Wyoming Law Journal

Volume 7 | Number 2 Article 4

December 2019

The Operation of Wyoming Statutes on Probate and Parole

Frank A. Rolich

Follow this and additional works at: https://scholarship.law.uwyo.edu/wlj

Recommended Citation
Frank A. Rolich, *The Operation of Wyoming Statutes on Probate and Parole*, 7 WYO. L.J. 104 (1953)
Available at: https://scholarship.law.uwyo.edu/wlj/vol7/iss2/4

This Comment is brought to you for free and open access by Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Wyoming Law Journal by an authorized editor of Law Archive of Wyoming Scholarship.

prevent such a case from arising and to further the cause of justice in Wyoming the statutes should undergo considerable revision.

On this there must be a word of caution. Naturally the more extensive the power to arrest, the easier it is to apprehend criminals. But any statute extending the power to arrest too far beyond the common law is in danger of being declared unconstitutional, as being a deprivation of due process. It might also be determined to be an unreasonable search and seizure , for the reason that the constitutional provision on this applies to the person, as well as to the property of the citizen, and to seizures as well as to searches, of either the person or property; and that an arrest of the person is a seizure of the person.[20]

For this reason it might be well to modify the statutes to the extent of granting clear authority to arrest for felonies in all those situations covered by common law rules, making them in effect a codification of the common law. As previously pointed out, the statute covering right to arrest for misdemeanors without a warrant appears sufficient without any revision.

WARD A. WHITE

THE OPERATION OF WYOMING STATUTES ON PROBATION AND PAROLE

State statutes are often the objects of much criticism because of their ambiguity, indefiniteness or antiquity. The laws of Wyoming, like those of any other state, are not invulnerable to these attacks. It is therefore a satisfaction to note that the Wyoming statutes on probation and parole are, on the whole, clearly written and in step with modern developments in this field.

This article deals particularly with that portion of the law devoted to treatment of an accused criminal, both before and after trial, but prior to the time when sentence is imposed. In the orthodox sense this treatment is known as probation; however, there is no legal distinction between that term and "parole." Both terms are used interchangeably when referring to probation procedures, and in this article there will be no intended reference to the parole of a prisoner after he has served a portion of his sentence.

The Wyoming Probation Acts, Sections 10-1801 through 10-1805, and Sections 10-1901 through 10-1906, Wyo. Comp. Stat., 1945, adopt some of the most advanced conceptions of the treatment of criminals, and tend to "make the punishment fit the criminal" rather than the crime. Under

20. Ex Parte Rhodes, 202 Ala. 68, 79 So. 462, 1 A. L. R. 568 (1918); see annotation, 1 A. L. R. 585 (1919).

Section 10-1803, following conviction and prior to sentence, provision is made for an investigation of the criminal's personality, character, and reputation, and for filing a report with the District Judge. His subsequent disposition of the case may be greatly affected by this report. Although persons accused of certain crimes are expressly excluded from the provisions of the Act,[1] it does allow for an investigation in a majority of the cases. However, there appears to be some inconsistency in the statutes in regard to exactly who is excluded from the provisions of the Acts. Section 10-1803 specifically excludes from probation persons accused of murder, rape and first degree arson,[2] whereas Section 10-1901 excludes only persons charged with offenses which are punishable by death or life imprisonment. An investigation of the Wyoming Criminal Offenses (Chapter 9, Wyo. Comp. Stat., 1945) reveals that the only crimes punishable by death or life imprisonment are murder in the first degree,[3] murder by duel,[4] child stealing or harboring,[5] and a fourth felony conviction under the Habitual Criminal Acts.[6] Thus, rapists and arsonists are made eligible for parole under the provisions of Section 10-1901 but not under 10-1803. On the other hand, child stealers and fourth time felons are eligible for parole under Section 10-1803 but not under 10-1901. It therefore appears that murder in the first degree and murder by duel, which is considered as murder in the first degree, are the only crimes wholly excluded from the Probation Acts. This conflict has not been resolved by our courts. Its significance is somewhat lessened by reason of the fact that under our Probation Acts an accused person cannot demand, as a matter of right, that action to be taken in his behalf. It is understood that Wyoming District Courts have taken advantage of this inconsistency and, for example, have referred a rape case under Section 10-1901, though they would not have been able to do so under 10-1803.

