

ORAL ARGUMENT - 9/7/95
94-0460
EX PARTE JUDY COX SWATE

CASEY: May it please the court, counsel. I am going to initially address if I may what I perceive as the defenses that were raised in the response brief by the real party in interest Mr. Eikenberg, the receiver, and the person for who he is trying to collect the debt for Ms. Hartwell.

The first argument they've raised is that my filing on behalf of my client a application for writ of habeas corpus is an attempt to substitute as a regular appeal. I wish to point out that my habeas corpus is within the parameters of what a habeas corpus is for, and that is namely to find the commitment and contempt orders void. You could take if you like and discharge or ignore the other pleadings and orders that relate to the turnover order. In fact if you will recall I did not even want to file this and initially was granted bond on behalf of my client by this court. I didn't even file a statement of facts.

I am here suggesting to this court that the orders of commitment and contempt themselves are void and that this is not any attempt to do something by a regular appeal. The order themselves on their face are what's void.

HECHT: You could have appealed I suppose?

CASEY: Well you could have appealed the turnover order that's correct. I mean that is subject to a regular appeal. But at this point in time in terms of the contempt itself I mean obviously all I had was the habeas method in order to release my client from jail.

Further the second argument was that they said that I did not raise defenses at the trial court level. And they cite in their brief a number of cases that talk about if you are going to raise...

GONZALEZ: Mr. Casey I appreciate you going right into the legal issues. But the facts are very convoluted in this case. At least from my purpose I think at least a minute or two resuscitation of the facts of the case would be helpful. Because I don't find anywhere in the case where Ms. Swate is a judgment debtor. And if she is not a judgment debtor how can there be a turnover order? So I think it would be helpful to trace some of the procedural history of the case.

CASEY: In terms of the history, and I will tell the court that obviously I got on the tail end of this particular history for the habeas itself. And because I was specifically addressing the voidness of the order because I thought it had to be limited in scope. But in terms of the order as I understand it there was a first Mrs. Swate, which is Mrs. Hartwell now. She had a judgment a post-divorce judgment resulting from something out of their original divorce decree.

GONZALEZ: The judgment was against her ex-husband?

CASEY: Against Mr. Swate. There has never been a judgment per se to my client. At some point in time the second Mrs. Swate, which is my client, also got a divorce and is out of the 312th court. This court will notice that this particular order was out of the 309th, the judgment was out of the 309th. In the 312th court at that point in time there was a judgment and there were certain funds that were found to be and segregated as the 2nd Mrs. Swate's separate property - my client's separate property. Because Mr. Swate perfected an appeal of that second divorce, at that point in time the money was put into the registry of the court, of the 312th.

At some point in time then the first Mrs. Swate had gotten the judgment and furthermore had gotten a receiver appointed in the person of Mr. Eikenberg at which point in time they then filed an intervention in the 312th. In other words intervention in the 2nd divorce case asking that any funds to be disbursed that their interest be looked after and that these be assigned or paid over in satisfaction of this judgment. At that point in time the intervention I believe on Nov. 6 the 312th Judge Webb, the trial judge of the 312th, dismissed the intervention.

GONZALEZ: And there was no appeal for the denial of intervention?

CASEY: That's exactly correct. And I think that's a very cognizant point because my client is being attacked for the purpose that you know we are trying to sit here and set aside a turnover order when we should have done it by direct appeal. When in fact I think the turnover order is an attempt to collaterally attack this failure of the 312th to allow the intervention to stand.

At that point in time after the intervention was denied, then my client did in fact remove the funds because his appeal was unsuccessful. There was a disbursement of the funds. And again these funds at that point in time had been legally found to be the separate property and were segregated as the separate property of my client. At that point in time that's when the turnover order came about and they indicated that they were claiming that they have a right to these funds and they should be turned over to Mr. Eikenberg as part of his satisfaction of the judgment.

GONZALEZ: Up to this point she in no way is a judgment debtor?

CASEY: That's correct.

GONZALEZ: To a receiver or to the parties who the receiver represented?

CASEY: That's absolutely correct your honor. I still don't think she is a judgment debtor in the classical sense except for the awarding of attorney's fees. She is not a judgment debtor in terms of the monies that are owed in satisfaction of that judgment, which is due the first Mrs. Swate from Dr. Swate.

GONZALEZ: Can we move on now to the contempt.

