

1952

Ogden City v. Ferrell H. Adams : Brief of Plaintiff

Utah Supreme Court

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Case No. 7779

IN THE SUPREME COURT

of the
FILED
STATE OF UTAH
JAN 11 1952

Clerk, Supreme Court, Utah

OGDEN CITY, a Municipal Corporation,
Plaintiff,

vs.

7779

FERRELL H. ADAMS, State Treasurer of
Utah,

Defendant.

PLAINTIFF'S BRIEF

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In the Supreme Court of the State of Utah

OGDEN CITY, a Municipal Corporation,
Plaintiff,

vs.

FERRELL H. ADAMS, State Treasurer of
Utah,
Defendant.

STATEMENT OF FACTS

1. During the period of March 31, 1951 to August 27, 1951, five criminal actions, each with more than one defendant, for violation of Section 46-0-237, U.C.A., 1943, were prosecuted in Weber County, State of Utah. All the evidence for said prosecutions was obtained by private investigators who were employed by and paid by Ogden City and by officers of Ogden City. At the same time these criminal prosecutions were commenced five civil proceedings to forfeit the personal property used in connection with liquor nuisances were commenced on Relation of Paul Thatcher, City Attorney of Ogden City. All said criminal and civil actions were successfully prosecuted. Substantial sums resulted in fines and forfeitures in the criminal cases.

2. All the fines and forfeitures in the criminal cases have been sent to the defendant herein and he now has the same in his possession and control.

3. The plaintiff pursuant to Section 46-0-219 obtained certificates from the judges who presided at the hearings on each of the criminal cases certifying that officers of Ogden City initiated the prosecution of each case; the evidence was obtained by and at the expense of Ogden City, and officers of Ogden City assisted in the successful prosecution of each of said cases and that all fines, forfeitures or costs paid to the defendant as a result of said prosecutions should be paid to Ogden City. The judges further certified that all fines, forfeitures and costs received by the defendant in said cases be paid to Ogden City.

4. The chairman of the Utah State Liquor Commission in writing approved the payment of all said fines, forfeitures and costs to Ogden City.

5. The judges of the court in which said criminal cases were heard before issuing the certificates mentioned in Paragraph 3 above had copies of the petition of the plaintiff for issuance of said certificates served on the District Attorney of the Second Judicial District and on the Weber County Attorney and a date was set for hearing on said petitions. No objection was made by anyone to the issuance of said certificates.

6. In addition to obtaining all the evidence and initiating all of the cases, two of the attorneys for Ogden City helped the County Attorney prepare the criminal complaints and appeared as attorneys of record in and were personally present at all of the hearings before

the magistrate. All of the defendants in three of the cases waived preliminary hearings. The defendants in two of the cases demanded and had preliminary hearings. At both said preliminary hearings two attorneys of Ogden City actively participated with the County Attorney, they questioned witnesses, looked up the law and did all other things that attorneys prosecuting criminal cases do. All of the defendants were bound over to the District Court.

7. In the District Court, the District Attorney prepared the information in all the cases. Two of the attorneys for Ogden City appeared in each of the cases in the District Court. Plaintiff's officers were present and participated in nearly all the consultations with the defendants and their counsel regarding disposition of the cases. The District Court work in these cases consisted only of arraignments, pleas and consultations. Each defendant plead guilty. There were no trials and no preparation for trials in the District Court. The real work of the cases was in obtaining the evidence, preparing the complaints handling the preliminary hearings and consulting with the defendants regarding disposition of the cases.

8. Demand has been made by plaintiff on the defendant for the remittance to it of all fines and forfeitures he has received from these five cases and the defendant refuses to make said remittance and as a result thereof this action was brought, praying for an extraordinary writ to compel remittance to plaintiff of the fines in question.

STATEMENT OF POINTS

1. Under the express words of Section 46-0-219, U.C.A. 1943, plaintiff is entitled to be paid the fines in defendant's hands.

