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State of Utah v. Dung Hung Vo : Brief of Appellant

Utah Supreme Court

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THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

v.

DUNG HUNG VO,

Defendant-Appellant.

CASE NO. 15788

APPELLANT'S BRIEF

Appeal from the Judgment of the
Third District Juvenile Court
HONORABLE MERRILL L. HERMANSEN, JUDGE

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ATTORNEY FOR RESPONDENT

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THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,)
)
Plaintiff-Respondent,)
)
vs.)
)
)
DUNG HUNG VO,)
)
Defendant-Appellant.)

CASE NO. 15788

APPELLANT'S BRIEF

STATEMENT OF THE NATURE OF THE CASE

Defendant-Appellant was charged in the Third District Juvenile Court with violating the provisions of Utah Code Annotated (1953), Section 78-3a-19, in that being "over the age of 18 years" he did "commit the crime of contributing to the delinquency of Becky Horton, age 17, a child, under the age of 18 years, by willfully, intentionally, and unlawfully harboring Becky Horton, age 17 years, knowing that the said Becky Horton was a runaway, and by such conduct did tend to cause the said Becky Horton to become delinquent."

DISPOSITION IN THE LOWER COURT

Defendant was found guilty after a trial to the Court and sentenced to serve ninety (90) days in the Utah County Jail and pay a fine of \$150.00.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of his conviction or failing that, a new trial.

STATEMENT OF THE FACTS

Testimony presented at the trial indicated that a juvenile, Becky Horton, had run away from home on the 19th day of September, 1977. The said juvenile went first to the home of Nancy Floyd, a girlfriend, and then to the home of another girlfriend, Kathy Fixell. (R.6)

Subsequent to the two stops at the girlfriends home, the defendant went to an apartment where the defendant resided with two other Vietnamese males. (R.7)

Prior to the juvenile leaving home on this occasion, she had run away from home four (4) times. (R.25) The defendant was not present at the apartment when the juvenile arrived nor did he make an appearance at the apartment for some three

to four hours after the juvenile had first come to the apartment, at which time the only contact or conversation between the juvenile and the defendant was that the defendant said "Hi" to the juvenile. (R.10) The juvenile was at the apartment for three (3) days and two (2) nights during which time she only had one conversation of any duration with the defendant which occurred on the second evening that she was at the apartment. (R.29) There was never any conversation with the defendant in which the defendant told the juvenile that she could stay at the apartment, or gave her permission to stay at the apartment, or encouraged her to remain at the apartment. (R.26) In fact, during the one conversation the defendant had with the juvenile, he asked her why she was not at home and encouraged her to go home. (R.24,28,29)

The defendant made no sexual advances toward the juvenile during the time that she was at the apartment, did not provide food for the juvenile during the time she was there, did not restrict her movement or prevent her from leaving at any time, and exercised no control or influence over the juvenile during the time she was at the apartment. (R.26,30)

The State introduced a police report over the objection of the defendant to establish the age of the defendant as being over the age of eighteen (18) years. The objection of defense counsel was based upon the corpus delicti rule since

the information was a result of a personal interview with the defendant by the police officer. The prosecution offered a conversation between the defendant and the juvenile in which certain statements were made by the defendant during the second night that the juvenile was at the apartment. Defense counsel objected to the admission of any statements or admissions made by the defendant upon the grounds that the State had not established that a crime had been committed independent of the statements of the defendant. (R.14) The Court allowed the statements in, subject to striking them at a later time. (R.17)

The defendant moved at the close of the State's case for a dismissal upon the grounds that the State had failed to prove a prima facie case in that there was no evidence that the defendant had intentionally or knowingly encouraged the juvenile to run away from home, nor was there any evidence that he was harboring the juvenile or encouraging her to remain away from her home. (R.34) The motion to dismiss was denied by the Court. (R.35)

