

1997

Utah v. Culley : Brief of Appellant

Utah Court of Appeals

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D. Gilbert Athay; Michael R. Sikora; Attorneys for Appellant.

Murray City Prosecutor; Attorney for Appellee.

Recommended Citation

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 970672-CA

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	BRIEF OF APPELLANT
Plaintiff/Appellee,	:	
v.	:	
RODERICK CULLEY,	:	Case No. 970672-CA
Defendant/Appellant.	:	Priority No. 2

Appeal from the Judgment and Conviction for
Violation of a Protective Order, a
Class A Misdemeanor, in the Third Judicial
District Court, Murray Division, State of Utah,
the Honorable Joseph Fratto, Presiding.

D. GILBERT ATHAY (0143)
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Murray City Prosecutor
5025 South State
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FILED
Utah Court of Appeals
JUN - 8 1986
Julia D'Alesandro
Clerk of the Court

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	BRIEF OF APPELLANT
Plaintiff/Appellee,	:	
v.	:	
RODERICK CULLEY,	:	Case No. 970672-CA
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STATEMENT OF JURISDICTION

This is an appeal from a judgment and conviction for Violation of a Protective Order, a Class A Misdemeanor, in violation of Utah Code Ann. § 76-5-108 (1997). This Court invokes jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(e).

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

Whether the trial court erred in convicting Culley of violation of a protective order when there was no evidence that Culley was properly served with the order. When examining the sufficiency of the evidence in a criminal bench trial, the reviewing court applies a "clearly erroneous" standard: if the trial court's verdict in a criminal case is "against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made, the [verdict] will be set aside." State v. Walker, 743 P.2d 191, 193 (Utah 1987); City of Orem v. Lee, 846 P.2d 450 (Utah Ct. App. 1993); Utah R. Civ. P. 52(a). Whether a person has been "properly served" is a question of law to be reviewed for correctness. In Re Schwenke, 865 P.2d 1350, 1354 (Utah 1993); Reed v. Reed, 806 P.2d 1182, 1184 n.3 (Utah 1991).

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Utah Code Ann. § 76-5-108. Protective orders restraining abuse of another--violation.

(1) Any person who is the respondent or defendant subject to a protective order or ex parte protective order issued under Title 30, Chapter 6, Cohabitant Abuse Act, or Title 78, Chapter 3a,

Juvenile Courts, Title 77, Chapter 36, Cohabitant Abuse Procedures Act, or a foreign protective order as described in Section 30-6-12, who intentionally violates that order after having been properly served, is guilty of a class A misdemeanor, except as a greater penalty may be provided in Title 77, Chapter 36, Cohabitant Abuse Procedures Act.

(2) Violation of an order as described in Subsection (1) is a domestic violence offense under Section 77-36-1 and subject to increased penalties in accordance with Section 77-36-1.1.

Utah Code Ann. § 30-6-4.2. Protective orders--Ex parte protective orders--Modification of orders--Service of process--Duties of the court

* * * *

(5)(a) Each protective order shall include two separate portions, one for provisions, the violation of which are criminal offenses, and one for provisions, the violation of which are civil violations, as follows:

(i) criminal offenses are those under Subsections 30-6-4.2(2)(a) through (e), and under Subsection 30-6-4.2(3)(a) as it refers to Subsections 30-6-4.2(2)(a) through (e); and

(ii) civil offenses are those under Subsections 30-6-4.2(2)(f) through (h), and Subsection 30-6-4.2(3)(a) as it refers to Subsections 30-6-4.2(2)(f) through (h).

(b) The criminal provision portion shall include a statement that violation of any criminal provision is a class A misdemeanor.

(c) The civil provision portion shall include a notice that violation of or failure to comply with a civil provision is subject to contempt proceedings.

