

2010

Office of Professional Conduct v. D. Bruce Oliver : Brief of Appellee

Utah Court of Appeals

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JURISDICTIONAL STATEMENT

Mr. Oliver appeals from the district court's ruling on a post-judgment motion filed in his underlying reciprocal attorney discipline case. The Utah Supreme Court has jurisdiction over attorney discipline matters pursuant to Utah Constitution article VIII, section 4, which provides that "[t]he Supreme Court by rule shall govern the practice of law, including admission to practice law and the conduct and discipline of persons admitted to practice law." Rule 14-517(a) makes the Utah Rules of Civil and Appellate Procedure applicable in formal attorney discipline cases. Mr. Oliver's motion was untimely and thus did not operate to extend the time period to file an appeal under Rule 4(b) of the Utah Rules of Appellate Procedure. Because his appeal is not timely, this Court lacks jurisdiction to hear the issues which Oliver presents on appeal, and the case must be dismissed.

STATEMENT OF ISSUES

I. Whether Mr. Oliver can revive his expired appeal rights through an untimely post-judgment motion to alter the district court's order of reciprocal discipline.

STANDARD OF REVIEW

Pursuant to the Rules of Lawyer Discipline and Disability, the standard of review for sanctions imposed for professional misconduct in attorney discipline actions before the state district courts is a correctness standard and the Utah Supreme Court may make an independent judgment regarding the appropriate

level of discipline if the evidence warrants it. See *In re Babilis*, 951 P.2d 207 (Utah 1997).

DETERMINATIVE LAW

Rule 14-517, Rules of Lawyer Discipline and Disability

Rule 4, Utah Rules of Appellate Procedure

Rule 59, Utah Rules of Civil Procedure

Rule 60, Utah Rules of Civil Procedure

STATEMENT OF FACTS

1. On April 4, 2007 the United States District Court for the District of Utah entered a Public Reprimand and Disciplinary Order against Mr. D. Bruce Oliver ("Oliver"), finding violations of Rules 3.1, 3.2, 3.4 and 8.4(a) of the Rules of Professional Conduct. (R. 28-30).

2. The Office of Professional Conduct ("OPC") sought reciprocal discipline against Oliver in Utah's Third District Court pursuant to Rule 14-522(d) of the Rules of Lawyer Discipline and Disability. (R. 1-24).

3. On January 9, 2008, Judge Anthony Quinn entered Findings of Fact, Conclusions of Law, and Order of Reciprocal Discipline: Reprimand and Suspension against Oliver in Civil No. 070909858. (R. 2209-2227).

4. Oliver filed a Notice of Appeal with the District Court on January 18, 2008. (R. 2251-2252).

5. On January 29, 2008, Oliver filed with the Utah Supreme Court a Petition for Emergency Relief, a Motion to Stay the Imposition of the 12-Month Suspension, and a Motion for Expedited Ruling (See case no. 20080087-SC).

6. On February 19, 2008, the Court denied the Motion to Stay.

7. On April 22, 2008, the Court dismissed the appeal due to Oliver's failure to file a docketing statement within the time permitted by Rule 9 of the Utah Rules of Appellate Procedure.

8. Oliver then returned to the District Court, over a year later, and filed a Motion to Correct Order for Lack of Jurisdiction and supporting Memorandum on November 2, 2009. (R. 2262-2276).

9. By minute entry dated December 8, 2009, the District Court denied the motion stating that it was untimely and that the time limits of Rule 59 of the Utah Rules of Civil Procedure applied to such a request. (R. 2328-2329).

10. Oliver filed a Notice of Appeal on January 5, 2010, and asked the OPC to prepare an order consistent with the Court's minute entry of December 8, 2009. The OPC believed the minute entry was sufficient and objected to that request. (R. 2330-2352).

11. On February 5, 2010 the District Court adopted the minute entry of December 8, 2009 as the order for the motion. (R. 2356),

12. Oliver filed another Notice of Appeal on March 5, 2010. (R. 2358-2359).

SUMMARY OF THE ARGUMENT

Mr. Oliver is attempting to appeal the substance of the January 9, 2008 Order of Reciprocal Discipline by bootstrapping the issues to his appeal of an untimely post-judgment Rule 59 motion he filed nearly two years after the District Court's order. Mr. Oliver had an opportunity to raise these issues through a

timely post-judgment motion, but he failed to do so. The issues which Mr. Oliver raises in his brief would have been properly addressed had he pursued the first Notice of Appeal filed on January 18, 2008, but he did not pursue that appeal, and the window has now closed on the review he seeks. To allow Mr. Oliver to revive his right to appeal through an untimely post-judgment motion would be improper. This Court lacks jurisdiction to hear Mr. Oliver's untimely appeal, and the case must be dismissed.

ARGUMENT

I. Mr. Oliver's Appeal From His Order of Reciprocal Discipline Is Not Timely, and This Court Lacks Jurisdiction To Hear The Issue He Raises In His Appeal And Must Dismiss The Case

Mr. Oliver has filed an appeal challenging certain aspects of the district court's January 9, 2008 Order of Reciprocal Discipline.¹ Mr. Oliver originally filed a Notice of Appeal for that case on January 18, 2008, within the time period allowed under Rule 4 of the Utah Rules of Appellate Procedure. Mr. Oliver didn't pursue that appeal and the court dismissed the case. Now, nearly two years later, Mr. Oliver is attempting to revive his appeal rights by appealing from a ruling on a post-judgment motion filed in the district court. He is, however, challenging issues which could have only been addressed in the first appeal

¹ Mr. Oliver argues that the district court exceeded its subject matter jurisdiction by entering discipline in excess of the discipline he received from the Federal Court. Oliver Brief at 7-13. His argument is mischaracterized as a jurisdictional argument, and was correctly interpreted by the district court as an argument asserting legal error, which should have been addressed under Rule 59. (R. 2328).

which he did not pursue.² Mr. Oliver failed to properly raise these issues under the Rules of Appellate Procedure, and this court now lacks jurisdiction to hear the argument presented in Mr. Oliver's Brief.

