1980

Ernie Zamora v. Lorin Draper, Robert B. Clements And Joe Greiner : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

ERNIE ZAMORA,

Plaintiff,
Appellant,

-vs-

LORIN DRAPER, ROBERT B. CLEMENTS and JOE GREINER,

Defendants,
Respondents.

CASE NUMBER 17263

BRIEF OF APPELLANT

Appeal from an Order of Dismissal [illegible] Honorable Ronald O. Hyde, of the [illegible] of Weber County, State of Utah which [illegible] were acting in the course of their [illegible] and therefore appellant must file [illegible] Code Annotated, §78-11-18 (1977) [illegible]

[illegible]

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IN THE SUPREME COURT OF THE STATE OF UTAH

ERNIE ZAMORA,)

Plaintiff,)
Appellant,)

-vs-) CASE NUMBER 17263

LORIN DRAPER, ROBERT B. CLEMENTS and JOE GREINER,)

Defendants,)
Respondents.

BRIEF OF APPELLANT

Appeal from an Order of Dismissal granted by the Honorable Ronald O. Hyde, of the Second Judicial District Court of Weber County, State of Utah which provided that respondents were acting in the course of their employment as police officers and therefore appellant must file a bond in accordance with Utah Code Annotated, §78-11-10 (1977) in order to sue the respondents.

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IN THE SUPREME COURT OF THE STATE OF UTAH

ERNIE ZAMORA,)

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Appellant sued respondents for injuries suffered on June 9, 1979, in Ogden City, when respondents attacked and severely beat appellant. Appellant sued respondents as private individuals and not in their capacity as police officers. Respondents made a Motion to Dismiss based on the ground that before filing an action against police officers a bond must be filed in accordance with Utah Code Annotated §78-11-10 (1977). Appellants contend that since respondents were being sued as private individuals, a bond need not be filed. Furthermore, by imposing a bond under these circumstances, a poor person, such as the appellant who had filed an Affidavit of Impecuniosity, would be denied access to the Courts.

DISPOSITION OF THE LOWER COURT

The Motion to Dismiss filed by respondents was granted by Third District Judge, Ronald O. Hyde, on July 21, 1980. The Court held that the action "[arose] out of, or in the course of, the performance of the defendants' duties as police officers, and a bond must be filed before filing action against said defendants".

RELIEF SOUGHT ON APPEAL

The Lower Court's Order of Dismissal should be reversed because:

a. A bond need not be filed in this action, since it is brought against the respondents as private individual who were acting far beyond the normal range of legitimate police conduct; and

b. Section 78-11-10 of the Utah Code Annotated, providing for the imposition of a bond prior to filing an action against police officers, is unconstitutional on its face and as applied because it denies access to the courts to those unable to afford the cost of posting a bond.

STATEMENT OF FACTS

Appellant is an unskilled laborer of Mexican-Amer descent who manages to support his family of six through period work as a security guard. Because appellant's income is below the officially established poverty level he filed an Affidavit of Impecuniosity at the time of filing his action.

On June 9, 1979, in Ogden City at the corner of Washington and 31st Street, appellant joined his children and brother-in-law to talk and socialize. Defendants approached the group and proceeded to remove them from the corner by using loud, insulting abusive and threatening language. Appellant then entered his home, located approximately one-hundred feet from the corner, and contacted defendants' supervisor to complain about the abusive action undertaken by the defendants. Upon coming out of his home defendants attacked the appellant without any cause or provocation. Defendants hit, kicked and choked the appellant. That as a result of the attack appellant suffered abrasions, cuts, contusions on his body and head; and, muscle spasms around the neck. Appellant also incurred $193.63 in medical expenses.

Appellant's attorney studiously drafted his complaint so as to state a cause of action against the defendants in their individual capacity. At no time has appellant tried to attach the defendants' bond; and, appellant has refrained from sueing the City of Ogden or including the City of Ogden as a defendant in this suit.

ARGUMENT

POINT I.

