1992

J. R. Scarth v. G. Barton Blackstock : Brief of Appellee

Utah Court of Appeals

J. R. Scarth; Pro Se Appellee.
Jan Graham; Utah Attorney General; Thom D. Roberts; Assistant Attorney General; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

----ooOoo----

J. R. Scarth,	:	
Petitioner and Appellee,	:	APPELLEE'S BRIEF
v.	:	
G. Barton Blackstock,	:	
Respondent and Appellant.	:	Case No. 920580-CA Priority No. 16

APPEAL FROM THE FINAL JUDGMENT OF THE SIXTH JUDICIAL DISTRICT COURT, KANE COUNTY, THE HONORABLE DON V. TIBBS, PRESIDING.

J. R. SCARTH, pro se
Petitioner/Appellee
76 North Main
Kanab, Utah 84741
Telephone: (801) 644-5278

Jan Graham
Utah Attorney General
Thom D. Roberts
Assistant Attorney General
Attorneys for Respondent/Appellant
236 State Capitol
Salt Lake City, Utah 84114

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

J. R. Scarth pro se (2870)
Appellee and Petitioner
76 N. Main
Kanab, Utah 84741
(801) 644-5278

IN THE UTAH COURT OF APPEALS

----ooOoo----

J. R. Scarth,	:	
Petitioner and Appellee,	:	APPELLEE'S BRIEF
v.	:	
G. Barton Blackstock,	:	
Respondent and Appellant.	:	Case No. 920580-CA

JURISDICTION

Jurisdiction is in the Court of Appeals is grounded in Utah Code Annotated, section 78-2A- 3(2)(a) (1992).

ISSUES RAISED ON APPEAL AND STANDARD OF REVIEW

Was the Trial Court empowered to extend the suspension period beyond the time allowed by statute? Section 41-2-130(7)(1988), Utah Code Annotated, 1953 as amended.

Has the issue raised by Appellant been rendered moot by the passage of time? Section 41-1-130(7)(1988), Utah Code Annotated, 1953 as amended.

Did the Appellant fail to pursue available remedies and thus foreclose himself from complaining at this late date? Rule 4-501, Code of Judicial Administration.

The Appellant has challenged a conclusion of law made by the Trial Court and this Court should review the matter on a "correctness" standard. Reinbold v. Utah Fun Shares, 210 Utah Adv. Rep. 30 (Utah Ct. App. 1993).

DETERMINATIVE STATUTORY AND RULE PROVISIONS

Utah Code Ann., section 41-2-130 (7) (1988):

* * *

(b) A second or subsequent suspension under this subsection is for a period of 120 days, beginning on the 31st day after arrest.

* * *

Rule 4-501(d) of the Code of Judicial Administration provides in its relevant part as follows:

* * *

> **Notice to submit for decision.** Upon the expiration of the five-day period to file a memorandum, either party may notify the Clerk to submit the matter to the court for decision. The notification shall be in the form of a separate written pleading and captioned "Notice to Submit for Decision." The notification shall contain a notice of mailing to all parties. If neither party files a notice, the motion will not be submitted for decision.

* * *

STATEMENT OF THE CASE AND RELEVANT FACTS

This is an appeal from a portion of the final judgment of the Sixth Judicial District Court for Kane County, the Honorable Don V. Tibbs presiding, arising from a trial de novo upon Appellee's Petition for Reinstatement of Driving Privilege and Drivers License following a ruling adverse to Appellee by a hearing officer at a per se hearing of the Utah Drivers License Division.

Appellee sought a trial de novo following the administrative action of Appellant suspending Petitioner's driving privilege for a period of 120 days, commencing March 11, 1992. Appellee filed his Verified Petition seeking temporary and permanent relief from said suspension on April 7, 1992. (R-40) On April 24, 1992, the Trial Court entered its Temporary Order reinstating Appellee's driving privilege pending trial. (R-38)

Trial de novo was held on June 25, 1992, and the Trial Court immediately vacated its temporary order and ordered the Appellant's suspension order reinstated, ruling that the suspension period would expire at the conclusion of July 9, 1992, the original suspension

period. (R-5) Respondent has appealed that portion of the Trial Court's final judgment declaring that the suspension period would end on July 9, 1992, claiming that the Trial Court erred and should have added an additional 66 days suspension from June 25, 1992.

