Case No. 07-35962

United States Court of Appeals

for the Ninth Circuit

Brian P. Carr

Plaintiff-Appellant

versus

Sam Reed, in his official capacity as Secretary of State of the State of Washington, Wanda Briggs in her official capacity as Chair of the State of Washington Commission of Judicial Conduct, and Rob McKenna, in his official capacity as Attorney General of the State of Washington and representing in their official capacity as representatives of the State of Washington and, separately, as private individuals the Honorable Robert L. Harris, John F. Nichols, Barbara D. Johnson, Kenneth Eiesland, Rich Melnick, John Hagensen, Kelli E. Osler, Joel Penoyar, (J.) C. C. Bridgewater, J. Robin Hunt, Gerry L. Alexander, Barbara Madsen, Mary E. Fairhurst, Susan Owens and James M. Johnson

Defendants-Appellees

Appeal from an Order of the United States District Court

for the Western District of Washington, Case No. C07-5260RJB

The Honorable Robert J. Bryan, Judge Presiding

Reply Brief of Plaintiff-Appellant

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Preliminary Statement

The defendant-appellee's briefs do not address critical questions but rather endeavor to obscure these questions with unrelated matters.

Issues

1 Did defendant-appellee Briggs and the CJC fulfill the requirements of the Washington state constitution?

2 Does the plaintiff-appellant have standing with the CJC in matters concerning continuing violations of the rule of law?

3 Does the Washington State Supreme Court establish requirements to practice law before state courts, and, hence, to run for the elected office of Justice of the state Supreme Court?

4 Can the state restrict ballot access via petitions based solely on economic status?

5 Can appointment orders known to violate the state constitution (and, hence, void ab initio) grant jurisdiction?

6 Does *Rooker*[1]-*Feldman*[2] doctrine and res judicata apply when there are no intertwining issues and no state court orders which would be overturned?

Argument

1. CJC Constitutional Mandates

The defendants-appellees in their brief cited the order of the district court where the Eleventh Amendment was allowed as protection against damages for Ms. Briggs and the Washington State Commission on Judicial Conduct (CJC), but the plaintiff-appellant never sought damages from the CJC as Ms. Briggs was listed only in her official capacity and damages were sought only from those individuals sued as private individuals acting

1 *Rooker V. Fidelity Trust Co.*, 263 U. S. 413 (1923)
2 *District of Columbia Ct. of Appeals v. Feldman*, 460 U. S. 462 (1983)

outside of their official capacity. Further, the court applied this limitation only to the actions of Ms. Briggs and the CJC in their official capacity. If, at some later date, it comes to light that Ms. Briggs or other members of the CJC knowingly and intentionally violated their oath of office and acted outside their official capacity in violation of 42 U.S.C. § 1985 (3), 42 U.S.C. § 1986 or other federal statute, then the court could add those individuals as defendants in the suit as private individuals and subject to payment for damages.

The defendants-appellees also cite the CJC Rules of Procedure, C.J.C.R.P. 3(d) which lists procedures for the CJC to dismiss complaints without a public hearing and with wide discretion, but these procedures do not negate the mandates of the Washington State Constitution, Article 4, Section 31 which states:

> *Whenever* the commission receives a complaint against a judge or justice ... the commission *shall* first investigate the complaint ... *and then* conduct initial proceedings for the purpose of determining whether probable cause exists for conducting a public hearing or hearings to deal with the complaint....
>
> *Whenever* the commission concludes, based on an initial proceeding, that there is probable cause to believe that a judge or justice has violated a rule of judicial conduct..., the commission *shall* conduct a public hearing or hearings and *shall make public* all those records of the initial proceeding that provide the basis for its conclusion.
>
> Upon the completion of the hearing or hearings, the commission in open session *shall* either dismiss the case[3], or shall admonish, reprimand, or censure the judge or justice, or shall censure the judge or justice and recommend to the supreme court the suspension or removal of the judge or justice, or shall recommend to the supreme court the retirement of the judge or justice.[4]

The constitutional charter for the Commission of Judicial Conduct (CJC) does not

3 Presumably the justification for dismissing the case is due to some defect in the evidence of a violation as there is no other exception for this progression from the previous step in the process.

