

1979

State of Utah v. Robert Alex Valdez : Brief of Appellant

Utah Supreme Court

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Dean R. Mitchell; Attorney for Appellant;

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IN THE SUPREME COURT
OF THE STATE OF UTAH

THE STATE OF UTAH,

Plaintiff-Respondent,

vs.

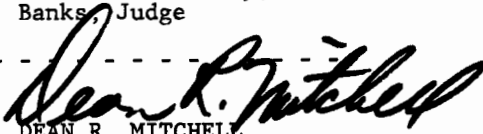
No. 15920

ROBERT ALEX VALDEZ,

Defendant-Appellant.

BRIEF OF APPELLANT

Appeal from a Judgment of the Third Judicial
District Court, in and for Salt Lake County,
the Honorable Jay E. Banks, Judge


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FILED

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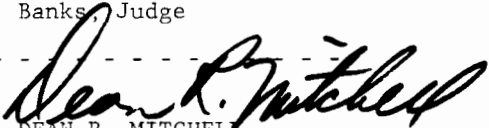
Clerk, Supreme Court, Utah

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THE STATE OF UTAH, :
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ROBERT ALEX VALDEZ, :
Defendant-Appellant. :

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BRIEF OF APPELLANT
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STATEMENT OF NATURE OF CASE

The appellant, Robert Alex Valdez, appeals from a judgment and conviction on jury trial of the crime of negligent homicide in the Third Judicial District Court, the Honorable Jay E. Banks, Judge, presiding.

DISPOSITION BELOW

The appellant was arrested and charged with second degree murder in violation of 76-5-203, U.C.A. 1953. After preliminary hearing he was held for trial and charged by information with second degree murder. Jury trial was held in the District Court of the Third Judicial District on June 12, 1978. The jury returned a verdict on June 14, 1978 of guilty of the lesser included offense of negligent homicide. The appellant was sentenced on June 15, 1978, to serve one year in the Salt Lake County Jail. This appeal was taken on June 23, 1978, from the judgment imposed.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the trial court's judgment and a new trial.

STATEMENT OF FACTS

The appellant was charged and prosecuted for the crime of second degree murder of Melvin Gregory Miller. (R. 10) The prosecution alleged that the appellant shot Miller on the 11th day of December, 1977, in Salt Lake County. At the time of trial, there was no dispute that the appellant in fact shot Miller. The jury returned a verdict of guilty to the lesser included offense of negligent homicide and the appellant was sentenced to be committed to the Salt Lake County Jail for one year. (R. 70, 74).

Debbie Valdez, the daughter of the appellant, (R. 128-129) was not living with her father and mother, but at 4:00 a.m. on December 11, 1977, entered their home, took a set of automobile keys and drove off alone in her father's car. (R. 129) Debbie was 15 years of age and had been going with the deceased, Melvin Miller, for approximately two years. (R. 138) She was residing in a motel at the time the offense occurred. (R. 138) She admitted having given her parents a bad time and had been in the detention home and the Utah State Hospital. (R. 138-139) The deceased was approximately 25 years of age and rumored to be married. (R. 251, 252) The appellant, Robert Valdez, had never seen or met Miller although he had heard that his daughter, Debbie, was going with Miller. (R. 252) Robert Valdez had been advised by a police officer on the Salt Lake

Police Department. Detective Green, that Debbie had been hanging around with the worst kind of people and that Miller had a criminal record. (R. 233) On the morning of December 11, 1977, Robert Valdez noticed his vehicle had been taken by someone. (R. 237) He believed that Debbie had taken the car because the car was gone and he had not heard his dog bark. (R. 238) Valdez had a gun that he purchased while he was working part time with Webb Security as a security guard. (R. 229) He got the gun from the closet and put two bullets in it that a friend had given him. (R. 238) He did not have Miller in mind when he got his gun, but intended to scare Debbie to try to get her to go straight. (R. 237, 238) Valdez in the company of his brother-in-law, Billmen LeFevre, went in the latter's vehicle to try and find Valdez' car. The vehicle was spotted in the vicinity of North Temple and Third West at approximately 10:40 a.m. (R. 109, 129) When Valdez spotted the car, he only observed the driver, Melvin Miller, a black man. (R. 241) He started towards the car when his brother-in-law said, "That's not Debbie". He told Miller to get out of the car and to walk back in the direction of the car that Valdez and LeFevre had been riding in. Valdez grabbed Miller by the shoulder and told him to lean on the car and then looked back and saw that Debbie was in the Valdez car of which Miller had gotten out. (R. 242, 245) Valdez was looking at Debbie when the gun went off. (R. 243) Valdez testified he didn't go to kill Miller and he didn't recall if Miller had hit his gun before the shot was fired. (R. 245) He indicated that his brother-in-law may have called out for him to watch out for

