

2001

Joseph Bradbury v. State of Utah, Division of Wildlife Resources : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

Joseph Bradbury

:

Appellant,

:

Case No. 20010839-CA

vs

:

**State of Utah, Division of Wildlife
Resources,**

:

Priority No. 14.

Appellee.

:

REPLY BRIEF OF APPELLANT

Appeal from a final Order of the Division of Wildlife Resources.

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ORAL ARGUMENT IS REQUESTED

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Point I. The Wildlife Board erroneously attempts to expand the standard of review.

This appeal involves the interpretation of a statute; Utah Code Ann. §23-13-2(37)(a). Statutory interpretations by agencies are reviewed under a correction-of-error standard, giving no deference to the agency's interpretation, unless the statute grants to the agency the discretion to interpret the statute. (*See*: Appellant's brief, pp. 1-2). Nothing in Title 23 of the Utah Code expressly confers upon the agencies involved in this matter any authority or discretion to interpret the statutes in question. In an attempt to overcome this problem, the Wildlife Board cites *Morton Int'l, Inc. v. Auditing Division of the Utah State Tax Commission*, 814 P.2d 581 (Utah 1991) suggesting that it stands for the proposition that the Wildlife Board has "implied" authority to interpret the statute and therefore this Court must defer to the Board's interpretation.

The problem with the Board's position is that *Morton Int'l* does not support it. The discussion of question of statutory interpretation in *Mortion Int'l* is extensive, but the conclusion is succinct:

However, it is clear from the wording of section 63-46b-16 that an agency's statutory construction should only be given deference when there is a grant of discretion to the agency concerning the language in question, either expressly made in the statute or implied from the statutory language.
Id, 589.

The Board has not, nor can it point to any language in the statute in question that expressly or impliedly grants the Board the deference it seeks. The Board's citations to U.C.A. §§23-14-3 and 23-14-18 are to no avail. Nothing in those sections "impliedly"

grants the Board discretion to interpret statutes. The Board's attempt to expand the Standard of Review in this matter should be rejected.

Point II. The Board made erroneous statements of fact.

At page 6, the Board states that “[I]n 1993 Appellant unlawfully obtained an Idaho drivers [sic] license using his sister’s Idaho daycare center’s address to facilitate an illegal scheme of obtaining resident Idaho hunting licenses. (R. 118 at 22,70).”

There has never been a determination anywhere or at anytime that Appellant “unlawfully obtained an Idaho driver’s license.” The citations to the Transcript do not support such a conclusion. This is one example of the attempt by the Board to paint the Appellant is as negative a picture as possible, apparently hoping that such besmirchment will sway opinion. Other examples include the conclusion that Appellant “falsely” listed his sister’s Idaho daycare center’s address as his, etc. (Appellee’s brief, p.6). Again, if Appellant was claiming residency in another state *for hunting and fishing purposes* in Utah, he was obligated to list an out-of-state address on his Utah hunting applications. These characterizations by the Board continue to beg the ultimate question: did Appellant qualify as a non-resident under U.C.A. §23-13-2(37)(a)? The negative appellations of the Board should be ignored while the ultimate issue is resolved.

Point III. Appellant did not waive his right to challenge his status as a Utah resident.

On page 12 of its brief, the Board suggests that Appellant waived his right to

challenge his status as a Utah resident by his guilty plea in Uintah County. However, the Board is bound by its “Notice of Agency Action” and by the statutes governing hunting license revocation. The Notice of Agency Action (R. 55) specifically stated that “the purpose of this proceeding is to determine whether the facts underlying the criminal conviction were committed knowingly and flagrantly.” U.C.A. §23-19-9(1) sets forth the standards for a license revocation. Under that section a license can be revoked only if a hearing officer “determines that a person flagrantly and knowingly” violated the Wildlife Code or any rule, proclamation or order of the Wildlife Board. Both the Notice of Agency Action and the governing statute require a complete redetermination of the “facts underlying a criminal conviction” to see if they were committed knowingly or flagrantly. Ironically, the Board makes this very argument at pages 24 and 25 of its brief.

A defense that the Appellant did not qualify as “resident” of Utah would necessarily be a consideration in this procedure. And, because of the language of the Notice of Agency Action and the governing statute, Appellant, contrary to the contention of the Board, had every right “to collaterally attack his plea and the elements of the offense he admitted.” (Appellee’s brief, p.13). Therefore, there was no waiver.

It should also be noted that this issue of waiver is being raised for the first time on appeal. It was never raised by the Board at either of the administrative hearings. (*cf.* Appellee’s brief, p.29).

Point IV. Appellant did not waive his right to challenge the Board's authority to conduct a de novo review.

Appellee suggests that Appellant waived his right to challenge the Wildlife Board's authority to conduct a hearing de novo by failing to raise the issue at the hearing before the Board. (Appellee's brief, p.19).