CASEY: In terms of the contempt itself the arguments that I've posed are basically 4:

GONZALEZ: Factually how do we get to the contempt?

CASEY: In terms of the contempt there was the turnover proceeding filed, and then there was a motion filed for contempt for enforcement. And on the motion for contempt for enforcement again one of my arguments is that nowhere in there are they specifically asking for jail time. But they had a motion for contempt, they file it, and at that point in time there are some mandamuses filed because there was a bankruptcy filed in there and so there was a stay order. What happened is that on Sept. 7 they actually had a hearing. There was a mandamus filed. It was conditionally granted and then it was subsequently dismissed. The court dismissed it. And then at that point in time an order was actually put in on the 10th. And the oral rendition on the 7th indicated that payment had to be made of the \$10,000, and 3 days in jail, but could be purged if there was some arrangement to make up other payments that had come out of the registry of the court and to make some attorney's fees.

They signed this order on 10th, and said all these things had to be done. Then there was a compliance...

PHILLIPS: All of these days are a little hard on me.

CASEY: They are hard on me as well your honor. The receiver at that point in time comes back in the 309th court, all this now is taking place in the 309th, there's nothing further happening the 312th, in the 309th court the receiver gets the order that's signed on Sept. 10. Also at that time a compliance hearing was set. Finally in Jan, 1994, they then have the compliance hearing. At which point in time they put in what is known as the commitment order. And at that point in time she is incarcerated and they seek application from the 14th CA. She was released on \$500 bond. And after a hearing in an opinion the 14th CA found that the writ should not be granted.

ENOCH: The judgment against Mr. Swate occurred while he was married to the 2nd Mrs. Swate?

CASEY: I believe that is correct your honor.

ENOCH: Can that judgment be collected against community assets of that 2nd marriage?

CASEY: Your honor in terms of collection I don't believe so because my understanding that...yes I think it can possibly under the Family Code be collected against community assets.

ENOCH: Is it significant to our inquiry in this case...I mean is it relevant to the inquiry whether or not the TC in the 2nd divorce divides this money between Mrs. Swate and Mr. Swate with respect to whether the money that's in that pot is subject to this judgment?

CASEY: I don't think that's...I mean in terms of subject to a judgment my analogy would be just as if you've got a judgment abstracted out there. You know when persons get divorced I don't think there is any necessity in the divorce decree to say this is or this isn't subject to that particular piece of property. So I don't think the very fact that the judgment was not mentioned in the divorce decree itself had any bearing.

ENOCH: I guess my point is there is no question that whoever was seeking to enforce that judgment could trace these community funds regardless of what the family court says about where the funds go?

CASEY: I don't think there is any dispute that they were community funds that were partitioned at the time of the divorce if that's what you are asking.

ENOCH: My question is is there any question about whether the first Mrs. Swate being a judgment creditor could go after those funds that were awarded in the divorce court to the 2nd Mrs. Swate?

CASEY: Again when you are talking about _____, the problem is when you do a partition in terms of those funds supposedly there is some sort of quid pro quo. But I am assuming that she could have made some claim as she tried to do via the intervention route.

HECHT: Let me take you to one of the issues that you've raised. Regarding the vagueness of the enforcement part of the order, the payment of \$39,000 some odd upon making satisfactory provision for that. If that argument is sound does it relieve the relator of the criminal punishment, the fine and the imprisonment?

CASEY: Your honor I believe it does. Because those cases stemming from Genacobb(?)

and it's not something that can be split. Also basically what this court will be doing is reforming a criminal sentence. And there is in criminal case law that indicates that you cannot perform a criminal sentence in a non-jury criminal trial. And that's Bogany v. State, 661 S.W.2d 957; and there is also one out of the 14th CA, King v. State, 710 S.W.2d 110, (1987). So my feeling is because you are talking about one particular incident and all of a sudden you are reforming that sentence, I think that's a void action.

HECHT: The requirement of making suitable arrangements for payment is separate from the 3 days in jail and the \$500 fine. And you say you can't separate those?

CASEY: That's correct. Because I mean basically on that line of the cases that stem from Genacobb(?) what they are saying is that if you can separate incident by incident. In other words you've got punishment for incident A, and you've got punishment for incident B, then okay if the punishment for incident B is no good, you can throw that out and leave the incident A. But what we've got here is one incident where she failed to turn it over, and so all that punishment comes under that one particular incident. And so therefore the entire punishment has to be thrown out.