Miller. (R. 246) Other witnesses to the incident testified that Miller, in fact, struck the gun or tapped it just before it went off. Debbie Valdez testified that immediately before the shot, Melvin "chopped the gun" (R. 125) and had testified at preliminary hearing that he hit the gun. (R. 172) Janet Klindt, a bystander in another vehicle, said that she observed the incident that the black man who had been driving the car got out when Valdez was holding a gun, that they walked back towards the car and she saw the black man fall and she saw Debbie Valdez drive away in the car. (R. 111, 113) This was corroborated by the driver of the vehicle in which Janet Klindt was a passenger. (R. 119, 126) Billmen LeFevre testified that he saw Miller as he got out of the car reach out like he was going to get something, that he shouted to Valdez "Watch out, I think he's going to pull something out" and that Miller then hit the gun which went off and Miller fell on the car. (R. 219, 220) After the shooting, Valdez told LeFevre to call the police. (R. 220, 244) The Valdez vehicle had been reported stolen to the police by Robert Valdez' wife. (R. 257) Police officers had received a call concerning the stolen vehicle immediately before going to the scene of the shooting. (R. 187) Valdez remained at the scene and advised the officer who arrived of the fact of the shooting. (R. 175).

The bullet that killed Miller entered in the side of his head at a rising angle and was expended and came to rest in the hatband of the deceased. (R. 152, 161, 178) Police examination of the weapon showed that it contained only two bullets, one:

which had been fired. (R. 179) Valdez' statement to the police at the scene was that he had been looking for the person who stole his car, had gotten the driver who was in his car out of the vehicle and had the gun out and then "didn't know what happened." (R. 182) This was consistent with his testimony at the time of trial. (R. 244, 246) The appellant's statement to Officer Pat Smith who interrogated him following the shooting was that he had not seen Miller before the shooting, although he knew of him through Detective Green and that the gun went off when he was pushing Miller on the car. He indicated he took the gun to scare Debbie. (R. 269, 273). It was Robert Valdez' contention, at the time of trial, as corroborated by other witnesses that the gun went off after Miller had been removed from the vehicle and that he did not intend to shoot Miller but the killing was an accident.

At the time of trial, defense counsel requested the court to instruct the jury to the effect that Valdez had a right to use non-deadly force to terminate criminal interference with his property. (R. 37) The trial court denied the defendant's requested instruction which was to the effect that a person was justified in using force other than deadly force when necessary to terminate criminal interference with his property. (R. 38) In addition, the trial court gave an instruction on negligent homicide (R. 56, 65) and on accident (R. 59). The instruction on accident (R. 59) advised the jury that the killing was excusable if the defendant "acted with * * * ordinary care and caution which would be exercised by the ordinary careful and

prudent individual acting under like circumstances." However, the court's instructions to the jury on negligent homicide were in accord with the provisions of 76-5-206 and 76-2-103(4), Utah Code Annotated, 1953, defining criminal negligence. That standard given the jury was that in order to convict "a gross deviation from the standard of care that an ordinary person would exercise" was required. The appellant's counsel took exception to the failure to give the requested instructions on appellant's right to use force to terminate interference with his property (R. 283)

The jury returned a verdict of negligent homicide.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE APPELLANT'S RIGHT TO USE FORCE TO TERMINATE INTERFERENCE WITH HIS PROPERTY.

