

2002

Jeff Tucker v. State of Utah : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JEFF TUCKER,	:	
Petitioner/Appellant,	:	
v.	:	Case No. 20020191-CA
STATE OF UTAH,	:	
Respondent/Appellee.	:	

BRIEF OF RESPONDENT - APPELLEE

Appeal from a Final Order of Dismissal of the Third Judicial
District Court, Salt Lake County, State of Utah, the Honorable
Glenn K. Iwasaki presiding

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**ORAL ARGUMENT AND PUBLISHED OPINION NOT
REQUESTED BY RESPONDENT - APPELLEE**

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LIST OF ALL PARTIES

To the best of Respondent's knowledge, all interested parties appear in the caption of this Brief.

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BRIEF OF RESPONDENT - APPELLEE

STATEMENT OF JURISDICTION

The instant action comes within the original appellate jurisdiction of the Utah Court of Appeals under Utah Code Ann. § 78-2a-3(2)(g) (1996).

STATEMENT OF THE ISSUES

1. The trial court correctly dismissed this action with prejudice due to the failure of the petitioner to file the requisite notice of claim with the Attorney General.

This issue was raised by the defendant's motion to dismiss. R. 35-39.

STANDARD OF REVIEW: This matter was decided below upon the defendant's motion to dismiss. Because this issue raises only a question of law, the Court gives the trial courts' ruling no deference and reviews it under a correctness standard. Zion's First National Bank v. Fox & Co., 942 P.2d 324, 326 (Utah 1997). When reviewing the dismissal of a petition for an extraordinary writ, the appellate court accords

“no deference to the conclusions of law that underlie the dismissal. They are reviewed for correctness. In addition, while we must review the fairness of the process by which the Board undertakes its sentencing function, ... we do not sit as a panel of review on the result.” Monson v. Carver, 928 P.2d 1017, 1023 (Utah 1996) (citations and internal quotes omitted).

2. The petitioner’s claims for equitable relief fail to state a claim.

This issue is raised as an alternative ground for affirmance on appeal.

STANDARD OF REVIEW: This Court can affirm on any ground finding support in the record. Sharon Steel v. Aetna Cas. & Sur., 931 P.2d 127, 132 (Utah 1997); K & T, Inc. v. Koroulis, 888 P.2d 623, 628 (Utah 1994).

3. Having never moved to amend his petition, the petitioner cannot claim the trial court erred by not granting leave to amend.

Because petitioner never made an adequate motion to amend his petition in the trial court, there is no basis for review of this issue.

DETERMINATIVE STATUTES

Utah Code Ann. § 63-30-12 (Sup. 2002) **Claim against state or its employee - Time for filing notice.**

A claim against the state, or against its employee for an act or omission occurring during the performance of the employee’s duties, within the scope of employment, or under color of authority, is barred unless notice of claim is filed with the attorney general within one year after the claim arises, or before the expiration of any extension of time granted under Section 63-30-11, regardless of whether or not the function giving rise to the claim is characterized as governmental.

Utah Code Ann. § 76-3-202(8) (Sup. 2002) Paroled persons – Termination or discharge from sentence – Time served on parole – Discretion of Board of Pardons and Parole

(8) While on parole, time spent in confinement outside the state may not be credited toward the service of any Utah sentence. Time in confinement outside the state for a conviction obtained in another jurisdiction shall toll the expiration of the Utah sentence.

STATEMENT OF THE CASE

Jeff Tucker filed this action against the State of Utah on November 8, 2001. R. 7-13. On December 3, 2001, the trial court ordered the Attorney General's office to file a response to the petition within thirty days. R. 32. On December 17, 2001, the State of Utah filed its motion to dismiss. R. 35-47.

After oral argument on January 28, 2002 (R. 48, 56), the trial court dismissed Tucker's petition on February 12, 2002. R. 57-59. Tucker's damage claims were dismissed with prejudice while the remainder of his claims were dismissed without prejudice. R. 58. The petitioner filed this appeal on March 4, 2002. R. 60-62.

STATEMENT OF RELEVANT FACTS

Jeff Tucker was sentenced to a term of from one to fifteen years on May 18, 1990 for sexual abuse of a child.¹ R. 7. On May 14, 1996, Tucker was released on parole for a second time. R. 7. On June 10, 1998, Utah's adult probation and parole received information that Tucker was in violation of his parole, having committed new offences. R. 7. Parole officers,¹ with assistance from other law enforcement officers, searched

¹ The facts are taken from Tucker's petition so far as his factual statements can be understood.

Tucker's home the next day and seized his computer. R. 8. Tucker was arrested on June 12, 1998, pursuant to a board warrant. R. 9. His parole revocation hearing before the board was continued pending the outcome of federal charges that were to be filed against the petitioner. R. 9. After his conviction on the federal charges, Tucker's parole was revoked on February 2, 2000. R. 9.

