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State v. Korn Appellant's Brief Dckt. 34965

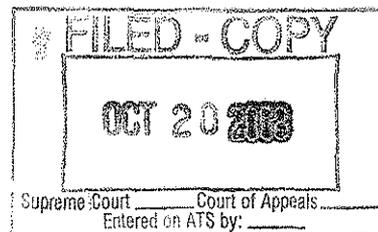
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
Plaintiff-Respondent,)	Payette County Case: CR-2006-1271
)	NO. 34965
v.)	
JEROME L. KORN,)	APPELLANT'S BRIEF
Defendant-Appellant.)	

Appeal from the District Court of the Third Judicial District for Payette County.

The Honorable Renae J. Hoff, District Judge, presiding.

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STATEMENT OF THE CASE

The Appellant (hereinafter "Korn") lived in the City of Nampa, Canyon County, State of Idaho prior to April of 2006. (Mot. Tr., pp. 5-6). While in Canyon County, Korn operated a zoo at 1506 Happy Valley Road. Id. The zoo had an extensive collection of animals including cranes, camels, zebras, exotic porcupines and tigers. (Mot. Tr., p. 7, L. 13-21). In 2002, Korn's wife, Susan, moved from the Nampa property. (Mot. Tr., p. 8, L. 5-6). At that time, Susan changed the addresses on the permits that Korn required to operate his zoo without Korn's knowledge. (Mot. Tr., p. 8, L. 5-13). As a result, Korn did not receive the necessary permit notices and he lost his permits to operate the zoo. (Mot. Tr., p. 8, l. 14-18).

In August of 2004, Susan filed rape charges against Korn. (Mot. Tr., p. 8, L. 22-25). The rape charges were ultimately dismissed. (Mot. Tr., p. 37, L. 2-11). As a result of the false charges, Korn was removed from the Nampa property. (Mot. Tr., p. 9, L. 1-3). When Korn was again allowed back on the Nampa property, he discovered that several of the zoo animals were missing. (Mot. Tr., p. 9, L. 10-19).

During 2004, Korn was involved in divorce litigation with Susan. (Mot. Tr., p. 9, L. 17-19). In the divorce case, Korn was ordered to remove the zoo animals from the Nampa property. Id.

In November or December of 2004, Korn filed for bankruptcy protection. (Mot. Tr., p. 10, L. 1-7). In the course of the bankruptcy proceeding, a development company named DDR purchased the real property in Nampa where Korn had maintained his zoo. (Mot. Tr., p. 10, L. 8-

21). When DDR purchased the Nampa property, Korn started looking for alternative placement for the zoo animals. (Mot. Tr., p. 11, L. 16-25). Korn spoke with representatives from the Boise zoo about placing the animals, but the Boise zoo was not interested. (Mot. Tr., p. 11, L. 19-20). Korn also looked for alternative placement for the animals in Owyhee County, Canyon County, Boise County, and Payette County. (Mot. Tr., p. 12, L. 16-19). Ultimately, Korn decided to relocate the animals to a property in Payette County (the "County"). (Mot. Tr., p. 13, L. 2-15).

At the time Korn decided to move the animals to the County, he checked the Payette County ordinances with his realtor. (Mot. Tr., p. 14, L. 18-22). At that time, there was no ordinance on the books that prohibited the housing of exotic animals in the County. (Mot., Tr., p. 14, L. 23-25).

Since Korn was in bankruptcy, he entered into a contract with his mother and DDR to move the animals and house them in the County. Pursuant to the agreement, Korn's mother would purchase the Payette County real property and invest \$30,000 towards moving the animals and building facilities for the animals in the County, and DDR would give Korn \$50,000 to help move the animals and construct facilities for the animals. (Mot. Tr., p. 15, L. 5-11). In exchange DDR could take possession of the Nampa property more quickly and begin developing the property for commercial use. As the project proceeded in the County, DDR put even more funds into the Payette County facility, ultimately expending approximately \$600,000.00. (Mot. Tr., p. 19, L. 14-19).

While the Payette County facilities were being constructed, Korn was visited by a Payette County Employee by the last name of Dressen. (Mot. Tr., p. 16, L. 2-5). Mr. Dressen advised Korn that he needed to apply for a permit to build on the Payette County property. (Mot. Tr., p. 16, L. 8-12). Korn paid and applied for a site permit to continue his construction in the County. (Mot. Tr., p. 16, L. 14-15).