At the time of trial, counsel for the appellant requested the judge to instruct the jury that a person could use force other than deadly force in order to terminate criminal interference with the possession of his personal property. The trial court declined to give such an instruction. (R. 37,38) It is submitted that under the appellant's theory of the case such an instruction was proper. The facts disclosed that Robert Valdez's vehicle was taken from his premises early on the morning of December 11, 1977. Because of the manner in which the vehicle was taken, Valdez believed that Debbie Valdez, his daughter, had taken the vehicle. He sought to recover the vehicle which he believed was probably in the vicinity. In the company of

brother-in-law, Billmen LeFevre, he commenced to look for the car. He had previously taken a weapon for the purposes of scaring Debbie Valdez. When he observed his vehicle it was not being driven by his daughter but by another person whom he had not given permission to take or use his vehicle. At the time that the victim, Melvin Miller, was operating the vehicle he knew that it had been taken without permission from Valdez. (R. 142) Miller, upon being told that Robert Valdez had spotted the car, thought that he and Debbie could still get away if the light changed. (R. 143). Miller's action under these circumstances was felonious. § 41-1-112, Utah Code Ann. 1953. Cf. State v. Levin, 587 P.2d 124 (Utah 1978). Valdez approached Miller according to his testimony only with a view towards getting his vehicle back and did not at any time intend to use deadly force. Valdez had Miller get out of the vehicle and move to the rear towards the other vehicle. At that point Valdez saw Debbie, his daughter, and was looking at her when the gun went off. Other witnesses indicated that Miller struck out at the gun just before it went off. The jury's finding of negligent homicide supports the conclusion that the jury believed that Valdez did not intend to kill Melvin Miller and that the death was the result of Valdez' negligence. It in effect was the appellant's position that the gun went off unintentionally. The jury was called upon to determine under the negligent homicide standard whether the appellant had been "criminally negligent". § 76-5-206, Utah Code Ann. 1953. In order to find the appellant criminally negligent, the jury had to weigh whether the conduct of Valdez under the

circumstances constituted "a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances if viewed from the actor's standpoint." In making the determination as to whether Valdez' conduct was criminally negligent or not, the question of whether Valdez had a right to use force to terminate Miller's interference with Valdez' property was a legitimate consideration. If Valdez had no such authority then the use of force could be deemed a gross deviation from the conduct of an ordinary person under the circumstances. If he had a right to threaten the use of force his action in having the weapon could be non-negligent or mere simple negligence. There is nothing inconsistent between the defense position that the gun went off by accident and the right to use force to terminate interference with one's property. In State v. Mitchell, 560 P.2d 1120 (Utah 1977), the defendant was charged with murder in the second degree. This Court reversed a conviction because of a failure to instruct as to the right of the defendant to use force in defense of his habitation. In response to the contention that such a defense is inconsistent with accident, this Court stated:

"It is our judgment that the position of the defendant, that he was defending what he regarded as his habitation, is not necessarily inconsistent with his assertion that the discharge of the gun and the striking of the deceased in the neck was an accident. Furthermore, even if they were inconsistent, that should not deprive the defendant of either defense.

In a criminal case the defendant need not specially plead his defenses. The entry of a plea of not guilty places upon the State the burden of proving every element of the offense beyond a reasonable doubt. This gives the defendant the benefit of every defense thereto which may cause a reasonable doubt to exist as to his guilt, arising either from the evidence,

or lack of evidence, in the case; and this is true whether his defenses are consistent or not.

On the basis of what has been said herein, it is our opinion that if the requested instruction had been given and the jury had so considered the evidence, there is reasonable likelihood that it may have had some effect upon the verdict rendered. Therefore the defendant's request should have been granted."

The above case would support the proposition that the defendant had a right to have submitted to the jury his claim that he had a right to use force to retake his property or effect an arrest or in the alternative the killing was an accident. The jury was entitled to know that the defenses were not necessarily inconsistent with one another.

§ 76-2-406, Utah Code Ann. 1953, provides:

"A person is justified in using force, other than deadly force, against another when and to the extent that he reasonably believes that force is necessary to prevent or terminate criminal interference with real property or personal property:

(1) Lawfully in his possession; . . ."

