

2008

American Fork City v. Karl G. Peterson : Brief of Appellant

Utah Court of Appeals

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Karl Peterson; pro se.

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IN THE UTAH COURT OF APPEALS

----ooO00----

American Fork City,)	
)	
Plaintiff and Appellee,)	Appellant's Brief
)	
v.)	Appellate Case No. 20081052-CA
)	
Karl G. Peterson,)	District Court No. 081100531
)	
Defendant and Appellant.)	
)	
)	

This is an appeal from a final judgment and order of the Fourth Judicial District, American Fork Department, Judge Maetani presiding.

Now comes the Appellant and submits this Appellant's Brief as follows:

Karl Peterson
70 West 400 North
American Fork, Utah 84003

Request that an Opinion be published.

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Statement showing Jurisdiction:

Jurisdiction of this appeal is conferred on this Court pursuant to section §78-2a-3(2)(e) of the Utah Code.

Statement of the Issues

Appellant asserts the following issues on appeal:

Issue 1:

- a. The American Fork City Municipal ordinances at Chapter 8.08 *Nuisance Abatement and Beautification Ordinance* is unenforceable. It does not comply with the requirements of Utah Code Annotated §10-9a-515 (1) which trumps or preempts it.
- b. Determinative Law: §UCA 10-9a-515 (1)
- c. Standard of Review: de novo. Statutory Interpretation (*Sill v Hart*, 2005 UT 537 ¶¶7), Public Policy Implications (*State v Levin*, 2006 UT 50 ¶¶ 20-24, 29 - 31)

Issue 2:

- a. The Motion to Set Aside the Judgment should have been granted.
- b. Determinative Law: Utah State Constitution, Section 7; Utah Rules of Criminal Procedure, Rule 16, 5b
- c. Standard of Review: de novo. Statutory Interpretation (*Sill v Hart*, 2005 UT 537 ¶¶7), Public Policy Implications (*State v Levin*, 2006 UT 50 ¶¶ 20-24, 29 - 31)

Determinative Constitutional provisions, statutes, ordinances and rules

47 C.F.R. Part 97

101 FCC 2nd 952 (1985) PRB-1

Utah Code Annotated §10-9a-515 Regulation of amateur radio antennas.

Utah State Constitution, Section 7

Utah Rules of Criminal Procedure, Rule 16

Statement of the Case

a. Nature of the Case

¶1 Defendant has stored, in his back yard, empty containers which have value to him and with which he plans to construct an amateur radio tower to support an antenna and perhaps wind generation rotors for the production of electrical power.(Response, lines 46-48) The back yard is completely surrounded by privacy fencing with no gaps greater than 2 inches between fence sections and buildings and less than 2 inches below any gate or fence section. All gates are kept closed and latched. American Fork City brought suit against the defendant citing violation of 08.080 *Nuisance Abatement and Beautification Ordinance*, but chose to shorten the name to 08.080.030 *Beautification Ordinance* before the Trial Court when the real title for the section 08.080.030 which they cite is *Prohibited Conduct--Definition of Nuisance*.

b. Course of proceedings

¶2 American Fork City brought suit against the defendant for violation of Chapter

8.08 *Nuisance Abatement and Beautification Ordinance* and more specifically 8.08.030 *Prohibited conduct --Definition of nuisance*. The Pretrial Hearing was aborted due to defendant filing a Motions for Dismissal. After the defendant had been excused, the prosecutor chased him down and showed defendant photos that could only have been taken by entry into the backyard of the property. A request for copies of those photos was verbally made by the defendant. At a subsequent hearing, the trial judge denied both Motions for Dismissal. Defendant attempted to file an appeal with the trial court after that hearing, but the clerk of the court refused to accept it and told defendant that he would have to wait until after the trial concluded. No further hearings were held prior to trial. Specifically a complete pretrial hearing was not held. No communications were had between the City and the defendant prior to the trial. Specifically no photos, witness lists or other discovery documents were supplied to the defendant. Trial was held in the absence of the defendant. Defendant was made aware that he had been tried in absentia when a letter arrived at his residence notifying him that he needed to appear for Sentencing. This notice arrived the day before the Sentencing Hearing. Prior to the Sentencing Hearing, defendant filed a Motion to Set Aside the Judgment. At the Sentencing hearing, defendant's Motion to Set Aside the Judgment was denied by the judge, then sentence and an order were issued. Defendant filed an appeal following sentencing.

c. disposition at trial court

¶3 Defendant was found guilty of violation of Am. Fork 8.08.030 *Beautification Ordinance*, fined \$1000 suspended and jail of 180 days suspended, order to clean and secure a Certificate of Clean Bill of Health from Environmental Quality within 60 days.

