1979

George S. Whitting et al v. Charles R. Clayton et al : Brief of Appellant

Utah Supreme Court

Nick J. Colesides; Attorney for Plaintiffs-Appellants;
Mark Nick Mascaro; Attorney for Defendants-Respondents;

IN THE SUPREME COURT OF THE STATE OF UTAH

GEORGE S. WHITTING, JUDITH SILVA and DANIEL SILVA, dba JUDD'S FRONTIER CLUB, Plaintiffs - Appellants vs. CHARLES R. CLAYTON, Mayor of Midvale City, et al., and MIDVALE CITY, a municipal corporation, Defendants - Respondents.	)	Case No. 16543

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE
DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

Honorable James S. Sawaya
Judge

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AUTHORITIES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

GEORGE S. WHITTING, JUDITH SILVA and DANIEL SILVA, dba JUDD'S FRONTIER CLUB,	)	
Plaintiffs - Appellants	)	
vs.	)	Case No. 16543
CHARLES R. CLAYTON, Mayor of Midvale City, et al., and MIDVALE CITY, a municipal corporation,	)	
Defendants - Respondents.	)	

BRIEF OF APPELLANTS

STATEMENT OF NATURE OF CASE

Appellants initiated this action in the Court of the Third Judicial District in and for Salt Lake County, Utah, praying for an Extraordinary Writ to review and reverse the ruling of the City Council of the City of Midvale, which revoked the business license held by Appellants.

DISPOSITION IN LOWER COURT

The Third District Court, in and for Salt Lake County, Utah, the Honorable James S. Sawaya, Judge presiding, entered its Order affirming the action of the City Council of the City of Midvale.

RELIEF SOUGHT ON APPEAL

Appellants seek a reversal of the District Court's Order which affirmed the nuisance abatement method used by respondents in revoking the business license of appellants; and in the event this Court upholds the lower Court's decision, a restraining order pending the final determination of plaintiffs/appellants' Complaint pending in lower Court.

STATEMENT OF FACTS

Appellants began operating a business known as Judd's Frontier Club, at 7890 South State Street, Midvale, Utah, on or about December, 1976, pursuant to a business license obtained from the Midvale City. Appellants are in the business of selling beer and soft drinks and operate what is commonly known as a "beer bar"; appellants do not possess a license to, nor sell, or dispense "hard liquor" pursuant to any authority or licensing by the Utah Liquor Control Commission.

On or about May 15, 1978, the individual defendants, acting as the mayor and the city council of Midvale City, held a public hearing for the purpose of considering the revocation of the business license theretofore issued to appellants.

On or about May 30, 1978, the Midvale City Council issued its Findings of Fact and Order revoking appellants' business licenses, finding that appellants were maintaining a public nuisance contrary to the city ordinances.

After the Order of revocation appellants filed this action in District Court and obtained a Temporary Restraining Order. Appellants' Complaint states several causes of action, and, concurrently, appellants' amended Complaint sought the relief provided for under Rules 65A and 65B of the Utah Rules of Civil Procedure, relating to the appellate review on the certified record.

The District Court, the Honorable Judge James S. Sawaya presiding, after a hearing which was held on June 12, 1979, entered its Order (pages 128 and 129 of this record) affirming the action of revocation theretofore taken by the City Council; said order was entered on June 25, 1979.

On June 27, 1979, appellants by and through their attorney of record, Nick J. Colessides, filed a Notice of Appeal, appealing the order entered by Judge Sawaya, to the Utah Supreme Court.

On June 29, 1979, respondents filed their Motion to Amend Findings and Order (page 136 of this record) and after a brief conference among all counsel and Judge Sawaya, the trial Court entered its order granting respondents their motion to " ... amend the Order entered hereinto on the 25th day of June, 1979."

Subsequently thereto, respondents filed and the Court approved Findings of Fact and Conclusions of Law (page 137 to 142) and the Court entered its Amended Order of Judgment (pages 143 to 144).

Appellants' Complaint alleging certain other causes of action is presently pending before the Third Judicial District Court, and this appeal was necessitated by the fact that implicit in Judge Sawaya's Order and/or Amended Order, there was a dissolution of the Court's theretofore issued restraining order.

ARGUMENT

POINT I

RESPONDENTS HAVE FAILED TO PROCEED UNDER THE STATUTORY AUTHORITY GIVEN TO CITIES TO ABATE PUBLIC NUISANCES.

