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State of Utah v. Jerry Cooper : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. JERRY COOPER, Defendant/Appellant.	Case No. 20080413-CA

REPLY BRIEF OF APPELLANT

APPEAL FROM THIRD JUDICIAL COURT, SALT LAKE COUNTY, STATE OF UTAH, FROM A CONVICTION OF FOUR COUNTS OF KNOWINGLY FILING A WRONGFUL LIEN, THIRD DEGREE FELONIES, BEFORE THE HONORABLE RANDALL SKANCHY

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ARGUMENT

I. THE INVITED ERROR DOCTRINE IS NOT APPLICABLE WHERE COOPER DID NOT KNOWINGLY OR INTELLIGENTLY WAIVE HIS RIGHT TO A JURY TRIAL

Relying on *Allen v. Friel*, 2008 UT 56, 194 P.3d 903, the State asserts that Cooper, acting pro se, is "held to the same standard of knowledge and practice as any qualified member of the bar ..." *Id.* at ¶ 11. Holding Cooper to this legal standard, the State next asserts that Cooper committed "invited error" when he "led the trial court into committing the error" of giving Jury Instruction #34. *See* Aple. Br. at 12-13. The State finally asserts that because Cooper failed to object to Jury Instruction #34, this Court is precluded from considering the issue, no matter the seriousness of the constitutional

violation. *See* Aple. Br. at 14-15. [1] *See* Aple. Br. at 14-15.

The State fails to acknowledge, however, that *Allen v. Friel* was a civil matter, not a criminal matter where personal freedom is at stake. Rather, in criminal trials, pro se defendants "should be accorded every consideration that may be reasonably indulged." *State v. Winfield*, 2006 UT 4, ¶ 19, 128 P.3d 1171. Moreover, the State ignores that a pro se defendant cannot waive his right to a trial by jury unless and until the trial court makes a finding that the waiver is knowing and intelligent. *See Patton v. United States*, 281 U.S. 276, 312 (1930).

Notably, the State does not challenge the fact that Jury Instruction #34 commands a directed verdict for the State. Neither does the State challenge the fact that Cooper did not knowingly or intelligently waive his right to have the jury determine the factual issue in Jury Instruction #34. The State also does not challenge the fact that Cooper's right to a trial by jury was not forfeited. Instead, the State asserts that this Court cannot consider this constitutional violation because of the "invited error doctrine." *See* Aple. Br. at 14-15. The State's assertion is not correct.

As set forth in the opening brief, Cooper's failure to object to Jury Instruction #34 is tantamount to an unknowing and unintelligent waiver of his right to a trial by jury. *See* Aplt. Br. at 11-14. This violation of Cooper's constitutional right to a jury trial is a structural defect that requires a reversal. *See* Aplt. Br. at 16-19. The State does not address or even challenge Cooper's analysis of this structural defect. Accordingly,

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[1] This final assertion is based on a list of cases wherein the invited error doctrine was applied to instances wherein able trial counsel assured the trial court that there was no error in the proceedings. The lone exception is *State v. Winfield*, 2006 UT 4.

reversal is appropriate.

Even if the "invited error doctrine" precluded this Court from reversing on the grounds of structural error (which Cooper does not concede), the invited error doctrine is inapplicable in this case.

To assert that a pro se defendant led the trial court into this error, when the jury instruction was crafted and proposed by an experienced prosecutor, wholly lacks good faith. Prosecutors have a duty to ensure a fair trial. *See State v. Saunders*, 1999 UT 59, ¶ 31, 992 P.2d 1028 ("Prosecutors have a duty to eschew all improper tactics" and while prosecutors " may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one). Judges also have a duty to ensure a fair trial. *See State v. King*, 2006 UT 3, ¶ 19, 131 P.3d 202.

Though it is true that there are many instances where trial counsel will make calculated decisions not to object to certain matters, there is no evidence suggesting that Cooper made a calculated decision in hopes of leading the trial court into error by failing to object to Jury Instruction # 34.

Cooper was not even provided with the Jury Instructions 28 through 34 until the end of trial (R. 462: 289-91)[2]. To assert that an untrained pro se defendant read through and comprehended these jury instructions, with all their legalese, in a few minutes, and

[2] The proposed jury instructions were filed on January 22, 2008 (R. 208). The certificate of mailing is unsigned, indicating it was not served on Cooper (R. 209). Even if these documents were mailed to Cooper at that time, there is no reason to believe Cooper would have received them before trial on January 23, 2008.

then made a decision not to object to Instruction #34 with the sole purpose of leading the trial court into error so that an appeal could be taken, is absurd.

In *State v. Winfield*, 2006 UT 4, the Utah Supreme Court applied the invited error doctrine to a pro se defendant. However, the nature of the error in *Winfield*, if any, does not rise to the constitutional error in this case. For example, in *Winfield*, the claimed error was the trial court's failure to ask follow up voir dire questions of a single juror. *Id.* at ¶¶ 6-7. Notably, the defendant requested that the trial court ask a jury member an additional voir dire question, and then the defendant passed the jury for cause, stating that he "absolutely" found that the jury panel was acceptable and the defendant declined to use any of his peremptory challenges, stating, "The defense concedes to the jury selection." *Id.* at ¶ 8.

The Court found that the defendant's question and objections during voir dire, his affirmative statements, as well as the fact that he had previously represented himself before, and "appeared to have a reasonable knowledge of his rights and of trial procedure" "invited the trial court to proceed without further questioning of the panel..." *Winfield*, 2006 UT 4, ¶¶ 20-21. Accordingly, if there was any error, the defendant invited the error.

