

2009

# State of Utah v. Richard Donald Cooper : Reply Brief

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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STATE OF UTAH,

Plaintiff / Appellee,

vs.

RICHARD DONALD COOPER,

Defendant / Appellant.

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Case No: 20090396-CA

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**REPLY BRIEF OF APPELLANT**

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APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH, FROM A CONVICTION ON FOUR COUNTS OF WRONGFUL LIEN, THIRD DEGREE FELONIES, BEFORE THE HONORABLE JUDGE ROBERT ADKINS

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**REPLY BRIEF OF APPELLANT**

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**ARGUMENT**

**I. THE TRIAL COURT ABUSED ITS DISCRETION BY TAKING JUDICIAL NOTICE OF THE PRIOR COURT’S WRONGFUL LIEN ORDER**

**A. Not invited error**

In its brief the State alleges that by objecting to the trial court’s taking judicial notice of the prior court’s wrongful lien order and then requesting the order not be submitted to the jury as an exhibit Copper is now precluded from asserting an error on appeal because the error was somehow then invited. Unfortunately, defense counsel cannot understand the State’s argument on this point. How could Cooper’s attempts to prevent the jury from seeing the earlier wrongful lien order, the very order of which he objected to taking judicial notice of... The State further alleges that Cooper invited error by remaining silent when the trial court offered to “put in the exact language out of subsection (G) of Rule 201...” Appellee’s Brief at 18; R. 1166: 34-35. Neither or these

instances constitute invited error nor did or could Cooper have benefitted from failing to object at trial and then benefit by being able to claim the error on appeal. Rather, Cooper's objection to the judicial notice preserved his claim and his conduct with respect to the way the notice was introduced over his objection were legitimate attempts to reduce the prejudice caused by the trial court's erroneous ruling.

The State cites *State v. Pinder*, 2005 UT 15, ¶¶ 62-63, 114 P.3d 551, in support of the claim that Cooper's silence at the trial court's invitation to give a curative instruction including the language of Rule 201(g) constituted invited error. In *Pinder* the trial court instructed the jury on that the State bore the burden to disprove the affirmative defense. The defendant appealed and claimed the trial court erred in that instruction by failing to expressly require the State to disprove the affirmative defense beyond a reasonable doubt. Although the defendant did not object to the instruction at trial he claimed the appellate court could address the error because it constituted manifest injustice. *Id.* at ¶ 61. The Court ruled that "[a] jury instruction may not be assigned as error, even if such instruction would otherwise constitute manifest injustice, 'if counsel, either by statement or by act, affirmatively represented to the court that he or she had no objection to the jury instruction.'" *Id.* at ¶ 62. The Court found that because the defendant had stipulated to the instruction at trial he could not "take advantage of [the] error committed at trial" and then raise the error on appeal. *Id.* at ¶¶ 62-63.

Presumably, the State is arguing that because the court offered to mitigate the damage created by its taking judicial notice of the prior wrongful lien order and Cooper did not stipulate to that instruction Cooper therefore invited the error and should thus be

prevented from now claiming the judicial notice was in error but that argument fails. Unlike *Pinder*, where the error challenged on appeal was the very jury instruction the defendant stipulated to at trial, the error now challenged in this case was clearly objected to at trial and jury instruction offered by the court would only have reminded the jury of a fact that Cooper believed was prejudicial and would taint the jury's decision. To require Cooper to stipulate to an instruction focusing on the very evidence he wanted to keep from the jury makes no sense and is not supported by the invited error principle in *Pinder*. Although the proposed instruction that the jury "may, but is not required to, accept [the judicially noticed fact] as conclusive..." may have mitigated the prejudice caused by the taking of judicial notice, it also likely would have brought the matter back the forefront of the jury's minds. By refusing to ask the court to do this is not the unfair advantage contemplated by the invited error doctrine. Further, Cooper's silence at the trial court's offer to use the exact language of Rule 201 did not

What is at issue is whether the fact judicially noticed was admitted in accordance with Rule 201 and whether its prejudicial effect substantially outweighed its probative value. The extent to which, and the means by which, Cooper decided to try to mitigate the harm after the court's error should not prevent him from raising the issue at this point. Nor should the trial court's failure to follow both the substantive and procedural requirements of Rule 201 be excused by Cooper's silence or his attempts to mitigate after he had already objected to the judicial notice.