Tucker was again granted parole on April 2, 2002, releasing him to a federal detainer so that the petitioner could begin serving his federal sentence. R. 9.

Tucker never filed a notice of claim with the Attorney General before filing this action for damages. R. 42-43.

SUMMARY OF ARGUMENT

A notice of claim is required of all plaintiffs who seek to file an action against the State of Utah or its employees. Tucker's failure to file a notice of claim deprived the trial court of jurisdiction to hear his claims for damages.

The trial court dismissed the remainder of the petition on the grounds suggested by the respondent, that it was improperly brought pursuant to Rule 65B as opposed to Rule 65C of the Utah Rules of Civil Procedure. The State of Utah admits that this petition could be properly brought under Utah R. Civ. P. 65B(d). But the dismissal of Tucker's petition should be affirmed on the alternative ground that he had failed to state a claim upon which relief could be granted. The petition admits that the parole authorities had been informed of potential parole violations by fellow officers. Peace officers have a right to rely upon information provided by fellow officers. Parole authorities can perform

warrantless searches without violating the rights of a parolee. The parole board has the right to continue a revocation hearing pending the outcome of the federal charges.

Finally, Utah law prohibits the granting of credit towards Tucker's Utah parole for the time he is serving in a federal correctional facility due to his federal conviction.

The trial court correctly dismissed this action and this Court should affirm that decision.

ARGUMENT

I. TUCKER FAILED TO FILE THE NECESSARY NOTICE OF CLAIM

The Utah Governmental Immunity Act governs the procedure for suing the State of Utah, its agencies, and its employees. Both this Court and the Utah Supreme Court have held that the filing of the notice of claim required by the Act is a jurisdictional precondition to filing any suit against the state or its employees. Lamarr v. Utah State Dep't of Transp., 828 P.2d 535, 540-42 (Utah App. 1992); Rushton v. Salt Lake County, 1999 UT 36, ¶18, 977 P.2d 1201; Madsen v. Borthick, 769 P.2d 245, 249-50 (Utah 1988). Full (strict) compliance with the requirements of the Utah Governmental Immunity Act is essential to maintain a cause of action thereunder. Lamarr; Rushton, 1999 UT 36, ¶19; Scarborough v. Granite School District, 531 P.2d 480 (Utah 1975).

At the relevant time, the Governmental Immunity Act required that:

[a] claim against the state, or against its employee for an act or omission occurring during the performance of his duties, within the scope of employment, or under color of authority, is barred unless notice of claim is filed with the attorney general within one year after the claim arises,

Utah Code Ann. § 63-30-12 (1998) (in part).

The Immunity Act defines a claim as "any claim or cause of action for money or damages against a governmental entity or against an employee." Utah Code Ann. § 63-30-2(1) (2000). Petitioner's damage claims are either claims or causes of action for money, even though brought in a petition for extraordinary relief. As such, Tucker had the obligation to file a timely notice of claim that he has failed to fulfill. The trial court correctly dismissed the petitioner's damage claims for lack of jurisdiction and that decision should be affirmed on appeal.

II. PETITIONER FAILED TO STATE A CLAIM

The trial court dismissed the remainder of the petitioner's claims on the ground that they should have been raised pursuant to Rule 65C instead of Rule 65B. Respondent submits that this may have been an error. While Rule 65B(d) is a proper avenue for seeking relief against the Utah State Board of Pardons and Parole, any error in dismissing this petition was harmless. First, the dismissal was without prejudice to its being refiled properly without the invalid damage claims that were jurisdictionally defective. Second, as shown below, the petitioner had failed to state a claim under either rule.

A. Parole Officers Can Rely Upon Information Provided by Fellow Officers

Petitioner's first claim is that there was something improper in the parole officers relying upon the information, which he now claims was false, provided by a Salt Lake City detective. R. 7. But law enforcement personnel can rely upon information from

fellow officers in determining whether or not probable cause, or reasonable suspicion, exists.

Officers may rely on information furnished by other law enforcement officials to establish reasonable suspicion and probable cause for an arrest. Allbright v. Rodriguez, 51 F.3d 1531, 1536 (10th Cir. 1995). There is no evidence in the record that Spiegel had any reason to doubt Howe's statements. Consequently, even if we conclude Howe is not entitled to qualified immunity for detaining Foote, Spiegel could rely on Howe's statements in deciding to conduct field sobriety tests and arrest Foote.

Foote v. Spiegel, 118 F.3d 1416, 1424 (10th Cir. 1997).

No violation of the petitioner's rights can be shown from the simple fact that parole officers may have relied upon information provided by fellow peace officers.