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION TO DISMISS BECAUSE APPELLANT'S COMPLAINT WAS PROPERLY FRAMED AS BEING AGAINST DEFENDANTS INDIVIDUALLY AND DEFENDANTS DID NOT SHOW BY A PREPONDERANCE OF THE EVIDENCE THAT DEFENDANTS ACTS WERE WITHIN THE PERFORMANCE OF THEIR DUTIES.

Utah Code Annotated §78-11-10 provides:

> Before any action may be filed against any sheriff, constable, peace officer, state road officer, or any other person charged with the duty of enforcement of the criminal laws of this state, or service of civil process, when such action arises out of, or in the course of the performance of his duty, or in any action upon the bond of any such officer, the proposed plaintiff, as a condition precedent thereto, shall prepare and file with, and at the time of filing the complaint in any such action, a written undertaking with at least two sufficient sureties in an amount to be fixed by the court, conditioned upon the diligent prosecution of such action, and, in the event judgment in the said cause shall be against the plaintiff, for the payment to the defendant of all costs and expenses that may be awarded against such plaintiff, including a reasonable attorney's fee to be fixed by the court. In any such action, the prevailing party therein shall, in addition to an award of costs as otherwise provided, recover from the losing party therein such sum as counsel fees as shall be allowed by the court. The official bond of any such officer shall be liable for any such costs and attorneys fees. (Emphasis added).

From the plain meaning of the underlined provisions above, it would appear that a bond need be posted only when a plaintiff

sues police officers acting in the "course of the performance of" their duties as police officers, but not if he sues them in their private capacity when they have acted far beyond the normal range of legitimate police conduct. This interpretation is borne out by Utah case law.

The facts in Wright v. Lee, 101 Utah 76, 118 P.2d 132 (1941) are similar to those in the instant case. In Wright the plaintiff brought a complaint against several police officers for personal injuries caused by the officers. The complaint evidenced a "studious attempt" to sue the officers as individual and alleged that they had acted far beyond the range of their official duties. Furthermore, the suit in that case did not purport to be against the officers' bonds. The attorney for the defendants in the Wright case moved to dismiss the plaintiff's action since plaintiff had not posted a bond as required by Chapter 148, Laws of Utah, 1937, (predecessor to U.C.A. §78-11-10) which provided in part:

> In any action brought against any sheriff, constable, peace officer, state road officer, or any other person charged with the duty of enforcement of the criminal laws of this state, or service of civil process, when any such action arises out of, or in the course of, the performance of his duty, or in any action upon the bond of any such officer, the prevailing party therein shall, in addition to an award of costs as otherwise provided by law, recover from the losing party therein such sum as counsel fees as shall be allowed by the court. The official bond of any such officer shall be liable for any such costs and attorney fees. Before any such action is filed, and as a condition precedent thereto, the proposed plaintiff shall prepare and file with, and at the time of filing, the complaint

> in any such action, a written undertaking with at least two sufficient sureties in an amount to be fixed by the court, conditioned upon the diligent prosecution of such action, and, in the event judgment in the said cause shall be against the plaintiff, for the payment to the defendant of all costs and expenses that may be awarded against such plaintiff, including a reasonable attorney's fee to be fixed by the court. Wright v. Lee, supra., at 135.

The lower court in Wright granted defendants' Motion to Dismiss but the Utah Supreme Court, on appeal, reversed the lower court and held that no bond was required of the plaintiff where the suit was brought against officers as individuals. In so ruling, the Court distinguished the Wright facts from those of an earlier case which had required a bond, Kiesel v. District Court, 96 Utah 156, 84 P.2d 782 (1939). The Court noted:

> The instant case differs from the cited case, in that in the Kiesel case, the action was against the officers, as officers, and was also against the officers' bondsman. The instant case is an attempt to sue the defendants, not as officers, but as private individuals and the complaint evidences a studious attempt to limit this action to a private personal suit for which the bond of the officers would not be looked to for relief. Wright v. Lee, supra., at 134.

