

1999

Utah v. Stringham : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
	:	
Plaintiff/Appellee,	:	Appellate Court No. 990630-CA
	:	
vs.	:	
	:	
ROBERT W. STRINGHAM	:	Priority No. 2
and GALE I. STRINGHAM,	:	
	:	
Defendants/Appellants.	:	

BRIEF OF APPELLANTS

APPEAL FROM A CRIMINAL CONVICTION OF THE
THIRD JUDICIAL DISTRICT COURT, SALT LAKE
COUNTY, SALT LAKE DEPARTMENT, THE HONORABLE
ANTHONY B. QUINN, PRESIDING

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Clerk of the Court

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JURISDICTION

This Court has jurisdiction in this matter pursuant to *Utah Code Ann.* § 78-2a-3(1)(e).

ISSUES PRESENTED ON APPEAL

1. Was the plea agreement entered into between the Plaintiff/Appellee State of Utah (the “State”) and Defendants an enforceable agreement?
2. Should the Trial Court have granted the motion to dismiss for lack of evidence against Gale Stringham at the close of the State’s case, and if not, does the evidence as a whole support her convictions?
3. Did the Trial Court err in denying the use of the good faith belief defense and refusing to give the defendants proposed instruction on this defense?

DETERMINATIVE LAW

The determinative law in this case includes *Utah Code Ann.* §§ 76-10-1601 and 76-10-1801, which are the statutes under which these charges are filed.

STATEMENT OF THE CASE

Defendants Bob and Gale Stringham were charged with Communications Fraud founded on insurance billings during 1993 for patients of an organization known as Utah Treatment and Addiction Health Services. Founded on the Communications Fraud, Bob Stringham was charged with thirteen counts, Gale Stringham was charged with six counts. They were both additionally charged with one violation of a pattern of unlawful activity based on the communications counts. *Utah Code Ann.* § 76-10-1601.

The matter was tried over the period beginning February 23, 1999, through March 4, 1999. The Trial Court denied a motion to dismiss as to Gale Stringham at the close of the State's case. The defendants were convicted of all charges and filed a timely appeal.

STATEMENT OF FACTS

In approximately June of 1992, Defendant Bob Stringham and Carolyn Edwards met and decided to organize the Utah Treatment and Addiction Health Services (UTAHS). This organization was to provide treatment in the fields of drug abuse and domestic violence counseling. (Tr 130-131) The company opened offices in Bountiful, Salt Lake, Sandy and Orem. The principles of the company were Carolyn Edwards, Bob Stringham, and their spouses. Carolyn Edwards supervised the conduct of operations at the Bountiful, Salt Lake and Sandy locations. *Id.* Bob Stringham was in charge of the billing. (Tr. 134) Gayle Stringham, the wife of Bob Stringham and a Ph.D. in Psychology, provided services at the Orem business location.

At the time that this counseling was first offered by UTAHS there were no rules for the conduct of domestic violence counseling. (Tr. 134, 171-2) By 1993, the State of Utah developed regulations for qualification to provide domestic violence counseling. (Tr 142) Under the new standards, only those individuals with certain academic qualifications could provide this counseling. (Tr. 176) These rules were published by the end of 1993.

The regulations governing mental health professionals allows for the conduct of certain types of counseling by individuals who are working toward a license, if the activities of these individuals are performed under the supervision of a fully licensed person.

After her graduation and prior to receiving her Ph.D. in 1993 Gale Stringham worked under the supervision of Geri Alldredge, a licensed Ph.D.

Carolyn Edwards, who was only licensed to provide alcohol and drug counseling, provided other types of counseling at the Salt Lake office of UTAHS. She believed that she was conducting her therapy under the supervision of Dr. Charles Walton. (Tr 233) Walton, however, testified that he did not believe that he was supervising Edwards to the extent that she did. (Tr. 913)

Some of the services provided by UTAHS was billed to insurance companies. These billings traditionally utilized a standard form known as a Health Insurance Claim Form (HICFA). At its inception UTAHS had hired another company to process and file insurance claims, but learned in 1993 that the forms were not being submitted. The four principals of the company met at the Stringhams' residence, and the Edwards and the Stringhams filled

out HICFA's for services rendered to patients prior to that date. (Tr 166, 189-190) One of the blocks on the insurance form calls for the identification of the "Physician or Supplier". (Tr 197) Ms. Edwards believed that this block was not one of the ones completed by the four individuals on this occasion. (Tr. 168) Carolyn Edwards testified that at that time she believed that the billing forms that were filled out and submitted were correct and properly billed for services provided by the company. (Tr. 196, 198)

After the catching up the bills, the billing function for the company was conducted out of the Orem location under the control of Bob Stringham. (Tr. 191) The bills would be processed by an employee from the Orem office based on records provided from each of the offices. All of the services provided out of the Salt Lake Office were submitted with the stamp signature of Dr. Charles Walton, a medical doctor, in the block provided for "Physician or Supplier". (Tr. 241-242) This was done even though Dr. Walton performed very few of these services himself. The individual who prepared these forms testified when asked who told her to utilize this procedure: "I believe it was Bob and Gale." (Tr. 242) Later when asked about a specific insurance company and who told her how to bill: "It was either Bob or Gale." (Tr. 243)

The insurance companies that rely upon these forms expect that the "Physician or Supplier" block will be either the person who actually performed the services or, in the alternative, the person supervising the actual person performing the services. Some of the

services billed under the stamp of Dr. Walton would not have been compensable if billed under the name of the person who provided the actual services.

