1978

State of Utah v. Lloyd William Norman : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent, vs. LLOYD WILLIAM NORMAN, Defendant-Appellant.	Case No. 15315

BRIEF OF APPELLANT

APPEAL FROM A JUDGMENT IN THE SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF DAVIS, STATE OF UTAH,
THE HONORABLE THORNLEY K. SWAN, JUDGE, PRESIDING

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BRIEF OF APPELLANT

STATEMENT OF THE CASE

Appellant seeks a reversal of a judgment entered in the Second Judicial District Court, in and for the County of Davis, State of Utah, finding him guilty of the offense of attempted manslaughter.

DISPOSITION IN LOWER COURT

Appellant was originally charged with the offense of attempted criminal homicide in violation of UCA 76-5-203(b), a felony of the second degree. A trial was held in the lower Court without a jury. After all the evidence had been presented, the Court found appellant guilty of attempted manslaughter.

RELIEF SOUGHT ON APPEAL

Appellant submits that attempted manslaughter is not a criminal offense under Utah Law, and, therefore, requ an order reversing the lower Court's judgment and an order releasing appellant from custody.

STATEMENT OF FACTS

During the early morning hours of December 25, 197 Clifford Daniels, and others, were at appellant's home celebrating Christmas (T-211, 212). Appellant and Mr. Daniels had played cards during the preceding evening and all had been drinking (T-212).

An argument developed between appellant and Mr. Daniels (T-214, 215), during which, Mr. Daniels, while holdi an open knife pointing toward appellant, said he could whip appellant (T-216). Appellant thereupon left the room, went into his bedroom where he obtained a forty-five caliber pist which was loaded, placed the same under his belt behind him and returned to the game table where he sat opposite Mr. Daniels (T-219).

Appellant, without Mr. Daniels' knowledge, removed the pistol from his belt, cocked the same and laid it on his lap underneath the table (T-220). He then demanded the knife (T-220). Mr. Daniels shoved it toward appellant, who picked

it up and threw it against the wall (T-220). Appellant then reached underneath the table for the gun to uncock the hammer. His fingers slipped, the gun discharged and Mr. Daniels was struck in the abdomen (T-221).

Appellant then called the police and reported the shooting (T-221).

ARGUMENT

POINT I

ATTEMPTED CRIMINAL MANSLAUGHTER IS NOT A CRIMINAL OFFENSE

At the conclusion of the evidence, the Court found appellant guilty of attempted manslaughter, a felony of the third degree (R-20; T-258).

Under Utah Law:

> "(1) Criminal Homicide constitutes manslaughter if the actor
>
> (a) Recklessly causes the death of another, or
>
> (b) Causes the death of another under the influence of extreme mental or emotional disturbance, for which there is a reasonable explanation or excuse . . ." UCA 76-5-204(1) (a) and (b)

One acts:

> "recklessly . . . with respect to circumstances surrounding his conduct or the result

> of his conduct when he is aware of but conscientiously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur . . . " UCA 76-2-103(3)

There is no definition of "Under the influence of extreme mental or emotional disturbance" in the Utah Criminal Code.

The Court did not specify whether its finding of "guilty of attempted manslaughter" was premised upon subpara (a) or (b) of the manslaughter statute quoted above.

In any event, appellant claims that there is no criminal offense under Utah Law known as attempted manslaug

The elements of attempt are:

> "(1) For purposes of this part a person is guilty of an attemp to commit a crime if, acting with the kind of culpability otherwise required for the commission of the offense, he engages in conduct constituting a substantial step toward commission of the offense." UCA 76-4-101(1)

The term "culpability" as used in the attempt statute, means the appropriate mens rea associated with the offense the ac is charged with having attempted. It does not mean one's actions which may be deemed "reckless" or which may be the result of "extreme mental or emotional disturbance". Other the second element of attempt, ". . . engaged in conduct co tuting a substantial step toward commission of the offense", becomes meaningless and, thus, unnecessary.

This analysis is consistent with the general rule law associated with the offense of criminal attempt.

