

STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2012-0372

Lucien Vincent v. Davina MacLean

AMICUS BRIEF

On Behalf of the

New Hampshire Civil Liberties Union

MANDATORY APPEAL PURSUANT
TO SUPREME COURT RULE 7

Kelly E. Dowd, Esq.
NH Bar ID # 14890
Bragdon, Dowd & Kossayda, P.C.
82 Court St.
P.O. Box 465
Keene, NH 03452

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QUESTION PRESENTED

Did the procedures utilized by the trial court, specifically the trial court's refusal to transport the plaintiff to the proceeding, violate due process and necessitate reversal?

CONSTITUTIONAL PROVISIONS AND STATUTES

N.H. Const. Pt. 1, Art. 2
[Art.] 2d. [Natural Rights.]

All men have certain natural, essential, and inherent rights--among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin.

N.H. Const. Pt. 1, Art. 14
[Art.] 14th. [Legal Remedies to be Free, Complete, and Prompt.]

Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

INTEREST OF AMICUS CURIAE

The New Hampshire Civil Liberties Union (hereinafter NHCLU) was founded to defend those freedoms which are guaranteed to every individual by the Bill of Rights of the United States Constitution. Throughout history, frequent attempts have been made to curtail the civil liberties of groups with radical or unpopular positions or associations. The NHCLU is often the only organization able to act to protect those who would otherwise stand alone in defense of their Constitutional rights in New Hampshire.

The NHCLU and its Foundation have three principal objectives in the fight to preserve civil liberties:

- Representation of people whose rights have been violated;
- Education of citizens concerning their civil liberties under the Constitution;
- Challenges to laws which infringe on individual freedom.

The NHCLU believes that Due Process necessitates that an incarcerated person be transported to a civil hearing in the absence of a compelling reasons why he or she cannot be present.

STATEMENT OF THE CASE

Plaintiff Lucien R. Vincent is an inmate in the New Hampshire State Prison System residing at the Concord Facility. On February 14, 2012, he filed a small claims action *pro se* against Davina Maclean in the Sixth Circuit Court – Concord District Division. Appendix at 1 (hereinafter “A at ____.”). On or about April 9, 2012, he filed a motion requesting permission from the trial court to appear, and for issuance of a transportation order. A at 2. The Defendant filed an objection to that motion on April 19, 2012. A at 3. The motion for transportation was summarily denied by the trial court on April 30, 2012, a week prior to the hearing, without any written findings. A at 2, 5. The Plaintiff filed another pleading on April 24, 2012, reiterating his request for transportation, and indicating that he had written evidence that he sought to introduce to the court in support of his claim. A at 4. The Judge ruled that the issues would be addressed on May 7, 2012. *Id.* The record does not indicate that the Plaintiff was ever apprised of the actual method that would be employed by the Court prior to trial, nor did it address any means for the Plaintiff to submit written evidence. The hearing was conducted on May 7, 2012, with the Plaintiff appearing via telephone, without counsel, and without the opportunity for him to introduce written exhibits. Brief of Plaintiff. The Court subsequently ruled against the Plaintiff on May 8, 2012, citing insufficient evidence. A at 6.

SUMMARY ARGUMENT

Inmates have the right to be physically present at a hearing when a protected liberty interest is at stake, unless substantially outweighed by compelling factors such as “expense, security, logistics, and docket control.” A trial is a physical process that occurs in a prescribed space in accordance with prescribed rules. The physical absence of a party substantially impairs his or her ability to provide compelling testimony, and significantly limits his or her ability to weigh and

respond to the testimony of others. Absence often results in the inability of a party to introduce physical evidence, and to conduct effective cross-examination. Finally, the ability of the fact finder to make determinations of credibility is significantly compromised when one party is absent. The trial court in this matter committed reversible error in denying the motion to transport, particularly where the Plaintiff was incarcerated only a few miles from the locus of the Court. The trial court also erred in not establishing procedures that allowed the Plaintiff to meaningfully participate in the proceedings in absentia, such as the ability to introduce exhibits and other documentary evidence in support of his claim. This error constitutes reversible error, particularly in light of the Court's denial of the claim citing insufficient evidence.

