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Justice Court Appeals: The Good, the Bad, and the Unintended

by Sam Newton

Your client has been charged with a criminal misdemeanor which is being heard in a justice court. What a lucky draw, right? The client gets two bites at the apple. He can run motions, and then he can try the case. If he wins, then he is done. But if he loses, then he has the option to appeal the case to District Court, wipe the slate clean, and start everything from scratch. What could be better? The Utah Court of Appeals agrees. In *Lucero v. Kennard,* 2004 UT App 94, the defendant wanted review of a justice court decision, and he did it by filing an extraordinary writ.[1] The Court of Appeals disagreed with defendant's decision to pursue a writ: "A trial de novo would have remedied any constitutional violations Petitioner may have suffered in the Justice Court." *Lucero,* 2004 UT App 94, ¶13. But is this statement true? Is the trial de novo the complete "fix-all"? Is it possible that pursuing a trial de novo may actually create problems for a defendant?

Everything is Not So Rosy

In Shakespeare's *Measure for Measure* one character laments: "O, what may man within him hide, Though angel on the outward side!"[2] The trial de novo process seems to be a perfect fix to most any problems which would occur in justice court. What could be better than a fresh start? But we may not consider (or realize) that pursuing a trial de novo may be unintentionally complicated or may bring unintended consequences.

I. No or Limited Review of Justice Court Judges' Legal Rulings

Supreme Court Justice William Brennan once said, "there are few, if any situations in our system of justice in which a single judge is given *unreviewable discretion* over matters concerning a person's liberty or property . . . ."[3] Because de novo review results in a case simply starting over as though it was never heard, the justice court judges are almost completely insulated from true appellate review. They have the power to make legal conclusions and to impose criminal sanctions which impact defendants' most fundamental constitutional rights. Yet the trial de novo remains the only procedure in place in Utah law to remedy any justice court problem. While the trial de novo gives our clients a fresh start, the justice court judge's legal rulings or sentence remain unchecked.

Outside of the United States Supreme Court, the justice courts are the only other body in this jurisdiction to have virtually no appellate review. Of course the trial de novo most often fixes or eliminates a poor justice court decision. But what is alarming is that in a system which thrives on the ability of higher courts to check the abuses of lower courts, the decisions of justice court judges cannot be checked or called into question. Sure, justice court sentences and convictions no longer stand when one successfully pursues a trial de novo, but the higher court is not able to tell a lower court that a particular process or practice is unconstitutional. The procedure lacks a mechanism to review a judicial officer's exercise of discretion. This essentially gives justice court judges free rein – they know that their specific rulings cannot be reviewed or their abuses of discretion called into question.

Interestingly, the Utah Code gives the prosecution an opportunity to have the district court review a justice court decision. If the justice court dismisses a case, invalidates a statute or ordinance, excludes evidence, or grants a motion to withdraw a guilty plea, then the prosecution is entitled to a hearing de novo in district court on that issue.[4] No such provision exists for the defendant. This is arguably because she has a better right: she can start the whole proceeding over and run all of her motions or arguments again in the district court. But the problem remains: a defendant lacks a procedural mechanism to ask a higher court to review a justice court decision.

Let's assume the worst. What if a justice court decided to illegally detain a defendant? Or what if that court refused to afford people their constitutional trial rights? What are defendants' remedies? They must plead guilty and appeal. Or they must go to trial and then appeal. Neither of these options fixes the problem that occurred below, and neither option slaps the justice court on

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the wrist. That court may engage in repetitively unconstitutional practices, yet Utah law lacks a mechanism which tells that court that it is in the wrong.

Some may assume that the extraordinary writ may keep a justice court in check. The writ may be used when a court "has exceeded its jurisdiction or abused its discretion."[5] Yet before one may pursue the extraordinary writ there must be "no other plain, speedy and adequate remedy" available.[6] But in the current state of the law, it appears that the availability of the writ may be questionable. The Court of Appeals in *Lucero v. Kennard,* 2004 UT App 94, held that a defendant who pursued an extraordinary writ should have pursued the trial de novo, even though that defendant was not represented by counsel in the justice court.

The problem is fundamental. The extraordinary writ may be the only way a defendant has to check a justice court judge's abuse of discretion. And while the appellate courts have reviewed justice court writs in the past,[7] *Lucero* illustrates that the appellate courts have become more reticent about using the writ as a method of review. They seem to prefer use of the trial de novo. The writ still seems to be an option that is out there, but there are no guarantees that the appellate courts will accept one.