Prior to the trial, counsel for the defendants (Mr. Mooney) and the prosecutor (Mr. Gunnarson) met to discuss a possible plea agreement. At the end of that meeting, the two lawyers structured an agreement that would involve pleas from Mr. Stringham, and a dismissal of Mrs. Stringham. Neither of the defendants was present at this meeting, and it was understood that counsel for the defense would have to discuss the proposal with the defendants. Mr. Gunnarson, the prosecutor, wrote an outline of the proposed offer on his pad and asked defense counsel to sign next to it. The agreement was silent on the subject of restitution. Thereafter, counsel for defendant left a message on the answering machine at the number that had been provided by Mr. Gunnarson. Defendants maintain that they accepted the offer. Although there is a factual dispute relating to the exact wording of the message, the trial Court never reached this issue. Defendants brought a motion to enforce the plea agreement. Prior to the commencement of trial, the Court ruled: 1) that a defendant had no right to enforce a plea agreement under Utah law; and 2) the agreement would be unenforceable because it did not address the issue of restitution. (Tr. 3-11)

At the close of the governments case, the defense moved for a dismissal as to Mrs. Stringham. (The motion was heard on the 1st of March, 1999, but is not reflected in the record.) The court denied the motion. (Tr. 1439).

The defense requested that the jury be charged that a good faith belief negates the necessary intent for a fraudulent statement. Proposed instructions were discussed at length in chambers. Defense presented an instruction based on good faith belief which the court refused to give. Defendants objected to the Courts failure to instruct. (Tr.1175) The jury convicted, and the defendants filed a timely appeal.

SUMMARY OF ARGUMENT

Prior to the trial, a plea agreement was offered by the State prosecutor, this offer was accepted by communications to an answering machine at a number provided by the prosecutor, and when the offer was later withdrawn, the Trial Court erred in not enforcing the agreement.

At the close of the evidence, Defendant Gale Stringham moved to dismiss for insufficient evidence. The Trial Court, however, improperly denied this motion, finding that an oblique reference to her in connection with the billing procedure that served as the basis for the charges was sufficient to send the case to the jury.

Finally, defendants claimed that they acted in good faith and had a good faith belief that the procedures they were following were proper. The defense offered an instruction on its defense. The Court ruled that good faith was not a defense under the mental state standard of the Communication Fraud statute and denied the instruction.

ARGUMENT

I

THE COURT ERRED BY NOT ENFORCING THE PLEA AGREEMENT

The standard to be applied to the enforcement of plea agreements is a matter of law. Legal issues are reviewed *de novo* for correctness. *State v. Pena*, 869 P.2d 932 (Utah 1994).

Counsel for the defendants and the prosecutor sat down in a good faith attempt to settle this matter on the eve of trial. At the end of that session, the attorneys arrived at what they felt would be a fair disposition of the matter. While the prosecutor has the authority of his client, the State, to settle criminal cases, it is necessary for a defendant to give approval to any such arrangement. Because the defendants were not present at the meeting between the lawyers, it was necessary for defense counsel to contact the his clients and obtain their consent to the agreement.

In order to insure that there would be no ambiguity in the agreement, the prosecutor wrote out the terms on his pad and asked defense counsel to sign next to it, which was done.¹ This document reflected that Mrs. Stringham would be dismissed and that Mr. Stringham would plead guilty to three third degree felonies. The agreement did not address the subject of restitution.

¹ The page from the prosecutors note pad was ordered to be included in the record. (Tr. 11) It would appear that it was never turned over to the Court by the prosecution as a review of the record failed to locate it. A motion to supplement the record will be filed as soon as a copy of the document is obtained from the prosecution.

Mr. Gunnarson provided a telephone number to defense counsel and the attorneys parted. Later after defense counsel had made contact with his clients and obtained their approval, he called the number provided by the prosecutor. Mr. Gunnarson was not there, so defense counsel left a message. The exact wording of the message is in some dispute, but the Court never got to this issue.

The Court first held that the State could not be bound to such an agreement and further, that there was no meeting of the minds in any event because the agreement did not address the subject of restitution.

A. Plea Agreements Are Enforceable Contracts with Constitutional Overtones in the State of Utah.

The foundation case dealing with the rights bestowed to a defendant in a plea agreement is *Santobello v. New York*, 404 U.S. 257, 30 L.Ed.2d 427, 92 S.Ct. 495 (1971). In this oft quoted case, the United States Supreme Court decided that a plea agreement is a contract between the prosecution and the defendant that is enforceable as are other contracts dealing with more mundane aspects of peoples lives.

Santobello involved enforcement of the terms of a completed plea agreement. The defendant in that case entered his plea as a part of the agreement, but felt that the government had breached the agreement by not following through with its obligations under the agreement. From the doctrine of *Santobello* comes the concept of the reasonable expectation of the defendant in a plea agreement. *State v. Bero*, 645 P. 2d 44 (Utah 1982).

Many of the cases differ somewhat from the issue before this Court because in those factual circumstances the agreement had been entered and partially performed, usually by the entry of the plea by the defendant. In the instant case we deal with the subject of enforcement of an agreement that has not been performed by either party and is repudiated very shortly after it is made.