Respondents' theory of the right of revocation of the business license by the Midvale City Council is based upon a theory of nuisance and the abatement thereof.

Utah law specifically provides for a meothd of abatement of a public nuisance and specifically sets forth the criteria of a public nuisance together with the exact procedure a public body must follow in order to abate a nuisance.

Assuming arguendo that the acts complained of by respondents are in fact true and within the state statutory or city authority section 76-10-808 specifically designates the forum where an abatement of the nuisance shall occur. There, it is stated that a city attorney is empowered to institute an action in the name of the city to abate a public nuisance. Further it is stated therein:

> " ... The action shall be brought in the district court of the district where the public nuisance exists and shall be in the form prescribed by the Rules of Civil Procedure ...."

Nowhere in the Utah State Code the power to abate nuisances is given to a city council or other administrative body. It is exclusively within the province of the district and subject to the Rules of the Civil Procedure.

The fact that exclusive jurisdiction to abate a nuisance is vested with the district court is further buttressed by the provisions of section 78-38-1, wherein it defines a nuisance and makes it a

> " ... subject of an action. Such action may be brought by any person ...; and by the judgment the nuisance may be enjoined or abated, and damages may also be recovered. Utah Code Annotated § 78-38-1. (emphasis supplied).

It is clear from this language that in dealing with nuisance abatement the law contemplates an action at law, to be tried in a court of competent jurisdiction, and a judgment to be entered thereunder; it is not contemplated nor authorized by state statute, that a city council may act as a forum to adjudicate the abatement of a nuisance.

Furthermore, the provisions of section 76-10-808 provide for the relief to be granted in the event a nuisance is established, and the relief contemplated is judicial relief which can be had pursuant to a judgment entered by a court.

Respondents claim that appellants' conduct of their business creates a nuisance, as it is defined in Ordinance No. 7-2(d) of the ordinances of Midvale City, wherein it states:

> " ... (d) Laws or ordinances are violated by licensees, agents, or patrons with the consent of knowledge of licensees upon such premises which tend to affect the public health, peace or morals are hereby declared to be nuisances. (emphasis added). R-109.

It was stipulated by counsel for respondents that the city in its proceedings relied upon the alleged violations of subsection (d) to revoke the business licenses of appellants (see Tr. p.22 to p.23 line 3). In essence the city relying upon a theory of nuisance sought to abate the alleged nuisance by revoking appellants' business license, rather than file a civil action against appellants to abate an alleged nuisance which by necessity would have required the city to seek and obtain an independent judicial determination of the facts.

Appellants do not quarrel with the right of respondents to abate a nuisance; only the method sought by the city to abate the alleged nuisance. Nevertheless,

> "The power of a municipal corporation to define, declare, and deal with a nuisance is restricted ... A municipality can provide that a particular business ordinarily lawful and unobjectionable, e.g., a hotel [or as in this instance a "beer bar"] cannot operate after it has been found by a court of competent jurisdiction to be operated in a mannerinjurious or dangerous to the public morals, health or safety. But such an adjudication must have been made by a court with jurisdiction in the premises. McQuillin, Municipal Corporations, §24.64 (citations omitted).

While a municipality has a right under its police power to declare and restrain nuisances such power is not an uncontrollable power at the will and whim of the local authorities.

> " ... Under the rule denying municipal power to declare as a nuisance that which is not a nuisance, a municipal corporation, cannot, under its police power or its specific power to suppress nuisances, suppress in toto or in part any legitimate business, trade or occupation which is not a nuisance per se, in fact or under state statute ... A fortiori, a municipality cannot make a nuisance that which state law expressly authorizes. Under the rule, indeed, to justify any municipal interference with the enjoyment of property as a nuisance, two facts must be established: first, that the property, either per se or in the manner of using it, is a nuisance, and, second, that the interference does not extend beyond what is necessary to correct the evil. At least, property rights cannot be taken away by an ordinance declaring that to be a nuisance which is not a nuisance per se or in fact ... McQuillin, §24.66, p.621 (citations omitted).

There is no question that Midvale City has a right to adopt an ordinance declaring, defining and providing for the abatement of nuisances. But such an ordinance (7-2) must be in conformity with the general law and the laws relating to nuisances including the requirements of definiteness and certainty.