Defendant testified that he had only met Becky Horton at the time that she appeared at the apartment which he rented with the two other Vietnamese. (R.36,40) He further testified that he had no prior knowledge that the juvenile was coming to the apartment or that the juvenile was a runaway until the

second evening that she was there. (R.42,39) The defendant indicated that he does have difficulty with the English language. (R.47) The defendant also indicated a lack of understanding of the term "juvenile" and the law relative to harboring juveniles. (R.48,49)

The interpreter was sworn and testified that in his opinion the defendant has a very limited ability to speak and understand the English language, that the defendant did not clearly understand the law and further, that in Viet Nam it was not a crime to help juveniles by giving them shelter. (R.52,53)

POINT J

DEFENDANT'S MOTION TO DISMISS AT THE CLOSE
OF THE STATE'S CASE SHOULD HAVE BEEN GRANTED.

A. NO ACT OF DELINQUENCY WAS PROVEN BY
THE STATE.

The defendant was charged with a violation of Utah Code Annotated, (1953) Section 78-3a-19, in that "the above named defendant, over the age of 18 years, in the above-stated County, State of Utah, did on or about the 21st day of September, 1977, commit the crime of contributing to the delinquency, neglect of Becky Horton, age 17, a child under the age of 18 years, by willfully, intentionally and unlawfully harboring Becky Horton, age 17 years, knowing that the said Becky Horton was a runaway,

and by such conduct did tend to cause the said Becky Horton to become delinquent."

The act of delinquency alleged to have been committed by the juvenile and which defendant is alleged to have caused is the running away of the juvenile from home. The provisions of Section 78-3a-16, Utah Code Annotated (1953) as amended, does not provide that the runaway child be subject to the jurisdiction of the juvenile court as a result of that act. A 1971 amendment to said section, removed the runaway from the jurisdiction of the juvenile court.

There was no allegation of any violation of any state, local, or federal law, nor was there any evidence of any violation of a state, local or federal law on the part of the juvenile introduced by the State. This fact is apparent from the Conclusions of Law entered by the Court wherein the Court stated:

"Based on the foregoing facts, the Court concludes that the female minor child being a runaway was in violation of the law of this State and the conduct of the defendant, Dung Hung Vo, was such that it did tend to cause this child to remain a runaway. That this action was done knowingly and the Court finds him guilty as charged."

The evidence presented at trial by the State was simply that the juvenile had run away from home, that she stayed for three (3) days and two (2) nights at an apartment occupied by the defendant and two other individuals, and that the defendant

knew she was there.

Assuming that the defendant also knew she was a runaway and having that knowledge, he allowed her to remain, it is apparent that even under those circumstances, he has not caused her to be delinquent.

U.C.A. Section 78-3a-16.5 provides:

"The Court shall have jurisdiction in cases referred to the court by the Division of Family Services or those public or private agencies which have contracted with the Division of Family Services to provide the services referred to in Section 55-15b-6 (12) where, despite earnest and persistent efforts of the Division of Family Services of the contracting agency, the child demonstrates that he or she:

- (1) Is beyond the control of the parents, guardian, other lawful custodian, or school authorities to the point that his or her behavior or condition is such as to endanger his or her own welfare or the welfare of others.

- (2) Has run away from home."

In the present case, there was no evidence presented which would establish that the juvenile Becky Horton had been referred to the court pursuant to the statute cited above. Unless so referred after "persistent and earnest efforts" by the Division of Family Services, the act of running away from home is not treated as a delinquent act invoking jurisdiction of the juvenile court.

There being no act of delinquency proven, defendant-appellant submits his conviction should be reversed.

B. THE STATE FAILED TO PRESENT EVIDENCE WHICH, IF BELIEVED, REASONABLE MINDS COULD HAVE FOUND DEFENDANT GUILTY, BEYOND A REASONABLE DOUBT.

At the conclusion of the State's evidence, the defendant-appellant moved the court for a dismissal upon the grounds that the State had failed to prove a prima facie case. The trial court denied the motion.

