

1986

The State of Utah v. Lane B. Halverson (D. Gilbert Athay) : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Bradley P. Rich; Yengich, Rich, Xaiz and Metos; Attorney for Appellant.

David L. Wilkinson; Attorney General; Attorney for Respondent.

Recommended Citation

Reply Brief, *Utah v. Halverson*, No. 860249 (Utah Court of Appeals, 1986).

https://digitalcommons.law.byu.edu/byu_ca1/144

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

J
S. COURT
CFU
50
A10
DOCKET NO.

IN THE UTAH COURT OF APPEALS

860249-CA

THE STATE OF UTAH, : REPLY BRIEF OF APPELLANT
Plaintiff/Respondent,
v. :
LANE B. HALVERSON, Case No. 86-249-CA
(D. Gilbert Athay)
Defendant/Appellant. : Priority No. 2

THIS IS AN APPEAL FROM A FINAL ORDER AND JUDGMENT OF CONVICTION OF SUMMARY CONTEMPT UNDER UTAH CODE ANNOTATED, §78-32-3, (1953 AS AMENDED), IN THE SEVENTH JUDICIAL DISTRICT COURT, THE HONORABLE RICHARD C. DAVIDSON, JUDGE PRESIDING.

Bradley P. Rich #2730
YENGICH, RICH, XAIZ & METOS
175 East 400 South, #400
Salt Lake City, Utah 84111
Telephone: (801) 355-0320

Attorney for Appellant

David Wilkinson
ATTORNEY GENERAL
236 State Capitol Building
Salt Lake City, Utah 84114

Attorney for Respondent

RECEIVED
FEB 8 1999
860249-CA
COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, : REPLY BRIEF OF APPELLANT
Plaintiff/Respondent,
v. :
LANE B. HALVERSON, Case No. 86-249-CA
(D. Gilbert Athay)
Defendant/Appellant. : Priority No. 2

THIS IS AN APPEAL FROM A FINAL ORDER AND
JUDGMENT OF CONVICTION OF SUMMARY CONTEMPT
UNDER UTAH CODE ANNOTATED, §78-32-3, (1953 AS
AMENDED), IN THE SEVENTH JUDICIAL DISTRICT
COURT, THE HONORABLE RICHARD C. DAVIDSON,
JUDGE PRESIDING.

Bradley P. Rich #2730
YENGICH, RICH, XAIZ & METOS
175 East 400 South, #400
Salt Lake City, Utah 84111
Telephone: (801) 355-0320

Attorney for Appellant

David Wilkinson
ATTORNEY GENERAL
236 State Capitol Building
Salt Lake City, Utah 84114

Attorney for Respondent

TABLE OF CONTENTS

STATEMENT OF THE CASE.....1
STATEMENT OF THE FACTS.....1
POINT ON REPLY.....1
ARGUMENT.....2
CONCLUSION.....4

OTHER AUTHORITIES

Utah Code Annotated, §78-32-3 (1953 as amended).....1, 3

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH, : REPLY BRIEF OF APPELLANT
Plaintiff/Respondent,
v. :
LANE B. HALVERSON, Case No. 86-249-CA
(D. Gilbert Athay)
Defendant/Appellant. : Priority No. 2

STATEMENT OF THE CASE

Appellant, D. Gilbert Athay, originally filed this appeal from a final order and judgment of conviction for summary contempt under Utah Code Annotated, §78-32-3 (1953 as amended), in the Seventh Judicial District Court, the Honorable Richard C. Davidson, judge presiding.

STATEMENT OF THE FACTS

Defendant is relying on the facts as set forth in his original brief filed in this case. Specifically, defendant will be addressing the argument raised by the State of Utah in its response brief that was filed on January 22nd, 1988.

POINT ON REPLY

This reply brief will argue that the state's response misconstrued the district court's findings of fact and conclusions of law in arguing that defendant was afforded due process in his contempt proceedings.

