2008

State of Utah v. Greg C. Johnson and Kerry E. Lynn: Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. GREG C. JOHNSON, and KERRY E. LYNN, Defendant/Appellants.	: : : : : :	**REPLY BRIEF** Appellate No: 20080701-CA Trial Court No: 01160026 and 01160027

REPLY BRIEF OF APPELLANTS

APPEAL FROM ORDERS
FROM THE SIXTH DISTRICT COURT
HONORABLE WALLACE A. LEE

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ARGUMENT I

THIS COURT HAS SUBJECT MATTER JURISDICTION PURSUANT TO UTAH CODE ANN. §23-19-9.1 BECAUSE THE DIVISION OF WILDLIFE SERVICES IS REQUIRED TO COMPLY WITH ALL COURT ORDERS IRREGARDLESS OF ADMINISTRATIVE PROCEEDINGS.

The State argues that Greg C. Johnson ("Johnson") and Kerry E. Lynn ("Lynn") did not exhaust their available administrative remedies and as such this Court is without subject matter jurisdiction to hear this appeal. However, the State's argument is incorrect.

First, both Johnson and Lynn have in place a Order Granting 402 Motion ("January 25, 2005 Orders") entered by the Sixth District Court on or about January 25, 2005 which specifically states that their "hunting privileges are suspended until April 22, 2007 which is five years from the date of conviction. [R. at 49-50, 275-276 and Pleading Copies at Addendum 3 and 4 of Appellant's Brief]. On July 17, 2008, Judge Wallace Lee issued a Memorandum Decision and Order in both the Johnson and Lynn cases and held that "25 January 2005 Order of this Court did not direct the Division to do anything. Thus Section 23-19-9.1 does not apply." [R. at 126-129, 267-270 and Pleading Copies at Addendum 5 and 6 of Appellant's Brief].

Utah Code Ann. §23-19-9.1 mandates that the Division "withhold, suspend,

restrict, or reinstate the use of license if ordered by a court. [See Statute Copy at Addendum 1 of Appellant's Brief]. The plain language of Utah Code Ann. §23-19-9.1 requires the Division to comply with all Court orders. There simply is no requirement that administrative remedies be exhausted prior to entry of any court ordered suspension or reinstatement of hunting privileges.

In contrast, if this appeal was based upon the Division wrongfully suspending Johnson and Lynn's hunting privileges, then Johnson and Lynn would be required to "exhaust applicable administrative remedies as a prerequisite to seeking judicial review." State Tax Comm'n v. Iverson, 782 P.2d 519, 524 (Utah 1989). However, since Johnson and Lynn are arguing that the plain language of Utah Code Ann. §23-19-9.1 requires that the Division reinstate their hunting privileges, the requirement that they pursue administrative remedies is not applicable since Utah Code Ann. §23-19.-9.1 requires that the Division comply with **all** court orders if so ordered by a court irregardless of administrative hearings.

Furthermore, even if this Court believes that Johnson and Lynn should have exhausted all administrative remedies before seeking judicial review, there are exceptions to this general requirement. As outlined in the State's Brief, in

unusual situations "where it appears that exhaustion would service no useful purpose" then the "law does not require litigants to do a futile or vain act" of exhausting all administrative remedies. [State's Brief at p. 7, citing Holladay Towne Ctr. v. Holladay, 192 P.3d 302, 304 (Utah 2008)(citations omitted)].

In this matter, on April 22, 2002 when Johnson and Lynn plead guilty to Wanton Destruction of a Trophy Deer, they were aware that pursuant to Utah Code Ann. §23-9-9, that the Division would be pursuing an administrative suspension of their hunting privileges. Johnson and Lynn were subsequently given notice that the Division would be suspending their hunting privileges. Even though they were given notice of their right to an administrative hearing, they did not respond to the Division's action to suspend their hunting privileges because of their agreement with the Prosecutor, Marvin Bagley, that upon successful completion of their probation that their hunting privileges would only be suspended for five years from date of conviction rather than the term of the impending longer Division suspensions. [R. at 274 P.5 Ls 20-25, and 274 P.5 Ls 8-13].

Utah Code Ann. §23-19-9 is very specific as to when and for how long hunting privileges will be suspended for listed violations. In this case, the Division

followed the mandatory provisions of Utah Code Ann. §23-19-9 and suspended Johnson and Lynn's hunting privileges pursuant to statute. [R. at 67 ¶9, 91-93, 193 ¶9, 217-219].