During the construction of the Payette County facilities, the Payette County Commissioners passed an ordinance making it illegal to possess exotic animals in the County. (Mot. Tr., p. 17, L. 17-23).¹ By the time Korn was advised of the new ordinance, it was too late to build a facility to house the animals someplace else. (Mot. Tr., p. 19, L. 7-10). Further, Korn had been ordered by the Federal Bankruptcy Judge to move and Korn had been advised that if he did not get the animals moved he would be in contempt of the Bankruptcy Court's orders. (Mot. Tr., p. 18, L. 11-18).

The County filed charges against Korn for violating the newly enacted exotic animal ordinance known as Payette County Ordinance 5-6-2, and for violating I.C. § 25-3905 and IDAPA 02.04.27.111. (See Criminal Complaint). Korn brought a pretrial Motion to Dismiss the count brought against him for violating the Payette County ordinance on the grounds that the County's enactment of the ordinance violated the contract clause of the Idaho and U.S.

¹In the Commissioner's Meeting Minutes, which were admitted at the hearing on Korn's Motion to Dismiss, it states that the reason for the ordinance is that "there is a man wanting to bring exotic animals to a place on Little Willow." In other words, the ordinance was enacted specifically to affect Korn.

Constitutions. The Court heard Korn's Motion to Dismiss on August 4, 2006, and denied the same. (Mot. Tr., p. 39-40).

The cause proceeded to jury trial on August 24, 2006. (Trial Tr., p. 1). During the course of the trial, and during the cross-examination of Korn, the Prosecutor gave Korn a copy of an order from the Bankruptcy Court. (Trial Tr., p. 155-159). The Prosecutor asked Korn questions about the order and both Korn and the Prosecutor read portions of the order to the jury. *Id.* On redirect, defense counsel attempted to introduce the bankruptcy court orders, both the one discussed by the Prosecutor and another one, into evidence. (Trial Tr., p. 166-168). The Prosecutor objected on the basis that the orders were not certified and the trial court sustained the Prosecutor's objections. *Id.*

Ultimately, the jury found Korn guilty on both counts, Korn was sentenced and appealed to the District Court for the Third Judicial District in and for the County of Payette. That appeal was denied in an Appellate Decision by District Judge Renae J. Hoff, filed on December 12, 2007. This appeal followed.

ISSUES PRESENTED ON APPEAL

1. Did the trial Court err by applying the wrong legal standard in denying Korn's pretrial Motion to Dismiss?
2. Did the trial Court err by failing to allow the admission of the bankruptcy court orders into evidence at the jury trial?

ARGUMENT

There are two issues on appeal and they will be address in turn.

A. DENIAL OF APPELLANT'S MOTION TO DISMISS WAS REVERSIBLE ERROR

Korn filed a Motion to Dismiss Count I of the Complaint which alleged a violation of the Payette County Ordinance 5-6-2 prohibiting the possession of exotic animals (the "Ordinance"). Korn argued that the passing of the Ordinance after he had entered into an agreement with his mother and DDR (an agreement that was ratified by the bankruptcy court) to house the animals in the County violated the contract clause of the U.S. and Idaho Constitutions.

1. STANDARD OF REVIEW

The Supreme Court exercises free review over constitutional issues as they are purely issues of law. *Meisner v. Potlach Corp.*, 131 Idaho 258, 260, 954 P.2d 676, 678 (1998). "In an appeal from a final judgment of a magistrate judge following an appeal to a district jude sitting as an appellate court, we [the Supreme Court] review the record of the magistrate judge independently of the decision of the district judge." *State v. Anderson*, 2008 Idaho 34411 (Supreme Court 2008) (internal citations omitted).

2. APPLICABLE LEGAL STANDARD

The Idaho Constitution provides that, "[n]o . . . law impairing the obligation of contracts will ever be passed." Idaho Const. Art. I, § 16 (Lexis 2006). The U.S. Constitution provides that, "[n]o state shall . . . pass any . . . law impairing the obligation of contracts . . ." U.S. Const. Art. I, § 10 (Lexis 2006). These clauses are known as the contract clauses.

