1978

Reagan Outdoor Advertising, Inc. v. Utah Department of Transportation : Brief of Respondent

Utah Supreme Court

Stephen J. Sorenson; Attorney for Plaintiff-Respondent;
Stephen M. Harmsen; Attorney for Defendant-Appellant;

IN THE SUPREME COURT OF THE STATE OF UTAH

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REAGAN OUTDOOR ADVERTISING, INC., a Utah corporation,

Defendant-Appellant,

vs.

UTAH DEPARTMENT OF TRANSPORTATION,

Plaintiff-Respondent.

No. ~~23860~~ 15693

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BRIEF OF RESPONDENT

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APPEAL FROM THE JUDGMENT OF
SECOND JUDICIAL DISTRICT COURT,
DAVIS COUNTY, STATE OF UTAH
HONORABLE J. DUFFY PALMER, JUDGE

---oo0oo---

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TABLE OF CONTENTS

CASES CITED

STATUTES, RULES, AND ADMINISTRATIVE REGULATIONS CITED

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NATURE OF THE CASE

This is an appeal from a determination by the District Court that it lacked jurisdiction to hear an appeal from a decision of the Utah Transportation Commission that two outdoor advertising signs owned by Appellant were illegally erected and would be removed.

DISPOSITION IN THE LOWER COURT

The Second District Court, the Honorable J. Duffy Palmer, Judge, dismissed Appellant's appeal for the reason that the appeal was not timely filed.

RELIEF SOUGHT ON APPEAL

Respondent seeks a ruling of this Court affirming the decision of the District Court.

STATEMENT OF FACTS

A hearing was held before Commissioner Charles Ward of the Utah Transportation Commission in December of 197[illegible] as to the status of two outdoor advertising signs owned by Appellant. On September 16, 1977, the Transportation Commissio[illegible] issued its findings, conclusions, and decision in the matter, finding that the signs were unlawful and ordering that they be removed. Appellant subsequently filed a notice of appeal, dated October 20, 1977, with the Second District Court, also requesting a trial de novo in the matter. Respondent filed a motion to dismiss the appeal for lack of jurisdiction.

Following oral argument and the submission of memoranda of points of law by both parties, the District Court issued its Memorandum Decision and Order on January 24, 1978, dismissing the appeal because it was not timely filed. The present appeal to this Court followed.

ARGUMENT

POINT I

THE DISTRICT COURT CORRECTLY RULED THAT IT LACKED JURISDICTION TO HEAR APPELLANT'S APPEAL IN THIS MATTER, BECAUSE APPELLANT'S NOTICE OF APPEAL WAS FILED MORE THAN 30 DAYS AFTER THE DECISION OF THE STATE TRANSPORTATION COMMISSION IN THE MATTER, CONTRARY TO SECTION 27-12-136.9, UTAH CODE ANNOTATED, 1953, AS AMENDED.

U.C.A. 27-12-136.9, a section of the Utah Outdoor Advertising Act, provides that the owner of an illegal outdoor advertising sign may request an administrative hearing before the Utah Transportation Commission, "to show cause why the sign should not be removed." An appeal may be taken from the Commission's determination, as further provided in U.C.A. 27-12-136.9:

> The decision of the commission may be appealed to the district court in the county in which the sign is located. The court shall sustain the decision of the commission if it is supported by substantial evidence as shown by the records, exhibits and transcripts. If there is no appeal from the commission's decision or if the commission's decision is affirmed, the sign owner, landowner, or occupant of the land shall be liable for all costs incurred by the

commission, including the transcript fees. Appeals shall be taken within 30 days of the commission's decision by filing a notice of appeal and sending a copy of the notice to the commission. (emphasis added).

The statute clearly indicates that the deadline fo filing an appeal from a decision of the Commission falls thirty days from the decision, not thirty days from the receipt of the notice of decision by the appellant. The statutory language is unambiguous, and is therefore not susceptibl to statutory construction or interpretation aimed at making it say what it does not. Appellant has conceded that its notice of appeal was filed more than thirty days after the Commission's decision in the matter (Appellant's Brief, page and that it received notice of the Commission's decision well within the thirty-day period, that is, "nearly 14 days from the date of the decision..." (Appellant's Brief, page 7). Failure to file a notice of appeal in a timely manner is a jurisdictional defect, and the District Court correctly rule that it lacked jurisdiction to hear Appellant's appeal in th matter.