> " ... Generally, it is only a public and not a private nuisance that a municipal corporation can abate or have abated. Furthermore, it is only that which is a nuisance at common law, by declaration of statute or in fact that can be summarily abated by a municipal corporation ... Thus, vested rights in property cannot be destroyed summarily as a nuisance unless in a great emergency. Accordingly, a power given to it to abate nuisances in any manner it may deem expedient is not an unrestricted power ... The abatement must be limited by its necessity .... McQuillin, §24.74, p.633.

It is respectfully submitted that the City having failed to follow the statutory prescription for the abatement of a nuisance, which unequivocally contemplates a judicial determination of the allegations made by respondents, the city's action in revoking appellants' business license because they maintain a public nuisance is illegal; therefore, the trial Court should be reversed.

POINT II

THE TRIAL COURT ERRED IN AFFIRMING THE ACTION TAKEN BY MIDVALE CITY REVOKING APPELLANTS' BUSINESS LICENSE, AND THAT SUCH REVOCATION WAS ARBITRARY AND CAPRICIOUS.

There is little question that the revocation of a liquor license itself ordinarily rests in the studied discretion of the body which has been delegated such power. However, there does exist a question as to the proper exercise of such discretion; for while it is broad, it cannot be applied arbitrarily or capriciously.

> "The intentment of the law is that the discretionary decision shall be the outcome of examination and consideration, and not a mere expression of personal will, and that the refusal of licensing authorities to issue a license without having made due inquiry into the relevant facts and without having stated its reason for such refusal is arbitrary ...." (45 Am Jur 2d 603, "Intoxicating Liquors", Sec. 161).

Generally, a business license may be revoked by the issuing authority for legal cause; with that appellants do not quarrel. However, what constitutes a legal cause is the heart

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All references are hereby made as follows:

(a) Transcript of hearing before Judge Sawaya as "Tr."
(b) Transcript of hearing before Midvale City Council as "Tr. M.
(c) References to the record before the Utah Supreme Court as "R.

of the argument in appellants' case. Again referring to McQuillin for an elucidation of the principles governing the revocation of a business license, and particularly a beer or liquor license the following grounds have been set forth as those meriting a revocation of such license.

> " ... Conviction of a violation of an intoxicating liquor statute or ordinance usually affects the revocation or termination of a license thereunder .... Other offenses which in particular cases have been deemed sufficient ground for revocation of a liquor license or permit have been, ... the sale of, or traffic in narcotics, the sale of whiskey by a beer license, sale of beer or liquor to minors, female solicitation of sale of drinks on the licenses premises, permitting premises to be used as resort for prostitutes, and the maintenance of a nuisance offensive to common descency and morals. McQuillin, §26.197b, p.497, (citations omitted).

Of all the grounds for revocation stated in the preceding paragraph only the last ground could possibly form the basis for a revocatoin in the instant case. But certainly the issuance of parking tickets and other police related activities a block and a half from appellants' place of business (Tr. M. p.83, lines 16 to 23) do not qualify as the "maintenance of a nuisance offensive to common descency and morals."

"A revocation for 'cause' generally must be based on a violation of the liquor law or of regulations promulgated thereunder." 48 Corpus Juris Secundum 282, "Intoxicating Liquors" A lack of such determination abuses the Commission's discretion-

ary power and makes its action arbitrary and capricious.

> "Capricious or arbitrary exercise of discretion by an administrative board can arise in only three ways, namely: (a) By neglecting or refusing to use reasonable diligence and care to procure such evidence as it is by law authorized to consider in exercising the discretion vested in it; (b) By failing to give candid and honest consideration of the evidence before it on which it is authorized to act in exercising its discretion; (c) By exercising its discertion in such a manner after a consideration of evidence before it as clearly to indicate that its action is based on conclusions from the evidence such that reasonable men fairly and honestly considering the evidence must reach contrary conclusions." (Van De Vegt v. Board of Com'rs of Larimer County, 55 P2d 705, Colo. 1936).

While the liquor authorities need not follow the precise rules of evidence and procedure required to be followed by judicial officers, they can annul or suspend a license only on competent proof. Migliaccio v. O'Connell, 307 NY 566, 122 NE 2d 914.