Interestingly, the vast majority of persons encounter the criminal justice system through the justice courts. People think that because the justice courts only handle class B and C misdemeanors, they can only do limited damage to peoples' liberties. But recently the justice court sentencing practices have been coming under fire. That is, even though the justice courts lack the ability to punish severely, they make up for it in their more-frequent use of punitive measures.[8] This issue has become increasingly political with the release of a study commissioned by the Criminal Justice Advisory Counsel (CJAC) this last May. Because of massive over-crowding at the Salt Lake County Jail, the CJAC study made some rather drastic recommendations regarding the justice courts. Among others, the study recommended that the jail should discontinue accepting class B and C misdemeanants, that justice court judges should be given a limited number of beds at the jail based on their jurisdiction's population, and that defense attorneys should "adopt a policy of routinely appealing all justice court convictions that result in excessive or disproportionate sentences, especially when the sentence is in lieu of payment of a fine . . ."[9] Alan Kalmanoff, of the Institute for Law and Policy Planning, and the consultant on the study, said that justice courts have been overusing jail as a sanction: they have been incarcerating "those we're angry at," rather than "those we're scared of."[10]

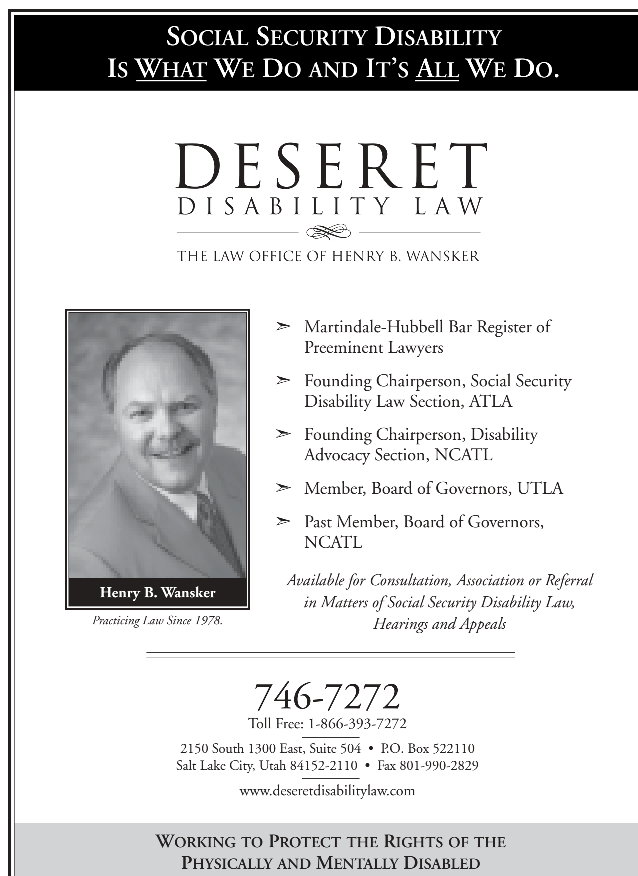
Of course the majority of justice court judges act within their discretion and act to protect defendants. But it is not necessarily the justice court judges as a whole who are the problem. The problem is created by a *system* which allows judges to overstep the bounds of propriety. The concern is not that these judges should lack the authority to incarcerate defendants. The concern is that the current state of the law lacks a mechanism to check a justice court judge's abuse of that power.

If our clients plan on pursuing a trial de novo, and if we wish to allege some sort of unconstitutional error or practice in the justice court, we must realize that it may be extremely difficult to even get the appellate courts to take a look at the issue.

II. Custody Status Pending Appeal

Not only does a defendant lack the means to get a justice court decision reviewed, but he may suffer other collateral consequences by entering a plea or going to trial and then asking for a trial de novo.

Let's say that a person is arrested for simple assault on Friday. Under the law, he must be arraigned, his bail must be set, and he must be given a court date within a few days. Now let's take an identical defendant, but this time he enters a plea to simple assault in the justice court on Friday – and let's say that he is taken into custody. He files his appeal that day. This same defendant may not get his case heard in the district court, nor may he get his bail set for periods of up to twenty days or more. How can this defendant make sure that the justice court sentence is stayed



or that the district court hears his case within a reasonably prompt period of time?

According to Rule 38 of the Rules of Criminal Procedure, once a defendant has filed a notice of appeal *and* the justice court has issued a certificate of probable cause, the judgment of the justice court is stayed.[11] Yet interestingly, the rule states that once a defendant has filed a notice, then the district court must issue all further orders governing the case (with the exception of the certificate of probable cause) and must "conduct anew the proceedings."[12] But what happens with these defendants who are either in custody, or who are taken into custody, when the justice court enters its sentence? Are they instantly released from jail upon counsel's filing for the trial de novo? Is the justice court sentence automatically stayed?

