

2000

Dan Henry Tijerina, Sr. v. Utah State Board of Pardons; Paul Sheffield; Gerals Cook; and various John Does : Brief of Appellee

Utah Court of Appeals

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Dan Henry Tijerina, Sr.; Petitioner/Appellant.

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IN THE UTAH COURT OF APPEALS

DAN HENRY TIJERINA, Sr., :
 :
 Petitioner/Appellant, :
 :
 vs. : Case No. 20000548-CA
 :
 UTAH STATE BOARD OF PARDONS; : Priority No. 3
 PAUL SHEFFIELD; GERALD COOK; :
 and various JOHN DOES, :
 :
 Respondents/Appellees. :

BRIEF OF APPELLEE

On Appeal from the Judgment
of the Third Judicial District Court
in and for Salt Lake County, State of Utah
Honorable J. Dennis Frederick
District Court Judge

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FILED
Utah Court of Appeals

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NO ORAL ARGUMENT OR PUBLISHED OPINION REQUESTED
Paulette Stagg
Clerk of the Court

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NATURE OF APPEAL AND BASIS OF JURISDICTION

Dan Tijerina appeals the trial court's denial of his Motion for Enlargement of Time to file a notice of appeal. This Court has jurisdiction under Utah Code Ann. §§ 78-2a-3(g) and (j) (1996).

ISSUE ON APPEAL AND STANDARD OF REVIEW

1. Did the trial court abuse its discretion in denying Tijerina's motion for an extension of time for filing a notice of appeal?

A trial court's decision to deny a party's motion for an extension of time is conducted under an abuse of discretion standard. *Reisbeck v. HCA Health Services of Utah, Inc.*, 2000 UT 48, ¶ 6, 2 P.3d 447, 449.

RELEVANT PROVISIONS

Any relevant statutes or rules will be quoted in the text.

STATEMENT OF THE CASE

Procedural history. On June 22, 1999, Judge J. Dennis Frederick, Third District Court, dismissed Tijerina's petition for extraordinary relief based on the legal grounds cited in the Utah State Board of Pardons' (Board's) motion to dismiss. (R. 184). Tijerina did not file an appeal from that dismissal, but on October 12, 1999, asked the trial court to re-enter the order of dismissal, alleging he never received a copy of the June order, and claiming that a re-entry of the order was necessary for him to file an appeal at such a late date. (R. 190).

The Board agreed to the request, and another order of dismissal was executed on October 19, 1999, and provided to Tijerina. (R. 202-209). Once again, Tijerina allowed the 30-day period to file a notice of appeal to lapse, and not until December 2, 1999, did he file a motion for the enlargement of time to file his notice of appeal, and his notice of appeal. (R. 211-216). Tijerina's excuse for the untimely filings was that he had sent his notice of appeal in the Utah Supreme Court.¹ (R. 211-216). On March 8, 2000, an Order

¹Tijerina submitted no evidence to the trial court of his alleged mailing of a notice of appeal to the Utah Supreme Court. (R. 211-16).

from the Utah Court of Appeals was filed in the Third District Court, staying Tijerina's appeal and remanding the case for an order on Tijerina's motion for an extension of time. (R. 224). On June 6, 2000, the trial court entered an Order denying Tijerina's Motion for Enlargement of Time. (R. 230-32). On June 22, 2000, Tijerina filed a Notice of Appeal in the Utah Supreme Court appealing the trial court's denial of that motion. (R. 234-35).

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING TIJERINA'S MOTION FOR AN EXTENSION OF TIME TO FILE A NOTICE OF APPEAL

Pursuant to Utah R. App. P. 4(a) a notice of appeal from a final judgment or order "shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from." (Emphasis added). This time period may be extended only "upon a showing of excusable neglect or good cause." Utah R. App. P. 4(e).

Here, Tijerina waited almost four months before first approaching the trial court for a reentry of the Order dismissing his petition for extraordinary relief. Even though the Board and the trial court accommodated his request, Tijerina once again failed to file his notice of appeal within the mandated 30 day time period.

The Utah Supreme Court addressed a factually similar situation in *Reisbeck v. HCA Health Serv. of Utah, Inc.*, 2000 UT 48, ¶ 2, 2 P.3d 447, 449. There, as here, a

notice of appeal was filed beyond the deadline, with a subsequent motion for an extension of time being filed. *Id.* at ¶¶ 2-3. The trial court denied the motion, and the denial was appealed. *Id.* at ¶ 4.

While acknowledging that the trial court may extend the filing of a notice of appeal upon a showing of excusable neglect or good cause, the Utah Supreme Court also noted that the trial court has “very broad” discretion in granting or denying such a motion.

