1992

Richard W. Von Hake v. Harry Edward Thomas : Reply Brief

Utah Court of Appeals

Shawn D. Turner; Brown, Larson, Jenkins & Halliday; Attorney for Appellant.
H. Ralph Klemm; Attorney for Respondent.

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IN THE UTAH COURT OF APPEALS

RICHARD W. VON HAKE, TRUSTEE OF THE VON HAKE 1987 TRUST Plaintiff and Appellee, vs. HARRY EDWARD THOMAS, aka ED THOMAS Defendant and Appellant.	:	**REPLY BRIEF OF APPELLANT** Case No. 920643-CA Priority No. 13

SHAWN D. TURNER (5813)
BROWN, LARSON, JENKINS & HALLIDAY
Attorneys for Defendant and Appellant
660 South 200 East, Suite 301
Salt Lake City, Utah 84111
(801) 532-6200

H. Ralph Klemm
Attorney for Plaintiff
489 West 3500 South
Bountiful, Utah 84010
(801) 295-0718

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(801) 532-6200

H. Ralph Klemm
Attorney for Plaintiff
489 West 3500 South
Bountiful, Utah 84010
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THE CAPTION OF THE CASE CONTAINS A LISTING OF ALL THE PARTIES.

TABLE OF CONTENTS

STATEMENT OF FACTS 1

ARGUMENT 1

I. THIS MATTER INVOLVES A CIVIL APPEAL AND CIVIL SANCTIONS 1
A. This Proceeding is a Civil Proceeding 1
B. Dismissal Is Inappropriate Even In A Criminal Context 2

II. DISMISSAL OF THIS APPEAL IS AN INAPPROPRIATE SANCTION 4
A. The Actions of This Court Constitute a Separate Contempt Proceeding 4
B. Respondent Fails To Correctly Address The Impossibility Defense 5
C. A Dismissal Without Prejudice of Mr. Thomas' Appeal Would Be Inequitable 6

CONCLUSION 7

TABLE OF AUTHORITIES

STATEMENT OF FACTS

The Appellant stands on the Statement of Facts submitted in his initial Memorandum filed with this Court. Although Respondent has failed to cite to the record to support the allegations set forth in his Statement of Facts, Appellant would generally accept those facts with the exception of Paragraph No. 7. In Paragraph No. 7, only the first sentence, alleging that Mr. Thomas moved to the State of Wyoming in 1984, has any basis in the record. The rest of the "facts" set forth are unfounded and unsupported conclusions and allegations and should be disregarded.

ARGUMENT

I. THIS MATTER INVOLVES A CIVIL APPEAL AND CIVIL SANCTIONS.

A. This Proceeding is a Civil Proceeding.

In Respondent's Brief, Respondent begins with the erroneous assumption that the proceedings before this Court are in some nature criminal proceedings.

While the sole existing contempt order entered by the trial court, which survives, is a criminal contempt order, the issues before this Court are purely civil in nature. This case is an appeal from an order of summary judgment entered by the trial court in a case brought to renew a civil judgment.

There is no provision in the criminal law for a motion for summary judgment. Nor is there any provision in the criminal law

for an action for a renewal of judgment that would end this case. This Court has already held the current proceedings are nothing but an extension of prior civil proceedings. Accordingly, it would be inappropriate to limit the discussion of this matter to issues relating solely to criminal contempt.

B. Dismissal Is Inappropriate Even In A Criminal Context.

Respondent argues that this Court's decision in D'Aston v. D'Aston, 790 P.2d 590 (Utah App. 1990) is inapplicable because we are in a criminal and not a civil context. As demonstrated above, this is not correct. However, even if we were operating in a criminal context as opposed to a civil context, the D'Aston decision would still apply, and dismissal would still be inappropriate.

In D'Aston, this Court recognized that no Utah Appellate Court had previously rendered a decision on the availability of the sanction of staying or dismissing an appeal for failure of an appellant to comply with a trial court's order in the same or a related proceeding.

Accordingly, this Court examined the law of other jurisdictions and the law in the State of Utah relating to dismissal of appeals in criminal settings. The very underpinnings of the D'Aston decision therefore, are based in an examination of existing criminal law, the law of other jurisdictions and perhaps most

importantly, an analysis of the requirements under the Utah State Constitution.

An examination of this case under the cited Utah State criminal authority and Statutory and Constitutional provisions clearly demonstrates that dismissal would be inappropriate in this case. In Respondent's Brief, he cites to the case of Hardy v. Morris, 636 P.2d 473 (Utah, 1981), for the proposition that the criminal appeal of an escaped prisoner can be dismissed. Respondent's ignore the fact that Hardy was explained in the case of State v. Tuttle, 713 P.2d 703 Utah 1985) wherein the Utah Supreme Court held that an appellant prisoner's escape "is not an abandonment of his right to an appeal and that the dismissal of his appeal is not an appropriate punishment for his escape". D'Aston at 593.

Respondent goes on to argue that because an escaped criminal's criminal appeal can be dismissed until he is recaptured, Mr. Thomas' appeal should be dismissed because he is outside of the jurisdiction of the authorities of Kane County.

The inapplicability of the Hardy and Tuttle cases to the present case is rather obvious. Both Hardy and Tuttle dealt with scenarios in which a prisoner had escaped and fled custody. The fact that the inmates were at large, indicates that they were free to return to custody at whatsoever time they chose. This is in

contrast with Mr. Thomas' situation where he is currently in custody, he is simply in custody some place else. He clearly has no present ability to conform to any court's order. As is discussed below, this matter of impossibility is the key to the entire issue currently before this Court.