HECHT: But part of it's punishment, part of it's remedial. In your view that doesn't keep that rule from applying? The payment of money is not something the judge could have punished her by. He could impose only a \$500 fine.

CASEY: That's right. Again I don't think that you can distinguish the two. The other question that to me is even more basic is this idea that it's nonimprisonment for debt. I mean there is clearly attorney's fees that are being _____. This is not a child support situation. I know of no law that states that you can hold somebody day to day until they make payment of attorney's fees. And so for that reason I think clearly there is an imprisonment for debt going on here. There has been trying to establish to say well this is not a debt. This is punishment for not complying with the order. Again, I think it is just a question of debt. And I don't see how you can get around it.

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RESPONDENT

JOHNSTON: May it please the court, counsel. Your honor I would like to address a couple of the questions that came up earlier as far as the history of the case. I do think that it is somewhat confusing. What happened in this case is that Dr. Swate who was an attorney as well as an M.D. had a practice and he had some money that was owed to him from the practice. In the course of the divorce \$49,000 which was owed to him by his law firm was deposited in the registry of the 312th District Court. That was money that had been earned by Dr. Swate. It was his sole management community property. It was never in the possession of Mrs. Swate. It had never become her separate property.

In the course of the divorce the parties Dr. and Mrs. Swate never informed the 312th District Court that the judgment against Dr. Swate in almost \$600,000 had been rendered in favor of Mrs. Hartwell. That was never brought to the attention of the 312th DC. The court awarded the money that was in the registry in the court, the \$49,000 to Mrs. Swate. However, Mrs. Swate did not obtain possession of that money until May 12, 1993. As it occurred in May 10, 1993, the 309th DC had ordered Mrs. Swate to turn over any funds that she obtained from the registry of the court to John Eikenberg.

GONZALEZ: At that point counsel can you tell me if there was a hearing on that turnover order, or a notice to Mrs. Swate before the order was issued?

JOHNSTON: Yes, your honor there certainly was. I was present. And there was a hearing. In fact there were two hearings.

GONZALEZ: She was served with a turnover order?

JOHNSTON: Her attorney was served with that order which Judge Montgomery signed on May 10 on May 11th. The day after that order was signed Mrs. Swate took the money out May 12, the next day.

GONZALEZ: Whatever notice she got she got it through service...

JOHNSTON: On her attorney who was also served with notice of the hearing before it took place, and was served with the order after it was signed.

GONZALEZ: Was there a hearing prior to the issuing of the order? You say there is notice.

JOHNSTON: Yes your honor there was.

GONZALEZ: Is the hearing in our record?

JOHNSTON: I don't believe that it's in this court's record. I think that there is a transcript of the Sept. 7 contempt hearing. But that clearly did take place, and is part of the CA's record if I recall properly your honor. I hope I am not mistaken on that.

GONZALEZ: At that hearing Mrs. Hartwell justified by some sort of right that she was entitled to those funds?

JOHNSTON: Well your honor I believe that Mrs. Hartwell and her attorney did not appear, although they were properly noticed of the hearing.

GONZALEZ: Who had the burden of proof to go forward? The judge sua sponte the turnover order. Who was speaking for the judgment creditor? Anybody?

JOHNSTON: Well your honor we were present, John Eikenberg through me at the hearing in order to pursue these funds.

GONZALEZ: What evidence did you present?

JOHNSTON: Your honor that the funds were uncontestedly money that had been earned by Mr. Swate through his law firm. They were his sole management community property, and therefore subject to execution by a creditor, a judgment creditor.

OWEN: Had you already made these arguments in the 312th DC?

JOHNSTON: We did your honor. They had not been made I believe at that time.

OWEN: Why were you in the 309th and not the 312th?

JOHNSTON: Because the 309th was the court which had granted the judgment, the \$579,000 judgment in favor of Mrs. Hartwell. And it was through the 309th DC that the post-judgment proceedings were being carried forward. The collection efforts were being made in the 309th. And it was unfortunate that the 2 courts for awhile were kind of going against each other in these proceedings. The 312th was doing a divorce; and the 309th was doing a judgment. And the judgment came first by approximately a month before the divorce happened in the 312th.

OWEN: When was the intervention where you were denied intervention?

