2000

State of Utah v. Richard Ivan Lloyd : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent	:	
vs.	:	
RICHARD IVAN LLOYD,	:	Case No. 14472
Defendant-Appellant	:	

BRIEF OF APPELLANT

Appeal from a non-jury trial in The District Court of the Third Judicial District in and for Salt Lake County, State of Utah, the Honorable Gordon R. Hall, presiding.

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STATEMENT OF THE NATURE OF THE CASE

This case is an appeal from a conviction of Unlawful Taking of a Vehicle, a violation of Utah Code Ann. §41-1-109 (1953), one of the provisions of Utah's Motor Vehicle Act.

DISPOSITION IN LOWER COURT

Appellant was charged with the crime of theft of an operable motor vehicle, a second degree felony, in an information filed in the District Court of the Third Judicial District In and For Salt Lake County, State of Utah on December 5, 1975. On that date, appellant entered a plea of not guilty (R.6).

On January 23, 1976, appellant waived the jury and tried the matter before the Honorable Gordon R. Hall. Judge Hall acquitted the appellant of the charge of auto theft contained in the information (R. 91, at lines 24-26). The Judge then heard arguments of counsel on the question as to whether or not the State could refile a misdemeanor charge of Unlawful Taking of a Motor Vehicle (or Depriving an Owner as it is commonly referred to) (R. 91-95). The Court then indicated that it

found the appellant guilty of that charge which the Court found to be a lesser and included offense of Theft as charged in the information (R. 95-96).

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the lower court's verdict of guilty of the charge of Unlawful Taking of a Motor Vehicle on the grounds that: (a) the court had acquitted appellant of the felony and then later decided to convict him of the misdemeanor; and (b) that the crime of Unlawful Taking of a Motor Vehicle is not a lesser and included offense of Theft. Therefore, the Court's verdict of not guilty of the charge in the information requires this Court to discharge him from the custody of the Third District Court.

STATEMENT OF FACTS

Arthur A. Polad testified that his automobile had been parked in front of his apartment at 341 Post Street (900 West) approximately 7:30 p.m. on the evening of September 28, 1975 and he did not see it again until the following morning when he found it damaged beyond repair. (R. 31-34)

Police officer Tim Phelan testified that at about 3:00 a.m. on the morning of September 29, he observed Mr. Poland's vehicle in the middle lane of 4th South between 2nd and 3rd West. He identified the appellant as having been slumped behind the wheel of the vehicle unconscious. (R. 37, 38) The officer testified that the appellant's lips were blue, but there was no evidence of injuries. He also stated that the paramedics on the scene diagnosed the appellant's condition

as an overdose of narcotics (R. 41).

Susan Williams, the appellant's ex-wife, testified that he had been at her apartment at 415 Post Street until about 2:00 - 2:30 a.m. (R. 58) She further stated he called her from a hospital about 5:00 a.m. and told her he had "OD'd" on some heroin (R. 60). When he had been placed in the ambulance at the scene, a hypodermic needle he had had in his possession fell out onto the ground (R. 47).

Counsel for both the State and appellant entered into a stipulation that if a Dr. Richard L. Jackson were called to testify, he would testify that he treated the appellant in the emergency room of Holy Cross Hospital in the early morning hours of September 29, 1975 and diagnosed his condition as an overdose of the drug heroin. Further, the Dr. would have testified that appellant lapsed in and out of consciousness and that one who is overdosed on heroin could commit acts which he does not consciously remember (R. 86-87).

Appellant testified in his own defense that after leaving his ex-wife's apartment, he went to Sherwood Park and "shot up" a large quantity of heroin (R. 82-83). He further testified that he had no recollection as to what happened after that and had no memory of getting into a car (R. 83-84).

ARGUMENT

POINT I

THE CRIME OF UNLAWFUL TAKING OF A VEHICLE PURSUANT TO UTAH CODE ANN. §41-1-109 (1953) IS NOT A LESSER INCLUDED OFFENSE OF THEFT OF AN OPERABLE MOTOR VEHICLE PURSUANT TO UTAH CODE ANN. §76-6-404 (AS AMENDED 1973).

