1968

Celeste Bott v. Mary Turner Bott : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

CELESTE BOTT,
Plaintiff-Appellant,

vs.

MARY TURNER BOTT,
Defendant-Respondent.

Case No. 11266

BRIEF OF APPELLANT

Appeal from the Order of the Third Judicial District Court in and for Salt Lake County, the Honorable Joseph G. Jeppson, Presiding

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NATURE OF THE CASE

This matter arises out of an action for divorce involving events arising subsequent to the rendition of the Decree of Divorce, whereby plaintiff was granted a Decree of Divorce from defendant, and defendant was awarded a Decree of Divorce from plaintiff on her counterclaim.

DISPOSITION OF CASE IN LOWER COURT

This is an appeal from a judgment and order holding the appellant in contempt of court for failure to comply with the Decree of Divorce, and further restraining plaintiff from maintaining a separate cause of action against defendant for adjudication or personal property rights in and to certain personal property that plaintiff claims defendant removed from his dwelling house.

RELIEF SOUGHT ON APPEAL

The appellant seeks a reversal of the trial court's order dated May 2, 1968, on the grounds that the court, in holding the plaintiff in contempt thereof, violated plaintiff's constitutional rights, and the court in its entering a restraining order restraining plaintiff from pursuing his cause of action against defendant did so contrary to law.

FACTS

Plaintiff and defendant were divorced in July of 1966; and at the time of the rendition of the Decree of Divorce, the defendant was awarded *in lieu of alimony* the sum of $2,400.00 payable at the rate of $200.00 per month for one year without interest. (R-28)

In addition thereto, defendant was awarded certain items of personal property, which by a further memorandum decision rendered by the Court on September 23,

1966, additional personal property was given to the defendant. (R-32, 33)

Thereafter, the defendant removed herself from the dwelling house that had been awarded to the plaintiff, but according to the allegations of plaintiff removed personal property not awarded to her, having a value in excess of $2,000.00. (R-99)

The plaintiff, by reason of defendant's conduct, refused to pay the balance of the $2,400.00 called for in the original Decree of Divorce, claiming an offset for the property removed by defendant. (R-99, 100) Subsequently, the defendant caused an order to show cause to be issued ordering the plaintiff to appear and show cause why he should not be held in contempt of court for his failure to pay the judgment. This matter was the subject of an appeal to the Supreme Court of Utah, Case No. 10992, the decision of the Supreme Court being rendered on February 19, 1968. (R-73)

At the time of the hearing on the order to show cause, the court went into matters not plead pursuant to Utah Rules of Civil Procedure, but did adjudicate the property rights of the plaintiff in and to certain personal property which he claimed defendant had removed from the dwelling house. In addition thereto, the court held that the plaintiff was in contempt of court and ordered him to serve five days in the County Jail.

The court, in its decision, held that even though there was only three days notice to the plaintiff, and

even though there had been no written pleadings filed, the matter with regard to the adjudication of the property rights was properly before the court; but the court did rule that because no affidavit had been filed with regards to the alleged contempt, the court had improperly held the plaintiff to be in contempt of court.

Following the rendition of the Supreme Court's decision, the defendant filed an affidavit in compliance with the Utah statute, and proceeded to a new adjudication as to whether or not the plaintiff was in contempt of court. The court found that he was, and ordered him to serve fifteen days in the County Jail. (R-120)

In addition thereto, the court entered a restraining order restraining plaintiff from continuing an independent action filed by plaintiff against the defendant to adjudicate property rights in certain personal property that plaintiff claims defendant has. The property rights are not the same as those adjudicated by the court previously. (R-113)

ARGUMENT

POINT I

APPELLANT'S CONSTITUTIONAL RIGHTS WERE VIOLATED IN HOLDING HIM IN CONTEMPT OF COURT FOR HIS FAILURE TO PAY A MONEY JUDGMENT.

Under the original Decree of Divorce, the appellant was ordered to pay to the respondent a money

judgment of $2,400.00. (R-28) The appellant's refusal to pay this money judgment may not be punished by contempt of court in that the Constitution of Utah specifically holds that there shall be no imprisonment for debt. Article I, Section 16, Constitution of Utah.

Imprisonment for debt, while popular in the early colonial days of our country, fell into disuse hundreds of years ago, and the various states of the Union, in enacting their constitutions, expressly prohibited imprisonment for debt. In speaking of the subject, 16 Am Jur 2nd, 723, Constitutional Law, Section 386, observed:

> "In a few other states, the constitution forbids imprisonment for debt, except in cases of absconding debtors. Such a prohibition is broad and sweeping, and no limitations should be read into it except that exception which actually exists, inserted by the makers of the constitution themselves in accordance with their expressed intention." (citing cases)

The provision of the Utah Constitution, Article I, Section 16, reads:

> "There shall be no imprisonment for debt except in cases of absconding debtors."

