1978

Patricia Mellor, James White, Nedra Allred, Thomas Pirtle and Tonia Pirtle v. Mark Cook, Bryant Madsen, Kenneth Strate, (and Thomas R. Blonquist) : Brief of Defendants-Appellants

Utah Supreme Court

IN THE SUPREME COURT

OF THE STATE OF UTAH

PATRICIA MELLOR, JAMES WHITE, NEDRA ALLRED, THOMAS PIRTLE and TONIA PIRTLE,

Plaintiffs-Respondents,

-vs-

MARK COOK, BRYANT MADSEN, KENNETH STRATE, (and THOMAS R. BLONQUIST)

Defendants-Appellants.

Case No.

BRIEF OF DEFENDANTS-

APPEAL FROM THE SIXTH JUDICIAL
SANPETE COUNTY, HONORABLE

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OF THE STATE OF UTAH

PATRICIA MELLOR, JAMES WHITE, NEDRA ALLRED, THOMAS PIRTLE and TONIA PIRTLE,

Plaintiffs Respondents,

-vs-

MARK COOK, BRYANT MADSEN, KENNETH STRATE, (and THOMAS R. BLONQUIST)

Defendants-Appellants.

Case No. 15,639

BRIEF OF DEFENDANTS-APPELLANTS

APPEAL FROM THE SIXTH JUDICIAL DISTRICT COURT OF SANPETE COUNTY, HONORABLE DON V. TIBBS, JUDGE

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BRIEF OF DEFENDANTS-APPELLANTS

STATEMENT OF THE KIND OF CASE

This is an appeal from a judgment of the Sixth Judicial District Court of Sanpete County, Judge Don V. Tibbs, presiding, which held each of the defendants and their attorney, Thomas R. Blonquist, Salt Lake City, Utah, in contempt for violation of a certain order of the Court.

DISPOSITION IN LOWER COURT

The defendants, and their attorney Thomas R. Blonquist (hereafter collectively "defendants"), were found in contempt for violating a Court Order dated September 22, 1977. It is from that judgment that the defendants appeal. The "Sworn Accusation" or complaint against the defendants was ultimately dismissed and that order of dismissal is also on appeal by the plaintiffs as Case No. 15,620.

RELIEF SOUGHT ON APPEAL

The defendants seek a reversal of the judgment of contempt.

STATEMENT OF FACTS

On September 22, 1977 at the hour of 2:15 p.m., Judge David B. Dee signed a "Order to Show Cause and Temporary Restr Order" in Civil No. 7556 in the Sixth Judicial District Court Sanpete County, State of Utah. That Order to Show Cause orde the defendants to appear in the County Courthouse in Manti, U on Wednesday, September 28, and there show cause why a preliminary injunction should not issue enjoining the defend from appointing a new superintendent of the North Sanpete County School District and why they should not be enjoined from "further violation of the Utah Open and Public Meetings Act and the Utah Orderly School Termination Procedures Act." The Order further temporarily restrained and enjoined the defendants from appointing a new superintendent of the North Sanpete County School District and from violating the two above cited Acts.

The Order to Show Cause and Temporary Restraining Order were apparently based upon a document entitled "Sworn Accusa which was subsequently filed with the Clerk of the Sixth Judicial District in Sanpete County at 5 P.M. on September 22, 1977. (R.1.) At the time the "Sworn Accusation" was originally filed, there was only one plaintiff, Patricia Mellor, and the Sworn Accusation claimed that it was a removal action to remove the defendants from their offices on the Board of Education of the North Sanpete County Scho

District pursuant to Utah Code Annotated, 77-7-1, et.seq.

The sequence of events surrounding the obtaining of the Temporary Restraining Order and the filing of the Sworn Accusation are as follows:

