

1992

Jeanette Crawford Osguthorpe v. Jerry Silver Osguthorpe : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Jeanette Crawford Osguthorpe v. Jerry Silver Osguthorpe*, No. 920395 (Utah Court of Appeals, 1992).
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DOCKET NO. 920395 IN THE UTAH COURT OF APPEALS

JEANETTE CRAWFORD OSGUTHORPE,

Plaintiff-Appellee,

vs.

Case No. 920395-CA

JERRY SILVER OSGUTHORPE,

Defendant-Appellant

REPLY BRIEF OF APPELLANT

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County
Honorable Homer F. Wilkinson

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FILED

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REPLY BRIEF OF APPELLANT

Plaintiff Jeannette Osguthorpe in her Brief filed February 2, 1993 has continued an effective strategy which has been used throughout all of the legal proceedings in this case, i.e., inflame the court with emotional arguments so that the law will be cast aside. Plaintiff's addendum is full of irrelevant information which is there for the sole purpose to obtain a sympathetic response from this Court. Witness, for example, the police report at Appendix A19-24, the alleged transcript of conversation between Jerry and Jeannette Osguthorpe, Appendix A69-70, and the picture of the Osguthorpe house, Appendix A71. This effort would not be complete without the traditional citing of the trial testimony of Mr. Lynn Turnbow, "a neighbor of the parties" contained on page 31 of Plaintiff's Brief. Of course, as is normal, Plaintiff fails to mention that this "neighbor" is the former husband of Defendant's wife Gwenda, and is the present boyfriend of the plaintiff.

It is sincerely hoped that this Court will be able to rise above the emotionalism of the "deadbeat dad" allegation and examine this case in the academic and legal context it deserves. In the context of a legal analysis, therefore, a review of Plaintiff's Brief shows that she has been unable to refute the contentions made by Defendant in his opening Brief. She has attempted to confuse and misconstrue some of the events which occurred during this convoluted proceeding in an effort to avoid the pure and simple legal consequences of this case. Defendant will therefore review the original arguments he made in his opening Brief in light of the response now filed by Plaintiff.

POINT I

THE JANUARY AND MAY ORDERS OF THE LOWER COURT CONSTITUTE BOTH CRIMINAL AND CIVIL CONTEMPT.

In Defendant's opening Brief he explained in great detail the distinctions between criminal and civil contempt. (Appellant's opening Brief at 26-34). The language in both the January and June Orders clearly showed both criminal and civil contempt was being imposed. The thirty-day requirement of incarceration in both orders constituted criminal contempt. Likewise, the \$200 fine also complied with Section 78-32-10.

Defendant in his opening Brief contended that the January hearing for purposes of this appeal is irrelevant. (Appellant's Brief at 42). The arguments advanced by Plaintiff substantiate this contention. As correctly noted by Plaintiff, no appeal was taken by Defendant from the January Order. (Appellant's Brief at 12, 15-16). The reason that no appeal was taken was simply that

Dr. Osguthorpe, by borrowing money with his new wife, was able to come up with the lump sum amount of \$5,000 to cancel his pending incarceration.

Dr. Osguthorpe was able to successfully make his payments for a short time after the January hearing but then again fell into arrears. By then, of course, the thirty-day appeal time had expired and no appeal could be taken. This principle is even more dramatically illustrated had there been, for example, a year between the first order of contempt and the second. Obviously, a defendant who is incarcerated a year later from the first hearing cannot be said to have waived his appellate rights simply because he did not appeal from the first hearing even though he was only incarcerated pursuant to the second hearing and order. Quite simply, each order of contempt in a divorce proceeding must stand by itself in both procedure and evidence in order to justify contempt. Litigants cannot cite testimony in the original divorce proceeding or in prior contempt hearings in order to establish the necessary elements and procedure that must be present before incarceration can be imposed.

For purposes of this appeal, therefore, Defendant will readily agree with the plaintiff that the January 24 hearing is non-appealable and will focus solely upon the May hearing and the June order. Understandably, while Plaintiff maintains that the January hearing is not properly before this Court she relies solely upon it for the evidentiary basis of contempt and the procedural events which occurred. This double speak must be removed from the issues actually being litigated in this appeal.