The defendant was charged with the crime of Theft pursuant to Utah Code Ann. §76-6-404 (1973 as amended) which provides:

> "a person commits theft if he obtains or exercises unauthorized control over the property of another with a purpose to deprive him thereof."

Further, Utah Code Ann. §76-6-412 (1973 as amended) provides:

> "Theft of property. . .shall be punishable as follows:
> (a) as a felony of the second degree if:
> . . .(ii) The property stolen is a firearm or an operable motor vehicle;"

Two other crimes involving unauthorized use or possession of a motor vehicle appear in the Utah Code, however, these crimes are included as part of Utah's Motor Vehicle Act and not as part of the Criminal Code. Utah Code Ann. §41-1-112 (1953) is uniformly interpreted as punishing the knowing possession of a stolen motor vehicle as a felony, while Utah Code Ann. §41-1-109 (1953) punishes the unlawful taking of a motor vehicle with intent to only temporarily deprive the owner of his possession as a misdemeanor. That statute provides:

> "Unlawful taking of vehicles a misdemeanor.--Any person who drives a vehicle, not his own, without the consent of the owner thereof and with intent temporarily to deprive said owner of his possession of such vehicle, without intent to steal the same is guilty of a misdemeanor. The consent of the owner of a vehicle to its taking or driving shall not in any case be presumed or implied because of such owner's consent on a previous occasion to the taking or driving of such vehicle by the same or a different person. Any person who assists in, or is a party or accessory to or an accomplice in any such unauthorized taking or driving is guilty of a misdemeanor."

The Court will note that punishment for a violation of 41-1-109 is described as a 'misdemeanor'. Although Utah's new Criminal Code, in 1973, provides for three different types of misdemeanor offenses,[1] it is clear that the legislative intent in enacting 41-1-109 was to provide the same punishment for a misdemeanor as was provided for in Utah's now defunct Penal Code.[2] Further, Utah Code Ann. §76-3-104 (2) (as amended 1973) provides:

> "An offense designated a misdemeanor, either in this code or in another law, without specification as to punishment or category, is a class B misdemeanor."

A class B misdemeanor is punishable by imprisonment for a term not exceeding six months[3] or a fine not exceeding $299.[4]

Since 41-1-112 is not involved in this appeal, attention will be focused on the relationship between 41-1-109 and 76-6-412, supra.

It is established law that a defendant can be convicted only of the offense charged in the information,[5] or of an offense which is necessarily included in the charged offense. To that end, Utah Code Ann. §77-33-6 (1953) provides:

> "The jury may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment or information, or of an attempt to commit the offense."

Just exactly what constitutes an offense which is "necessarily included" is a subject which this Court has chosen to deal with on

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1. Utah Code Ann. §76-3-104
2. See Utah Code Ann. §76-1-16 (Repealed 1973)
3. Utah Code Ann. §76-3-204 (as amended 1973)
4. Utah Code Ann. §76-3-301 (as amended 1973)
5. Utah Code Ann. §77-33-4 (1953)

a case by case basis. See e.g. State v. Woolman, 84 Utah 23, 33 P.2d 640 (1934); State v. Smith, 90 Utah 482, 62 P.2d 1110 (1936); State v. Close, 28 Utah 2d 144, 499 P.2d 287 (1972).

This Court dealt directly with the question of the relationship of 41-1-109 with Utah's grand larceny statute in effect in 1969 in the case of State v. Ash, 23 Utah 2d 14, 456 P.2d 154 (1969). In that case, the defendant was charged with grand larceny pursuant to Utah Code Ann. §76-38-3 (Repealed 1973). One of the defendant's assignments of error was that the trial court failed to instruct the jury on what he construed to be the lesser and included offense of Unlawful Taking of a Motor Vehicle pursuant to Utah Code Ann. §41-1-109 (1953), supra. Writing for the majority, Justice Ellet said:

> "In the instant case the jury found the defendant guilty of intending to deprive the owner permanently of the use of his car, and we cannot see why they should also have been required to decide if he only intended to deprive the owner temporarily. The two crimes are based upon contrary intentions in the mind of the defendant. However, this does not mean that one offense is necessarily included within the charge made of the other. An acquittal of one is not a bar to a prosecution for the other offense. The law is stated in 7 Am. Jur. 2d, Automobiles and Highway Traffic §343, to be as follows:
>
> * * * Furthermore, since the offense of taking and using a motor vehicle without the consent of its owner is distinct in its elements from the offense of larceny, an acquittal of one of these offenses is not a bar to a prosecution for the other. * * *"
>
> 456 P.2d 155.

There can be little doubt from this language that this Court has clearly held that 41-1-109 is not a lesser and included offense of felony auto theft. Although decided prior to the adoption of 76-6-404 and 412, supra, this case is clear authority for appellant's argument.

The Supreme Court of Colorado has also ruled that the crime of joyriding is not a lesser included offense of the crime of auto theft in Sandoval v. People, 176 Col. 414, 490 P.2d 1298 (1971). The elements

of Colorado's joyriding statute[6] are virtually identical to Utah Code Ann. §41-1-109 (1953), and Colorado's theft statute is also identical to Utah's.[7] Although lengthy, the following segment of Justice Hodge's opinion is quoted by appellant as presenting in a nutshell the legal issue presented by this point on appeal:

> "From the foregoing discussion, it appears clear that an essential element of the crime of theft is the formation of an intent to permanently deprive the owner of his property. On the other hand, the crime of joyriding requires as an element of proof an intent to just temporarily deprive the owner of his property. The intent to permanently deprive is not a progression of an intent to temporarily deprive. To state it another way, the joyriding intent does not mature into the theft intent. A culprit who takes the automobile of another has either the intent to permanently deprive or the intent to temporarily deprive. He cannot have both intents because the one is exclusive of the other. Therefore, it follows that the greater offense of theft of an automobile does not include the element of intent to temporarily deprive. Under the rule of Futamata, supra, before an offense can be classified as a lesser included offense of a greater crime, the establishment of the greater must also necessarily establish all the elements required to prove the lesser. As a consequence, it must be concluded that joyriding is not a lesser included offense of theft, nor is an attempt to commit joyriding a lesser included offense of attempted theft."
>
> 490 P.2d at 1300.

In reviewing the procedure involved in the instant case, it will be noted that the trial judge ruled that 41-1-109 was a lesser and included offense of the information which charged appellant with felony auto theft pursuant to 76-6-404 and 412 (R. 95, 96). Because this ruling is in direct conflict with the Court's holding in State v. Ash, supra, appellant urges this Court to reverse the judgment of guilt and discharge him from the custody of the Third District Court.

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6. C.R.S. 1963, 13-13-2

7. 1967 Perm. Supp., C.R.S. 1963, 40-5-2

POINT II

THE COURT'S PRONOUNCEMENT OF ACQUITTAL ON THE THEFT CHARGE PRECLUDED A LATER FINDING THAT APPELLANT WAS GUILTY OF A LESSER INCLUDED OFFENSE.

Even if this Court does not accept appellant's argument as outlined in Point I of this brief, it is his position that the trial court acquitted him of the charge contained in the information; and it was only after discussions among counsel and the court that the Honorable Gordon R. Hall changed his mind and the verdict, and found the defendant guilty of a lesser included offense of unlawful taking of a motor vehicle. Appellant contends that when Judge Hall pronounced the appellant not guilty of the charge of theft, the trial ended and he could not later return to the subject and find him guilty of a lesser included offense.