The same is true for the State's claim that Cooper invited the error asking that the wrongful lien order not be provided as an exhibit to the jury. Asking that the wrongful

lien order not be admitted as an exhibit is a wholly different matter from the requirement that it be made part of the record in accordance with Rule 201. The requirement of Rule 201 that evidence of the prior ruling be placed on the record is for foundational purposes supporting the judicial notice, not, as the State suggest, the equivalent of taking the records as exhibits to present to the jury at trial. The State failed to admit the order into the record and the court failed to require it prior to taking judicial notice. Neither of these failures have anything to do with Cooper's refusal to stipulate to the order being presented as a piece of evidence presented to the jury. That decision cannot constitute an invited error.

#### B. Violation of Rule 201

The State's brief seems to suggest that while the court did take judicial notice of the prior order it did so only for the "limited purpose of recognizing that 'judicial act' that the order represents or the subject matter of the litigation." State's Brief at 22 (*citing United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994)). The State argues that because the trial court "nowhere stated that it was taking judicial notice of the truth or accuracy of Judge Quinn's wrongful-lien order" it was merely taking notice of the "action" of another court and not noticing any fact underlying that action it was therefore not in taken in violation of Rule 201. Appellee's Brief at 23. In support of the court's notice the State urges that "Judge Quinn's order 'cannot be questioned,' it 'was a judicial determination on a matter involving the administrative judgments,' and 'that determination of [Judge Quinn] conclusively binds the parties in making that determination that it was a wrongful lien.'" Appellee's Brief at 23 (citing R. 1166: 34.).

The State argues that the trial court's judicial notice was limited to the fact that a judicial act had taken place, regardless of what the underlying legal decision was.

The State claims that the trial court's ruling could have been "more artfully worded" but it never "stated that it was taking judicial notice of the truth or accuracy of Judge Quinn's wrongful-lien order." Appellee's Brief at 23. However, as demonstrated by *Silva* and the other Federal cases cited in Appellant's opening brief, unless the fact noticed by the trial court was that prior litigation took place and nothing more, the obvious implication, and the only relevant one (clearly the purpose of its admission), is that the prior finding that the Administrative Judgment is a wrongful lien and that was used as evidence in and of itself in this case that the Administrative Judgment and the Consent Judgment were wrongful liens.

The State's position begs the question, to what end, if not to the ultimate issue, was this notice taken? If the notice was not requested to prove that these documents were in fact wrongful liens but, as the State seems to imply, only admitted to prove the action of another court of the this state, then how is that fact relevant, of what is that evidence probative? Cooper asserts that it is not relevant or probative of any relevant issue and that the evidence was clearly admitted for the purpose of proving the underlying issue decided in the wrongful lien order making its admission by judicial notice an improper and erroneous act by the trial court. The fact that the jury was allowed by the court to "give the previous decision the weight' they thought it deserved" does not overcome the fact that the court took judicial notice of a fact underlying another judicial act which is beyond the reach of Rule 201. The trial court told the jury that a "court of competent

jurisdiction” determined the Administrative Judgment to be a wrongful lien and that they “may consider the previous decision of that court finding that the administrative judgment was a wrongful lien in [their] deliberations in this case.” R. 1166: 102-03. Clearly the jury was allowed to take as evidence in support of the State’s requirement to prove the documents filed by Cooper were wrongful liens the fact that another court had already found one of them to be a wrongful lien. The State cannot escape the words of the notice itself and the words show that the court violated the principle established in *Silva* by taking notice of “facts found by a judge upon resolution of contested evidence” which could not have been considered “beyond ‘reasonable dispute.’” *State v. Silva*, 926 A.2d 382, 385 (N.J.Super 2007) (citing FED.R.EVID. 201).