(6) The protective order shall include:

(a) a designation of a specific date, determined by the court, when the civil portion of the protective order either expires or is scheduled for review by the court, which date may not exceed 150 days after the date the order is issued, unless the court indicates on the record the reason for setting a date beyond 150 days;

(b) information the petitioner is able to provide to facilitate identification of the respondent, such as social security number, driver license number, date of birth, address, telephone number, and physical description; and

(c) a statement advising the petitioner that:

(i) after three years from the date of issuance of the

protective order, a hearing may be held to dismiss the criminal portion of the protective order;

(ii) the petitioner should, within the 30 days prior to the end of the three-year period, advise the court of the petitioner's current address for notice of any hearing; and

(iii) the address provided by the petitioner will not be made available to the respondent.

* * * *

(8)(a) The county sheriff that receives the order from the court, pursuant to Subsection (5)(a), shall provide expedited service for orders for protection issued in accordance with this chapter, and shall transmit verification of service of process, when the order has been served, to the statewide domestic violence network described in Section 30-6-8.

* * * *

(12) Insofar as the provisions of this chapter are more specific than the Utah Rules of Civil Procedure, regarding protective orders, the provisions of this chapter govern.

Utah Rule of Civil Procedure 4. Process.

* * * *

(h) Manner of Proof. In a case commenced under Rule 3(a)(1), the party serving the process shall file proof of service with the court promptly, and in any event within the time during which the person served must respond to the **process**, and proof of **service** must be made within ten days after such service. Failure to file proof of service does not affect the validity of the service. In all cases commenced under Rule 3(a)(1) or Rule 3(a)(2), the proof of service shall be made as follows:

(1) If served by a sheriff, constable, United States Marshal, or the deputy of any of them, by certificate with a statement as to the date, place, and manner of service;

* * * *

STATEMENT OF THE CASE

By amended information, Murray City charged Roderick Culley of violating a protective order "on the 10th day of October [1996] through the 17th day of January 1997 . . . " (R. at 16) A bench

trial was held on September 5, 1997, and the trial judge convicted Culley of the offense. (Transcript at 2, 29) [Hereinafter "Trans."]

To be guilty of the crime of violation of a protective order it is necessary that the prosecution prove beyond a reasonable doubt that the accused was "properly served" with the order before he violated the order. No evidence of proper service was adduced at trial, so the prosecution failed to meet its burden of proof. Culley should have been acquitted.

STATEMENT OF THE FACTS

At trial, Culley's ex-wife Lisa Stout testified for the prosecution. Stout testified that she and Culley had been separated for about four years and that they shared two children. She stated that in September of 1996, she applied for a protective order against Culley. She and Culley appeared at a hearing on her application and the application was granted. A copy of a certified copy of the protective order was admitted into evidence. (Trans. at 4-7)

There was no evidence that Culley was properly served with the actual order. In closing argument, the prosecutor merely observed that Culley was present when the order was granted and that there were "some boxes checked on the on the [sic] protective order that suggests he was there along with [counsel] when it was granted." The trial judge found that a lawful protective order was in place on the January 16, 1997, but he did not specifically find that

Culley had been properly served with the order. (Trans. at 26, 28)

The protective order prohibited Culley "from directly or indirectly contacting, harassing, telephoning or otherwise communicating with the petitioner except for visitation." (Trans. at 8)

Stout testified that she had had contact with Culley after the issuance of the protective order. On direct examination, Stout related that between October 10, 1996, and January 17, 1997, she received at least three phone calls each week from Culley. Stout testified that the phone calls sometimes dealt with matters other than visitation. On cross-examination, she stated that she received phone calls from Culley on the 16th of January, but she did not say what was discussed during those calls. Stout testified that she received about six phone calls from Culley between ten o'clock at night and two o'clock in the morning. (Trans. at 9-12)

However, counsel questioned Stout regarding records of phone calls on her caller I.D. Specifically, and contrary to her testimony on direct examination, she conceded that the caller I.D. had shown only three calls on the 16th of January (12:01 a.m., 12:32 a.m., and 8:25 a.m.). Stout also admitted that during this period of time Culley had advised her that their daughter was ill and complaining of headaches. (Trans. at 12, 18, 21)

Culley testified in his own behalf regarding the telephone calls on January 16, 1997. He stated that his daughter Libby had been complaining of terrible headaches and had been vomiting, and he had called Stout to get her opinion about what he should do.