The three defendants, Cook, Madsen and Strate had been duly elected as members of the Board of North Sanpete County School District and were functioning in that capacity in the Spring of 1977. In June and July of 1977, the Board decided to remove Royal N. Allred as superintendent of schools in that area and to replace him with another. The Board solicited applications from various individuals which resulted in the setting of a meeting for September 22, 1977 at which time the Board was to consider final applicants for the superintendent position. A small but vocal group of local citizens had opposed the actions of the school board and the consternation of this group apparently culminated in the decision to institute removal proceedings against the three defendants. Patricia Mellor, an alleged taxpayer in Sanpete County, was apparently chosen as the figurehead for the movement and to represent this group as the plaintiff. Apparently the group decided on September 22, 1977 that they would have to take some action to attempt to stop the meeting scheduled for that evening. It appears that the attorneys for the plaintiff called for Judge Don V. Tibbs in Sanpete County but discovered that he was conducting a trial in Vernal, Utah and would be unable to hear a motion for a Temporary Restraining Order. (R.37-38). It is assumed that attorneys for the plaintiff were going to go to Manti, file the "Sworn Accusation"

and then have the judge hear the motion for the Restraining Order. The attorneys contacted Judge Tibbs in Vernal, who then called the Court Administrator for the State of Utah in Salt Lake City and asked the administrator to assign a judge in the Third Judicial District to hear the motion for the Temporary Restraining Order. (R.38, 56). The administr called Judge Peter Leary, presiding judge of the Third Judicial District who suggested that Judge David Dee, assign to the Law and Motion Calendar of the Third Judicial Distric should be asked to hear the Motion. Whereupon, the assistan court administrator, Ronald W. Goodson, assigned Judge Dee to hear the Motion. In a subsequent affidavit, the adminis claimed authority pursuant to Utah Code Annotated, Section 78-3-24 for making the assignment (R.57).

The motion of the plaintiff was heard on the afternoon of June 22, 1977 and at 2:15 p.m., Judge Dee signed the Order to Show Cause and Temporary Restraining Order. (R.20). Since no pleadings had been filed in Sanpete County prior to the time that Judge Dee signed the Order, the attorneys for the plaintiff, immediately after obtaining the Judge's signature on the Order, called Mrs. Wanda Bartholomew Deput Clerk of the Sixth Judicial District Court of Sanpete Count and informed her that an attorney was leaving from Salt Lake City for Manti and that he would be in Manti at approximate 5:00 p.m. to file the papers. The Attorney requested that Mrs. Bartholomew stay a few minutes after 5:00 p.m. in the event that he was unable to arrive exactly at 5:00 and the

attorney also informed her that it was important that the papers be filed on September 22. (R.31-32). The attorneys arrived at 4:58 p.m. and commenced filing the papers and Mrs. Bartholomew stamped the Sworn Accusation as being filed on September 22, at 5:00 P.M. (R.1, R.31). The attorneys also had Mrs. Bartholomew issue the Temporary Restraining Order and Order to Show Cause.

The Sworn Accusation, along with a summons and the Order to Show Cause and Temporary Restraining Order were then delivered to the Sheriff who served them on each of the three defendants at approximately 6:00 p.m., as they arrived at the scheduled meeting that evening.

In the meantime, Mr. Thomas R. Blonquist, an attorney in Salt Lake City who had been retained by the North Sanpete County School Board, had been contacted by Mr. Bruce J. Nelson, attorney for the plaintiff on the late afternoon of September 22, 1977 and had been informed by Mr. Nelson that the Temporary Restraining Order had been signed. Mr. Blonquist was on his way to the meeting in Sanpete County and arrived in Sanpete County after the meeting had already commenced. At the time of arrival of Mr. Blonquist, the Board was already in a closed meeting where the Order to Show Cause and Temporary Restraining Order were being discussed. Mr. Blonquist at that time advised the members of the Board that in his opinion the Temporary Restraining Order and Order to Show Cause was improperly issued and that the Board could proceed to hire a new superintendent on that evening. Subsequently,

the Board did in fact vote to hire a new superintendent at the meeting of September 22, 1977. (R.38-39).

On September 26, 1977, the plaintiff obtained an Order to Show Cause signed by Judge Don V. Tibbs ordering the defendants and Thomas R. Blonquist to appear before him on September 28, at the hour of 10:00 a.m. and show cause why they should not be held in contempt for disobeying the Temporary Restraining Order and Order to Show Cause issued on September 22 by Judge Dee. (R.36). Pursuant to request of both counsel, the matter was continued to Friday, Septemb 30, 1977 for hearing on the contempt issue.

