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The State of Utah v. Verl Farnsworth : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- :

Case No:

STEVEN A. IRELAND, : 11127

Defendant-Appellant. :

BRIEF OF APPELLANT

Appeal from a jury verdict of guilty to assault by a convict without malice aforethought with a deadly weapon in the Third District Court in and for Salt Lake County, the Honorable Merrill C. Faux, presiding.

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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- : Case No:

STEVEN A. IRELAND, : 11127

Defendant-Appellant. :

STATEMENT OF NATURE OF CASE

This is an appeal from a jury verdict of guilty to assault by a convict without malice aforethought with a deadly weapon, a lesser included offense of the crime of assault by a convict with malice aforethought.

DISPOSITION IN LOWER COURT

The jury found the defendant guilty of assault by a convict without malice, a lesser included offense. He was sentenced to a further indeterminate term in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the jury verdict, or in the alternative, to grant him a new trial with instructions in accordance with the points raised on appeal.

STATEMENT OF FACTS

The appellant, Steven A. Ireland, is an inmate of the Utah State Prison having been committed by the Honorable Joseph E. Nelson of the Fourth Judicial District on January 28, 1966. Mr. Ireland had entered a plea of guilty to the charge of Burglary in the Second Degree.

(T-16)

On April 1, 1966, appellant was housed at the prison in the segregation unit, B-North, (T-16) along with several other convicts, including Michael Patrick Jones. At approximately 11:00 a.m. the appellant, Ireland, was in the officer's walkway playing chess with inmate Jones, through the bars. (T-122)

Joy Jones, a guard assigned to B-North, walked the length of the officer's walkway, passed the appellant and delivered something to another prisoner. On his return he made contact with Ireland in the area of his shoulder. This contact was variously described as "gigged" (T-118) or goosed or pushed or hit. (T-147) Ireland whirled around and hit guard Jones, once with his hand or fist, knocking him to the ground. (T-149)

Ireland, then, grabbed guard Jones who was yelling and told him to be quiet that he had a razor blade. Ireland threw guard Jones against the bars and told inmate Mike Jones, "Come hold him while I get this straightened out, because I'm in trouble. I'm going out to talk to Moss." (T-147) He was referring to the head guard, William Robert Moss. Ireland denies, however, that he did, in fact, have such a razor blade. (T-148)

The appellant, Ireland, then apparently walked down the officer's walkway to the head of the tier where

he encountered Officer Moss who upon entering noticed a door open that should not have been. (T-142) He saw inmate Jones with his arms through the bars holding Officer Jones by the shoulders, (T-42) with his back toward the bars or grating. There is conflict as to whether Ireland jumped out and struck Moss (T-42, 3) or whether a fight just erupted. (T-148) In any event, a knock down, dragout fight ensued between Moss and Ireland during which Ireland made a statement to the effect that inmate Jones had Officer Jones back in the barrack with a razor at his throat. (T-43) In time, Officer Moss subdued the appellant, using his flats, a broom handle, a metal water pitcher and his teeth and forced him back into his cell with Ireland apparently being the worse for the experience. Other officers were called and apparently inmate Jones released Officer Jones from his grasp.

There was no direct evidence presented indicating

that a razor had in fact been used on Officer Jones, although razor blades were said to have been available. There was testimony of a medical technician who observed a small hairline scrape or cut on the left side of Jones' neck. (T-75) State's Exhibit #1 portrays that scrape or cut. The appellant, however, had made a statement to the effect that inmate Jones had Officer Jones back in the corner with a razor at his throat. There, further, was no evidence presented showing that any more than one blow was made on the person of Officer Joy Jones by either the appellant or inmate Jones.

After the State had rested, the District Attorney moved to amend the Information striking the words "and William Moss," and the plural "guards" and substituting the singular "guard." The motion was granted. (T-102, 3)

The jury retired to deliberate at 4:18 p. m. (T-124) At 6:09 p. m. they returned to the courtroom asking for further instructions. Specifically, the foreman asked

for the court's ruling on whether a fist is considered a deadly weapon. The court directed the jurors attention to Instruction No. 11 defining assault. In his explanation the court indicated, by a threatening gesture with his fist, that a fist could be a deadly weapon within the meaning of the instruction. Mr. Mitsunaga excepted to the court's instruction and the inference inherent in the court's demonstration that a fist might be an instrument which could fall within the definition of the information. He was overruled.

The jury retired at 6:17 p.m. They returned at 9:00 p.m. with a verdict of guilty of assault by a convict without malice aforethought, an included offense.

ARGUMENT

Point I

THE TRIAL JUDGE ERRED IN INSTRUCTING THE JURY THAT A FIST COULD BE A DEADLY WEAPON AS ALLEGED IN THE INFORMATION.