The Court during the May hearing "sustained its previous January Order" and ordered Defendant to be incarcerated in the Salt Lake County jail for a period of thirty days together with any additional time until he complied with the delinquent support obligation. Plaintiff maintains that Defendant's assertion that this was a criminal contempt proceeding is erroneous. She states, "Both the January and June Orders were remedial in nature because they provided Dr. Osguthorpe with a way of avoiding the jail sentence and contempt citation by simply making the child support payments required by the Court." (Respondent's Brief at 21).

The argument made by Plaintiff is the same one referred to in Defendant's opening Brief where judges and lawyers believe that the stay of a sentence in order to allow a defendant to raise money prior to incarceration constitutes a "purge" thereby making the sentence civil and not criminal. (Appellant's Brief at 28-29). This contention of Plaintiff is simply not correct. The June 19, 1992 Order states, "If the \$3,050 is not paid by June 24, 1992 at 12:00 noon, a bench warrant shall issue, unless the defendant submits himself to the Salt Lake County Jail for incarceration." As happened in this case Defendant served his entire thirty-day sentence when he was unable to obtain the necessary funds prior to the date of the ordered incarceration. Moreover, after the thirty days had expired he would have continued to serve indefinitely on the civil contempt order until the amount had been paid. The "purge" ability only applied to the sentence beyond the initial thirty days. The thirty-day

provision cannot be "purged". It is a criminal sentence for past actions of contempt.

It is the obligation of this Court to correct the misapplication of criminal contempt which occurs daily in divorce proceedings. Merely staying a sentence prior to incarceration does not convert a criminal sentence of a fixed number of days into a civil sentence. The "purge" must be allowed to occur while the defendant is incarcerated and not prior to the incarceration! Because of this misapplication of contempt numerous defendants each day are being sentenced to jail sentences without being afforded the criminal procedural rights they are entitled to under the state and federal Constitution.

If judges such as Judge Wilkinson are going to use the thirty-day sentencing provision of Section 78-32-10, U.C.A., then they had better be prepared for the criminal ramifications that that section imposes. The flagrant violation of this principle daily violates the mandate of the Utah Supreme Court in Von Hake v. Thomas, 759 P.2d 1162, 1168 (Utah 1988), where the Court stated, "A contempt order is criminal if its purpose is to vindicate the court's authority, as by punishing an individual for disobeying an order, even if the order arises from civil proceedings.

For the preceding reasons, therefore, the analysis of the May Order as constituting both criminal and civil contempt has not been refuted by the plaintiff and is a legally correct analysis for purposes of this appeal.

POINT II

DEFENDANT WAS DENIED PROCEDURAL RIGHTS DURING THE PROCEEDING OF CRIMINAL CONTEMPT.

Plaintiff asserts that Defendant was not denied procedural rights during either the January or May hearing. (Appellee's Brief at 13-14, 16, 23). These contentions are without merit.

This Court in a recent December 1992 opinion stated the following concerning indirect criminal contempt:

Due process requires a person charged with indirect criminal contempt "to be advised of the nature of the action against him [or her], have assistance of counsel, if requested, have the right to confront witness, and have the right to offer testimony on his [or her] behalf. Von Hake, 759 P.2d at 1170 (quoting Burgers v. Maiben, 652 P.2d 1320, 1322 (Utah 1982); State v. Long, 204 Utah Adv. Rpt. 18 (Utah App., Dec. 16, 1992)).

In the Long case initial hearings were held as to the reason why Mr. Long's client did not report to the Salt Lake County Jail. When it was determined that this failure to report was due allegedly from Mr. Long's advice to his client, the Court recessed the proceedings and required a new hearing specifically as to the issue of Mr. Long's criminal contempt. In other words, just like any other criminal offense, an accused defendant is entitled to a separate trial with its criminal procedural protections.

In the instant case, however, as in literally hundreds of cases each year in the district courts, a father-defendant is brought to court on a civil order to show cause in the divorce proceeding which seeks numerous claims of relief such as back child support, back alimony, attorneys' fees, visitation awards,

property awards, etc. All of these claims for relief are civil. No notice of criminal contempt is ever given. This same lack of notice occurred here also. In the instant case "Plaintiff's Verified Motion for Judgment, Contempt Order, Sanctions and Other Relief" filed on September 25, 1991 requested a finding that Defendant be held in contempt of court. It did not apprise Defendant that criminal contempt of court was being sought. (Appellee's Brief, Appendix A9-14).

