2001

State of Utah v. Sun Surety Insurance Company, and Defino Fernandez Cadena : Reply Brief of Petitioner

Utah Court of Appeals

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IN THE UTAH COURT APPEALS

State of Utah, Plaintiff/Appellee, vs. **Defino Fernandez Cadena,** Defendant, and **Sun Surety Insurance Company,** Surety/Appellant.	Appellate Court No. 20010906 CA Priority Classification No 15

REPLY BRIEF OF APPELLANT

Appeal from the Order denying Appellant's **MOTION FOR ORDER TO SET ASIDE DEFAULT JUDGMENT AND TO EXONERATE BOND** of the THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, Salt Lake Department, the Honorable Judge William W. Barrett presiding.

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SUMMARY OF THE ARGUMENT

The plain language of Utah Code Ann. §77-20b-101(1)(a) mandates that "the ***SURETY*** be given notice of the non-appearance" and that the surety is relieved of further obligation under the bond ***if the surety's current name and address are on the bail bond in the court's file.***" [emphasis added]. The language in the statute is plain and clear. Therefore, the law requires express actual notice be mailed within 30 days to the "***address of the surety***" as listed on the bond. No notice was mailed to Sun Surety. It is not even certain that notice was mailed to the Agent since there is no certificate of mailing. Even if notice was mailed to the agent, it was outside the scope of authority of the Agent to receive notice for Sun Surety. Therefore, notice cannot be imputed to Sun Surety since the Agent was acting outside the scope of it's authority and in contravention of the interests of Sun Surety. As such, Sun Surety would be deprived of property without notice and an opportunity to be heard and would be denied Due Process of Law under the Fifth Amendment to the U.S. Constitution made applicable to the State of Utah under the 14th Amendment. Because there is no proof of mailing to either the Surety or the Agent, there is no proper notice and therefore the Third District Court lacks jurisdiction. Therefore the Lower Court's Order should be overruled and Sun Surety's bond should be exonerated.

ARGUMENT
Point I

THE STATUTORY NOTICE AS REQUIRED BY UTAH CODE ANNOTATED §§77-20-1 AND 77-20B-101 ET SEQ. PLAINLY AND CLEARLY MANDATES EXPRESS ACTUAL NOTICE OF NONAPPEARANCE TO THE SURETY OR SURETIES TO THE ADDRESS(ES) LISTED ON THE BOND.

Utah's Appellate courts interpret statutes according to their plain language "unless such reading is unreasonably confused, inoperable, or in blatant contravention of the express purpose of the statute." *Beehive Bail Bonds, Inc. v. Fifth District Court*, 933 P.2d 1011, 1011 (Utah App. 1997). Where a correctness review requires this court to examine statutory language, the Court looks to the plain meaning of the statute first and goes no further unless it is ambiguous. See, *State v. Ostler*, 2001 UT 68, ¶ 7, 31 P.3d 528.

The plain language of the of Utah Code Annotated §77-20b-101(1)(a) states the clerk of the court shall: (a) mail notice of nonappearance by ***certified mail, return receipt requested***, within 30 days ***to the address of the surety who posted the bond*** . . . etc." (Italics added). Utah Code Annotated §77-20b-101(3) further states, "If notice of nonappearance is not mailed to a surety, other than the defendant in accordance with Subsection (1) or (2) , ***the surety is relieved of further obligation under the bond if the surety's current name and address are on the bail bond in the court's file.***" (Italics added). The language is unambiguous and clear. The address of Sun Surety was on the bond. And notice should have been mailed to that address. The address of the agent, Bail Out Fast was also listed on the bond. The fact that there is more than one address on the

bond does not give the State the discretion to choose which one to notify. There is no ambiguity as to who should be served with notice. At a minimum, if the bond lists two different addresses, both should receive notice. The fact that the State failed to notify Sun Surety Insurance Company is undisputed.

Even assuming there is some ambiguity, legislative intent and or the policy considerations for interpreting the statute may be inferred from the fact that the Surety is the entity who holds the money and is ultimately responsible for the payment of the bond when a Defendant fails to appear. It only makes sense that the Surety be notified. In this matter, the Prosecutor knew this and after the Order of Forfeiture telephoned Sun Surety to demand money. To require less would leave open the possibility that the State may act arbitrarily and unfairly fairly with a Surety by simply mailing notice to the address less likely to promote a response to the Notice of Non-appearance.

Sun Surety does not argue that it should be notified to the exclusion of the agent as the State has argued. Sun Surety Insurance Company only argues that it should have received notice since it took the pains to make sure its address was clearly on the Bail Bond. Any procedure short of this could "adversely reflect upon the judiciary and its processes." *Heninger v. Ninth Circuit Court*, 739 P.2d 1108, 1111 (Utah 1987).

Furthermore, there is no proof that the Scott Candland received or signed for the mail (See Exhibit D). The letter was allegedly mailed to the correct address for the Agent, but the Agent's name was not addressed. Additionally, the signature of Scott

Candland as found on the Bond has no similarity with that on the return receipt. Finally, there is no certificate of mailing by the Court Clerk indicating that the notice was mailed.