> "To convict one of an attempt to commit a crime, it is necessary that the overt act have been done with the actual intent to commit that particular crime. Such intent must be an intent in fact as distinguished from an intent in law, and cannot be implied as a matter of law from the existence of the same facts and circumstances which would, in case the deed had been accomplished, have furnished conclusive evidence of an intention to commit the substantive crime." 22 C.J.S. 75(3), page 233. (Emphasis added)

See also State of Washington vs. Lewis, 69 Wash. 2d 120, 417 P.2d 618 (1966)

Since the term "culpability" refers to the necessary mens rea associated with the offense attempted, it must be decided what mens rea is applicable to the manslaughter statute in Utah. A reading of the statute clearly reveals that there is no mens rea requirement; rather, one's conduct, if done "recklessly" or as a result of "extreme mental or emotional disturbance" constitutes the offense of manslaughter and no mental intent is required. As a matter of fact, if one acts "recklessly" with intent to kill, then the offense would be "criminal homicide" and not manslaughter. UCA 76-5-202 and 203 (1977 Supp.). Since there is no mens rea with manslaughter, there can be no offense of attempted manslaughter.

In State vs. Smith, 534 P.2d 1180 (Ore. 1975), the Court of Appeals of Oregon specifically held that there is no offense of "attempted reckless murder".

> "We conclude that the legislative scheme, as a whole, is complete and consistent with

the approach that 'one cannot attempt to act recklessly' . . .

"It therefore was error to instruct the jury on the theory of attempted reckless murder, . . ." 534 P.2d at 1184 (Emphasis added)

Since defendant was convicted of a nonexistent criminal offense, his conviction should be reversed and he should be released from custody forthwith.

POINT II

DEFENDANT CANNOT BE RETRIED ON THE ORIGINAL CHARGE

Section 12, Article 1 of the Constitution of Utah provides:

". . .Nor shall any person be twice put in jeopardy for the same offense."

The issue is whether or not a finding of guilty by the trier of fact of a lesser included offense is an acquitt of the greater offense. The Supreme Court of Kansas in the case of State vs. McCorgary, 543 P.2d 952 (Kan. 1975) holds in the affirmative:

"We further note that appellant was charged with first degree murder and convicted of the lesser offense of second degree murder. As to those two offenses a conviction of the lesser offense is an acquittal of the greater degree of the offense." 543 P.2d at 961 (Emphasis added)

See also State vs. Tanton, 88 N.M. 333, 540 P.2d 813 (1975); State vs. Pia, 514 P.2d 580 (Hawaii 1975); State v. Leverich, 269 Ore. 45, 522 P.2d 1390 (1973).

Under the holding of the McCorgary case cited above, appellant, in the instant case, was acquitted of the greater offense of attempted criminal homicide when the Court found him guilty of what the Court thought was the lesser included offense of attempted manslaughter. This is true even though the conviction on the lesser included offense may be reversed on appeal. The United States Supreme Court in Green vs. U.S., 78 S.Ct. 221, 355 U.S. 184, 2 L.Ed 2d 199 (1957) held:

> "At Green's first trial the jury was authorized to find him guilty of either first degree murder . . . or, alternatively, of second degree murder . . .. The jury found him guilty of second degree murder, but on his appeal that conviction was reversed and the case remanded for a new trial. At this new trial Green was tried again, not for second degree murder, but for first degree murder, even though the jury had refused to find him guilty on that charge and it was in no way involved in his appeal. For the reasons stated hereafter, we conclude that this second trial for first degree murder placed Green in jeopardy twice for the same offense in violation of the constitution." 355 U.S. at 190, 75 S.Ct. at 225, 2 L.Ed 2d at 205 and 206 (Emphasis added)
>
> See also Bunnell vs. Superior Court of Santa Clara County, 119 Cal.Rptr 302, 531 P.2d 1086 (1975)

Since attempted manslaughter is not a criminal offense, a fortori it cannot be a lesser included offense of attempted criminal homicide. The Court should therefore have found the defendant guilty of attempted criminal homicide as charged or not guilty. Since the Court implicitly found appellant not guilty of the original charge by finding him guilty of a

nonexistent lesser offense, the defendant should now be released from custody and the conviction reversed. Jeopardy has attached to the original charge and, thus, the State has no legal right, nor reason, for holding appellant longer.