A similar situation to the case at bar existed in *United States v. Cooper*, 594 F.2d 12 (4th Cir. 1979). *Cooper* is further distinguished in that prior to the ability of the defense lawyer to communicate the acceptance to the prosecutor, the prosecutor advised the defense lawyer that the offer was withdrawn. Thus under *Cooper* no contract under strict contract law would have come into being because the acceptance had not been communicated. (Communications of acceptance is the disputed part of the evidence in this case that the judge never reached.) In enforcing the plea agreement, the *Cooper* Court found that there was a fundamental right of fairness guaranteed by the Constitution that was impacted by the case, “that under appropriate circumstances which we find here a constitutional right to enforcement of plea proposals may arise before any technical “contract” has been formed, and on the basis alone of expectations reasonably formed in reliance upon the honor of the government in making and abiding by its proposals.” *Id.* at 16.

One of the reasons for the forgoing is the necessity for confidence in the process of justice itself:

To the extent that the government attempts through defendant's counsel to change or retract positions earlier communicated, a defendant's confidence in his counsel's capability and professional responsibility, as well as in the government's reliability, are necessarily jeopardized and the effectiveness of counsel's assistance easily compromised. At the very least, these Sixth Amendment considerations add a heightened degree of obligation to the government's fundamental duty to negotiate with scrupulous fairness in seeking guilty pleas.

U.S. v. Cooper, supra at 18.

In the case of *State v. Patience*, 944 P.2d 381 (Utah Ct. App 1997), a plea bargain was entered into allowing the defendant to plead guilty to three counts of attempted forgery, a third degree felony. Unbeknownst to either of the parties, Forgery was reduced from a second degree felony to a third degree felony, which would have made attempted forgery class A misdemeanors. At sentencing, the defendant was sentenced on the basis of three third degree felonies. On appeal, defendant alleged that the Court erred by sentencing her for the felonies when the level of the crime had been reduced by the legislative change.

In opposition to the defendants position, the State argued that the plea agreement constituted a mutual mistake by the parties as neither were aware of the change in the law, nor was the judge at the time of the sentencing. Thus, in *Patience* it was the government that attempted to argue strict principles of contract to the agreement. Unlike many of the cases dealing with plea agreements, *Patience* did not desire to withdraw the plea, but rather to have it strictly enforced under the amended statute. The Court of Appeals recognized that

principles of contract only go so far in cases involving pleas and that there are constitutional implications of such a situation:

In applying contract law principles to plea agreements, "courts must keep in mind that the defendant's 'underlying "contract" right is constitutionally based and therefore reflects concerns that differ fundamentally from and run wider than those of commercial contract law.' As a result, the application of contract law principles to plea agreements may require tempering in some instances." People v. Evans, 174 Ill. 2d 320, 673 N.E.2d 244, 247, 220 Ill. Dec. 332 (Ill. 1996)

Id. at 396.

The trial court was required to resentence the defendant with the benefit of the amended statute.

If a defendant is to be allowed the full benefit of the contract even when there are mistakes made in the defendant's favor that neither the prosecution or the defense realized, an agreement struck and accepted should be enforceable. Given the important rights that overlay and attach to the plea bargain process, defendants should be allowed under Utah law to enforce plea agreements, including specific enforcement of agreements struck, but not yet implemented.

B. Failure to Address the Issue of Restitution Was Not Fatal to the Plea Agreement.

It is axiomatic that any plea agreement entered into between the State and a defendant will not necessarily resolve all issues and always will be subject to the exercise of sentencing discretion by the judge following the entry of the plea. The key element of the plea

agreement that is in the control of the parties is which counts, or amended counts, will be plead to and which will be dismissed. Following the plea, it becomes the province of the judge to affix the sentence.

Issues related to sentencing may or may not be an element of plea negotiations. Thus a plea agreement may involve a requirement that the court accept matters of disposition before it accepts the plea. Utah Rules of Criminal Procedure 11h. But even in these circumstances the judge has not been made a party to the plea negotiations. The structure of such an agreement is that the defendant is not bound to the plea if those matters outside the control of the prosecution are not accepted by the court.

In many circumstances the government may make a recommendation or stand silent at sentencing. These are matters under the control of the prosecution and things that can be negotiated, but they are not binding on the court, and a defendant that does not receive these benefits may not later complain of the court's action. *United States v. Benchimol*, 471 U.S. 453, 85 L.Ed.2d 462 (1985).

Restitution is not a part of a guilty plea; rather it is a consequence that flows from the conduct of the defendant and the finding of guilt that is entered by the court on the plea of the defendant. U.C.A. 76-3-201. In the instant matter, the issue of restitution was not addressed by the parties in their plea agreement. The agreement instead dealt only with the number of counts to which the defendant Bob Stringham would plead guilty. Yet the Court found that the lack of this component made the agreement unenforceable.

Defendants frequently enter pleas without the subject of restitution being addressed. It is like many of the other consequences of the plea, something that is left to the court in the majority of sentences as a part of its discretion. *See State v. Thurston*, 781 P.2d 1296 (Utah Ct. App. 1989). As discussed above, plea agreements are similar to contract, but are only similar. One of the striking differences is that not all aspects of what may occur thereafter need be a part of the agreement.

In *State v. Watson*, 987 P.2d 1289 (Utah Ct. App. 1999), a defendant originally charged with murder and obstruction plead under a plea agreement to the charge of obstruction of justice. At sentencing the court imposed restitution for costs associated with the murder charge. It is clear that the subject of restitution had not been a component of the plea agreement of these parties, but the court did not find this to be an incomplete contract as would be the case under the rational proposed by the trial court herein. Whether restitution could be ordered instead turned on the admissions that the defendant had made in allocution.

