

1988

Utah v. Roger Dale Smith : Reply Brief

Utah Court of Appeals

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BRIEF

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DOCKET NO. 880099CA IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,

Plaintiff and Appellant,

v.

Case No. 880099-CA

ROGER DALE SMITH,

Defendant and Respondent.

REPLY BRIEF OF THE APPELLANT

Appeal from the Circuit Court of Garfield County, Panguitch City
Department, Honorable David L. Mower.

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Argument Priority Classification: 2

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SUMMARY OF ARGUMENT

The Utah Criminal Code is to be construed to promote justice, and to effect the objects of the law. This Court has power to construe "and" to mean "or", in the Utah custodial interference statute, in order to promote justice, and to clarify the application of the law.

In this case, this Court should construe the word "and", between paragraphs (1) (a) and (1) (b) of Utah Code Annotated Section 76-5-303, to mean "or", in order to harmonize and reconcile the provisions of that statute.

ARGUMENT

POINT I: THIS COURT HAS THE AUTHORITY TO CONSTRUE "AND" TO MEAN "OR" IN THIS CASE.

Utah Code Annotated Section 68-3-2 provides that the statutes of the State of Utah are to be liberally construed, with a view to effect the objects of the statutes, and to promote justice. This principle is expressly made applicable to the Utah Criminal Code by Utah Code Annotated Section 76-1-106, as follows:

The rule that a penal statute is to be strictly construed shall not apply to this code, any of its provisions, or any offense defined by the laws of this state. All provisions of this code and offenses defined by the laws of this state shall be construed according to the fair import of their terms to promote justice and to effect the objects of the law and general purposes of Section 76-1-104.

The general rule is that courts have the power to change, and will change, "and" to "or", and vice-versa, whenever such conversion is required by the context, or to save it from unconstitutionality, or, in general, to effectuate the obvious intention of the legislature. However, in penal statutes, the word "or" cannot be interpreted as meaning "and", when the effect would be to aggravate the offense or increase the punishment. 73 Am. Jur. 2d Statutes, § 241, p. 420 (1974), citing Smith v. Casper, 419 P. 2d 704 (Wyo. 1966).

Numerous courts across the country have interpreted various statutes in accordance with that general rule. For example, in People v. Skinner, 39 Cal. 3d 765, 704 P. 2d 752 (Cal. 1985), the Supreme Court of California held that the inadvertent use of the word "and", where the purpose or intent of the statute seems clearly to require the word "or", is an example of a drafting error which may properly

be rectified by judicial construction. Similarly, in McMechan v. Everly Roofing, Heating and Air Conditioning, Inc., 8 Kan. App. 2d 349, 656 P. 2d 797 (Kan. App. 1983), the Court of Appeals of Kansas held that the word "and" in a statute may be construed to mean "or", when it is necessary to carry out the legislative intent. For other such examples of statutory construction by various courts, see, e.g., Comptroller of Treasury v. Fairchild Industries, Inc., 303 Md. 280, 493 A. 2d 341 (Md. 1985); People v. Wang, 128 Misc. 2d 554, 490 N.Y.S. 2d 423 (N.Y. Sup. 1985); State vs. Hughes, 702 S.W. 2d 864 (Mo. App. 1985); and State v. Grimes, 292 S.C. 204, 355 S.E. 2d 538 (S.C. 1987).

Thus, it is clear that, where necessary to promote justice, and to effect the objects of the law, this Court has the authority to construe "and" to mean "or" in the Utah custodial interference statute under consideration in this case.

POINT II: THIS COURT SHOULD CONSTRUE "AND" TO MEAN "OR" IN THIS CASE, IN ORDER TO RECONCILE THE PROVISIONS OF THE CUSTODIAL INTERFERENCE STATUTE.

In interpreting a statute, the Court should look to all of its parts, and should not rely too heavily on characterizations such as the "disjunctive" form versus the "conjunctive" form, in resolving difficult issues. Kelly v. Wauconda Park Dist., 801 F. 2d 269 (7th Cir. 1986); cert. denied, 107 S. Ct. 1592-1593 (1987).

The Utah Supreme Court has held that, in cases of apparent conflict between provisions of the same statute, it is the Court's duty to harmonize and reconcile statutory provisions, since the Court cannot presume that the legislature intended to create a conflict. Where contradictory provisions are passed, the provision susceptible

of but one meaning will control those susceptible of two, if the statute can thereby be rendered harmonious. Madsen v. Brown, 701 P. 2d 1086 (Utah 1985) at 1089-90.

In this case, a careful examination of the current Utah custodial interference statute, Utah Code Annotated Section 76-5-303, reveals that paragraph (1) (a) of that section must be interpreted to operate independent of paragraphs (1) (b) and (2) of that section, particularly in light of the 1979 and 1984 amendments to that section.

In 1979, the penalty for custodial interference was increased from a Class B Misdemeanor in all cases to a Class A Misdemeanor; and where, as in this case, the child is removed and taken from one state to another, the penalty was increased to a third-degree felony.

In 1984, former subsection (3) was deleted, which dealt with the taking of incompetents, or other persons "committed by authority of law" to the custody of another person or institution, from such other person or institution, knowing he or she has no legal right to do so.

In the process of enhancing the penalty for violation of Section 76-5-303 in 1979, and deleting the foregoing provision in 1984, it is inconceivable that the legislature intended to deprive natural parents of any remedy for unlawful interference with their inherent parental rights to the custody of their own children, where no court order of custody is in effect. To read the statute as defendant and respondent urges, in a manner restricting its application to situations where custody has been ruled upon by a court of competent jurisdiction, renders meaningless the phrase "whether a parent or other" in paragraph (1).

More importantly, the interpretation claimed by defendant and respondent would create a conflict with paragraph (2) of the statute, which the legislature surely did not intend. If paragraph (1) were to be restricted only to cases where there is an existing judicial order of custody, then paragraph (2) would appear to be inconsistent, because it does not require the element of "knowing the actor has no legal right to do so." It is readily apparent that paragraph (1) (b) is intended to address those cases where a non-custodial parent holds a child for a period substantially longer than the period prescribed by court order, while paragraph (2) is intended to address the opposite situation of a custodial parent who holds a child with intent to deprive the other person of lawful visitation or custody rights. Paragraph (2) does not require the element of "knowing the actor has no legal right to do so"; yet it addresses precisely the converse of the conduct prescribed by paragraph (1) (b). It would seem to be an artificial and convoluted interpretation of this statute to require a culpable mental state for a non-custodial parent, but not to require the same for a custodial parent.

In short, the only reasonable interpretation of this statute, which harmonizes and reconciles all of the foregoing provisions, is to construe paragraph (1) (a) to operate independent of paragraphs (1) (b) and (2). By construing the statute in that manner, paragraph (1) (a) would then protect the inherent custodial rights of natural parents, where, as here, there is no existing judicial order of custody; paragraph (1) (b) would address the situation where a non-custodial parent holds a child in violation of an existing court order; and

paragraph (2) would address the circumstance where a custodial parent holds a child in violation of lawful visitation or custody rights. Such clarifying construction would neither aggravate the offense, nor increase the punishment for the offense, and would clearly promote justice in this case.

CONCLUSION

THE STATE OF UTAH respectfully requests that this Court hold that the word "and" between paragraphs (1) (a) and (1) (b) of Section 76-5-303 should be construed to mean "or", in order to harmonize and reconcile the provisions of the statute, promote justice, and effect the objects of the law; and in order to give recourse to the State of Utah in cases of unlawful interference with the inherent parental rights of natural parents to the custody of their own children, where there is no court order of custody in effect. THE STATE OF UTAH respectfully requests that this Court reverse the decision of the Circuit Court, vacate the Judgment and Order of Dismissal entered by that Court, and remand this case to the Circuit Court for further proceedings.

DATED this 11th day of July, 1988.



Patrick B. Nolan
Garfield County Attorney

CERTIFICATE OF MAILING

I hereby certify that I placed a full, true and correct copy of the foregoing REPLY BRIEF OF THE APPELLANT in the United States Mail, postage prepaid, on this the 11 day of July, 1988, addressed as follows:

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