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State of Utah v. Kenneth Sharp, George Christensen, and James N. Tucker : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent, -v- KENNETH SHARP, GEORGE CHRISTENSEN and JAMES N. TUCKER, Defendant-Appellants.	:	Case Nos. 16147, 16040 and 16019

BRIEF OF APPELLANTS

Appeal on behalf of appellants, KENNETH SHARP and GEORGE CHRISENSEN, from the judgment and conviction of Aiding Escape in the District Court of the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Bryant H. Croft, Judge presiding.

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent, -v- KENNETH SHARP, GEORGE CHRISTENSEN and JAMES N. TUCKER, Defendant-Appellants.	:	Case Nos. 16147, 16040 and 16019

BRIEF OF APPELLANTS

STATEMENT OF THE NATURE OF THE CASE

Appellants, KENNETH SHARP and GEORGE CHRISTENSEN, were convicted as charged of the offenses of Aiding Escape and Theft of an Operable Motor Vehicle in the District Court of the Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable Bryant H. Croft, Judge presiding. This brief is intended to apply to appellants KENNETH SHARP and GEORGE CHRISTENSEN and treats only the conviction of the crime of Aiding Escape. Appellants KENNETH SHARP and GEORGE CHRISTENSEN join in a separate brief dealing with the conviction of the crime of Theft of an Operable Motor Vehicle.

DISPOSITION IN THE LOWER COURT

Appellants were sentenced to prison for the term as provided

by law for both charges, which sentences were to run concurrently, after a jury found them guilty of the offenses of Aiding Escape and Theft of an Operable Motor Vehicle.

RELIEF SOUGHT ON APPEAL

Appellants seek reversal of the judgment rendered on both counts, or in the alternative, a new trial.

STATEMENT OF THE FACTS

At the trial in the above entitled matter, Glenn Hudson, a Records Identification Officer at the Utah State Prison, testified regarding the status of the three appellants in the above entitled action on the date of April 19, 1979. After laying a foundation regarding the records that he had in his possession, State's Exhibit 2-S was admitted which showed that the appellant JAMES N. TUCKER had been committed to the Utah State Prison for an indeterminate term as provided by law for a crime of Rape, of not less than one nor more than fifteen years. Also admitted were records purporting to be an order for a 90-day evaluation for the appellant KENNETH SHARP (State's Exhibit 5-S) and a similar order for the appellant GEORGE CHRISTENSEN (State's Exhibit 6-S).

On the face of the above documents it appeared that the appellant JAMES N. TUCKER was incarcerated at the Utah State Prison pursuant to a valid commitment while the appellants SHARP and CHRISTENSEN were in the Utah State Prison only for the purposes

of testing and evaluation.

Paul Christensen testified that on the 18th day of April, 1978, he was employed at the Utah State Prison and that he knew all three of the appellants (R. 205). Mr. Christensen testified that on the day in question he had taken the three appellants out to work in an area of the farm on the Utah State Prison grounds. Some hour and a half later, he returned to discover two shovels together in one portion of the ditch, and a third shovel at the other end of the field (R. 220).

Mr. Christensen then reported the three appellants missing. He further testified that some time later he was called to an area in Butterfield Canyon where he made an indentification of two of the appellants, SHARP and CHRISTENSEN.

Eleanor Collard testified for the State that on the 19th day of April, 1978, she was employed and on duty for Riverton City. She further testified that around 3:00 in the afternoon she had an occasion to see three young men walking down the street side by side (R. 231). Darlene Ruark testified for the State that on April 19, 1978, she was working at Save More Television at approximately 12600 South on Redwood Road (R. 238). She further testified that on that day at approximately 2:45 she observed three males in front of the windows in the store (R. 240). Marsha Ruark testified that on April 19, 1978, she was also at Save More Television and that she arrived there between 1:00 and 1:30 in the afternoon in a white 1971 Cadillac. Some time between 2:30 and

