

2000

Kurt N. Holbrook and Tracy H. Bigelow v. West N. Holbrook : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KURT N. HOLBROOK, an individual, |
and TRACY H. BIGELOW, an |
individual, |

Plaintiffs and Appellees, |

vs. |

WEST N. HOLBROOK, an individual, |

Defendant and Appellant. |
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|
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Appellate Case No. 20000931CA

Priority No. 15

APPELLANT'S REPLY BRIEF

APPEAL FROM THE ORDER ON ORDER TO SHOW CAUSE
FINDING APPELLANT IN CONTEMPT

Third Judicial District Court, Salt Lake County, State of Utah
The Honorable Tyrone E. Medley, Third District Court Judge

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FILED
Utah Court of Appeals

JAN - 4 2002

Paulette Stagg
Clerk of the Court

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ARGUMENT

I. Those Parts of Appellees' Brief That Fail to Cite to the Record Should be Disregarded.

Much of the Brief of Appellees¹ recites several important “facts” without any citation to the record. Such unsupported assertions should be disregarded by this Court. The Rules of Appellate Procedure require that “all statements of fact and references to the proceedings below shall be supported by citations to the record.” Utah R. App. P. 24(a) (7). In the context of briefs by appellants, “[the Utah Supreme Court] has repeatedly noted that it will not accept as true factual allegations in briefs not properly cited to the record.” *Butler, Crockett and Walsh Development Corp. v. Pinecrest Pipeline Operating Co.*, 909 P.2d 225, 230 (Utah 1995) (citation omitted). That rule applies to briefs by appellees as well. Utah R. App. P. 24(b). This Court should consider only those facts and references that are properly cited and supported by the record, and disregard those that are not. *Amica Mut. Ins. Co. v. Schettler*, 768 P.2d 950, 957 (Utah App. 1989).

There are numerous uncited references in Appellees' Brief. For example, in arguing this Court should uphold the TRO Hearing, Plaintiffs assert that West's counsel avoided a prior temporary restraining order “on the understanding that counsel would supervise [West]” and that this was part of the “exigent circumstances” on which the trial court went ahead with the TRO hearing on March 30, 2000. Appellee's Brief p. 6. No citation is made to the record for this, and the order denying that earlier application for a temporary restraining order

¹Appellees are also referred to as “Plaintiffs” here.

mentions no such “understanding.” R. 151 - 154. The TRO at issue here, which issued later, contains its own findings of fact and none of them mention any such prior understandings or exigent circumstances either. R. 376 -379.

Similarly, in their arguments about the Contempt Hearing, Plaintiffs make several assertions regarding the Fidelity documents - *e.g.* that “West was questioned extensively regarding the transactions evidenced in the Fidelity documents” and that the “Fidelity documents identify the date and nature of each transaction initiated by [West].” Appellees’ Brief p. 10. Not only is this assertion uncited, the record evidence is to the contrary. The transcript of the Contempt hearing at pages 67-68 show a *cursory* examination of West about the transactions shown in the Fidelity documents. R. 1120.² And the Fidelity documents

²In his Opening Brief, West marshaled that evidence thus:

The most precise relevant testimony though occurs towards the end of West’s testimony as follows:

Q. (by Zachary Wiseman) If we look at B.G. Holbrook Family Trust, let’s look at Page 29 [R. 797]. Do you see 29?

A. Yes.

Q. It says there that there were transaction dates on March 29th, through March 31st; do you see those dates?

A. Yes.

Q. Okay you look in April, you start on Page 32 [R. 800], just glance, if you will, quickly, page 32.

A. Okay.

Q. Those are all trades occurring on April 5th and 6th, correct.

A. Correct.

Q. And if you keep turning slowly to 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43 [R. 801 - 811], all of those pages contain transactions, investments that occurred in the month of April after March 30th, correct?

A. Correct.

R. 1120 (Tr. 67-68) as quoted in Appellant’s Opening Brief at p. 23.

make no reference whatsoever to acts by West. Plaintiffs also assert that “trades are generally ‘settled’ within a few hours of being ‘made.’” *Id.* p. 11. This claim is unsupported and the record shows the contrary to be true: The Fidelity documents show at least two stocks that were sold on March 31, 2000, but which were not settled up until *five days* later, on April 5, 2000. R. 797, 800. That is not a few hours and no evidence generally correlates the date of a transaction with its settlement.