4 Italics added by plaintiff-appellant.

list any discretionary investigations. The CJC must investigate all allegations until it is determined whether or not there is probable cause of a violation. On being presented with four appointment orders[5] while the state constitution clearly restricts such appointments to *'not exceeding three in number'*,[6] there was prima facie evidence meeting probable cause of a violation. While the CJC may not like this lack of discretion for investigations, they do not have the authority to simply ignore these constitutional mandates (at least under the rule of law, which appears to be widely ignored by the Washington judiciary). It is reasonable for the CJC to develop internal rules to speed and simplify the processing of complaints but, to the degree that these rules do not comply with the constitutional mandates, they are null and void.

2. Standing to Pursue CJC Complaints

The defendants-appellees have listed numerous cases concerning the disciplining of attorneys by private bar associations, but none of these are relevant to the matter at hand where the disciplining body is a government agency without the broad discretionary powers of private bar associations. Similarly, the disciplining of private individuals (attorneys) who have no authority over other private individuals (the plaintiffs in the cases of attorney discipline cited by the defendants-appellees) does not apply to government officials who have greater responsibilities to the public and, in the case at hand, absolute authority over the life, liberty, and property of the residents of Clark County. They claim that Mr. Carr would not benefit from the restoration of due process to the handling of these restraining orders (which impact life, liberty, and property in a very delicate balance), but all citizens of Clark County are being deprived of a forum where these disputes can be resolved under the auspices of the rule of law. In specific, Mr. Carr has a continuing request for an ex parte hearing which are required by

5 Record 56 ¶1-5,pg1-14, Record 56-2, Record 56-3, Record 56-4.
6 Washington State Constitution, Article 4, Section 23.

RCW 26.50.070 (3) but which are never held by the courts in Clark County[7].

3. Requirements for Elected Judicial Office

The defendants-appellees claims that the Washington Supreme Court does not determine who can run against them on the basis of the fact that it is the Secretary of State who makes the final determination of eligibility[8]. However, this neglects the fact that it is the state Supreme Court which plays a primary role in determining those eligibility requirements. While many state supreme courts may establish reasonable requirements for practicing before the court and being an elected judge of the court, it is clear that in Washington states where all levels of the court chose to ignore clear violations of the state constitution, the current standards are not in the interest of the citizens of the state. Washington state needs judicial candidates who will support the rule of law and it is apparent that those attorneys who have worked in the current system of expediency will not restore the rule of law.

4 Restrictions on Petition Ballot Access

The defendants-appellees state '*Requiring plaintiff in this case to amass merely 1,320 signatures is constitutional*'[9] which is exactly what Mr. Carr is arguing. The restrictions on access to the ballot via petitions preclude Mr. Carr from the option of submitting petitions based solely on his economic status. RCW 29A.24.091 states '*A candidate who lacks sufficient assets or income at the time of filing to pay the filing fee* [may submit petitions]' and this has been interpreted as requiring '*A candidate must declare and be indigent in order to submit a nominating petition in lieu of paying the filing fee.*' If a potential

7 Record 56 ¶7.
8 Defendants-Appellees Brief, January 30, 2008, pg 15.
9 Defendants-Appellees Brief, January 30, 2008, pg 19.

candidate has assets which can be sold to cover the filing fee or has income that would allow the taking on of debt sufficient to cover the filing fee, then petitions would not be an option, even if paying the fee would leave the candidate penniless, homeless, and unable to support their self or their family. This rather draconian restriction defeats the purpose of adding petitions as it leaves economic status as a central criteria for eligibility to submit petitions for ballot access.

> *Closer scrutiny is required in such cases because '[e]conomic status is not a measure of a prospective candidate's qualifications to hold elective office.' Clements, 457 U.S. at 964, 102 S.Ct. at 2844.*[10]

from *O'Connor v. State of Nevada*, 27 F.3d 357, 362 (9th Cir. 1994). This restriction is particularly offensive as it most impacts potential candidates of moderate means who would be most likely to help bring the Washington judiciary back to the rule of law rather than simple expediency. Those portions of RCW 29A.24.091 which restrict ballot access via petitions based solely on economic status should be held as unconstitutional.

