

Case No. S207250

In the

Supreme Court

SUPREME COURT
FILED

APR 16 2013

Frank A. McGuire Clerk

Deputy

of the
State of California



THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Appellant,

v.

PAUL BIANE, MARK KIRK, JAMES ERWIN, JEFFREY BURUM,

Defendants and Respondents.

AFTER A DECISION BY THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION TWO
CASE NO. E054422,
SAN BERNARDINO COUNTY SUPERIOR COURT
CASE NO. FSB 1102102
HON. BRIAN MCCARVILLE, JUDGE

**DEFENDANT AND RESPONDENT JAMES ERWIN'S JOINDER TO JEFFREY
BURUM'S ANSWER BRIEF AND MOTION FOR JUDICIAL NOTICE**

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ATTORNEYS FOR DEFENDANT AND RESPONDENT,
JAMES ERWIN

By this joinder, Defendant/Respondent James Erwin joins Defendant/Respondent Jeffrey Burum's Answer Brief in response to the People's Opening Brief. Mr. Erwin respectfully requests that the Court affirm the Court of Appeals' decision to overturn the trial court and sustain the demurrer as to Counts 5 and 8 of the Indictment charging Mr. Erwin with aiding and abetting the receipt of bribes by former Supervisor Paul Biane, and affirm the Court of Appeals as to Count 11 charging Mr. Erwin with the violation of Government Code Section 1090. Mr. Erwin also asks that this Court direct the trial court to sustain the demurrer to Count 1, the conspiracy charge, with respect to the target crimes associated with these bribery charges and Section 1090. Mr. Erwin also requests that this Court direct the trial court to sustain the demurrer to Count 1 on the basis that Government Code Section 9054 is overbroad and void for vagueness. Mr. Erwin further joins Mr. Burum's Motion for Judicial Notice requesting that this Court take judicial notice of Exhibits A-F attached thereto.

The Indictment alleges that Mr. Erwin acted as Mr. Burum's agent and aided and abetted him in giving bribes to Messrs. Postmus and Biane to facilitate a settlement of litigation between Colonies Partners and the County of San Bernardino. (CT, 2:16-17, 6:21-25.) Count 1 of the Indictment alleged the existence of a conspiracy between Mr. Erwin and the other co-defendants to commit several target crimes, including bribery, conflict of interest, and violations of Government Code section 1090 and 9054. Counts 4 and 7 of the Indictment alleged that Mr. Erwin aided and abetted former Supervisor William Postmus in receiving bribes. Counts 5 and 8 alleged that Mr. Erwin aided and abetted Supervisor Biane in receiving bribes. Mr. Erwin demurred to these counts on the basis that a bribe giver cannot be convicted of the crime of aiding and abetting, or conspiring in, the receipt of the same bribe he is alleged to have given. The trial court below determined that Mr. Erwin acted as an "intermediary," and

thus could be “prosecuted for conspiring with [Mr.] Burum to bribe [Messrs.] Postmus, Biane and Kirk.” (CT, 257:17-26.)

The Court of Appeal determined that with regard to the allegations involving Supervisor Postmus, the People alleged sufficient facts for Counts 4 and 7 to survive at the demurrer stage.¹ (Opinion, p. 23.) But it reversed the trial court’s finding as to Counts 5 and 8, holding that the People had failed to allege any facts that Mr. Erwin aided and abetted Mr. Biane’s receipt of a bribe. (*Id.*) Thus, the Court of Appeal correctly decided that the Indictment failed to allege facts to support a charge that Mr. Erwin aided and abetted, or conspired with, Mr. Biane to receive a bribe. In sum, Mr. Erwin was alleged to be on the “other side of the transaction” from Mr. Biane. *People v. Lips* (1922) 59 Cal.App. 381 (holding that wife of bribe giver could not be convicted of aiding and abetting bribe receivers). Therefore, under the rule set forth in *People v. Clapp* (1944) 24 Cal.2d 835, 838, and *People v. Wolden* (1967) 255 Cal.App.2d 798, 803-04, the California Court of Appeal correctly decided that Mr. Erwin cannot be prosecuted as a bribe receiver when he merely is alleged to be the giver of the same bribe. For this reason and the other reasons described in Mr. Burum’s Answer Brief (see Ans. Br. At Parts III.A-C), the Court of Appeals’ decision to grant Mr. Erwin’s writ of mandate as to Counts 5 and 8, and the associated target crimes supporting Count 1, was proper and should be affirmed by this Court.²

¹ Mr. Erwin does not, at this time, challenge the Court of Appeal’s ruling as to Counts 4 and 7 regarding Mr. Erwin’s alleged concerted acts with Mr. Postmus.