When the actual hearing occurred in January a full day of evidence was offered as to the numerous claims advanced by the plaintiff. As is apparentd from the transcript of that proceeding, no effort was ever made to conform this hearing to a criminal case. Defendant was never advised by the court that this was a criminal action against him, that he had the right to assistance of counsel if he was unable to afford counsel, that he had the right to confront witnesses, remain silent or to offer testimony in his behalf. The entire proceeding was in the nature of a civil divorce trial.

It was not until the court made its ruling from the bench that the matter of criminal contempt was raised. The court stated in the January 7, 1992 hearing, "The Court would order, pursuant to Section 78-32-10--and of course I've indicated he has been found in contempt--that he be fined \$200, and that he be ordered to spend thirty days in the Salt Lake County Jail." (Appellant's Appendix at 53).

This type of proceeding which is common in Utah would be analogous to a situation where a grocery store files a civil

damages action against an employee for embezzlement and at the conclusion of the trial the court orders the payment of damages to the store and the defendant to be incarcerated for criminal embezzlement. Obviously, such a result would never occur in any other context than divorce proceedings which are already muddled to the point of being almost incomprehensible.

The procedural violations concerning the May hearing were even more flagrant. Again, the "Plaintiff's Verified Motion for Judgment, Attorneys' Fees and Immediate Imposition of Jail Sentence" did not give Defendant proper notice of a criminal contempt of court proceeding--a jail sentence can also be for civil contempt. (Appellant's Brief at A42-45). The "Notice of Hearing" likewise did not inform Defendant of the criminal nature of the proceeding. (Appellant's Brief at A47).

During the May proceeding the Court never advised Defendant of the criminal nature of the action against him, that he had the right of assistance of counsel or that counsel would be appointed for him if he could not afford it, that he had the right to confront witnesses or that he had the right to offer testimony on his behalf. No witnesses were sworn and no evidence was taken in this proceeding with the exception of the proffer by Defendant of his current income tax forms. At the conclusion of the hearing Dr. Osguthorpe stated to the judge "I didn't know today that I could call witnesses, Your Honor. I thought this was just a motion to show cause. I'm not familiar--that familiar with the court system." (R. 645).

Defendant like numerous other litigants in the divorce

system before the Utah courts was "ordered to show cause" why he should not be held in contempt of court. As noted by the Illinois Appellate Court in In Re Marriage of Betts, 558 N.E.2d 404, 425 (Ill. App. 1990) if a defendant accused of criminal contempt has a constitutional right not to testify, he cannot be required to "show cause" since this violates his right to remain silent. In addition, in a criminal contempt the burden is on the petitioner to prove the charges in the petition beyond a reasonable doubt and not upon the defendant to prove his innocence.

There is no other judicial situation where incarceration occurs because of the actions of a private attorney rather than a city or state prosecutor. If criminal contempt is to be a tool in divorce proceedings then the procedures applicable to any criminal defendant must be followed to the highest degree. In the instant case, for example, Defendant served thirty days in the Salt Lake County Jail and shared his cell with traditional criminal defendants who were afforded all of the constitutional rights that criminal defendants are entitled to receive. His incarceration, however, was no less painful than those of his cellmates and he is certainly entitled to the same protections that even the most heinous criminal defendant receives under our federal and state constitutional systems.

POINT III

DEFENDANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS WERE VIOLATED AS TO CIVIL CONTEMPT BY FAILING TO INQUIRE IF DEFENDANT WAS INDIGENT AND WHETHER COUNSEL NEEDED TO BE APPOINTED.

Plaintiff has made no attempt to refute the contention of Defendant that civil contempt defendants also require at least the right to counsel. Here, Defendant would still be incarcerated today under the Court's order of civil contempt if his father had not paid the money owing to the plaintiff.

It is completely against logic and justice to require full constitutional protections to a father being held in criminal contempt with a maximum of thirty days but to require no protections to a father who may be held in jail for months or even years for failure to pay an obligation he claims he cannot pay.