5. Jurisdiction from Void Appointment Orders

The defendants-appellees claimed that the 'Clark County Courts' are courts of general jurisdiction[11], but overlooks the fact that it was the District Court (a court of limited jurisdiction) issuing Orders of the Superior Court without any valid the appointment orders. The defendants-appellees would have us believe that the Superior Court can ignore the restrictions on constitutional Superior Court Commissioners '*not exceeding three in number*' in Washington State Constitution, Article 4, Section 23 with impunity. The question is can the rule of law survive when a party can simply ignore those laws which are inconvenient as virtually all laws are inconvenient to one party or another at some time. The knowing and intentional issuing of appointment orders in clear violation of the

10 Italics, quotes and insertions are from the original.
11 Defendants-Appellees Brief, January 30, 2008, pg 13.

state constitution is never protected by immunity of any kind and any orders which are based on those invalid appointments are similarly invalid.

The Clark County judges carefully insured that the individual deciding any RCW 26.50 matter was never recorded in the record (in apparent recognition of the lack of jurisdiction of the deciding individual).[12] As no state decision ever determined the deciding individual for any of these orders (even though the issue of individual jurisdiction was raised and, to a certain degree, addressed),[13] it was left to the federal district court to make that determination. However, according to the standards set in prior state court decisions, none of the individuals deciding RCW 26.50 matters in Clark County had jurisdiction to issue the orders they routinely issued.

6. *Rooker-Feldman* and res judicata

Due to the care with which the state courts avoiding ever establishing the deciding authority for any of the hundreds of RCW 26.50 matters cited in the complaint, the *Rooker*[14]-*Feldman*[15] doctrine and res judicata do not apply. No decision of the state courts would be overturned as the orders under consideration were submitted without any jurisdiction (e.g. the appointment orders were void ab initio and later orders were never decisions of the state courts). An individual fraudulently filing a decision of the state court does not get judicial immunity and such faux decisions are not protected in any way. The lack of jurisdiction and the rejection of these invalid orders would be in complete compliance with all of the actual decisions of the state courts.

12 Record 17 ¶18.
13 Record 36 pg34.
14 *Rooker V. Fidelity Trust Co.*, 263 U. S. 413 (1923)
15 *District of Columbia Ct. of Appeals v. Feldman*, 460 U. S. 462 (1983)

Conclusion

U.S. v. Lee 106 U.S. 196, (1882) states

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it.
>
> It is the only supreme power in our system of government, and every man who, by accepting office participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes on the exercise of the authority which it gives.

The defendants-appellees claimed that they can ignore constitutionally mandated restrictions and actions and violate the constitutions, statutes, and their oaths of office with impunity, but the members of the Washington state judiciary are not permitted to simply ignore the rule of law. The plaintiff-appellant asks that the Court of Appeals remand this matter to the District Court directing that the trial court take those actions necessary to return the Washington state judiciary to the rule of law.

Respectfully submitted, February 15, 2008 (Vancouver, WA).

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Certification

I certify that pursuant to FRAP 32 (a) (7) (C) and Ninth Circuit Rule 32-1, the attached reply brief uses a 14 point proportionately spaced font with serifs and contains less than 7,000 words (2,793 at last count). One original and seven (7) copies were filed with the court clerk by mailing with the United States Postal Service using First Class Mail and addressed to:

Office of the Clerk
United States Court of Appeals for the 9th Circuit
P.O. Box 193939
San Francisco, California 94119-3939

True and accurate copies of this reply brief were served on the defendants-appellees by mailing with the United States Postal Service using First Class Mail. Two copies of this Brief were mailed to each counsel for the defendants-appellees at:

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This reply is timely as the reply brief from the state's defendants-appellees was not received (i.e. served) until February 2, 2008 and the order of this court provided that this reply brief was due within fourteen days of service of the appellees' brief (Time Schedule Order dated November 21, 2007), i.e. February 18, 2008 in accordance with FRAP 26 (a) (3). This three day extension beyond the 'filing date' of January 30, 2008 is also provided

for in FRAP 26 (c). In accordance with FRAP 25 (b) (i), it is sufficient to have mailed the brief via First Class Mail by the required due date.

Dated: February 15, 2008

Location: Vancouver, WA

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