

1985

Utah v. Olmos : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

1985 20671
 DOCKET NO. THE STATE OF UTAH, :
 Plaintiff-Respondent, :
 -v- : Case No. 20671
 FELIX OLMOS, :
 Defendant-Appellant. :

BRIEF OF RESPONDENT

- - - - -

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT'S
DISMISSAL OF DEFENDANT'S APPEAL OF A MISDEMEANOR
CONVICTION.

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STATEMENT OF THE ISSUES PRESENTED ON APPEAL

1. Does this Court have jurisdiction to entertain this appeal?

2. Did the district court properly dismiss defendant's appeal?

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, :
Plaintiff-Respondent, :
-v- : Case No. 20671
FELIX OLMOS, :
Defendant-Appellant. :

BRIEF OF RESPONDENT
- - - - -

STATEMENT OF THE CASE

The record produced for this appeal is sparse, only 15 pages, and is in some respects incomplete. The record does, however, indicate the following:

On 26 October 1984, in the Third District Court, Judge Conder entered a Notice of Defect in Appellate Procedure against defendant. Defendant, who had apparently been convicted of a misdemeanor in the circuit court, was faulted for: (1) failure to file a timely designation of record on appeal, (2) failure to file a timely statement of points and authorities, and (3) failure to file a transcript (R. 2-3). The district court ordered defendant to cure the defects within ten days, or have his appeal dismissed with prejudice (R. 3). On 4 December 1984, more than one month later, Judge Conder determined that defendant had failed to comply with proper appellate procedure. The court ordered defendant's appeal dismissed with prejudice, and remanded the case to the circuit court for execution of judgment (R. 4).

It is unclear from the record why defendant's case was still before the district court after having been dismissed with prejudice, but on 25 February 1985, Judge Wilkinson entered a second notice of the Court's intent to dismiss defendant's appeal. Again the court cited defendant for failure to file a transcript and for failure to file a statement of points and authorities. The court ordered that defendant comply with the rules of appellate procedure by 29 March 1985, or his appeal would automatically be dismissed with prejudice (R. 6).

On 29 March 1985, the day defendant's appeal was to have been dismissed, defendant requested a 14-day extension in which to file his brief (R. 9). On 1 April 1985, Judge Wilkinson formally ordered defendant's appeal dismissed and remanded to the circuit court (R. 5); and on that same day, Judge Fishler granted defendant the requested extension (R. 11).

On 22 April 1985, more than 20 days after Judge Fishler had granted defendant the 14-day extension to file his brief, Judge Wilkinson once again ordered that defendant's appeal be dismissed (R. 10). There is no indication in the record that defendant did anything to perfect his appeal during the extended 14-day period. Nor is there evidence that defendant ever complied with the above-mentioned rules of appellate procedure.

SUMMARY OF ARGUMENT

This Court should not entertain this appeal because it fails to expressly raise a constitutional issue.

In at least two instances, the district court properly dismissed defendant's appeal. Consequently, his argument that

this Court should reverse the court's dismissal of his appeal on yet a third occasion is without merit.

ARGUMENT

THIS COURT SHOULD UPHOLD THE DISTRICT
COURT'S DISMISSAL OF DEFENDANT'S APPEAL.

Decisions of district courts on appeal from circuit courts are "final except in cases involving a constitutional issue." Utah Code Ann. § 78-3-5 (Supp. 1983). This Court accordingly has restricted its review of cases originating in circuit court to constitutional issues. State v. Taylor, 664 P.2d 439 (Utah 1983). This case is therefore dismissable on that basis. However, should this Court somehow view this appeal as raising a constitutional due process claim, though the appellant has not expressly characterized it as such, the case was properly dismissed by the district court because the defendant did not pursue the appeal in the district court from his circuit court conviction with reasonable diligence. Despite several months of delay and repeated warnings from the district court, defendant failed to comply with the rules of appellate procedure. As a result, the district court properly dismissed defendant's appeal on at least two occasions.

The Notice to Dismiss, entered by Judge Wilkinson on 25 February 1985, declared that if defendant did not perfect his appeal by 29 March 1985, "then this notice shall serve as a dismissal of the appeal with prejudice by order of the Court" (R. 6). On 29 March 1985, defendant applied for the 14-day extension which Judge Fishler did not grant until three days later (R. 11). Since defendant did not even apply for an

extension until the day that his appeal was automatically to have been dismissed, an extension which was not granted until three days later, Judge Wilkinson's Notice to Dismiss, by its own terms, effectively terminated defendant's appeal on 29 March 1985. Logic and proper appellate procedure would suggest that an appeal cannot be revived merely by obtaining an extension from one judge, after another judge of the same court has already dismissed the appeal with prejudice.

Moreover, even if the extension granted by Judge Fishler somehow overcame the dismissal of defendant's appeal on 29 March 1985, the district court dispositively terminated defendant's appeal on 22 April 1985. Defendant portrays this dismissal of his appeal as one in which Judge Wilkinson "refused to honor a continuance order granted by another Third District Judge" (Brief of Appellant at 2). Such was not the case. Judge Wilkinson apparently honored the 14-day extension. On 22 April 1985, more than 20 days after Judge Fishler granted the 14-day extension, because of defendant's continued failure to comply with the rules of appellate procedure, Judge Wilkinson dismissed defendant's appeal for the third and final time (R. 10). Defendant makes no allegation that this final dismissal was inappropriate. In fact, defendant's brief fails to acknowledge

that this dismissal ever occurred.¹

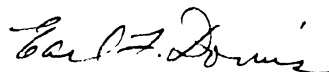
Defendant's appeal was appropriately dismissed once on 29 March 1985, when defendant failed to obtain an extension before his appeal was automatically dismissed. And Judge Wilkinson properly dismissed the appeal for the second time on 22 April 1985, after defendant had failed to perfect his appeal within the 14-day extended period. Defendant has not established that the district court acted improperly as to these dismissals. Accordingly, his argument that this Court should reverse the dismissal of his appeal is without merit. See State v. Jones, 657 P.2d 1263, 1267 (Utah 1982) ("The burden of showing error is on the party who seeks to upset the judgment. In the absence of record evidence to the contrary, we assume regularity in the proceedings below, and affirm the judgment.")

CONCLUSION

Based upon the foregoing, the dismissal of defendant's appeal should be affirmed.

DATED this 27th day of November, 1985.

DAVID L. WILKINSON
Attorney General



EARL F. DORIUS
Assistant Attorney General

¹ Defendant cites Christensen v. Christensen, 52 Utah 253, 173 P. 383 (1918) for the proposition that the mistake of a court clerk should not adversely affect the defendant. Because defendant produces no evidence to support his speculation that there was a clerical error in the district court, and because, even if such an error had occurred, it would have no bearing upon the final dismissal of his appeal of 22 April 1985, Christensen is inapposite, and defendant's reliance upon that case is misplaced.

CERTIFICATE OF MAILING

I hereby certify that I mailed four true and exact copies of the foregoing brief, postage prepaid, to David L. Grindstaff, attorney for appellant, 395 South 600 East, Salt Lake City, Utah 84102, this 27th day of November, 1985.

Earl F. Down