The Supreme Court in Wright found that there was no evidence presented to support the Motion to Dismiss and so reversed it and remanded the case to the District Court. In Wright the appellant had also raised the issue whether the statute requiring the posting of a bond is constitutional. The Supreme Court declined to rule on this issue, because no evidence was presented that would require the posting of a bond:

> The constitutionality of the statute cannot be passed on, upon this appeal

> as the action was instituted as a personal action and there is no evidence to invoke the application of the statute. Wright v. Lee, supra., at 135.

The Wright case, after remand, went up to the Supreme Court of Utah a second time, Wright v. Lee, 104 Utah 90, 138 P.2d 246 (1943)(hereinafter referred to as Wright II). The trial court, after remand in the first Wright case, had dismissed plaintiff's complaint a second time with a conclusory rationale that the defendants were police officers and that they 'were acting as such police officers and this action ... arose out of or in the course of the performance of the duty ... as peace officers to enforce the criminal laws in the State of Utah'. See Wright II, at 246. The Utah Supreme Court once again reversed the trial court and ordered the cause to be reinstated. In its opinion, the Supreme Court states:

> We shall refer to the statute as it now appears in the Utah Code Annotated 1943, as Sec. 104-44-22. The section reads:
>
> In any action brought against any sheriff, constable, peace officer, state road officer, or any other person charged with the duty of enforcement of the criminal laws of this state, or service of civil process, when any such action arises out of, or in the course of, the performance of his duty, or in any action upon the bond of any such officer, the prevailing party therein shall, in addition to an award of costs as otherwise provided by law, recover from the losing party therein such sum as counsel fees as shall be allowed by the court. The official bond of any such officer shall be liable for any such costs and attorney fees.
>
> ....
>
> Had the section ended thus with the words "attorney fees", this case would not have arisen, nor would the case of Kiesel et. al.

v. District Court, 96 Utah 156, 84 P.2d 782. It is the last sentence of the section, not quoted above, to wit: "Before any such action is filed" etc., that appears to have been construed as though the words, "when any such action arises out of, or in the course of, the performance of his duty", were not in the statute. It takes more than the fact of official position to make the last sentence of the section applicable. It must either be alleged in the complaint or shown by proof that the acts were official or so related thereto as to establish official immunity.

The statute does not require the filing of a bond "in any action brought" against any person who happens to be a peace officer. The statute cannot be construed as a cloak to protect any peace officer by a bond as a condition precedent merely because of his officical position and to prevent his being sued without the bond for personal wrongs having no relation to his official duties. Officers should be protected to the limit within the performance of their authorized acts and imposed duties.

The language of the statute requires a bond only "when any such action arises out of, or in the course of, the performance of his duty". There is not a word in the complaint about any of the defendants being officers of any of the classes mentioned in the statute, nor is there any mention of any "bond" of such officer, nor that any of the wrongs against plaintiff were in any way related to any officer while in "the performance of his duty".

The case of Kiesel et. al. v. District Court, supra., on certiorari to this court raised the question of jurisdiction of the trial court to proceed with the trial of an action against public officers after denying a motion to dismiss the complaint for failure to file a bond under Sec. 104-44-22, supra. In the Kiesel case the suit upon which the certiorari proceeding was based was one against the city marshal of Salina, Utah, and his deputy and the surety upon their bonds. We held that the failure

> to file a bond before or at the time of filing the complaint did not deprive the court of jurisdiction to proceed. That case differs from the instant case in that the instant case does not purport to be a suit against public peace officers or upon their bonds.
>
> We are of the opinion the statute has not shut the door against the right to bring an action against any person, official or otherwise, for a wrong committed and not alleged to have any relation to or connection with official duties. It must therefore follow that the judgment of dismissal was erroneous. The cause should be reinstated. such is the order. Costs to appellant. (Emphasis added)