This inquiry should consist of the taking and examining of evidence. The right to revoke or suspend a liquor permit as a general rule depends on the evidence presented. The burden is on the board or officer to prove the facts which constitute the causes which are alleged as grounds for revocation or suspension. Cambell v. Galeno Chemical Co., N.Y. 50 S. Ct. 412, 281 US 599, 74 L Ed 1063. As to the weight and sufficiency of such evidence, general rules of evidence apply as to whether it is sufficient to prove particular facts or violations. Arrow Distilleries v. Alexander, C.C.A., 109 F2d 397. Although evidence beyond a reasonable doubt or overwhelming proof is not required, there must be substantial evidence of probative

character to sustain the action of the deciding body. It has been held that revocation cannot be based upon evidence which causes a mere suspicion of a violation of a liquor statute. Mahanoy Mfg. Co. v. Doran, D.C. Pa. 40 F2d 561. This Court went on to say at page 561, "The real question is not so much over the facts as over the other question of whether the truth of the charge was brought home to the permitee with that degree of certainty which would justify a revocation of the permit."

There is no question that where a licensing board conducts a proper hearing and assigns a valid reason for refusing to grant a license, the courts, in the absence of a showing that the action of the board was an abuse of its plain legal duty in the premises, will not assume there was a lack of substantial reason for such action. However, appellants contend that such was not the case here.

In O'Conner v. City of Moscow, 202 p2d 401, Idaho 1949, a case involving a question as to whether or not a city ordinance deeming any change of ownership of an existing business in which draft beer or liquor by the drink was sold to be a new or additional business and thus prohibited from operating within specified areas, the Idaho Court, at page 405, stated:

> "While a license to operate a beer parlor ... does not confer any vested property right, yet if the city makes such businesses lawful by a permit or license, it cannot arbitrarily, capriciously, or unreasonably impair, interfere with or eradicate the same."

On page 67, 51 Am Jur 2d, "License and Permits", Sec. 62, it is said:

> "The weight to be given to evidence presented in a hearing in which it is sought to suspend or revoke a license rests ... in the discretion of ... body ... conducting the hearing. However, it has been said that hearsay evidence, standing alone, is not sufficient to support the suspension or revocation of a license where the licensee is entitled to a hearing on the matter involved." (Emphasis added).

In the instant case, the Midvale City Council considered no hard evidence but relied upon a simple summaries of the activities of the City Policy Department as it related to the vicinity of appellants' business premises and which had found numerous complaints of fighting, other disturbances and violations. These allegations have never been supported by hard evidence and the appellant maintains that they are unfounded and are in effect hearsay allegations.

Revocation of a license for cause has been said to contemplate such cause as would render the licensee unfit to engage in the licensed activity with his fitness being judged in the light of the potential evil with which the legislature was concerned in enacting the licensing legislation.

This Court in deciding Anderson v. Utah County Board of County Commissioners, ___ P 2d ___, 1/4/79, addressed itself to the exact issue at bar by commenting on the nature of the governing body's act in its failure to renew a beer license; and the hearing had thereupon, and also the nature of the beer license as a valuable property right. This Court said:

> "The spirit of enterprise which impels a person to initiate and develop a business which provides services to the public and employment for others is vital to the common welfare. By the same token that a business must operate in accordance with lawful regulations and requirements it should be the policy of the law, and of officials charged with its administration, to encourage such initiative and enterprise by according it all proper protections of the law. In harmony with that purpose there should be considerable difference in determining whether an application for a new license should be granted, as compared with the renewal of a license where the business has been established and operating for a number of years.
>
> There are respected authorities which affirm the proposition that the administrative body (the County Commission here) should not have the same breadth of discretion in refusing the reestablishment of a new business. The reasonableness and justice of such a rule is apparent when one reflects on the practicalities of the situation where the business has been established and operating for some years and thus represents a substantial commitment in the time, effort and expense by the owner.
>
> We do not desire to be understood as saying that an operating business necessarily has any such vested or inviolable right in the renewal of its license that the licensing authority is without discretion in determining whether it should be renewed. On the other hand, inasmuch as the licensing of his business does represent a substantial property interest to the plaintiff, which also has its effect upon the public welfare, it should not be destroyed not disrupted arbitrarily,

> nor without following fundamental standards of due process of law to guard against capricious or oppressive administrative action.
>
> It is further pertinent to observe that because beer licenses are available on a quota system it seems especially reasonable and proper that a business which has had a license and has been in operation should have some preference over any new application; and that the operating business should have its license renewed unless there is some reasonable basis for denying it. The same considerations of fundamental fairness and justice which prevent an administrative body from acting in a capricious or arbitrary manner in other areas of the law also apply in a beer license, even though it is a business which is subjected to a high degree of supervision and regulation in the interest of the public welfare. (citations omitted).