Both parties filed Memoranda and Affidavits in Support of their respective positions prior to September 30, 1977, and in addition, Mr. Blonquist (since he was also the subjec of the Order to Show Cause), employed Robert C. Fillerup as his counsel. The testimony at the hearing showed the follow

1. The Sworn Accusation was signed by the plaintiff o the afternoon of September 22, 1977. (R.224).

2. Judge David Dee signed the Order at approximately 2:15 p.m. in Salt Lake City, Utah.

3. At approximately 2:30 p.m., a copy of the Restrain Order along with the Sworn Accusation, Order to Show Cause and Motion for Order to Show Cause were delivered to Mr. Blonquist at his office in Salt Lake City by Mr. Bruce Nelson. (R.230-232).

4. Enroute to the regularly scheduled meeting, Mr. Blonquist stopped and called the Clerk of Sanpete County

approximately 4:30 p.m. and asked if the Sworn Accusation had been filed. He was told that the Sworn Accusation had not been filed but that the Clerk had been requested to stay until 5:00 p.m. so that the documents could be filed that afternoon. (R.232).

5. At approximately 5:00 p.m., Mr. Blonquist again called the Clerk and was told that there were representatives of the plaintiff there at that time filing the papers. (R.234). Mr. Blonquist requested that the clerk note not only the date but the time that the papers were being filed (R.236), which notation appears on the Sworn Accusation and the accompanying Motion for Temporary Restraining Order. (R.1, 13).

6. Mr. Blonquist arrived at the School Board meeting on the evening of September 22 after the Board had entered into "closed session". (R.237). At that time Mr. Blonquist was asked concerning the Restraining Order and he advised the Board that based upon his knowledge of the Utah Rules of Civil Procedure and the information that he had received from Mrs. Bartholomew, it was his opinion that Judge Dee did not have any jurisdiction over the matter at 2:15 p.m. that afternoon, that in his opinion the Court Order was void, having been signed prior to the time that the action was commenced. (R.237). He advised the Board in addition that they could appoint a Superintendent even though the Order had been served upon them prior to the Board Meeting. (R.237).

7. Based upon the advice of Mr. Blonquist, the Board

voted in closed session 5 to 0, to hire a new superintendent and in open session voted 3 to 2 to hire a new superintendent (R.252-253).

8. At the meeting the Board in fact hired Mr. Lloyd Smith as the new superintendent of the School Board. (R.253).

9. The School Board had been acting without a superintendent from August 29, 1977 to September 22, 1977. (R.265-268).

10. Each of the defendants testified that they would not have taken the action to vote for a new superintendent but for the advice of Mr. Blonquist.

In its Order of Contempt, the Court made the following findings: that the Judge (Tibbs) was out of the District on September 22, that he was notified by telephone of an immediate need for a Hearing, that in conformity with the rules and the laws, he contacted the Court Administrator's office for the purpose of obtaining another Judge to sit in his place for the hearing of the Motion, that Judge Dee was assigned and heard a Motion for Temporary Restraining Order, which was executed in Salt Lake City at 2:15 p.m. September 22. The Court further found that the Sworn Accusation and other documents were filed in the Sanpete County Clerk's office on September 22 at 5:00 p.m. and that they were served upon all three defendants personally on September 22, at 6:00 p.m. The Court also found that Mr. Blonquist had personal information and knowledge of the Order at the time that he appeared at the School Board meeting and the Court found that all the defendants and Mr. Blonquist had knowledge of the Court

Order prior to the meeting of the School Board.

The Court found each of the defendants in contempt for violating the Order on the basis that the question of the legality of the order should have been brought before the Court upon application of counsel and that Mr. Blonquist should not have taken upon himself to instruct anyone to disobey the order. The Court also found that this case had received wide publicity to the point that the public needed to be advised that when the Court issued an Order, it had to be obeyed until it was set aside by further order of the Court. (R.293, 294).

The Court reserved the question of the amount of attorneys fees for further hearing, which hearing was held on November 30, 1977. (R. 173). At that time, the Court ordered that defendants pay to plaintiff the sum of $1,000 as attorneys fees for obtaining a contempt citation. The final findings, conclusion and order were entered by the Court on December 12, 1977. (R. 177-180).

Defendants submit that the lower Court erred in finding contempt in the present circumstance.

POINT I

THE TRIAL COURT ERRED IN HOLDING THE DEFENDANTS IN CONTEMPT.