In Wright II, Justice Wades' concurring opinion is especially helpful in its discussion as to the circumstances under which a plaintiff may be required to post a bond. Both the concurring and majority opinions recognize that the test is two-fold: (1) Were the defendants charged with the enforcement of the criminal laws? and (2) were the acts of the defendants committed in the course, or did they arise out of, the performance of their duty in enforcement of the criminal laws? Justice Wade pointed out that if both questions were answered in the affirmative, the action was properly dismissed. However, the alleged facts had to be proven by a preponderance of the evidence and, on appeal, there must be substantial evidence to support the findings of the lower court. Justice Wade concluded:

> The defendants' evidence merely shows that they were police officers, and as such were instructed by their superior to make an investigation of the plaintiff, in connection with the writing of certain letters and with certain robberies, and that they made the arrest. They further testified that all the acts, alleged in the

complaint, which they did, were done pursuant to and in furtherance of the instructions of their superior, and arose out of, or were in the course of the performance of their duty as such officers. The testimony on the matters stated in the last sentence were the bald conclusions of the witnesses, and no facts or circumstances in support thereof were given. In fact, the court expressly excluded such testimony. The mere fact that they were officers and were instructed to make an investigation of the plaintiff does not prove that the acts that they did were done in the course of the performance of their duty, nor does it prove that their acts arose out of the performance thereof. Nor is this shown by the conclusion to that effect. Such testimony may be admissable to show the purpose of the witnesses in committing the acts, still that question must be ultimately determined by the court from all of the facts and circumstances surrounding the commission of the acts in question. These facts not being disclosed, the evidence is insufficient to justify the decision.

The court seemed to conclude that as long as the defendants were officers, and purporting to act as such, no matter how far they went beyond their duty, still plaintiff was required under the statute to furnish an undertaking. Apparently on this theory, all the evidence of the facts and circumstances surrounding the acts complained of were excluded. The court stated that it was not interested in whether the defendants acted in good or bad faith, or with or without malice, or whether they acted reasonably. It intimated that it was immaterial even though they were merely "masquerading under the guise of police officers", and made the arrest knowing the plaintiff was guilty of no offense. If I have correctly interpreted the statute, it was necessary for the defendants to show either that they acted in the course of the performance of their duty as police officers, or if their acts did go beyond the course, still their acts must arise out of the performance of such duty. Otherwise the plaintiff was not required to furnish an undertaking.

In the instant case, the trial court's ruling, dismissing plaintiff's complaint solely because he did not post a bond pursuant to §78-11-10, was in error. The two Wright cases clearly show that the trial court is required to make a factual determination, which is not simply conclusory, as to whether the defendants acts were done in the course of performance of their duties. No bond is required prior to this factual determination and if defendants were acting outside their official capacity, no bond is required at all. It is the theory of plaintiff's complaint, that defendants' actions against him went far beyond what is normally associated with the performance of defendants' duties. Plaintiff's complaint was carefully constructed so as to make clear that he was initiating a tort action against the defendants as individuals, and not as police officers, qua officers. Accordingly, plaintiff did not name Ogden City as a defendant nor does the caption of his complaint refer to the defendants in their capacity as police officers. Although the complaint, for purposes of clarity, does identify the defendants as law officers, it does not recite that they were acting within the performance of their duties as police officers. Rather, the complaint twice alleges that defendants' acts were far beyond the scope of normal police conduct. (Complaint, ¶¶ 7 & 10)

The instant case, therefore, falls squarely within the holdings of the Wright cases and the trial court's decision dismissing plaintiff's suit should be reversed and the case reinstated. The only evidence presented by defendants at

the hearing on their Motion to Dismiss were affidavits signed by the individual defendants declaring that they arrested plaintiff in the course of performance of duties with the Ogden City Police Department and the arrest arose out of their duties with the Department. This evidcence is conclusory in nature and, in accordance with the Wright cases, should not be dispositive of the issues raised herein.

POINT II.