JOHNSTON: The denial of the intervention happened approximately 4 months after the divorce took place.

OWEN: Is it before or after May 10?

JOHNSTON: It was before.

OWEN: You had made these arguments in the 312th?

JOHNSTON: Actually we had never had an opportunity to make them. The 312th had just not been willing to consider an intervention because the divorce had already happened, and they said: It's too late; we don't want to hear any of your arguments because the divorce is over with.

GONZALEZ: You did not appeal that?

JOHNSTON: No your honor that was not appealed. The problem with that is that I don't think that a judgment creditor in order to preserve rights is required to intervene in a divorce. Just like a mortgage holder on a house is not required to intervene to preserve the lien. It's there. And the third party creditor's rights are not going to be damaged by the fact that a divorce has taken place.

GONZALEZ: Counsel do you concede the fact that Mrs. Swate was not a judgment debtor?

JOHNSTON: She was not a judgment debtor.

GONZALEZ: But then if she was not a judgment debtor how could you get a turnover order against her?

JOHNSTON: Your honor because the money we were getting was not her money.

GONZALEZ: The court had adjudicated it was her money.

JOHNSTON: No your honor the 312DC...

GONZALEZ: The court had allowed her to take the money out of the receivership.

JOHNSTON: The 312th that is correct. The 312th DC had awarded that money to Mrs. Swate in ignorance of the fact that there was a judgment...

GONZALEZ: Whether it was ignorance or not the court said it's your money you can take it.

JOHNSTON: That's correct.

GONZALEZ: So there was a valid court order saying these are your funds?

JOHNSTON: That said that she could take them. The order that said she could take them didn't say these are your funds. It said you are entitled to take them out of the registry of the court.

GONZALEZ: She was awarded the funds out of the marital estate.

JOHNSTON: She was awarded the funds in the divorce decree. And the order that allowed her to take them out allowed her to withdraw them from the registry of the 312th DC.

GONZALEZ: Help me understand how you can get a turnover order against a person who was a stranger to the lawsuit, and is not particularly is not a judgment debtor?

JOHNSTON: Well your honor the funds were sole management community property that had been her husband's earnings. They were going into her hands, into her possession pursuant to the divorce decree. But a judgment creditor, Mrs. Hartwell, was attempting to follow those funds and to collect those funds to partially satisfy her judgment.

GONZALEZ: Against a stranger to the lawsuit?

JOHNSTON: A stranger to the divorce. Mrs. Hartwell was a stranger to the divorce. Mrs. Swate was a stranger to the judgment.

GONZALEZ: She was not a party?

JOHNSTON: That's correct. But she was obtaining funds that were in fact completely subject to collection under the family code. There is no way that two spouses should be able to divide their assets, allow the judgment creditor out there to watch the money just go to the other spouse, and the other spouse can say: "Well I was never the judgment debtor so it's now my separate property and you can't ever have it."

HECHT: The order allowing her to withdraw the funds was agreed to by the judgment creditor?

JOHNSTON: The order allowing Mrs. Swate?

HECHT: To withdraw funds from the registry of the 312th court?

JOHNSTON: No it was not agreed to your honor.

HECHT: The one in the record is signed as having been agreed to.

JOHNSTON: No your honor there was an agreement between Mrs. Swate and her husband's attorney, but not an agreement ever between Mrs. Swate and either Mr. Eikenberg or Mrs. Hartwell.

HECHT: No I am not suggest that. I am saying that the judgment debtor and...

JOHNSTON: And his to be ex-spouse.

HECHT: Yes, who took the money, that order allowing that payment was agreed to?

JOHNSTON: Yes your honor Mr. Swate had no problem letting her have it rather than letting Mrs. Hartwell have it. But that really doesn't solve the problem. He was more than willing to let her have his money rather than the judgment creditor.

HECHT: It seems to be minimal cooperation between the two district courts in this case; is that true or is that unfair?

JOHNSTON: Your honor for awhile there was confusion. Ultimately the 312th realized where we were coming from and in fact ordered Mrs. Swate to give us the money too. But that was much further down the road and is not part of any of our records. It was just unfortunate because of the closeness of time things were out of kilter or out of synch for awhile.

ENOCH: The order says that she can purge herself, the 2nd Mrs. Swate, of contempt if she makes suitable arrangements for payment. Why is that not so vague that makes the contempt order void?