In *State v. Twitchell*, 832 P.2d 866 (Utah Ct. App. 1992), this Court conducted a lengthy discussion of the inter-relationship of restitution to a finding of guilt. In so doing, the Court underscores the discretionary function of the trial court in the issuance of an order of restitution. Like many other areas that may be addressed in a plea agreement, an agreement as to restitution is not mandatory to such an agreement, is normally a function of

the sentencing judge, and a plea bargain agreement is not incomplete because it fails to address this component.

II

GOOD FAITH IS A DEFENSE TO COMMUNICATIONS FRAUD, AND A DEFENDANT IS ENTITLED TO AN INSTRUCTION ON GOOD FAITH BELIEF WHEN FACTUALLY JUSTIFIED.

Jury instructions are reviewed under a correctness standard granting no particular deference to the trial court. *State v. Stringham*, 957 P.2d 602 (Utah Ct. App. 1998).

Defendants maintained that they believed they were billing in a correct fashion. Gale Stringham testified that the procedure utilized by UTAHS of having a single stamp for an individual from each location regardless of who had actually provided the services was the procedure that she had learned over the years. She did not become aware that this was an improper method of billing until some time after the bills in the instant matter when she read an article in a professional magazine that indicated the procedure was improper and could in fact be fraudulent. (Tr 1286-87)

In line with this defense, the defendants presented a proposed instruction as follows:

“You are instructed that a representation that is made by an individual who has a good faith belief in the correctness or truth of the representation is not a fraudulent representation.”

Record 166.

The Tenth Circuit Court of Appeals has ruled that a defendant is entitled to a good faith instruction when he has interposed the defense of good faith, has requested the instruction, and when there is sufficient evidence to support it. *United States v. Hopkins*, 744 F.2d 716, 717 (10th Cir. 1984) (*en banc*). Good faith belief is a defense that centers on the intent component of a fraud allegation. Because it is a defense, it is entitled to its own instruction. The basis for the grant of such an instruction is that the general instructions on willfulness and intent are not deemed sufficient to clearly convey to a jury the defendant's good faith defense. *United States v. Haddock*, 956 F.2d 1534 (10th CA 1992); *United States v. Harting*, 879 F.2d 765 (10th Cir 1989). It is not necessary that the good faith belief be rational; so long as it is held in good faith, it is a proper defense that may be raised if there is sufficient evidence, and as such is proper for an instruction on the defendants theory of the case. *United States v. Mann*, 884 F.2d 532 (10th Cir. 1989).²

The defendants in this case raised as their primary defense to the charges their good faith belief that it was a proper procedure to stamp the HICFA with the names as was done.

² "Mann testified at length regarding the beliefs underlying his decision not to file, citing a wide range of legal authority, including United States Supreme Court opinions, in support of his position. Although Mann's varied arguments are difficult to distill into a unified theme, the most basic thrust of his asserted beliefs seems to be that the law as articulated in various court opinions supports the application of the income tax only to corporations, and that the enforcement of the individual income tax is carried out only by threats and coercion from "Satan's little helpers," the IRS. We must remind ourselves here that the good-faith defense need not be rational, if there is sufficient evidence from which a reasonable jury could conclude that even irrational beliefs were truly held." Citations omitted. *Id.* at 541.

They presented affirmative evidence on this subject, but were denied an instruction on their theory of the case. In denying the instruction submitted by the defendants, the Trial Court incorrectly ruled that the good faith defense was not applicable to the communication fraud statute:

I don't think that the good-faith instruction is a correct statement of the law. The reason I think that is because the mental state is clearly set forth in the statute. I think it's possible for an individual to be in good faith but, nevertheless, reckless within the meaning of the statute.

(Tr. 1176)

The defendants were charged with violation of Utah's Communication Fraud Statute. Utah Code Ann. § 76-10-1801.³ This statute goes on to provide an affirmative defense if the representations were not made knowingly or with reckless disregard for the truth. *Id.* at § 76-10-1801(7). Although this provision is stated as an affirmative defense in the statute, it has been construed through statutory construction as defining the necessary mental state for this crime of either acting knowingly or with reckless disregard for the truth. *State v. Tebbs*, 786 P.2d 775 (Utah Ct. App. 1990). This was underscored in *State v. Stringham*, *supra*, holding that an instruction on the mental state necessary to commit the offense was necessary before a conviction of communications fraud could be had.

³ Any person who has devised any scheme or artifice to defraud another or to obtain from another money, property, or anything of value by means of false or fraudulent pretenses, representations, promises, or material omissions, and who communicates directly or indirectly with any person by any means for the purpose of executing or concealing the scheme or artifice is guilty of [communications fraud]. U.C.A. 76-10-1801(1).

The clarification of Utah's communication fraud statute placing the *mens rea* standards back in their proper place, however, does not thereby determine that affirmative defenses otherwise available in fraud actions would not still be available. Were subparagraph 7 of the statute to be read as setting forth all available "affirmative defenses", the *Tebbs* Court would have found it unconstitutional. Thus, this paragraph can only be read as less than artful communication of the mental state standard which the state is required to prove.

Defendants claim that a good faith belief in the correctness of the representation is a defense against criminal fraud actions generally, including the communications fraud statute. This was tacitly recognized in *dicta* in *State v. Shickles*, 706 P.2d 291 (Utah 1988). In *Shickles*, not a fraud case, the Court allowed evidence that was otherwise inflammatory to undercut the defendants claim that he acted with a "good faith belief".

