

2001

Jay Peterson v. City of Provo : Brief of Appellant

Utah Court of Appeals

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Jay Peterson; pro se.

Gary L. Gregerson; David C. Dixon; Gary A. McGinn.

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IN THE UTAH COURT OF APPEALS

Jay Peterson,
Plaintiff and Appellant,
~~CA~~

Appellate Case No. 20010319-CA

Priority No. 15

v.

City of Provo,
Defendant and Appellee.

Appeal from the Fourth District Court, Utah County. Judge Schofield

BRIEF OF THE APPELLANT

Jay Peterson
Appellant pro se
2025 North 1450 East
Provo, Utah 84604

FILED
Utah Court of App
DEC 12 2001

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STATEMENT OF JURISDICTION

This court has jurisdiction to hear this appeal pursuant to UCA 78-2a-3(2)(b)(i), UCA 78-2a-3(2)(d), and UCA 78-2a-3a(2)(j) as previously argued at length in Appellant's Memorandum on file in this Court of Appeals

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Was Appellant given "adequate notice" when the notice of violation issued by Provo City merely stated, "illegal accessory building?" Reviewed for correctness, State v. Lopez, 1999 UT 24, P6, 980 P2d 191. (The Notice of Violation is attached hereto as Exhibit A in the Addendum.)
2. Was it plain error for both the hearing officer in Provo City Court and the District Court judge to simply invent an imaginary ordinance providing that the Uniform Building Code requires a "building permit?" Reviewed by the three part test in State v. Dunn, 850 P2d 1201 (1208-1209)(Utah 1993)
3. Did the District Court error in failing to admit Appellant's proffered affidavit in complete defense to any possible conviction? Reviewed for correctness.
4. Can the conviction for, or finding of violation of, a penalizing ordinance be based upon neither a preponderance of the evidence,

nor proof beyond a reasonable doubt, nor substantial evidence of each of its elements: (1) no permit, (2) excessive size, or (3) “required by the “Uniform Building Code.” Reviewed at least for substantial evidence, Schmidt v. Utah State Tax Comm’n, 1999 UT 48, P7, 980P2d 690.

5. Was the Provo City hearing officer improperly biased, a due process violation material to the result, when he was receiving personally a bribe-like, virtual commission of \$100 for each “conviction” and was employed and selected for each hearing by the personal decision of the prosecutor, a virtual “yes man” and pawn of one of the adverse parties. Reviewed de novo by the inherent authority of any court to police its own integrity
6. Was appellant denied material due process rights when he was unable to cross examine the secretary of the Provo building department, custodian of the records, who did not attend the hearing and was on vacation shortly thereafter? Reviewed for correctness.
7. Is appellant protected by double jeopardy from a second trial of a penalizing city ordinance? Reviewed for correctness, State v. Lopez, Id.

DETERMINATIVE LAW

Provo City Ordinances:

17.01.03.020 Notice of Violation, “The notice of violation shall include the following information:.. .(d) All code sections violated and a description of the condition that violates the applicable code.”

17.02 010. Administrative Enforcement Hearings. “Due Process of law shall require adequate notice, an opportunity to request and to participate in any hearing, and an adequate explanation of the reasons justifying any resulting action.”

17.02.60 Procedures at Administrative Enforcement Hearing “4)

Each party shall have the opportunity to cross-examine witnesses and present evidence in support of his case”

STATEMENT OF THE CASE

Appellant was served with a “notice of violation” merely alleging an “illegal accessory building.” Appellant then paid \$10 for a copy of the city file that provided no further factual allegations. A hearing was held in Provo City Court by a hearing officer selected for each case and paid by the zoning enforcement manager. The hearing officer found no violations based upon the extensive “evidence” presented by the city during most of the hearing, but decided that there was a violation of an imaginary ordinance based upon

a last minute comment at the end of the hearing by city employee Cleo Davis on an entirely new issue. Appellant asked for review in the District Court but that court found the same violation of the same imaginary ordinance without ever reading the ordinances. Appellant appealed to the Court of Appeals, the case was transferred to the Supreme Court and then back to the Court of Appeals.