ARGUMENT

A. Due Process

Part I, Article 2 of the New Hampshire State Constitution guarantees due process rights to all citizens commensurate with or in excess to those provided under the Federal Constitution. In In re Baby K, 143 N.H. 201, 205 (1998), this Court has devised a three point test for determining the process due in a particular context:

- i.) We consider the private interest that will be affected by the official action ...
- ii.) the risk of an erroneous determination of such interest through the procedures used, and the probable value, if any, of the additional or substitute safeguards;
- iii.) and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute safeguards would entail.

citing Royer v. State Dep't of Empl. Security, 118 N.H. 673, 678, (1978) (quotation omitted); see also Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, (1976).

1. The Private Interest Affected.

With respect to the first prong, the right to recover for injuries is a constitutionally protected right under Part I, Article 14 of the N.H. Constitution. "The purpose of part I, article 14 was to make civil remedies readily available, and to guard against arbitrary and discriminatory infringements on access to the courts." Cargill's Estate v. City of Rochester, 119 N.H. 661, 665, (1979). "Although the right to recover is not a 'fundamental right,' it is nevertheless an important substantive right." Carson v. Maurer, 120 N.H. 925 (1980) (overruled on other grounds, citation omitted.) The infringement of any party's ability to meaningfully participate in a civil action to recover for injury substantially compromises an express constitutional right under the State Constitution.

2. The Risk of an Erroneous Determination, and Value of Additional or Substitute Safeguards.

To consider the risk of an erroneous determination arising from the actual absence of a party from a proceeding, it is important to consider what a trial is, and what it is not. A trial is a performative ritual that results in a socially transformative outcome. Jesse Allen, A Theory of Adjudication: Law as Magic, 41 Suffolk U. L. Rev. 773, 776 (2008). Trials involve primarily oral testimony, and the timing and the types of evidence admitted are rigidly scripted in accordance with formal rules:

In the judicial process, it matters enormously when and where an argument is made or a fact revealed. In most other important governmental and private decision making neither the time nor the location of an expressed idea matters much at all.

Id. at 783. Although driven by facts and evidence, a trial is primarily a performance, and is conducted differently from other information-gathering processes. A trial is conducted in a special, dedicated, space and consists of a series of performative actions by witnesses, parties, and attorneys, and concludes in the issuance of a verdict. This performance is carefully scripted in accordance with procedural and evidentiary rules. It is because of compliance with these special rules that a verdict is just, that it is accorded authority and legitimacy, rather than merely being void (e.g. for lack of subject matter jurisdiction, for failure to correctly advise the jury of the appropriate law, or for the admission of improper evidence.) In contrast, when a government agency or private individual engages in information gathering (for example, producing a report on the environmental impacts of a proposed bridge), there is no special place dedicated to this information gathering process, the fact-finders rely primarily on written documentation, and there is no strict concern for when, or in what order, or even of what kinds of written documents are considered.

The inability of a party to be physically present at a hearing substantially reduces the ability of an individual to obtain a just outcome. Oral communication is not reducible to the content of spoken words. Demeanor, tone of voice, gesticulation: these dimensions of communication are integral to understanding and evaluating the meaning of spoken words. A witness does not merely *say* what happened, a person physically *bears witness* to the truth. The way a witness comports him or herself is a critical factor in assessing credibility.¹ In most instances, it is the embodiment of the qualities of *gravitas* and authority that make *testimony* (and argument) credible and powerful,

¹ The archaic English word "geste" means both deportment as well as gesture. It is derivative from the Latin noun, *gestus*, meaning carriage, posture or attitude, and the Latin verb, *gerō*, to carry or to bear. When a witness is not present, there is no way to assess his or her *bearing* in relation to truth.

not the mere content of oral communication². As the Fed. R. Civ. P. 43 Advisory Committee on the 1996 Amendment noted:

The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truth-telling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition.

