

2004

In the Matter of David Weisopf, a person over 18 years of age : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

IN THE MATTER OF

:

DAVID WEISKOPF,

: Case No. 20040489-CA

: (not incarcerated)

A person over 18 years of age.

:

REPLY BRIEF OF APPELLANT

This is an appeal from a final order of criminal contempt, in violation of Utah Code Ann. § 78-32-3, entered in the Second District Juvenile Court in and for Weber County, State of Utah, the Honorable Mark R. Andrus, Judge, presiding.

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UTAH COURT OF APPEALS
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IN THE UTAH COURT OF APPEALS

IN THE MATTER OF :
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A person over 18 years of age. : (not incarcerated)
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SUMMARY OF ARGUMENT

The document entitled Minutes, Findings and Order signed on May 11, 2004 constitutes a final order in this case and the judge was precluded from entering a new and different order on May 21, 2004. The facts in the record of this case do not support the judges contempt Findings and Order of May 21, 2004.

ARGUMENT

Judge Andrus' brief distorts, misstates and misrepresents the facts of this case. The recitation in the statement of case is substantially correct. Paragraph 15 is incorrect wherein it states that Mr. Weiskopf did not say anything. In fact, Mr. Weiskopf when asked if he wanted to say anything responded "Not at this time your honor. I did want to review the record but didn't have an opportunity, as the court well knows, so I'm not really prepared to say anything at this time . Thank you." (R. 48 p 2 lines 8-11).

Paragraph 14 of Respondent's brief misstates the facts of this case. At no time did the court state that it "had initially indicated orally that it would not find contempt of court at the time, even though Mr. Weiskopf's behavior would support such a finding." What the court did

say was “Now, I’m going to warn you again, Mr. Weiskopf, it was very inappropriate when you made the last statement to the court directly, “I’ve had it” and then repeated that and I find that that is contemptible I’m not finding you in contempt of Court at this time.” (R. 47 p. 80 lines 2-6). At no time did the court use the words “even though Mr. Weiskopf’s behavior would support such a finding.” Respondent’s brief is misleading. The court did prepare a document on May 21st that recites “that it initially indicated orally that it would not find contempt of court at that time even though Mr. Weiskopf’s behavior would support such a finding.” (R. 38). This finding is not supported by the record of what the judge actually said. This finding is made 10 days after the hearing where the alleged contempt occurred and 10 days after the same court had prepared and signed a document called: Minutes, Findings and Order, wherein it had stated “the court indicates that it finds Mr. Weiskopf’s conduct contemptible but does not find him in contempt” (R. 41). This Minutes, Findings and Order document contains interlineations made and initials by the judge indicating that he carefully reviewed it prior to signing it.

Respondent argues “the ultimate issue in this case is the effect of the trial courts words and actions related to: 1) The oral and written statement that the Appellant’s actions were contemptible; 2) the oral statement that the Appellant would not be held in contempt “at this time”; 3) the minute entry which stated that the court did not find Appellant in contempt; and 4) the subsequent contempt order issued at the end of the certification hearing.” (Respondent’s brief p. 10).

Respondent argues that the courts words and actions indicate that the court was reserving final judgement on the contempt but does not explain why. Appellant argues that the courts words and actions indicate the court was making a final determination of the case. The court

makes its oral ruling finding that Appellant's actions are contemptible but making a specific finding that "I'm not finding you in contempt at this time" (R. 37 p. 80 lines 5, 6). Immediately upon completion of the days proceeding, the judge prepares a document called "Minutes, Findings and Order." In this document the court originally finds Mr. Weiskopf's conduct contemptible but does not find him in contempt (R. 41). The court then by interlineation changes contemptible to contemptible and does to does and initials these changes. The court then has a new document prepared entitled Minutes, Findings and Order. In this document he says "the court does find Attorney Weiskopf's conduct was contemptible, but does not find him in contempt" (R. 37 p. 40). It's clear by these changes that the judge carefully considered and weighted what he was doing. He prepared three separate documents before he was satisfied with his work. At no time in the preparation of the documents did he indicate he was reserving time to change his mind or to reconsider what he was doing. He chose the words Findings and Order and he should be bound by that order. He gave no indication, as argued in his brief, that he was reserving final judgement. Further evidence of the judge's mind set when he prepared and signed the documents on May 11, 2004 can be found in the judge's own words on May 21, 2004 when he says "... I have, regarding my ruling on May 11th when we were here last time, Mr. Weiskopf, where I decided not to find you in contempt of court, I changed my mind" (R. 47 p. 267 lines 14-16). The judge himself acknowledges that he made a ruling that there was no contempt but no, he is changing his mind. To permit this to occur would be akin to having a jury find a defendant not guilty but some ten days later saying "gee, we have changed our minds, you are now guilty."

Respondent place great weight in the use of the words "at this time" in his initial oral ruling and contends that this language indicates an intention to do something later. The problem

with this argument is the judge himself prepared the written Findings and Order which did not contain any such reservation. If the judge had intended to reserve judgement he would have said so in his order that he corrected twice before being satisfied with it. The May 11th order was a final order.

