

1988

Leo Duran v. Gerald Cook : Brief of Respondent

Utah Court of Appeals

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Leo Duran.

David L. Wilkinson; Attorney General; Dan R. Larsen; Assistant Attorney General; Attorneys for Respondent.

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO.

880217-CA

IN THE UTAH COURT OF APPEALS

LEO DURAN,

Petitioner-Appellant.

vs.

GERALD COOK, Warden,
Utah State Prison,

Respondent.

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Case No. 880217-CA

Priority 3

BRIEF OF RESPONDENT

APPEAL FROM A DISMISSAL OF A PETITION FOR A
WRIT OF HABEAS CORPUS IN THE THIRD DISTRICT
COURT, THE HONORABLE HOMER F. WILKINSON,
PRESIDING

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

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Petitioner-Appellant.	:	Case No. 880217-CA
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BRIEF OF RESPONDENT

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a dismissal of a petition for a Writ of Habeas Corpus in the Third District Court. This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(f) (1987).

STATEMENT OF ISSUE

Whether defendant was properly convicted of both theft and burglary arising from the same criminal episode.

STATEMENT OF THE CASE

Petitioner was charged with burglary, a second degree felony in violation of Utah Code Ann. § 76-6-202 (1978), and theft, a third degree felony in violation of Utah Code Ann. § 76-6-404 (1978). Petitioner pled guilty to the charges on June 8, 1987, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable J. Dennis Fredrick, presiding.

On October 14, 1987, petitioner filed a Petition for Writ of Habeas Corpus in the Third Judicial District Court, in and for Salt Lake County, State of Utah. After a hearing on January 12, 1988, Judge Homer F. Wilkinson dismissed the petition. Petitioner now appeals that dismissal.

STATEMENT OF FACTS

Because petitioner pled guilty and did not appeal, there is no record on which to base a statement of facts.

SUMMARY OF ARGUMENT

Petitioner was properly convicted of both theft and burglary as separate offenses. Theft is not a lesser included offense of burglary for purposes of determining whether a person may be convicted of both.

ARGUMENT

POINT I

DEFENDANT WAS PROPERLY CONVICTED OF BOTH THEFT AND BURGLARY.

Petitioner asserts that his theft conviction should be vacated because it is a lesser included offense of burglary, an offense for which he was also convicted. Petitioner therefore argues that he should not have been convicted of both the greater and lesser offense.

There are two contexts in which a greater-lesser relationship may exist. First, is whether a defendant is entitled to a jury instruction on a lesser offense where a partial overlap exists with the greater offense. See State v. Baker, 671 P.2d 152 (Utah 1983). Second, is whether there is a complete overlap of the elements of the lesser offense with the

elements of the greater offense so that a conviction of the greater offense necessarily includes a conviction of the lesser. See State v. Bradley, 752 P.2d 874 (Utah 1988). Regarding the second context, it is well established that:

A defendant (1) may be convicted of an offense included in the offense charged (2) but may not be convicted of both the offense charged and the included offense.

Utah Code Ann. § 76-1-402(3) (1978).

In determining whether a greater-lesser relationship exists, this Court has explained that the statutory elements of the crimes must be compared.¹ State v. Hill, 674 P.2d 96 (Utah 1983). The elements needed to prove theft are:

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

Utah Code Ann. § 76-6-202 (1978). The elements which comprise burglary are:

(1) A person is guilty of burglary if he enters or remains unlawfully in a building with intent to commit a felony, or theft or commit an assault on any person.

Utah Code Ann. § 76-6-202 (1978). This Court has stated that whether something is missing when a person is apprehended is no defense to burglary and does not destroy the intent element of burglary. State v. Wilson, 701 P.2d 1058 (Utah 1985); State v.

¹ This Court has further stated that, where necessary, a greater-lesser relationship determination may require a reference to the facts proved at trial. State v. Hill, 674 P.2d 96, 97 (Utah 1983). However, because there is an absence of a trial record in the present case due to defendant's plea of guilty to the charges, a factual comparison is impracticable.