B. A Parolee Can Be Arrested and His Home Searched Without a Warrant

A parolee's home can be searched without a search warrant. The Utah Supreme Court has expressly held that 1) only reasonable suspicion need be shown, and 2) other law enforcement officers' participation in such a search does not invalidate it. State v. Velasquez, 672 P.2d 1254, 1261-63 (Utah 1983). The same is true of the arrest of a parolee. Reasonable suspicion requires only that the search or arrest not be based upon "a mere hunch without factual basis, nor upon casual rumor, general reputation or mere whim." Id. at 1262 (internal quotes omitted). Adequate reasonable suspicion existed to search Tucker's home where a citizen informant reported being shown child pornography by an individual on parole for sexual abuse of a child and that the parolee had contacted a female child on the internet. R. 7. Tucker's petition fails to state a claim and it was correctly dismissed.

That the search uncovered evidence not just of a parole violation, but of new crimes, does not invalidate the search. That the evidence was used in obtaining Tucker's new federal conviction does not invalidate the search. That the revocation was based on the new convictions, and not directly upon the evidence itself, does not invalidate the search. No right of the petitioner was violated and the dismissal of this action should be affirmed.

C. Board of Pardons Can Continue a Parole Revocation Hearing for Good Cause

Nor does the petitioner's claim that the Board continued its hearing pending the outcome of the new federal charges state a claim. By rule, the Board can "[f]or good cause, . . . continue the hearing beyond 30 days." R671-515-1 Utah Admin. Code. Such a continuance was found appropriate in Petersen v. Board, 907 P.2d 1148, 1150 (Utah 1995). No right of the petitioner was violated by the board's rational decision to await the outcome of the new charges in federal court before making a final determination on whether to revoke Tucker's parole.

D. Tucker is not Entitled to Credit for Time Served in Federal Custody

By law, "[w]hile on parole, time spent in confinement outside the state may not be credited toward the service of any Utah sentence. Time in confinement outside the state for a conviction obtained in another jurisdiction shall toll the expiration of the Utah sentence." Utah Code Ann. § 76-3-202(8) (1999). This same result was reached by this Court in Ontiveros v. Utah Board of Pardons, 897 P.2d 1222 (Utah App. 1995) (parolee

who was incarcerated in California prison not entitled to credit on Utah sentence for time so served).

Tucker was released on parole by Utah. The purpose of parole is to supervise a criminal during his initial period of being reintroduced into society. This purpose cannot be fulfilled while Tucker is incarcerated in another jurisdiction. Nor can Tucker be given credit towards his Utah sentence when he is no longer in the custody of Utah, but is serving an independent sentence imposed by another jurisdiction.

Petitioner's claims fail on the merits. Rather than remand this matter to the trial court to consider these issues, respondent urges this Court to affirm the dismissal of this action on the alternative ground that the petitioner has failed to state a claim.

III. PETITIONER DID NOT FILE A MOTION TO AMEND

Tucker, on appeal, claims that the trial court erred by not permitting him to amend his petition. No such motion was ever made to the trial court. No effort was made by the petitioner to amend his petition. Petitioner's response to the motion to dismiss did not address this issue. R. 53-55. Utah law requires that a motion to amend a complaint be accompanied by a proposed amended complaint. Holmes Dev., L.L.C. v. Cook, 2002 UT 38, ¶¶56-59, 48 P.3d 895. Petitioner failed to comply with this rule. Indeed, the record is void of any showing that he sought to amend his petition in any manner below. The trial court cannot be said to have erred in denying a motion to amend that was never made.

Further, the appellant cannot raise new issues for the first time on appeal. Espinal v. Salt Lake City Bd. of Educ., 797 P.2d 412, 413 (Utah 1990) ("This claim was raised

for the first time on appeal. With limited exceptions, the practice of this Court has been to decline consideration of issues raised for the first time on appeal. We therefore do not address this claim.” (citations omitted)). The limited exceptions to this general rule deal with cases in which the appellate court is persuaded that "the trial court committed plain error or exceptional circumstances exist in this case." State v. Sepulveda, 842 P.2d 913, 917-18 (Utah App. 1992) (footnote omitted). See also State v. Brown, 853 P.2d 851, 853 (Utah 1992); State v. Emmett, 839 P.2d 781 (Utah 1992). No plain error or exceptional circumstances have been shown here. Given the petitioner’s failure to raise this issue in the trial court, this Court should refuse to consider the question on appeal.

CONCLUSION

For the above stated reasons, respondent State of Utah asks this Court to affirm the dismissal of this action.

RESPONDENT DOES NOT DESIRE ORAL ARGUMENT OR A PUBLISHED OPINION

The respondent-appellee does not request oral argument and a published opinion in this matter. The questions raised in this appeal, having already been decided by this Court in published opinions, are not such that oral argument or a published opinion are necessary, though the respondent desires to participate in oral argument if such is held by the Court.

Respectfully submitted this 9th day of August, 2002.



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CERTIFICATE OF SERVICE

I hereby certify that I mailed two true and exact copies of the foregoing Brief of Respondent-Appellee, postage prepaid, to the following on this the 9th day of August, 2002:

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