It is submitted that a fist as used by the appellant in this case is incapable as a matter of law of being a deadly weapon or instrument within the meaning of Section 76-7-11 and 12 Utah Code Annotated 1953 as amended.

As a general rule the term deadly weapon or instrument as used in statutes defining aggravated assaults includes instruments, other than parts of the body, which by their use are likely to produce great bodily harm or death. Words and Phrases, Vol. 11 Deadly Weapon p. 129

In an early A. L. R. Annotation the question of "Kicking as an Aggravated Assault or an Assault with a Deadly Weapon," was explored. 33 A. L. R. 1186 The cases therein cited indicate that normally a foot or fist is not a deadly weapon. Warren v. State, 88 Ark. 322, 114 S. W. 706 (1908), held that a man's foot covered by an ordinary shoe could not as a matter of law be a "deadly weapon. Citing the Warren case, Wilson v. State, 162

K. 1972, 258 S. W. 2d 972 (1924) held that striking with a fist could not be an assault with a deadly weapon sufficient to constitute an aggravated assault.

Hands and feet were held not to be "deadly weapons" within the meaning of a statute relative to assault with deadly weapons with intent to kill in McIntosh v. Commonwealth, 120 S. W. 2d 1001. The Kentucky Court ruled that a person's hands or feet are not 'deadly weapons' within the meaning of the law, and where death results unintentionally from their use in an assault, the result is not murder but involuntary manslaughter.

A few courts, however, forced with particularly brutal assaults with feet or fists have created an exception to the general rule. The Washington Court in State v. Smith, 33 P. 2d 749 (1938) held that "fists," though not generally a "deadly weapon," may become deadly by blows often repeated, long continued, and applied to vital and delicate parts of the body of a defense-

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less, unresisting man. (Emphasis added)

The California Court adopted this approach in People v. Lantz, 120 Cal. App. 2d 787, 262 P.2d 19 (1953). Therein, they upheld the conviction of a jailor who had brutally beaten and kicked three prisoners under his care.

In Stice v. State, 228, Ind. 144, 89 N.E.2d 913, (1950) the court said that notwithstanding the fact that a fist is not normally a deadly weapon, the fist of an ex-prize fighter, "One Round Muldoon" which was used to brutally batter the face and ultimately kill a forty-six year old woman was used in such a manner as to constitute a deadly weapon.

In State v. Gillespie, 356 S.W. 2d 667, fists used in a violent and aggravated assault were held to fall within the Missouri statute defining aggravated assault. It should be noted, however, that the Missouri statute defines the crime as the use of a deadly weapon or any other

means of force likely to produce death or great bodily harm."

It is submitted that the present case does not fall within the exception as outlined above, but rather falls within the general rule that a fist as it was used by the appellant in this case is incapable, as a matter of law, of being a deadly weapon.

In the present case, the appellant was charged by the amended information with being a convict in the Utah State Prison, who with malice aforethought, committed an assault, upon Joy Jones, a guard at said prison, with a deadly weapon, particularly a razor blade. (T-8)

The only evidence presented in regard to a fist being used by the appellant on Joy Jones was that the appellant turned on the guard when gipped in the shoulder from behind and slugged him, possibly knocking him to the ground. There is no evidence that the blow caused any real damage to the person of Officer Jones, although he

did complain of pain in his jaw and some swelling was observed. (T-86)

It is submitted that there is not sufficient evidence of blows "often repeated, long continued, and applied to the vital and delicate parts of the body of a defenseless unresisting man." There is no evidence of any brutal, vicious assault. There is no evidence that the appellant's "fists" were used in any manner sufficient as a matter of law to justify an instruction that such a fist could be "a deadly weapon" within the meaning of the statute, nor is there justification for an intimation from the court that it might be.

It might be argued by the State that Section 76-7-11 and 12 Utah Code Annotated 1953 as amended contains in addition to the terms "deadly weapon or instrument," the term "by means of force" in defining the crimes charged. The argument would follow that the case then should fall within the rule of the Gillespie case supra

which held that a fist was a deadly weapon within the meaning of a similar statute. It is submitted, however, that the term "by means of force" was not alleged in the Information (T-8) and was stricken from the Instructions of the court. (T-41-47-50) The very presence of the term "by means of force" seems to indicate the intent of the Legislature to limit the meanings of "deadly weapon or instrument" to that other than the ordinary fist. In view of this distinction as well as the lack of brutal, vicious force, it is asserted that the Gillespie exception should not be applied, but rather the general rule excluding the fist as a deadly weapon or instrument should be determinative.

CONCLUSION

Appellant submits that he was prejudiced by the trial judge's intimation that a fist might properly be a deadly weapon under the facts as presented by the State. It is evident that his conviction arose directly from that

intimation which was incorrect as a matter of law.

Respectfully submitted,

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