These are unanswered questions.[13] According to Rule 38, in order to obtain a stay of the justice court sentence, two requirements must be met: 1) the defendant must file a notice of appeal, and 2) the justice court judge must issue a certificate of probable cause.[14] This matter starts to get complicated when one looks at the standard for obtaining a certificate of probable cause, which is found in Rule 27. According to Rule 27, in order to obtain the certificate, the judge must make two findings: 1) the appeal is not taken for purpose of delay; and 2) the appeal "raises substantial issues of law or fact reasonably likely to result in reversal . . ."[15] Add one more rule to the sticky pot: if the defendant is in custody or sentenced to jail, the judge must determine by clear and convincing evidence that the defendant is not likely to flee and that he does not pose a danger to the community if he were to be released.[16]

Now here's where it really gets messy. Utah Code Ann. § 78-5-120 contains the trial de novo standard, and is completely clear: "In a criminal case, a defendant *is entitled* to a trial de novo in the district court" when a notice of appeal is filed within thirty days of either 1) sentencing after a trial or a plea of guilty, or 2) after a plea held in abeyance.[17] Here is the problem: a defendant has an automatic right to a trial de novo. She doesn't have to make a showing. She doesn't have a burden. She files her notice on time and the statute automatically gives her a new trial.

But what is the justice court judge supposed to do with the issuance of the certificate of probable cause? The rules clearly require one to issue. Additionally, they require the justice court judge to make findings regarding whether the defendant raises a good question of law or whether the appeal is just a delay tactic. But she gets her new trial automatically, so arguably, the certificate should also issue as a matter of course.

Not all justice court judges agree. Some will automatically stay a sentence once a notice of appeal is received. Others want to go through the formalities of the certificate of probable cause – and it is not uncommon for a justice court judge to deny a stay based on some of the prongs traditionally required for issuing a certificate.[18]

The Court of Appeals seems to have agreed with justice courts who have automatically issued the stay. In a series of memorandum decisions, the Court held that defendants would not have to show a likelihood that they will prevail on appeal: "A defendant appealing a justice court judgment is entitled to a trial de novo without any demonstration of error in the justice court. In this context, we agree it appears unnecessary to require a defendant to demonstrate that the 'appeal . . . raises substantial issues of law or fact reasonably likely to result in a reversal . . . .'"[19]

Despite this pronouncement from the Court of Appeals, the rules still appear to be contradictory – and it appears that these questions remain unresolved in the minds of many district and justice court judges. When a defendant appeals, is her justice court sentence automatically stayed? Or does the justice court retain the power to hold the defendant? At what point may the district court step in and order a defendant's release or set an appropriate bail? As one can see, the questions are not answered by the rules and as a result, some defendants may get caught in the middle.

Counsel must realize that if a client is sentenced to jail in the justice court and is taken into custody (or the client is already in custody) that he or she may not get out of jail, nor may the justice court sentence be stayed, until counsel can get a district court judge to act on the matter.

The problem is further complicated because the district courts may not generate a file until they have received the file from the justice courts. In the event that the defendant is only being held on the justice court sentence, it may leave counsel with the only option of filing an extraordinary writ in order to have the district court hear the issue in the meantime. Some justice court judges think that because the Rule gives them twenty days to transfer the file to the district court,[20] that they can hold a defendant in custody for the full twenty days before transferring the file. This attitude only prolongs the amount of time our clients may sit in custody while we attempt to secure their release.

Securing our clients' release may be further complicated because different district court judges have different procedural approaches. Some will sign an order which stays the justice court sentence as a matter of course. Others want defense counsel to file a motion. Others want to wait until the district court clerks have generated a file. Some want stipulations from both counsel. Some want a formal denial from the justice court and an appeal of that denial. Others want counsel to use the

extraordinary writ. But what if the justice court sentences a defendant to twenty days jail and waits the full twenty to transfer the file? Or what if that court refuses to transfer the file at all? Then defense counsel must spend time at the district court to try to get a judge to act. We, as counsel, should not judge-shop. In the Third District Court in downtown Salt Lake City, there has been an attempt to solve this problem. The District Court will generate a file upon defense counsel's promise that an appeal is "on its way." The file is created then assigned to the judge on rotation for accepting new cases. Counsel can then file a motion with the newly-assigned judge and raise the issue. Then that judge has a case, and can begin making rulings on the matter.