The complaint charging defendant contains several elements each which must be proven by the State before a conviction may be had:

1. A person over the age of 18 years;
2. contributed to the delinquency of Becky Horton, a child under 18;
3. willfully, intentionally, and unlawfully harboring the said Becky Horton;
4. knowing she was a runaway, and;
5. caused the said Becky Horton to become delinquent.

The State must prove the foregoing elements beyond a reasonable doubt. In State v. Taylor, 21 U2d 425, 446 P 2d 954, this court stated that the prosecution has the burden of proving the elements of the crime beyond a reasonable doubt on a charge of contributing to the delinquency of a minor.

Through an admission of defendant as to his age, the

State proved the first element and also proved the second element through the witness Becky Horton. However, as to the third, fourth, and fifth elements, the State did not present evidence, which if believed, would tend to convince a person of reasonable mind of the guilt of the defendant.

The State failed to present any competent evidence as to the authority or control of the defendant over the apartment.

At page 16 of the transcript of trial, the Court stated:

"COURT: That she remained there for 3 days and 2 nights--uh--I think we should establish something about whose apartment it was and things like that I really haven't heard that yet.

MS. NELSON: Whose apartment was it?

A: Uh...(pause)...I don't know, I was told that Dung was just..."

Defense counsels objection was sustained as to what the witness was told. During the rest of the State's presentation, and prior to defendant's Motion to Dismiss, there was no evidence offered to indicate control of the premises on the part of defendant. The evidence only established that the defendant slept at the apartment the two nights in question along with two unidentified male individuals. Nor was there any evidence of any control over the activities or comings

and goings of the juvenile by the defendant. (R.27,28,29).

The Supreme Court of Washington considered a similar situation in State v. Davis, 558 P 2d 263 wherein the defendant was charged with contributing to the delinquency of minors by furnishing them with alcoholic beverages. The State's evidence established the presence of the defendant at the house where the juveniles were found. The Court held that mere presence in the house without a showing of participative conduct is not sufficient to support a conviction.

Considering the testimony of the juvenile in this case, to the effect that she had run away four times previously (R.25), that she had no prior contact nor arrangements with the defendant and in fact went to two other places prior to going to the apartment where she was found (R.6,7), and considering the defendant actually advised her to return home rather than encouraged her to stay (R.29), it is difficult to imagine a reasonable mind not having a reasonable doubt as to the defendant's acts causing the juvenile to become delinquent.

It is respectfully submitted that the State failed to prove the elements of the case sufficiently to survive defendant's Motion to Dismiss.

POINT II

THE STATE FAILED TO PROVE THAT THE DEFENDANT
"HARBORED" A JUVENILE IN VIOLATION OF UTAH
CODE ANNOTATED, SECTION 78-3a-19.

This Court has previously considered the issues presented by the appeal in State v. Macri, 28 U 2d 69, 498 P2d 355, and the defendant-appellant considers that case to be dispositive of this matter. In Macri, (supra) the juvenile was not induced nor encouraged to leave home by the defendants. She was simply given shelter. Defendants were charged with a violation of U.C.A. 55-10-80(1) which has been redesignated as U.C.A. 78-3a-19, the statute of which defendant appellant in the present case stands convicted.

The Court in Macri, (supra) held that the mere act of providing shelter was not a violation of the statute and further, that defendants had no duty to investigate the age of the juvenile and notify the parents. At 498 P2d 356, the Court stated:

"There is nothing in the record to indicate that during Robin's stay at the church she engaged in any unlawful or immoral conduct, nor was she exposed to criminal or immoral conduct on the part of others. The State contends that the defendants were under a duty to investigate the age and residence of Robin and to notify her parents or the authorities of her whereabouts. We do not believe that the statute referred to above imposes that duty upon the defendants. The simple act of affording shelter to Robin is not a violation of the statute and it is especially true where Robyn was not induced nor encouraged to seek shelter at the premises under control of the defendants."

The evidence adduced at trial by the State failed to establish a prima facie case against defendant in that there was no evidence that defendant encouraged the juvenile to run away from home, the defendant was not informed at any time as to the age of the juvenile, and further, there were no unlawful acts or immoral acts engaged in by the juvenile during the time she stayed at the apartment.