The foregoing analysis by this Court, reiterates and reaffirms the long standing principle of law as stated by McQuillin wherein he states:

> " ... the right to carry on a lawful business is a property right, which can be taken from a licensee only by due process of law, which means, it has been held, only after a judicial hearing and not on a mere resolution of a city council declaring the license revoked .... a license once granted may not normally be revoked at the mere option or whim of the licensor. ... It is not within the police power of a city to revoke without cause a license for which it has accepted a substantial fee, and the application of this rule, it has been said, is not affected by the character of the business. McQuillin, §26.81a, pp. 183, 184 (citation omitted, emphasis supplied).

Furthermore, to revoke appellants' license alone, while in the same building, within thirty (30) feet on either direction of the front door of appellants' place of business, there are also two additional establishments selling beer and utilizing

the same parking lot, and not revoke the license of the other two establishments is an arbitrary discriminatory act on the part of Midvale City. McQuillin adds that:

> "... A municipality has no authority to discriminate arbitrarily and without cause between licensees by revoking one license and not those of others who occupy exactly the same position. The cause for revocation of a whole class of licenses or permits must affect the hole class or the revocation will not be sustained. In other words, the holder of a license is entitled to equal protection of the laws. McQuillin, §26.81(a), p.184 (citations omitted).

Based upon the indicated lack of facts and evidence, which at best they can be termed double hearsay, the Midvale City Council's action and method of revoking appellants' business license was both arbitrary and capricious, denied appellants' substantive due process of law and the enforcement of the licensing ordinance and the revocation of the license was discriminatory. Nowhere in the record there appears facts to justify the city's action in revoking the license; what the record shows are facts relating to parking problems, fighting, etc., and the cause of which could be the patrons of two other establishments located within the same building as that of appellants' premises, and an attempt by city officials to close down a successful business, without the necessity of a judicial determination of the underlying facts and circumstances.

POINT III

THE DISTRICT COURT ERRED IN ENTERING ITS ORDER DATED JUNE 25, 1979, WITHOUT ENTERING CONCURRENTLY THEREWITH FINDINGS OF FACT TO SUPPORT SAID ORDER.

At the conclusion of the hearing held June 12, 1979, in the District Court, the trial Court took the matter under advisement, and thereafter it merely entered its Order, as it appears on pages 128 and 129 of this record, affirming the action of the City Council. Such action by the District Court without the formal entry of adequate Findings of Fact to support the trial Court's order is reversible error and the judgment of the trial Court should be vacated. Anderson v. Utah County Board of County Commissioners, ___ P2d ___, January 4, 1979.

Subsequently to appellants' filing of their Notice of Appeal, respondents sought to amend the Findings and Order of the District Court. The district court allowed respondents to "... amend the Order entered on the 25th day of June, 1979, ..." over the objections of appellants, and, thereafter respondents filed for the Court's approval Findings of Fact and Conclusions of Law, and an Amended Order of Judgment, dated July 3, 1979.

It is appellants' contention that the trial Court erred in granting respondents' motion to amend on the basis and for the reason that the District Court lacked jurisdiction

to hear respondents' motion because jurisdiction of this case after the Notice of Appeal was filed, rested exclusively with the Supreme Court of the State of Utah.

Respondents' Motion to Amend, after the Notice of Appeal was filed by appellants, could not continue the jurisdiction of the trial Court and could not suspend the finality of judgment appealed from, and to do so amounted to reversible error.

CONCLUSION

For the foregoing reasons the judgment of the trial Court should be reversed and the following relief granted:

1. The revocation of appellants' business license by respondents on the theory of abating a nuisance should be declared null and void.

2. In the alternative, this Court should find that the revocation of appellants' business license was arbitrary and capricious and that City of Midvale should be ordered to re-instate the same upon payment of the necessary fees by appellants.

3. In the alternative, if this Court upholds the District Court in its review of the proceedings held by respondents, a restraining order should issue directing Midvale City to refrain with appellants' operation of their business until the Complaint on file with the District Court has been herad on its merits.

DATED this 20th day of November, 1979.

Respectfully Submitted

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CERTIFICATE OF MAILING

I hereby certify that I mailed two (2) true and accurate copies of the foregoing BRIEF OF APPELLANTS, to Marc Nick Mascaro, 7417 South State Street, Midvale, Utah 84047, postage prepaid, this 20th day of November, 1979.

Nick J Colonnis