Aside from that failing, Plaintiffs are incorrect about the import of the Fidelity documents. Plaintiffs simply confuse the concept of numerous instances of conduct with conduct that results in numerous transactions at Fidelity. The Fidelity documents may well show the numerous transactions, but without more evidence than was presented, they do not show numerous instances of conduct.

II. This Court Should Review the TRO Hearing.

West’s first argument on brief was that the trial court erred in proceeding with the TRO hearing on March 30, 2000 contrary to the 20 day moratorium imposed by UCJA 4-506 and Utah Code Ann. 78-51-36 (1996).³ Admittedly, that argument was not raised below, but West asserted it was appealable under the plain error exception to that requirement. Appellant’s Opening Brief p.p. 14 -15.

³Under §78-51-36, a party who becomes unrepresented in a proceeding must be required by the other party to appoint another attorney or appear in person “before any further proceedings are had against him.” Although in effect at all relevant times here, it was repealed effective April 30, 2001. Laws of Utah 2001, c. 4, § 3.

A. Rule 4 does not preclude West's Appeal of the TRO Hearing.

Plaintiffs claim West failed to timely appeal the TRO Hearing under Utah R. App. P. 4. If the TRO had been a final order, Plaintiffs would be correct. But their reliance on Utah R. App. 4 is misplaced because that rule applies to *final* orders and, by definition, a temporary restraining order is not a final order. The only final order with respect to the TRO was the Contempt Order and contrary to Appellee's argument, Rule 4 should not preclude West's appeal of the issuance of the underlying TRO.

In candor to this Court, however, West must point out that Utah R. App. P. 5 may pose a similar problem with respect to contesting the trial court's holding of the TRO hearing on March 30, 2000. Rule 5 applies to interlocutory orders and this Court may determine it has a preclusive effect similar to that of Rule 4. The purpose of Rule 5, however, is different than the preclusive purpose of Rule 4. Arguably, therefore, Rule 5 does not apply.

"An interlocutory appeal is designed to review an intermediate order of the trial court upon which further proceedings in the trial court hinge." *State v. Potter*, 860 P.2d 952, 959 (Utah App. 1993) (Bench, J., dissenting, *citing*, *Manwill v. Oyler*, 361 P.2d 177, 178 (1961)). "Permission to proceed with such an appeal is granted only when it is 'essential to adjudicate principles of law or procedure in advance as a necessary foundation upon which the trial may proceed; or if there is a high likelihood that the litigation can be finally disposed of on such an appeal.'" *Williams v. State*, 716 P.2d 806, 808 n.2 (Utah 1986) (*quoting* *Manwill v. Oyler*,

11 Utah 2d 433, 435, 361 P.2d 177, 178 (1961). Thus, the Utah Supreme Court states:

[W]henever it appears likely that the matters in dispute can be finally disposed of upon a trial; or where they may become moot; or where they can, without involving any serious difficulty, abide determination in the event of an appeal after the trial, *the desired objective is best served by refusing to entertain an interlocutory appeal and letting the case proceed to trial.*

Manwill v. Oyler, (*supra*) as quoted in *Estate of Waters*, 2001 UT App 164, ¶ 23, 29 P.3d 2, 7 (emphasis added). With respect to the TRO, the Contempt Hearing itself would be the equivalent of trial under *Manwill*.

Thus, it appears that an earlier interlocutory appeal of the TRO may have been fruitless as an appeal under Rule 5. Therefore, that rule should not preclude raising the issue here. This would be consistent with the thoroughness and efficiency in the administration of justice espoused in *Manwill*; *see also Reed v. Alvey* 610 P.2d 1374, 1280 n. 23 (Utah 1980) and *Leger Const., Inc. v. Roberts, Inc.*, 550 P.2d 212, 214 (Utah 1976) (the law does not require the doing of that which is useless or impossible).

B. West's failure to earlier raise the issue of the TRO Hearing is not preclusive.

Plaintiffs also properly note that a failure to raise an issue before the trial court generally waives that issue for appeal and that West did not raise the issue of Rule 4-506's moratorium before the trial court. But West already addressed that problem in his opening brief, pointing out that matters involving plain error are an exception to that general rule. *State v. Holgate*, 2000 UT 74, 10 P.3d 346. (So too are matters where a person's liberty is at stake, as here. *Pratt v. City Council of City of Riverton*, 639 P.2d 172, 174 (Utah 1981).)