Culley testified that he thought he could contact Stout to discuss the childrens' medical problems, that he believed that such contact was not a violation of the protective order, and that he did not intend to violate the protective order. (Trans. at 20-22)

Finally, Culley provided un rebutted testimony that his daughter was the one who asked him to contact Stout. (Trans. at 25)

The trial judge convicted Culley, and concluded that contact to discuss a medical problem suffered by one of the children was not a defense to the crime. (Trans. at 29)

SUMMARY OF THE ARGUMENT

There was no evidence that Culley was "properly served" with the protective order before he made contact with Lisa Stout. Service of process of a protective order is described in Utah Code Ann. § 30-6-4.2(8)(a), which requires the county sheriff to serve the respondent named in a protective order. Rule 4(h)(1) of the Utah Rules of Criminal Procedure requires the sheriff to file a certificate of service with the court. Because the prosecution presented no evidence that service was properly accomplished, or done at all, Culley's conviction cannot stand.

ARGUMENT

The trial court erred in convicting Culley of violation of a protective order because there was no evidence that Culley was properly served with the order.

Violation of a protective order consists of the following

elements, each of which must be proven beyond a reasonable doubt: (1) a person is a respondent in a protective order, (2) the order was issued pursuant to Utah law, (3) the order was properly served on the respondent, and (4) the respondent intentionally violated the order after it was served. Utah Code Ann. § 76-5-108. Culley's argument involves the third element--proper service. The issue is whether service of process (on the order itself and not just the petition) was **properly** made in compliance with Utah law. There was no evidence at trial that process was properly made, and so the prosecution did not meet its burden at to the proper service element of the offense.¹ Accordingly, there was insufficient evidence to convict Culley.

The protective order in this case stemmed from a domestic civil proceeding. Hence, proper service of the order is set forth in Utah Code Ann. § 30-6-4.2(8)(a) of the Cohabitant Abuse Act, which requires the county sheriff to serve process of all orders issued under the statute. Rule 4(h)(1) of the Utah Rules of Civil Procedure mandates that if process is served by the sheriff's office, the sheriff must file a certificate with the court containing the date, place, and manner of service.²

¹ Under the plain language of section 76-5-108, it is clear that proof of proper service is an element of the offense, and not simply a jurisdictional matter as it would be in a civil lawsuit. Therefore, proof of proper service is part of the prosecution's burden at trial rather than a jurisdictional issue to be raised by a defendant in advance of trial.

² "Service of process" is the term used in section 30-6-4.2(8)(a). Service of process is distinguished from service of other pleadings and papers, which is controlled by Rule 5, Utah Rules of Criminal Procedure.

At trial there was evidence presented, through Lisa Stout, that a hearing was held on Stout's petition for a protective order and that Culley was present at the hearing accompanied by counsel. There was no evidence presented as to how Culley learned about the hearing. There was no evidence that the hearing was preceded by an ex parte protective order or that such order, *if* issued, was properly served on Culley by the sheriff's office. See Reed, 806 P.2d at 1185 (uncontroverted evidence that sheriff left summons at home of defendant's parents and made required return of service). In closing argument the prosecutor stated that Culley was present when the order was granted and that there were "some boxes checked on the on the [sic] protective order that suggests he was there along with [counsel] when it was granted." The trial judge found that a lawful protective order was in place on January 16, 1997, but he did not specifically find that Culley had been properly served with the order. (Trans. at 26, 28) Indeed, the judge could not find that Culley had been properly served since there was no evidence he had been served. One may infer that because Culley was at the hearing he had been served with the application filed by Lisa Stout, but the order itself could not have been signed until the hearing took place. Under section 76-5-108 it is the signed **order**, not the petition, that binds the conduct of a respondent or defendant, and for purposes of attributing criminal liability under the statute the order could only become binding when "properly served" on Culley.