It is obvious from the reading of the Utah Constitution, and from the observations made by the authors of American Jurisprudence, that the only limitation that the framers of the Utah Constitution saw fit to place therein was for absconding debtors.

It is recognized by the appellant that courts may enforce their decrees with regards to the payment of "alimony" and "support money," by contempt of court proceedings. With this plaintiff makes no quarrel, and in fact recognizes that the great weight of authority holds this to be the law. However, under the facts of the instant case, the trial court at the time of the rendition of the decree specifically stated that the $2,400.00 due to the respondent was "in lieu of alimony," and therefore constituted nothing more than a money judgment. As this is in fact a money judgment, the court may not enforce under the guise of enforcing the payment of alimony, an order compelling the payment of this money judgment. To do so flies in the teeth of the constitutional prohibition of imprisonment for debt. If this were the case, any money judgment rendered by a court could be followed by an order of court directing the judgment debtor to pay the judgment upon punishment of contempt proceedings if he failed so to do. This would in effect be imprisonment for debt if the debtor did not pay the money judgment.

The law has provided the remedies of a judgment creditor to collect a money judgment.

There is nothing to prevent the respondent in this matter from pursuing her statutory rights to collect by execution and garnishment. But to allow the court, through the medium of contempt proceedings on the theory that this is a domestic relations affair, to hold the plaintiff in contempt of court and punishing him by

placing him in jail is to go contrary to the constitutional guarantees afforded the appellant.

Had the trial court wished to denominate this $2,400.00 as "alimony," it could have done so not only on the occasion of rendering the original Decree of Divorce, but at the time it rendered its subsequent modifications of that decree, and so far as that goes at the time that it in effect modified the Decree of Divorce at the time of the hearing in June of 1967, which gave rise to the first appeal of this matter.

Alimony means money for the support of a divorced wife. *Anderson v. Anderson,* 110 U. 300, 172 P.2d 132. When the court stated that the $2,400.00 was in *"lieu of alimony,"* it left nothing to conjecture that the $2,400.00 was for the wife's support.

A similar case as the one before the Court now arose in California in the matter of *Bradley v. Superior Court* (Supreme Court of California, 1957) 310 P.2d 634. In this case the parties had entered into a property settlement agreement which was incorporated into the Decree of Divorce. This called for periodic payments by the husband to the wife of certain income which he derived from mining properties. He refused to pay part of these payments, and was held in contempt of court and sentenced to jail. The husband asserted the provisions of the California Constitution, Article I, Section 14, which states:

> "No person shall be imprisoned for debt in any civil action, on mense or final process, unless

in cases of fraud, nor in civil actions for torts, except in cases for willful injury to person or property; and no person shall be imprisoned for a militia fine in time of peace."

The California court held that this provision of the Constitution barred the imprisonment of the husband for the nonpayment to the wife of this money on the theory that the moneys due were not alimony or support money, but was part of a property settlement and therefore only enforceable as any normal money judgment. The court reflected and said:

> "Although 'as in the case of all constitutional provisions designed to safeguard the liberties of the person, every doubt should be resolved in favor of the liberty of the citizen in the enforcement of the constitutional provision that no person shall be imprisoned for debt.' (Citing Authority) A court may nevertheless punish by imprisonment as a contempt the willful act of a spouse (or former spouse) who, having the ability and opportunity to comply, deliberately refuses to pay a valid order to pay alimony or an allowance for the support of the other spouse (or former other spouse). It is held that the obligation to make such payments is not a 'debt' within the meaning of the constitutional guarantee against imprisonment for debt. (Citing Cases)"
>
> "Where, however, the payments provided in the property settlement agreement constitute an adjustment of property interests, rather than alimony, support or maintenance, the more generally prevailing rule is stated to be that decrees based thereon are not enforceable by contempt proceedings."

The court, in summarizing its position, stated:

> "Inasmuch as it has been finally determined as between the parties that the payments to be made by petitioner to Francis in the present case constitute 'an inseverable part of an integrated adjustment of all property relations of the parties and not * * * a severable portion for alimony' (citing cases) we conclude that enforcement of such payments by contempt proceedings is forbidden by the constitutional prohibition against imprisonment for debt."

Arizona had a like situation arise in the case of *Stone v. Stidham, Judge* (1964) 96 Ariz 235, 393 P.2d 923, wherein the Supreme Court of Arizona, in holding that a writ of prohibition would lie against the Superior Court to enforce a Decree of Divorce by contempt proceedings, stated:

> "As in all cases of constitutional provisions, designed to safeguard the liberty of the person, every reasonable doubt should be resolved in favor of such liberty."
>
> "The term alimony does not contemplate a settlement of property interest or general endowment of wealth. Like the alimentum in civil law from which the word was derived, it has for its sole object the provision of food, clothing, habitation and other necessities for support. We believe the better view is that the decree incorporating property settlement agreement cannot be enforced by contempt proceedings."