STATEMENT OF FACTS

Appellant was cited for violating Provo City Ordinance 14.10.080 with a violation description of only “illegal accessory building,” attached in the Addendum as Exhibit A. This ordinance is entitled, “**Yard Requirements,**” and lists approximately thirty rather lengthy requirements as to the portion of the yard upon which an accessory building can be located. Appellant paid \$10 for a copy of the city file regarding this “violation,” but still could only guess at what the violation might be at the time of the hearing.

At the hearing, city employee Cleo Davis introduced into “evidence” a graphic that he had drawn showing a building that was only fifteen feet from the front property line, a violation of the “yard requirements” if true. When asked where the front property line was he testified under oath, “I have no idea,” and admitted that he had not measured the alleged violation

but had only guessed. Frustrated by his inability to prosecute appellant for anything during the very lengthy hearing, he then at the very end of the hearing uttered in the nature of hearsay that the same building did not have a building permit. The secretary of the building department is the custodian of the records, did not attend the hearing, did not testify, and left for vacation shortly after the hearing.

The hearing officer was an attorney who works as an independent contractor. Although he doesn't literally "chase ambulances," he must engage in the usual attorney solicitations or related activities in order to put bread on his table. The manager of zoning enforcement for Provo City, in addition to notifying appellant in writing that hearsay evidence would be admissible at her hearings, selects and pays a hearing officer for each of her pet hearings and has very substantial control over him. Undoubtably there is an implicit if not explicit agreement between them that the hearing officer will make every effort to "convict" someone at every hearing so that the "convicted party" will pay his \$100 fee instead of imposing it upon the zoning manager who will be unlikely to again hire that hearing officer if she must pay him from her own budget. In this case, the hearing officer, to grovel for his pay, seized upon the last minute utterance of Cleo Davis and

slickly imagined that “Yard Requirements” included the requirement for a building permit which they do not.

SUMMARY OF THE ARGUMENT

Appellant cannot be convicted of an imaginary penal violation by any stretch of even the most tenuous arguments. In addition, any conviction cannot be affirmed when there has been a glaring, egregious, intentional and material lack of adequate notice. The other failures of due process, the non-admittance of the defensive affidavit, lack of any evidence but hearsay, no opportunity to cross-examine, the biased hearing officer, and the proposed use of a double jeopardy second prosecution are still more reason to reverse the conviction for the imaginary violation.

DETAIL OF THE ARGUMENT

POINT ONE.

APPELLANT DID NOT RECEIVE ADEQUATE NOTICE WHEN CITED ONLY FOR AN “ILLEGAL ACCESSORY BUILDING.”

The Utah Court of Appeals condemned a shady procedure similar to this one in Provo City Court in the earlier case of State of Utah, re HJ, MJ, JM vs. State of Utah, (Ct.App. 1999) 986 P2d 115, 1999 Utah App. Lexis 109 and stated:

“In addition, due process concerns are implicated when a hearing for one purpose serves a second purpose involving different issues. Due

Process requires ‘timely notice’ which adequately identifies the specific issues they must prepare to meet. L.A.W. v. State, 970 P2d 284, 294 (Utah Ctr. App. 1998) Furthermore, parties are ‘entitled’ to notice that a particular issue is being considered by a court. Id. at 295. Adequate notice and an opportunity to be heard in a meaningful way are at the very heart of procedural fairness. Id. at 294. Due Process is not met when notice is ambiguous or insufficient to identify the issues to be considered, thus impeding a party’s preparation for the proceedings. See Id.”

In the State of Utah case, the hearing was noticed as a temporary custody hearing but evidence was then introduced for fitness for adoption. In this Provo City case, a lengthy “yard requirements” ordinance was cited and noticed but then at the last minute at the end of the hearing, hearsay evidence was uttered on an entirely different issue, a past building permit. In an attempt to avoid the obvious notice problem, the hearing officer, to collect his \$100 from the least powerful party, then imagined that the utterance did provide a basis for a violation of “yard requirements.” It simply does not do so. Even if it did, the same lack of adequate notice makes a conviction impossible to affirm. The lack of notice was very material and would have changed the outcome as Appellant’s proffered affidavit, refused by the District Court, established that Provo ordinances do not even require a building permit for the relevant building(s).