SUMMARY OF ARGUMENT

Section 41-2-130 (7), Utah Code Annotated, (1988), provides for a 120 day suspension, beginning on the 31st day after the arrest and does not give the Court latitude to extend the suspension period.

The statutory suspension period has long since expired and the Appellee has been with out a drivers license for 54 days plus in excess of six months and therefore, the issue is moot. See Affidavit of Appellee, infra.

The Appellant should not be heard to complain when he failed to exercise any of the available means to obtain a prompt ruling on his Motion in Re: Temporary Order Reinstating Driving Privilege wherein he prayed the Trial Court to set aside its temporary order. (R-20-30)

ARGUMENT

POINT I

THE RELEVANT UTAH CODE SECTION DOES NOT EMPOWER THE COURT TO EXTEND THE SUSPENSION PERIOD BEYOND 120 DAYS FROM 30 DAYS AFTER THE ARREST OF APPELLEE.

On February 10, 1992, Petitioner was arrested for driving under the influence of alcohol and agreed to submit to an intoxilyzer examination. As a result of the arrest and intoxilyzer results, the Utah Drivers License Division scheduled a suspension hearing, at which Petitioner, the officer and witnesses attended and testified with an employee of the Division presiding.

After the hearing, the Division entered its Order suspending Petitioner's driving privilege for a period of 120 days, commencing March 11, 1992. (R-40)

Thereafter and on April 20, 1992, Petitioner obtained from the Sixth Judicial District Court a Temporary Order Reinstating Driving Privileges and Driver's License. (R-38)

Petitioner filed his Verified Petition herein on April 7, 1992, and mailed a copy of the same to the Utah Attorney General on the same day.(R-40-44) Petitioner's ExParte Motion for Temporary Order was filed on April 16, 1992, and a copy of the motion was mailed to the

office of the Utah Attorney General Office on April 16, 1992.(R-34) The District Court's temporary order reinstating Petitioner's driving privileges was entered on April 24, 1992, and a copy was mailed to the Office of the Utah Attorney General on April 22, 1992.(R-38-39) Respondent filed his Response to Temporary Order on April 27, 1992.(R-34-36)

Respondent filed his Motion In Re: Temporary Order Reinstating Driving Privileges together with Memorandum on May 4, 1992.(R-20-30) Respondent never noticed said Motion for hearing. Respondent never filed a notice to submit (his motion) for decision. Respondent never requested a hearing date and never filed a notice of readiness for trial.

At trial on the matter held on June 25, 1992, the trial court sustained the suspension, and vacated the temporary order, ruling that the suspension period would end on July 9,1992, which was 120 days from 30 days after the Petitioner was arrested.

The relevant portion of section 41-2-130 (7), Utah Code Annotated (1953, as amended) (1991 Edition) is as follows:

* * *

A second or subsequent suspension under this subsection is for 120 days, beginning on the 31st day after the date of arrest.
There is no language in the Utah Code subsection quoted immediately above that empowers the Court to extend the suspension of Petitioner's driving privilege beyond 150 days after the date of his arrest. The language of said code section is unequivocal, without ambiguity and leaves no room for misunderstanding. The Court simply is not empowered to extend the suspension beyond the period authorized by the legislature.

POINT II

WITH THE STATUTORY SUSPENSION PERIOD HAVING PASSED, THE ISSUE RAISED BY APPELLANT IS MOOT.

The 120 suspension period expired on July 9, 1992, rendering the present appeal moot. In Richens v. Schwendiman, 802 P.2d 108 (Utah App. 1990), where the petitioners' appealed the Division's revocation of their drivers' license, the Utah Court of Appeals ruled that because the one year revocation period had passed, that the issues were moot and dismissed the appeals. At page 110 of the Richens opinion, id., this Court wrote the following:

* * *

Utah Courts have consistently refused to hear the merits of driver's license revocation appeals rendered moot because the revocation period has expired.