Id. at ¶ 6. The court explained

[t]he question of whether any given set of facts constitutes “excusable neglect” under appellate rule 4(e) is highly fact dependent. Moreover, the situations that might be presented to a trial court under this rubric are so varied and complex that no rule adequately addressing the relevance of all these facts can be spelled out.

Id. (quoting *West v. Grand County*, 942 P.2d 337, 339-40 (Utah 1997)).

The court defined excusable neglect as “an admittedly neglectful delay that is nevertheless excused by special circumstances,” and defined good cause as pertaining “to special circumstances that are essentially beyond a party’s control.” The court, however, refused to establish specific criteria for the determination of either standard, noting “the trial court’s inquiry is fundamentally equitable in nature and entails broad discretion.” *Id.* at ¶ 15. Using both standards, the court affirmed the denial of the motion for an extension of time, where the notice of appeal was filed four days beyond the deadline due to

attorney miscalculation as to calendar date for the deadline, as well as miscalculation of the necessary postal time. *Id.* at ¶ 16.

Likewise here, Tijerina pleads nothing showing the trial court abused its broad discretion in denying this motion. Nothing is pled that would meet either standard of “good cause,” or “excusable neglect.” The only “excuse” Tijerina extends is that he sent his notice of appeal to the wrong court.

Filing a notice of appeal in the wrong court was addressed in *State ex rel. M.S.*, 781 P.2d 1287 (Utah App. 1989). There a notice of appeal was incorrectly filed with the Fourth Judicial District Court rather than the Fourth District Juvenile Court, making the notice ultimately filed in the correct court untimely, as here. *Id.* at 1288. The court concluded that, “the filing with the Utah County Clerk does not constitute a timely filing with the juvenile court.” *Id.* at 1289. Accordingly, the trial court did not abuse its broad discretion in not accepting Tijerina’s excuse that he mistakenly filed in the wrong court.²

²Mr. Tijerina, acting as his own counsel, is obviously literate, with ready access to Utah R. App. P. 4, from which he quoted in his motion for an enlargement of time. (R. 215). Rule 4(a) clearly instructs appellants to file their notices of appeal “with the clerk of the trial court.”

Tijerina has been provided two opportunities to file a timely appeal. He failed in both instances. It was not an abuse of discretion for the trial court to deny Tijerina's motion for an enlargement of time based on these facts.

While Tijerina totally ignores the timeliness issue in his brief, arguing only the merits of his underlying petition, timeliness cannot be circumvented. There was no abuse of discretion in denying Tijerina's motion for an enlargement of time, making Tijerina's notice of appeal untimely. Accordingly, this Court lacks jurisdiction, *Reisbeck*, 2000 UT 48, ¶ 1, and the merits of Tijerina's underlying petition should not be considered.

Tijerina's appeal of the order denying his motion for an enlargement of time should not be used as a "back door" for appellate review of issues that would be before this Court only on a timely appeal.³ See *Franklin Covey Client Sales, Inc., v. Melvin*, 2000 UT App. 110, ¶ 23, 2 P.3d 451, 457. If, however, this Court decides the merits of this case should be addressed, Appellee asks for an opportunity to brief such.

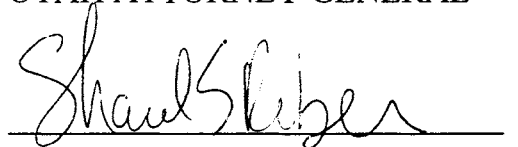
³Petitioner also raises claims not raised before the trial court, alleging violation of the separation of powers provisions of the state and federal Constitutions. See Br. of Appellant at 7, 22-24. First, these issues are not properly before the Court. "Issues not raised at trial cannot be argued for the first time on appeal." *State v. Lopez*, 886 P.2d 1105, 1113 (Utah 1994). Second, even addressing the merits of these allegations, the Utah Supreme Court, in *Padilla v. Utah Board of Pardons & Parole*, held that the Board's parole power did not violate the separation of powers provision, clearly disposing of this claim. 947 P.2d 664, 668-69 (Utah 1997).

CONCLUSION

This appeal should be dismissed based on lack of jurisdiction. Because this case deals with claims addressed by established law, the Board does not request oral argument or a published opinion.

RESPECTFULLY SUBMITTED THIS 3rd November 2000.

JAN GRAHAM
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Assistant Attorney General
Attorney for Respondents/Appellees

CERTIFICATE OF MAILING

On 3rd November 2000, I mailed, by U.S. Mail, postage prepaid, two copies of this **BRIEF OF APPELLEE** to:

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