
IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Respondent,

v.

CLIFFORD DARRELL KEYS,

Defendant-Appellant.

Marion County Circuit Court
Case No. 16CR24492

CA A163519

APPELLANT'S SUPPLEMENTAL BRIEF

Appeal from the Judgment of the Circuit Court
for Marion County
Honorable Sean E. Armstrong, Judge

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APPELLANT’S SUPPLEMENTAL BRIEF

Introduction

Defendant appeared for arraignment on a district attorney’s information that charged him with possession of methamphetamine—which was a felony at the time. The trial court appointed a lawyer for him, and the lawyer waived defendant’s right to a preliminary hearing. Neither the lawyer nor the court told defendant anything about that right or asked him whether he wanted to waive it. The case proceeded to trial and conviction.

Defendant appealed, arguing that he did not validly waive his right to preliminary hearing under Article VII (Amended), section 5, of the Oregon Constitution, and that the error was either jurisdictional or plain error. This court reversed. *State v. Keys*, 302 Or App 514, 460 P3d 1020 (2020), *rev’d*, 368 Or 171, ___ P3d ___ (2021). This court held that the attorney’s waiver did not satisfy Article VII (Amended), section 5, and that the error was jurisdictional and required reversal despite defendant’s lack of objection. *Id.* at 517, 523-27.

The state petitioned for review solely on the issue of jurisdiction. The Supreme Court concluded that the error was not jurisdictional and reversed this court’s decision. *State v. Keys*, 368 Or 171, ___ P3d ___ (2021). However, it remanded the case to this court “so that it can consider, in the first instance, whether it should exercise its discretion” to address plain error. *Id.* at 205.

Argument

This court “may, in its discretion, consider a plain error.” ORAP 5.45(1). Oregon appellate courts have identified many factors that a court may consider in exercising that discretion, but the ultimate question is whether “[i]n *this* case, under *these* circumstances, plain error review is appropriate.” *State v. Gayman*, 312 Or App 193, 203, ___ P3d ___ (2021) (emphasis in original). Here, relevant factors include “the gravity of the error” and the “interests of the parties,” *Ailes v. Portland Meadows, Inc.*, 312 Or 376, 382 n 6, 823 P2d 956 (1991); judicial efficiency, *State v. Fults*, 343 Or 515, 523, 173 P3d 822 (2007); and how this court’s discretionary decision will “generate expectations in analogous cases,” *State v. Dilallo*, 367 Or 340, 348, 478 P3d 509 (2020).

First, the gravity of the error weighs in favor of correcting it. The core principle of Article VII (Amended), section 5, is that “the state cannot charge a defendant with a felony unless persons outside the office of the prosecutor”—either a grand jury or a magistrate at a preliminary hearing—“determine that the state has probable cause to move forward with that charge.” *State v. Kuznetsov*, 345 Or 479, 483-84, 199 P3d 311 (2008). “The constitutionally required roles of the grand jury and the magistrate in felony cases operate as a check on the power of the district attorney and serve a critical function in protecting individual liberties.” *Id.* at 484.

Here, neither the trial court, nor the prosecutor, nor even the defense attorney, gave that right its due deference. Defendant lost his protections under Article VII (Amended), section 5, without ever being asked whether he wished to do so or advised about the pros and cons of such a decision. That error was grave. Indeed, in its original opinion this court already explained why the gravity of the error weighs in favor of correcting it:

“We recognize the significance of this holding. It is no small thing to hold that a conviction is void when the defendant did not raise any objection to the lack of indictment or preliminary hearing during the months of trial proceedings and when, on appeal, the defendant has not challenged any of the trial court’s rulings or the sufficiency of the evidence on which the conviction is based. But neither is it a small thing for the government to proceed against a person on a felony charge when nobody outside the executive branch has determined that there is probable cause to believe that the person has committed the charged crime.”

Keys, 302 Or App at 527 (citing *Kuznetsov*, 345 Or at 484).

