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Supreme Court, U.S.
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MAY 11 2004
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CASE # _____

In The Supreme Court Of The United States

IN RE ROSEMARY PARMAR,

On Habeas Corpus

On Petition for Writ of Habeas Corpus

THE CALIFORNIA SUPERIOR COURT, COUNTY OF SACRAMENTO,

APPELLATE DIVISION

PETITION FOR WRIT OF HABEAS CORPUS ;

APPLICATION TO PROCEED IN FORMA PAUPERIS

EMERGENCY ACTION REQUIRED

TURN-IN DATE ON A POTENTIALLY VOID JUDGMENT

OF INCARCERATION SET FOR

MAY 13, 2004 AT 5:00 P.M.

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THE QUESTIONS PRESENTED FOR REVIEW

In view of *Morissette v. United States*, 342 U.S. 246, 258 (1952)*) and Staples v. United States,* 511 U.S. 600 (1994), does a trial court have jurisdiction to impose a period of incarceration in a misdemeanor case for violation of health and safety regulations in a case submitted on the theory of strict criminal liability?

California Building Standards Code (1995)

California Code of Regulations, Title 3, section 2653(e)

California Code of Regulations, Title 24

California Health and Safety Code §§ 17912, 17920(e), 17920(m), 17920.3, 17921, 17922, 17980, 17981, 17983, 17984, 17985, 17986, 17987, 17988, 17989, 17990, 17990, 17995, 18900©, 26101.7, 26102, 26103(d)

STATEMENT OF THE CASE

Petitioner was charged with, eventually,, 250 counts of misdemeanor health and safety code violations arising out of the operation of two family owned motels.

Defendant entered a plea of not guilty.

Trial was by jury.

The record in the case shows that the defense requested instructions on intent, but that the court submitted the case to the jury with instructions on strict liability.

Petitioner was convicted on 5/15/02, however the imposition of judgment and sentence was stayed pending appeal on the merits of the judgment

Petitioner appealed her conviction pursuant to P.C. § 1466(1)(b), in People v. Parmar, California Superior Court, County of Sacramento, # 97M12758, from the judgment in # 97M12758.

Petitioner's appeal was dismissed with appeal as follows:

(a) Appellate counsel failed, repeatedly, to file the documents necessary to prosecute the appeal, ending up with demanding that a brief not conforming to California Rules of Court be filed, while in default. The court struck the brief and dismissed the appeal.

(b) The brief submitted was wholly deficient failing to raise the most serious issue raised by *Morissette* and *Staples*, manifesting ineffective assistance of counsel.

(c) On remand, Petitioner appeared for sentence and judgment on April 28, 2002. She submitted a sentencing memorandum citing *Morissette* and *Staples*,

and requested an evidentiary hearing. The court denied the request. The court imposed a total of 15.8 years, staying all but 2 years, with a recommendation of work project for the second year. Petitioner then asked for a stay pending appeal of the sentence imposed, and the court denied that request as well.

On April 29, 2004, petitioner filed an appeal under California Penal Code section 1466(2)(b), from the orders after judgment affecting her rights.

Petitioner also filed a motion for a stay in the appellate division. That order was denied May 10, 2004 by telephone notice.

On May 10, 2004, Petitioner filed a petition for writ of habeas corpus and requested an appointment to seek a temporary stay pending disposition. The court refused to set an appointment.

SUMMARY OF ARGUMENT

In view of *Morissette v. United States,* 342 U.S. 246, 258 (1952)) and *Staples v. United States,* 511 U.S. 600 (1994), it appears that the trial court may not have jurisdiction to impose a period of incarceration in a misdemeanor case for violation of health and safety regulations in a case submitted on the theory of strict criminal liability.

However, the appellant may have fully served the time imposed under an unlawful judgment before a final decision on appeal, or on review in this court may be had if the execution of the sentence is not stayed.

The equities tip sharply in favor of the petitioner to stay the sentence pending appeal and review, and against the immediate enforcement of a period of incarceration.

Conclusion. Based upon the foregoing, this court should grant the writ of habeas corpus, and stay the period of incarceration until the matter can be heard and determined on appeal below, or on certiorari in this court.

ARGUMENT

I

THERE IS AN ABSENCE OF AVAILABLE STATE CORRECTIVE REMEDIES OR THE EXISTENCE OF CIRCUMSTANCES RENDERING SUCH REMEDIES INEFFECTIVE

This court may grant the petition for writ of habeas corpus if "there is either an absence of available State Corrective Process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." 22 USC, § 2254(b). There is no discretionary review in the California Supreme Court in misdemeanors. Cal. Rules of Court, Rule 64. While such a review may be had in the Third District Court of Appeal, other than either a habeas corpus challenge or a petition for writ of mandamus, there is no effective procedure in light of the time remaining.

As a protective measure, Petitioner will in fact file a petition for writ of habeas corpus, in the Third District, but given the time limitations, it is unlikely that court can, or even will, act to protect the petitioner. Petitioner will give notice if such relief is forth coming.

The harm to California is non-existent. She no longer has the subject property; she has lost her life savings; her husband has been rendered an invalid; she has timely made all appearances, including judgment and sentence after her disastrous appeal. On the other hand, incarceration will leave the petitioner's family without support and the hardships of incarceration that may be unwarranted. The hardships on the Petitioner should the court below have erred clearly outweigh the hardship to the state should she be wrong.

II

A JUDGMENT IN EXCESS OF THE COURT'S POWER TO IMPOSE IS VOID; THIS COURT HAS TWICE DUCKED THE ISSUE OF INCARCERATION STRICT LIABLITY CASES BASED ON HEALTH AND SAFETY CODE VIOLATIONS

This court has repeatedly held that a criminal conviction in excess of a court's jurisdiction is void. *Re Snow*, 120 U.S. 274 (1887); *Re Nielsen*, 131 U.S. 176 (1889); *Re Mills*, 135 U.S. 263 (1890). In *Atkin v.Virginia*, 536 U.S. 304, this Court held that an incarceration of 90 days is not cruel and unusual *per se*, but in the context of imposing incarceration on an addict, it was excessive punishment.

The issue raised by this case, is one that has eluded decision in this court. *See, e.g., Morissette v. United States*, 342 U.S. 246, 258 (1952); *Staples v. United States*, 511 U.S. 600 (1994). It appears that it would be a miscarriage of justice to incarcerate a person for conduct in which strict scrutiny was used, eliminating the mens rea element, in a case which is purely an enforcement of health and safety regulations, however it is for the appellate courts in the first instance, and this court as the court of last resort to decide that issue. Having said that, it would appear to be unfair to incarcerate if in fact the courts below have exceeded their jurisdiction.

The harm to California is non-existent. She no longer has the subject property; she has lost her life savings; her husband has been rendered an invalid; she has timely made all appearances, including judgment and sentence after her disastrous appeal. On the other hand, incarceration will leave the petitioner's family without support and the hardships of incarceration that may be unwarranted. The hardships on the Petitioner should the court below have erred clearly outweigh the hardship to the state should she be wrong.

CONCLUSION

WHEREFORE, for all, or any one of, the foregoing reasons, this court should grant the writ of habeas corpus, stay the imposition of incarceration pending appeal and review, if necessary in this Court, and such other and further relief as the court deems just and proper under the circumstances.

Dated: 5/11/2004

RESPECTFULLY SUBMITTED,

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