ARGUMENT

The state's response brief did not specifically address defendant's argument that the contempt, if committed, occurred outside the presence of the court, therefore entitling appellant to a due process hearing. Because this was not addressed in the response brief, defendant assumes that the state is in agreement with that argument. Therefore, that issue will not be re-argued in this reply brief.

The state's brief did argue that defendant had misstated the issue on appeal. At one point the brief argued:

[T]his court need not decide whether Athay's contemptuous conduct deserved summary adjudication. Even though the court found that it held Athay in contempt without a hearing (R. 18), the court did not, in fact, use its summary power but respected Athay's due process rights. Athay received notice through an order to show cause and attended a hearing where he was allowed to explain his absence and proffer evidence. (States brief at pages 3-4).

It is clear from reading this argument that the state, not defendant, has completely misconstrued the finding of the district court in this case. Defendant's original brief included as an exhibit a copy of the district court's findings of fact and conclusions of law.¹ (See exhibit to defendant's brief)

In reading said findings of fact and conclusions of law, it is also clear that defendant was not allowed to explain

¹ Because of the importance of the findings of fact, they are attached to this reply brief as Exhibit A.

his absence and proffer evidence.² Paragraph number 1 of the findings of fact specifically stated that the court had previously, and without a hearing, found defendant to be in contempt of court pursuant to Utah Code Annotated, §78-32-3. In paragraph number 2 the court confirmed that it had entered the summary contempt order without prior notice to appellant and without taking any evidence. Finally, in paragraph number 3 the court stated that it was "unnecessary to hear evidence regarding this type of contempt hearing". (Findings of fact and conclusions of law, page 2, emphasis added) And, in fact, the court did not consider any evidence.

Thus, because of the summary contempt, the court ruled no evidence need be taken. In fact, the court refused defendant's proffer to introduce evidence and witnesses on his behalf (R. 48-49). In addition, the court, in paragraph number 2 of its conclusions of law, urged defendant to appeal the matter to the Utah Supreme Court,³ obviously in order to settle the issue of what constitutes summary contempt in Utah.

A reasonable reading of the court's findings lead to the conclusion that the court believed summary contempt to be appropriate. Further, despite the state's argument, the court

² See page 2, lines 16-17, wherein the court noted that the purpose of the hearing was to determine what, if any, sanctions to impose, not as the state argues to determine whether defendant was in contempt.

³ Tr.p. 14.

did not consider any evidence at the order to show cause hearing, where it specifically held that it was enforcing the earlier summary contempt order. This type of finding is not one which comports with the requirements of due process as argued by the state's brief.

Finally, the state summarized its brief by arguing:

[T]hus, when the court found that an evidentiary hearing was unnecessary, it acted within the due process rights provided by Utah for a contempt proceeding. It is clear from the record that the court was aware from the hearing of the reasons for Athay's failure to appear, but the court found them unpersuasive. (Respondents brief at page 5).

Defendant respectfully submits that nowhere in the record is it clear that the court considered appellant's reasons and explanations for his absence. The fact that a court is aware of something but chooses not to consider it does not comport with the requirements of due process. The district court in this case made it clear that it was not considering any evidence and was letting the original summary contempt stand.

CONCLUSION

The court, in finding defendant in summary contempt, did not give him a due process hearing whereby he could be afforded the opportunity to be heard. The state's conclusion that such was done is without basis in the record. Therefore, defendant respectfully requests this court to remand this matter to the district court for further proceedings based on argument

presented in his original brief on appeal.

Dated this ____ day of January, 1988.

BRADLEY P. RICH, #2730
YENGICH, RICH, XAIZ & METOS
Attorney for Appellant
175 South 400 South, Suite 400
Salt Lake City, Utah 84111
Telephone: (801) 355-0320

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of February, 1988, I mailed/delivered a true and correct copy of the foregoing Brief of Appellant to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah, 84114.