JOHNSTON: Your honor it's not too vague because it's subject to common sense. This lady was specifically found in the order of contempt to have sufficient resources to be able to make arrangements. And in fact it left her some room to either sign a note or to sell assets, or to make some kind of written arrangement that would allow her over whatever period of time was reasonable to pay back these funds.

Your honor I thought about this. All over this state judges are ordering people to answer interrogatories, to just answer the interrogatories that they have failed to answer. People can't. They shouldn't be able to come back and say well you didn't tell me how long to make my answers, or how detailed to make my answers.

SPECTOR: But that doesn't need the agreement of the other party. It would not need the agreement. In this case suitable arrangements depended on the receiver agreeing to that.

JOHNSTON: Your honor yes. Everyone would have to be in reasonable good faith to make it work. And I think they would have been had there been the slightest effort made to try to make it work. She had the assets. Clearly had the funds available. But she never made even the slightest attempt to make this arrangement work, to make any kind of arrangement. Nor did she make the slightest effort to pay the \$10,000 which she had testified was in her possession at the time. So she took funds which from the creditor's point of view were not her funds. This had been argued for quite some time before May 10, 1993. Then what happened is that Mrs. Swate, the 2nd Mrs. Swate, got the money on May 12. She then took the money and more or less disappeared and claims she never knew about the order which was personally delivered to her attorney's office on May 11. She didn't know anything about it until July 8 she testified, then she learned about it through her second set of attorneys. And at that point she made no effort to make any complaints with the court's order. And eventually the contempt hearing took place on Sept. 7. The order was signed on Sept. 10, 1993. The court gave her time to comply, and time to make these arrangements. She never went back to the court. And I think this is significant that Mrs. Swate never went back to the court to ask for any clarification. If there was clarification needed then she should have...

GONZALEZ: Why did she need clarification? She had her money in her pocket. She had no incentive to go and clarify what. She got what she wants.

JOHNSTON: Well I was talking specifically your honor about any alleged vagueness in the balance of the order if there was any unclarity as to what she was supposed to be doing she should have gone back to the trial court. She had four months between the time the order of contempt on Sept. 10, and then the compliance hearing on Jan. 21, 1994. She had all that period of time in which she could...

GONZALEZ: But counsel you've shifted the focus to Mrs. Swate, which is fine, but going back to Justice Spector's question: Why is it to make suitable arrangements not vague but particularly when it takes the other party, the party that's receiving the money, has the control as to whether or not whatever arrangements are made are suitable or not. Why is that not vague?

JOHNSTON: Well your honor because I think it's subject to a reasonableness test. If she had made some arrangements and if Mr. Eikenberg had said well those are not suitable, then we would have

had to start completely over again. We would have gone back to the court. We would have had a new proceeding to determine whether her arrangements were suitable or not. She would have at least complied with the order that was in front of her. And she didn't even make the slightest effort to do so.

HECHT: If that portion of the order is too vague, does that vitiate the rest of it?

JOHNSTON: No your honor it shouldn't.

HECHT: Why not?

JOHNSTON: Because your honor the things that are specific, that are there that she needs to do such as pay the \$10,000 that she had in her possession, why should she not be required to do that? If in fact we are correct in that money was never her money to just grab and run off with, then she should put it back. She should pay what she had. And I don't think that the court's order was unreasonable. If we are correct and if she took money that was not hers that she knew she shouldn't have been taking without paying attention to Judge Montgomery's order, then what do you do. You require her to sell assets. You require her to sign a promissory note. She needs to make arrangements to pay that money back. And I think the court was giving her room to do that, to do something.

CORNYN: Why isn't it unconstitutional for imprisonment of debt?

JOHNSTON: Because we are not collecting a debt from Mrs. Swate. We are trying to collect money that was her husband's sole management community property, which she took and was trying to change the characterization of that money into her separate property. That was not collecting a debt from her. It's trying to execute against the money that was clearly subject to execution that was her husbands.

CORNYN: So this kind of like a sequestration?

JOHNSTON: I guess it could be similar your honor. I think of it as sort of like if the divorce court had awarded her the house and the husband to debt, the lienholder out there is not going to say well I guess I can't get the house because he's not paying the debt. As far as the third party goes, the lien is still against the house.

CORNYN: You say though that she is not entitled to this money?

JOHNSTON: She was not entitled to this money.

CORNYN: And she owes it to the receiver?

