

1987

West Valley City v. Frank Ronald Borrego : Brief of Respondent

Utah Court of Appeals

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BRIEF

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DOCKET NO. 870360-CA

IN THE COURT OF APPEALS

STATE OF UTAH

WEST VALLEY CITY,

Plaintiff,

vs.

FRANK RONALD BORREGO,

Defendant and Appellant.

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Case No. 870360-CA

BRIEF OF RESPONDENT,
FIFTH CIRCUIT COURT

Appeal from a finding of Contempt
from the Fifth Circuit Court, West Valley Department
Honorable Tyrone E. Medley

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Court, Respondent

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COURT OF APPEALS

IN THE COURT OF APPEALS

STATE OF UTAH

WEST VALLEY CITY,	:	
	:	
Plaintiff,	:	
	:	Case No. 870370-CA
vs.	:	
	:	
FRANK RONALD BORREGO,	:	
	:	
Defendant and Appellant.	:	

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Attorney for Fifth Circuit
Court, Respondent

LIST OF PARTIES

The original parties to this action are West Valley City and Frank R. Borrego. This appeal arises out of a contempt citation by the Fifth Circuit Court. As a consequence, the actual parties to this appeal are the Fifth Circuit Court and Mr. Borrego. West Valley City does not participate in the appeal.

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STATUTES CITED:

All references are to Utah Code Annotated, 1953, as amended:

§78-7-17	2
§78-7-18	2
§78-32-1	2,4
§78-32-3	2,4

STATEMENT OF JURISDICTION

Respondent does not contest the Statement of Jurisdiction made by the appellant.

STATEMENT OF ISSUES

Respondent does not contest the Statement of Issues made by the appellant and does not restate them here in accordance with Rule 24(b), Rules of the Utah Court of Appeals.

DETERMINATIVE STATUTES

The text of the relevant statutes is given in the addendum.

STATEMENT OF THE CASE

In accordance with Rule 24(b), Rules of the Utah Court of Appeals, Respondent does not contest the statement of the case made by the appellant. However, the Court is reminded that the facts stated in the appellant's Brief are not complete in describing the proceeding at issue. Additional facts, with appropriate citations to the record, are contained in this Brief in support of the action of the Fifth Circuit Court.

SUMMARY OF ARGUMENTS

The Fifth Circuit Court, respondent, argues and shows herein that to prevail the appellant must show that the trial court abused its discretion. As the acts of the appellant which led to the contempt citation were within the statutory framework of contempt, no abuse of discretion can be shown and the contempt conviction should stand.

ARGUMENTS

A. STANDARD OF REVIEW

The Utah Code provides in §78-7-17 and §78-7-18 that judicial officers have the power to punish for contempt in appropriate cases as provided by law. Those acts which may constitute contempt are specifically defined in §78-32-1 of the Utah Code. Section 78-32-3 further refines this judicial power by allowing judges to punish contempt by summary action. See Addendum.

Utah law is well-settled that the citation of contempt is a matter of discretion with the trial judge and that the contempt citation should be overturned on appeal only where the court has acted so unreasonably as to be classified as capricious and arbitrary or a clear abuse of judicial discretion is

shown. Bartholomew v. Bartholomew, 548 P.2d 238 (Utah 1976); Thomas v. Thomas, 569 P.2d 1119 (Utah 1977).

The legal analysis of this appeal is two-pronged. First, this Court should review the record to determine whether the contempt citation is consistent with the statutory framework for contempt. Then, the Court should examine the action of the Fifth Circuit Court to determine whether its action was arbitrary, capricious, or a clear abuse of discretion. There is a presumption that the trial court acted properly and the burden of showing error is on Mr. Borrego. State v. Noren, 704 P.2d 568 (Utah 1985).

**B. THE TRIAL COURT'S ACTION
COMPLIED WITH ALL REQUIREMENTS
OF THE UTAH CODE**

The transcript of proceedings, which is part of the record of this appeal, clearly describes the words and acts of Mr. Borrego which led to the contempt citation. No attempt will be made here to repeat all the details of the transcript, but certain events occurring therein should be highlighted for the Court's analysis.

The transcript makes clear that the entire incident occurred in the presence of the trial court. The following offensive and disruptive acts occurred:

A. Mr. Borrego continually interrupted the court as it spoke. See Transcript, p. 6, 9, 11.

B. Mr. Borrego engaged in profanity directed at the court. Transcript, p. 7.

C. Mr. Borrego called the court a liar. Transcript, p. 9 and 11.

D. Mr. Borrego was told at least twice by his own counsel to be quiet. Transcript, p. 7.

E. The court indicated that the manner in which Mr. Borrego was acting was disrupting the court. Transcript, p. 9, lines 4-18.

