1954

Earle Cecil Barber v. Frank E. Moss et al : Brief of Appellant

Utah Supreme Court

Rawlings, Wallace, Roberts & Black; Dwight L. King; Counsel for Appellant;

Case No. 8180

IN THE SUPREME COURT
of the
STATE OF UTAH

EARLE CECIL BARBER,
Plaintiff and Appellant,

— vs. —

FRANK E. MOSS, County Attorney of Salt Lake County; ALVIN KEDDINGTON, County Clerk of Salt Lake County; SHARP M. LARSEN, County Treasurer of Salt Lake County; and DAVID P. JONES, County Auditor of Salt Lake County,
Defendants and Respondents.

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Throughout this Brief, Appellant will be referred to as plaintiff, and respondents will be referred to as defendants. All italics are ours.

STATEMENT OF FACTS

This appeal arises out of a claim submitted to Salt Lake County for witness fees resulting from the attend-

ance by Earle Cecil Barber as witness for the State of Utah in the case of the State of Utah v. Ellis Ollie Hazelwood. Plaintiff claims the sum of $1,098.00 for attendance in court for 183 days.

The matter comes to this Court on an appeal from a denial by the Honorable David T. Lewis of plaintiff's Motion for Summary Judgment, it appearing from the records, answer and file in the case of State of Utah v. Ellis Ollie Hazelwood that there is no material dispute as to the facts surrounding plaintiff's claim and that a summary judgment should, therefore, be granted in favor of plaintiff and against defendants. The undisputed facts are as follows: That plaintiff was, by order of J. Patton Neeley, committed to the Salt Lake County Jail on the 28th day of April, 1953, to insure his presence in the Hazelwood case unless a sufficient surety bond in the amount of $10,000.00 was furnished.

The order by Judge Neeley recites that Barber was unable to put up any bond of any character. The order further commits Barber to jail until the completion of the hearing on the Hazelwood cause (R-27). Barber was, pursuant to the order, committed to the Salt Lake County Jail and remained there until the 26th day of October, 1953. While Barber was in jail, he was subpoenaed or appeared as a witness on behalf of the State on five occasions, the first occasion being on May 8, 1953, the last occasion on October 8, 1953. The total

time which Barber remained in jail was 183 days, which days were from the 26th day of April, 1953 to the 26th day of October, 1953, both days inclusive.

The Salt Lake County Officials admit responsibility and liability for the witness fees on the days which plaintiff appeared in court, which would be five in number, but deny the claim of plaintiff for the 178 days which plaintiff remained in jail on the order of Judge J. Patton Neeley (R-13).

To recover a judgment for the 178 days, plaintiff instituted his action and prayed for the summary judgment. Motion for Summary Judgment was denied on March 4, 1954. There appears to be only one question which is a legal question and that is: Is plaintiff entitled to a witness fee of $6.00 per day for the days which he remained in Salt Lake County Jail on the order of J. Patton Neeley, because of his inability to furnish a bond in the sum of $10,000.00?

STATEMENT OF POINTS RELIED ON

POINT I.

UNDER THE LAW OF THE STATE OF UTAH, A PERSON COMMITTED TO JAIL BECAUSE OF INABILITY TO FURNISH A SURETY BOND IS ENTITLED TO WITNESS FEES FOR EACH DAY OF CONFINEMENT.

ARGUMENT

POINT I.

UNDER THE LAW OF THE STATE OF UTAH, A PERSON COMMITTED TO JAIL BECAUSE OF INABILITY TO FURNISH A SURETY BOND IS ENTITLED TO WITNESS FEES FOR EACH DAY OF CONFINEMENT.

The rights of persons committed to jail in default of bail to appear as a witness in a criminal cause has been the subject of consideration in the American courts for one hundred and fifty years. The first instance plaintiff has been able to locate wherein the question of surety for appearance was discussed is Case No. 6471 entitled *Higginson's Case,* 1 Cranch, C.C. 73, a decision of the Circuit Court for the District of Columbia in the March term of 1802. The decision is of such an early date and has been cited so often as a landmark decision, that it is quoted in full herein:

> *"A witness who for want of surety to appear and testify, has been imprisoned, is entitled to the daily compensation for the time of imprisonment.*
>
> "Eleanor Higginson had been ordered by a justice of the peace to recognize with surety in a small sum, to appear and testify as a witness against Daniel Hennissee, on a charge of felony; but being a stranger and unable to get surety, she had been committed to prison and detained until the trial.
>
> "Mr. Mason, for the United States, moved that she should be allowed payment for her attendance during the whole time she was so detained. The

act of 1753 C. 13 only provides for the payment of the prison fees, and makes no allowance for the time of the witness.

"The court allowed the witness to prove her attendance, and ordered her to be paid for the whole time she was detained, it being her misfortune and not her fault that she could not obtain security for her appearance."

After the Higginson case, there were some authorities to the contrary. The authorities to the contrary seemed to be based upon a theory that the appearance of a person as a witness was a public duty and did not require the payment of witness fees. It being recited in such cases that since there was no fee provided by law for witnesses called to appear in criminal cases, the fact that a person was imprisoned awaiting the trial of a criminal case would not entitle him to any compensation for the time which he gave up to benefit the State, nor would it entitle him to any witness fees. An example of this reasoning is *Moren v. County,* 18 Oregon 163, 22 P. 490. The State of Oregon at the time of the decision did not provide for the payment of witness fees in criminal cases. The Court held no witness fee was due following a line of cases that being a witness was a public duty.

