

2001

The State of Utah, Plaintiff and Appellee, vs. Allen Cook, Defendant and Appellant : Brief of Appellee

Utah Court of Appeals

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Allan Cook; pro se.

Lee Edwards; attorney for appellee.

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IN THE UTAH COURT OF APPEALS

<p>THE STATE OF UTAH, Plaintiff and Appellee, vs. ALLEN COOK, Defendant and Appellant.</p>	<p>BRIEF OF APPELLEE Case No. 20010832 CA</p>
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Priority Number of the case: (15)

Nature of Proceeding: Appeal

Name of Court and Judge: First Judicial District, Cache County, State of Utah, Honorable Clint S. Judkins

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JURISDICTIONAL STATEMENT

This is an appeal from a criminal case in the First Judicial District, Cache County, State of Utah. This Court has Jurisdiction pursuant to Utah Code Ann. § 78-2a-3(e).

ISSUE AND STANDARD OF REVIEW

Whether the Appellant has failed to properly marshal the evidence and preserve issues for appeal. Although the Appellant has failed to specifically set forth an issue in his brief, it appears that the Appellant generally questions the sufficiency of the evidence. The standard of review when the sufficiency of the evidence is challenged after a criminal bench trial is whether the finding was clearly erroneous. *See State v. Galli*, 967 P.2d 930, 933 (Utah 1998); *State v. Taylor*, 947 P.2d 681, 685 (Utah 1997); *City of Orem v. Lee*, 846 P.2d 450, 452 (Utah Ct. App. 1992).

STATEMENT OF THE CASE

In this criminal case, the Appellant was charged with one count of Theft By Deception, a class A misdemeanor in violation of Utah Code Ann. § 76-6-405. The Appellant was convicted at a bench trial before the Honorable Clint S. Judkins on July 25, 2001 and sentenced on September 10, 2001.

The Appellant is a landlord in Logan, Utah (R. at 8). On June 19, 1999, the Appellant entered into an agreement with Bear River Regional Housing Authority (hereinafter "BRAG") to receive payments for Housing Assistance for an apartment located at 82 1/2 West 100 North #1, Logan, Utah, from BRAG on behalf of the tenant, Michael Martinez (Pl. Ex. 2). In December of 1999, the tenant, Michael Martinez moved out of the apartment (R. at 76). In December of 1999, the tenant notified the Appellant that he was moving from the apartment. (R. at 76-77). After Michael Martinez moved from the apartment, the Appellant received four checks from BRAG for housing assistance payments in the amount of two hundred twenty four dollars (\$224.00) for a total of eight hundred ninety six dollars (\$896.00). These checks are dated December 27, 1999, January 28, 2000, February 28, 2000, and March 3, 2000 (Pl. Ex. 4-7). These checks were received and cashed by the Appellant after the Appellant knew that the tenant, Michael Martinez had moved out of the rental unit and that the Appellant was not entitled to assistance payments (R. at 10-15, 19-20; Pl. Ex. 2).

SUMMARY OF ARGUMENTS

The Appellant has failed to properly marshal the evidence and preserve issues for appeal. The trial court's findings of fact in a criminal bench trial are reviewed under a clearly erroneous standard of review. *See*

State v. Galli, 967 P.2d 930, 933 (Utah 1998); *State v. Taylor*, 947 P.2d 681, 685 (Utah 1997); *City of Orem v. Lee*, 846 P.2d 450, 452 (Utah Ct. App. 1992). The Appellant has failed to point to any finding that was clearly error by the trial court.

ARGUMENT

Utah Rules of Appellate Procedure, Rule 24(5)(A) requires that an Appellant brief include “[a] statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and (A) citation to the record showing that the issue was preserved in the trial court; or (B) a statement of the grounds for seeking review of an issue not preserved in the trial court.” The Appellant’s brief states no legal issues and does not reference an appropriate standard of review. The Appellant’s brief simply retries the case from the Appellant’s perspective. “A reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research.” *State v. Larsen*, 828 P.2d 487, 491 (Utah Ct. App. 1992). The failure of the Appellant to comprehend appellate review is illustrated when he asks this appellate Court to “find him” not guilty and that “judgement [sic] in this case be made on the contracts involved in this case.” Br. of Aplt. at 22. The

Appellant has failed to point to any legal issue, cite any legal standard, or point to any error in the trial court.

Utah Rules of Appellate Procedure, Rule 24(a)(9) provides:

The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding.

Again the Appellant's brief fails to comply with this rule. It presents no issues, cites no cases and contains no legal analysis or argument.

The marshaling process is not unlike becoming the devil's advocate. Counsel must extricate himself or herself from the client's shoes and fully assume the adversary's position. In order to properly discharge the duty of marshaling the evidence. The challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings that the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous.

West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah Ct. App. 1991).

The Appellant does not present in "comprehensive and fastidious order" evidence supporting the findings made by the trial court. However, the

defendant does reference matters not introduced and not properly preserved for appeal. The Appellant brief states:

Although there is another document not provided because it is not available to the Appellant, that is the agreement between BRAG and Mr. Martinez. It is believed that one of the duties of the Tenant in this document would be to notify BRAG in writing if the Tenant Vacates the apartment. Though not the actual Statement of Family Responsibility signed by Mr. Martinez, attached is form HUD-52578-B (1/96) which should be the same type of form signed by Mr. Martinez. Section 4. Obligations of the Family, 6. Notify the HA and the owner in writing before moving out of the unit or terminating the lease.

Br. of Aplt. at 6-7.

This paragraph does not reference the record at trial, contains speculation and is not logically arranged or worded. Clearly the Appellant has failed to comply with the marshalling requirement as set forth in *West Valley City*.

“Failure to marshal the evidence waives an appellant’s right to have his claim of insufficiency considered on appeal.” *State v. Gallegos*, 851 P.2d 1185, 1189-1190 (Utah App. 1993). Accordingly, the Appellant’s assertion that the evidence presented before the trial is insufficient is waived. Based on the Appellant’s failure to marshal the evidence and failure to point to any ruling of the trial court that is clearly erroneous, the Judgment of the trial court must be affirmed.

CONCLUSION

In conclusion, the Appellant has failed to properly marshal the evidence and preserve issues for appeal. Moreover, the Appellant has failed to point to any finding that was clearly error by the trial court. Therefore, the decision of the trial court finding the defendant guilty of one count of "Theft by Deception" in violation of Utah Code Ann. § 76-6-405 must be affirmed.

Dated this 29 day of March, 2002



Lee Edwards
Attorney for Appellee

CERTIFICATE OF MAILING

I, Lee Edwards, Logan City Prosecutor's Office, hereby certify that on November 2, 2001, I mailed, postage prepaid and by first class mail, two true and correct copies of the foregoing BRIEF OF APPELLEE to:

Allen Cook
Appellant pro se
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N. Logan, Utah, 84341

Dated this 29 day of March, 2002.



Lee Edwards
Attorney for Appellee