This case is distinguishable from *Winfield.* First of all, there is no evidence that Cooper has any constructive legal experience commensurate with the defendant in *Winfield.*[3] More importantly, the claimed error in *Winfield*, that the trial judge failed to

[3] A cursory review of the numerous pleadings filed in this case by Cooper reveals his lack of technical knowledge of law and procedure.

conduct adequate voir dire, is not a structural error such as the violation of Cooper's right to a trial by jury. In addition, it cannot be asserted in good faith that Cooper led the trial court into this error.

To a person with legal training, to which there is no evidence that Cooper has any such training, Jury Instruction #34 clearly usurps the jury role, since it compels the finding that Cooper filed a wrongful lien. That this is plain and clear is beyond dispute, and should have been readily apparent to the trial court. Not surprisingly, the State does not attempt to dispute the fact that Jury Instruction #34 deprives the jury of its role of determining the facts. The State also does not attempt to dispute the fact that Jury Instruction #34 demands a guilty verdict on all counts for a wrongful lien. The State does not dispute this because to do so would be frivolous and lack good faith.

Instead, the State requests that this Court ignore the important duties prosecutors and judges have in ensuring fair trials, and find that Cooper somehow pulled a fast one on the trial court and led the trial court down the path to issuing a directed verdict for the State, just so Cooper could serve jail time and then file an appeal. Such an assertion is nonsensical.

If the State's position is correct, then no matter what error exists in the jury instructions, as long as the pro se defendant raises no objection to the instruction, then the pro se defendant is forever barred from raising any issue on appeal regarding the defective jury instructions. This is true even where the jury instruction directs a directed verdict for the State!

The trial court plainly erred in when it issued a directed verdict for the State as to

whether the document filed was a wrongful lien. This error deprived Cooper of his right to a trial by jury.

In addition, and as set forth in the opening brief, harmless error cannot apply because Cooper never enjoyed his right to a jury trial because the judge instructed the jury to find Cooper guilty. The Fifth, Sixth, and Fourteenth Amendments, as well as Article I, Sec 12 of the Utah Constitution, require that the verdict be reversed.

II. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTIONS OF FOUR SEPARATE COUNTS OF FILING A WRONGFUL LIEN

The State asserts that the conviction for filing a wrongful lien as to Judge Davis' property was proper because Jury Instruction #34 instructed the jury that the document was a wrongful lien as to Judge Davis. *See* Aple. Br. at 19. Notably, the State ignores the fact that Utah Code Ann. § 38-9-1(6) provides that the document must at least purport to "create a lien, notice of interest, or encumbrance on an owner's interest in certain real property" and that the document filed by Cooper did not identify any real property owned by Judge Davis. *See* Aplt. Br. at 26-27. Instead, the State asserts that the invited error doctrine precludes this challenge on appeal. *See* Aple. Br. at 19.

For the reasons set forth above in Point I, the State's position is incorrect. Cooper did not waive his right to have the jury determine this factual element, nor did Cooper lead the trial court into this error. For the reasons set forth in Cooper's opening brief, the conviction pertaining to Judge Davis should be reversed. *See* Aplt. Br. at 26-28.

The State next asserts that Cooper's interpretation of Utah Code Ann. § 38-9-5(2) (2004) is incorrect, and that § 38-9-5(2) does not preclude a conviction of multiple

felonies where only one wrongful lien document is filed. *See* Aple. Br. at 20-21. Admittedly, Cooper's appellate counsel unintentionally misquoted the statute by adding the word "single" to § 38-9-5(2) on page 30.[4] *See* Aplt. Br. at 30.

However, Cooper stands by his interpretation of § 38-9-5(2). Before the words "third degree felony" in § 38-9-5(2) is the article "a". The article "a" denotes a single felony, not multiple felonies. In addition, the statute reads, "A person who intentionally records or files or causes to be recorded or filed a wrongful lien...." Again, the article "a" precedes "wrongful lien." Thus, the act of recording "a" single document results in "a" single felony conviction.

The Legislature's desire to protect the "lawful property interest in real property" does not authorize four separate convictions where only one document was filed. Again, if the Legislature intended multiple charges where multiple properties were encumbered by a single recorded document, then the Legislature merely had to include such language as, "Each encumbered property shall be a separate offense."

The State's interpretation, that "a plain reading authorizes the State to prosecute on behalf of all affected owners, whether identified in a single recorded document as here, or in separately recorded documents," cannot be correct. For example, if a single wrongful lien is recorded on a property owned by ten people, even though the wrongful lien identified only one individual owner, then ten felony charges would be authorized since all ten owners would be "affected". A plain reading of the statute does not

[4] Counsel did not intentionally misquote the statute and apologizes for the careless mistake. The statute was, however, correctly quoted on page 29. *See* Aplt. Br. at 29.

authorize this result. Nor does the plain reading of the statute authorize more than one felony conviction in this case.

In addition, because the language of the statute is plain and unambiguous, there is no need to resort to Legislative intent. *See Brown v. Sandy City Bd. of Adjustment*, 957 P.2d 207, 210-11 (Utah App. 1998).

For these reasons, and the reasons in Cooper's opening brief, three of the four convictions should be reversed pursuant to the plain language of § 38-9-5(2).

CONCLUSION AND PRECISE RELIEF SOUGHT

For the foregoing reasons and the reasons stated in the opening brief, Cooper asks this Court to reverse his convictions of four counts of filing a wrongful lien, third degree felonies, and to remand this matter for a new trial. In addition, Cooper requests that three of the four convictions be dismissed for insufficient evidence as set forth in Point II.

RESPECTFULLY SUBMITTED this 21st day of June, 2010.

for Aaron P. Dodd
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that I delivered two (2) true and correct copies of the foregoing Brief of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 23rd day of June, 2010.