The Appellee fails to cite to the numerous objections made by Appellant's counsel during the hearing that the hearing was proceeding beyond the scope of the Notice of Agency Action and that the evidence sought to be introduced was irrelevant. Transcript, pp. 34-36, 72-76, particularly pp. 76-84, and p.101.

The second, and more serious problem with Appellee's argument is that it implies that if a party fails to properly object to the Board's authority or jurisdiction to conduct a hearing, then it has free-reign to do what ever it wants. It is gainsaid that a lack of subject matter jurisdiction cannot be stipulated around and it cannot be cured by a waiver. *Barton v. Barton*, 2001 Ut.App. 199, 29 P.3d 13, 16. Administrative agencies are statutory creatures that have no more power than that which is expressly or impliedly granted by statute. Any reasonable doubt of the existence of agency power must be resolved against the existence of such power. *Nielson v. Division of Post*, 851 P.2d 1201, 1204 (Ut.App. 1993).

No amount of "waiver" by Appellant could confer upon the Board powers which it has not been specifically granted by statute. Under the analysis of the controlling

statutes set forth in Appellant's brief, the Board had no power to conduct a hearing de novo, but only a review of the decision of the hearing officer.

Point V. Appellant did not waive his right to challenge the definition of "knowingly."

Appellee argues that Appellant failed to raise or argue before the Board a concern about the definition of "knowingly" and therefore waived the same. (Appellee's brief, p.28).

Appellee correctly points out that this question was specifically raised in Appellant's Notice of Appeal. There Appellant stated that "[d]efining 'knowingly' to include principles of criminal negligence exceeds the scope of authority, and is an abuse of the discretion of the agency." (R. 13). In addition, Appellant's counsel referred to the problem with the word "knowingly" in his opening statement before the Board. (Transcript p.15). *cf. Brookside Mobile Home Park v. Peebles*, 2002 Utah 48 ¶12, 447 Utah Adv. Rep. 3, 4 (2002).

Finally, as previously stated, the Notice of Agency Action and the license revocation statute (Point III above) require a finding that the Appellant's actions were "knowingly." Fundamental to this process is the right to challenge the very definition of the operative term.

Point VI. Appellant properly marshaled the evidence.

Appellee takes Appellant to task for failing to marshal the evidence. (Appellee's

brief, p. 33). However, an appellant is only required to marshal all *relevant* evidence. *WWC Holding Co. v. Public Service Comm.*, 2002 Ut 23 ¶, 442 Utah Adv. Rep. 8, 9 (Utah 1996). *cf. Neeley v. Bennett*, 2002 Ut.App. 189, 448 Utah Adv. Rep. 14.

To establish that Appellant “flagrantly” and “knowingly” violated the Wildlife Code as required by U.C.A. §23-19-9(1), the Board had to establish Appellant’s mental state at the time of the alleged violation. Evidence about what may have occurred subsequent to that date is irrelevant. Appellant submits that he marshaled the only *relevant* evidence as to his mental state at the time of the alleged offense. All the evidence “marshaled” by the Appellee has to do with events occurring after the fact, and conclusions based thereon. That is precisely why Appellant challenged the findings of the Board in the first place; i.e., there is no relevant evidence to support the findings that Appellant did anything *at the time* either flagrantly or knowingly. All of the “evidence” set forth by Appellee begs the ultimate question in this case: Did Mr. Bradbury properly qualify as a “non-resident” under U.C.A. §23-13-2(37)(a) when he applied for and purchased a non-resident elk hunting tag in 1997? If he did, then all of the evidence cited by Appellee is irrelevant.

Conclusion.

Appellee’s brief fails to address the real problem in this case; that section 23-13-2(37)(a), as presently worded, does not prohibit a person otherwise domiciled in Utah, to claim residency *for hunting and fishing purposes* in another state and therefore qualify

for the purchase of Utah non-resident hunting privileges. That such claim of residency in another state may run afoul of that state's laws is irrelevant. Neither the Wildlife Board nor the Division of Wildlife Resources has authority to expand the wording of the section in question to make it read differently, "even in the name of fairness." *Bevans v. Industrial Comm'n*, 790 P.2d 573, 578 (Ut.App.1990).

Respectfully submitted.

A handwritten signature in black ink, appearing to read "R. C. Fillerup", written over a horizontal line.

Robert C. Fillerup, Attorney for Appellant Joseph Bradbury.

CERTIFICATE OF SERVICE

I certify that on the 21st day of June, 2002, I caused to be mailed two copies of the foregoing Reply Brief by first class mail to:

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A handwritten signature in black ink, appearing to read "R. C. Fillerup", written over a horizontal line.

Robert C. Fillerup