Under current Utah law, the mental state necessary to commit the offense of communications fraud is one on intentional or knowingly making the false statement, or recklessly disregarding the truth. It is well established that a good faith belief is a defense against a "willful" conduct standard. *Cheek v. United States*, 498 U.S. 192, 111 S. Ct. 604, 112 L. Ed. 2d 618 (1991). Thus, a good faith belief would clearly undercut a finding of either intentionally or knowingly.

This only leaves the reckless disregard component. If one is acting with a good faith belief, can that conduct also constitute a "reckless disregard"? The obvious answer is "no".

Under the civil standard for fraud, reckless conduct is that conduct arising from the actions of the defendant when a defendant knew that they did not have sufficient information upon which to base the representation. *See Pace v. Parrish*, 247 P.2d 273 (Utah 1952); *Crookston v. Fire Ins. Ex.*, 817 P.2d 789 (Utah 1991).

Reckless disregard is a standard that is more blameworthy than negligence. *Farmer v. Brennan*, 511 U.S. 825 (1994). In defamation claims, it has been held to be one in which “the defendant in fact entertained serious doubts as to the truth”. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688, 105 L. Ed. 2d 562, 109 S. Ct. 2678 (1989) . If a belief is in “good faith”, then it would seem to negate “serious doubt” for the truth.

The United States Supreme Court has further held that lack of reasonable belief in the truth of a statement is not the equivalent of a reckless disregard for the truth. *Garrison v. Louisiana*, 379 U.S. 64 (1964)⁴ (*Garrison* was a criminal prosecution based on defamation.) In *Johnson v. Rogers*, 763 P.2d 771 (Utah 1988), the mental state of reckless disregard was

⁴ “The reasonable-belief standard applied by the trial judge is not the same as the reckless-disregard -of-truth standard. According to the trial court's opinion, a reasonable belief is one which “an ordinarily prudent man might be able to assign a just and fair reason for”; the suggestion is that under this test the immunity from criminal responsibility in the absence of ill-will disappears on proof that the exercise of ordinary care would have revealed that the statement was false. The test which we laid down in *New York Times* is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth.” *Garrison v. Louisiana*, at 79.

deemed to be fact intensive, and required a finding that the conduct was “knowingly reckless”. *Id.* at 776.

Under both the standards set by the Supreme Court of the United States and the Supreme Court of Utah, knowledge of the risk associated with the act of the defendant is a necessary component of the mental state of reckless disregard. It is axiomatic that a good faith belief would negate such a finding.

The defense of good faith belief is a proper defense to raise in the face of allegations of fraud founded on reckless disregard and, as a defendant’s theory of the case, should have been the subject of a separate jury instruction as required by the Tenth Circuit Court of Appeals in its treatment of this subject.

III

**THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN
A CONVICTION OF GALE STRINGHAM BOTH AT THE
CLOSE OF THE STATES CASE ON THE MOTION OF
THE DEFENDANT AND AT THE COMPLETION OF
THE EVIDENCE.**

A. **Defendant’s Motion to Dismiss as to Gale Stringham at the Close of the
State’s Case Should Have Been Granted.**

A trial court's denial of a motion to dismiss at the close of the State’s case for insufficient evidence is reviewed to determine if, "upon reviewing the evidence and all inferences that can be reasonably drawn from it, . . . some evidence exists from which a

reasonable jury could find that the elements of the crime had been proven beyond a reasonable doubt.” *State v. Dibello*, 780 P.2d 1221, 1225 (Utah 1989).

A defendant may make a motion for dismissal based on lack of evidence at the close of the State’s case. Utah Code Ann. § 77-17-3. If the Court finds that there is not sufficient evidence to put the defendant to his proof, then the Court should grant the motion. In so doing, the Trial Court determines whether reasonable minds could find all the elements of the crime charged in favor of the State. *State v. Smith*, 675 P.2d 521 (Utah 1983).

At the close of the State’s case, the defense moved for a dismissal as to Gale Stringham. The Court took argument on the subject, but did not immediately rule.⁵ The record was later corrected to show the ruling. In denying the motion, the Court relied on the testimony of Kim Bateman:

“It was brought to my attention that counsels’ concerned that I may not have explicitly ruled on the motion for directed verdict. I think that’s probably true, now that I think back on it. I did intend to deny the motion for directed verdict as to Mrs. Stringham. My reasoning being that the testimony that she directed Kim Bateman [Kim Platt] to make the entries out of the Salt Lake office stamped with Dr. Watson’s signature was, in my mind, enough to create a jury question on that issue.”

Tr. 1439.

The State put on over a dozen witnesses. The majority of these were patients who testified as to who had provided the services they received, and primarily supported the

⁵ Argument was conducted on March 1st. 1999. The record prepared in this matter does not include these arguments.

proposition that the services they received in the Salt Lake office were not provided by Dr. Walton. This was only of significance because the HICFA forms submitted in this case were stamped in the “provider or physician” block with the stamp signature of Dr. Walton.