Decisions of this Court have repeatedly approved the principle that deadlines for initiating appellate review are not mere technicalities which may be ignored by the cour and that the failure to meet such deadlines is a jurisdictio defect which will result in dismissal of the attempted appea

For example, in Anderson v. Anderson, 3 Utah 2d 277, 282 P.2d 845 (1955), an appeal from a denial to vacate a contempt order was dismissed, because the notice of appeal was not filed with the district court until one day beyond the one-month limit for notice of appeal which applied in that case. In re Estate of Ratliff, 19 Utah 2d 346, 431 P.2d 571 (1967), this Court declined to entertain an appeal from a denial of a motion for new trial, because the proper filing fee was not paid within the one-month deadline, and therefore the appeal was not timely filed. Similarly, in Watson v. Anderson, 29 Utah 2d 36, 504 P.2d 1003 (1973), the Court refused to hear an appeal from a denial of motion for new trial where the appeal was not timely filed. In unlawful detainer actions, the Court has also refused to hear appeals filed after the ten-day period set by statute for such filings, e.g., Coombs v. Johnson, 26 Utah 2d 8, 484 P.2d 155 (1971); Vickery v. Kaiser, 556 P.2d 502 (Utah, 1976).

Courts in numerous other jurisdictions have recognized the principle that failure to comply with the time limit for filing an appeal is a fatal jurisdictional flaw, and have ruled that this principle applies with equal force to appeals from determinations of administrative bodies. For example, in Hollywood Circle, Inc. v. Department of Alcoholic Beverage Control, 153 Cal App. 2d 523, 314 P.2d 1007 (1957), cert. den. 356 U.S. 902, 78 S.Ct. 562 (1958), the Court ruled

that a state appeals board had no jurisdiction to review an administrative decision where the appeal was mailed one day beyond the statutory forty-day period allowed for taking such an appeal. The Court stated:

> The general policy of our law is not unfavorable to judicial review of administrative proceedings. But it is the policy of our law that time limits for filing notices of appeal in all legal proceedings must be complied with literally and exactly. This is generally held to be a jurisdictional prerequisite. (Citations omitted).
>
> This court can see no reason why appeals in administrative tribunals should be governed by any other rule.
> Id. at 1009.*

In Butler v. Insurance Department, 6 Ore.App. 241, 487 P. 2d 103 (1971), the court similarly denied the petitioner's right to judicial review of an administrative determination, for failure to file a petition for review within the statutory sixty-day period. In Varnes v. Lentz, 30 Ill.App. 3d 806, 332 N.E. 2d 639, 642-3 (1975), the Court stated that the 35-da

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* Another holding of the Hollywood Circle case, that a sectio of the California Code of Civil Procedure dealing with service by mail did not apply to administrative proceedings, was subsequently overturned in Pesce v. Department of Alcoh Beverage Control 51 Cal. 2d 310, 333 P.2d 15, 17 (1958). H ever, neither the Pesce case, nor any other case of which Respondent is aware, questioned the policy and language of the Hollywood Circle case cited above.

limit for notice of appeal from an administrative determination provided for in the Illinois Administrative Review Act was jurisdictional, that parties could not stipulate otherwise, and that the appellant's complaint, filed beyond that time limit, could not be heard. In Williams v. City of Kirkwood, 537 S.W. 2d 571 (Mo.App., 1976), where the plaintiffs were not allowed judicial review of the administrative granting of a permit because they failed to comply with a thirty-day filing requirement, the court approvingly cited the following language:

> The right of appeal is purely statutory and courts may not enlarge the period in which notice is required. Such timely notice is a prerequisite to jurisdiction. Id. at 574-5, citing Lafayette Federal Savings & Loan Association of Greater St. Louis v. Koontz, 516 S.W. 2d 502, 504 (Mo.App. 1974).

Thus, numerous cases in this and other jurisdictions have recognized that courts may not assume appellate jurisdiction, where jurisdictional requirements set out by statute have not been complied with. Similarly, in the present case, the right to appeal from a determination of the Utah Transportation Commission is statutory and precisely the same result should obtain. Appellant has cited no authority from this jurisdiction or any other in which an appeal from an administrative hearing has been allowed where the appealing party failed to fulfill the jurisdictional requirements of the

statute which created the right of appeal. Nor has Appellant suggested any other valid reason why the clear requirement of U.C.A. 27-12-136.9 that notice be filed within thirty days of the Commission's decision should be disregarded.

Appellant argues that the thirty-day period should begin upon notice, despite the clear statutory directive of U.C.A. 27-12-136.9 that the period begins at the time of the Commission's decision. Appellant concedes that "Appellant's appeal would have been late" if the language of U.C.A. 27-12-136.9 means what it says (Appellant's Brief, page 3), but attempts to circumvent this by applying Rule 73(h) of the Utah Rules of Civil Procedure to this case by means of the Commission's purported adoption by regulation of Rule 81(d). This argument is specious for a number of reasons: (1) Utah Transportation Department Regulation A-88-30-1:14c, cited by Appellant, applies only to the filing of the notice of appeal with the Commission, not with the District Court. The regulation also expressly reaffirms the statutory mandate that notice to the Commission shall be made within thirty days of the decision (2) Rule 81(d) states that provisions of the Utah Rules of Civil Procedure apply in appealing from any order of an administrative agency, "except insofar as the specific statutory procedure in connection with any such appeal...is in conflict or inconsistent with these Rules." (emphasis added). Even