This issue does not reflect a mere technicality, but instead

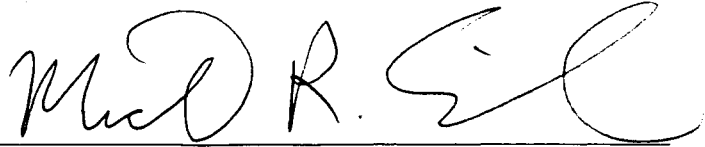
encompasses fundamental fairness concerns under the notice requirement of the Due Process Clause. If Culley was never properly served with the order, there can be no assurance that he received and read the contents of the order. In determining what he was permitted to do under the order, he may have been relying on his memory of what happened at the hearing or what his lawyer told him. The legislature could have chosen to include more flexible language in the statute regarding the manner in which a respondent was to be put on notice that he was subject to criminal sanction for violating a protective order. But the language used in the statutory scheme is clear and absolute: the manner of proper service is dictated by section 30-6-4.2(8)(a), and U.R.C.P. 4(h)(1) requires the filing of a certificate with the court by the sheriff proving process was served. The record in this case is void of any evidence that this occurred.

Culley's argument does not suggest that failure to comply with the terms of the order would have to go unpunished. On the contrary, the judicial officer who signed the order still had the jurisdiction to issue Culley with a contempt citation and punish him accordingly. See Utah Code Ann. §§ 78-7-17, 78-32-1(5), 78-32-10. In addition, there is nothing to prevent proper service of the order now. Simply put, at trial the court received no evidence that Culley had been served with the protective order in compliance with section 30-6-4.2(8)(a). Accordingly, until properly served, he cannot be held *criminally* liable for violating the order.

CONCLUSION

Based upon the foregoing facts and argument, Culley requests this Court to reverse the judgment of conviction.

DATED this 8 day of June, 1998.

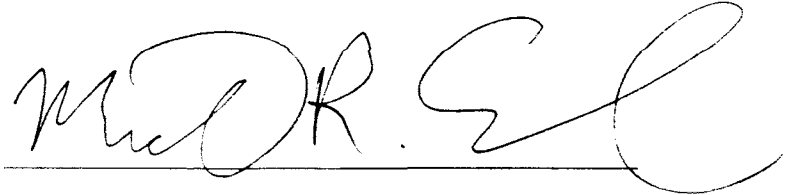
A handwritten signature in black ink, appearing to read "Michael R. Sikora". The signature is fluid and cursive, with the first name "Michael" written in a large, looping script, followed by "R." and "Sikora" in a similar style.

D. GILBERT ATHAY
MICHAEL R. SIKORA
Lawyers for Appellant

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing **Brief of Appellant** was mailed or hand-delivered on the 5 day of June, 1998, to:

Murray City Prosecutor
5025 South State
Murray, UT 84107

A handwritten signature in cursive script, appearing to read "Michael R. Seale", is written over a horizontal line.

ADDENDUM

1. Notice of Appeal
2. Judgment and Sentence
3. Amended Information

D. GILBERT ATHAY (0143)
MICHAEL R. SIKORA (6986)
43 East 400 South
Salt Lake City, Utah 84111
Telephone: (801) 363-7074
Lawyer for Defendant

THIRD DISTRICT COURT - MURRAY DIVISION
SALT LAKE COUNTY, STATE OF UTAH

MURRAY CITY,

Plaintiff,

v.

RODERICK CULLEY,

Defendant.