WHEN A PLAINTIFF PROCEEDS IN FORMA PAUPERIS BY FILING AN AFFIDAVIT OF IMPECUNIOSITY, THE TRIAL COURT, IN ITS DISCRETION, SHOULD WAIVE THE BOND SO THAT THE LEGISLATIVE INTENT OF PROVIDING IN FORMA PAUPERIS PROCEEDINGS IS NOT FRUSTRATED.

Utah, like many other states, has established a procedure whereby impecunious litigants may appeal "any cause of action in any court in this state" without paying any of the "necessary fees and costs". Utah Code Annotated (1953) §21-7-3 et. seq. This section provides:

> Any person may institute, prosecute, defend and appeal any cause in any court in this state by taking and subscribing, before any officer authorized to administer an oath, the following:
>
> I, AB, do solemnly swear (or affirm) that owing to my poverty I am unable to bear the expenses of the action or legal proceedings which I am about to commence (or the appeal which I am about to take), and that I verily believe I am justly entitled to the relief sought by such action, legal proceedings or appeal.

The following section, U.C.A. §21-7-4, further provides:

> On such oath or affirmation being filed with any justice of the peace or clerk of any court, such justice of the peace or clerk, as the case may be, shall at once

> file any complaint or papers on appeal and do any and all things necessary or proper to be done as promptly as if such litigant had fully paid all the regular fees; and the constable or sheriff shall at once promptly serve any and all summonses, writs, process and subpoenas, and all papers necessary or proper in the prosecution or defense of such cause, for such poor person as if all the necessary fees and costs had be fully paid; provided, that in cases where an impeunious affidavit is filed the judge at the time of hearing the cause shall question the person who filed such affidavit as to his ability to pay and in the event that the judge is of the opinion that such person is reasonably able to pay the costs he shall direct that judgment or decree be not entered in favor of such person until such costs are paid. Such order may be later canceled upon petition if the facts warrant such cancellation. (Emphasis added)

As can been seen from the above statutes, if a person is determined to be impecunious, the court shall proceed "as if all the necessary fees and costs had been paid", 21-7-4. This latter wording is broad enough to include waiving a bond such as that required, when suing police officers, qua officers, by Utah Code Annotated §78-11-10 (cited supra.). The phrasing of §78-11-10 also allows for this interpretation:

> ..., the proposed plaintiff, as a condition precedent thereto, (i.e. filing the suit), shall prepare and file with, and at the time of filing the complaint in any such action, a written undertaking with at least two sufficient sureties in an amount to be fixed by the court,... (Emphasis added)

The underlined language is broad enough to allow the trial court judge to waive the posting of a bond in the case of impecunious plaintiffs. This result would seem to be mandated by the statutory purposes of allowing impoverished plaintiffs to proceed in forma pauperis, i.e. to allow them their day in court for a full hearing of their claims. If an impecunious plaintiff cannot even afford the filing fees, how could the person afford the greater costs involved in posting a bond? To require an impecunious plaintiff to post a bond would defeat the statutory intent of Utah Code Annotated §21-7-3 et. seq. which allows an impecunious plaintiff to conduct a lawsuit "as if all the necessary fees and costs had been fully paid". It is a rule of statutory constuction that two statutes covering the same or similar subject matter should be construed so as to preserve the integrity of both. The Utah Supreme Court in the case of In Re Utah Savings and Loan Association, 21 Utah 2d 169, 442 P.2d 929, 931 (1968) stated the rule as follows:

> ...It is true here, as it is in so many areas of the law, that one statute has been enacted at one time with a particular purpose in mind, and that another has been enacted at another time with a different purpose in mind. When this has been done and there is an apparent conflict, it is not proper to put all the emphasis to one statute, as though it stated all of the law on the subject to the exclusion of the other. They should be looked at together, in their relationship to each other, with a view to reconciling any such apparent conflict and giving each its intended effect insofar as that can be accomplished without nullifying the other.[1]

1. University of Utah v. Richards, 20 Utah 2d 99, 433 P.2d 596, states: "One act is not

> to be allowed to defeat another, if by reasonable construction the two can be made to stand together." To the same effect see also Western Beverage Co. of Provo, Utah v. Hansen et al., 98 Utah 332, 96 P.2d 1105.