2. Opinions of the Attorney General are not controlling.

3. There has been no acquiescence by the plaintiff in the administrative interpretation.

POINT 1. UNDER THE EXPRESS WORDS OF SECTION 46-0-219, U.C.A. 1943, PLAINTIFF IS ENTITLED TO BE PAID THE FINES IN DEFENDANT'S HANDS.

Said section reads as follows:

“46-0-219. *Payment Over of Fines and Forfeitures.* All fines and forfeitures levied under this act shall be paid to the state treasurer and credited to the general fund; PROVIDED, HOWEVER, that in all cases where violations of this act are prosecuted to a conviction by the officer of any town, city or county the judge of the court wherein such prosecution took place shall certify to the state treasurer that such prosecution was conducted by the officers of such town, city or county, and the state treasurer, on the written approval of the chairman of the commission, shall pay to said town, city or county all amounts collected as fines, forfeitures or costs as the result of such prosecution.”

The words of statutes should be given their ordinary and usual meaning. If that is done to this section, there is no ambiguity or uncertainty except as to the meaning

of "prosecuted to conviction." In unequivocal terms the legislature has provided that upon proper certificate and consent *all* fines and forfeitures levied under the Liquor Control Act should be returned to the town, city or county in those cases where officers of such town, city of county prosecute the cases.

No distinction is made as to the court in which the prosecution takes place—the plain meaning must be that the legislature meant the statute to apply to all courts of the state, not merely as the defendant contends to city and justice of the peace courts.

The statute says "All fines and forfeitures levied under this act" the plain meaning must be the provisions apply to *all* fines and forfeitures where levied, whether for simple misdemeanors or indictable misdemeanors. The defendant agrees that the statute means what it says and applies to fines from all courts when it provides that "all" fines shall be paid over to him. However, he refuses to agree that it means what it says when it provides that "all" fines growing out of local prosecutions (without restriction as to the court of origin) shall be repaid to the local unit. In the latter case he insists, at least by implication, that "all" means only "part"—that part originating in the lower courts. And nowhere in the opinions of the Attorney General, which are hereafter considered, is any attempt made to justify this inconsistency in the meaning attributed to the same simple word. It would seem that "all" for the goose should mean "all" for the gander.

What was the purpose of Section 46-0-219? It is common knowledge that the enforcement of any liquor control act is a very difficult matter. The legislature

in that act sought to enlist and require the active assistance of all officers in this state be they state, county, city or town officers. Section 46-0-248 makes it the duty of “all *city*, county, precinct and state executive, *prosecuting* and *peace* officers” to enforce the provisions of the act and provides for other attorneys to assist the prosecuting attorney and be counsel in the case. Section 46-0-206 requires any district, county, city or town attorney or peace officer or any other person to come forward with any information they have of violation of the act.

It is apparent that the legislature recognized the difficulties of enforcement. Sections 46-0-248 and 46-0-206 make enforcement a duty of local unit. Section 46-0-219 makes it financially worthwhile. Section 46-0-219 is merely another means the legislature used to encourage the active assistance of all officers in the state to help enforce the act. It provides that in those cases where local *officers* prosecute, the returns if any from those prosecutions will go to the local governmental unit. Thus the expenses of the local governmental unit in prosecuting liquor control act violators will be in part or in whole paid and in some cases may be financially profitable. Thus the enforcement of the act will be a lesser or no burden on the local units and they will naturally be more enthusiastic about expending their money and the time and efforts of their officers in liquor control activities.

The encouragement of local enforcement has become even more important in the overall administration of the Liquor Control Act since the abolition of the Liquor

Commission's enforcement unit. Now, unless local officers are encouraged, enforcement will be routine and perfunctory in most localities, and the purpose of the law will be defeated.

The legislature makes the controlling factors in the matter of remittance of the fines and forfeitures (1) prosecution to a conviction by the officers of a town, city or county; (2) certification of that fact to the state treasurer by the judge of the court wherein such prosecution took place; (3) written approval by chairmen of the Liquor Commission of the remittance to the town, city or county of said fines and forfeitures. There are no other factors or conditions attached by the legislature. The restriction as to court of origin is a contribution from attorney general's opinions with no basis whatever in this or any other statute.