If the outcome of a trial is, on one level, a judgment rendered on which of two competing performances is more compelling, then the impact of the physical absence of one of the rival performers is clear. If two actors audition for a part, and one actor auditions in person, and the other via telephone, the actor giving the telephonic audition suffers a substantial impairment. In-person testimony and argument is more powerful, more dramatic, more humanizing than remote testimony. The impact of absence fundamentally impairs the impartiality of the fact-finder.

The impact of absence also substantively impairs the absent party's ability to meaningfully participate in the proceedings. When we review a court transcript, we obtain only a fraction of the meaning and impact of the testimony on the proceeding, and arguably, the least important portion. When we give testimony in person, it is far more powerful than merely submitting a written statement or talking over the telephone. Physical absence from a proceeding substantially impairs the ability of the absent party to fully comprehend opposing testimony and it substantially impairs the absent party from effectively testifying.

Absence also has a significant and negative impact on the ability to conduct cross-examination. Wigmore On Evidence, § 1367, at 32 (Chadbourn rev. 1974) states:

For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law....

² The proverbial miscarriage of justice stems from the fundamental ambivalence of performance. There is a real anxiety that a skilled rhetorician/advocate and/or actor/witness will distract the proceedings from the actual substance of the law and the evidence by means of their skillful powers of elocution.

[I]t is beyond any doubt the greatest legal engine ever invented for the discovery of truth.... If we omit political considerations of broader range, then cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure.

Cross-examination improves the reliability of the trial process precisely because it allows the factfinder to observe the demeanor of the witness subjected to physical confrontation by the other party:

The primary object of [the confrontation clause] was to prevent depositions or *ex parte* affidavits [from] being used against the [accused] in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness *but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.*³ [Emphasis supplied.]

John L. Kuehn, Speaker-Telephone Testimony in Civil Jury Trials: The Next Best Thing to Being There?, 1988 Wis. L. Rev. 293, 319 (1988). "The Sixth Amendment's guarantee of the right to confront one's accuser is most certainly compromised when the confrontation occurs through an electronic medium." United States v. Yates, 438 F.3d 1307, 1315 (11th Cir. 2006). With regard to the second prong, the physical exclusion of a party substantially impairs the ability of that party to meaningfully obtain justice. There is no satisfactory substitute for actual presence in an adversarial trial proceeding.

3. The Government's Interest.

In contrast with a proceeding to terminate parental rights, the Government's interest in a civil action is in most cases only an issue of avoiding a modest expense and inconvenience. In Baby K., this Court held that physical presence of a party was not required in termination case

³ Although the Court has not acknowledged a constitutional right to confrontation in civil hearings, the right to confrontation historically has been preserved in civil cases through the hearsay rule, which creates a *de facto* right to confrontation.

based on a counter balancing interest of the State, the need for children to be placed in a stable home in an expedited manner related to the State's role as *parens patriae*. 143 N.H. at 204. In contrast, the State has no interest in the outcome of a civil dispute between two private individuals. The court should make an individualized assessment of the burden upon the government, and it should balance the due process rights of the individual to appear against the particular expense, logistics, or security associated with transportation of the individual inmate. For example, in Buzzard v. F.F. Enterprises, 161 N.H. 28, 30 (2010), where the plaintiff was incarcerated in the State of Washington, the expense and logistics of transportation made transportation inexpedient in a routine civil matter.

It is clear that due process mandates the transportation of incarcerated inmates so that they can be physically present in a hearing involving a protected liberty interest. An inmate cannot meaningfully understand the full impact of testimony unless he or she can see it in the flesh. A transcript or even overhearing the live testimony conveys only a fraction of the full meaning of live testimony. A judge cannot fully comprehend an inmate's testimony without being able to see that person bearing witness. One cannot fully testify or cross examine another from a remote location.