This court further pointed out that the question of whether "alimony" or a "property settlement" was involved

would not be determined by the Supreme Court, but would be determined by the trial court or the court of first instance. We submit that in the case now before this court the determination as to whether or not this was in fact "alimony" or a "property settlement" was decided by the court when it denominated the moneys due to the defendant as moneys "in lieu of alimony," consequently this question has been laid to rest by the trial court in the original Decree of Divorce.

POINT II

THE TRIAL COURT HAD INSUFFICIENT EVIDENCE UPON WHICH TO BASE A CONTEMPT OF COURT FINDING.

The appellant in this matter testified at the time of the second hearing, and for that matter at the time of the first hearing on the contempt of court citation, that the reason he had not paid his wife was that she had removed personal property belonging to him from the family home, and refused to return it, and that he was claiming an offset against the moneys he was ordered to pay her "in lieu of alimony." (R-98, 99, 100). Mr. Bott stated when he was asked:

> "Why did you stop paying her."
>
> ANSWER: "Because when she moved I stayed home from work one time. I wanted to see she got out of the house. She didn't pack anything when I was there. I told her, knowing her as I did, I said 'Anything you take that don't

belong to you I will have to charge it back to you.' And that is what she did. It took me quite a while to find out everything. That is why I didn't pay her anything."

QUESTION: "You stopped paying because you found out some of your things were missing?"

ANSWER: "Yes."

QUESTION: "And you told her you would charge her up for anything she took that belonged to you?"

ANSWER: "Right" (R-98, 99, 100)

It is respectfully submitted that an offset is justification for nonpayment, and that therefore appellant did not stand in contempt of the court's order.

POINT III

APPELLANT'S CONSTITUTIONAL GUARANTEES OF DOUBLE JEOPARDY HAVE BEEN VIOLATED.

The appellant in this matter was put on trial by the District Court in June of 1967, for contempt of court. This contempt of court conviction was overturned by the Supreme Court of Utah in February of 1968. Subsequently the appellant was tried a second time for the same alleged contempt of court, the contempt of court allegations covering the same period of time as was adjudicated in the prior action. It is respectfully submitted that pursuant to Article I, Section 12 of the Constitution of Utah, the appellant may not be put

twice in jeopardy for the same offense. *State v. Whitman,* 93 U. 557, 74 P.2d 696; *State v. Sandman,* 4 U.2d 69, 286 P.2d 1060.

It will be argued to the court that the holding of the Supreme Court in February of 1968 was to rule that the court had no jurisdiction and therefore double jeopardy will not attach. *State v. Empey,* 65 U. 609, 239 P. 25. It is respectfully submitted, however, that if the court had no jurisdiction as to the contempt of court charge, it also had no jurisdiction to proceed forward with the other matters which were incident to and based upon the motion for contempt citation which brought the parties before the court in the first instance. Therefore, it is submitted that the court's ruling in February of 1968 must stand for the proposition that the court did have jurisdiction over the parties, and that the Supreme Court's holding that the contempt of court could not stand now invokes the doctrine of double jeopardy.

It is submitted that the Supreme Court is faced with a paradoxical situation of either the court had jurisdiction over the parties in the first instance in June of 1967, for all purposes or it did not have jurisdiction over the parties for any purpose, and as it ruled previously that it did in fact have jurisdiction for the purposes of settling and trying issues of property, then it must have had jurisdiction over the person of the appellant, although for procedural reasons the trial court's judgment as to contempt of court was in error.

POINT IV

THE TRIAL COURT COMMITTED ERROR IN ENTERING AN INJUNCTIVE ORDER AGAINST APPELLANT FROM PROSECUTING A CIVIL ACTION AGAINST RESPONDENT.

The appellant instituted an action against respondent on March 27, 1968, in the District Court of Salt Lake County, State of Utah, entitled *Celeste Bott v. Mary Turner Bott,* Civil No. 178623, said action being for the recovery of a money judgment for the wrongful conversion of personal property. The District Court, without having examined the file, but taking judicial notice of it, made a determination over the objection of appellant that the matter therein contained had been adjudicated in the matter presented to the Supreme Court heretofore. It was pointed out to the court at that time that this was not the fact, and that at the previous hearing in June of 1967, all of the property which respondent had taken from the appellant's dwelling house had not been adjudicated and that this law suit sought to do just that.

The Constitution of Utah has guaranteed to the appellant his right to the courts of this State, and the right to prosecute an action before the courts of this State.

Article I, Section 11, provides:

> "All courts shall be open, and every person, for any 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."