It is well established that the lawful owner or possessor of property may use reasonable force, other than deadly force, to protect his chattel property. In Clark & Marshall, Crimes, 7th Ed. p. 500, it is observed:

"While a person cannot take another's life or inflict great bodily harm in defense of his property, except when it is necessary to prevent a felony attempted by violence or surprise, he may use any force short of this that may reasonably seem to be necessary in defense of his property, real or personal."

In LaFave & Scott, Criminal Law, p. 399, it is stated:

"One is justified in using reasonable force to protect his property from . . . theft, when he reasonably believes that his property is in immediate danger of such an unlawful interference and the use of such force is necessary to avoid that danger."

The motor vehicle in question was lawfully in the possession of Robert Valdez prior to the action of the victim and Valdez' daughter in interfering with his possession. He therefore had a right to use non-deadly force to terminate their interference with the vehicle. Further, the mere fact that Robert Valdez had in his possession a gun and threatened by its display Melvin Miller did not constitute the use of deadly force. He did not use deadly force until the gun went off. Before then, he merely threatened such force. Robert Valdez had a right to threaten use of deadly force but not the right to use it. Valdez had been told Melvin Miller was a criminal type and a bad person. In Perkins on Criminal Law, Second Edition, p. 1028, it is stated

"Wisely or unwisely the law tolerates a bluff which it would not permit to be carried out, and in a case in which D drew a knife which he threatened to use, but did not use, in defense of his property a conviction of assault was reversed on the ground that a threat to use a weapon may be privileged when its actual use would not be."

Other authorities recognize the difference between the right to use deadly force and the right to threaten its use. The Restatement of Torts, Second § 81(2) provides:

"The actor is privileged in defense of his . . . chattels against intrusion to do an act which is intended to put another in immediate apprehension of a harmful or offensive contact or other bodily harm or confinement which is in excess of that which the actor is privileged to inflict, if his act is intended and reasonably believed by him to be likely to do no more than to create such apprehension."

The same policy is also recognized as to self-defense. See Restatement of Torts, Second § 70(2).

In State v. Yancey, 74 N.C. 244 (1876), the principle was recognized and applied in acquitting a defendant on assault charges in a dispute over the possession of a saddle. The defendant had brandished a knife and declared, "If you don't turn loose, I'll cut you loose." The Court stated:

"This conduct of the prosecutor was not such as to justify an actual battery with the knife in the first instance, but the defendant had the right to do what was necessary to make the prosecutor let go his saddle, beginning with moderate force and increasing in the ratio of the assistance, without measuring it in golden scales.

* * *

A threat to use a deadly weapon, with the power to do it, may often be justifiable, when a battery with the same would not be. And this is one of those cases."

In State v. Terrell, 55 Utah 314, 186 Pac. 108 (1919), this Court reversed a conviction where the trial court failed to give proper instructions as to defendant's theory of the case in a defense of property situation.

In the instant case, appellant does not contend that the facts require his acquittal. It is appellant's position that the jury should have been instructed that if they found that appellant was pursuing the victim to terminate the intrusion of the victim with appellant's property, that he was privileged to so act including threaten, as Valdez impliedly did, the use of deadly force. Such an instruction would have allowed the jury to find that the appellant was acting lawfully in doing what he did up until the time the gun went off. Such an instruction would have allowed and justified the jury in believing that the appellant's conduct, up until the gun

that an ordinary person would exercise." 76-2-103(4), Utah Code Ann. 1953. This was of major significance to the jury as their verdict indicates. The jury could have found that Robert Valdez did not act unreasonably and that the weapon went off by simple negligence or without Valdez' fault. The instruction requested was therefore critical to appellant's theory of the case, was properly requested by appellant, and the failure to give it was prejudicial error. State v. Terrell; supra; State v. Mitcheson, supra.

POINT II

THE TRIAL COURT COMMITTED PLAIN ERROR IN GIVING INCONSISTENT INSTRUCTIONS ON ACCIDENT AND NEGLIGENT HOMICIDE.

The trial judge instructed the jury in Instruction 17C of excusable homicide by accident (R. 59). The instruction given was as follows:

"The killing of a human being in and of itself is not sufficient to convict the defendant.