Therefore, appellant respectfully urges that the court rule, as a matter of law, that where a plaintiff is allowed to proceed in forma pauperis pursuant to Utah Code Annotated §21-7-3 et. seq. that the lower court ought to waive other costs, including the bond required by Utah Code Annotated §78-11-10 if the suit is against police officers, as officers acting within the legitimate scope of their duties, and against the officers' bonds.

POINT III.

TO REQUIRE A BOND UNDER UTAH CODE ANNOTATED §78-11-10 IN ALL INSTANCES IS A VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATE'S CONSTITUTION AND OF ARTICLE I, SECTIONS 10 AND 11 OF UTAH'S CONSTITUTION.

The United States Supreme Court in the case of Boddie v. Connecticut, 401 U.S. 371, (1971) held that to require fees of impecunious plaintiff's in a divorce action and, consequently, to deny court access to those who were unable to pay a fee was a violation of the due process clause of the Fourteenth Amendment of the United States Constitution. The court stated:

> American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts, or other quasi-judicial official bodies, that we look primarily for the

> implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle. Boddie v. Connecticut, supra.

The Court continued:

> The arguments for this kind of fee and cost requirement are that the State's interest in the prevention of frivolous litigation is substantial, its use of court fees and process costs to allocate scarce resources is rational, and its balance between the defendant's right to notice and the plaintiff's right to access is reasonable.
>
> In our opinion, none of these considerations is sufficient to override the interest of these plaintiff-appellants in having access to the only avenue open for dissolving their allegedly untenable marriages. Not only is there no necessary connection between a litigant's assets and the seriousness of his motives in bringing suit, but is is here beyond present dispute that appellants bring these actions in good faith. Moreover, other alternatives exist to fees and cost requirements as a means for conserving the time of courts and protecting parties from frivolous litigation, such as penalties for false pleadings or affidavits, and actions for malicious prosecution or abuse of process, to mention only a few.

> In concluding that the Due Process Clause of the Fourteenth Amendment requires that these appellants be afforded an opportunity to go into court to obtain a divorce, we wish to re-emphasize that we go no further than necessary to dispose of the case before us, a case where the bonafides of both appellants' indigency and desire for divorce are here beyond dispute. We do not decide that access for all individuals to the courts is a right that is, in all curicumstances, guaranteed by the Due Process Clause of the Fourteenth Amendment so that its exercise may not be placed beyond the reach of any individual, for, as we have already noted, in the case before us this right is the exclusive precondition to the adjustment of a fundamental human relationship. The requirement that these appellants resort to the judicial process is entirely a state-created matter. Thus we hold only that a State may not, consistent with the obligations imposed on it by the Due Process Clause of the Fourteenth Amendment, pre-exempt the right to dissolve this legal relationship without affording all citizens access to the means it has prescribed for doing so.

In the instant case, if indeed the police officers assaulted and committed a battery upon the plaintiff and exceeded the legitimate scope of their authority and reasonableness, the plaintiff's only redress is by using the courts. The courts are the exclusive means for plaintiff's redress of injuries in this situation. To deny plaintiff access to the courts merely because he is unable to obtain the bond mentioned in U.C.A. §78-11-10 would be a violation of due process just as clearly as was the denial of access in the Boddie case.

The Utah Constitution also supports plaintiff's argument for access to the courts unrestricted by his economic status.

Article I, Section 11 of the Utah Constitution provides:

> All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, which shall be administered without denial or unnecessary delay; and no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party.