Sisneros, 631 P.2d 856 (Utah 1981). Therefore, an actual taking of property is not a requirement of burglary, but is an essential element of theft. While the intent element of theft may overlap with burglary, a complete overlap does not exist. A conviction of burglary does not necessarily include a conviction of theft. Thus, in proving burglary, one has not proved theft.

In contrast, this Court in State v. Bradley, 753 P.2d 874 (Utah 1985) found that aggravated assault was a lesser included offense of aggravated burglary. Both crimes were aggravated by the defendant's use of a gun in threatening his victims. The defendant's use of a gun proved aggravated assault and by showing his unlawful entry also proved aggravated burglary. Under the facts of Bradley, by proving aggravated burglary, one also proves aggravated assault.

Defendant relies on State v. Hill, 674 P.2d 96 (Utah 1983) and State v. Johnson, 745 P.2d 452 (Utah 1987) to support his argument that theft is a lesser included offense of burglary. However, both Hill and Johnson involve the offenses of aggravated robbery and theft. Aggravated Robbery occurs when:

- (1) A person commits aggravated robbery if in the course of committing robbery, he:
 - (a) Uses a firearm or a facsimile of a firearm, knife or a facsimile of a knife or a deadly weapon; or
 - (b) Causes serious bodily injury upon another.
- (2) Aggravated robbery is a felony of the first degree.
- (3) For the purposes of this part, an act shall be deemed to be "in the course of committing a robbery" if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.

Utah Code Ann. § 76-6-302 (1978). Robbery is defined as:

Robbery is the unlawful and intentional taking of personal property in the possession of another from his person, or immediate presence, against his will, accomplished by means of force or fear.

Utah Code Ann. § 76-6-301 (1978). After comparing the statutory elements of aggravated robbery and theft, and upon a review of the relative facts, this Court in Hill found theft to be a lesser included offense of aggravated robbery. Simply, robbery is a theft with the added elements of the presence of the victim and the use of force or fear. Aggravated robbery adds one more element, the use of a firearm or the causing of bodily injury. Thus, theft may be established by proving aggravated robbery.

Defendant also relies on State v. Baker, 671 P.2d 152 (Utah 1983) and State v. Pitts, 728 P.2d 113 (Utah 1986) to support his contention that theft is a lesser included offense of burglary. However, both Pitts, and Baker involve whether it was necessary to give a lesser included offense instruction to the jury on the uncharged offense of theft. As noted earlier, only a partial element overlap need exist to justify giving a lesser included offense jury instruction. The lesser included offense instruction is therefore given as an alternative offense where the evidence may not support a finding of the greater offense and there is some evidence of the lesser.

Finally, the statutory scheme clearly differentiates between entering or remaining unlawfully in a building with the intent to commit a theft and actually carrying out that intent. To treat a person who commits a simple burglary the same as a

person who commits both a burglary and theft would frustrate the purpose of the criminal statutes. In the instant case, petitioner committed the offense of Burglary when he unlawfully entered the building with the intent to commit Theft. Petitioner then committed the offense of Theft when he unlawfully took possession of another's property with the intent to deprive. To grant petitioner's request would be to treat him as if he did not unlawfully take the property of another, but rather, exited the building without carrying out his intent. However, such was not the case.

CONCLUSION

Based on the foregoing, petitioner's conviction for theft should be affirmed.

DATED this 27th day of July, 1988.

DAVID L. WILKINSON
Attorney General


DAN R. LARSEN
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify that on the 27th day of July, 1988, I caused to be mailed, postage prepaid, four (4) true and exact copies of the above and foregoing Brief of Respondent to Leo Duran, P.O. Box 250, Draper, Utah 84020.





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Re: Leo Duran v. Gerald Cook,
Case No. 880217-CA

Dear Ms. Noonan:

The State wishes to correct an error contained in the Brief of Respondent in the above-referenced case. Throughout the brief, respondent inadvertently referred to the cited cases as if they were decided by the Utah Court of Appeals. However, all cited case authority derived from the Utah Supreme Court.

Thank you for your assistance in correcting this matter.

Sincerely,

DAN R. LARSEN
Assistant Attorney General

DRL:bks

cc: Leo Duran