JOHNSTON: Right. That's our position your honor.

CORNYN: But that's not a suit for debt?

JOHNSTON: That's correct. It's not a suit for debt. We are not trying to get the money from her.

CORNYN: But if she pays you the money, then you are okay?

JOHNSTON: That's right. At any rate I do think that it can be separated. I think that the contempt cases are troubling because they do go to the dignity and the power of the court. And how does the court enforce its orders? If the court has ordered someone to do something like it ordered Mrs. Swate

if she took the money out of the registry of the 312th give it to John Eikenberg. It had been determined to be Mr. Swate's earnings. It was going to go to the prior judgment creditor. And she wouldn't do it. But how do you deal with that? How does the court protect the constitutional rights of Mrs. Swate, and at the same time protect its own dignity and power to be able to enforce its own orders? And I think that Judge Montgomery did it. I think he made a very detailed contempt order. He also gave Mrs. Swate, she had plenty of time in which to clarify or to go back and ask the court what to do or take steps. She didn't do it. Certain complaints that she never made to the TC, which she has raised here. And those complaints should be waived.

GONZALEZ: Are there any limits to a turnover order?

JOHNSTON: I think there must be your honor.

GONZALEZ: What are they?

JOHNSTON: I don't know your honor.

GONZALEZ: Can you get a turnover against a stranger?

JOHNSTON: Your honor I think that if a stranger is holding assets that belong to a judgment debtor, then I think a turnover order can be if I recall properly can be properly directed to that 3d party to turnover those funds.

GONZALEZ: Without that 3d party being a judgment debtor?

JOHNSTON: Yes your honor if that third party is holding assets that belong to someone else.

GONZALEZ: In Beaumont Bank v. Bullard we held that the turnover statute does not authorize a court to issue orders against those who are not judgment debtors. Why is this Beaumont Bank not dispositive of this case?

JOHNSTON: Because your honor we are not talking about collecting the debt out of the assets of Mrs. Swate. We are talking about requiring Mrs. Swate holding assets that really belong to Mr. Swate...

OWEN: But she had a court order directing her, allowing her. Now you keep saying they are Mr. Swate's funds, but the 312th had directed that they were her funds. Now how do you get around that?

JOHNSTON: Well your honor the 312th had awarded those funds to her in the divorce not knowing about the judgment.

OWEN: Irrespective that there was a valid order she lawfully withdrew them from the registry of the court, and they were her funds. Now how do you get around that?

JOHNSTON: Well your honor the character of the funds didn't change by the fact that she took them out of the registry of the court. By the act of taking them out they didn't become instantly her separate property. Their character was still the source of the funds. They were Mr. Swate's earnings.

OWEN: In response to Justice Gonzalez's question she still was not a judgment debtor. How do you get around the Beaumont decision?

JOHNSTON: Well your honor because we are not trying to collect out of her assets. We are collecting against Mr. Swate's assets that she was holding in her possession. I think that's an important distinction. It's true that she had them in her possession. I am really concerned that by a divorce parties can divide their money by agreement, and then by agreement as soon as the nondebtor spouse gets that property in his or her possession, it's instantly immunized from any kind of tracing or follow through by a creditor, then that's going to be very troublesome.

OWEN: How does she differ from anyone else who is served with a turnover order? Why do you not have to first get a judgment against her just like you would any other creditor, or anyone else who held Mr. Swate's funds?

JOHNSTON: Well your honor I think anyone who held Mr. Swate's funds would be in her position, that they would be required. In fact we had to do that a couple of times to get people to relinquish funds that belonged to Mr. Swate that they happened to be holding.

OWEN: If this had been his law firm wouldn't you first have to get a judgment against the law firm under the Beaumont decision?

JOHNSTON: I don't think so your honor. Because that money was not the Beaumont firm's money. It was already Mr. Swate's money. Once it was Mr. Swate's money whoever was holding onto to it should be required to turn it over to the receiver.

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REBUTTAL

SPECTOR: Would a garnishment proceeding have been proper?

CASEY: Your honor I think the real question is is that she keeps saying these funds are Mr. Swates, and she is trying to adjudicate that these funds are Mr. Swates by a turnover order. My feeling is that if a garnishment action had been filed at that point in time there would have been a dispute as to whether or not those were appropriate garnishment because I don't think anybody knows with the paper trail that we've got right now whose funds those really are. She just says well these are his funds so, therefore _____. Basically I am in disagreement with her that these funds were Mr. Swates.