A killing is excusable when it is committed by accident and misfortune, in doing any lawful act by lawful means, and without any unlawful intent, and where the person causing the death acted with that ordinary care and caution which would be exercised by the ordinarily careful and prudent individual acting under like circumstances." (Emphasis added)

The trial court instructed the jury on the lesser included offense of negligent homicide in Instruction 21. (R. 65) The trial court instructed the jury that to find the defendant guilty of negligent homicide they would have to find that the defendant caused the death of Melvin Miller by engaging in conduct which

constitutes "criminal negligence". (R. 65) The court had previously defined criminal negligence as follows: (R. 56)

"'With criminal negligence' when he ought to be aware of a substantial and unjustifiable risk that the surrounding circumstances exist or the result will occur . . . the risk must be of such a nature and degree that its disregard or failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise. . ."

The instructions on negligent homicide required a finding of gross negligence when viewed from the standpoint of the actor as required by 76-2-103(4) defining criminally negligent conduct. However, the instruction on accident, which is not based on anything in the current Utah Penal Code, advised the jury that the defendant could only be exonerated for the accidental killing of Miller if they found that he acted with "ordinary care and caution". Consequently, the instructions given by the court created a hiatus between gross negligence and no negligence.

One standard to convict, one standard to acquit, and the two standards do not dovetail with one another. Thus, a hiatus existed in the instructions as given by the court. This is apparently because the instruction on accident appears to have been taken in part from the definition of excusable homicide by accident as it existed in the prior penal code. See 76-30-8, R.S. Utah 1898 § 4166. The instruction is not quite in accord with 76-30-8, Utah Code Ann. 1953, as it existed under the prior penal code which was replaced by the current code in 1973, 76-1-102, Utah Code Ann., 1953, Laws of Utah 1973 Ch. 196. The prior code also defined the term "negligence" in terms of simple negligence, 76-1-3(2), Utah Code Ann. 1953. Thus, the

negligence under the prior code. However, the current code defines negligence in terms of "criminal negligence" and requires a gross deviation from the standard of care of an ordinary person. 76-2-103, Utah Code Ann. 1953. Any lesser standard of negligence, except for automobile homicide, is not criminally punishable. Compare, State v. Johnson, 12 Utah 2d 220, 364 P.2d 1019 (1961) with State v. Wade, 572 P.2d 398 (Utah 1977). The instruction given by the court on accident was therefore incompatible with the standard for conviction on negligent homicide which could only have confused the jury. Thus, the jury could have believed that unless the defendant acted as a reasonable prudent man he was not entitled to acquit in spite of the instruction given by the court that to convict on negligent homicide required a higher standard. Thus, with the two inconsistent standards one is left to guess at what standard the jury might have applied.

It is submitted that although no exception was taken to the instruction given on accident, that it was plain error to give the instruction that was given. The current Utah penal code contains no provisions regarding excusable homicide but refers generally to justification excluding criminal responsibility. See, Part 4, Title 76 Chapter 2, Utah Code Annotated, 1953. The standard that existed as to excusable homicide under the prior penal code is different than the standard under the current penal code. Criminal negligence under the prior penal code was defined in terms of simple negligence. Criminal negligence under the current penal code requires a higher level of culpability. The instruction given by the court on accident created a disparity of standards, was not in accord with the provisions of the

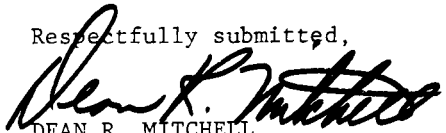
current penal code as to criminal negligence and constituted plain error. State v. Cobo, 90 Utah 89, 60 P.2d 952 (1936).

CONCLUSION

It is respectfully submitted that the trial court committed reversible error. The defendant is entitled to have the jury instructed on his theory of the case if the evidence warrants it. In this case the evidence warranted an instruction to the jury that the appellant was justified in using force to terminate the criminal interference with his property. The court's refusal to so instruct could only have prevented the jury from proper consideration of whether appellant was criminally negligent.

The court also committed prejudicial, plain error in giving an instruction on accident that was outside of current penal code and not compatible with the instruction given for negligent homicide. Prejudicial error was committed, this Court should reverse.

Respectfully submitted,



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