Nothing in the Supreme Court’s opinion in this case undermines what this court said. This court can and should adhere to its assessment of the gravity of the error in this case.

Second, the interests of the parties weigh in favor of correcting the error. Defendant stands convicted of a felony that was obtained in violation of his constitutional rights; he has a strong interest in reversal. *See, e.g., State v. Ryder*, 230 Or App 432, 435, 216 P3d 895 (2009) (holding that error that results in felony conviction “strongly militates in favor of the exercise of discretion”).

In contrast, the state has less interest in upholding the conviction. Although defendant stands convicted of felony, Oregon no longer views the offense as a felony—possession of methamphetamine was recently reduced to a misdemeanor and then a violation. Or Laws 2017, ch 706, § 15; Ballot Measure 110 (2020). The state’s interest in upholding a felony conviction is diminished when the same conduct today would not even be a crime.

Moreover, the state *shares* defendant’s interest in correcting the violation of his right to a preliminary hearing. Even when a defendant intends to waive his constitutional rights, “the public” has an independent “interest in procuring a trial of the citizens of a state according to law” that “cannot be left entirely to the wishes of the person on trial.” *State v. Walton*, 51 Or 574, 576, 91 P 495 (1907). That interest sometimes compels appellate courts to intervene even when a defendant fails to object at trial. *Id.* at 576-77.

Third, judicial efficiency weighs in favor of correcting the error on direct appeal. If this court affirms defendant’s conviction based on his trial attorney’s unilateral decision to waive his constitutional rights, then defendant could raise a strong claim of ineffective assistance of counsel in a post-conviction relief proceeding. In contrast, correcting the error now will preclude the need for costly, collateral proceedings. *See State v. Reynolds*, 250 Or App 516, 526, 280 P3d 1046, *rev den*, 352 Or 666 (2012) (“the availability of post-conviction relief is a reason in support of affirmatively exercising our discretion”).

Fourth, the impact of this court’s opinion on future cases weighs in favor of reversal. When a criminal defendant purports to waive their constitutional rights—including the rights protected by Article VII (Amended), section 5—the trial judge has a “duty” to ensure that the waiver is valid and must exercise “[e]xtreme care” to confirm that the defendant understands their rights and that the record reflects that fact. *Huffman v. Alexander*, 197 Or 283, 331, 251 P2d 87 (1952), *reh’g den*, 197 Or 283, 253 P2d 289 (1953). In other words, this case falls into the narrow “universe of circumstances in which a trial court is compelled to act, in the absence of a motion or objection by a party.” *Reynolds*, 250 Or App at 531 (Haselton, C.J., dissenting); *see also State v. Corkill*, 262 Or App 543, 551, 325 P3d 796, *rev den*, 355 Or 751 (2014) (similar).

Reversing defendant’s conviction will have a beneficial effect in those kinds of circumstances. The bench and bar will receive an important reminder about a trial judge’s duties, and judges will have an additional incentive to fulfill them. In contrast, affirming the conviction will signal that those duties are of little consequence. This court should not encourage such negligence:

““One act of neglect might be recognized as a waiver in one case, and another in another, until the constitutional safeguards might be substantially frittered away. The only safe course is to meet the danger *in limine*, and prevent the first step in the wrong direction. It is the duty of courts to see that the constitutional rights of a defendant in a criminal case shall not be violated, however negligent he may be in raising the objection.””

Walton, 51 Or at 577 (quoting *Hill v. People*, 16 Mich 351, 358 (1868)).

CONCLUSION

Defendant respectfully requests that this court reverse his conviction.

Respectfully submitted,

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By Kyle Krohn at 9:06 am, Jul 16, 2021

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05

Brief length

I certify that (1) this brief complies with the page limitation in ORAP 5.05; and (2) the number of pages in this brief is 5 pages.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Appellant's Supplemental Brief to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on July 15, 2021.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Appellant's Supplemental Brief will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Benjamin Gutman #160599, Solicitor General, attorney for Plaintiff-Respondent.

Respectfully submitted,

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