3:00 she observed a person to walk briefly into the store and shortly thereafter, she heard an engine start. She ran to the front door and looked out to observe her car being driven away (R. 249). Marsha Ruark further testified that she gave no one permission to take her car from the place where it was parked on the day in question. Mrs. Ruark reported the theft of her automobile to the police authorities and Leonard Smock and Officer Whipple, among others, left in pursuit of the vehicle. Officer Whipple spotted the vehicle and several officers joined in a chase. The Cadillac proceeded at a high rate of speed, running cars off the road and running a stop sign in at least one location (R. 289). Several police cars pursued the vehicle at speeds up to 70 and 80 m.p.h. (R. 291), eventually following into an area of Butterfield Canyon. The total distance of the chase was approximately five miles (R. 299). The appellant, JAMES N. TUCKER, was observed by the officers to be driving the vehicle.

At the conclusion of the chase, the appellants SHARP and CHRISTENSEN, passengers in the vehicle, abandoned the vehicle, fled in one direction and were captured shortly thereafter. The driver, TUCKER, fled in another direction and was subsequently apprehended in the neighboring vicinity by a citizen in the area. Marsha and Darlene Ruark testified that, when they had recovered the vehicle later, the license plates had not been removed or altered and that the vehicle did not appear to be damaged, except for being covered with dirt and smeared with the "dust" that was

used to test for fingerprints on the vehicle (R. 243, 253).

Appellant TUCKER testified under oath that on the 19th day of April, 1978, he was in the Utah State Prison on a commitment. He also testified that on April 19th he was put on a work detail and he left on his own and without any aid from the appellants SHARP and CHRISTENSEN (R. 233).

Appellant TUCKER further testified that some time later he ran into the other two appellants in Riverton. He said that he had been drinking during the course of the morning while at the prison, and that in Riverton he began to sober up to the point where he resolved to go back to the prison. He and appellant SHARP started to hitchhike back towards the prison, when appellant CHRISTENSEN drove up in a 1971 Cadillac. Appellant TUCKER testified that they then resolved to drive around a little bit before going back to the prison and turning themselves in (R. 237).

Appellant TUCKER further stated that when he saw the police he panicked and fled in the vehicle. He ended up driving to the Butterfield Canyon area, where he was subsequently apprehended.

ARGUMENT

POINT I

THE APPELLANTS, SHARP AND CHRISTENSEN, WERE INAPPROPRIATELY CHARGED WITH THE CRIME OF AIDING ESCAPE WHEN THEIR ACTUAL OFFENSE, IF ANY, WAS THE CRIME OF ESCAPE, A CLASS B MISDEMEANOR.

Appellants SHARP and CHRISTENSEN have been charged and convicted under Utah Code Ann. §76-8-310 (1953), which provides in pertinent part:

> Aiding Escape--(1) A person is guilty of an offense if:
>
> (a) he aids another person to escape from official custody; . . .
>
> (2) An offense under this section is a felony of the second degree if: . . .
>
> (b) a person to whom the aid or item to facilitate escape is given is a prisoner confined in the state prison; . . .

Appellants contend that the State produced insufficient evidence to warrant a conviction on the offense of Aiding Escape for reasons stated below.

A. INTENT ELEMENT

Both the principal offense of Escape, Utah Code Ann. §76-8-309 (1953) and Aiding Escape, Utah Code Ann. §76-8-310 (1953) lack a specific intent requirement. Utah Code Ann. §76-2-102 (1953) provides that every offense not involving strict liability shall require a "culpable mental state." Where a particular statute does not specify a culpable mental state required

for the offense, §76-2-102 states a requirement of intent, knowledge or recklessness. Thus, for the offenses of escape and aiding escape, either an intentional, knowledgeable or reckless mental state of the accused to commit the offense must be proven. Utah Code Ann. §76-2-202 (1953) requires that:

> Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be liable as a party for such conduct. (Emphasis Supplied)