Point II

THE SCOPE OF THE POWER OF ATTORNEY DOES NOT INCLUDE RECEIVING NOTICE

The Power of Attorney does not include the authority to receive notice of non-appearance. Instead the powers are limited to one sentence by giving "full power and authority to sign the Company name and affix its seal to, and deliver on its behalf as surety, a bail bond only." Sun Surety is not obligated to list all of the powers not delegated. Instead, Sun Surety chose to limit the authority to three acts or powers, to 1) sign the company name, 2) affix its seal, and 3) deliver a bail bond. The sentence further limits the three delegated powers to appearance bonds. The State's argument that an Agent possesses all powers not otherwise excluded by express limitations is without merit. Instead, Sun Surety, as principal designated only three powers to the exclusion of all others.

Point III

BECAUSE THE ACTS OF THE AGENT (SCOTT CANDLAND) WERE ADVERSE TO THE INTERESTS OF SUN SURETY (PRINCIPAL), SUN SURETY SHOULD NOT BE BOUND BY THE ACTS OR OMISSIONS OF SCOTT CANDLAND

The State of Utah asserts that the notification allegedly sent to Mr. Candland is

imputed to Sun Surety. While this accurately states the general rule of agency, an exception is found when the Agent acts outside the scope of his or her authority. An agent's acts are not imputable to his principal when an agent acts adversely to his principal's interests. *Anchor Equities, Ltd. v. Joya*, 773 P.2d 1022, 1025 (Ariz.App. 1989) (quoting *Hays v. Bank of Arizona*, 110 P.2d 235, 237 (Ariz. 1941)). In this matter, the agent, Scott Candland failed to notify Appellant of the notice of bail forfeiture (see Addendum I - Affidavit of Pat Wood). Mr. Candland's failure to notify Sun Surety, alone, shows that the Agent did not act in the scope of his authority.

Furthermore, the last paragraph of the Power of Attorney states that the power of attorney is "void if used to furnish bail in excess of the stated amount of this power." Above and in capitalized letters, the Power of Attorney states, "THE OBLIGATION OF THE COMPANY SHALL NOT EXCEED THE SUM OF FIVE THOUSAND DOLLARS $5,000." See Addendum B). Yet the bond was issued in the amount of $6,064.00 which is in excess of the amount authorized by Sun Surety. Not only does this show that the Power of Attorney was void, but it shows that the Agent was further acting outside the scope of his authority by issuing the bond in excess of the power given him. Therefore his actions or omissions cannot and should not be imputed to Sun Surety since Sun Surety had no knowledge of these actions and omissions.

This Court of appeals previously stressed that even though the scope of the authority may be general or limited, "the instrument creating this agency relationship is to

be strictly construed." *Kline v Utah Dept. of Health*, 776 P.2d 57, 61 (Utah App. 1989) (quoting *In re Estate of Lienemann*, 382 N.W.2d 595, 602 (Neb.1986). The power of attorney in this matter is limited in scope and should be strictly construed to exclude power to accept notice on behalf of the Surety.

Point IV

Without actual notice and an opportunity to be heard the Appellant would be deprived of property without Due Process of Law under the Fifth Amendment to the U.S. Constitution made applicable to the State of Utah under the 14th Amendment. The Bail Bond should therefore be exonerated because the State failed to abide by the notice requirements found in Utah Code as described above.

Due process generally requires "notice and an opportunity to be heard prior the deprivation of a property interest." *United States v. Monsanto*, 924 F.2d 1186, 1192 (2nd Cir. 1991) (en banc) (quoting *United States v. Property at 4492 S. Livonia Rd.*, 889 F.2d 1258, 1263 (2nd Cir. 1989). Indeed the danger of violating due process rights is especially great when, as here, the government has a pecuniary interest in the outcome of the proceeding. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53, 55-56 (U.S. 1993); see also *Hamelin v. Michigan*, 501 U.S. 957, 978 n. 9 (1991) ("[I]t makes more sense to scrutinize governmental action more closely when the State stands to benefit."). The right to due process does not depend on the strength of one's opposition to the proposed governmental action. *Carey v. Piphus*, 435 U.S. 247, 266 (U.S. 1978) ("[T]he right to procedural due process is 'absolute' in the sense that it does not depend

upon the merits of a claimant's substantive assertions . . . ." Here, Sun Surety did not receive notice and an opportunity to be heard and it's due process rights have been violated by not receiving express actual notice.

CONCLUSION

This Court should overrule the trial Court's Order denying Appellant's Motion to set aside and require the lower court to exonerate the bond based on improper notice. Alternatively this court should declare that the Case below is dismissed for lack of jurisdiction or remand for a trial on the merits so that the court may make further findings of fact on the record that are consistent with the record.

DATED this 17th day of September 2002.

David M. Cook
Attorney for the Appellant

CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing REPLY BRIEF OF APPELLANT to be deposited in the United States mail to the parties listed below:

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DEPUTY DISTRICT ATTORNEY
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on this 17th day of September, 2002.

David M. Cook

Case No. 20010906-CA District Court No. 011900113