B. Standard for Transportation of Incarcerated Persons

Part I, Article 14 of the New Hampshire Constitution guarantees the rights of all subjects of the State to judicial remedy for injuries "completely, and without any denial." This right cannot be meaningfully exercised if a person is not physically present at the hearing. This Court has recognized that a prisoner has a basic right to participate in civil proceedings, in the absence of compelling written findings of concerns relating to "expense, security, logistics, and docket control" that make participation impractical. Buzzard, 161 N.H. 28, 30 (2010), citing Muhammad v. Warden, Baltimore City Jail, 849 F.2d 107, 111-112 (4th Cir.1988). The right of an inmate to have

a meaningful opportunity to participate is heightened in cases such as Buzzard and this appeal, in which the person is unrepresented by counsel.

We urge this Court to uphold a legal presumption that inmates have a right to be physically present in a hearing involving a constitutionally protected liberty interest, unless the trial court makes express written findings that demonstrate that the right to be present is substantially outweighed by compelling factors such as “expense, security, logistics, and docket control.” Even in those rare cases in which transportation is not warranted, the incarcerated party must be provided with opportunities that maximize the incarcerated person’s ability to participate. This Court has specifically held that merely allowing an inmate to participate telephonically does not satisfy basic due process. Baby K., 143 N.H. 201, 207-8 (1998). Although this Court has not expressly mandated a procedure for telephonic hearings or other alternatives to physical transportation, this Court *has* noted appropriate procedures. Id. In its discussion of those elements that are necessary to insure meaningful participation short of physical presence, this Court noted the practice in several other jurisdictions:

. . . many States provide incarcerated parents other procedural safeguards, such as an opportunity to “participate” meaningfully by telephone, provide a deposition, or review transcripts of witness testimony and provide rebuttal testimony, either via deposition or telephone connection to the courtroom.

Id. at 206. In addition, this Court noted in Baby K. that the Court’s failure to apprise the incarcerated party of the alternative telephonic methodology to be employed prior to the hearing substantially impaired the incarcerated party’s ability to make use of the opportunities afforded by telephonic participation. Id. at 207.

The trial court committed reversible error in this matter. The Plaintiff filed a motion for transportation which was denied without written grounds. In accordance with Buzzard, the trial

court is required to make written findings with respect to the "expense, security, logistics, and docket control" prior to denying such a request. The trial court should have granted the motion for transportation, given that the Plaintiff is located only a few miles from the court house, and there were no other countervailing concerns identified by the court in its order. Second, there is no evidence in the record that the Plaintiff was advised of the court's proposed telephonic procedure prior to the court hearing. Third, although the Plaintiff was allowed to participate by telephone, he was not accorded the opportunity to introduce appropriate exhibits due to the trial procedure. Having prevented the Plaintiff the opportunity to present his case, the court denied the Plaintiff's suit based on "insufficient evidence." The procedures employed by the Court in this instance did not comport with constitutional due process.

CONCLUSION

There is a legal presumption that inmates have the right to be physical present in civil actions, unless substantially outweighed by compelling factors such as "expense, security, logistics, and docket control." The trial court committed reversible error in denying the motion to transport, particular where the Plaintiff was incarcerated only a few miles from the locus of the trial court. The trial court also erred in not establishing procedures that allowed the Plaintiff to meaningfully participate in the proceedings, such as the ability to introduce exhibits and other documentary evidence in support of his claim. This error constitutes a structural error impacting the entire trial, especially in light of the Court's denial of the claim citing insufficient evidence.

Respectfully submitted,

New Hampshire Civil Liberties Union
By its Attorneys
Bragdon, Dowd & Kossayda, P.C.

Dated: May 30, 2013

By: 

Kelly E. Dowd (NH #14890)
82 Court Street, P.O. Box 465
Keene, NH 03431
(603) 357-4800

CERTIFICATE OF SERVICE AND REQUEST FOR ORAL ARGUMENT

I hereby certify that I have this 30th day of May, 2013, sent by first class mail two copies of this Brief to Lucien R. Vincent, Inmate No. 68277, P.O. Box 14, Concord, NH 03301 and Davina MacLean of 58 Branch Turnpike #48, Concord NH 03301.

I respectfully request oral argument and request 5 minutes to address the issues set forth in the Appeal.



Kelly E. Dowd