The authorities cited by Defendant in his opening Brief are convincing. While this is a question of first impression in the State of Utah, there is no reason not to apply the decisions of these well-respected courts in requiring the assistance of counsel where civil contempt is being imposed. Again, in the instant case, the defendant's incarceration in the Salt Lake County Jail was just as traumatic to him during the one day of civil contempt as any other person who is incarcerated as a criminal defendant. It is the loss of liberty and freedom which is the issue and not the proceeding from which this loss occurs.

POINT IV

THERE IS INSUFFICIENT EVIDENCE TO ESTABLISH THE ELEMENTS REQUIRED FOR CIVIL OR CRIMINAL CONTEMPT AND, IN ADDITION, THE FINDINGS OF THE LOWER COURT ARE LEGALLY INSUFFICIENT TO IMPOSE CONTEMPT.

Defendant in attempting to justify the contempt orders specifically relies upon the January 7 proceeding. (Appellee's

Brief at 18-19). As noted earlier, however, Defendant was not incarcerated as a result of the January hearing but specifically as a result of the May hearing. Even if it is assumed arguendo that the evidence in the January hearing was sufficient to have imposed the contempt of court of the January 24 Order, such fact does not help the appellee in this case.

It is the obligation of the moving party to prove the required evidentiary basis by the criminal standard of beyond a reasonable doubt or the civil standard of clear and convincing evidence each time a separate contempt is being sought. For example, if Defendant had a high paying job in January but lost it in February and was therefore unable to make any continuing payments, the evidence taken in the January hearing could not be used as a basis for a subsequent hearing in December. Moreover, it is not sufficient for a litigant in a divorce proceeding to merely show that money is owed by the other party. While this will result in a money judgment being levied against the other party, it is legally insufficient to impose incarceration. The moving party must prove that the defendant has the ability to comply with the court's order and has willfully refused to do so.

In the instant case, the May hearing is clearly procedurally as well as substantively inadequate to have imposed jail incarceration. No testimony under oath was taken by the court at all. No proffers of testimony were made. All that occurred was the dialogue among the judge, defendant and plaintiff's attorney. The only evidence offered was by Defendant of his current tax return which substantiated his claims that he was unable to meet

these obligations.

Since there was no evidence taken there were no findings entered. As noted in Defendant's opening Brief, such findings are legally required before contempt of court can be imposed. Thus, Plaintiff's effort to piggyback the May hearing upon the findings of the January hearing is constitutionally defective and cannot be allowed to stand.

POINT V

DEFENDANT'S INCARCERATION FOR THIRTY
DAYS IN THE SALT LAKE COUNTY JAIL
VIOLATED ARTICLE I SECTION 16 OF THE
UTAH CONSTITUTION WHICH PROVIDES THERE
SHALL BE NO IMPRISONMENT FOR DEBT.

Plaintiff has made no attempt to address the constitutional issue raised by Defendant. Instead, she has generally relied upon her old tactic of trying to inflame this Court as to emotional issues of nonsupport. In addition, many of her citations for this emotional impact relate to testimony or events many years prior to the May hearing. The standard of contempt of court as well as this state constitutional provision requires evidence of a present ability to pay and a present defiance of the court's order. Whatever happened in the past is irrelevant in determining imprisonment for debt.

POINT VI

THE TRIAL COURT ERRED IN AWARDING PLAINTIFF
ATTORNEYS' FEES INCURRED AS A RESULT OF THE
UTAH SUPREME COURT EXTRAORDINARY WRIT ACTION
AND THE FEDERAL COURT HABEAS CORPUS ACTION.

Plaintiff makes the interesting argument that because no separate notice of appeal was taken from the order of attorneys' fees issued in accordance with this Court's remand, that

Defendant has waived any right to now complain. (Appellee's Brief at 12; 24-25). This argument is also without merit.

Defendant properly appealed the June 19, 1992 order of contempt. At that time all matters relating to the contempt were removed from the lower court and placed in the jurisdiction of this Court. On July 16, 1992 this Court issued an order "that the case is temporarily remanded to the trial court for determination and entry of an award of appellee's costs and attorneys' fees reasonably incurred in opposing the motion for stay."

As soon as this hearing had been held the case was sent back to this Court for disposition. In effect, this Court appointed the lower court as a master to assist in the appellate decision. As such, therefore, Defendant is entitled to properly complain about the proceedings below which are legitimately connected to the original notice of appeal filed in this case.