Johnson and Lynn could have requested a hearing, but irregardless of what Johnson and Lynn would have presented as evidence or justification to shorter suspension terms, the Division would have still entered the same suspensions because Utah Code Ann. § 23-19-9 mandates when and how suspensions are to be handled. Additionally, even if Johnson and Lynn would have requested an administrative hearing and testified that they had a deal with the Prosecutor that provided that in more than two years in the future, the Sixth District Court would be entering an order trumping any Division suspension, it would have **served no useful purpose** to exhaust their administrative remedies. The Division would have given little or any credibility to their arguments since it would be uncertain as to whether the Sixth District Court would enter such an order, and if an order was entered it would be more than two years in the future. Therefore, almost to a certainty, the Division would have entered the same suspension orders irregardless of all defenses and evidence that could have been presented by Johnson and Lynn about some future event more than two

years in the future. Consequently, it is clear that this matter falls under the exception cited in Holladay Towne Ctr. since it would have served no useful purpose for Johnson and Lynn to exhaust all administrative remedies.

Therefore, as outlined herein, this Court clearly has subject matter jurisdiction and this appeal should not be dismissed because of lack of subject matter jurisdiction.

ARGUMENT II

THE DISTRICT COURT CLEARLY ABUSED ITS DISCRETION WHEN IT HELD THAT THE January 25, 2005 COURT ORDERS DID NOT DIRECT THE DIVISION TO DO ANYTHING AND THAT UTAH CODE ANN. § 23-19-9.1 DID NOT APPLY.

The State argues in its brief that Johnson and Lynn have failed to demonstrate that Judge Lee's decision was a clear abuse of discretion. State's Brief at P.7]. This argument is incorrect. In Appellant's Brief, Johnson and Lynn, cite applicable case law which provides that unless there is a clear abuse of discretion, a court's interpretation of its own order will typically not be reversed. [See Appellant's Brief at P. 16 and Uintah Basin v. Hardy, 179 P.3d 786 (Utah 2008) and Enodis Corp. v. Employers Inc. of Wausau (In. Re Consol. Indus. Corp.), 360 F3d 712 (7th Cir. 2004).

Appellant's Brief clearly details exactly how Judge Lee abused his discretion in holding that the January 25, 2005 Orders created a separate judicial suspension rather than trumping the existing Division suspension orders. In Judge Lee's analysis of the Johnson and Lynn's cases, he incorrectly states that the August, 2002 Division suspensions and the January 25, 2005 Orders were entered at or about the same time." [R. at 126-129, 267-270, and Pleading Copies at Addendum 5 and 6 of Appellant's Brief]. The January 25, 2005 Orders were entered nearly two and one-half years after the Division suspensions. Additionally, as outlined in Appellant's Brief, the facts surrounding the issuance of the January 25, 2005 Orders clearly demonstrates that it was the intent of Johnson, Lynn, Prosecutor and the District Court to "reinstate" hunting privileges as of April 22, 2007. [Appellant's Brief at p. 20-22]. To hold otherwise makes no sense. Why would the District Court enter the January 25, 2005 Orders suspending hunting privileges until April 22, 2007 if it were not the intention that Johnson and Lynn's hunting privileges were to be reinstated on April 22, 2007?

Furthermore, the State argues that there is statutory authority to create both administrative and judicial suspensions and, therefore, it was appropriate for Judge Lee to interpret that the Johnson and Lynn Court Orders were to run

consecutively with the Division Default Orders of longer duration.

It is true that Utah Code Ann. §23-19-9 provides for both judicial and administrative suspensions. However, the State incorrectly argues that because there is nothing in Utah Code Ann. §23-19-9 that prohibits both a judicial and administrative suspension be imposed for the same conviction, that there was no abuse of discretion for Judge Lee to hold the two competing orders were to run consecutively.

However, as argued in Appellant's Brief, the **plain language** of Utah Code Ann. §23-19-9(6)(c) "specifically provides that if the **Division suspends hunting privileges** that have been **previously suspended** by a court, the suspensions **may** run consecutively. [Appellant's Brief at p. 20]. However, in interpreting the plain language of the statute, it only provides for consecutive suspensions, if the court ordered suspension is entered and then a Division order is entered." However, in this matter, there was a Division Order and almost two and one-half years later a Court Order was entered with the clear intent that Johnson and Lynn's hunting privileges were to be reinstated as of April 22, 2007.

As outlined herein, Judge Lee's interpretation of the Court Order's is a "clear abuse of discretion" because he incorrectly cited critical facts which lead to

the wrong conclusion and he ignored the "plain language" of Utah Code Ann §23-19-9(6)(c) which only provides for consecutive suspensions when there is first a judicial suspension and then a division suspension.

CONCLUSION

Based upon the foregoing, this Court has subject matter jurisdiction to hear this appeal and the Court should reverse the Memorandum Decision of the Trial Court and order that the Division of Wildlife Resources immediately reinstate all hunting privileges of Gregg C. Johnson and Kerry E. Lynn.

RESPECTFULLY SUBMITTED this 30th day of July, 2009.

MARY ANN HANSEN