1949

State of Utah v. Clive K. Calder : Brief of Respondents

Utah Supreme Court

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7384 7385

In the Supreme Court
of the State of Utah

STATE OF UTAH,
Respondent,

vs.

CLIVE K. CALDER,
Appellant.

Case No. 7384
Case No. 7385

RESPONDENTS' BRIEF

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RESPONDENTS' BRIEF

This is an appeal from an order of the Third Judicial District Court of Salt Lake County committing defendant to jail for contempt in wilfully failing and refusing to furnish bond securing payments ordered by the court in two bastardy proceedings in which he was adjudged father of the child in each case.

FACTS

Respondent will refrain from making an independent presentation of the facts since appellant's brief contains an accurate and detailed summary of the proceedings and evidence considered by the Court below in making its order of commitment.

The several assignments of error will be covered in the order presented by appellant.

ASSERTION NO. 1

THE COURT DID NOT ERR IN MAKING FINDING OF FACT NUMBER FOUR.

Appellant argues that the court erred in making Finding of Fact number four to the effect that defendant has a Willys Automobile Agency in his name and that he is closely associated with his brother in the operation of that and other automobile agencies because, as he contends, it does not reflect the evidence but imports a proprietorship in the business whereas in fact the defendant is a mere employee. Respondent respectfully submits that the evidence in the record amply supports the finding of the court. By the defendant's own admission (Tr. p. 10), the franchise for a Willys Automobile Agency was in defendant's name even though the agency was actually financed by someone else. It is submitted furthermore that the language of the court that "the defendant and his brother, Harold Calder, are closely associated together" just as readily implies an "employer-employee" relationship in the operation of the various automobile agencies as that of a "proprietorship" unless the appellant insists on being religiously pedantic.

ASSERTION NO. II

THE COURT DID NOT ERR IN MAKING FINDING OF FACT NUMBER FIVE.

ASSERTION NO. III.

THE COURT DID NOT ERR IN MAKING FINDING OF FACT NUMBER SIX.

Appellant claims in support of his Assignments of Error II and III that the Court erred in making its Findings of Fact number five that "defendant is able to obtain a bond" and that "defendant has wilfully failed and refused to obtain a bond" because there is no evidence in the record to support such findings.

The record clearly shows that the defendant earned between $200.00 and $250.00 per month during 1947 and 1948 and $300.00 per month since the first of 1949 (Tr. p. 18); that he owned a substantial equity in a home in Bountiful (Tr. 11-12); that he owned a coca-cola vending machine (Tr. p. 13); and, that he listed a monthly expense for gas and oil of $25.00 when he didn't even own a car. Faced with this evidence, elicited from the defendant himself, indicating that his financial condition was considerably better than that of the average working man, it cannot be contended very seriously that there was no evidence to support the aforesaid findings of the court. On the other hand it would appear that in considering this evidence, the court was even more justified than usual in making its findings because, in this type of case, a person is very apt to minimize his income and puff-up or exaggerate his expenditures.

In his fourth Assignment of Error, appellant argues that the court erred in refusing to make a finding as to the financial status of the defendant as reflected by the evidence showing

his indebtedness and obligation. Apparently the appellant has overlooked Findings of Fact number one wherein the court found that "defendant is an able-bodied person earning and capable of earning the sum of $300 per month" and number five that "defendant is able to obtain a bond." Neither in this nor in any other type of case is the court required to set forth with meticulous detail all the evidence upon which the particular finding is made. Furthermore, with respect to "findings of fact" this court has held in Munsee v. McKellar, 39 Utah 282, 116 Pac. 1024:

> "It undoubtedly is true that, where issues are not expressly found, but are necessarily negatived by other specific findings of fact, or where it is clearly made to appear from the specific findings of fact found that the issues not found would necessarily have been adverse to the appellant, had they been found, a failure to find on such issues is not reversible error, if the findings which are made are sufficient to support the judgment."

It is believed that the two findings referred to, adequately reflect the financial status of the defendant.

The argument of appellant in his fifth Assignment of Error that the Court committed error in making its Conclusion of Law number three that "in wilfully failing and refusing to furnish a bond, the defendant is in contempt of Court and should be incarcerated" because it is based on a Finding of Fact not supported by evidence, is without merit. Reference is made to Respondent's Assertions II and III and the arguments in support thereof to show that the Conclusion of Law is based on Findings of Fact which are more than adequately supported by evidence in the record.

ASSERTION NO. IV

THE COURT DID NOT ERR IN REFUSING TO HEAR EVIDENCE AS TO DEFENDANT'S LACK OF ABILITY TO OBTAIN A BOND IN SUPPORT OF HIS MOTION OF JUNE 27.

There is no question but that the language of Sections 14-2-11 and 14-2-8 U.C.A. 1943 clearly establishes that a person not able to comply with the order of the court either as to the payment of money or as to the furnishing of a bond cannot be found guilty of a contempt. State v. Bartholomew, 85 U. 95, 38 P. (2d) 753. However, the court certainly would not be required to perform a useless act and since it had already made a determination, amply supported by the evidence, that the defendant was able to furnish a bond and that he had wilfully failed and refused to do so, these issues are now res judicata as to this defendant. There was, therefore, no error in refusing to entertain defendant's motion.

ASSERTION NO. V

THE COURT DID NOT ERR IN COMMITTING THE DEFENDANT TO JAIL FOR FAILURE TO POST A BOND SECURING PAYMENTS ORDERED BY THE COURT.

This Honorable Court held in State v. Reese, 43 U. 447, 135 Pac. 270:

> "No doubt so long as the imprisonment is for the purpose of compelling the accused to comply with the demand of the court in case he neglects or refuses to do so, and so long as it is not made to appear that by

> reason of insolvency he cannot pay and is unable to give the security required of him, the imprisonment cannot be held to be unreasonable and hence not illegal."

It is respectfully submitted that the evidence in this case shows conclusively that the defendant was a person whose means were well above the average and that it was within his ability to comply with the order of the court. In Brown v. Echtenhamp, 130 Neb. 297, 264 N. W. 757, the defendant had no property whatsoever, his father had purchased the suit he was wearing, and, he earned only $20 per month. Even under those meager circumstances the court ordered him to pay $200 at once and $25 every three months as well as to furnish a bond to secure the payments. The court held that even that evidence did not convince the court that it was impossible for him to either furnish a bond or to comply with the judgment of the court. In the course of its opinion, the court said:

> "In all of these cases this question of the ability of the defendant to comply with the judgment is committed to the sound discretion of the trial court, who, in the case at bar, had the advantage of this court in that he had all of the witnesses before him, especially the defendant. This court cannot presume that the trial court was convinced of the utter inability of the defendant to meet the judgment, or any part thereof, and refused to grant him some relief; but, on the other hand, it appears that the trial court made a very generous modification of the original judgment, and required but the sum of $200 to be paid at once and the balance to be paid in small payments of $25 every three months."

* * *

"The evidence indicates that the defendant has usually worked for his father, and that when working for his father he has earned $20 a month. The evidence of the defendant does not convince this court that it is impossible for him to either furnish a bond or to comply with the judgment of the court, but rather indicates the contrary, and the action of the trial court in this matter is hereby

Affirmed."

It is respectfully submitted that the court exercised its sound discretion in holding that the defendant could furnish a bond and had wilfully failed and refused to do so and therefore that its order of commitment should be upheld.

CONCLUSION

A review of the record reveals that the court did not commit prejudicial error and that there was sufficient competent evidence in the record upon which the court made its Findings of Fact and Conclusions of Law and that the judgment and order of commitment should therefore be affirmed by this Honorable Court.

Respectfully submitted,

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