POINT TWO.

IT IS PLAIN ERROR TO CONVICT APPELLANT OF AN
IMAGINARY ORDINANCE.

The three part test in State v. Dunn, 850 P2d 1201. (Utah 1993), provides that there has been a plain error when an error exists, should have been obvious, and would have changed the outcome. All three parts are met here as the “Yard Requirements” in no way includes a requirement for a building permit. Appellant cannot be convicted of violating the “Yard Requirements” upon the hearsay utterance that the relevant building did not have a building permit. Additionally, there cannot be any evidence: hearsay, substantial, or otherwise to support the conviction for violating an imaginary ordinance.

This slick interpretation of the “Yard Requirements” ordinance, to render a make believe, imaginary violation, is especially offensive to the law abiding of Utah because of our long history of case decisions requiring that such ordinances be strictly construed in favor of the defendant or landowner. As one in a long line of cases, the Utah court found in Brown v. Sandy City Board of Adjustment, 957 P2d 207 (Utah App.1998) that ordinances that regulate land use are in derogation of the common law and must be strictly construed in favor of the landowner. Chief Justice Marshall himself wrote in U.S. v. Wittberger, 5 L.Ed. 37 (1820) that:

“The Rule that penal laws are to be strictly construed, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of the individual; and on the plain principle, that the power of punishment is vested in the legislature; not in the judicial department. It is the legislature, not the court, which is to define a crime, and ordain its punishment.”

POINT THREE.

APPELLANT’S CONVICTION CANNOT BE AFFIRMED BASED
UPON THE OTHER DUE PROCESS VIOLATIONS.

In Dairy Products Services v. City of Wellville, 2000 UT 81, 13 P3d 581, the Utah court stated;

“To be considered a meaningful hearing, the concerns of the affected parties should be heard by an impartial decision maker.”

The court went on to list a fairly direct benefit to the decision maker when he makes a decision in favor of one party as grounds for disqualification. In this case, the vital benefit of continued employment will influence the hearing officer in Provo City Court to always make a conviction in every case regardless of the innocence of the accused. If he ever ventures to be completely fair and lawful, he will be fired from a lucrative job paid for by the sweat of his suffering victims.

In State v. Arbon, 909 P2d 1270, 1272 (Utah App. 1996), the Utah court decided that it would henceforth disregard the label “civil” when according to its two part test a proceedings is in fact penal in nature and

apply the constitutional law of double jeopardy. That two part test is easily met in this penal case regardless of any attempt by Provo City to exploit the potential “civil” status of this proceedings.

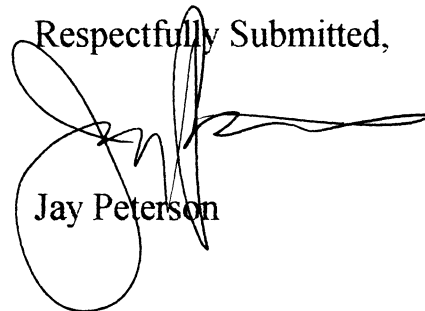
CONCLUSION

The conviction of appellant cannot be affirmed because of the plain error in finding a violation of an imaginary ordinance and the complete lack of adequate notice. The other violations of due process and Provo ordinance are yet further grounds for both a reversal and also an ancillary finding by this court that appellant cannot be prosecuted a proposed second time for the same offenses according to the application of the law of double jeopardy.

The policy of Provo City to only prosecute by complaint and prosecute every complaint regardless of merit has inevitably led to racist prosecutions in Utah’s statistically most racist large city.

DATED this 13th day of December, 2001

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Jay Peterson", is written over the printed name. The signature is stylized with a large loop at the beginning and a long horizontal stroke extending to the right.