Under the provisions of Sections 10-1801 to 10-1805 inclusive, upon a finding of guilt by the court, either through a trial or by a plea of guilty by the accused, the court may, upon its own initiative, begin an investigation by temporarily postponing sentence. Under the present system there is no compulsion on courts to begin such an investigation, and as a result the procedure is not carried on in as many instances as would otherwise be possible. According to Mr. Norman G. Baillee, the State Probation and Parole Officer, the number of referments is further curtailed by the limited number of persons on the staff of the Department of Probation and Parole.

Once the case is referred to the Department of Probation and Parole, a thorough investigation is made of the past history of the accused. The

1. ". . . murder, rape of a woman or female child forcibly and against her will, or arson of a dwelling house or other human habitation in the actual occupancy of a human being. . . ." Wyo. Comp. Stat. 1945, sec. 10-1803. ". . . crime punishable by death or life imprisonment. . . . "Wyo. Comp. Stat. 1945, sec. 10-1901.
2. Ibid., sec. 10-1803.
3. Wyo. Comp. Stat. 1945, sec. 9-201.
4. Wyo. Comp. Stat. 1945, sec. 9-202.
5. Wyo. Comp. Stat. 1945, sec. 9-216.
6. Wyo. Comp. Stat. 1945, sec. 9-110.

information discovered is then submitted to the court, along with recommendations (the latter being a practice adopted by the Department), and the court then imposes sentence in its discretion. Under the Act the court may let the defendant go at large on a probationary status, subject only to possible prosecution if he should fail to demean himself as a law abiding citizen. In such case his probation may be revoked and he may be prosecuted for the crime he committed as though no probation had been allowed.

Almost the same procedure is followed under Sections 10-1901 to 10-1905. Here, however, the county attorney is specifically named as the investigation officer, and provision is made for a suspension of trial. Investigation, even under this Act, is made by the Department of Probation and Parole at the request of the county attorney. Mr. Baillee reports that suspension of trial is granted only in rare cases since the accused, during the investigatory period, is not confined and is free to commit other acts, which leads to serious complications. The more desirable practice is to complete the trial of the accused, and to suspend the sentence after a finding of guilt.

The inconsistency and duplication found in these two Acts seems to escape explanation. Under both, the court acts in its discretion in refering a case to probation authorities, and there is no compulsion on the court to act. The result is the same whether the case is given directly to the Department of Probation and Parole or to the county attorney. The legislative intent may have been to provide further investigative means by making county attorneys available, but this could have been as easily accomplished by an amendment to Section 10-1803 as by creating Sections 10-1901 through 10-1906.

Section 10-1804, Wyo. Comp. Stat., 1945, gives the court absolute discretion in determining the advisability of paroling any person whose character has been investigated, and no appeal or proceeding in error follows such a determination. A casual observer may think this to be a harsh rule since the findings may have acted considerably to the detriment of the accused, but it is not necessarily so since once the accused is found guilty, he is subject to the maximum penalty for the crime he has committed. This is entirely in keeping with the modern psycho-sociological view on punishment (or treatment) in accord with the person's personal background and unique characteristics. This view embraces the theory that punishment based on the crime, rather than on the individual, may be unjust. For example, almost everyone would agree that a person stealing to feed his impoverished family should not be punished as severely as the habitual thief.

The Federal Probation Acts[7] are very similar to those of Wyoming, though they do differ in one important respect, i.e., the Federal Act makes it mandatory for the Probation Service to make a pre-sentence investigation

7. Fed. R. Crim. P. 32(c) and (e).

in all cases covered by the Act. The Act expressly forbids the use of information so obtained, before a finding of guilt. It also excludes all crimes punishable by death.