These forms were prepared at the Orem office by Kim Bateman [Platt] and predecessor Polly Tyacke, who both were witnesses. Others who testified included

- ◆ Other therapists that had provided services, but who had no knowledge of the billing process;
- ◆ Representatives from insurance companies who testified that they expected the actual person who provided the services to be shown in this block;
- ◆ Mr. Franke and Mr. Hayward, who were involved in establishing the rules for domestic violence counseling, served on the committee with Bob Stringham, and had conducted a visit to the UTAHS office in Salt Lake. They testified to conversations they had with Mr. Stringham and the visit made to the Salt Lake office of UTAHS. They testified that they had told both Carolyn Edwards and Bob Stringham that they were no longer qualified to conduct domestic violence counseling after March of 1993. Both continued to do so, and these services, all conducted in Salt Lake were billed under Dr. Walton’s name. At none of the meetings or conversations was Gale Stringham present,

and there was no testimony that this information was ever passed on to Dr. Stringham.⁶

- ◆ Dr. Alldredge testified that she acted as the supervisor for Gale Stringham during the period after her graduation and prior to her licensure as provided by statute; Carolyn Edwards who was the president of the company and ran the Salt Lake Office; and Dr. Walton who testified that he had made a stamp of his signature at Mr. Stringham's request and had not authorized its use in the fashion that it had been used also testified.

The only witnesses during the state's case that discussed in any fashion the preparation of the HICFA forms were Platt, Tycke, and Edwards.

1. Carolyn Edward's Testimony.

Carolyn Edwards testified that the bulk of her interaction was with Mr. Stringham. She taught a class with Mr. Stringham on Tuesday nights. (Tr. 144) The meeting with Dr. Watson to hire him included Ms. Edwards, her husband, and Mr. Stringham (Tr.138-9) When the representatives of the licensing division reviewed progress notes, they met with Ms. Edwards, her husband, and Mr. Stringham. (Tr. 150-1)

⁶ Dr. Stringham later testified that she was never told that the conduct of the domestic violence classes in the Salt Lake office would be in violation of new rules that were being created during 1993. (Tr. 1193-96, 1280-81). She also testified that the information received from Mr. Stringham was that he would be able to continue to provide domestic violence course in 1993. (Tr. 1272-73, 1304-05)

There was a meeting that took place at the Stringham's home at which time insurance forms that had not been completed by the company that had been doing billing were filled out by both the Stringhams and the Edwards. (Tr. 166). At this time codes for treatment services provided were entered into the forms. Bob and Gale provided this information. (Tr. 169) But the block in question, the one that shows the service provider, was not part of what they filled in on this occasion. There is no indication that there was any discussion of this block or what should go in it. (Tr. 168) Under the arrangement between Ms. Edwards, her husband, and the Stringhams, Bob Stringham would be in charge of billing and related administrative matters.

2. Polly Tycke's Testimony.

Polly Tycke testified that she was an employee of Aspen Center for Wellness, an entity that rented space to UTAHS, and that she provided billing services for all of the providers at that location, including UTAHS. In so doing, she utilized a signature stamp for each of the providers to submit the forms. (Tr. 274) She would either use the signature stamp of the person who provided the services or the person who supervised that person on the billing form. (Tr. 274) She did not bill for Bob Stringham. (Tr. 278) She testified that Gale Stringham worked under the supervision of Jeri Alldredge who also worked at Aspen Center for Wellness. (Tr. 278) She did no billing for UTAHS. (Tr. 298) Mr. Stringham brought in Kim Bateman and turned her over to Ms. Tycke to train. (Tr. 269)

3. Kim Bateman's Testimony.

Kim Bateman [Platt] is the only other witness that testified regarding the billing procedures. She was the witness that the Court relied upon in denying the motion to dismiss.

The testimony in question is as follows:

Q. Did you ever receive instructions from Mr. or Mrs. Stringham as to how to fill out this insurance form? [HICFA]

A. If there was a question, I was told to ask them, yes.

Q. You indicated you stamped a signature and sent it in.

A. Yes.

Q. Whose signature did you use?

A. It depended on the therapist they saw.

Q. Did you ever receive instructions on whose stamps to use?

A. Yes.

Q. What -

A. I was told to use Bob's or Gale's – I mean Charles Walton's or Gale's or Jeri's.

Q. Did you ever receive specific instructions on what to use on all Salt Lake billings?

A. I believe I was told to bill Salt Lake billings under Dr. Walton.

Q. Did that – did it make any difference who performed the service or was it just every time, you's stamp Dr. Walton's signature?

A. I believe I stamped Dr. Walton's on everything.

Q. Who told you to do this?

A. I believe it was Bob and Gale.

Tr. 241-2.

This was the total extent of the evidence relating to knowledge and the element of intent entered against Mrs. Stringham during the State's case. It is at best a vague and uncertain connection between Mrs. Stringham and the practice that served as the basis for the charges against these defendants. It was insufficient to sustain a prima facie case, and the Court should have granted the motion to dismiss.

A prima facie showing applies to each element of the offense charged. The key element in controversy in this case is the element of intent. In order to prove its case, the State must prove beyond reasonable doubt that the improper insurance filings were done intentionally, knowingly, or with reckless disregard for the truth.

As argued above, the defendants maintained that they were also entitled to a good faith belief defense. If good faith is an available defense, there is clearly no showing in the record that could establish a sufficient mental state to pass the prima facie standard.

But even if this Court sustains the position of the Trial Court (see Argument II above) that a good faith defense is obviated by the reckless disregard standard, the simple statement of Kim Platt is of insufficient strength to raise an inference of reckless disregard by Ms. Stringham.