POINT III

IF THE COURT HOLDS THAT ATTEMPTED MANSLAUGHTER IS A LESSER INCLUDED OFFENSE OF ATTEMPTED CRIMINAL HOMICIDE, DEFENDANT IS STILL ENTITLED TO A REVERSAL AND A RELEASE IN THAT THE EVIDENCE PRODUCED AT TRIAL WAS INSUFFICIENT TO SUSTAIN THE CONVICTION.

Mr. Clifford Daniels, the victim, was called to testify for the Respondant. His testimony described the incident as follows: That appellant, after the children left his home, suddenly accused Mr. Daniels of messing with a Norman (T-31); that appellant hit his hands together, knocking glasses off the table where appellant and Mr. Norman were seated, facing one another (T-31); that Mr. Daniels got up to leave appellant's home (T-31); that appellant got out of his chair, reached behind his back, obtained a forty-five caliber pistol and shot Mr. Daniels in the abdomen (T-32); that he thereafter threatened to kill Mr. Daniels and ordered him out of the house (T-32).

Appellant, on the other hand, described the incident stating that Mr. Daniels had a knife with the blade open and said that he could whip appellant (T-214, 215); defendant got up from the table at which both were seated and went out

bedroom to get his gun (T-216, 217, 219); appellant placed the gun under his belt behind his back and returned to the table and sat down (T-219); appellant pulled the gun from under his belt behind his back and placed it in front of him on his lap underneath the table (T-219, 220); appellant then asked Mr. Daniels for the knife whereupon Mr. Daniels provided him with the same and appellant picked it up and threw it against the wall (T-220); appellant then attempted to uncock the gun while it was still under the table, at which time, his finger slipped, the gun fired and the bullet struck Mr. Daniels in the abdomen (T-220, 221, 222).

The trial Court apparently disbelieved Mr. Daniels' version of the facts in that it did not find appellant guilty of attempted criminal homicide. The Court must have, therefore, given more weight to appellant's version of the incident.

Appellant's version is corroberated by Ted Bird who testified in his behalf. Mr. Bird stated that he test fired the gun in question the day before trial and as he lowered the hammer to uncock the gun, it slipped from his fingers (T-255, 256). This experience is identical to the accidental firing of the gun as described by appellant when Mr. Daniels was shot, thus giving credibility to appellant's version of the facts.

Moreover, Officer Benjamin R. Rendon, Police Detective of Clearfield City Police Department, testified that a mark on the wall of appellant's residence was thought to be made by the

bullet fired from appellant's gun and that the mark was twenty-three and one-half inches from the floor (T-147, 176). Notwithstanding, Mr. Daniels testified he was shot in the abdomen approximately six inches above his navel and exited back approximately four inches above his belt (T-188, 189). It becomes apparent that the mark on the wall allegedly made by the bullet would be much higher than the distance measured by Officer Rendon had Mr. Daniels been shot while standing. Thus, the physical evidence supports appellant's version that the gun fired while he had it under the table on his lap and Mr. Daniels was seated on the other side.

These facts corroberate appellant's testimony that the firing was accidental. Since the Court apparently did not believe Mr. Daniels' testimony as to how the shooting occurred it should have found appellant not guilty in that there were other facts before the Court negating appellant's claim that the firing was accidental.

As a consequence, appellant is entitled to a reversal and immediate release from the custody of the State of Utah.

CONCLUSION

Appellant alleges that his conviction of attempted manslaughter is legally fatal in that, under Utah Law, there is no crime of attempted manslaughter. Further, the fact

that the Court found defendant guilty of what the Court thought was a lesser included offense, results in appellant being found not guilty of the original charge. As a result, appellant cannot now be tried a second time on the original charge in that it would violate his constitutional right against being placed in jeopardy twice for the same offense.

In the event the Court finds there is a crime under Utah Law of attempted manslaughter, appellant contends that there was insufficient evidence adduced at trial to support conviction of the lesser offense.

Respectfully submitted,

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CERTIFICATE OF MAILING

I certify that I mailed a copy of the foregoing Brief of Appellant to ROBERT B. HANSEN, Attorney General, State Capitol Building, Salt Lake City, Utah 84114, postage prepaid, this 18 day of January, 1978.