In his answer the defendant admits that conditions 2 and 3 have been compiled with but denies that condition 1 has been met. Did officers of Ogden City prosecute to conviction in the five criminal cases here involved within the meaning of Section 46-0-219?

In the ordinary indictable misdemeanor case a person with knowledge of the facts presents them to the county attorney. The county attorney issues a complaint and handles proceedings before the magistrate to have the defendant bound over to the district court. The district attorney prepares the information and handles the matter in the district court.

In the ordinary simple misdemeanor case under a state statute a person with knowledge of the facts presents them to the county attorney and the county attorney tries the case.

It must be assumed that the legislature was aware of the method for handling these matters when it enacted the Liquor Control Act. Undoubtedly the legislature did not intend to upset this orderly procedure and it intended that offenses under that act should be handled the same way as far as possible. By Sections 46-0-206, 46-0-219, 46-0-248 and other provisions the legislature made it the duty of all officers to assist in enforcement and provided for other attorneys to assist the county and district attorneys.

If the legislature intended that "prosecute to conviction" in Section 46-0-219 meant that the officers of a city or town had to issue the complaint and exclusively and without the aid or cooperation of the County or District Attorney handle the case before the magistrate and in the district court, then as a practical matter and as a legal proposition Section 46-0-219 is a nullity as far as city and towns are concerned. The orderly administration of justice requires that so long as county and district attorneys are competent, honest and actively carrying out the duties of their office that all state complaints be issued by and with the cooperation of the county attorney and all district court criminal matters be under the supervision and control of the district attorney. So if the legislature meant "prosecute to conviction" to mean exclusive initiation, control and trial by town or city officers, as a practical matter, the statute 46-0-219 was a use-

less enactment because city and town officers cannot, will not and should not undertake such proceedings on their own. The legislature must have intended "prosecute to conviction" to mean to do those acts necessary to convict and to do them within the orderly established channels for the administration of justice, that is present the evidence to the County Attorney and have complaints issued; obtain the evidence; assist the County Attorney at the arraignment and preliminary hearing before the magistrate and conduct said hearing if the county attorney desires; to conduct the trial in the district court or assist the district attorney herein. Officers of Ogden City did everything in each of the five cases here involved that could be done without ignoring the orderly channels for the administration of justice and without totally disregarding the county and the district attorneys. If it had not been for action taken by the officers of Ogden City, there would not have been any cases and there would not have been any convictions and no fines or forfeitures would have been realized.

It is to be observed in this connection that the legislature, in providing for repayment of the fines, referred to the "officers" of the local governmental unit. It did not refer to "prosecuting attorneys", although attorneys are specifically mentioned in other sections. It would seem clear from this choice of words that the legislature intended a broad interpretation of the word "prosecuted", because in the narrow sense of that word, a prosecution can be conducted before a court only by an attorney.

It is equally clear, we submit, that where local officers "made" the case, and a conviction resulted, the legislature intended those officers' local units to have the benefit of the fines. Any other interpretation defeats the obvious purpose of the law and renders many of its provisions meaningless. The legislature wanted liquor "control" for the state -- not fines, which were clearly regarded as a means to that end. See Section 46-0-44, U. S. C., 1943.

The legislature provided in 46-0-219 that the judge of the court in which the case was held should certify who or what officers prosecuted the case. In each of the five cases here involved, judges presiding, the county attorney and the district attorney recognized that Ogden City officers were responsible for all said prosecutions. No objection of any kind was made to the issuance of said certificates and the judges who knew the whole circumstances made the certificates.

The plaintiff submit that the actions of its officers in each of the five cases here involved constitute "prosecuted to conviction" as those words are used in Section 46-0-219; that the section applies to all fines and forfeitures levied under the Liquor Control Act, regardless of the court in which levied; and that there is a clear and present statutory duty resting on the treasurer to remit the fines to the plaintiff.

POINT 2. OPINIONS OF THE ATTORNEY GENERAL ARE NOT CONTROLLING.

The answer of the defendant provides the opinions of the then attorney general of Utah and gives the same as the reason for non-payment of the fines here involved to the plaintiff.