The sequence of events in the trial of this matter is very important After both sides had rested, counsel for appellant made his closing argument and cited the precedent of State v. Ash for the proposition that Unlawful Taking of a Motor Vehicle under 41-1-109 was not a lesser included offense of theft as charged in the information (R. 90-91) The trial court then indicated there was reasonable doubt as to the theft charge and indicated he agreed with counsel that 41-1-109 was not lesser included and would require a separate prosecution. The following exchange occurred:

THE COURT: The Court in this case does have a reasonable doubt of the intent of the defendant in this matter and is prepared to so rule. However, it is very obvious to the Court that in light of Ash that any further proceeding probably would require an action to be filed. However, I hesitate to have the State go to that extent and also to have

you defend such an action. And my suggestion to you now would be that if we cannot necessarily show that as an included offense, that of depriving an owner, that you consider at this time the possibility of a new complaint in this court being filed and have the Court dispose of that now rather than starting afresh all over again. No question in my mind but whether he's guilty of the misdemeanor.

MR. HAYCOCK: We have alleged that Ash doesn't preclude that finding and the Court has had all kinds of experience wherein this very counsel stipulated under this section it's an included --

THE COURT: My only concern is that Mr. Keller has made such an issue of it. I have on other cases permitted it to become a lesser and included offense and have found guilt on that rather than on the felony.

MR. KELLER: I feel it is my duty on behalf of my client it's not a lesser included offense and I believe the language --

THE COURT: I understand that and that's the reason I don't want to have any difficulty over it and what I am suggesting is I am not prepared, if I acquit the defendant on the felony charge I'm going to require the prosecution to proceed on the misdemeanor offense; and I do not intend to release the defendant today.

(R. 90-91)

It will be noted that appellant maintained the position that the misdemeanor charge was not lesser included and that the Court seemingly agreed, stating that he would require the State to proceed on the misdemeanor charge in a seperate action. The exchange was culminated by the court's pronouncement of acquittal:

MR. KELLER: Your Honor, it would be defendant's position to remain

firm that it is not a lesser included offense at this point and ask the Court to consider the case on that basis.

THE COURT: Knowing the position of the Court, Mr. Keller, regarding the misdemeanor I'm going to require a prosecution on that. Do you have any suggestion on that?

MR. KELLER: Yes. May we assume at this point the Court has acquitted the defendant of the greater offense?

THE COURT: The record may show that the Court does now acquit the defendant of the offense as charged, that of theft, a felony of the second degree.

After this pronouncement of acquittal by the court, arguments were heard as to whether the State could refile a new complaint. The appellant took the position that since he had now been tried once for this criminal episode and acquitted, that a separate trial would be subject to a plea of former jeopardy. This issue was argued by both counsel for some period of time (R. 90-95). The Court then interjected the following statement:

THE COURT: The Court has again reviewed the content of the Ash case during the argument of counsel and head note number 2 therein would indicate that a subsequent prosecution is not barred by a finding of not guilty on the felony. And as I indicated to you previously, this Court has on other occasions -- more than one, found the defendant guilty of a lesser and included offense and rather than put the State to any further efforts by way of filing an additional complaint in this matter, the Court now further finds that the defendant in this case is guilty of a lesser and included offense, that of unlawful taking of a motor vehicle under the provisions of Title 41, Chapter 1, Section 109. What is your desire as to time for sentencing,

Mr. Keller?

MR. KELLER: Your Honor, this Court then reverses its judgment of acquittal?

THE COURT: No. I acquitted him on the charge of the felony, find that he's not guilty of that, but guilty of a lesser and included offense, that of unlawful taking of a vehicle. No reversal that I intended in my mind, or intended to convey to you; I am not able to find him quilty of a felony.

(R. 95-96)

With all due respect for Judge Hall, despite his statement that he was not reversing his judgment, he clearly adopted a different position than he maintained at the time he pronounced his verdict of acquittal (R.62). He overruled his former judgment that the misdemeanor of Unlawful Taking of a Vehicle was not lesser included in auto theft pursuant to State v. Ash, supra, and ruled that it was lesser included. He then convicted the appellant of that misdemeanor offense (R. 66-67).