Virginia has gone a step further than the Wyoming and Federal legislation in her Probation Act.[8] The usual provision is made for pre-sentence investigation; however, when the information comes before the court, it is subject to cross examination by the defendant. It has been held by the Supreme Court of Appeals of Virginia that it is error for a court to deny the defendant an opportunity to cross examine such findings.[9] This gives the accused every opportunity to prove to the court his good character and reputation in mitigation of sentence or toward his parole.

Though the Wyoming probation statutes do not give the defendant a right to contest the findings made by the Department of Probation and Parole, as does Virginia, he has ample opportunity to see that his rights are not violated because of Section 10-1406, Wyo. Comp. Stat., 1945, which makes provision for submitting evidence in mitigation of sentence. Further, Mr. Baillee states that as a matter of practice the accused is permitted to have counsel, friends or relatives present when the information disclosed by the investigation comes before the court.

The Wyoming statutory provisions concerning mitigation of sentences are closely related to probation and parole. By statutory construction it seems mandatory that Wyoming courts consider any evidence the accused may submit tending to prove good character in mitigation of sentence. Section 9-105, Wyo. Comp. Sat., 1945, provides for fixing of punishment by the courts in all cases of felony or misdemeanor, and Section 9-106, Wyo. Comp. Stat., 1945, provides that a court may impose a fine as a part of the punishment in the case of a felony. Section 10-1406, Wyo. Comp. Stat., 1945, gives any person convicted, by confession or otherwise, the right to move the court to hear testimony in mitigation of sentence if the crime is punishable in whole or in part by fine. Since Section 9-106 makes it possible to impose a fine for a felony, it seems that all crimes are subject to 10-1406. The Wyoming Supreme Court has held that it is not error to impose a fine in addition to the death penalty.[10] Thus, all persons, including murderers, rapists, arsonists, child stealers, and fourth time felons, evidently have the right to demand that the court hear testimony in mitigation of sentence. The only question remaining would be as to the type of testimony admissible in mitigation.

It is consistently held that a court cannot upon its own initiative seek information concerning the accused's character prior to a finding of guilt. In an Illinois case the Supreme Court of that state held it error when the judge, prior to a finding of guilt, in a trial without a jury, made statements which indicated he had obtained outside information concern-

8. Virginia Code 1950, sec. 53-278.1.
9. Linton v. Commonwealth, 192 Va. 437, 65 S.E. 2d 534 (1951).
10. Jenkins v. State, 22 Wyo. 34, 134 Pac. 260, 135 Pac. 749 (1913).

ing the defendant.[11] The defendant is said to be deprived of due process of law in such cases. The Illinois case points out that an accused criminal has an inherent and constitutional right that all proceedings against him be open and notorious. In all cases the defendant has a right to be confronted by the witnesses against him.[12] In yet another Illinois case it was held error when the private investigation disclosed evidence favorable to the accused,[13] and the court took this evidence into account in arriving at a finding.

Yet, once a verdict is rendered, the court can receive virtually any information concerning the defendant which will enable it to determine the appropriate punishment, even though these statements may not be supported by evidence.[14] For example, the Circuit Court of Appeals of Ohio held that where a court has discretion to fix punishment, it may consider evidence as to matters which may be an aggravation or mitigation of the offense, although such evidence may not be admissible in ascertaining guilt or innocence.[15] The Supreme Court of the United States has taken a similar view. In *Williams v. People of State of New York*[16] it upheld the decision of a judge below when he imposed the death penalty based almost solely on information disclosed by the court's probation department after a jury had found the defendant guilty of murder in the first degree and had recommended life imprisonment.