: NOTICE OF APPEAL

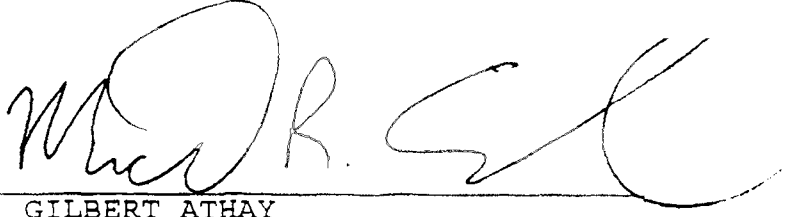
:

: Case No. 971000369

: Judge Joseph Fratto

Please take notice that defendant Roderick Culley, by and through his lawyers D. Gilbert Athay and Michael R. Sikora, appeals the judgment and conviction in the above captioned matter. Judgment and conviction were entered on October 14, 1997.

DATED: November 14, 1997.

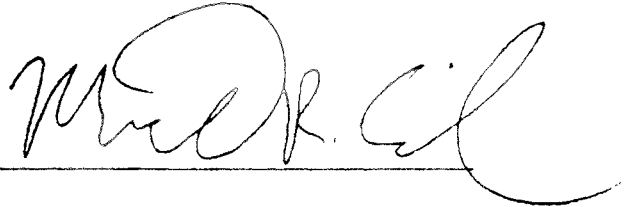

D. GILBERT ATHAY
MICHAEL R. SIKORA
Lawyers for Defendant

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing
Notice of Appeal was mailed, postage prepaid, on the 14 day of
November, 1997, to:

Murray City Prosecutor
5025 South State Street
Murray, Utah 84107

Randall Gaither
321 South 600 East
Salt Lake City, UT 84102

A handwritten signature in cursive script, appearing to read "Randall Gaither", written over a horizontal line.

275 DWS
SLC UT 84111

District Court, State of Utah
SALT LAKE COUNTY, MURRAY DEPARTMENT
5022 South State Street
Murray, Utah 84107

State of Utah - Murray City

Plaintiff

Roderick

vs

Defendant

4265 So. 900 E. SLC UT 84124

Defendant's address

Tape

Counter No

CRIMINAL JUDGMENT AND SENTENCE

Case No. 971002369

APPEARANCES/PLEA

The above entitled case came on for arraignment/pre-trial/trial/preliminary hearing before the Honorable Judge of the above entitled court on the 5th day of Sept 97 Plaintiff was represented by J.L. Crichtfield

☐ District Attorney

☒ Murray City Attorney

☒ The defendant appeared in person and was/was not represented by Randall Graham as counsel.

☐ The defendant failed to appear, and the Court finding that the defendant had received proper notice of the trial date and had voluntarily absented himself therefrom, the trial is ordered to proceed in absentia.

☐ The defendant entered his plea of guilty to the following charge(s):

Count I _____ Count II _____

Count III _____ Count IV _____

JUDGMENT

After hearing the evidence in the matter and taking into consideration the arguments of the parties, the Court finds the following:

☒ Guilty () Not Guilty () Dismissed Viol. Protective Order () Amended to _____ ()
() Guilty () Not Guilty () Dismissed () Amended to _____ ()
() Guilty () Not Guilty () Dismissed () Amended to _____ ()
() Guilty () Not Guilty () Dismissed () Amended to _____ ()
() Guilty () Not Guilty () Dismissed () Amended to _____ ()
() Guilty () Not Guilty () Dismissed () Amended to _____ ()
() Guilty () Not Guilty () Dismissed () Amended to _____ ()

SENTENCE

On the 16 day of October, 1997 the Court sentenced the defendant as follows:

- (1) Imprisoned in the City jail/prison for a period of 365 days/months/years, and
- (2) Ordered to pay a fine in the amount of \$ 1500.00
- (3) The Court suspended \$ 1500.00 of the fine and 365 days/months/years of the jail sentence.
- (4) Home confinement for _____ days/months in lieu of jail monitored by _____
- (5) Work in a community service program for a period of _____ days/hours in lieu of jail/fine at charity of choice/ _____ to be completed by _____
- (6) Ordered to pay Legal Defender fee in the amount of \$ _____
- (7) Submit to outpatient/inpatient treatment at _____ for a period of _____ days/months. Aftercare as deemed necessary by the treating facility.
- (8) Plea held in abeyance for a period of _____ days/months. Count(s) _____ may be dismissed/reduced to _____ if no further violations.
- (9) Count(s) _____ to be dismissed/reduced upon completion of Traffic School/Defensive Driving Course and payment of \$ _____ cost by _____
- (10) Debt to pay restitution in the amount of \$ _____ All restitution is to be paid to the Court/ _____ who will reimburse the victim(s).
- (11) Court ordered term of probation for a period of 24 months days/months defendant to be supervised by AP+P under the following conditions:
 - ☒ No further violations of the law. Weekly AA meetings for _____ weeks
 - ☒ Antabuse _____ times per week monitored by NO Other Calls to write or protect
 - ☒ Other ~~NO alcohol or drugs~~ Do not frequent places with alcohol
 - ☒ Complete Drug Court Program
 - ☒ Do not violate Protective Order - Protective Order conditions apply to this case
- (12) Defendant is granted a stay to _____ at the hour of _____ on said date and time to commence serving this jail/prison sentence. Defendant to report to _____
- (13) To be paid at \$ _____ per month beginning _____

DATED this 16 day of October, 1997

Defendant received a copy of the above judgment and sentence on the date the judge signed the same

FILED

17 APR 29 PM 4 08

THIRD DISTRICT COURT
MURRAY DEPT.

RANDY B. HART (#1399)
Attorney for Plaintiff
5025 South State Street
Post Office Box 57520
Murray, Utah 84157-0520
Telephone: (801) 264-2642

IN THE THIRD DISTRICT COURT, STATE OF UTAH
SALT LAKE COUNTY, MURRAY DEPARTMENT

THE STATE OF UTAH,

Plaintiff,

vs.

RODERICK J. CULLEY
4265 S. 900 E.
Salt Lake City, Utah 84124
DOB: 10/19/51

Defendant.

) FILED BY: RANDY B. HART
) MURRAY CITY
)

) **AMENDED**
) **INFORMATION**
) OTN:
) Release Type: None
)

) Criminal No:

) DL: #Ut. 2637324

971-369

PTS 5-21-97

The undersigned complainant, Cindy L. Tooms, under oath, states on information and belief that the defendant committed, in Murray City, State of Utah, the crime(s) of:

COUNT I

VIOLATION OF PROTECTIVE ORDER, to wit: That on the 10th day of October through the 17th day of January 1997, the defendant, being a person who has been restrained from abusing or contacting another or to remain away from the premises of the other's residence, employment, or other place as ordered by the court under a protective order or exparte protective order issued, did violate that order, at or near 309 E. 4500 S., #7,

Murray, Utah, in violation of Section 76-5-108, Utah Code Annotated, a Class A Misdemeanor.

This information is based upon the evidence obtained from the following witnesses:

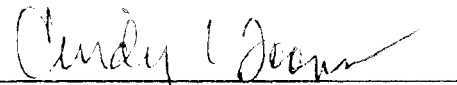
OFFICER: L. Gibbs, MCPD

DETECTIVE: J. Peterson, MCPD

AGENCY CASE NUMBER: 97-747

PROBABLE CAUSE STATEMENT:

Your affiant, Murray City Attorney, based upon information provided by Detective J. Peterson, Murray City Police Department, hereby states that on or about the 10th day of October 1996 through and including the 17th day of January 1997, at or near 309 E. 4500 S., #7, Murray City, Utah, the defendant, Roderick J. Culley, did place telephone calls to the victim's, Lisa Stouts, residence on occasions from October 10, 1996 between the hours of 11:45 p.m. to January 17, 1997 8:25 a.m. The phone calls were on the victim's caller I.D. Box. A protective order was signed by Judge Casey in the Third District Court on 9/26/96 prohibiting defendant from contacting, harassing and telephoning the victim except for arranging for visitation of the children.



Cindy L. Tooms (Affiant)
Murray City Prosecutor