In fact, the State's evidence indicated that the defendant was not at the apartment when the juvenile arrived, (R.10), that the juvenile had had no prior contact with the defendant (R.8), that the only conversation with the defendant the first night she was at the apartment was "Hi" (R.10), that when he did have a conversation with her the second night it was then, upon learning she was a runaway, he advised her to return to her parents (R. 24,28,29), and that the only contact the juvenile had with the defendant was the conversation on the second night (R.30). Further, there was no indication that the defendant knew the juvenile to be under age since she never informed him of that fact (R.29). The defendant did not have any sexual contact with the juvenile nor did he harm her in any way (R.30).

Based upon the foregoing, the defendant-appellant urges the Court to reverse his conviction as coming within this Court's ruling in State v. Macri, (supra).

POINT III

THE TRAIL COURT ERRED IN CONVICTING DEFENDANT-APPELLANT SINCE THERE WAS NO EVIDENCE INDEPENDENT OF DEFENDANT'S ADMISSION TO ESTABLISH THE CORPUS DELECTI.

The juvenile, Becky Horton, was allowed to testify over the objection of defense, concerning a statement made to her by the defendant as follows:

"...he was telling me how he took Cindy somewhere else, so if I got caught, Cindy wouldn't get caught, or if Cindy got caught, I wouldn't get caught." (R.17)

At the time the statement was introduced, the only evidence introduced by the State was that the juvenile had gone to an apartment where the defendant was staying without any encouragement or contact with the defendant, that she had run away from home, and that she had remained at the apartment the night previous to the conversation. At that point, there was never any evidence that anyone had harbored the juvenile.

Utah case law is clear that there must be independent evidence of the crime in order to support a guilty conviction.

In State v. Erwin, 101 U 365, 120 P2d, 285, the Court found that:

"In order to support a verdict; the State must prove the corpus delicti; that is, that a crime was committed... and this without the aid of the admissions of the defendants themselves."

See also State v. Knowfler, 563 P. 2d 175;
State v. Cazier, 521 P 2d 554; State v. Wells, 35 UT 400,
100 P 681; and State v. Johnson, 95 UT 572 83 P2d.

Aside from the admission of the defendant, there was no evidence that the crime alleged to have been committed had actually occurred. Defendant respectfully requests reversal of his conviction for that reason.

CONCLUSION

Appellant submits that the court should have granted defendants Motion to Dismiss for the reasons that no act of delinquency was ever proven by the State, and further, the State failed to present sufficient evidence to convict the appellant.

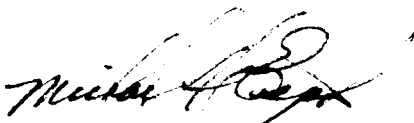
In addition, the appellant suggests that State v. Macri (supra) disposes of the issues presented by this appeal and that the appellant was merely an occupant of an apartment who had no part in encouraging or inducing the juvenile to run away from home.

Finally, appellant maintains that there was no independent evidence of involvement on his part aside from his admissions.

For the above reasons, appellant maintains his conviction.

tion should be reversed, or failing that, a new trial.

RESPECTFULLY SUBMITTED,

A handwritten signature in black ink, appearing to read "Michael D. Esplin". The signature is fluid and cursive, with the first name "Michael" written in a larger, more prominent script than the last name "Esplin".

MICHAEL D. ESPLIN

107 E. 100 South #29
Provo, UT 84601

Attorney for Defendant-Appellant

CERTIFICATION OF DELIVERY

This is to certify that I personally delivered Appellant's Brief, Case Number 15788, along with _____ copies to the Supreme Court of the State of Utah, State Capitol Building, Salt Lake City, Utah, this _____ day of July, 1978.

DELIVERED BY:

I do hereby acknowledge receipt of the foregoing Appellant's Brief, delivered to me this _____ day of July, 1978.

RECEIVED BY: