

1997

State of Utah v. Caprice T. Martin : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Utah v. Martin*, No. 970501 (Utah Court of Appeals, 1997).
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JUDGMENT
SU
A-10
DOCKET NO. 970501 CA

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,
vs.

CAPRICE T. MARTIN,

Defendant/Appellant.

APPELLANT'S REPLY BRIEF

Court of Appeal Case # 970501

District Court
Case No. 931900803

APPEAL FROM THE JUDGMENT, SENTENCE (COMMITMENT) OF THE
THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, THE
HONORABLE FRANK G. NOEL AND THE HONORABLE LESLIE LEWIS, JUDGES,

PRESIDING

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FILED

OCT 02 1998

COURT OF APPEALS

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REBUTTAL ARGUMENT

**POINT I: DEFENDANT MARTIN IS NOT ESTOPPED FROM
CHALLENGING THE THE PROPRIETY OF THE EXTENSION.**

- 1. This Court should not consider the State's Estoppel Argument, where the State did not raise the argument below before the trial court.**

Appellee asserts that Defendant MARTIN is estopped from challenging the propriety of the extension. This estoppel argument was not raised or argued before the trial court. (See transcript of May 8, 1997.) This Court has long held that the Court of Appeal will not address an alternative theory offered by the State to affirm the ruling of the trial court, if that argument was not argued before the trial court. State v. Marshall, 791 P.2d 880, 886 (Utah Ct. App. 1990)(refusing to consider State's argument raised for the first time on appeal).

Thus, this Court should not consider the State's estoppel argument, because it was not raised below.

2. **If the Court considers the Estoppel argument of the State raised for the first time on appeal, the Court should reject this argument as not being applicable in the instant case.**

Appellee asserts that Defendant MARTIN is estopped from challenging the propriety of the extension. To support this proposition, Appellee cites Lone Mountain Production v. Natural Gas Pipeline, 984 F.2d 1551 (10th Cir. 1992). In Lone Mountain, the Tenth Circuit held that a pipeline company was estopped from demanding strict compliance with an assignment provision of a gas purchase contract. Id. at 1557.

In this case, the estoppel principle used in business contracts does not apply to extension, terminations, and revocations of probation merely because probation revocation proceedings are civil in nature. Appellee cites Commonwealth v. Griffin, 942 S.W.2d 289 (Ky 1997), to support its proposition that estoppel does apply to probation extension proceedings. However, the Griffin case finds estoppel only because there was a knowing and intelligent waiver of a five year probation limitation statute. Id. at 291. In this case, Mr. MARTIN did not legally waive his rights, because, Mr. MARTIN was never adequately informed about the rights he was waiving. Also, the waiver was not conducted in a manner consistent with Utah Code Section 77-18-1 and requirements of Due Process under the United States Constitution. Therefore, the rationale of Griffin does not apply.

Further, in order to support this estoppel theory, Appellee mis-characterizes the record asserting that “Defendant . . . by his own act . . . [obtained] the extension”. Appellee’s assertion is contrary to the record.

The record clearly shows that all the actions taken to illegally and improperly extend the jurisdiction of the Court over Mr. MARTIN, were taken at the direction, and control of

Adult Probation and Parole.¹ Further, the Court's role in the extension was limited to Judge

¹ Probation Officer Anderson showed Mr. MARTIN the waiver form, (See District Court File, page 82), which was the third page of Exhibit 3 (Transcript, May 8th Hearing, page 7:19 - 8:14). Probation Officer Anderson did not show Mr. MARTIN the Progress/Violation Report, or discuss the contents of the Progress/Violation Report which is found in the District Court File, at pages 82, 83. (Transcript, May 8th Hearing, page 7:19 - 8:14, and May 8th hearing, Exhibit 2, pages 1,2)

The Waiver Form states that "I Caprice Martin . . . do hereby voluntarily request that my personal appearance before the Third District Court be waived and that my probation supervision be extended; AND/OR that the conditions of my probation be amended as follows:" (District Court File, page 82, and Exhibit 2 from May 8th hearing, page 3). Then, the document continues in handwritten language that "Probation extended 12 months from July 6, 1996, for payment of remaining fine balance and completion of substance abuse counseling." (District Court File, page 82, and Exhibit 2 from May 8th hearing, page 3).

Before signing the Waiver form, Mr. MARTIN was never made aware that he had the right to receive advice from an attorney. (Transcript of May 8th Hearing, 13:13 -18).

Before signing the Waiver form, Mr. MARTIN was never advised that he had the right to require the probation office to show probable cause before he could be held on a hearing for violation of his probation. (Transcript of May 8th Hearing, 13:19 - 23). Before signing the Waiver form, Mr. MARTIN was never advised that he was entitled to a neutral officer making a determination of whether probable cause existed that Mr. MARTIN violated his probation. (Transcript of May 8th Hearing, 13:19 - 14:4). Before signing the Waiver Form, Mr. MARTIN was never informed that Adult Probation and Parole had the burden of proof to show that he willfully violated his probation. (Transcript of May 8th Hearing, 14:5 - 14.9). Before signing the Waiver form, Mr. MARTIN was never advised that he had the right to speak out and present evidence in his own behalf at a probation revocation hearing. (Transcript of May 8th Hearing, 14:10 - 14)

Probation Officer Anderson testified that, at the May 21st meeting, Mr. MARTIN was never shown an Order to Show Cause or Affidavit asserting that Mr. MARTIN violated the terms of his probation. (Transcript of May 8th Hearing, 7 25 - 8:11, 13:9 - 13). The only persons in attendance at the May 21st meeting were Glade Anderson and CAPRICE MARTIN. (Transcript of May 8th Hearing, 10:12 - 15). On May 21, 1996, the only probation condition that had not yet been met was the verification of payment of the fine and verification of substance abuse counseling. Everything else was done. (Transcript of May 8th Hearing, 9.14-19).

Mr. MARTIN'S previous probation officer had focused on the other requirements of his probation, such as the requirement of achieving a G E D , and attending a cognitive thinking course. (Transcript of May 8th Hearing, 9.14 - 12:20). Officer Anderson testified that a probation officer never gives one probationer too many things to do at one time. (Transcript of May 8th Hearing, 11:12 -12:20) A probation officer is trained to stagger the requirements of probation. (Transcript of May 8th Hearing, 11:12 -12:20).

On May 21, 1996, Probation Officer Anderson was aware that Mr. MARTIN's probation was scheduled to terminate in July, 1996. (Transcript of May 8th Hearing, 18:1 - 4).

Noel signing a report as approved and ordered, and sending the original report back to Adult Probation and Parole, with a conformed copy remaining in the Court's file.

Even if the doctrine of estoppel applies to the extension, modification, or revocation of probation, the record does not support the Appellate Court finding estoppel, where the State of Utah did not argue the doctrine to the Court below and the trial court did not find estoppel applicable.

For the foregoing reasons, this Court should reject Appellee's argument concerning waiver.

POINT II: APPELLEE INCORRECTLY ASSERTS THAT :

- (1) THE EXTENSION OF MR. MARTIN'S PROBATION MET THE REQUIREMENTS OF UTAH CODE SECTION 77-18-1; AND**
- (2) THE STATE AND THE COURT MET THE LOWER DUE PROCESS PROTECTIONS REQUIRED TO EXTEND MR. MARTIN'S PROBATION.**

On May 28, 1996, the "Progress/Violation Report" was filed. (District Court File, 80 - 83, and Exhibit 3) The Progress/Violation Report was signed by Glade Anderson and Patricia Dennis, from Adult Probation and Parole. (District Court File, 80 - 83, Transcript of May 8th hearing, 18:21 - 19:18) Neither Glade Anderson nor Patricia Dennis are licensed to practice law. (Transcript of May 8th hearing, 18:21 - 19:18). The document filed in the District Court file on May 28, 1996, was signed by Pat Jones, using the letters, "/s/FGN". Transcript of May 8th hearing, 22:12 - 18) The letters "/s/FGN" were placed next to the language "APPROVED AND ORDERED:" on the Progress/Violation Report, at the direction of Judge Noel. (District Court File, 80 - 83, Transcript of May 8th hearing, 20:16 - 24). Besides the Progress/Violation Report, no other evidence was considered by Judge Noel before he directed his clerk, Pat Jones, to place the letters "/s/FGN" on the Progress/Violation Report. Further, Judge Noel did not make any findings of fact, whether oral or written, on record regarding the Progress/Violation Report filed on May 28, 1996. (Transcript of May 8th hearing, 27:25 - 28:8).

For the reasons and arguments full set forth in Appellant's opening brief, Appellee's assertions are incorrect.

CONCLUSION AND PRECISE RELIEF SOUGHT

Based on the foregoing, this Court of Appeals should determine that Defendant MARTIN'S probation was not legally and constitutionally extended. Thus, by operation of the order of January 6, 1995, Defendant's MARTIN'S probation expired on July 6, 1996. Thus, the Court was without jurisdiction to conduct any further proceedings after July 6, 1996. Any and all revocations, extensions, and modifications, to Defendant MARTIN'S probation after July 6, 1996, are null and void. Thus, this Court should remand this case to the District Court, with an order requiring the District Court to vacate its order signed on June 30, 1997, and to enter and order of dismissal.

Dated this 30 day of September, 1998



Gregory M. Constantino

CERTIFICATE OF MAILING/DELIVERY

I, the undersigned, hereby certify that a true and correct copy of the foregoing
APPELLANT'S REPLY BRIEF was, this 1 day of ~~June~~^{Oct}, 1998, mailed first class,
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