Plaintiffs do not address that exception, but rather cite to newer cases that simply restate the general rule, *e.g. Tebbs Family Partnership v. Rex*, 2001 WL 312387, No. 990681-CA (March 15, 2001). *Tebbs*, however, is an unpublished decision, which adds nothing to the general rule. West properly raised the issue of plain error and illustrated it in his opening brief and, therefore, that issue is properly before the Court. *Coleman ex rel. Schefski v. Stevens*, 2000 UT 98, ¶ 9, 17 P.3d 1122.

C. The trial court did not order a waiver of UCJA 4-506's time limit.

UCJA 4-506 provides that a court can deviate from its 20-day moratorium if it is “otherwise ordered by the court.” Plaintiffs argue that the trial court did so here, asserting for example (and without citation) that the trial court saw a reason to waive compliance with Rule 4-506. Appellees’ Brief p. 7. That, however, just did not happen. The trial court made no order whatsoever regarding a deviation from the 20 day moratorium. R. 376 - 379; *see* Record generally. Again, Plaintiffs point to nothing showing that the trial court even considered Rule 4-506, much less entered an order deviating from its time limit. Appellees’ Brief p. 6-7. (*See* Argument I, *supra* noting uncited references should be disregarded.) In fact, although the TRO makes findings of fact and issues orders, nowhere does it even mention Rule 4-506. R. 376 - 379. As near as one can tell, the trial court and all the attorneys (none of whom represented West) simply forgot the rules and statute.

In sum, the trial court committed plain error in proceeding with the TRO hearing in the manner it did. If this Court does not determine West’s argument on that issue is

precluded by Utah R. App. P. 5, the trial court's issuance of the TRO should be reversed because it failed to address Rule 4-506 at all.

III. The Trial Court's Factual Findings Cannot Support a Conclusion That West Violated the TRO any Specific Number of Times.

A. The factual findings do not tie into the effective period of the TRO.

West's second argument on brief was that the Trial Court's Factual Findings were insufficient to support its conclusion that West had committed over 100 separate acts in contempt of the TRO. The key factual findings in that Contempt Order are as follows:

1. On March 30, 2000 this Court entered a Temporary Restraining Order (the "Order") requiring, among other things, that Defendant cease acting as Trustee of the B.G. Holbrook Family Trust (the "Trust") and that all Trust Assets be frozen.

* * * *

8. From March 30, 2000 until on or about May 31, 2000, the Defendant initiated over 100 separate transactions, trades or transfers in or from the B.G. Holbrook Family Trust Account, resulting in a balance on May 31, 2000 of \$0.00.

R. 986. The TRO West purportedly violated provided that its term was effective from March 30, 2000 "for a period of ten (10) days or, upon termination of the hearing for preliminary injunction, *whichever is sooner*. R. 378 (emphasis added).

The law on written judgments parallels that of written contracts. If the language of the judgment is clear and unambiguous, the "judgment must be enforced as written." *Bettinger v. Bettinger*, 793 P.2d 389, 391 (Utah App. 1990) (citing *Park City Utah Corp. v. Ensign Co.*, 586 P.2d 446, 450 (Utah 1978)). Not only is the TRO clear and unambiguous, it tracks Utah law as effective dates, which provides that such an "order shall expire by its

terms within such time after entry, not to exceed ten days.” Utah R. Civ. P.65A(b)(2). The TRO did not issue until the bond undertaking was completed on March 31, 2000, and by its terms was effective until April 9, 2000. This Court should not look beyond the clear terms of the TRO itself. *See Birch Creek Irr. v. Prothero*, 858 P.2d 990, 994(Utah 1993) (noting a presumption that the trial court knew the contents of the order it authorized and refusing to speculate that the trial judge meant something else). This presumption is even more salient when it is remembered that West was unrepresented.

Thus, if during the 62 days between March 30, 2000 and May 31, 2000, West initiated stock transactions once, or even 100 times as the trial court found, that cannot establish that West violated the TRO even once during the ten days when it was in effect. There must be a finding that West violated the TRO on at least one day during its effective period. Findings that cover a larger time period and nothing else cannot do that. And even if the trial court extended the TRO to May 2, 2000 as Plaintiffs contend, the findings still suffer from the same defect. Even under that version, finding that West committed acts up to May 31, 2000 does not establish that he violated a TRO that terminated 28 days earlier on May 2, 2000.