B. There Was Insufficient Evidence to Sustain a Conviction in this Case.

Claims founded on insufficiency of the evidence are viewed in the light most favorable to the jury verdict. *State v. Souza*, 846 P.2d 1313 (Utah Ct. App. 1993). When the evidence as viewed in this light is sufficiently inconclusive or inherently improbable as to any element of the charge that a jury must have entertained a reasonable doubt as to the defendant's guilt then reversal is mandated. *State v. James*, 819 P.2d 781 (Utah 1991). It is the burden of the defendant herein to marshal all of the evidence and then show that it is insufficient to support the conviction. *State v. Perdue*, 813 P.2d 1201 (Utah App. 1991)

While the motion to dismiss is judged on the state of the evidence at the close of the State's case, a claim founded in insufficiency of the evidence looks to all of the evidence presented during the case. For this portion of Mrs. Stringham's claim, the Court must consider both the evidence presented in the prosecutions case as outlined above and the evidence presented once the State rested. The defense presented five witnesses. Notably these included Carolyn Edwards who was recalled; the doctor who wrote the article that finally alerted Mrs. Stringham to the proper procedures for use of the HICFA testified about the conditions in the industry that caused him to prepare the article; and Mrs. Stringham testified in her own defense.

Carolyn Edwards was asked about the billing process when recalled. She testified that she believed that Mrs. Stringham knew the process involved in the billing process, but stated that she did not know if she knew about the process of who signed the HICFA's. (Tr. 1077).

The only date she could recall there being a meeting in which billing method was discussed was the incident she had testified about earlier in which the HICFA's that had not been submitted by the company doing the billing were filled out by both the Stringhams and the Edwards. (Tr. 1077-78, 1081-82).

She did testify that she did not know that there was anything wrong with the method of billing that the company was using, and that neither of the defendants said or did anything that caused her to believe that they thought there was anything wrong with the billing process. (Tr. 1083-86). Thus, Carolyn Edwards added no inculpatory information relating to the claim that billing was improper and that Gale Stringham somehow had knowledge and intent to a greater extent than Carolyn Edwards who was the president of the company.

Chris Wehl testified that he had written an article in 1994 dealing with the billing practices that psychologists were utilizing and which he had learned were improper. (Tr. 1096). The primary issue was exactly the process that created the foundation for the charges in this case, marking the HICFA with the signature of a person other than the person who had actually provided the services. (Tr. 1097, 1100-01)

Gale Stringham testified in her own defense. She testified that at the time she worked at Charter Canyon she was under the understanding that all HICFA were submitted under the stamp of the medical director of the hospital. (Tr. 1124).

She testified that she believed that Dr. Walton was supervising Carolyn Edwards and the activities at the Salt Lake office. She admitted that the source of this information was Carolyn Edwards. (Tr.1163-64).

She testified that when the billing was taken over by Polly Tycke that Gale had not provided information on billing, and in fact Polly instructed Gale on how the billing was to work. (Tr. 1212) .

On cross examination she testified that she knew that Dr. Walton's signature stamp was being used, and she felt that it was a correct use because he was the Medical Director of the company. (Tr. 1257-58, 1277-78). She went on to testify that she did not have specific knowledge about the use and that she never had information that caused her to believe billing was not being performed in a correct fashion. (Tr. 1263) In fact, everything she saw caused her to believe that the billing was being done in the same fashion as other organizations for which she had worked and in a correct fashion. (Tr. 1285).

The only additional evidence presented by the testimony of Dr. Stringham in support of the state's case is that she had knowledge that Dr. Walton's signature was being used in the billing of some patients from the Salt Lake office. This is tempered by her testimony that she believed based on here experience at other hospitals prior to this date that this was correct, and she had no information regarding the extent of Dr. Walton's involvement in the therapy being billed under his name prior to the filing of charges in these matters; therefore, this evidence does nothing to advance the State's case on the issue of intent.

Even if the Trial Court were correct, and good faith is not a legitimate defense to reckless disregard, there is not sufficient evidence in this record to show that Gayle Stringham acted in a fashion that demonstrated a knowing disregard of the facts so as to make her criminally culpable. The States evidence both in its case in chief and at the close of the evidence fails to provide support for the necessary element of *mens rea*.

CONCLUSION

Plea bargains are an important part of the criminal justice system. They transcend the standard rules of contract and impact on constitutional implications. There was an offer made, one that the defendants desired to accept and took steps toward accepting. This Court can follow the rule set by the Fourth Circuit Court of Appeals and enforce based on those facts alone, but at a minimum should remand for a factual determination of whether the communications by defense counsel constituted acceptance.

The Trial Court effectively denied these defendants there primary defense, that they acted in the good faith belief that their actions were correct. Good faith belief flies in the face of fraudulent intent. It negates the necessary intent to commit fraud and where supported by the evidence should always be a proper defense to such charges.

Defendants are entitled to an instruction on their theory of the case. The instruction requested in this matter was very simple and straight forward. It put intent in issue, the issue which was the key to the case and asked the jury to apply a higher standard than just


recklessness. The Court should have given the instruction and erred in failing to do so. The convictions should be reversed on this basis and remanded for new trial.

State of mind is an important element of these charges. While it may be inferred from other evidence presented in the case, there must be some evidence to support such an inference. At the close of the evidence there was not sufficient evidence to even demonstrate that Dr. Stringham had knowledge of the improper billing practice let alone any improper state of mind. She should not have been put to further evidence in the case. But having been placed in that position, the only addition to the evidence is the testimony of Dr. Stringham. This testimony may show that she had knowledge of the practice in a general fashion, but it does not support any knowledge of the incorrect nature of this billing, and this general knowledge is overwhelmed by her belief in the correctness of the procedures being followed. The conviction of Dr. Stringham should be reversed, and the charges dismissed.