Relevant Facts with citation to the record

¶4 Defendant filed a Motions for Dismissal with a First Motion for Dismissal and a Second Motion for Dismissal. (transcript, page 3, lines 14,15) (Motions for Dismissal, Response to Memorandum in Opposition...)

Trial Judge tells defendant to make arguments for both Motions for Dismissal.

(transcript, page 3, lines 14 - 18)

Defendant made arguments about the enforceability of the ordinance citing trumping State Law. (transcript, page 5, lines 5 - 18)

Prosecutor says "I don't even know where he's coming from with that" (transcript, page 6, lines 12-13)

Trial Judge denies second cause for dismissal. (transcript, page 8 line 1)

Prosecutor interprets the statute for the Judge incorrectly. (transcript, page 6, lines 7-13)

Trial Judge says "Not before this Court" (transcript; page 6, line 16; p8, lines 1 - 3)

Defendant Filed a Motion To Set Aside The Judgment which was denied. (Trial Court case notes 12/17/2008, p51)

Summary of Argument 1

¶5 This issue is being tried de novo, so Appellant will attempt to make all arguments that have been made in pleadings and in oral argument before the Trial Court for the benefit of the Appeals Court.

¶6 The Federal Communications Commission(FCC), issued PRB-1 in 1985. Utah enacted §10-9a-515 in 2005. American Fork City purchased from the West Company, Inc. a body of statutes for a City. This body of ordinances does not comply with §10-9a-515 and is thereby rendered unenforceable by §10-9a-515 which trumps or preempts it. The issue was placed before the court both in pleadings and oral argument. The Trial court erred in interpreting this statute and the case should have been dismissed and never gone to trial.

Detail of Argument 1

¶7 Appellant holds an FCC Extra Class Amateur Radio licensee, the highest license class attainable, with call sign WB7PZA and station location at 70 West 400 North, American Fork, Utah as issued by the FCC. Defendant is also a member of Civil Air Patrol (CAP) and the Radio Amateur Emergency Service (RACES).

¶8 Amateur Radio Operators, commonly referred to as Ham Radio Operators or Hams, play a critical role in disaster communications. With little or no help from any level of government, they equip themselves with stations consisting of transceivers attached to antennas supported by towers or other structures that enable them to have

worldwide communications capabilities both to send and receive messages in good times and in times of disaster when there is no power. Many times the first reports out of a disaster area are from Ham operators in the middle of the disaster who have equipped their stations with emergency power generation systems and are using makeshift antennas if their permanent antennas have been damaged. In the event that the signal from the sending station is weak, a receiving station needs a good antenna system in order to solidly pass messages to and from the disaster area. The higher above ground an antenna is, the better it will perform. Due to the danger of airplanes running into tall towers, the Federal Communications Commission (hereinafter abbreviated as FCC) has regulated Ham radio antennas and towers for many years.

¶9 In recent years, Ham Radio operators who put up antennas and towers, not near airports, have been the target of harassment from governmental entities using zoning ordinances, revocation of permits, exorbitant fees, nuisance, health and beautification ordinances and other tactics. This became such a problem for amateur radio operators in the 1980's that the FCC stepped in at the request of the Amateur Radio Relay League (ARRL), an Amateur Radio national advocacy group. After public comment, the FCC issued what has come to be known as PRB-1. It is formally cited as Amateur Radio Preemption, 101 FCC 2nd 952 (1985), and has been codified at 47 C.F.R. Part 97. The FCC ruled that local governments must grant "reasonable accommodations" to Ham radio operators in the erection of antennas and their associated towers and other structures and

also that the regulations needed to be the minimum practicable regulation to accomplish their legitimate purposes. The reasonableness of the accommodations would be from the viewpoint of view of the Commission and not that of the local government. PRB-1 gives any licensed individual who wishes to put up an antenna or tower recourse if he is hassled in putting it up. This is because the Federal preemption trumps or preempts any state or local law. In like manner, a state law trumps or preempts any local ordinance.