Another major problem with the recitation of facts by Respondent in paragraphs 13 and 14 of his brief is that while the facts recited in the brief are substantially correct, they are not supported by evidence and or facts in the record of this case. The Courts written findings dated May 21, 2004 (R. 35-38) are likewise not supported by the evidence in this case. The court made findings without evidence to support them.

It is clear that the court found Mr. Weiskopf in contempt for the four separate reasons set forth in paragraph 13 of Respondent's brief. The problem with this finding is that there is no evidence in this record to support these findings. Respondent cannot cite any portion of the transcript to support the conclusions reached.

There is no evidence that Mr. Weiskopf "repeatedly and rudely interrupted the court while it was attempting to explain its ruling or violating the courts order not to argue with the courts ruling." The complete colloquy on this point can be found at (R. 47 pages 71-76) On page 74, the court makes its ruling. Mr. Weiskopf argues language from the statute whereupon the court says "Okay, I've made my ruling."

Weiskopf: All right. The State denotes that in stark contrast and plain language and the definition in the code and the Court has already shown hostility toward prosecution and we wonder why they're trying to keep evidence out that's clearly provided for in the law.

The Court: Mr. Weiskopf, your statements are inappropriate. The next time that you argue with my rulings after I've made a ruling, I will find you in contempt of court. I'm directing you not to do that.

Weiskopf: We'd asked to be allowed (inaudible) an appeal on this issue and a continuance for the purpose of doing that appeal.

The Court: Denied.

Weiskopf: Would you - can we have a recess to page Detective Scott?

The Court: Yes. Let's take about a 10 minute break.

Weiskopf: So you're saying we need to present Alex Espinoza?

The Court: I've made my ruling on the - I've denied -

Weiskopf: We'd ask for a continuance since the Court gave us this new slant on what a certification -

The Court: I'm taking a 10 minute break, so let's take a break.

It's clear from the record that Mr. Weiskopf does not interrupt the judge and when warned that the next time he argues a ruling he will be found in contempt. Mr. Weiskopf merely asks for a continuance to appeal. When Mr. Weiskopf seeks to give further explanation for his request for continuance he is cut off by the judge (R. 47 p. 76 lines 9-12). These facts do not constitute "repeatedly and rudely interrupting the court while it was attempting to explain its ruling, violating the courts order not to argue with the court.

The behavior in chambers is a disputed matter. After the in-chambers proceeding, the court attempts to re-create what occurred. The court placed its version of what had occurred on the record (R. 47 p. 76 lines 17-25, p. 77 lines 1-11). Mr. Weiskopf then presented his version of

what occurred. He specifically points out that he was not trying to re-argue the ruling but in fact was seeking clarification since evidence of a similar nature was going to be offered later on in the case (R. 47 lines 16-25). Judge Andrus recognizes and acknowledges that part of what Mr. Weiskopf was doing was seeking clarification regarding the admission of similar evidence at a future time in the proceeding (see R. 36 ¶ 4). The record is not clear as to what occurred in chambers and does not support a finding of contempt.

As pointed out in paragraph 14 of Respondent's brief, the court made contempt findings based upon conduct that had not occurred in these proceedings but in the past. The court makes findings that Mr. Weiskopf has engaged in contemptible behavior in the past and makes a further finding that there had been a meeting with his employer to address this problem. There is no evidence in the record of this case to support these findings. Mr. Weiskopf was never notified of these contempt allegations nor was he given an opportunity to respond to them. There is no evidence in this record that "other attempts to address Mr. Weiskopf's inappropriate behavior have been unsuccessful" (R. 38). The court, ten days after the alleged contempt in this case, made findings of fact based upon conduct other than that in the current proceeding before the court. Mr. Weiskopf was not given notice of this alleged contemptible conduct. No hearing was held concerning these matters and Mr. Weiskopf was not given an opportunity to defend against these allegations. The court made findings of facts not based upon evidence. Appellant's due process rights were violated.

The respondent, in his conclusion, sets forth a litany of factors that supposedly justify the judge in entering a contemptible order against Appellant. The problem is, none of those factors were before the court in this case and there is no evidence in this record to support a finding of

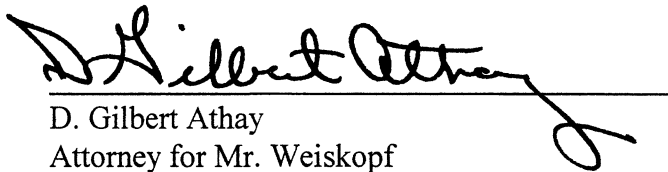
contempt therefrom.

CONCLUSION

The trial court entered a final order on May 11, 2004 finding that Appellant was not in contempt. The court improperly reversed this order and entered an invalid contempt order on May 21, 2004.

The May 21, 2004 order of contempt was entered without prior notice to Appellant. No notice was given concerning the allegations of contempt. Appellant was not permitted to present evidence on his own behalf in defense of this contempt and the findings of the court are not supported by evidence in the record of this case.

Dated: April 21, 2005.


D. Gilbert Athay
Attorney for Mr. Weiskopf

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of April, 2005, I mailed two true and correct copies of the foregoing Reply Brief of Appellant to Brent M Johnson, Administrative Office of the Courts, Legal Department, 450 South State Street, 3rd Floor, Salt Lake City, Utah 84111.