The Idaho Courts have historically recognized and enforced the provisions of the contract clause. See e.g., *Curr v. Curr*, 124 Idaho 686, 864 P.2d 132 (1993); *Steward v. Nelson*, 54 Idaho 437, 32 P.2d 843 (1934). In conducting an analysis under the Contract Clause, the Court must first determine “whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.” *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983) (internal citations omitted). “Any enactment of a legislative character is said to ‘impair’ the obligation of a contract which attempts to take from a party a right to which he is entitled by its terms, or which deprives him of the means of enforcing such a right . . .” *Curr*, 124 Idaho at 692, 864 P.2d at 138. If the State’s regulation constitutes a substantial impairment on a party’s contract rights, then the State must justify its actions by showing that there is a “significant and legitimate public purpose behind the regulation.” *Energy Reserves Grp., Inc.*, 459 U.S. at 411. “[T]he next inquiry is whether the adjustments of ‘the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation’s] adoption.’” *Id.* at 412. Finally, in *Sanderson v. Salmon River Canal Co.*, 45 Idaho 244 (1927), at 256, the Supreme Court held that “the general rule would seem to be that a statute which does not act on the contract itself but merely on the property which is the subject of the contract may not be said to impair the obligation of the contract. The value of the contract may be diminished, but the obligation of the parties to each other is not affected in the slightest degree[.] (internal citations omitted) Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which

parties look now in making a large class of contracts that they may be affected in many ways by state and national legislation.”

3. ANALYSIS

The trial court denied Korn’s Motion to Dismiss and ruled as follows:

In your motion to dismiss, you cited Energy Reserves Group versus Canada Power and Light, 459 US 400. And that case states that first, whether state law has in fact operated as a substantial impairment of a contractual relationship and assuming all the evidence that you presented is correct, that it’s true, there may possibly be an impairment of a contractual relationship and I’m not ruling on whether or not that’s a legal relationship or that contract is valid or not. But then Energy Resources goes on to say if a substantial impairment is found, the State justification must have a significant legitimate public purpose behind the regulation. It’s clear to me that Payette County has a significant and legitimate public purposes behind the regulation of exotic animals. Contrary to what Mr. Korn may assert, it’s clear that exotic animals can be dangerous. And they – and the county certainly has a legitimate public purpose in their regulation. Furthermore, under Kerr versus Kerr, 124 Idaho 686, specifically in footnote 3, the Idaho Supreme Court said that impairment of a contract is an intent by the state to take from a party the right to which he is entitled to by its terms or which deprives him of the means of enforcing such right. I cannot find, as a matter of law, that Mr. Korn is entitled to keep exotic animals in Payette County. He has to have permits from the State. He has to have permits from the federal government. He doesn’t have any of those permits. I fail to see that anything that Payette County did is an impairment of any contract whatsoever. Based on that and based on Energy Resource Group versus Kansas Power and Light and Kerr versus Kerr, the Court’s denying the motion to dismiss.

(Mot. Tr., pp. 39-40).

The trial court’s analysis does not follow the analysis set forth by the appellate courts as outlined above. In a contract clause analysis, the first step is for the Court to determine whether the Ordinance substantially impairs a contractual relationship. In this case, Korn had a

contractual right to have his mother and DDR construct a facility for the animals and house them in the County. While the facility was being built, and after issuing Korn a site permit for the building, the County enacted an ordinance that made the facility worthless to Korn since he could not house his animals there. In effect the County deprived Korn of the benefit of a \$600,000.00 facility which could not be duplicated due to orders of the federal Bankruptcy Court that ratified Korn's, his mother's and DDR's agreement initially. It is clear that the answer to the first step of the contract clause analysis is that the County substantially impaired Korn's contractual rights. The argument that Korn had no legal right to said contract due to the lack of appropriate state and federal permits is irrelevant since the Ordinance at issue makes no exception for the possession of such permits and the lack of such permits is not an element of the crime. As the trial Judge's jury instructions make clear, the lack of the possession of any such permit is not an element of the crime charged and moved under the Motion to Dismiss, the violation of Payette County Ordinance 5-6-2, but rather is for the other charged crime, the violation of Idaho Code Section 25-3905. (Trial Tr., p. 180-187)

The further argument that Korn's contract rights were not substantially impaired under the standard articulated in *Sanderson*, is not applicable here. *Sanderson* dealt with a lien placed on land for water right payments that took priority over, but did not vitiate, the complainant's mortgage rights on said lands. The statute at issue here placed no burden on the land, but rather flatly denied Korn the right to keep the animals on the property for which he had entered into his

various contracts, making the contracts and the property improvements with respect to the land essentially worthless.