The plaintiff agrees that opinions of the attorney general should be given some consideration by this court. They, however, are by no means binding on the court. The weight given an opinion of the attorney general should depend upon the soundness of the reasoning, the authorities relied upon, and the circumstances.

The opinion dated December 21, 1938, a copy of which is part of defendant's answer herein, was given in response to a request by the state auditor, in which request the auditor sets forth the answer he wanted. Said opinion answered the question in the manner desired. To point up the fallacy of that opinion, the last paragraph reads, "In my opinion it does not make any difference who does the prosecuting if the action is one brought under the state law and is in the district court". The legislature, in Section 46-0-219, provided that the test on remitting fines should be who did the prosecuting. The attorney general says who did the prosecuting makes no difference to him, that it is the fact that the prosecution is under the state law and is in the district court that is controlling. This opinion is therefore right in the teeth of the legislative enactment and should have no weight whatsoever.

The opinion of April 4, 1939, which opinion is also part of defendant's answer, makes the test the court in which the prosecution occurred and expressly rules out test supplied by the legislature.

The April 18, 1939, opinion which is part of defendant's answer maintains the test of "which court". The last paragraph of that opinion reads:

"I do not believe it was the intention of the Legislature to allow towns, cities or counties to participate in the fines and forfeitures where the prosecution was had in the district courts of the State, since any appearing in the District Court on behalf of such prosecutions would be appearing on behalf of the district attorney, and the prosecution by the said town, city or county officer would not be that prosecution as is meant by the provision that where violators of the Act are prosecuted to a conviction by the officer of any town, city or county, the State Treasurer shall pay all amounts collected as fines, forfeitures or costs as the result of such prosecution."

Assume that any appearance by an officer of a city, town or county in the district court is "an appearance on behalf of the district attorney" as the opinion says, what has that to do with the question of which unit gets the fines? The purpose of the statute was to encourage local governmental units to assist in enforcing the Liquor Control Act and to give them the fines for successful prosecutions by their officers. When district court appearances are made by city, town or county officers, they remain officers of said local units, they are paid by said local units—not by the state. They are officers of the local unit whether acting in the city court or in the district court. To say they are state officers is not only erroneous in fact, but if it follows that their employer does not

participate in the fines collected, the very purpose of 46-0-219 is defeated and the local units will not be encouraged to enforce those provisions of the Liquor Control Act which must be handled in the district courts. In the cases here concerned, regardless of the authority with which Ogden City officers were clothed to enable them to appear in the district court, they remained in fact officers of Ogden City; were paid by Ogden City and have no claim against the state for salaries. If said officers in prosecuting these cases were clothed with certain authority of district attorneys, i. e. represent the state in indictable misdemeanor cases in district court, what has that to do with the question here involved? They remained officers of Ogden City, accountable to Ogden City, paid by Ogden City, and except for their being officers of Ogden City, they would not have taken any action in any of these cases.

Even if the Attorney General were right in his opinion that "an appearance in the district court was an appearance on behalf of the district attorney", it would not follow that the local unit employing the officer so appearing should not receive the fruits of his efforts. The statute recognizes that the local servant is worthy of his hire, and as a matter of common justice, the unit that employed him to do state work should receive the benefits of that work. If city officers at the request of the legislature perform services for the state, the state should pay the city the promised consideration.

Thus we see that the opinions of the Attorney General are contrary to the purpose and express word-

ing of the statute. None of the opinions cite any authorities or precedents. It follows that said opinions are entitled to no weight whatever by this court.

POINT 3. THERE HAS BEEN NO ACQUIESCENCE BY THE PLAINTIFF IN THE ADMINISTRATIVE INTERPRETATION.