Rule 4 of the Rules of Appellate Procedure provided Mr. Oliver 30 days in which to file an appeal from the Order of Reciprocal Discipline. Rules of Appellate Procedure Rule 4(a). Mr. Oliver complied with that Rule, and filed a Notice of Appeal on January 18, 2008. When he failed to file a docketing statement in accordance with Rule 9, the court dismissed his case on August 22, 2008. Mr. Oliver is now attempting to revive his expired right to appeal by appealing from an untimely post-judgment motion filed in the district court case.

Some post-judgment motions will work to extent an appellant's time period to file an appeal under Rule 4. However, "[t]he time for appeal is extended only if the motion can be construed as a timely motion of a type enumerated in Rule 4(b) of the Utah Rules of Appellate Procedure." *Bonneville Billing & Collection v. Torres*, 15 P.3d 112, 114 (2000). As stated in Rule 4(b)(1)(C), a motion to alter or amend a judgment under Rule 59 of the Utah Rules of Civil Procedure, if timely filed, will extend the appellant's time period to file an appeal under Rule 4. Utah Rules of Appellate Procedure, Rule 4(b)(1)(C). Mr. Oliver's motion to alter

² Mr. Oliver states in his Brief that he is appealing from the district court's order of February 5, 2010. Oliver Brief at 1. His arguments, however, go to the district court's order of January 9, 2008. As this court has previously ruled, when an appellant appeals from an untimely post-judgment motion, but argues the merits of the underlying order, this court lacks jurisdiction over the challenge to the underlying district court decision. See *Wisden v. Bangarter*, 893 P.2d 1057 (Utah 1995).

the judgment was not timely, and did not work to extend the time period in which he could file an appeal to the district court's Order of Reciprocal Discipline.

Mr. Oliver filed, on November 2, 2009, a Motion to Correct Order for Lack of Jurisdiction. In that motion and supporting memorandum, Mr. Oliver argued that elements of the district court's then twenty-three month-old Order exceeded the district court's jurisdiction and the judgment needed to be altered. Though he did not cite to a Rule of Civil Procedure for his request, either Rule 59 or Rule 60(b) would have applied to the relief he was seeking. Under either rule, his request was untimely³ and the OPC opposed his motion on that basis (as well as for other reasons). On December 8, 2009 the district court ruled on the motion, finding that the motion was untimely, as the time limits of Rule 59 applied to Mr. Oliver's request.

Had Mr. Oliver timely filed his Rule 59 motion after the court's Order of Reciprocal Discipline on January 9, 2008, that motion would have extended, under Rule 4(b) of the Rules of Appellate Procedure, his time period to file an appeal. That motion, however, was not timely under the Rules of Civil Procedure, and it would be improper to now allow Mr. Oliver to revive his appeal rights through an untimely post-judgment motion. This court has consistently stated that

³ Rule 59(e) requires that the motion to alter or amend the judgment be filed "not later than 10 days after the entry of judgment." Rule 59(e) URCP (1953). Rule 60(b) states, in relevant part: "[t]he motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment, order, or proceeding was entered or taken." Rule 60(b) URCP (1953). Mr. Oliver's motion was made well after three months had passed.

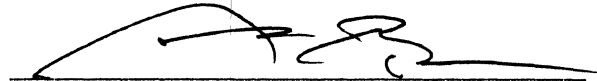
it is “axiomatic in this jurisdiction that failure to perfect an appeal is a jurisdictional failing requiring dismissal of the appeal.” *State v. Bowers*, 57 P.3d 1065, 1066 (2002) (quoting *Proswood v. Mountain Fuel Supply Co.*, 676 P.2d 952, 955 (Utah 1984). Further, “[t]his court has no authority to extend its jurisdiction beyond the 30-day period for filing notice of appeal plainly stated in the rule. Nor does this court have power to transubstantiate an untimely notice of appeal into a timely one.” *State v. Bowers*, 57 P.3d at 1066. Mr. Oliver’s most recent appeal is untimely, because it is based upon an untimely Rule 59 motion which did not extend his time period to appeal under the Rules of Appellate Procedure. This court lacks jurisdiction to hear Mr. Oliver’s appeal, and the case must be dismissed.

CONCLUSION

Mr. Oliver is seeking an appeal from a final judgment that was entered on January 9, 2008. His notice of appeal follows an untimely post-judgment motion made in the District Court. Because that motion was not timely, it is not subject to Rule 4(b)(1) which would have extended the time period in which Mr. Oliver could have appealed to 30 days from the date of disposition from that motion. Because this appeal is untimely, this Court lacks jurisdiction and the appeal should be dismissed.

DATED this 20th day of July, 2010.

UTAH STATE BAR:



Adam C. Bevis
Assistant Counsel
Office of Professional Conduct

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of July, 2010, I caused to be mailed via United States mail, first class postage pre-paid, two true and correct copies of the foregoing BRIEF OF THE APPELLEE to:

D. Bruce Oliver
P.O. Box 1213
Layton, Utah 84040



Adam C. Bevis