B. West is not responsible for the lack of a transcript of the TRO Hearing.

Plaintiffs now cite to a video recording of the TRO Hearing that, again, is not part of the record on appeal. They claim that West consented to the extension of the TRO, with the reasons for the extension entered of record as shown on that video. Apparently they seek to excuse the fact that they cite to no transcript record of the TRO hearing and blame West for

“any error in presenting the transcript in the record on appeal,” asserting an eight month delay in filing his opening brief. Appellees’ Brief p. n. 2. Plaintiffs grossly mischaracterize the timetable in this case.

West filed his Opening brief on April 8, 2001 in accordance with this Court’s briefing schedule, just a little over five months after West had filed his Notice of Appeal. In fact, Plaintiffs then had the benefit of their own lengthy extension(s): almost seven months passed from the time West filed his opening brief until Plaintiffs filed their brief in opposition on November 2, 2001.

West’s appellate counsel became aware of this new claim of Plaintiffs’ at the proverbial last minute. West filed his notice of appeal on October 27, 2000 and requested a transcript of the Contempt hearing. At that time, West’s appellate counsel had no reason to believe the TRO could possibly mean anything other than what it said on its face. West did not object to the TRO’s actual findings or conclusions and, therefore, his counsel had no reason to request a transcript of the TRO hearing.

Because this matter was on appeal, West sought a certificate of probable cause from the trial court, seeking his release from jail. On March 29, 2001, Plaintiffs for the first time asserted that West himself had requested an extension of the TRO. By that time, however, West’s Opening Brief was substantially completed. Consequently, a note was added stating there might be a need to supplement the record on appeal. *See* Appellant’s Opening Brief p. 10, n. 2. However, Plaintiffs then had the benefit of significant extra time - seven months -

to file their brief. At no time did they seek to supplement the record on appeal and they should not be allowed to cite to a video tape no one else has or a nonexistent transcript.

IV. The Evidence was Insufficient Support a Finding of 100 Acts of Contempt.

Plaintiffs contend the Fidelity documents evidence more than 100 transactions initiated by West. Appellees' Brief p. 9. In doing so they seek to bootstrap the information in the Fidelity Reports into separate individual acts of contempt by West. Plaintiffs assert that "there is no need to speculate . . . when these [stock] transactions took place." Appellee's Brief p. 10. The Fidelity documents indeed show when certain trades and settlements occurred *from Fidelity's perspective*. But it is not Fidelity's acts that are at issue - it is West's acts. It was Plaintiffs' burden to show by clear and convincing evidence that West committed specific numerous acts of contempt during the effective period of the TRO. The evidence just failed to do that.

In his opening brief, West marshaled the evidence. It shows that both Plaintiffs and the trial court confused the concept of numerous transactions at Fidelity with the concept of the same number of acts by West. Accordingly, Plaintiffs try to equate those numerous stock "settlements" with numerous acts or initiations of transactions by West. But they are not the same and no amount of evidence can establish that they are. No evidence showed specific acts by West; no evidence showed his acts at any specific time; and no evidence compared trades or settlements at Fidelity with acts by West. Therefore no evidence tied the transactions at Fidelity with acts of contempt.

It is reasonable to infer that something happened at some time to precipitate numerous transactions. But that does not rise to the level of clear and convincing evidence that West committed an equal number of acts while the TRO was in effect. Moreover, Plaintiffs do not direct this Court to such evidence. It is true that there is no need to speculate when the transactions at Fidelity occurred, but they do not show what or when West did anything. Thus, it is Plaintiffs who would have the Court engage in speculation as to what West did, when he did it, and how many times. For the Fidelity transactions to evidence contempt, there must be some evidence correlating those transactions to specific acts by West. Without such evidence one must speculate that each settlement or trade was one act by West. The trial court did just that - it engaged in improper speculation when it found that West engaged in 100 acts of contempt based on a similar number of transactions at Fidelity.

V. The Trial Court did not have the Discretion to Sentence West to Numerous Consecutive Sentences.

Plaintiffs understate the holding of *Department of Registration v. Stone*, 587 P.2d 137 (Utah 1978). They assert it simply gives a trial court discretion to treat separate acts of a contemnor as separate acts for sentencing. That is only partially true, for *Stone* goes on to limit that discretion.

