Judicial Opinions
2019 Report

Background and Introduction

Under section 2-9-1.1 of the South Dakota Codified Laws, the Legislative Research Council is required to prepare an annual report noting "opinions of state and federal courts issued in the preceding year" involving the interpretation of "legislative intent of various South Dakota statutes." The report may include recommendations for "corrective action if it is determined that the opinion of the court may be adverse to what was intended by the Legislature or if the court's opinion has identified an appropriate area for legislative action." The Executive Board of the Legislative Research Council, in accordance with subdivision 2-9-4(8), shall "review and make recommendations for further legislative action regarding the opinions of state and federal courts" that interpret the intent of legislative acts.

Summary of Cases

***Virginia House of Delegates v. Bethune-Hill*[1]: Standing of a Legislative Body**

Under Virginia law the authority to represent the Commonwealth's interests in civil litigation rests solely with the Attorney General.[2]

In *Bethune-Hill*, the Supreme Court of the United States considered whether the Virginia House of Delegates had standing to appeal the invalidation of a redistricting plan. The Court concluded the Virginia House of Delegates did not have standing to appeal on its own behalf because the body itself suffered no cognizable harm as only one body of a bicameral legislature. There was no standing on behalf of the Commonwealth because, by statute, the Attorney General has sole authority to represent the Commonwealth.

***SD Voice v. Noem*[3]: re: Out-of-state Contributions Ban**

SDCL 12-27-18.2 prohibits contributions to ballot question committees "by a person who is not a resident of the state at the time of the contribution, a political committee that is organized outside South Dakota, or an entity that is not filed as an entity with the secretary of state for the four years preceding such contribution."

The Federal District Court considered whether the statute violates the First Amendment and whether it violates the so-called "dormant" Commerce Clause.[4] The Court concluded that the ban violated the First Amendment. Since the law bans all direct political speech from one segment of society the ban would be unconstitutional unless it was narrowly tailored to a compelling government interest. The Court determined that this law was not narrowly tailored to a compelling government interest.

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[1] 139 S.Ct. 1945 (2019).
[2] Va. Code Ann. § 2.2-507(A).
[3] 380 F.Supp.3d 939 (2019).
[4] The "dormant" Commerce Clause prohibits states from discriminating against or imposing excessive burdens on interstate commerce without congressional approval. *See* U.S. Const. Art. I, § 8, Cl. 3.

The court also concluded that the statute violates the dormant Commerce Clause because the law was intended to discriminate against out-of-state interests.

Dakota Rural Action v. Noem[5]: re: Riot Boosting

SDCL 22-10-1 defines a riot as "[a]ny use of force or violence or any threat to use force or violence, if accompanied by immediate power of execution, by three or more persons, acting together and without authority of law[.]" SDCL 22-10-6 and 22-10-6.1 impose a felony for any person who directs, advises, encourages or solicits persons participating in a riot to acts of force or violence. Additionally, in 2019, the Legislature passed Senate Bills 189 and 190 which imposed civil liability for riot boosting.[6]

In *Dakota Rural Action*, the Federal District Court considered whether to grant a preliminary injunction[7] to stop enforcement of these laws. The Court granted the preliminary injunction, concluding that the First Amendment challenges to the riot boosting laws were likely to prevail, with the possible exception of direction of another person participating in the riot to use force or violence. While the case was pending the challengers and the Governor reached a Stipulated Settlement Agreement that would stop enforcement of portions of these laws. Some parts of these laws will still be enforced.

The agreement provides that:

- SDCL 20-9-54, in its present form, will not be enforced except for that portion of the statute which provides: In addition to any other liability or criminal penalty under law, a person is liable for riot boosting, jointly and severally with any other person, to the state or a political subdivision in an action for damages if the person: (3) Upon the direction, advice, encouragement, or solicitation of any other person, uses force or violence.
- SDCL 20-9-56, in its present form, may be enforced, except for the sentence which provides: defendant who solicits or compensates any other person to commit an unlawful act or to be arrested is subject to three times a sum that would compensate for the detriment caused.
- SDCL 22-10-6, in its present form, will not be enforced.
- SDCL 22-10-6.1, in its present form will not be enforced.

Recommendation: The Legislature should look at how the law is being enforced to determine if this is consistent with the Legislature's intent. Additionally, the Legislature should consider repealing any law that is unenforceable.

Olson v. Butte County Commission[8]: re: Appealing a Road Vacation

Under SDCL 31-3-34 a person aggrieved by a county board's decision to vacate a public highway may appeal the decision "within thirty days after the date on which the decision of the board has become effective [. . .]."