Several states where witness fees have been provided by statute have held that the person committed to prison for his failure to provide an appearance bond was en-

titled to a witness fee for each day of imprisonment and that such imprisonment was in effect an attendance upon the court.

Plaintiff's claim is made under Section 21-5-4, *Utah Code Annotated, 1953,* which reads as follows:

> "21-5-4. *Witness fees and Mileage.* — Every witness legally required or in good faith requested to attend upon a city or district court or a grand jury is entitled to $6 per day for each day in attendance and twenty cents for each mile actually and necessarily traveled in going only; provided, that in case of a witness's attending from without the state in a civil case, mileage for such witness shall be allowed and taxed for the distance actually and necessarily traveled within the state in going only."

From the language quoted in Section 21-5-4, it appears that a witness is entitled to his $6.00 per day for "each day in attendance." It is the position of plaintiff that while he was incarcerated in Salt Lake County Jail, he was in attendance upon the courts of the State of Utah and is, therefore, entitled to his witness fees.

Plaintiff has been unable to discover any Utah case which has interpreted Section 21-5-4, or has passed upon the right of a person in the position of plaintiff to be paid for witness fees. However, there are a number of cases from other jurisdictions which have discussed the question of attendance upon court under such circumstances. One of the earliest cases which is cited very

frequently is *Robinson v. Chambers,* 94 Mich. 471, 54 N.W. 176, 20 L.R.A. 57. The opinion in the Chambers case is very short and is extremely important to plaintiff's point of view. It reads as follows:

> "Per Curiam:
>
> "May French was committed by the recorder's court of Detroit, in default of bail, to appear as a witness in a criminal cause in said court. Under this order she was confined from March 11 until the 21st of May following. The court allowed her $25.00 for such detention. She subsequently petitioned, through her guardian, for $57.00 more, claiming the statutory witness fees for the time that she was detained. The court denied the prayer of the petition. This was erroneous. The inability to give bail and consequent detention were the misfortune rather than the fault of the witness. She was detained by the court, and must be held to have been in attendance upon court, within the meaning of the statute providing for the payment of witness fees. *Hutchins v. State,* 8 Mo. 288; *State v. Stewart,* 4 N.N.C. (1 Car. Law Repts.) 524; *Higgison's Case,* 1 Cranch, C. C. 73.
>
> "*Mandamus must issued as prayed,* but without costs."

Since the Robinson decision, a number of other courts have had occasion to define what is meant by attendance upon court as that phrase is used in our witness fees statutes. In point of time, the next decision having bearing on the problem is *Hall v. Commissioners of Somerset Co.,* 82 Md. 618, 34 Atl. 771, 33 L.R.A. 449, 51

American St. Rep. 484. The Hall decision discussed all of the authorities, including those which have followed the line of reasoning that since the Legislature did not provide for witness fees for witnesses in criminal cases that no witness fee should be paid a person incarcerated while awaiting the trial of someone else. After a full discussion the Court concluded as follows:

> "We hold, then: First, that if a witness can, but will not, give security for his appearance, and is committed for his refusal he will not be entitled to a per diem fee during any part of the time he may be detained to secure his attendance; secondly, that if his inability to find security results from his own misconduct or bad character, he will equally not be entitled to a per diem fee; thirdly, that if he be committed because of inability to furnish a recognizance and if this inability arises from his misfortune, and not from his fault, he will be considered as in attendance on the court, and entitled for the term of his detention."

After the Hall decision, the next decision in point of time is *Kirke v. Strafford County,* 76 N.H. 181, 80 Atl. 1046. The Kirke case was decided in 1911 and seems to be exactly in point to the case at bar. Kirke, as is the case with Barber, was a stranger in the community in which she was to be a witness. Because of that fact, she was unable to procure surety and post a bail bond. It is a fact that Barber was a nonresident of the State

of Utah and did not have friends or acquaintances here who could assist him in furnishing security for his appearance. The affidavit of Jay Banks shows that Earle Barber was not a resident of the State of Utah; that he was a transient in the State, and it appears from said affidavit that this reason was the only one for requiring the commitment of Barber to jail pending the trial of Hazelwood. Under these exact circumstances, the Kirke decision holds that the failure of the witness to obtain a bail bond is not a result of her misconduct or bad reputation but is only a result of misfortune and as a consequence the witness is not at fault and should be considered as in attendance upon court during the time she was committed to jail awaiting the trial.

From the authorities and the statutes of the State of Utah, it appears that Earle Cecil Barber is entitled to be paid the regular witness fee for each day that he spent in jail. Certainly, all of the time that he was in jail, he was there by reason of services required of him by the State of Utah, and it is respectfully submitted that this court should find that he was in attendance on the District Court of Salt Lake County.

CONCLUSION

It is respectfully submitted that this Court should reverse the trial court's decision and should grant plaintiff judgment in the amount prayed for, which is the sum of $1,098.00.

Respectfully submitted,

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Received ..... copies of the within Brief of Appellant this ..... day of September, A. D. 1954.

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