² As explained in Mr. Burum’s Motion filed March 6, 2013, the People’s attempt to invoke the discovery rule against Mr. Erwin is legally deficient, and the charges against Messrs. Burum and Erwin are time-barred on the face of the Indictment. This is a jurisdictional bar that should be addressed as a preliminary matter, particularly in light of the Court’s recent denial of

The Indictment, in Counts 1 and 11, also alleges that Mr. Erwin violated California Government Code Sections 1090 and 1097 based on an alleged conflict of interest in the eventual settlement between Colonies Partners and San Bernardino County. The Court of Appeal, reversing the trial court, agreed that “the Legislature’s wording of section 1090 evinces the intent to exclude aider and abettor liability,” and granted Mr. Erwin’s writ of mandate on that ground. (Opn., p. 37, citing *D’Amato v. Superior Court* (2008) 167 Cal.App.4th 861.) Indeed, as Mr. Burum argues in his Answer Brief, Government Code Sections 1090 and 1097 should not and do not apply to private citizens. For these reasons and the reasons set forth in Mr. Burum’s Answer Brief (see Ans. Br. at Part III.D), the Court of Appeal’s ruling also should be affirmed as to Count 11 and the associated target crime under Count 1.

As part of Count 1, Mr. Erwin also is accused of conspiring to violate Government Code Section 9054. The Court of Appeal determined that the trial court was correct in overruling Mr. Erwin’s demurrer as to this count, holding that the phrase “improperly influence” means “the use of personal, or any secret or sinister, influence upon legislators.” (Opn., p. 34.) But to define Section 9054 in this manner renders the statute unconstitutionally vague and overbroad by definition, as it criminalizes a large swath of protected First Amendment activities. Thus, for the reasons described above and in Mr. Burum’s Answer Brief (see Ans. Br. at III.E), Mr. Erwin asks that this Court overrule the Court of Appeal and direct the trial court to sustain his demurrer to the target crime in Count 1 based on the alleged Section 9054 violation.

review in *People v. Milstein* (2012) 211 Cal.App.4th 1158, review den. (March 27, 2013) (holding that conspiracy charges are *not* subject to the discovery rule).

Thus, for the reasons described above and in Mr. Burum's Answer Brief, Mr. Erwin asks that this Court:

- Affirm the Court of Appeal's decision to direct the trial court to sustain Mr. Erwin's demurrer to Counts 5 and 8 of the Indictment, and the associated target crimes alleged in Count 1;
- Affirm the Court of Appeal's decision to direct the trial court to sustain Mr. Erwin's demurrer to Count 11 of the Indictment, and its associated target crime alleged in Count 1;
- Overrule the Court of Appeal's decision that Government Code Section 9054 is constitutional, and direct the trial court to sustain Mr. Erwin's demurrer to Count 1 on that basis.

Respectfully submitted,

Dated: April 15, 2013

THE LAW OFFICES OF RAJAN R. MALINE

By: _____



Rajan R. Maline

Attorneys for Defendant and Respondent
JAMES ERWIN

People v. Biane, et al.
California Supreme Court Case No. S207250

PROOF OF SERVICE

I am a citizen of the United States. My business address is LAW OFFICES OF RAJAN MALINE. I am employed in the county of RIVERSIDE where this service occurs. I am over the age of 18 years, and not a party to the within cause.

On the date set forth below, according to ordinary business practice, I served BY U.S. MAIL the following document described as:

**DEFENDANT AND RESPONDENT JAMES ERWIN'S
JOINDER TO JEFFREY BURUM'S ANSWER BRIEF AND
MOTION FOR JUDICIAL NOTICE**

I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing with the U.S. Postal Service, and that practice is that correspondence is deposited with the U.S. Postal Service the same day as the day of collection in the ordinary course of business. On this date, I placed the document in envelopes addressed to the persons stated on the attached service list and sealed and placed the envelopes for collection and mailing following ordinary business practices.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 15, 2013, at RIVERSIDE, California.


LISA LOPEZ

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