In *Olson*, the South Dakota Supreme Court considered when a board's decision to vacate a road is effective to determine the final date a person may appeal the board's decision. The Court found that SDCL 7-18A-8 provides

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[5] 2019 WL 4464388.

[6] SDCL 20-9-53 to 20-9-57. Under SDCL 20-9-54 "a person is liable for riot boosting [. . .] if the person (1) Participates in any riot and directs, advises, encourages, or solicits any other person participating in the riot to acts of force or violence; (2) Does not personally participate in any riot but directs, advises, encourages, or solicits other persons participating in the riot to acts of force or violence; or (3) Upon the direction, advice, encouragement, or solicitation of any other person, uses force or violence, or makes any threat to use force or violence, if accompanied by immediate power of execution, by three or more persons, acting together and without authority of law."

[7] A preliminary injunction is a "temporary injunction issued before or during trial to prevent an irreparable injury from occurring before the court has a chance to decide the case." *See Black's Law Dictionary* (11th ed. 2019).

[8] 2019 S.D. 13.

the effective date of all county commission resolutions, unless the Legislature has provided a different effective date, and the statute to vacate a road does not provide a different effective date. Under SDCL 7-18A-8, "every resolution or ordinance passed by a board shall take effect on the twentieth day after its completed publication [. . .]." Therefore, the Court concluded that the effective date is twenty days after publication, and a person has thirty days after that date to appeal a county board decision to vacate a road.

The Court determined that under this interpretation a person could appeal the board's decision after the land is vacated and the land comprising the road had been transferred back to the original owner.[9] The Court called on the Legislature to resolve this issue.

Recommendation: The Legislature may wish to eliminate the gap between when the vacated road may be transferred back to the original owner and when someone wishing to challenge the decision may appeal.

***Leighton v. Bennett*,[10]: re: Service of Notice of Death**

When a person involved in a lawsuit dies, SDCL 15-6-25(a)(1) gives the procedure to substitute a party in that person's place. A lawsuit will be dismissed unless a motion for substitution is made within 90 days after notice of death is served "as provided herein for service of the motion."[11] The statute also provides that a motion for substitution "shall be served on the parties as provided in § 15-6-5 and upon persons not parties in the manner provided in § 15-6-4 [. . .]."[12]

In *Leighton*, the South Dakota Supreme Court considered whether a notice of death must be served on both parties and interested nonparties to start the 90-day period. The Court concluded that there was no requirement to serve a nonparty to start the 90-day period. The Court determined that when the statute says notice of death must be served "as provided herein for the service of the motion" this merely refers to how service must be made and does not create a requirement that an interested nonparty must be served.

Recommendation: SDCL 15-6-25(a)(1) is unclear and subject to interpretation. The Legislature may wish to clarify the language "as provided herein for service of the motion."

***In re Matter of 2012, 2013, and 2014 Tax Refund and Abatement*[13]: re: Tax Refunds and Abatements**

Under SDCL 10-18-1 if a person claims that an "assessment or tax or any part of the assessment or tax is invalid [. . .] the assessment or tax may be abated, or the tax refunded if paid." The statute also provides that "[t]he board of county commissioners may abate or refund, in whole or in part, the invalid assessment or tax" only if it fits within one of the six subdivisions.[14]

In this case, the South Dakota Supreme Court considered four of the six subdivisions of the statute. Subdivision (1) applies when "an error has been made in any identifying entry or description of the real property [.]" Subdivision (3) applies when "the complainant or the property is exempt from the tax[.]" Subdivision (4) applies when "the complainant had no taxable interest in the property assessed against the complainant at the time fixed by law for

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[9] *See* SDCL 31-3-9 and 31-3-10.
[10] 2019 S.D. 19.
[11] SDCL 15-6-25(a)(1).
[12] SDCL 15-6-25(a)(1).
[13] 2019 S.D. 26.
[14] SDCL 10-18-1.

making the assessments[.]" Subdivision (5) applies when "taxes have been erroneously paid or error made in noting payment or issuing receipt for the taxes paid[.]"

The Court determined that subdivisions (1) and (5) apply only when the errors were clerical errors or mistakes. The Court further determined that subdivision (3) does not apply to property partially exempt from tax, but only to fully exempt property. Finally, the Court determined that subdivision (4) does not apply when a person only has a partial taxable interest in the property.

A dissenting opinion challenged the majority's interpretation of subdivision (3). The dissenting justice interpreted subdivision (3) to apply to property partially exempt from taxation, because the statute's earlier language says that an assessment or tax may be abated or refunded if "the assessment or tax *or any part of the assessment or tax* is invalid[.]."[15]

Recommendation: SDCL 10-18-1(3) should be clarified to make clear whether subdivision (3) applies to partially exempt property or only to fully exempt property.