At this point the burden shifts to the County to show a significant and legitimate public purpose behind the regulation. The County indicates that there is a significant and legitimate public purpose served by the Ordinance in that the ordinance protects people from dangerous exotic animals. The problem with this assertion is that the testimony at the hearing on the Motion to Dismiss indicated that the animals were not dangerous and no evidence was presented by the County to show otherwise. Further, the minutes from the Payette County Commissioner's meetings make it clear that this Ordinance was designed to keep Korn out of the County. There is no indication that there had been any problems with exotic animals in the County. In fact, Korn testified at the hearing that other people in the County had previously possessed exotic animals including an alligator (Mot. Tr., p. 37, L. 8-21), emus, rheas, ostriches, python, goboos, vipers, womas, blackheads, green bum, and other poisonous or "hot" reptiles. (Mot. Tr., p. 37-38). The trial court jumped to a conclusion not based upon the evidence presented at the hearing and concluded that Korn's animals "can be dangerous." The trial court ignored, however, the fact that the Ordinance was enacted to address Korn coming into the county and there was no proof that Korn's animals were dangerous or that the animals addressed in the ordinance were dangerous. Accordingly, the County failed to establish a significant and legitimate interest in enacting the Ordinance. Specifically, the trial court found as a fact that the County had a

significant and legitimate interest in regulating the animals at issue here without any evidence in the record to support that finding and said finding should be overturned as clearly erroneous.

Even if the County had established a significant and legitimate interest, the County's actions in enacting the Ordinance affected the rights and responsibilities of the contracting parties in a way that is not based upon reasonable conditions. Further, the Ordinance's effects were not of a character appropriate to the public purpose justifying the Ordinance's adoption. In other words, the County could have enacted an Ordinance that provided for guidelines that Korn would have to follow to keep the animals in the County. By doing so, Korn would have been able to enjoy the benefits of his agreement and the County could still regulate the animals and protect the citizens of the County.

**B. DENIAL OF ADMISSION OF APPELLANT'S BANKRUPTCY ORDERS WAS
REVERSIBLE ERROR**

During the course of the jury trial, one of the issues was whether or not the Bankruptcy Court had ordered Korn to move to the County. If so, Korn would have acted out of necessity and could not have been found guilty of the alleged violations of law. Korn attempted to prove that he had been ordered to move to the County by introducing two Bankruptcy Court orders into evidence, to wit: defense Exhibits E and F. The Prosecutor objected to the admission of the exhibits on the grounds that the orders were not certified and the trial court sustained the objections.

1. STANDARD OF REVIEW

An appellate court should “. . .only disturb a trial court’s discretion to admit evidence . . . upon ‘a clear showing of abuse.’” *State v. Sandoval-Tena*, 138 Idaho 908, 911 (2003) (citations omitted). “Even if the [trial] court used its discretion in error, such error, alone, does not constitute grounds for reversal.” *Id.* “Unless an error ‘affects substantial rights’ of the parties it should be disregarded.” *Id.* (citations omitted). “An error is harmless if the [appellate] Court is unable to say, ‘beyond a reasonable doubt, that the jury would have reached the same result absent the error.’ The burden of showing prejudicial error rests on the party asserting such error.” *Id.*

2. APPLICABLE LEGAL STANDARD

“Trial courts have broad discretion when ruling on the admissibility of evidence before them.” *Sandoval-Tena*, at 911.

“Physical items...must be authenticated before they may be admitted into evidence. Rule 901 provides that ‘[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.’ Further Rule 901 provides that, authentication may be presented, for example, through the testimony of a witness with knowledge that a matter is what it is claimed to be.” *Alderson v. Bonner*, 142 Idaho 733, 738 (Ct. App. 2006) (internal citations omitted). A copy of a court order does not have to be certified in order to be admitted into evidence. If a court order is certified it is self authenticating and does not require further

evidentiary foundation to prove what it is. I.R.E. 902(4) (Lexis 2006). However, authentication may be accomplished in other ways. “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” I.R.E. 901(a) (Lexis 2006). “By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule . . . [t]estimony of a witness with knowledge that a matter is what it is claimed to be.” I.R.E. 901(b)(1) (Lexis 2006).

Proof of a chain of custody is not a separate requirement for admissibility. *State v. Fee*, 124 Idaho 170, 175 (Ct. App. 1993). “Ordinarily, the party offering an exhibit establishes its chain of custody in order to create a presumption that it was not materially altered. If the chain of custody has been broken, however, the party can still rely upon other evidence to show a lack of material alteration.” *State v. Crook*, 98 Idaho 383, 384 (1977). The standard for admissibility of evidence is whether the trial court can determine, in all reasonable probability, the proffered exhibit has not been changed in any material respect. *State v. Kodesh*, 122 Idaho 756, 757 (1992). Generally, in laying a proper foundation for admission of evidence the practicalities of proof do not require the prosecution to negate all possibilities of substitution or tampering. *Dachlet v. State*, 136 Idaho 752, 756 (2002).