The contention of Plaintiff would require Defendant to pay a separate filing fee, file a separate docketing statement and file briefs months or years behind the main action which is the subject matter of the lawsuit. Moreover, the court's decision as to attorneys' fees cannot be deemed a final order but is only an interlocutory order of the contempt proceeding.

Defendant submits, therefore, that this matter of attorneys' fees is properly before the court and that the lower court exceeded its limited jurisdiction granted by this Court in awarding attorneys' fees incurred in the Supreme Court and Federal District Court actions. In any event, the district court

had no power to make the award when neither Court ordered such fees be assessed.

Assuming that this Court finds that Defendant's incarceration was improper and that the contempt of court order was illegal then Defendant respectfully submits that any award of attorneys' fees incurred as a result of attempting to stay that order should also be reversed since Defendant was justified in seeking the original stay in spite of this Court's preliminary decision to the contrary.

POINT VII

PLAINTIFF SHOULD NOT BE AWARDED HER
ATTORNEYS' FEES AND COSTS INCURRED IN
CONNECTION WITH THIS APPEAL.

In a final effort to arouse sympathy and emotion on her behalf Plaintiff's attorney cites selected portions of the record (some many years old) to further substantiate the "deadbeat dad" claim made throughout these proceedings. This Court should keep in mind, however, that attorneys' fees have already been awarded to the plaintiff for all of the proceedings from which this testimony was taken. The sole question before this Court is whether in this appeal Plaintiff is entitled to additional attorneys' fees.

The answer to this question is simple. If Defendant prevails in his claim that he was wrongfully incarcerated then he will be the victor in the appeal and Plaintiff is not entitled to attorneys' fee regardless of all of the past wrongs she may claim have occurred during these four-year proceedings. If, on the other hand, Defendant loses this appeal, then this Court may

properly consider awarding her appropriate fees directed solely to the issues of the appeal upon a finding that she is unable to pay her own attorneys' fees.

CONCLUSION

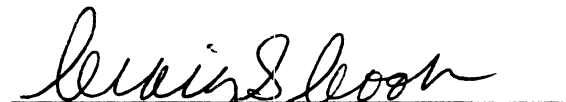
This Court, as an appellate court, is obligated to examine cases much more carefully than in the war zone of the district courts. For example, what may be an effective trial tactic to obtain a favorable verdict in an emotional personal injury case may not be found legally proper when viewed in the sanctity of the appellate court conference room. Likewise, the smoke and mirror arguments and emotional pleas which occur daily in the district courts as to divorce proceedings must be discarded completely so that a correct legal analysis can be made.

Defendant contends that when the emotional pleas of Plaintiff are eliminated from this appeal, the record is crystal clear that the following has occurred: (1) Defendant was not given proper procedural notice of his rights as to the criminal contempt conviction he received; (2) the stay of execution of a criminal contempt order does not amount to a "purging" which converts such order to a civil contempt as is erroneously believed by most judges and lawyers in Utah; (3) before a defendant can be physically incarcerated as to criminal contempt there must be an evidentiary hearing upon which the moving party proves beyond a reasonable doubt that the defendant willfully failed to comply with the court's order; (4) before incarceration can occur the lower court must specifically make findings as to this willfulness; (5) since the consequences of civil contempt

are even more severe than criminal contempt defendants are entitled to certain elementary rights such as the right to counsel to prevent unjustified incarcerations; (6) all of the above principles are applicable to every defendant in a divorce proceeding no matter how far behind he is in his child support payments and no matter how bad a person he is claimed to be by the former spouse.

This case not only affects the rights of Dr. Osguthorpe but concerns the procedures utilized daily in the State of Utah as to hundreds of other defendants. It is hoped that this Court will recognize the legal ramifications of this decision and will make the careful legal analysis required to overcome the emotional fluff permeating the record.

DATED this 18th day of February, 1993.


Craig S. Cook
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that I mailed two true and correct copies of the foregoing Reply Brief of Appellant to Sharon A. Donovan, Attorney for Appellee, 310 South Main, #1330, Salt Lake City, Utah 84111 this 18th day of February, 1993.