The mandated access is, for it speaks of "an injury done to him in his person, property, or reputation". The last clause is especially instructive: "no person shall be barred from prosecuting or defending before any tribunal in the State, ... any civil cause to which he is a party." To foreclose plaintiff from bringing his civil action for personal injuries done to his person would conflict with Section 11 of Article I, Utah Constitution. Thus, it can be seen, that the right to a trial for redress for a personal injury is an inalienable right under both the State and Federal Constitutions and should not be denied a plaintiff merely because he is unable to pay for a bond as required by U.C.A. §78-11-10. This view is supported by the California case of Beaudreau v. Superior Court of Los Angeles County, 121 Cal. Rptr. 585, 535 P.2d 713 (Sup. Ct. Cal. 1975) where the court struck down a similar bond requirement in California before a plaintiff could sue a public employee. Here the court held that requiring a bond was a taking of property, within the Fourteenth Amendment of the United States Constitution and that no bond could be required prior to the court holding a

a hearing as to the plaintiff's case. The court stated:

> The statutes before us make no provision for such a hearing. Every plaintiff who sues a public entity or public employee may be forced either to file an undertaking as security for the defendant's costs or to forego the prosecution of his claim. Absent proof of indigency, the court is given no discretion to dispense with the undertaking requirement if demanded by a qualifying defendant, regardless of the merit of the plaintiff's lawsuit. Furthermore, the legislation specifies no standards for determining the reasonable amount of such undertaking. If the defendant is satisfied to limit its demand to the statutory minimum, judicial approval is not required; if the defendant seeks a greater amount, he must show "good cause". Yet the statutes do not purport to define "good cause" and do not provide that the plaintiff has a right to be heard on this matter. Thus any hearing which the plaintiff may receive on the issue of good cause necessarily "excludes consideration of . . . element[s] essential to the decision ...." (Bell v. Burson, supra., 402 U.S. at p. 542, 91 S. Ct. at p. 1591). It would not be a "meaningful" hearing, "appropriate to the nature or the case" and as such would not meet due process standards. (Armstrong v. Manzo, supra., 380 U.S. at p. 552, 85 S. Ct. 1187; Mullane v. Central Hanover Bank & Trust Co., supra., 339, U.S. at p. 313, 70 S. Ct. 652). Beaudreau v. Superior Court, supra., at 720.

It should be noted that the California case law had determined prior to this time that an indigent plaintiff should not be required to post any bond. Thus, the California law was more liberal than Utah's but still the statute was held to be unconstitutional.

CONCLUSION

Appellant is a poor person and he has filed an Affidavit of Impecuniosity in order to pursue this action. If a person is determined to be impecunious the court shall proceed

"as if all the necessary fees and costs had been paid", §27-7-4. This latter wording is broad enough to include waiving a bond such as that required, when suing police officers, qua officers by Utah Code Annotated §78-11-10 .

In the instant case, if indeed the police officers assaulted and committed a battery upon the plaintiff and exceeded the legitimate scope of their authority and reasonableness, the plaintiff's only redress is by using the courts. The courts are the exclusive possibility for plaintiff's redress of injuries in this situation and to deny plaintiff access merely because he is unable to obtain the bond mentioned in U.C.A. §78-11-10 would be a violation of due process.

Furthermore, the two Wright cases clearly show that the trial court is required to make a factual determination, which is not simply conclusory, as to whether the defendants acted outside the scope of their official duties. No bond is required prior to this factual determination and if defendants were acting outside their official capacity, no bond is required at all.

DATED this 26 day of November, 1980.

Respectfully Submitted:

UTAH LEGAL SERVICES, INC.

PAUL GOTAY
Attorney for Plaintiff, Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

ERNIE ZAMORA,

Plaintiff,
Appellant,

-vs-

LORIN DRAPER, ROBERT B. CLEMENTS and JOE GREINER,

Defendants,
Respondents.

CERTIFICATE OF MAILING

Case Number 17263

I hereby certify that I mailed two copies of the BRIEF OF APPELLANT to SCOTT DANIELS, SNOW, CHRISTENSEN & MARTINEAU, Attorney for Defendants-Respondents, 700 Continental Bank Building, Salt Lake City, Utah, 84101, via first class U.S. Mail, postage prepaid this 26th ~~day~~ of November, 1980.

Linda Taylor

LINDA TAYLOR
Secretary