* * *

On December 8, 1992, the Honorable Patricia L. Chavez of the Kanab City Justice Court, at sentencing in a DUI case arising out of the same facts as those in the instant case ordered Appellee to surrender his Utah Drivers License to the Court and Appellee did so. (Affidavit of Appellee dated March 24, 1993, and filed with the Utah Court of Appeals) Thus, Appellee has been without a drivers license for the last six and one half months. This fact alone may render this appeal moot.

Add that fact to the fact that the statutory suspension period has expired and it is apparent that Appellant's appeal should be dismissed.

POINT III

RESPONDENT FAILED TO REQUEST A HEARING ON HIS MOTION TO VACATE TEMPORARY ORDER AND NEVER FILED A NOTICE OF READINESS FOR TRIAL AND THEREFORE SHOULD NOT BE HEARD TO COMPLAIN ABOUT THE EXTENDED TIME THE TEMPORARY ORDER OF REINSTATEMENT WAS IN EFFECT.

Rule 4-501 (d) of the Code of Judicial Administration provides as follows:

* * *

> **Notice to submit for decision.** Upon the expiration of the five-day period to file a memorandum, either party may notify the Clerk to submit the matter to the court for decision. The notification shall be in the form of a separate written pleading and captioned "Notice to Submit for Decision." The notification shall contain a notice of mailing to all parties. If neither party files a notice, the motion will not be submitted for decision. (emphasis added)

Respondent's attorney filed Respondent's Motion in Re: Temporary Order Reinstating Driving Privileges and Driver's License, which in reality was a motion to vacate the temporary order, together with memorandum, on May 4, 1992. (R-20-30) However, he never filed a notice of hearing the same and never filed a "Notice to Submit for Decision" pursuant to said Rule 4-501 of the Code of Judicial Administration. Furthermore, he never filed a notice of readiness for trial. In other words Respondent took no action to get the temporary order vacated.

Respondent was dilatory in that respect and is responsible for allowing Petitioner to drive pursuant to the temporary order for an extended period of time. However, it should be remembered that at trial, the Court vacated the temporary order and reinstated the Division's Order of Suspension.

A party should not be heard to complain on an appeal when he failed to use due diligence to bring a matter before the Court to correct what he perceives to be improper. In other words, the Respondent "failed to assert his right." The line of cases on the issue of the right to a speedy trial, are by illustration, enlightening on this issue. See State v. Trafny, 799 P. 2d 704, (Utah 1990) and State v. Hoyt, 806 P.2d 204 (Utah App. 1991).

CONCLUSION

The language of section 41-2-130 (7) Utah Code Annotated, 1953, as amended, is clear and limits the suspension of Petitioner's driving privilege to 120 days from thirty (30) days after the day of his arrest. Said code section does not empower the Court to extend the period of suspension beyond the period set by the legislature.

The statutory suspension period having expired, the issue raised by Respondent on appeal is moot.

Respondent filed his Motion in Re: Temporary Order Reinstating Driving Privileges on May 4, 1992, and then sat back and did nothing to bring the matter before the Court. (R-20-30) It was his responsibility to bring his Motion before the Court and he simply never did

anything to cause the Trial Court to rule on the matter. As a result, the Respondent should not be heard to complain, where he has failed to take available steps to timely bring the matter before the trial court for resolution.

Therefore, it is respectfully submitted that Respondent's appeal should be dismissed.

DATED this 24th day of June, 1993.

J. R. Scarth, Appellee and Petitioner

MAILING CERTIFICATE

I hereby certify that on this 24th day of June, 1993, I mailed four (4) true, full and correct copies of the above and foregoing BRIEF, with first-class postage thereon fully prepaid to: Thom D. Roberts Assistant Attorney General at 236 State Capital Bldg., Salt Lake City, Utah 84114.