The defendant's interpretation of Section 46-0-219 and his and his predecessor's action in accordance therewith are not controlling in this case. In his memorandum of authorities, the defendant cites part of Section 319, Am. Jur. (50 Am. Jur. 309) on this question. Further down in the same section, the editors say:

“A contemporaneous construction is not, however controlling; it does not preclude an inquiry into the correctness of the construction. It is not of such high authority as a judicial interpretation of an act. It has even been declared that a contemporaneous or practical construction of a statute must be resorted to with caution and reserve. In any event, to apply the doctrine of contemporaneous or practical construction to a statute, the statute so construed must be doubtful, ambiguous, or uncertain, and the ambiguity which arises from the language must be so great as to compel the court to seize upon extraneous circumstances to aid in reaching a conclusion. Where the meaning of a statute is plain, a contemporaneous or practical construction thereof will not be permitted to control, modify, destroy, abrogate, contradict, enlarge, or restrict that meaning.”

This court in two relatively recent cases considered administrative interpretations. In *Olsen Company v. State Tax Commission*, 109 *Utah* 563, 168 *P.* (2d) 324, on Page 332 of the Pacific Report, the court said:

“Where there is an ambiguity in the statute as to whether the latter does or does not cover a particular matter, a practical construction of the statute shown to have been the accepted construction of the agency charged with administering the matters in question under the statute will be one factor which the court may take into consideration as persuasive as to the meaning of the statute. Especially is this true where the agency, as in this case, is one on whom the Legislature must rely to advise it as to the practical working out of the statute and where practical application of the statute presents the agency with unique opportunities and experiences for discovering deficiencies, inaccuracies, or improvements in the statute. But such factor is only one among others persuasive on the court when it is engaged in the interpretation of the statute and may be given much or little weight in the total consideration of the question depending on circumstances but never against the plain meaning of the statute. . . .”

In *Utah Hotel Co. v. Industrial Commission*, 107 *Utah* 24, 151 *P.* (2d) 467, 153 *A. L. R.* 1176, headnotes of the Pacific Report (which are approved by the court under the constitutional requirement for syllabi) read:

Headnote No. 5: “Administrative agencies, in executing statutory scheme, must not only determine administrative questions involved, but apply law in first instance, that is, venture initial decision on judicial questions, but such a decision

is never binding, for binding decision of law question affecting private rights may be made only by appropriate court acting judicially.”

Headnote No. 7: “An administrative interpretation out of harmony with and contrary to express provisions of statutes interpreted cannot be given weight, as construction may not be substituted for legislation.”

As said on Page 472 of the Pacific Report, bottom of second column:

“To hold otherwise would permit the administrative tribunal to, in effect, amend a statute by the adoption of erroneous interpretive regulation. Construction is not legislation and should not be given that effect.”

As to the plaintiff’s acquiescence, defendant does not allege that plaintiff acquiesced, but only that the cities and town acquiesced. Ogden City can’t be bound by other cities. The five cases here involved are the first cases in which Ogden City has attempted to obtain remittance of fines assessed by a district court in a liquor case. As far as counsel for the plaintiff have been able to learn, these are the first cases Ogden City officers have prosecuted in the District Court under the Liquor Control Act, and so this is the first opportunity the city could have had to find out the so-called administrative interpretation in such cases and its first opportunity to acquiesce or object to such interpretation. Acquiescence presupposes opportunity to speak or act and the failure to speak or act. The plaintiff herein has never and does not now acquiesce to the state treasurer’s interpretation of the statute here concerned.

Assuming a city can acquiesce in such a matter as here concerned, the plaintiff has not done so.

A further observation -- even if there were a long established, well known administrative interpretation in this matter, and even if Ogden City had acquiesced in the same, since the administrative ruling is contrary to the express wording of the statute, the administrative interpretation, together with acquiescence, could not overturn the express statute and defeat the intention of the legislature. If it were not so, administrative officers could legislate merely by having the persons concerned acquiesce in their administrative interpretations. See *Utah Hotel vs. Tax Commission*, supra.

CONCLUSION

Under the above discussed points, it must be concluded that the defendant has a clear and present statutory duty to remit to the plaintiff all fines and forfeitures received by him in the criminal prosecutions described in the plaintiff's complaint. The opinions of the attorney general and alleged acquiescence of the plaintiff do not justify the retention of the moneys by the defendant. The alternative extraordinary writ heretofore issued by the court in this matter should be made permanent.

Respectfully submitted,

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