutely clearly sets out that restitution is permissible under the Youth Act, and we are prepared to concede that at this time. It's quite clear under 3651 that restitution is a permissible condition of probation.

The second section of the statute the courts have relied upon in order to permit fines under the Youth Act is, in fact, a change in the original language, the proposed language of 5010(b), which originally read that imprisonment under the Youth Act was in lieu of penalty otherwise provided by law, and this was changed in the present form of the law to penalty of imprisonment. And there is a letter cited in the Government's brief in support of the proposition that this permits fines.

In response to that, we would make two arguments to the Court. First, and most importantly, 5010(b) is not the issue before this Court. That is a separate and distinct sentencing alternative from 5010(a) and not the one for a decision in this case.

As Mr. Chief Justice Burger, in Dorszynski v. United States, stated at page 43, "the Act creates two new sentencing alternatives." And the one before this Court is the probation alternative, not the incarceration alternative.

QUESTION: That's not just an ordinary letter you are talking about. He was the Attorney General of the United States.

MR. FRISCH: That's correct, Your Honor.

QUESTION: We received the impression it was just a letter.

MR. FRISCH: Well, it was a letter written to the

House Committee considering the bill, I believe transmitted from the Judicial Conference that considered the Youth Act.

QUESTION: From the Attorney General of the United States.

MR. FRISCH: That's correct, Your Honor.

Secondly, if the Court --

QUESTION: And it said explicitly a fine was to be included.

MR. FRISCH: That's correct, with reference to (b), Your Honor.

QUESTION: And that was the reason for the amendment.

MR. FRISCH: That's correct, Your Honor.

If the Court is convinced --

QUESTION: Have you anything against that, any legislative history to contradict that?

MR. FRISCH: No, I don't, Your Honor. But I think the important point to be made is that letter and the change in language was with reference to the incarceration alternative.

I would direct the Court's attention to the language in 5010(a) which states that the sentencing judge may suspend imposition or execution of sentence. If Congress was aware of the necessity to change the language with respect to (b) to add the language "in lieu of panalty of imprisonment," I think the question might reasonably be asked why a similar change was not enacted as to (a) and why that same limiting language was

not put into (a).

The Government, in its brief, I believe, responds to this argument by stating that it would be illogical to conclude that Congress intended fines with respect to the incarceration alternative, but not with respect to probation.

I would suggest to the Court that there is a logical distinction between people sentenced under 5010(b) and people sentenced under 5010(a). I believe a sentencing judge makes a qualitative distinction between one who is in need of the incarceration alternative and one who is only in need of probation supervision and that this shows a different type of person that is being treated by the court with respect to (b), as opposed to (a).

QUESTION: What about restitution? Would your same argument as to fines apply to a requirement that the defendant make restitution?

MR. FRISCH: No, Your Honor, I am prepared to concede that restitution is proper from a fair reading of Section 3651. I believe distinction to be made between fines and restitution is that the power to impose restitution resides right in the probation statute. With respect to fines, it refers back to the substantive offense which a person has committed.

The final concern of courts that have found fines to be permissible under the Act is that to hold otherwise would deny the benefits of the Act to otherwise qualified young

offenders, and I can't state to the Court that this is not at least a possibility. However, I would hope that sentencing judges, particularly those cognizant of Mr. Justice Marshall's concurring opinion in the Dorszynski case which described the Youth Act as a "preferred sentencing alternative," would still treat it as such and not deny the benefits of the Youth Act to an otherwise qualified individual, merely because Congress did not provide for a fine in the sentencing scheme.

Secondly, having conceded that restitution is permissible and appropriate under the Act in the correct case, I would think that in most cases where a fine would be called for, where the individual had either financially profited from his offense or caused his victim -- caused some loss, the fact that restitution is available under the Act might go a long way toward curing that concern of the Fourth Circuit and the other courts that have permitted fines with respect to denying the benefits of the Act.

And, regardless of that, we do suggest to the Court that the real issue here is one of statutory construction, one of a fair reading of the Act, and although fines may be a wise policy under the Act, that is not the question before this Court. It's merely a question of what Congress provided for. And that a fair reading of this Act, reading 3651 and the change in language with respect to 5010(b) is simply not a sufficient indicator of Congress' intent as to this penalty.

Unless there are any questions, I would like to reserve five minutes for rebuttal.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Solicitor General.

ORAL ARGUMENT OF WADE H. McCREE, JR., ESQ.,

ON BEHALF OF THE RESPONDENT

Mr. McCree: Mr. Chief Justice, and may it please the Court:

The Government contends that the decision of the Court of Appeals is supported not only by the literal terms of the Youth Corrections Act, but also by the Act's legislative history.

The provisions under which Petitioners were sentenced, 18 U.S.C., Section 5010(a), provide that "if the Court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation."

Now, nothing in this provision, or in any other provision of the Act, precludes the imposition of a fine, and since my brother concedes that restitution is not proscribed, I won't labor that.

Indeed, Section 5023(a) of the Act expressly provides that nothing in this chapter "shall limit or affect the power of any court to suspend the imposition or execution of any

sentence and place a youth offender on probation, or be construed in anywise to amend, repeal or affect the provisions of 18 U.S.C., Section 3651, relative to probation." When we advert to 3651, we find that language provides "while on probation and among the conditions thereof, the defendant may be required to a fine in one or several sums, and may be required to make restitution or reparation."

Now, I understand my brother to concede that this statutory provision that permits the court to require restitution as found in 3651, eliminates that element from the consideration of the Court in this appeal. And I submit it similarly eliminates from this Court's consideration his contention that a fine might not be imposed.

And I think, probably, we could conclude our argument at this point. I would emphasize that the letter of Attorney General Biddle, as the Court has suggested in its questioning, is not a mere letter, but it's a letter that purports to communicate to the Congress the consensus of all the interested persons outside of the Legislature that were considering this piece of legislation, the Judicial Conference of the United States and the Department of Justice, including the Bureau of Prisons and the Parole Board. I think it makes it very clear that fines were not to be proscribed, and in the words of this Court in Dorszynski, the purpose of the Youth Corrections Act is, indeed, to afford additional sentencing

options to the district court.

We submit that with counsel's concession, and with that view of the statute, that the judgment of the Court of Appeals is eminently correct, as indeed it was in Oliver --

QUESTION: Does 3651 permit the imposition of fines as a condition of probation when the underlying statute doesn't impose a fine?

MR. McCREE: I would not so contend. I would suggest that it permits the imposition of a fine only when the underlying statute calls for fine and/or imprisonment. And, it does, indeed, in this case.

QUESTION: Does in this case, except they don't sentence him under that provision, do they?

MR. McCREE: No, they do not sentence him under that provision.

QUESTION: Nor under 3651.

MR. McCREE: Well, 3651 incorporates the offense that was committed. It brought the person before the court by reason of the indictment.

If the Court has no further questions, the Government will submit its argument at this point.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Do you have anything further, Mr. Frisch?

MR. FRISCH: No.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:54 o'clock, p.m., the case in the above-entitled matter was submitted.)