### C. Harmful error

The State contests that even if the trial court’s taking of judicial notice was erroneous it did not subject Cooper to unfair prejudice and therefore it was not a harmful error. Appellee’s Brief at 27. In essence the State argues that the remainder of the evidence presented proves beyond a reasonable doubt that Cooper knowingly made, uttered, recorded, or filed a lien (or something that purported to be a lien) without an objectively reasonable basis to believe he had a present and lawful property interest in the property. See UTAH CODE ANN. § 76-6-503.5. The State argues that because the documents were admitted to the jury and because the Consent Judgment contains the phrase ‘become a commercial lien’ that the evidence was sufficient to support the conviction without the judicially noticed facts and therefore the error was harmless.

However, the evidence admitted was not overwhelming, especially upon the very point for which the prior wrongful lien order was admitted. The State was confronted with the difficult task of proving that the Consent Judgment either created a lien or purported to create a lien. As asserted in Appellant's Brief it is without question neither the Administrative Judgment nor the Consent Judgment created a lien upon any of the personal or real property of the parties named in the documents. When the expert, Lisa Garner performed a records check she confirmed that neither of these documents was a lien or encumbrance on any of the property of the victims. R. 1166: 152, 167, 170.

The next question is whether it purported to create a lien in any such property. The State suggests that Cooper's testimony, the language of the Consent Judgment, and the expert testimony support the idea that the document purported to create a lien. Appellee's Brief at 28-29. The State suggests that because Cooper testified that the Consent Judgment "says if you don't do something, it can become a lien..." that the Consent Judgment therefore purported to create a lien. Appellee's Brief at 28 (citing R. 1282: 216). The State then cites the corresponding language of the Consent Judgment where it claims that unless the parties discharged the debt "within 90 days, the consent judgment would 'become a 'commercial lien.''" Appellee's Brief at 29 (citing Consent Judgment at page 4). Unfortunately the State inaccurately cites the Consent Judgment and implies a direct connection between the filing of the consent judgment and the creation of a lien, which doesn't exist.

The document does not say that the Consent Judgment would become a commercial lien or would create a commercial lien in 90 days, as the State argues, but in

fact says that if the account receivable created by the “Statement and Demand for payment” is not discharged then the “*account* become [sic] a commercial lien...” Consent Judgment at page 4 (emphasis added). The Consent Judgment does not purport to be a lien or create a lien, at very best it gives notice that a lien may arise if conditions are not met. However, this does not satisfy the elements of the crime nor does it, as the State alleges, provide overwhelming evidence that the Consent Judgment constituted a wrongful lien. Appellee’s Brief.

The State suggests that the jury may have found Cooper guilty of the crime of wrongful lien either by the act of filing the Administrative Judgment, which was drafted by his son, or by the act of filing the Consent Judgment, which Cooper himself drafted. In either case, the trial court’s error in taking judicial notice that the Administrative Judgment had been found to be a wrongful lien by another court was harmful because it “probably [had] a substantial influence in bringing about a different verdict.” *Redevelopment Agency of Roy v. Jones*, 743 P.2d 1233, 1235 (Utah App. 1987). As argued in the opening brief, the State’s witnesses could not and did not confirm that the documents filed by Cooper either created or purported to create a lien. See Appellant’s Brief at 34-36. This failure was supplemented by the judicial notice. The State’s witnesses testified about their relationships and interactions with Cooper and his son and about how they did not owe him any money. Their testimonies arguably proved he filed these documents and that they did not owe him money. What the witnesses didn’t and couldn’t prove was whether or not the documents were liens or purported to create a lien and on that point the State relied heavily or nearly entirely upon the prior wrongful lien

order. This reliance demonstrates the influence the erroneous judicial notice had upon the case. Without it, the State did not have a strong case because, on their face the documents did not create a lien nor do they purport to create a lien.