II. DISMISSAL OF THIS APPEAL IS AN INAPPROPRIATE SANCTION

A. The Actions of This Court Constitute a Separate Contempt Proceeding.

Throughout Respondent's Brief, there runs an erroneous thread of thought that this Court is seeking to enforce the original order which Mr. Thomas failed to comply with. That is not the case. This Court is instead seeking to punish Mr. Thomas for his failure to serve a thirty (30) day jail sentence which was imposed on Mr. Thomas and upheld by the Supreme Court. Mr. Thomas' failure to appear resulted in a contempt order being entered against him.

This Court now seeks additional sanctions. These new sanctions, constituting the stay or dismissal of Mr. Thomas' appeal, are not based upon his failure to appear before the court as previously ordered, but are rather based on Mr. Thomas' failure to serve the jail sentence. As such, this constitutes an entirely separate contempt proceeding.

Because this is a new contempt proceeding, the question of impossibility is to be measured now, at the time the sanction is sought to be imposed. Bradshaw v. Kershaw, 627 P.2d 528 (Utah

1981). Furthermore, Mr. Thomas should be afforded the due process protections which must be satisfied in a contempt proceeding. This would include a finding of a present ability to perform. Since such a finding cannot be made, the Appeal should proceed.

It would be inappropriate to dismiss Mr. Thomas' appeal.

B. Respondent Fails To Correctly Address The Impossibility Defense.

The Respondent seeks to deny the availability of the impossibility defense to Mr. Thomas based on the fact Mr. Thomas had previous opportunities to comply with the Court's Order that he serve thirty (30) days in the Kane County jail. The problem with this analysis is that the issue is not what Mr. Thomas could or could not have done previously, but rather what is Mr. Thomas' ability to perform at the time the sanction is sought to be imposed.

In Bradshaw, the Utah Supreme Court held:

> When the proposed sanction is coercive imprisonment, the defense of impossibility of performance as of the time the sanction is to be imposed would always be available without regard to how or by whom the condition of impossibility occurred. It is obviously repugnant to reason and futile to try to coerce an act that the contemnor has no present ability to perform. . . consequently, the defense of impossibility is uniformly held available to this type of sanction. In fact, the sanction cannot be imposed without an affirmative finding of present ability to comply.

Bradshaw at 531.

The Supreme Court's language is clear. Where the issue is one of coercive imprisonment, the time for evaluating the defense of impossibility of performance is the time that the sanction is to be imposed. This Court is seeking to impose a sanction now of dismissal of Mr. Thomas' appeal, while it is undisputed that Mr. Thomas has no present ability to perform. Furthermore, as the Supreme Court clearly stated, the defense is available irrespective as to how or by whom the condition of impossibility occurred. Under the plain language of the Supreme Court's decision in Bradshaw, the dismissal of Mr. Thomas' appeal is therefore inappropriate.

C. A Dismissal Without Prejudice of Mr. Thomas' Appeal Would Be Inequitable.

The underlying case in this appeal is one for a renewal of a judgment. It is Mr. Thomas' position that the judgment sought to be renewed is now void. Staying this matter, or dismissing it with a right of later reinstatement would allow the respondents to continue collections action against Mr. Thomas during the intervening period of time. Mr. Thomas does not have the financial capability of filing a supersedeas bond in this matter. Therefore, any assets which Mr. Thomas might come into control of will be subject to the depredations of the Respondents even though it is Mr. Thomas' view that after the issues of this appeal are consid-

ered on all of their merits, Respondents will have no rights to take further collections action.

On one point, both parties are in agreement, a stay of this matter would be inappropriate. The difference is that Appellant would request this Court address the issues on their merits, while the Respondents would simply have things continue in a status quo, allowing them to continue their collection efforts.

Unlike the scenario in D'Aston, where compliance with the court's order was necessary to protect the ability of the Respondent to collect on its judgment if such judgment were upheld, Mr. Thomas' serving of thirty (30) days in the Kane County Jail, while perhaps giving some emotional satisfaction to the Respondents, would in no manner improve their possibilities of recovering their judgment or protect their interests in any way.

Delay of this matter simply delays justice. In this case the adage is true that justice delayed is justice denied.

CONCLUSION

The issue in this case is an issue of civil law and not criminal. Whether the Court accepts the view of the Appellant that the Court's actions comprise a new action for contempt or the view of the Respondent that this is simply an attempt on the part of the Court to enforce the prior order of the trial court sentencing Mr.

Thomas to thirty (30) days in jail, the defense of impossibility is available and precludes a dismissal of this appeal.

In addition to the considerations and arguments raised above, Mr. Thomas' would draw the court's attention to the constitutional arguments raised in his initial memoranda. Those arguments have not been responded to in any manner within the Respondent's Brief, and accordingly will not be dealt with further here.

WHEREFORE, Mr. Thomas respectfully requests this Court vacate the prior Order of Dismissal and consider this case on its merits.

RESPECTFULLY SUBMITTED, this 4th day of April, 1994.

BROWN, LARSON, JENKINS & HALLIDAY

by _____
Shawn D. Turner

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April, 1994, I mailed, postage prepaid, a copy of the foregoing document to the following:

H. Ralph Klemm
489 West 3500 South
Bountiful, Utah 84010

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