All probation laws tend to emphasize the criminal rather than the crime. Undoubtedly future legislation throughout the states will place even greater weight on the criminal since psychology and sociology are currently becoming more powerful forces in our society. For example, as noted *supra,* the Federal Act has incorporated a provision which appears to make it mandatory for the Probation Service to make a pre-sentence investigation in all cases.[17]

There are several desirable improvements which the Wyoming legislature should make in our probation and parole statutes. A mandatory provision to refer all cases, as required by the Federal Act, would be highly desirable. In any event, a pre-sentence investigation should be required in all cases of first time offenders, and in all cases of juvenile offenders.

Presently our probation department functions directly under the executive branch of the state government. The appointment of the probation officer and the field officers who work under him is entirely political. To maintain a Department of Probation and Parole of a high professional

11. People v. Rivers, Ill. , 102 N.E. 2d 303 (1951).
12. People v. Cooper, 398 Ill. 468, 75 N.E. 2d 885 (1947).
13. People v. McGeoghegan, 325 Ill. 337, 156 N.E. 378 (1927).
14. Stobble v. U.S., 91 F. 2d 69 (7th Cir. 1937).
15. Hunter v. U.S., 149 F. 2d 710 (6th Cir. 1945), cert. denied, 326 U.S. 787 (1946), rehearing denied, 327 U.S. 814 (1946).
16. Williams v. People of State of New York, 337 U.S. 241 (1949).
17. "The probation service of the court shall make a pre-sentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs." Fed. R. Crim. P. 32(c) (1).

caliber, it would be preferable to make this board a part of the judicial system of the state. If, for example, the appointments were left up to the District Judges, it is likely that a highly qualified group of technicians would be assured. From the standpoint of both the system and the individual member of the probation staff, their tenure should be dependent upon their ability, rather than on political affiliations.

FRANK A. ROLICH

WYOMING RECORDING STATUTES AND THE BANKRUPTCY ACT

The Bankruptcy Act makes provision for transfer of the bankrupt's nonexempt property to the trustee in bankruptcy, title vesting "as of the date of the filing of the petition in bankruptcy."[1] After bankruptcy and prior to adjudication or before a receiver takes possession of the bankrupt's property, a transfer of the property by the bankrupt to a purchaser acting in good faith and paying fair value will be protected under Section 70 (d) of the Bankruptcy Act. Real property, excepted from this section, is governed by Section 21 (g) introduced in the Chandler Amendments to the Bankruptcy Act.

Section 21 (g) allows the trustee in bankruptcy to record in every county wherein the bankrupt owns or has an interest in real property either a certified copy of the petition with schedules omitted, the decree of adjudication, or the order approving the trustee's bond. Further, unless the trustee records in accordance with this section *in any state whose laws authorize such recording*, the commencement of proceedings under the Act will not be constructive notice to, or affect the title of, any subsequent purchaser without actual notice of the proceedings in bankruptcy who renders fair equivalent value.

Somewhat similar provisions[2] prior to the revision in 1938, though more limited, provided for recording by the trustee of a certified copy of the order approving his bond.[3] Compliance constituted notice equivalent to the bankrupt's giving the trustee a deed to the property[4] and it being recorded in the county in which the property was situated. Under those provisions, a purchaser in good faith from the bankrupt and giving value acquired title valid as against the trustee, where no certified copy of the order approving the trustee's bond was filed.[5] Such recordation was held to be directory only, not mandatory, and trustee's failure to observe those provisions did not prevent passage of title of bankrupt's property to him.[6] An adjudication in bankruptcy was not of itself notice to incumbrancers

1. 11 U. S. C., sec. 110 (1938).
2. 11 U. S. C., sec. 44 (c) (1898).
3. 11 U. S. C., sec. 21 (e) (1898).
4. Ibid.
5. Vromback v. Willvra, 331 Ill. 508, 163 N.E. 340, 17 Am. B. R. (N.S.) 122 (1928).
6. Hull v. Burr, 55 So. 832, 61 Fla. 625, 26 Am. B. R. 897 (1911).