Even assuming this Court overrules its previous position in Ash, appellant maintains that once Judge Hall pronounced his acquittal of the charge as contained in the information, the trial ended and he should have been discharged. As a matter of fact, Utah Code Ann. §77-33-12 (1953) clearly requires such a procedure:

> "If judgment of acquittal is given on a verdict, and the defendant is not detained for any other legal cause, he must be discharged as soon as the judgment is given."

The arguments of counsel after the verdict was pronounced were immaterial to the trial that had just ended. Whether or not the misdemeanor charge could have been refiled in a separate action should have had no effect on appellant's trial for auto theft which had just ended.

It would be helpful to compare this situation to that of a jury trial. Appellant had waived a jury in this case which he had a right to do pursuant to Utah Code Ann. §77-27-2 (1953). Utah's Code does not spell out procedures in a non-jury trial which are different than procedures in a jury trial and so it must be presumed that, except where obviously unnecessary (as in jury instructions), the legislature intended that a Judge sitting as trier of fact should conduct a trial as though a jury were present. (See Utah Code Ann. Chapter 27, Mode of Trial) Assuming this to be the case, Judge Hall's procedure would have been tantamount to the jury having returned from its deliberation with a verdict of acquittal, then after argument of counsel as to whether or not the defendant could be tried on another charge, reversing its verdict and finding him guilty of that other charge. In a jury trial, Judge Hall would have had to decide whether or not the misdemeanor was lesser included in the felony before the jury retired to deliberate. Certainly, the judge would not have been able to reverse his decision as to the lesser offense after the jury came back with a verdict of acquittal. Surely he could not have sent them back in to deliberate on the appellant's guilt as to another offense.

This Court considered an issue similar to the one raised in this appeal in the case of State v. Kelsey, 532 P.2d 1001 (1975). In that case the defendant was charged with first degree murder, and waived a jury in the case. One of his grounds for appeal was that the judge who heard the evidence retired from the bench and another judge signed findings of fact and conclusions of law, even though these were consistent with the verdict of the trial judge. This Court found no error in the procedure. Writing for a unanimous Court, Justice Crockett

stated:

> "The statement by the judge quoted above clearly placed in the record his verdict and judgment."
>
> 532 P.2d at 1005.

It is important at this point to quote that statement of the judge Justice Crockett referred to:

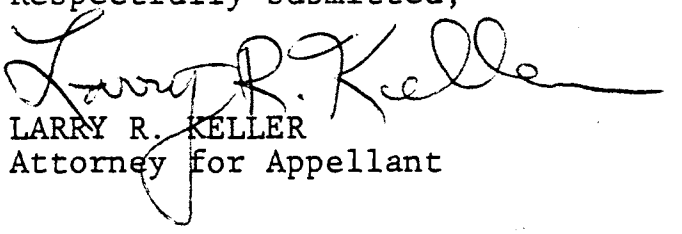
> "The parties having rested and submitted final argument, this is my ruling: I find that the defendant, Stewart Michael Kelsey, is guilty of the crime of murder in the second degree. The testimony of two of Utah's most distinguished medical doctors, one a psychiatrist, and one a forensic pathologist, coupled with other corroborating testimony, demonstrated that the defendant had a diminished ability to control himself in the commission of this crime, and therefore, the elemnts of murder in the first degree beyond those requisite for murder in the second degree were not proved by the state beyond a reasonable doubt. I do find, however, that the state has proved each and every element of the crime of murder in the second degree beyond a reasonable doubt."
>
> 532 P.2d at 1005.

It will be noted that instead of merely announcing an acquittal of first degree murder, the judge announced there was insufficient evidence for first degree murder but <u>at the same instant</u> pronounced the defendant guilty of the lesser included offense of second degree murder. The language of the Supreme Court decision indicates that it was at the instant the verdict was pronounced that judgment was entered. That case is powerful precedent for the instant case, and appellant asks this court to reaffirm its holding that once a verdict is announced, judgment occurs and the trial is ended where there is no jury.

CONCLUSION

For the reasons previously stated, appellant urges this Court to reverse his conviction and order him discharged from the custody of of the Court on this matter.

Respectfully submitted,



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