3. ANALYSIS

Korn attempted to enter into evidence two Exhibits, specifically Defense Exhibits E and F, which are orders from the Bankruptcy Court and which were necessary to provide the evidence

to support Korn's defense claim that he was acting, in moving the animals at issue in this case to the County, by necessity.

In the case of Exhibit E, Korn was asked if he recognized it while testifying and he said "Yes, sir." (Trial Tr., pp 165-166). There was no evidence of any kind introduced to call into question his identification of the document. It clearly, under the standard of *Kodesh* and I.R.E. 901(b)(1), should have been admitted into evidence. The next question is whether such error is harmless. I will address that question for both documents at the end of this section.

In the case of Exhibit F, there was a great deal of testimony by Korn about the document. While it is true that when asked about Exhibit F by the Prosecutor, Korn said, "Sir, I saw so many of those, I honestly don't know which one it is you have," (Trial Tr., p. 156) he had not yet been shown the document. The Prosecutor did not seek leave to approach Korn and show him Exhibit F until after that exchange. (Trial Tr., p. 156) Once Mr. Korn was shown the document and asked by his own Attorney what it was, he readily identified it, (Trial Tr., p. 167-168) thereby providing a proper authentication under the standard of *Kodesh* and I.R.E. 901(b)(1). Further, the Prosecutor elicited lengthy testimony from Korn about Exhibit F (see Trial Tr., pp. 155-159), and during said testimony the Prosecutor asserted various things about Exhibit F, such as "I don't see where it orders you to move to Payette County" (Trial Tr., p. 156), "You're not ordered to do anything there" (Trial Tr., p. 157) and "That order authorizes the release of funds. It does not say those animals shall be removed to Payette County. At least I don't read that." (Trial Tr., p. 158). Such lengthy testimony, elicited by the Prosecutor and including various

assertions about the document, should be sufficient to provide proper authentication under the standard of *Kodesh* and I.R.E. 901(b)(1).

In the case of Exhibit E, the jury heard Korn testify to its title, source and subject. (Trial Tr., p. 166). With respect to Exhibit F, the jury heard a great deal of testimony by Korn as to it, as well as a great many Prosecutorial assertions as to what it was. (Trial Tr., pp. 155-159). While the jury was able to hear some short statements by Korn with respect to Exhibit E's nature and the lengthier colloquy about Exhibit F, it is a very different level of proof to hear a defendant stating something and to be handed a written court order which says the same thing or something similar. While a jury may question the validity of the verbal testimony of a defendant, especially when the prosecutor makes assertions about the Exhibit, during his cross-examination, that tend to call into question the accuracy of the defendant's testimony, they will not so question an order by a court. Korn was simply unable to make a convincing claim of necessity when he was not allowed to introduce into evidence the very documents that were the cause of the claim, though properly authenticated, while simultaneously having his claim about those documents challenged by the Prosecutor during cross-examination. In such a situation, the error can not be harmless and the standard of *Sandoval-Tena*, at 911, is met. The Court simply can not say beyond a reasonable doubt, that the jury would have reached the same conclusion absent the error.

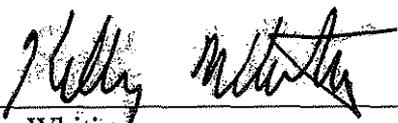
CONCLUSION

The trial court failed to properly analyze the evidence and apply the proper legal standard of analysis of the contract clause claim made by Korn in his Motion to Dismiss. Given the

significant impairment of Korn's contract rights with his mother and DDR, the lack of any evidence of any kind to support a finding of a significant and legitimate reason for the County to impair his contract rights, and the entire lack of any analysis of any kind with respect to the reasonableness of the County's legal enactment and enforcement, this Court should find that Korn's contract rights have been violated and reverse the trial court's decision and dismiss Count I of the Criminal Complaint herein on constitutional grounds as violations of the Idaho Const. Art. I, § 16 and the U.S. Const. Art. I, § 10.

The trial court erred in that it refused the admission of Defense Exhibits E and F, though they were properly authenticated and absolutely necessary to Korn successfully making his claim of necessity. This Court should vacate the judgment of conviction and remand this case for a new trial.

DATED this 17th day of October, 2008.



Kelly Whiting
Attorney for Defendant/Appellant, Jerome Korn

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 17th day of October, 2008, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF to be delivered to Jennifer Berkin, Deputy Attorney General, P.O. Box 83720, Boise, Idaho 83720-0010 by US mail, postage prepaid and by facsimile at (208) 854-8074.

Danelle Bezates
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