It can be extraordinarily complicated to try to secure a defendant's release from custody, or to get a stay of the justice court sentence, pending one's appeal. Hopefully the rule can be clarified in the future to make appropriate resolution of some of these procedural problems.

III. Remand Without Notice

Another problem arises when our clients fail to appear at the initial stage of the trial de novo appeal. According to Rule 38, the district court may dismiss the appeal and remand the case back to the justice court if the defendant fails to appear or "fails to take steps necessary to prosecute the appeal."[21] While this may be helpful in practice, it may not be entirely fair to a defendant.

When counsel asks for a trial de novo, the justice court has the responsibility to transfer the file to the district court. The district court, in turn, will generate its own file and set a new court date. The problem is that defendants may not get notice of the new court date. This may be because the district court does not look for the defendant's address in the justice court file, or perhaps it is because the justice court does not put the defendant's address in its file. Of course, it can always be that the defendant has chosen, for whatever reason, not to appear. Whatever the problem may be, the fact remains that defendants often do not receive notice from the district court of their new date. As a result, they may not appear. Because of their failure to appear the district court dismisses the appeal and remands the case.

If we as counsel are planning to pursue a trial de novo, we must take great care to inform our clients of new court dates. Perhaps to avoid this problem, we should also advise our clients to call the district court and/or our offices periodically to find out the new date. That way we avoid the potential problem of losing our appeal for something that is not our client's fault.

IV. Loss of Privileges

The last complication of a justice court appeal is that a plea of guilty or a finding of guilt at trial followed by an appeal may subject a defendant to a number of collateral consequences. First, on drug, DUI, and reckless driving cases, the Driver License Division will most likely pull a defendant's license upon receipt of the conviction.[22] It does not matter to the Division that the defendant's conviction is actually wiped clean and that the process starts over with the filing of a notice of appeal in justice court. The Division treats the justice court plea or finding of guilt as a conviction and pulls the license. The problem is that the Driver License Division does not get notice of the trial de novo from the justice court. It's a classic situation of the left hand not knowing what the right hand is doing.

There are additional collateral consequences: defendants may lose their funding for student loans.[23] They may be subject to deportation or suffer other immigration consequences.[24] If the defendant is in the military, it is likely that he or she will not be able to bear arms because of the conviction.[25]

Counsel may not have considered that by entering a plea, her client may lose a significant number of privileges. Other independent agencies and/or government entities may take actions against the defendant, merely because he has entered a plea and a "conviction" has been entered. As of yet, there is no solution. The statute requires that there be a finding or verdict of guilt before a defendant may pursue the appeal.[26] What other agencies will do with that finding of guilt is slightly up in the air. Practically

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speaking, they may do nothing. But the risk is there, and the fact remains that these agencies have been known to act following a guilty plea or such a finding.

Conclusion

There is no question that the justice courts serve a wonderful purpose. They alleviate the rather stressful burden of the district courts by taking jurisdiction over the class B and class C misdemeanors. Additionally, clients who are charged in justice court usually get two chances to have their cases heard. The benefits to these defendants are outstanding and crucial. But we must be aware that several complications may arise from trying to move the case from justice court to the district court. Outside of the extraordinary writ, justice court judges remain insulated from any sort of judicial review of the legal conclusions made in favor of the prosecution. Defendants may have great difficulty securing a stay of a justice court sentence pending the trial de novo. Defendants may not obtain notice of their new court dates. Finally, criminal defendants may lose a significant number of privileges merely because they have entered a plea or because they have been found guilty.

If we are aware of these consequences, then we can adequately advise our clients in pursuing their appeals in district court.