The basis upon which a court can find contempt is set forth in Utah Code Annotated, 78-32-1. The relevant portions of that section are as follows:

> "Acts and omissions constituting contempt. The following acts or omissions in respect to a Court or proceedings that are in contempts of the authority of the Court:
>
> * * *
>
> (5) disobedience of any lawful, judgment, order or process of the Court. (emphasis added).

The judgment, order, or process of the Court must be lawful before a defendant can be in contempt for its violation.

The lawfulness of a contempt order is determined by whether the issuing court had jurisdiction, Whillock v. Whillock, 550 P.2d 558 (Okl. 1976); and if an alleged contemnor can show that the act complained of as contemptuous is the claimed violation of an order of a court which was without jurisdiction, he may not be held in contempt, Phoenix Newspapers Inc., v. Superior Court In and for Maricopa County, 101 Arix. 257, 418 P.2d 594 (1966). Additionally, violation of an order patently in excess of the jurisdiction of the issuing Court cannot produce a valid judgment of contempt, State Ex Rel. Superior Ct. of Snohomish Co., v. Sperry, 79 Wash.2d 69, 483 P.2d 608 (1971). And finally, as stated in

In Re Berry, 65 Cal. Rptr. 273, 436 P.2d 273 at 280;

> "In this state it is clearly the law that the violation of an order in excess of the jurisdiction of the issuing court cannot produce a valid judgment of contempt (Fortenbury v. Superior Court (1940) 16 Cal. 2d 405, 407-408, 106 P.2d 411; Brady v. Superior Court (1962) 200 Cal. App.2d 69, 73, 19 Cal.Rptr. 242; Grant v. Superior Court (1963) 214 Cal.App.2d 15, 19-20, 29 Cal.Rptr. 125; 1 Witkin, Cal. Procedure, § 155, pp. 421-422), and that the "jurisdiction" in question extends beyond mere subject matter or personal jurisdiction to that concept described by us in Abelleira v. District Court of Appeal (1941) 17 Cal.2d 280, at page 291, 109 P.2d 942, at page 948, 132 A.L.R. 715: "Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of stare decisis, are in excess of jurisdiction."

These rules were acknowledged by this Court some time ago in the case of In Re Rogers' Estate, 75 Utah 290, 284 P.992 (1930),wherein the Court was faced with deciding whether the failure of an administratrix of an estate to execute a deed in accordance with an order of a probate court was contemptuous. This Court found that the probate court had exceeded its jurisdiction in quieting title in a stranger to the probate proceedings and directing a deed to be given to the stranger;

> Under such circumstances the Probate Court was without jurisdiction to direct Katie S. Rogers to execute a deed to Cornelius West. To invoke the jurisdiction of a Court there must be appropriate pleadings. Hampshire v. Wooley (Utah) 269 P.135; Rolando v. District Court (Utah) 271 P.225. The Order

> adjudging Katie S. Rogers guilty of contempt is based upon the judgment directing her to execute a deed to Cornelius West. A failure to comply with a void judgment is not contempt. 284 P. at 997. (Emphasis added).

In the present case, Judge Dee had no authority to issue the Temporary Restraining Order for several reasons;

FIRST, the Court did not have jurisdiction as required by Rule 3(c) of the Utah Rules of Civil Procedure. That rule states as follows:

> "(c) Time of Jurisdiction. The Court shall have jurisdiction from the time of filing the Complaint or the service of the summons."

Pursuant to the foregoing rule, a Court in this state cannot acquire jurisdiction prior to the filing of a Compla or the service of a summons.

The word "filing" as used in Rule 3(c), relates back t Rule 3(a) which describes the manner of commencing a civil action. As therein defined, a civil action may be commence as follows:

> "(a) How commenced. A civil action is commenced (1) by filing a Complaint with the Court, or (2) by the service of a summons.

According to the preceding rules, a Court neither acquires jurisdiction nor is the action commenced until either the Complaint is filed or a summons is served.

Rule 5(e) of the Utah Rules of Civil Procedure defin filing with the Court as follows:

> "The filing of pleadings and other papers with the Court as required by these rules shall be made by filing them with the clerk of the Court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the Clerk, if any."