Abata v. Pennington County Board of Commisioners[16] **re: Zoning Ordinance Amendment Notices**

SDCL 11-2-18 and 11-2-19 provide the notice requirements for hearings to enact zoning ordinances and that "[n]otice of the time and place of the *hearings* shall be given once at least ten days in advance[.]" Regarding ordinance amendments, SDCL 11-2-29 and 11-2-30 provide that notice "of the time and place of the *hearing*" must be given ten days in advance.[17] SDCL 11-2-28 provides that notice requirements are the same for both zoning ordinances and zoning ordinance amendments.

In *Abata*, the South Dakota Supreme Court considered whether a county board must provide new notice for each successive hearing on a zoning ordinance amendment. The Court concluded that the statutes do not require legal notice before each successive hearing. The Court considered the significance of the use of the plural "hearings" in regard to enacting zoning ordinances, but the singular use of "hearing" in regard to zoning ordinance amendments. The Court determined that when the statute uses the plural "hearings" in SDCL 11-2-18 and 11-2-19, notice should be provided before each of the three types of matters addressed in the statute, and not that notice be provided in successive hearings in the same matter.

Recommendation: The notice requirements for hearings on enactments and amendments of zoning ordinances are subject to interpretation and the Legislature may want to clarify the statutes.

State v. Sharpfish[18]**: re: A Prosecutor's Appellate Jurisdiction**

Under SDCL 23A-32-5 a prosecutor may appeal a suppression order or a dismissal of a complaint, but may not appeal under this statute “after a defendant has been put in jeopardy[.]" Alternatively, SDCL 23A-32-12 allows discretionary appeals of intermediate orders entered "before trial [. . .] when the court considers that the ends of justice will be served[.]"

In *Sharpfish* the South Dakota Supreme Court considered the meaning of "put in jeopardy" under SDCL 23A-32-5, and whether SDCL 23A-32-12 allows appeals from a magistrate court directly to the Court.

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[15] Emphasis added.
[16] 2019 S.D. 39.
[17] Emphasis added.
[18] 2019 S.D. 49.

On the issue of jeopardy, three justices interpreted the term "jeopardy" to mean the risk of conviction and punishment that a criminal defendant faces at trial, and distinguished the use of the term in SDCL 23A-32-5 from the concept of "double jeopardy", which subjects a defendant to being prosecuted or sentenced twice for substantially the same offense. A special concurrence disagreed and interpreted "put in jeopardy" to mean to put in risk of double jeopardy.

On the issue of appeals, one justice interpreted SDCL 23A-32-12 as allowing appeals from a magistrate court directly to the South Dakota Supreme Court. The special concurrence and dissent disagreed. The special concurrence argued that SDCL 16-6-10 gives circuit courts exclusive jurisdiction on all judgments and orders from magistrate courts, with the only exception being SDCL 23A-32-5.

Recommendation: SDCL 23A-32-5 is subject to interpretation and the Legislature should clarify the phrase "put in jeopardy." The Legislature should also clarify whether SDCL 23A-32-12 provides jurisdiction for an appeal from a magistrate court directly to the South Dakota Supreme Court.

Rhines v. South Dakota Department of Corrections[19]: Department of Corrections Rulemaking

SDCL 1-15-20 gives rulemaking authority to the Department of Corrections concerning: "(1) Public contact with inmates through telephone and mail services and visits; (2) Inmate release date calculations; (3) Standards for parole supervision and parolee conduct; (4) Federal and out-of-state inmates housed in state correctional facilities; and (5) Inmate accounts." Further providing that "[t]he department may prescribe departmental policies and procedures for the management of its institutions and agencies, including inmate disciplinary matters." SDCL 1-26-1(8)(g) excludes from the definition of "rule" in the Administrative Procedures Act (APA) inmate disciplinary matters as defined in SDCL 1-15-20.

In *Rhines*, the South Dakota Supreme Court considered whether Department of Corrections' policies related to the method and procedures for carrying out the execution of inmates are "administrative rules" subject to the requirements of the APA. The Court interpreted SDCL 1-15-20 as limiting the Department's rulemaking authority to the five enumerated areas. But the Court concluded that the policies are not rules subject to the APA because the Department's policy for the execution of an inmate fits within the "broad scope of regulating 'all matters relating to inmate behavior.'"

Recommendation: The Legislature should consider whether the Court's interpretation of the scope of the Department of Corrections rulemaking authority is consistent with the Legislature's intent regarding the execution of inmates.

[19] 2019 S.D. 59.