Thus, the mental intent for the principal offense and the aiding offense must be the same. Appellant TUCKER, as the principal offender, intended his escape while appellants SHARP and CHRISTENSEN did not share TUCKER's intent to effect their escape. The fact that TUCKER and the other two appellants were seen with each other after appellants SHARP and CHRISTENSEN escaped is no evidence that they assisted each other in escaping from the prison farm, and does not evidence intent on appellants SHARP and CHRISTENSEN's part, either intentional, knowing or reckless, to effect TUCKER's escape. There is no evidence in the trial record to indicate that appellants intended to aid TUCKER in his escape. "Aiding" means that "the aider must stand in some relation to the crime as the criminal, approach it from the same angle, touch it at the same point, and posses criminal intent". State v. Bearden, 405 P.2d 885 (Ariz. 1965) (Arizona Aiding Statute similar to Utah Code Ann. §76-2-202). Appellants, present at the prison farm for

a 90-day evaluation, possessed only the intent necessary to effect their escape, which would constitute a Class B Misdemeanor. The fact that TUCKER later joined them and the fact that TUCKER was a prisoner lawfully confined, were mere fortuitous events for which appellants should not be held accountable for absent the intent to commit the crime for which they were charged and convicted.

B. ESCAPE

Escape is defined as the unlawful departure of a prisoner from the limits of his custody. State v. Jones, 36 P.2d 530 (Idaho 1934). People v. Quijada, 199 P.854 (Calif. 1921) (prisoner unlawfully going beyond walls of prison is guilty of escape and not attempted escape, though he was captured while within the territory connected with the prison grounds). Appellants contend that the escape of TUCKER was complete when TUCKER walked away from the prison grounds and ended before he joined appellants. Where the escape is complete, and absent evidence of aiding (see infra), the conviction cannot stand on an aiding escape charge. In State v. Faulk, 136 So.601 (Fla. 1931) the Court, in regard to common-law escape, determined that "once the prisoner has succeeded in getting beyond the custody of and out of sight of the custodian, the escape is complete." 136 So. at 603. A prisoner, who was where he had no right to be without permission, even though it was not clear whether he was within or without the

area owned by prison, was guilty of escape where he removed himself from "the imposed restraint over his person and volition." People v. Quinters, 241 N.W.2d 251 (Mich. 1976). According to TUCKER's own testimony, he joined appellants after his escape was complete in terms of his removal from the imposed restraint over his person and volition.

Orth v. United States, 252 F.566 (C.A.4 1918), involved a prisoner who had escaped from an Atlanta, Georgia prison in August and appeared in Charleston, South Carolina, where the defendant resided. There was evidence that the defendant aided and protected the prisoner and assisted him in leaving Charleston. Defendant was convicted of aiding an escape but the Circuit Court of Appeals found:

> The evidence furnished no foundation for conviction of the charge of aiding Fay to escape from lawful custody. When the physical control has been ended by flight beyond immediate active pursuit, the escape is complete. After that aid to the fugitive is no longer aiding his escape. 2 Wharton, Cr.L. 2606; 1 Russell on Crimes, 467, 10 R.C.L. 579; Smith v. State, 8 Ga. App. 297, 68 S.E. 1071; State v. Ritchie, 107 N.C. 857, 12 S.E. 251.
> 252 F. at 568.

Physical control over TUCKER was ended when he walked away from the prison farm and entered the town of Riverton. That is evident from his testimony when he entered a bar for a drink. The escape was complete and any aid to TUCKER after that was not aiding an escape.

Appellants contend, in fact, that even if the escape was

not complete, the evidence does not show that they aided TUCKER.

C. AIDING ELEMENT

Aiding means to incite, encourage, instigate, or supplement commission of an offense. State v. Atwood, 492 P.2d 1279 (N.M. 1972); State v. Roberts, 336 P.2d 151 (Ariz. 1959).