It is respectfully submitted that if in fact this action filed by the appellant against respondent was barred by the doctrine of res judicata, this would constitute an affirmative defense which must be raised before the court having jurisdiction over that matter by the filing of a proper motion in that case. Rule 8(c), Utah Rules of Civil Procedure, states:

> "Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively * * * res judicata * * * and any other matter constituting an avoidance or affirmative defense."

It is respectfully submitted that the trial court exceeded its jurisdiction in entering the injunctive order in the divorce action against the appellant from continuing further proceedings in his independent action filed in District Court. It is submitted that the proper procedure should have been the filing of a motion to dismiss based upon res judicata in the independent action, and upon examination of the facts, the opportunity to file affidavits and other evidence, the court could then have determined whether or not the defense of res judicata in that action was applicable.

The method employed by the District Court in enjoining the appellant from proceeding forward with

his independent action is contrary to Article I, Section 11, of the Constitution of the State of Utah.

POINT V

THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO A GREATER TERM IN JAIL THAN THAT ORIGINALLY ORDERED.

The appellant in June of 1967 was ordered committed to the County Jail for a period of five days. This order was overturned by the Supreme Court. The trial court, in hearing the same case on the same merits, with the same evidence covering the same period of time, increased the punishment of appellant three fold by ordering him to be committed for a period of fifteen days.

It is submitted that to increase the punishment of appellant is to in effect deprive him of equal protections of the laws and of due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States, as well as to the constitutional guarantees under the Constitution of the State of Utah.

It is submitted that the law should be that an accused should not be punished for his willingness to challenge by an appeal to a higher court a lower court's ruling, and if it is found that the lower court lacked jurisdiction over the appellant in the first instance then the appellant should not be punished by a greater imposition of fine or imprisonment upon a second trial.

It is admitted by appellant that he can cite no general law to the court that this is the law. But it should be the law. To the contrary, it is admitted that it has been held that where a person has been charged with a crime, found guilty, and sentenced to imprisonment, and subsequently it is found that the court lacked jurisdiction, that that person may be tried again for that offense and greater or lesser punishment may be meted out, the theory being that if the court had no jurisdiction anything that it did was void and therefore the accused had no been injured or harmed in any way, even though by reason of his availing himself of his constitutional guarantees to a fair trial by appealing to a higher court he runs the risk of greater punishment.

It is submitted that to allow the court to inflict greater punishment upon one who had exercised his constitutional guarantees is to in effect "chill the assertion of constitutional rights by penalizing those who chose to exercise them." *United States v. Jackson* (1968) ..... U.S. ....., 20 L.ed 2d 138, 88 S.Ct ..... In this case, which arose under the constitutionality of the Lindbergh kidnap law and the imposing of the death penalty for demanding trial by jury, the Supreme Court pointed out that a law which had the effect of inducing defendants not to contest in "full measure" was patfully unconstitutional. The appellant does not claim that the Jackson case is relevant to the issues before this court, except that it does point up that the law may not be designed so that an accused will not avail himself of his constitutional guarantees for fear of added punish-

ment. In this respect it is submitted that the situation is analogous where if one wishes to avail himself of his constitutional guarantees to an appeal (Article I, Section 12, Utah Constitution) he should not be put in jeopardy of having additional punishment placed upon him when it turns out in that appeal that the court lacked jurisdiction to try him in the first instance and that upon retrial, upon the same facts and circumstances, punishment is meted out to him in excess of that which was pronounced in the first instance.

Where the appellant was sentenced to five days in jail upon his first trial, and upon the identical same facts at a second trial, his punishment is increased three fold, it would appear to the appellant that the court is punishing him not for the contempt before the court but for having taken an appeal to the Supreme Court and having prevailed over the rulings of the District Court.

It is one thing to state that a trial where there was no jurisdiction is void and therefore the accused may be tried a second time for the same offense, but is something else to say that the accused, if he seeks to avail himself of his constitutional guarantees that he should proceed on his own peril that if he should prevail he may be punished twice, three or four-fold over that which he had been sentenced to in the first trial, if he should prevail and be tried a second time. The consequential effect of this rule of law is to effectively prevent an accused from availing himself of his constitu-

tional guarantees for fear of the results of his act. In the case at hand it is evident that the assertion of appellant's constitutional guarantees brought about an infliction of greater and harsher punishment for the attempted protection of those rights. The fact that the punishment was increased for only ten days is immaterial as one day in jail for one person may be equivalent to one year in jail for another, and it is the deprivation of liberty which is the important factor, not the length of that deprivation.

SUMMARY

It is respectfully submitted to the court that the appellant's constitutional rights have been violated in this matter, and that this court should enter an order reversing the trial court's rulings and further allow appellant his constitutional right to his day in court.

Respectfully submitted,

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