The facts recited above clearly fall within the contempt statute found at §78-32-1 of the Utah Code. See Addendum. That is, the profanity, interruption of speaking, and general insolent behavior was directed toward the judge and tended to interrupt the due course of the sentencing of Mr. Borrego by the trial court.

The trial court entered specific findings that the proceeding was disrupted as required by §78-32-3. Record, pp. 14-15.

In summary, all of the statutory requirements have been met by the court for imposing a sentence for contempt in

that disorderly, contemptuous, and insolent behavior toward the court occurred in the presence of the court which tended to disrupt the proceeding and appropriate findings were entered.

**C. THE TRIAL COURT DID NOT
ABUSE ITS DISCRETION**

An admittedly difficult analytical issue is presented by the nature of a contempt citation. The determination of what constitutes insolent behavior or the use of profane language sufficient to merit a contempt citation is a judgment call not easily submitted to objective analysis. That analysis is qualitative in nature and requires an appellate court to some extent second-guess the trial court to find an abuse of discretion sufficient to merit reversal on appeal. An examination of the total circumstances shows that the Fifth Circuit Court acted in accordance with law.

Appellant cannot and does not deny that the acts for which punishment was imposed actually occurred. Significantly, appellant does not claim that the words spoken were not contemptuous. Rather, the thrust of the appellant's brief is to argue that the words spoken were somehow protected or that the judge abused his discretion by not issuing a warning prior to citation. Each of those contentions do not survive examination.

1. Free Speech. Appellant's argument that the offensive and disruptive comments to the court were protected by the First Amendment is without merit and fails for two reasons.

The first reason the claimed free speech interest fails is that it was not raised in the trial court. There is no assertion reflected in the record to the effect that Mr. Borrego had a right to speak as he did to the court. New issues cannot be raised for the first time on appeal. Lopez v. Schulsen, 716 P.2d 787 (Utah 1986).

The second reason the free speech argument fails is that the right to free speech has never been considered to be unfettered. That is, one's First Amendment rights exist only in the context of an acceptable time, place, and manner of expression. See, Clark v. Community for Creative Non-Violence, 468 U.S. 288, 82 L.Ed.2d 221, 104 S. Ct. 3065 (1984). The purpose of the contempt statute is to preserve the due course of judicial proceedings without unlawful interference to protect Mr. Borrego and the public from the evils which arise out of anarchy in a courtroom. Robinson v. City Corp. for City of Ogden, 112 Utah 36, (1947). To allow the plaintiff to invoke the First Amendment in defense of disrupting a judicial proceeding is to launch an attack on the very forum which protects the constit-

utional rights of Mr. Borrego. The irony of his position is that the more disruption allowed in a court, the less protection will be able to be given to the constitutional rights he seeks to assert. Anarchy is the antithesis of an ordered constitutional system. Appellant fails to show any authority that shields under the First Amendment disruptive courtroom behavior. He has not shown that the speech uttered was appropriate at the time and place at issue.

Finally, there is no authority cited to claim that the Utah Constitution protects speech which is disruptive of orderly judicial procedure. Absent some legal authority, the presumption that the trial court acted correctly is not overcome.

2. Duty to Warn. A second argument advanced by Mr. Borrego is that the judge was required to forewarn him that his conduct was contumacious before a finding of contempt was made. This argument also fails.

No statutory requirement exists for a warning. As a result, it cannot be said that the court abused its discretion in the context of the statute. Rather, one must look to that qualitative analysis mentioned above to determine if an abuse of discretion has occurred when measured against reasonableness.

An excellent discussion of the policies behind the contempt statute for the federal courts is given in United States v. Seale, 461 F.2d 345 (7th Cir. 1972). A reading of that case will show that those policies apply to the judiciary generally and the protection of judicial proceedings and have value in analyzing this case. Seale arose out of the prosecution in Chicago of seven Black Panthers who engaged in conduct which continuously disrupted their criminal trial. When Seale was cited for contempt, he appealed and raised the warning issue. The Seale court explained that, as a general proposition, specific intent is required for a contempt conviction. The role of a warning is to meet a due process requirement of a finding of intent. That is, one may show that a person intended to disrupt judicial proceedings by showing the person was warned that the conduct was disruptive.

The Seale court explained that there is no specific requirement for a warning. At 366. Instead, the evidence of intent may be derived by the very nature of the conduct under the circumstances. Intent can be found by conduct which one should or reasonably should have been aware was wrongful. This analysis is one of looking for an obstruction of the proceeding due to an activity which goes beyond mere insult to the court.