The State's allegations that "the evidence abundantly supports that Defendant, at the very least, 'knowingly' 'made uttered,' 'filed' and/or 'recorded... a lien' that 'purported to create a lien or encumbrance on an owner's interest in real or personal property or a claim on another's assets'" is not well taken because it fails to demonstrate how filing the documents that he filed created or purported to create a lien. Appellee's Brief at 29-30. While the prosecutor may not have focused on the wrongful lien order in closing he did use it in conjunction with the evidence of the filing and without the evidence that the Administrative Judgment was in fact a wrongful lien, all the State had was a filing that does not satisfy the elements. Thus the error was harmful and this Court should reverse the trial court's decision to take judicial notice of another court's factual and legal conclusions because the court failed to require the State to meet the foundational requirements of Rule 201 and because when the court did take notice it did so in a way that presented the underlying issues as true and unquestionable rather than the mere fact that the litigation had occurred as the rule intends.

## **II. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING THE MOTION FOR MISTRIAL**

### **A. Not invited error**

The State asserts that the prejudicial statements made by Judge Davis as a witness could not have supported a mistrial because, as the trial court found, the vast majority

were elicited on cross by defense counsel and therefore they constitute invited error. Appellee's Brief at 46. As adequately asserted in Cooper's opening brief, while it is true that some, even a significant amount, of the prejudicial testimony was elicited on cross examination, those questions came only after the witness repeatedly made improper statements, both on his own and in response to questions posed by the State. Appellant's Brief at 44-45. As argued before, the State repeatedly elicited testimony related to Davis's opinion of the legal effect of the documents, the effect of their being filed, and the effect those documents have had upon the status of his property. The State did open the door and Cooper had no choice but to try to confront it. That act, the attempt to lessen the damage caused by Davis's improper and highly prejudicial testimony, cannot constitute an invited error after the State had first and repeatedly placed a skunk in the jury box.

Without a doubt, Davis's testimony on direct examination was improper and prejudicial and was more than sufficient to support a motion for mistrial. Because the trial court either ignored or missed the significance of Davis's testimony when considering the motion for mistrial it abused its discretion. A review of the record and the significance of the evidence presented through Davis shows that the trial court's decision to deny the mistrial was plainly wrong because the evidence so likely influenced the jury that Cooper cannot be said to have received a fair trial. How could he be said to have had a fair trial were the State presented a witness, introduced him as a District Court Judge with 22 years on the bench, questioned him about his opinion of the legal significance of the documents and legal impact on his property.

B. Harmful error

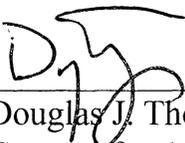
The State finally argues that even if Judge Davis's testimony was inappropriate and the trial court should have granted the motion for mistrial the error was harmless. The State alleges that the documents speak for themselves and supply overwhelming evidence supporting the guilty verdicts, that the curative instructions were sufficient, and that Judge Davis's improper opinion testimony was merely cumulative of what the defense expert testified to. Each of these excuses are insufficient to address the harm that came from Judge Davis's testimony.

First, that the evidence presented by Judge Davis was absolutely necessary, as was the judicial notice, if the State were going to prove that the documents filed either created or purported to create a lien because, as explained above, the remainder of the evidence was far from overwhelming, in fact none of it demonstrated this required element. Without Judge Davis's improper opinion testimony, combined with the improper judicial notice, the State could not have proved that what Cooper filed was a lien or even purported to be one. Without this erroneous evidence, the State's remaining case was insufficient to prove the charges.

**CONCLUSION AND PRECISE RELIEF SOUGHT**

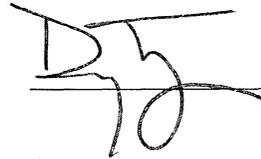
Because the trial court erroneously took judicial notice of a prior wrongful lien order and then failed to grant a mistrial after a witness improperly offered opinion testimony this Court should reverse that court and remand for a new trial.

RESPECTFULLY SUBMITTED this 14th day of March, 2011.

  
\_\_\_\_\_  
Douglas J. Thompson  
Counsel for Appellant

**CERTIFICATE OF MAILING**

I hereby certify that I mailed a true and correct copy of the foregoing Appellant's Brief postage prepaid to the Utah State Attorney General, Appeals Division, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114 on the 14th day of March, 2011.

  
\_\_\_\_\_