1. Arguably because Lucero could not take the trial de novo option.
2. Measure for Measure. Act iii. Sc. 2.
3. *Jones v. Barnes,* 463 U.S. 745, 757 (1983) (emphasis added).
4. Utah Code Ann. § 78-5-120(4).
5. Utah R. Civ. Pro. 65B(d)(2).
6. Utah R. Civ. Pro 65B(a).
7. *See e.g., Dean v. Henriod,* 1999 UT App 50
8. A Salt Lake County study done by the Institute for Law and Policy Planning found that nearly two-thirds of jail bookings were from misdemeanor offenses, with the justice courts accounting for 43 % of the jail population. The study also noted another problem: "Justice court judges recognize that they are key contributors to the jail's population. . . . [J]udges feel frustrated by the ability of the Sheriff/Jail Director to let inmates out before sentences are completed through early release and award of good time. This frustration has resulted in the use of consecutive sentences, resulting in inmates being in jail over one year and blocking early release while exacerbating crowding."
9. Salt Lake County Criminal Justice System Assessment, prepared for the Salt Lake County Criminal Justice Advisory Council, April 28, 2004, by the Institute for Law and Policy Planning. The study found that every sentence of "jail or pay a fine" originated from a justice court. This is arguably an unconstitutional practice. The Utah Constitution prohibits " . . . imprisonment for debt except in cases of absconding debtors." Utah Const. Art. I § 16.
10. *Report Says County Jail Need Not Be So Packed,* The Salt Lake Tribune, May 1, 2004; *Cooperation Called Solution to Jail Crowding,* The Salt Lake Tribune, May 6, 2004; *S.L. County Justice Overhaul Urged,* Deseret Morning News, April 29, 2004.
11. Utah R. Crim. Pro. R. 38(d).
12. Utah R. Crim. Pro. R. 38(e) and (f).
13. These questions may or may not be answered in the near future. The Utah Supreme Court has heard arguments on a case, *Bernat v. Allphin,* Case Number 20030567, which is awaiting a decision. In that case, defendant alleges that the current trial de novo scheme violates the double jeopardy clause. Unless a justice court sentence is automatically vacated upon filing the notice of appeal, he argues, then defendants are forced to keep vestiges of their justice court conviction throughout the trial de novo. It is unclear what the Supreme Court will do with the case, though it is possible they may address some of the stay questions brought up in this article. This will definitely be a case to keep an eye on.
14. Utah R. Crim. Pro. R. 38(d) and (e).
15. Utah R. Crim. Pro. R. 27(f).
16. Utah R. Crim. Pro. R. 27(b).
17. Utah Code Ann. § 78-5-120 (emphasis added).
18. This issue was interestingly discussed in 2001 in an article in the Utah Law Review. Bates, Benjamin. *Exploring Justice Courts in Utah and Three Problems Inherent in the Justice Court System,* 2001 Utah L. Rev. 731. In that note, the author recommends that the district court, and not the justice court, should make the determination regarding the certificate of probable cause.
19. *Ulmer v. Lubeck,* 2003 UT App 110; *Zakharian v. Burton,* 2003 UT App 111, though note 17, infra, refers to the possibility that the Supreme Court may take a look at this matter.
20. Utah R. Crim Pro. R. 38(c).
21. Utah R. Crim. Pro. R. 38(g). Another potential problem is Rule 38(g)(2). Exactly what does it mean to fail "to take steps necessary to prosecute the appeal"? Potentially any delay (i.e. continuances) subjects a defendant to dismissal for not moving the case on promptly.
22. Utah Code Ann. § 53-3-220(1) requires an automatic suspension of the driver license for several misdemeanors: DUIs, drug- and reckless-driving cases are among several offenses for which suspension is required.
23. 20 USCS § 1091(r). The 1998 Drug Free Student Loans Act denies federal grants, federally subsidized loans, and work-study funds to college students who have been convicted of any drug offense. This can be a felony or a misdemeanor, and includes sale or possession. If the conviction is for the purchase of a controlled substance, a person is ineligible for one year for the first offense, two years for the second, and indefinitely for the third. If the conviction is for the sale of a controlled substance, then the offender is ineligible for two years on the first offense and indefinitely for the second.
24. Most criminal convictions may subject a non-citizen defendant to immigration consequences. The Immigration & Naturalization Service (INS) defines a "conviction" as a formal judgment of guilt, or if a judgment is withheld, where there is some type of plea, and/or admission of facts warranting guilt and the imposition of some type of penalty. 8 USCS § 1101(a)(48); INA § 101(a)(48). Certain kinds of convictions may be deportable offenses and others may make a person ineligible for admission to the country. But the mere fact that a defendant enters a plea in order to pursue an appeal may be grounds for the INS to take administrative action. The following article in the Michigan Bar Journal has an excellent summary of immigration consequences. Ronald Kaplovitz, *Criminal Immigration: the Consequences of Criminal Convictions on Non-U.S. Citizens,* 82 MI Bar Jnl. 30 (Feb. 2003) (available online at http://www.michbar.org/journal/article.cfm?articleID=544&volumeID=41#fn5ref).
25. This is because of the Lautenberg Amendment, 18 USCS § 922(g)(9), which prohibits a person convicted of a misdemeanor from possessing a firearm or ammunition. The Utah Court of Appeals has agreed to hear this issue. In *Salt Lake City v. Gary Newman,* 20040452-CA, defendant has alleged that he had to file an extraordinary writ in order to obtain review of a justice court legal conclusion. His basis was that he could lose his military status by entering a guilty plea and pursuing the trial de novo.
26. Utah Code Ann. § 78-5-120(1).