assuming arguendo that the Rules of Civil Procedure would allow thirty days from the day of notice for an appeal to be filed, this would be inconsistent with U.C.A. 27-12-136.9, and therefore would not apply. (3) Further assuming arguendo that the Commission regulation may somehow be construed as allowing notice of appeal to be filed within thirty days after the notice of decision is received, such a regulation would be contrary to statute and would therefore be void. Furthermore, no regulation of the Utah Transportation Commission could have the effect of granting or withholding appellate jurisdiction to a District Court in contravention of statutory prerequisites, nor does this regulation purport to do so.

Appellant indicates in its Brief that, in Respondent's memorandum to the District Court, "it is conceded that where the Rules of Civil Procedure do apply, that Rule 73(h) is that rule..." (Appellant's Brief, page 4). This is not strictly accurate. Respondent's basic argument in its earlier memorandum, as in this Brief, was that U.C.A. 27-12-136.9 sets the time in which an appeal of this kind may be taken, and that no Rule of Civil Procedure supercedes that statutory limit. Respondent merely argued that Rule 73(h) would be more apposite than Rule 73(a) as to the question of Appellant's alleged excusable neglect, "even assuming arguendo that some one of the Rules of Civil Procedure applies in this situation...." (Memorandum in

support of Plaintiff-Respondent's Motion to Dismiss, page 4).

Finally, Appellant in its Brief states that "it is entirely possible" that a so-called restrictive reading of U.C.A. 27-12-136.9 may at some time result in an individual's not being advised of the Commission's decision until his right to appeal had run. That, however, is not the case currently before this Court. Respondent avers and the District Court agreed, that notice of the decision was given to Appellant well within the thirty-day limit, and that Appellant could have filed a timely notice of appeal upon the exercise of reasonable diligence. Respondent respectfully submits that this Court must rule on the basis of the facts before it, not on the basis of the uncertain and totally speculative eventuality posited by Appellant.

In short, Appellant failed to meet the jurisdictional prerequisite of filing a notice of appeal "within thirty days of the Commission's decision," U.C.A. 27-12-136.9, and therefore the District Court was correct in dismissing the Appeal.

POINT II

ASSUMING ARGUENDO THAT APPELLANT'S APPEAL IS NOT BARRED, APPELLANT IS NOT ENTITLED TO A TRIAL DE NOVO IN THE MATTER.

In its Notice of Appeal, Appellant requested that the District Court grant a trail de novo in the matter. In paragraph 2 of its motion to dismiss, Respondent requested

that the District Court issue an order that Appellant was not entitled to a trail de novo, in the event that the appeal was not barred. Counsel for Respondent argued the point at the District Court hearing on the Motion to Dismiss. In its Memorandum Decision granting the Motion to Dismiss, the District Court made "no ruling as to whether or not under a proper case a trial de novo should not be ordered." Nevertheless, in the event that this Court finds that Appellant's appeal is not barred, and in the interest of judicial economy, Respondent respectfully prays this Court to rule that Appellant is not entitled to a trial de novo.

U.C.A. 27-12-136.9 states that the District Court

> shall sustain the decision of the commission if it is supported by substantial evidence as shown by the records, exhibits and transcripts. (emphasis added).

Regarding review of a commission decision on illegal outdoor advertising, that section also states:

> The commission shall forward its records, exhibits and transcripts to the district court having jurisdiction within 30 days after receiving notice of such appeal.

U.C.A. 27-12-136.9 clearly contemplates only appellate review of the records, exhibits, and transcripts of the administrative hearing, and not a trial de novo by the District Court. In light of the statutory language, Respondent submits that such a ruling would be proper for guidance of the District

Court on remand, if this Court finds the appeal to have been improperly barred by the District Court.

CONCLUSION

Appellant has failed to meet the thirty-day jurisdictional requirement of U.C.A. 27-12-136.9, and has suggested no valid reason why the requirment should be ignored in this case, or why, in the event an appeal were granted, Appellant would be entitled to a trial de novo. Respondent therefore prays that the order of the District Court dismissing Appellant's appeal be affirmed, or if it is not affirmed, that this Court issue a ruling that Appellant is not entitled to a trial de novo.

DATED this 24th day of May, 1978.

Stephen J. Sorenson

STEPHEN J. SORENSON
Assistant Attorney General
Attorney for Respondent

CERTIFICATE OF MAILING

This is to certify that two copies of the foregoing Respondent's Brief were mailed, postage prepaid, to Stephen M. Harmsen, Attorney for Appellant, 350 South 400 East, Salt Lake City, Utah 84111 this 24th day of May, 1978.

Joan M. Roberts