Under *Stone*, the contempt statute “permits the imposition of sentence only where the person accused of contempt is determined to be ‘guilty of the contempt charged.’” *Stone*, 587 P.2d 138-139 (Utah 1978) (quoting Utah Code Ann. § 78-32-10). In turn, the “contempt charged” is set forth in the charging documents. Here, as in *Stone*, those consisted of the

order to show cause, the motion and supporting affidavit. *Stone*, 587 P.2d at 139 (Utah 1978); *see* R. 750 - 757 (affidavit of Plaintiffs' attorney). In *Stone*, the Utah Supreme Court applied a due process analysis and held the charging documents there to be insufficient to impose multiple sentences: they did not allege the multiple offenses, but rather a course of conduct. *Stone*, 587 P.2d at 139 (Utah 1978).

The same result obtains here. Plaintiffs argue that 154 instances of contempt were "individually set forth in [their] Memorandum in Support and the hearing and documented by the account statements from Fidelity." Appellees' Brief p. 13. But again Plaintiffs do not tell us where in the record this is located and such claims should be disregarded. (*See* Argument I, *supra*.) Moreover, even if individual instances of West's conduct were set forth at hearing, they must also be disregarded under *Stone*'s due process analysis. In that case, multiple individual violations were also adduced at hearing. But the hearing is not the charging document and, therefore, finding multiple instances at hearing does not allow the imposition of multiple sentences. *Stone*, 587 P.2d at 138 (Utah 1978).

Moreover, the Fidelity documents do not set forth individual acts of contempt by West, but rather transactions at Fidelity. Plaintiffs never tied those to specific acts by West. Thus, the Fidelity documents do not charge multiple violations by West. Plaintiffs believe, however, that their Memorandum in Support enumerates "291 instances of contempt." Appellees' Brief p. 13. But again, Plaintiffs simply confuse the concept of the numerous instances of conduct with conduct that results in numerous transactions. Their Memorandum

does set out a *course of conduct* that resulted in numerous alleged transactions. And West concedes that its language may be fairly read to allege as many two or three courses of conduct, but not 154, or even the 100 the trial court determined.

For example it asserts that “on March 31, 2000 [West] initiated ten transactions” and in April he initiated 154 more. R. 740. That, however, is classic course of conduct language, which charges two courses of conduct by initiating multiple transactions on two different occasions. It is not an allegation of 154 or 164 separate acts by West, nor is that even a reasonable inference. Since only a course of conduct was alleged, the trial court did not have discretion to sentence West based on 100 acts of contempt. *Department of Registration v. Stone*, 587 P.2d 137 (Utah 1978).

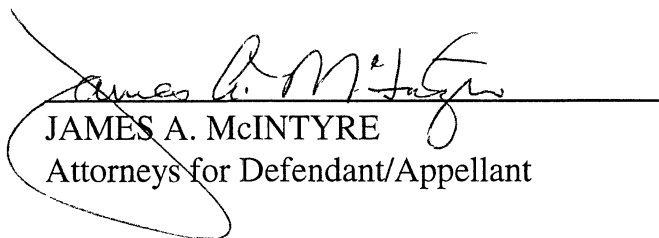
CONCLUSION

This Court should reverse the trial court’s decision finding that West had engaged in over 100 separate acts of contempt and sentencing him to at least 12 consecutive sentences. The trial court erred because, in proceeding with the TRO hearing in the first place, it ignored the 20-day moratorium imposed by UCJA 4-506, and committed plain error in the process. The factual findings do not support the conclusion that West violated the TRO over 100 times because, even under Plaintiffs’ version, those findings cover a time period when TRO was not in effect and the findings do not set specific dates for any violation. Moreover, the evidence did not support those findings of fact. No evidence showed when or what West did that resulted in the numerous transactions shown in the Fidelity documents. No evidence

related his acts with those transactions. Also, the trial court did not have discretion to sentence West to twelve consecutive sentences because the charging documents brought against West did not allege that many instances of conduct by him. Rather, they alleged a course of conduct or, at most, three courses of conduct. Finally, much of Appellees' Brief should be disregarded for its failure to properly cite to the record, including references to the TRO Hearing tape, which Plaintiffs themselves failed to have transcribed.

DATED this 4th day of January, 2002.

McINTYRE & GOLDEN, L.C.



JAMES A. McINTYRE
Attorneys for Defendant/Appellant

I:\Clients\Holbrook, West (Appeal)\Reply Brief Final.wpd

CERTIFICATE OF MAILING

I hereby certify that I mailed, postage pre-paid, a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** to the following on this 4th day of January, 2002.

A handwritten signature in black ink, appearing to read "James S. Jardine", written over a horizontal line.

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