1985

David A. Rivas Carol's Lounge v. Midvale City Corporation: Brief of Appellant

Utah Supreme Court

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20733

IN THE SUPREME COURT OF THE STATE OF UTAH

DAVID A. RIVAS, dba CAROL'S LOUNGE,

Plaintiff-Appellant,

vs.

MIDVALE CITY CORPORATION,

Defendant-Respondent.

Case No. 20733

BRIEF OF APPELLANT

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County,
Judge Dean E. Conder

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Ordinances

ISSUES PRESENTED

Whether the lower court erred in not finding the actions of Midvale City arbitrary and capricious in revoking permanently the business license of appellant according to the facts presented.

STATEMENT OF THE CASE

A. Nature of the Case. This is an appeal of a denial of a petition for an Extraordinary Writ pursuant to Rule 65(B). Appellant's license to sell beer was permanently revoked by the Midvale City Council after a finding that an employee of appellant had allowed minors in a tavern.

B. Proceedings and Disposition Below. On the 26th day of June, 1984, a hearing was held before the Midvale City Council, pursuant to an Order to Show Cause. Evidence was heard and appellant, through counsel, produced witnesses, testified himself, and cross examined the city's witnesses. On the 11th day of July the City entered an order, accompanied by Findings of Fact and Conclusions of Law, permanently revoking appellant's Class "C" beer license. On that day an amended petition for Extraordinary Writ was filed in the Third Judicial District Court, appealing the decision. (The original petition was amended to reflect the fact that the City had filed Findings of Fact, Conclusions of Law and an Order. The original petition was filed before the findings were made because of the threat of criminal prosecution by the City, communicated to appellant through counsel, should he remain open for business, in spite of the absence of formal findings.)

Appellant filed an affidavit reflecting his financial stake in the business and alleging immediate and irreparable harm would result unless a temporary restraining order was granted. Judge Conder granted the restraining order, which was later converted into a preliminary injunction during the pendency of the action.

On the 7th day of May, 1985, hearing was held on the petition in front of Judge Conder. The petition was denied. Findings of Fact, Conclusions of Law and an Order were submitted by counsel for the City. Appellant filed objections to the proposed order and those objections were heard and most objections were denied. This appeal was taken and Judge Conder granted a stay on June 11, 1985.

C. Statement of Facts. The facts underlying this matter are largely undisputed. On December 29, 1983, Junne Charon was cited by Respondent Midvale City for allowing minors in a tavern pursuant to, 9-435, Code of Revised Ordinances of Midvale City. On January 3, 1984 Junne Sharon was cited for the same violation with respect to two other individuals. Junne Charon plead guilty to the charge relating to January 3, and the other charge was dismissed.

At the time of both violations Junne Charon was an employee of the appellant, working at Carol's Lounge. Because of the circumstances surrounding the first incident (See

testimony of Junne Charon, City Council hearing pp.), no action was taken by appellant against Ms. Charon. Immediately upon the occurrence of the second incident, Ms. Charon was fired (Ibid, p).

The fact of the violations was not contested at the hearing before the City Council. Appellant testified that upon hiring employees he sat down with them and informed them of work rules regarding identification, gambling, and serving beer. (See testimony of Dave Rivas, city council hearing pp.). This was confirmed by Junne Charon (pp)

ARGUMENT

I. THE LOWER COURT ERRED IN NOT FINDING THAT THE RESPONDENT'S ACTIONS WERE ARBITRARY AND CAPRICIOUS.

A. THE FAILURE OF THE RESPONDENT TO MAKE FINDINGS WITH RESPECT TO UNDISPUTED TESTIMONY OFFERED BY APPELLANT IS ARBITRARY AND CAPRICIOUS.

Due process naturally requires that the licensee be entitled to notice and a hearing, and appellant should be afforded the opportunity to present evidence, which he did. Additionally, a record must be made so that judicial review is possible. Peatross v. Board of Commissioners of Salt Lake County, Utah, 555 P.2d 281 (1976). This review is especially important since a city council is not law-trained and quasi-judicial functions are the exception rather than the rule in municipal functions.

Taking the foregoing as true, it certainly follows that the hearing must be a meaningful one in the sense that all testimony adduced must at least be considered by the governing body. And if testimony is undisputed, and relevant, as is certainly the case with respect to the referred to testimony by Mr. Rivas and Ms. Charon, the Findings of Fact must at least recite those facts which are undisputed and relevant. Certainly if findings are necessary (Anderson v. Utah County Board of County Commissioners, Utah 589 P.2d 1214 (Utah 1979),

then to give this requirement meaning, the findings must comport with the evidence.

The findings in this case completely ignore the undisputed, relevant testimony of the appellant's witnesses and merely recite the allegations contained in the Order to Show Cause in conclusory fashion. Where the inferior tribunal below ignored these facts, this court should find such action to be arbitrary and capricious.

B. THE LOWER COURT ERRED IN NOT FINDING THAT RESPONDENT ACTED ARBITRARILY AND CAPRICIOUSLY IN MAKING NO FINDINGS CONCERNING APPELLANT'S PROPERTY INTEREST.

In the hearing before the City Council, appellant, Rivas testified concerning his ownership of the business known as Carol's Lounge, the length of such ownership and the efforts he had made to comply himself, and assure that his employees comply with applicable ordinances and statutes concerning his business. In the petition filed in Third District Court, appellant executed an affidavit specifying his monetary interest in the business. Yet neither in the findings before the council, nor the findings in Third District Court is there any showing that the appellant's property interest was considered. This court has held that

> A city has broad discretion in granting, denying or revoking beer licenses, but a business enterprise may not be deprived of a license without due concern for the property interest involved. Anderson v. Utah Board of County Commissioners, 589 P.2d 1214 (Utah 1979).

Obviously where this matter is not addressed by either the tribunal or the lower court it cannot be said that the matter was given "due concern". And if due concern was not given to the issue by respondent, its actions were arbitrary and capricious.

C. THE PENALTY OF PERMANENT REVOCATION OF APPELLANT'S LICENSE IS, IN AND OF ITSELF, ARBITRARY AND CAPRICIOUS AND AN ABUSE OF DISCRETION.

There is no question that cities have broad authority in regulating licensees. Whiting vs. Clayton, 617 P.2d 362 (Utah 1980). This discretion is not unbridled however. As has been pointed out, the respondent must take into account the property interest one has in his business. If that is so it seems to follow that the tribunal must balance that substantial interest, and the penalty that a forfeiture would entail, against the severity of the violation and the culpability of the appellant. Said in another way, to give effect to this court's pronouncements, the punishment should fit the crime.

In this particular case the appellant's testified as to the inadvertent nature of the violations, the habit or custom with respect to normal enforcement procedures, and the unique circumstances surrounding the violations. It should be noted that in this area, bar operators like the appellant are required to play an enforcement role with respect to city ordinances.

They are dealing with an area that involves others who may be intent on breaking the law themselves. In such circumstances the tribunal should be extremely reluctant to take away someones livelihood on a permanent basis, absent flagrant violations.

CONCLUSION

The tribunal below clearly abused its discretion and acted arbitrarily and capriciously by permanently revoking appellant's license and hence destroying his livelihood, based upon the record below. The respondent failed to make findings concerning relevant, undisputed testimony adduced before it. Respondent failed to even acknowledge, let alone show "due concern" for the property interest of appellant, contrary to this court's rulings in Whiting and Anderson. The lower court erred in denying the petition for extraordinary writ. The lower court's order should be reversed and the Respondent's order of revocation should be vacated.

Respectfully submitted

MARK A. BESENDORFER