To aid an escape or to aid in the general sense requires an intent to give aid and pricipal offender must know of the intent to give aid, Maxwell v. State, 43 So.2d 323 (Ala. 1949), and if there is no prearrangement or preconcert between persons charged with crime, mere presence of one of them to give aid if necessary is not aiding unless principal offender knew of such presence with intent to aid. Wright v. State, 333 So.2d 215 (Ala. 1976); State v. Cydzik, 211 N.W. 2d 421 (Wisc. 1973). It is not essential that there be a prearranged concert of action, however, in the absence thereof, it is essential that the aider should in some way advocate or encourage the commission of the crime. Coleman v. State, 121 A.2d 254 (Md. 1956). There is no evidence indicating that appellants intended to assist TUCKER in any means nor that appellants were even aware of TUCKER's intentions. Also, TUCKER did not indicate that he knew of appellants alleged intentions to assist him. The record simply shows appellants engaging in a Class B Misdemeanor escape when TUCKER happened along. There was no preconcert, no arrangement, no plan or common design. There was mere presence of the appellants with TUCKER, who, by his

escape, committed a felony. Mere presence, absent a showing of criminal intent, is not enough. Wright v. State, supra. In addition acquiescence in the actions of another is insufficient to constitute "aiding". State v. Stark, 490 P.2d 511 (Ore. 1971). Appellants merely acquiesced to TUCKER's committed felony. Any action taken by appellants while in the presence of TUCKER was not for the benefit of, or to "aid, assist, encourage or supplement" TUCKER's acts. Their conduct does not fall within the purpose of the statute.

D. PUBLIC POLICY

In reviewing cases wherein defendants were convicted of aiding an escape under statute, the obvious purpose of the statutes, similar to Utah Code Ann. §76-8-310, is not aimed at appellant's conduct.

Even in situations where prisoners act in concert when each is endeavoring to effect his own escape, there is stronger evidence than in this case of conduct that falls within the statute. In Luke v. State, 49 Ala. 30 (1873), two persons confined in jail under charges of felony, acting in concert, set fire to the jail for the purpose of burning a hole through which they may escape, each intending to effect his own escape. The defendants acted intentionally toward a common purpose, i.e. breaking out. There is no such evidence in the instant case.

In People v. Creeks, 149 P.821 (Cal. 1924), there was

evidence of a conspiracy to escape. There was no evidence in appellants' case of intent to aid TUCKER much less conspire to aid him escape. In State v. Navarro, 163 A. 103 (Me. 1932), the evidence showed that defendant was told that some prisoners had escaped, drove to the jail and was later found with the escaped prisoners. The Court found this conduct to fall under the aiding an escape statute. The Court found an intention to assist the prisoners. In State v. Cooper, 272 A.2d 557 (N.J. 1971), defendant's acts consisted of breaking out of his cell block, opening the other cell block and attempting to take over the prison which aided in the escape of other prisoners. Appellants' conduct certainly is not consistent with those acts which have been found to constitute the aiding of an escape under statutory law and, hence, is not under the purpose of the statute.

E. CONFLICTING STATUTES

Appellants were charged and convicted under Utah Code Ann. §76-8-310 (1953):

> Aiding escape--(1) A person is guilty of an offense if: . . .
> (a) he aids another to escape from official custody; . . .
> (2) An offense under this section is a felony of the second degree if: . . .
> (b) a person to whom the aid or item to facilitate escape is given is a prisoner confined in the state prison; . . . 1

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1. History: C. 1953, 76-8-310, enacted by L. 1973, ch. 196, §76-8-310.

Appellants contend that their conduct is more specifically covered by Utah Code Ann. §76-8-309 (1953):

> Escape--Term for escape from state prison--
> (1) A person is guilty of escape if he escapes from official custody.
> (2) The offense is a felony of the second degree if: . . .
> (b) the actor escapes from confinement in the state prison. Otherwise, escape is a Class B Misdemeanor.[2]

Where appellants were not "confined" but rather at the prison for a 90-day evaluation, the grade of offense applicable is a Class B Misdemeanor. It is clear that the above statute is more narrowly drawn than Utah Code Ann. §76-8-310 (1953). The above statute specifically singles out prohibited conduct as charged against appellants, i.e. escape.

Rules of common law statutory interpretation as well as rulings by the Utah Supreme Court clearly establish the proposition that when two statutes encompass the same criminal conduct, the more specific statute or the latest statute to be enacted should be applied. State v. Shondel, 22 Utah 2d 143, 453 P.2d 146 (1965).