Jay Peterson

EXHIBIT A

PROVO CITY NOTICE OF VIOLATION

1361

Date: June 22, 2000 **Time:** A.M. (violation observed) **File #:** 13-22-5
Corrections indicated below are required to be completed by the date of July 13, 2000. Failure to make the indicated corrections by this date will result in a fee of \$30.00 per violation. This fee shall accrue daily until the violation is corrected or until the maximum amount of civil fees of \$600.00 per violation has been reached. The City demands that you cease and desist from further action causing these violations and commence and complete all actions to correct the violations. When the violation is brought into compliance, the responsible person must request an inspection.

Peterson, Jay 377-754 Kaleidoscope Holding Corp., Jay Peterson
Person Cited Last First MI Phone # Affiliation to Violation
2005 North 1450 East, Provo, Utah, 84604 Kaleidoscope Holding Corp., Jay Peterson
Mailing Address Business Name
2005 North 1450 East, Provo, Utah, 84604 48:016:0001
Violation Address Parcel Number

MUNICIPAL CODE SECTION VIOLATED	VIOLATION DESCRIPTION
<u>14.10.020</u>	<u>Storage units within the R-1 zone</u>
<u>14.10.080</u>	<u>Illegal Accessory Building</u>

CORRECTIONS REQUIRED.

- Remove the Storage units from the R-1 zone.
- Remove the Storage units from the R-1 zone, or comply with the Building Codes and comply with the zoning requirements.

[Signature] Clec Davis
Signature of Issuing Officer Print Name of Issuing Officer
852-6400 June 22, 2000
Telephone No Issued Date

Signature of Person Cited

RIGHTS OF APPEAL

You have the right to request a hearing on this administrative citation within ten (10) days from the date the citation was issued. If the citation was mailed, the request must be made within thirteen (13) days. The request must be made in writing to the Nuisance Abatement Coordinator. Please include your name, address, telephone number, case number and violation address. A request will result in an administrative hearing which you should plan to attend. You may hire an attorney to represent you in the hearing although it is not required. An attorney will not be appointed for you.

FAILURE TO PROPERLY FILE A WRITTEN REQUEST FOR A HEARING WITHIN TEN (10) DAYS WAIVES YOUR RIGHT TO A HEARING.

CONSEQUENCES OF FAILURE TO CORRECT VIOLATIONS.

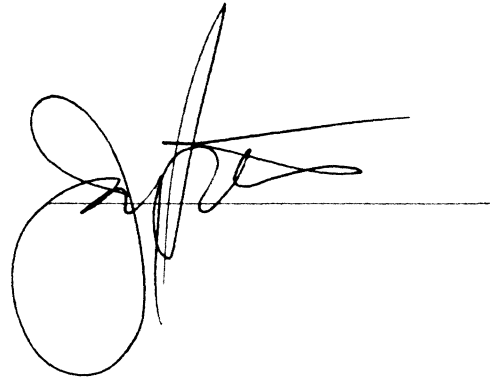
There are numerous enforcement options that can be used to encourage the correction of violations. These options include, but are not limited to: criminal prosecution, civil fees, revocation of permits, recordation of notice of violation, withholding of municipal permits, abatement of the violation costs, administrative fees, tax liens against the property and any other legal remedies. The failure to pay fines assessed by the Administrative Citation may result in a claim with the Small Claims Court or any other legal remedy to collect such money. The City has the authority to collect all costs associated with the filing of such actions including the cost of the citation, the cost of the hearing, the cost of the enforcement action, and the cost of the collection action. This notice is issued to Provo City Community Development Nuisance

EX
A

Certificate of Service

I hereby certify that I caused to be mailed, in the United States Mails, postage prepaid, on this 13th day of December, 2001, a true and correct copy of the foregoing, APPELLANT'S BRIEF to the following:

David C. Dixon
Attorney for Provo City
P.O. Box 1849
Provo, Utah 84603

A handwritten signature in black ink, appearing to read "David C. Dixon", is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke extending to the right.