ENOCH: I thought you conceded that these were community funds that were being distributed?

CASEY: I understand they are community funds at the time of the divorce. But once the divorce decree was entered I no longer concede...

ENOCH: But the concession was that regardless of how the court distributes the funds with respect to the spouses, it doesn't affect anyone else's interest in that property?

CASEY: But because it's community funds what I am trying to say is that portion that got partitioned now hers as opposed to his. Because I mean there is some quid pro quo over there. You know he got some things in return, and so it's a partitioning of their community estate. So as of the time the divorce decree was entered you know I am not so sure that they are any longer his funds. When I was answering your question what I was saying is those funds as they were at the time of partitioning in the divorce decree were still community funds. But I am of the opinion that once the divorce decree is over they are no longer community funds because the decree clearly states in the order that these are now the separate estate of the given spouse of which the particular asset is given.

ENOCH: So unless a party who claims an interest in those funds intervenes in the divorce case their interest is terminated?

CASEY: Not necessarily. Because again you know I could see Judge Spector's if somebody does a garnishment there might have to be some sort of adjudication of whether or not there was some type of fraud being worked on a creditor or something to that effect. But I know of nothing that shows any type of fraud.

Also I would like to address Justice Gonzalez's question about limits of the turnover. Another limit of the turnover order as I understand it is that you cannot have assets turned over to an individual such as Mr. Eikenberg. Mr. Eikenberg was a receiver but he was not appointed as part of the turnover. You have your assets turned over to a constable who then at that point in time satisfies those particular things.

So not only do I think that they are serving a person who is not a property party to the turnover order, but I also think that they have used an improper mechanism that the turnover order does not contemplate namely turning over assets to basically the judgment debtor. Because as the receiver, Mr. Eikenberg is actually in the shoes and in the position to be the judgment creditor. So I think again that part was improper.

In answer to Justice Spector's question I think that Ms. Johnston when she was well if it wasn't reasonable they are all going to do in good faith, you know they will go back to the court. But that's now how a sentence, you've got to remember this is a criminal proceeding and the person who determines whether a sentence has been in fact served and satisfied is not the court, but the sheriff, it's the jailer. And so if this was allowed to stand the person that's going to determine whether or not they've got a good agreement or whether it's reasonable or whether it's met some other type of test that she has served the sentence allowing her to get out is going to be the sheriff, and you don't go back to the court, and that's the same as you may recall a case you previously cited the Roost(?) case and another that talks about when the court in its order said we are not going to let them off for any good time for good behavior. And the court has held: the court does not have the ability once that sentence has been imposed to sit there and put the restrictions on that sentence. It's literally got to be read from the face of the document and it's up to the sheriff to determine whether or not that particular sentence is reasonable.

And so again I think you are putting the sheriff into an impossible situation. Because it's obvious that these two people do not get along, which I think it's fairly apparent. And then we are going to try to decide who is dealing in good faith and who's not.

Separate and apart from the facts, which again I think in terms of the turnover order. And I am a little off guard here because when I do these habeas things I sort of look at the order and try to sit there and focus on what's a void order as opposed to trying to pull out the past sins of the various parties on other cases.

HECHT: Which you really haven't done...you've not tried to do that.

CASEY: Exactly, which is why if I am a little slow on my...

HECHT: It's all come up today?

CASEY: ...on my response to questions and part of it is because I wasn't there, and the second part is my feeling is that just looking at the order itself. I do not think that my client can remain to be incarcerated. I think the arguments that I have made, the fact that there is additional stuff that's gone

from the time that she was found in contempt to make arrangements to make payments that was not part of the original order. It was just a purging provision as a probation deal. But then they actually made it part of her sentence in the contempt by the very fact that they've got attorney's fees that have to be paid, and this is not a child support. Again just looking at the order I am of the firm opinion that this is an imprisonment for debt. I don't see how you can get around it. The weakest argument that I've got there is the fact that they've got the contempt motion itself. And the contempt motion itself has nothing in the prayer. If you will look at that there and you will see nothing in the prayer that says I want this person imprisoned. The prayer is "I want money turned over to me." And so for that reason I think just looking at the documents itself as opposed to the past history of the parties is that they habeas should be unconditionally granted.