The Shondel case is directly on point to the case at bar. That case involved an overlap of the Drug Abuse Control Law and the Narcotic Drug Act which were both enacted during the same session at the 1967 Legislature of Utah. Shondel was charged with possession of the drug LSD. The Drug Abuse Control Law provided a misdemeanor penalty for that offense while the Narcotic Drug

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2. History: C. 1953, 76-8-309, enacted by L. 1973, ch. 196, §76-8-309.

Act made the same offense a felony. The Supreme Court held that the clear, specific and lesser penalty prescribed for the offense of possession of LSD was applicable rather than the more sever penalty provided by overlapping provisions at the Narcotic Drug Act. Accord, Rammel v. Smith, 560 P.2d 1108 (Utah 1977), State v. Loveless, 581 P.2d 575 (Utah 1978).

In State v. Fair, 23 Utah 2d 34, 456 P.2d 168 (1969), the Utah Supreme Court ruled on a similar matter. In that case, the defendant was convicted of uttering a forged prescription. The Supreme Court ruled that an amendment by the Legislature making the uttering of a forged prescription subject to legislative fiat, one of which would penalize an accused as a misdemeanant and the other as a felon, gave accused the benefit of being accountable only for the lesser of the two penalties-

In the case at bar, the statute under which appellants were convicted, §76-8-310, was enacted at the same time that the more applicable statute, §76-8-309, was enacted. The Utah Supreme Court noted in both the Shondell and Fair decisions that where there is a conflict between the legislative acts, the latest will ordinarily prevail. That rule is obviously not controlling here where the statutes were enacted at the same time. The holding of Shondell, Fair, Rammel and Loveless, supra, that the clear, specific and lesser penalty prescribed shall be applied when two statutes encompass the same conduct in controlling. The statute under which appellants were convicted is not specific and narrow

when compared to the more applicable statute, §76-8-309. In Shondell, supra, the Court stated:

> Related to the doctrine just stated is the rule that where there is doubt or uncertainty as to which of two punishments is applicable to an offense an accused is entitled to the benefit of the lesser. 453 P.2d at 148.

Since §76-8-309 refers specifically to an escape and appellants would be punishable only as to a Class B Misdemeanor, as compared to the §78-6-310 Second Degree Felony penalty, appellants are entitled to the benefit of that lesser punishment under §76-8-309.

Numerous jurisdictions have also held that where a statutory conflict exists, the more specific provision or statute will be applied. In Bateman v. Board of Examiners of State of Utah, 322 P.2d 381, 7 Utah 2d 221 (1958), the Utah Supreme Court was faced with a dispute between the Board of Examiners and the Board of Education as to which body had the authority to administer the Department of Education. The Court noted that general rule of statutory interpretation that "as to conflicting statutes, the more specific takes precedence over the general . . ." Bateman, supra, 381 at 389.

The premise is well established that when two statutes conflict the more specific statute governs. See Barum v. State Compensation Fund, 134 P.2d 505, 30 C.2d 575 (1946); Ex Parte Shull, 146 P.2d 417, 23 C.2d 745 (1944); State v. Backman, 368 P.2d 793, 149 Colo. 542 (1962); In Interest of Waterman, 512 P.2d 466, 212 Kan. 826 (1973).

There is an indisputable rule of statutory construction which is applicable to the case at bar: When two statues encompass the same criminal conduct, the more narrow or specific statute governs. Related to that doctrine is the rule that where there is doubt, the accused should be given the benefit of the lesser penalty. Since the escape statute, §76-8-309, covers more specifically the appellants' conduct and the penalty under that statute is lesser, appellants are entitled to the the benefit of that statute.

CONCLUSION

Appellants contend, given the inappropriate nature of the charge of Aiding Escape, that the conviction for the crime of Aiding Escape should be reversed and a judgment of acquittal should be entered, or in the alternative, that the appellants should be granted a new trial.

DATED this ____ day of October, 1979.

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