In the present case, the papers were clearly not filed with Judge Dee since there is no notation upon the papers. In addition, he did not transmit them to the office of the Clerk. In fact, the plaintiff must not have felt that she had filed the papers with Judge Dee or she would not have had her attorney call the clerk in Sanpete County and ask her to wait while they traveled to Sanpete County to file the papers. Until the Complaint in the instant action had been delivered into the hands of the Clerk of the Sanpete County Court, there was no filing. Since the Court can only "have jurisdiction from the time of the filing of the complaint," Judge Dee lacked jurisdiction at the time he signed the Order.

SECONDLY, Judge Dee, in particular, was without authority to hear the motion for temporary restraining order.

Utah Code Annotated, Section 78-3-13 indicates when judges may hold Court in another county.

> "Judge may hold Court in any county on request - Any district judge may hold a district court in any county at the request of the judge of the district or of the presiding district judge, and upon the request of the governor or the court administrator it shall be his duty to do so; and the judge holding the court shall have the same powers as the judge thereof."

This general rule allowing judges to preside anywhere in the state is restricted, however, by the very next sectio Utah Code Annotated 78-3-14 which defines when judges from another district may hear Ex parte applications.

> "78-3-14. Ex parte applications from another district A judge of the district may, in his own district, hear any ex parte application, and make any order concerning the same, in any action or proceeding pending or about to be commenced in another judicial district, in the following cases:
>
> (1) Upon the written request of the judge of the district in which the action or proceeding is at the time pending or is about to be commenced.
>
> (2) When it shall be made to appear by affidavit to the satisfaction of such judge that the judge of the district court in which the action or proceeding is at the time pending or is about to be commenced is absent from his district, or is incapacitated, or is disqualified to act therein; such application shall be made only to the judge of the adjoining district." (emphasis added).

The foregoing statute makes it clear that a judge outsi the district in which an action is pending or about to be commenced can hear ex parte applications only under two circumstances. First, upon the written request of the judge of the district in which the action is pending or, by an affidavit showing that the judge is either out of the distri incapacitated,etc. That application however, can only be ma to the judge of an adjoining district. The Third District C is clearly not adjoining to the Sixth District Court and so subsection (2) is inapplicable.

Since this was an ex parte proceeding, it required Judg Tibbs to make a written request that a judge of the Third District be assigned. There was no such written request i

the present case.

While Utah Code Annotated, §78-3-24 gives certain powers to the administrator of the Courts, those powers are clearly limited by Utah Code Annotated §78-3-14. The court administrator certainly has no power to set aside the clear requirements of that statute.

An analysis of the statutes cited oblige the conclusion that Judge Dee was without authority to hear the motion.

Finally, the defendants had not been served with any process of any manner prior to the time the order was entered. Without that service, the defendants could not be subject to any order of the court.

The trial court's finding that any problem with the time and manner of filing the order "was corrected upon the moment of filing the sworn accusation which was 5:00 o'clock in the afternoon," is clearly erroneous. A lack of jurisdiction over the person at the time of entry of an order or judgment cannot be corrected by the subsequent acquisition of proper jurisdiction. "The general rule is that a judgment which is void cannot be cured by subsequent proceedings." 46 Am. Jur. 2d, 349, Judgments, §50.

Since "Acquisition of Jurisdiction over the person of the defendant generally depends on whether service of process has been made in the manner required by law," 20 Am. Jur. 2d, 491, Courts §143, there could have been

no jurisdiction of the Court over the individual defendants, at the time of the entry of the order by Judge Dee, notwithstanding the fact that the Court subsequently acquired jurisdiction. Consequently, an order entered without such jurisdiction is in violation of Constitutional due process requirements and is not merely voidable but is void. 46 Am. Jur. 2d 330, Judgments, §25.

CONCLUSION

Defendants should not have been adjudged contemnors for violating an Order which was void for want of jurisdiction. To punish defendants for the failure of the plaintiff to properly proceed was manifestly erroneous. The Judgment of Contempt should be reserved.

Respectfully submitted,

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MAILED a copy of the foregoing Brief of Defendants-Appellants to: Arthur H. Nielsen, Earl Jay Peck, and Bruce J. Nelson of the firm of Nielsen, Henriod, Gottfredson & Peck, Attorneys for Plaintiffs-Respondents, 410 Newhouse Building, Salt Lake City, Utah 84111 this 9th day of June, 1978.

Secretary