1977

State of Utah v. Gary Alred Mitcheson : Petition for Rehearing

Utah Supreme Court

Dow Blackham; Blackham and Roley; Attorneys for Appellants;
Vernon D. Romney; Attorney General;

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

GARY ALFRED MITCHESON,

Defendant-Appellant.

PETITION FOR [illegible]

APPEAL FROM THE JUDGMENT OF THE
JUDICIAL DISTRICT COURT
COUNTY, STATE OF UTAH
SHEYA, JR.

DON BLACKHAM

3535 South 3200 West
Salt Lake City, Utah 84119

Attorney for Appellant

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Defendant-Appellant.

Case No. 14629

PETITION FOR REHEARING

The plaintiff-respondent petitions this Court for rehearing in the above entitled case pursuant to Utah Rules of Civil Procedure, Rule 76(e), for the reasons that (1) the Court did not consider a material fact in arriving at its decision, (2) the Court misconstrued the State's position, and (3) the Court's opinion creates uncertainty in the law as to the quantum of evidence necessary to mandate that a requested jury instruction be given.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

EARL F. DORIUS
Assistant Attorney General

Attorneys for Respondent

BRIEF IN SUPPORT OF
PETITION FOR REHEARING

POINT I

PETITION FOR REHEARING IS PROPERLY BEFORE THE COURT UNDER THE FACTS OF THIS CASE.

This Court has previously recognized that to make an application for a rehearing is a matter of right. Cummings v. Nielson, 42 Utah 157, 129 P.619 (1913). Nevertheless, plaintiff-respondent recognizes that this right is not absolute and that a petition for rehearing should not be utilized to challenge areas of the Court's decision which respondent merely disagrees with or considers unsatisfactory. Nor should the rehearing be used to reargue grounds originally presented. Cummings v. Nielson, supra; Beaver County v. Home Indemnity Co., 88 Utah 1, 52 P.2d 435 (1935). The standard established by this Court in determining whether a petition for rehearing is proper was expressed long ago in Brown v. Pichard, 4 Utah 292, 11 P. 512, reh. den., 4 Utah 292, 9 P. 573 (1886):

> "To justify a court in granting a rehearing it must be convinced that there has been a failure to consider some material point in the case; that there has been error in the conclusions heretofore arrived at; or that some matter has been discovered unknown at the time of the hearing."

See also Cummings v. Nielson, supra, at 624, wherein the Court stated the following:

> "When this court. . . has considered and decided all of the material questions involved in a case, a rehearing should not be applied for, unless we have misconstrued or overlooked some material fact or facts, or have overlooked some statute or decision which may affect the result, or that we have based the decision on some wrong principle of law, or have either misapplied or overlooked something which materially affects the result. . . If there are some reasons. . . such as we have indicated above, or other good reasons, a petition for a rehearing should be promptly filed, and, if it is meritorious, its form will in no case be scrutinized by this court." (Emphasis added).

The remaining points of this brief will adequately show that this petition for rehearing is properly before this court on the grounds that this court misconstrued or misapprehended certain material facts of this case in reaching its decision, and there are adequate "other good reasons" for rehearing the case - namely, the Court's opinion has left uncertain the viability of the evidence standard in State v. Castillo, 23 Utah 2d 70, 457 P.2d 618 (1969).

POINT II

THE OPINION OF THE COURT DID NOT ANSWER, CONSIDER, OR REFUTE THE SPECIFIC FINDINGS OF THE TRIAL COURT.

In its opinion in this case filed February 15, 1977, this Court did not discuss or mention the specific findings of Judge Edward Sheya of the Carbon County District Court on the defendant's request for an instruction on defense of habitation. According to the Supplemental Record, which the state did not have available for inclusion in its original Brief, but which was filed with the Court on January 5, 1977, and was alluded to during respondent's oral argument before this Court, Judge Sheya specifically found that there was not any evidence to support the requested instruction on defense of habitation, a defense provided in Utah Code Ann. § 76-2-405 (Supp. 1975). The following excerpts from pages three and four of the Supplemental Record clearly reflect the trial court's position and its concern with avoiding error:

> "'A person is justified in using force against another when and to the extent that he reasonably believes that the force is necessary to prevent or terminate the others unlawful entry into his habitation. However, he is justified in the use of force which is intended or likely to cause death or serious bodily injury only if, one, the entry is made or attempted in a violent and tumultous manner and he reasonably believes that the entry is attempted to be made for the purpose of assaulting or offering personal violence to any person dwelling or being therein and that the force is necessary to prevent the assault or offer of personal violence.'

The court, in the first place, was unable to find from the evidence that any force was necessary to prevent anyone's unlawful entry into the habitation. No one had advanced to the point where they became an immediate danger to the habitation. The evidence as I recall, was the people were standing, some were standing out by the truck. Some were standing out in the road. But I can't recall any evidence that anyone was advancing menacingly toward the door. Or was so near the door that something had to be done to stop the individual or individuals.