Because characterization of the act is qualitative, it is subject to the discretion of the judge. See also, Gordon v. U.S., 592 F.2d 1215 (1st Cir. 1979).

The intent of Mr. Borrego to improperly disrupt the proceedings is easily determined by reviewing the record. First, the court indicated at p. 9 of the transcript that it found the profanity offensive. Rather than responding with an apology, Mr. Borrego proceeded to further denigrate the court. Page 9 of the transcript also indicates that Mr. Borrego was acting in a same manner as on a prior day when he was physically removed from the courtroom. Further, he was told a couple of times by his own counsel to be quiet.

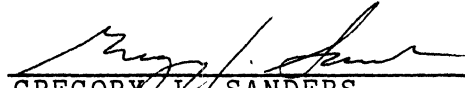
In summary, there is sufficient information in the transcript to show that Mr. Borrego was warned in a variety of ways that his conduct was unacceptable. Additionally, he engaged in conduct which a reasonable person would realize would be disruptive of the judicial proceeding, so no actual warning was required. As a result, the issue of intent is clearly resolved against Mr. Borrego by the warnings given and by the nature of his acts. It cannot reasonably be said that the trial court acted arbitrarily or abused its discretion under the actual circumstances of the proceedings.

CONCLUSION

The undisputed acts of Mr. Borrego were disruptive of the judicial proceeding in which they occurred. The court properly exercised its discretion to summarily punish the contempt which occurred in its presence. The conviction should be affirmed.

DATED this 30th day of December, 1987.

KIPP AND CHRISTIAN, P.C.



GREGORY J. SANDERS
Attorney for Respondent
Fifth Circuit Court

ADDENDUM

78-7-17. Powers of every judicial officer.

Every judicial officer has power:

- (1) to preserve and enforce order in his immediate presence, and in proceedings before him, when he is engaged in the performance of official duty.
- (2) to compel obedience to his lawful orders as provided by law.
- (3) to compel the attendance of persons to testify in a proceeding before him in the cases and manner provided by law.
- (4) to administer oaths to persons in a proceeding pending before him, and in all other cases where it may be necessary in the exercise of his powers and duties.

78-7-18. Power to punish for contempt.

For the effectual exercise of the powers conferred by the next preceding section [§ 78-7-17] a judicial officer may punish for contempt in the cases provided by law.

78-32-1. Acts and omissions constituting contempt.

The following acts or omissions in respect to a court or proceedings therein are contempts of the authority of the court:

(1) Disorderly, contemptuous or insolent behavior toward the judge while holding the court, tending to interrupt the due course of a trial or other judicial proceeding.

(2) Breach of the peace, boisterous conduct or violent disturbance, tending to interrupt the due course of a trial or other judicial proceeding.

(3) Misbehavior in office, or other willful neglect or violation of duty by an attorney, counsel, clerk, sheriff, or other person appointed or elected to perform a judicial or ministerial service.

(4) Deceit, or abuse of the process or proceedings of the court, by a party to an action or special proceeding.

(5) Disobedience of any lawful judgment, order or process of the court.

(6) Assuming to be an officer, attorney or counselor of a court, and acting as such without authority.

(7) Rescuing any person or property in the custody of an officer by virtue of an order or process of such court.

(8) Unlawfully detaining a witness or party to an action while going to, remaining at, or returning from, the court where the action is on the calendar for trial.

(9) Any other unlawful interference with the process or proceedings of a court.

(10) Disobedience of a subpoena duly served, or refusing to be sworn or to answer as a witness.

(11) When summoned as a juror in a court, neglecting to attend or serve as such, or improperly conversing with a party to an action to be tried at such court, or with any other person, concerning the merits of such action, or receiving a communication from a party or other person in respect to it, without immediately disclosing the same to the court.

(12) Disobedience by an inferior tribunal, magistrate or officer of the lawful judgment, order or process of a superior court, or proceeding in an action or special proceeding contrary to law, after such action or special proceeding is removed from the jurisdiction of such inferior tribunal, magistrate or officer. Disobedience of the lawful orders or process of a judicial officer is also a contempt of the authority of such officer.

78-32-3. In immediate presence of court; summary action — Without immediate presence; procedure.

When a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily, for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as prescribed in § 78-32-10 hereof. When the contempt is not committed in the immediate view and presence of the court or judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators or other judicial officers.

CERTIFICATE OF MAILING

MAILED, postage prepaid, this 30th day of December, 1987, ~~a~~^y true and correct copy^{'s} of the foregoing Brief of Respondent, Fifth Circuit Court, to the following:

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