¶10 Utah has Statutes which mandate compliance with PRB-1 at the county and local levels. The State Statute for local governments, which defendant cited to the court, (transcript, page 5, lines 5 - 18) is:

§10-9a-515. Regulation of amateur radio antennas.

(1) A municipality may not enact or enforce an ordinance that does not comply with the ruling of the Federal Communications Commission in "Amateur Radio Preemption, 101 FCC 2nd 952 (1985)" or a regulation related to amateur radio service adopted under 47 C.F.R. Part 97.

(2) If a municipality adopts an ordinance involving the placement, screening, or height of an amateur radio antenna based on health, safety, or aesthetic conditions, the ordinance shall:

- (a) reasonably accommodate amateur radio communications; and
- (b) represent the minimal practicable regulation to accomplish the municipality's

purpose.

¶11 The language of this statute makes it effective for all citizens, not just Hams. It applies even if there is no antenna evident, contemplated or applied for since the verbiage of the statute does not mention antennas. The Trial court erred in ruling that §10-9a-515 does not apply if there is no antenna. (transcript, page 8, lines 8-10) In section (1), this statute requires on its face that a ordinance must comply with PRB1 or it may not be enforced. In section (2) aesthetic conditions are mentioned. The court erred in ruling that Beautification has nothing to do with antennas (transcript, page 7, lines 3 - 5) since aesthetics are in the verbiage of the law.

¶12 The prosecutor misled the Trial Court when he feigned misunderstanding of where the defendant was coming from. Both the prosecutor and the court had defendants Response to Memorandum in Opposition... which lays out the argument. (Response to Memorandum..., lines 35 - 44) By feigning misunderstanding, the prosecutor was successful in getting the Judge to state that the matter was not before the court when it had been a central theme in all the pleadings prior to the hearing.

Further discussion of Argument 1

¶13 §10-9a-515 is an extension of the Federal preemption in PRB-1. The phrase “*an ordinance*” could be interpreted broadly or narrowly. If interpreted broadly, the entire body of the ordinances of a Utah municipality are rendered unenforceable if they do not

comply with the provisions of PRB-1 as of the date that this Statute was enacted. If interpreted narrowly, only ordinances such as those enumerated in section (2) and in PRB-1 would be effected. These would include, but not be limited to, Zoning, Nuisance, Health, Safety and Beautification. Exactly the ordinances that the defendant is accused of violating.

¶14 For purposes of this appeal, Appellant chooses to adopt the narrow interpretation. He does this since he was charged and prosecuted under 8.08 *Nuisance Abatement and Beautification Ordinance*. Antennas and towers have been declared nuisances or eyesores in many localities and so are clearly covered under PRB-1. American City Ordinance 08.080 does not comply with PRB-1 and therefore cannot be enforced. The trial court erred in denying defendant's second Cause for Dismissal in his Motions for Dismissal. (transcript, page 8 line 1)

¶15 Next comes a question of what would it mean to comply or how an ordinance could comply. The word "comply" is not found in Black's Law Dictionary, Eighth Edition. If we look to (2) of §10-9a-515 we can see what compliance might look like. It enumerates two conditions which must be addressed before an ordinance can be enacted and enforced. They are reasonable accommodations and minimal practicable regulation towards Amateur Radio Communications.

¶16 8.08. *Nuisance Abatement and Beautification Ordinance* meets the narrow test as being the type of ordinance that could affect amateur radio communications under the

second paragraph of §10-9a-515 and so it must comply with PRB-1 if it is to be enforced. There is nothing about reasonable accommodations or minimal practicable regulation to be found in the ordinance. In like manner, Appellant asserts that every other other ordinance of American Fork City will be found lacking. Appellant asks the Appeals court to clarify the standards by which §10-9a-515 is to be applied to the ordinances of a municipality, and also to those of a county, so that a clear public policy can be defined.