Now on this matter of when you can use deadly force, the statute says, and the instruction, of course, quoted the language of the statute. That the entry has to be made or attempted in a violent and tumultous manner. Number 1. That is one element. I can't recall any evidence to the effect that these people who came in were engaging in violent or tumultous conduct. I think he said he looked out the window and saw these car lights, but I can't recall evidence which would support the theory that they entered in a violent and tumultous manner. So it seems to me that there is one element that is missing. And I can't find from the evidence that the Defendant reasonably believed that an entry was being attempted or made for the purpose of assaulting either himself for anybody in the dwelling. As has been mentioned, the argument between these individuals, the defendant and the deceased and a brother of the deceased was regarding tires. He had been forewarned that they were coming down to retrieve these tires that were claimed by them. Nothing was said to the effect we are going to come down and get you. We are coming down to do you great bodily injury. We are coming down to kill you. I can't recall

any evidence that they were going to do him any bodily harm or inflict personal violence upon his person. Or upon the person of his sister. I can't recall any evidence to support that. Or anyone else in the home, or that the Defendant felt it was necessary that force was necessary, that is deadly force to prevent the assault or offer of personal violence. If it didn't exist, of course, he couldn't have intended to prevent it. So I am unable, aside from the fact that it is inconsistent with the accidental theory, that aside from that I cannot see where the evidence supports this instruction. In that there was no violent tumultous entry that he could not have reasonably believed that it was made, that the entry that was made was for the purpose of assaulting himself or his sister. Or that he had to use this force to prevent any such assault because it didn't exist. So because the court could see no evidence to support this instruction, I didn't want to commit error to support this instruction, I didn't want to commit error in giving it because our Supreme Court says it is error to give an instruction unless the evidence supports it." (Emphasis added).

Although this Court held that it was reversible error for the trial court not to give the requested instruction on defense of habitation, it never refuted or specifically overruled the trial court's finding that no evidence was submitted to warrant the instruction. That leaves the paradoxical situation of having accepted the trial court's judgment that no supporting evidence was submitted, yet having decided that the instruction which therefore has no evidentiary basis must be given.

Respondent submits that unless or until the trial court's findings are set aside for error or for abuse of discretion, the requested instruction was properly refused by the trial court, requiring this Court to affirm the conviction. In State v. Johnson, 112 Utah 130, 185 P.2d 738 (1947), reaffirmed in State v. Castillo, 23 Utah 2d 70, 457 P.2d 618 (1969), this Court held that an appropriate instruction on a theory of the case is required if there is any substantial evidence to justify giving such an instruction. Under this standard, defendant in the instant case was not entitled to the requested instruction, based on the trial court's determination that there was not any supporting evidence.

POINT III

THE COURT DID NOT ALLUDE TO OR DISCUSS RESPONDENT'S CHIEF CONTENTION ON THIS APPEAL; NAMELY, SUFFICIENCY OF THE EVIDENCE TO JUSTIFY AN INSTRUCTION ON DEFENSE OF HABITATION.

On page two of the opinion, Justice Crockett, writing for the Court, said:

> "The argument that the defendant was not entitled to that instruction is: (1) that the sister's home was not his habitation; and (2) that it was inconsistent with his own testimony and theory of defense that the shooting was an accident."

Respondent submits that neither of these theories articulate the State's argument to this Court requesting affirmation of the jury verdict. The only mention of (1) was at page seven of respondent's brief:

> "Even if, arguendo, this Court accepted that for purposes of this statute, appellant's habitation that evening was his sister's home, although he was merely staying the night, appellant could not surmount other obstacles . . . ."

Clearly, respondent did not contend that even under appropriate circumstances, appellant could not use the defense of habitation defense in his sister's home; rather, respondent acquiesced to the theory that another's home could in some situations be appellant's habitation.

The alleged theory (2) of respondent did not even appear in the State's brief. While this apparent inconsistency of defenses was noted by the trial court and perhaps mentioned before this Court on oral argument, it was in no sense relied upon by respondent in its request that Gary Mitcheson's conviction for second degree murder be affirmed.

Petitioner-respondent heavily relied upon and submitted to this Court the theory that defendant had failed to introduce sufficient competent evidence at trial to allow the defense of habitation instruction to be given. This Court did not meet this critical issue directly and therefore should grant a rehearing to consider its merits.

POINT IV

THE COURT'S OPINION HAS CREATED CONFUSION ABOUT THE QUANTUM OF EVIDENCE NECESSARY TO WARRANT THE SUBMISSION OF A REQUESTED INSTRUCTION TO A JURY.

State v. Castillo, supra, holds that each party is entitled to have his theory of the case which is supported by substantial evidence submitted to the jury. In the instant case, this Court, by not mentioning or referring to the trial court's specific findings on the evidence on this issue, has left the impression that no evidence or minimal evidence is all that is required to merit an instruction on a theory of the case. Until this Court resolves such confusion, trial court judges can no longer be sure of the proper evidentiary standard relating to jury instructions. Petitioner-respondent, at the very least, requests that this Court comment upon the viability of Castillo in light of the Mitcheson opinion.

CONCLUSION

Because this Court did not address the State's position and did not directly deal with the

trial court's findings, confusion over the evidentiary standard for requested jury instructions has arisen. Petitioner-respondent therefore requests that a rehearing be granted to resolve the issues outstanding.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

EARL F. DORIUS
Assistant Attorney General

Attorneys for Respondent