To allow the verdict to stand in this case is tantamount to the transformation of the mental state required under the communications fraud statute to one of strict liability.

RESPECTFULLY SUBMITTED this 2nd day of March, 2000.

LARSEN & MOONEY LAW

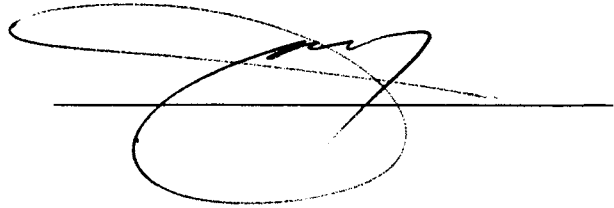


JEROME H. MOONEY
Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Appellants were mailed on the 2nd day of March, 2000, to Attorneys for Appellee at the following:

SCOTT WILSON, ESQ.
Assistant Attorney General
UTAH ATTORNEY GENERAL'S OFFICE
160 East 300 South, Sixth Floor
P.O. Box 140854
Salt Lake City, UT 84114

A handwritten signature in black ink, appearing to be "Scott Wilson", is written over a horizontal line. The signature is stylized with a large loop and a long horizontal stroke extending to the right.

ADDENDUM

1. Sentence/Judgment/Order for Robert Stringham
2. Sentence/Judgment/Order for Gale Stringham

Third District Court, State of Utah

SALT LAKE COUNTY, SALT LAKE DEPARTMENT
450 South State Street, P.O. Box 1860, Salt Lake City, Utah 84111 - 1860

SENTENCE/JUDGMENT/ORDER Criminal/Traffic

Y/STATE

-VS-

Plaintiff

Case Number

981904909

Tape number

223

C #

21125

Date

6/4

Time

Judge/Comm

Quinn

Clerk

82

Plaintiff Counsel

Gannarson

Defense Counsel

Mooney

Amended

Amended

Stringham, Robert

Defendant

B: ___/___/___

Interpreter

ARGES

Comm. Fraud

E COURT SENTENCED THE DEFENDANT AS FOLLOWS:

Jail

Suspended

Defendant to Commence Serving Jail Sentence

Fine Amt. \$

700

Susp. \$

Fee \$

Fine Bal \$

TOTAL FINE(S) DUE \$

Payment Schedule: Pay \$

50

per month/1st Pmt. Due

7/1

Last Pmt. Due

) Court Costs \$

) Community Service/WP

100 hrs

through

180 days

) Restitution \$

Pay to:

☐ Court

☐ Victim

☐ Show Proof to Court

Attorney Fees \$

) Probation

36 mos

☐ Good Behavior

☒ AP&P

☐ ACEC

☐ Other

) Terms of probation:

☒ No Further Violations

☐ AA Meetings

/ wk

/ month

☐ Follow Program

☐ No Alcohol

☐ Antibuse

☐ Employment

☐ Proof of

☐ Counseling thru

☐ Classes

☐ In/Out Treatment

☐ Health Testing

☐ Crime Lab Procedure

☒ monitor B

☐

3) Plea in Abeyance Diversion

9) Review ___/___/___ at

1 compliance with the Americans with Disabilities Act, individuals needing special accommodations (including auxiliary communicative aids and services) during this proceeding should call Third District Court at 238-7391, at least three working days prior to the proceeding.

District Court Judge

By

Mark Quinn

319

Third District Court, State of Utah

SALT LAKE COUNTY, SALT LAKE DEPARTMENT
450 South State Street, P.O. Box 1860, Salt Lake City, Utah 84111 - 1860

SENTENCE/JUDGMENT/ORDER Criminal/Traffic

CITY/STATE

-VS-

Plaintiff

Case Number

981904903

Tape number

223

C #

2165

Date

6/4

Time

Judge/Comm

Quinn

Clerk

Sh

Plaintiff Counsel

Gunnarson

Defense Counsel

Mooney

Amended

Amended

DOB: ___/___/___

Interpreter

CHARGES

Comm. Fraud

THE COURT SENTENCED THE DEFENDANT AS FOLLOWS:

1) Jail

Suspended

Defendant to Commence Serving Jail Sentence

2) Fine Amt. \$

700

Susp. \$

Fee \$

Fine Bal \$

TOTAL FINE(S) DUE \$

Payment Schedule: Pay \$

50

per month/1st Pmt. Due

7/1

Last Pmt. Due

9/1/2000

3) Court Costs \$

4) Community Service/WP

100 hrs

through

180 days to complete

5) Restitution \$

0

Pay to:

☒ Court

☐ Victim

☐ Show Proof to Court

Attorney Fees \$

6) Probation

300 mos

☐ Good Behavior

☒ AP&P

☐ ACEC

☐ Other

7) Terms of probation:

☒ No Further Violations

☐ AA Meetings / wk / month

☐ Follow Program

☐ No Alcohol

☐ Antibuse

☐ Employment

☐ Proof of

☐ Counseling thru

☐ Classes

☐ In/Out Treatment

☐ Health Testing

☐ Crime Lab Procedure

☐

☐

(8) Plea in Abeyance Diversion

(9) Review / / at

In compliance with the Americans with Disabilities Act, individuals needing special accommodations (including auxiliary communicative aids and services) during this proceeding should call Third District Court at 238-7391, at least three working days prior to the proceeding.

APPEAL MUST BE FILED WITHIN 30 DAYS OF JUDGEMENT

District Court Judge

Bv

333A