¶17 The West Company Inc. sold this package of municipal ordinances to cities throughout the State of Utah. There are probably other municipalities that will have their ordinances rendered unenforceable because of §10-9a-515. This constitutes a major public policy issue. If the ordinances of American Fork became unenforceable as of the 2005 enactment date of §10-9a-515, there are going to be a lot of traffic citations that will have to be vacated and refunded. For that reason, Appellant asks that the opinion of the Appeals Court be published so that any city with nonconforming ordinances may be properly notified.

Summary of Argument 2

¶18 Due to the lack of a proper Pretrial Hearing and the failure of the Prosecutor to provide defendant with required discovery documents prior to trial, the defendant's right to due process was denied.

Detail of Argument 2

¶19 The Pretrial Hearing shown on the Trial Court case notes was truncated by the

Judge when the defendant said he had filed Motions for Dismissal. During the Motions for Dismissal Hearing, the Judge did not give the defendant any opportunity to ask for a pretrial hearing and set the matter for a hearing after having told the defendant to sit down and wait a minute. (transcript, page 8, line 6 and 13). This effectively made the conversation between the Judge and Prosecutor a private conversation. Defendant expected to receive witness lists and other requested documentation well before a Trial as required of the Prosecution in the Rules of Criminal Procedure. No disclosures of any kind were made to the defense other than through the Information at arraignment. The complaining officer did not testify, but some other official did. There is also mention of an Elizabeth Batty of whom the defendant has no knowledge, especially knowledge that should have come to him from the prosecution on a List of Possible Witnesses. None of the required discovery materials or information were disclosed to the defendant prior to the trial, even though Rule 16 in section 5b says that all information will be made available before a defendant is required to plead, and that it is then a continuing duty. The Prosecution failed in this continuing duty. This lack of due process caused the defendant to let the matter slip from his mind and miss the hearing. The Court should have granted defendant's Motion to Set Aside the Judgment when this breach of the Rules of Procedure was brought to his attention in the Motion, and should have set the matter for Pretrial Conference or a new trial.

Conclusion

¶20 Appellant has had his privacy invaded under color of law, been denied due process, had motions denied that should have been granted if the law had been applied correctly, been prosecuted and convicted under ordinances that are unenforceable by the letter of trumping State law. The trial court erred by not dismissing the case when presented with that law and hearing arguments relevant to it. The trial court also erred by not granting defendant's Motion to Set Aside The Judgment when it was presented to the court.

Relief Sought

¶21 Appellant asks the Appeals Court to vacate the judgment and order, rule that American Fork City's 8.08.030 *Nuisance Abatement and Beautification Ordinance* ordinance is unenforceable, rule that all other ordinances that could be used to affect his ability to construct a tower from the raw materials in his backyard are unenforceable. He asks the Appeals Court to Dismiss with prejudice the case against him. Appellant asks for an order that American Fork City be barred from charging or prosecuting him under any effected ordinance once it is brought into compliance with PRB-1, but rather grandfather his uses of the property and materials stored on his property under the new ordinances. Appellant asks that the Appeals Court put forth a standard for interpretation for application to §10-9a-515 and §17-27a-514. He also asks the Appeals Court to censure the Prosecuting Attorney for his lack of providing required documents to

defendant prior to trial. Appellant asks for any other relief that the Court of Appeals might see fit to grant him.

Signature,

Filed with the Court of Appeals, 10/9/09

Karl Peterson

Certificate of Service

I certify that a copy of this Appellants Brief document was served upon the following party listed below by the method indicated:

American Fork City and Appellee's Counsel

by placement in the box at the courthouse set aside for the purpose of service

By: _____

Karl Peterson

Dated: _____

Addendum

- a. PRB-1
- b. Utah State Law City §10-9a-515
- c. Utah State Law County §17-27a-514
- d. Sill v Hart
- e. State v Levin
- f. Motions for Dismissal.
- g. Response to Memorandum in Opposition to Defendants Motion to Dismiss.
- h. Motion to Set Aside The Judgment
- i. American Fork Ordinance 8.08