1979

State of Utah v. Charles Erwin Alexander : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

CHARLES ERWIN ALEXANDER,

Defendant-Appellant.

Case No. 16025

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE FOURTH JUDICIAL DISTRICT COURT, IN AND FOR DUCHESNE COUNTY, STATE OF UTAH, THE HONORABLE ALLEN B. SORENSEN, JUDGE, PRESIDING

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

OTHER AUTHORITIES CITED

IN THE SUPREME COURT OF THE

STATE OF UTAH

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STATE OF UTAH, :

Plaintiff-Respondent, :

-vs- : Case No. 16025

CHARLES ERWIN ALEXANDER, :

Defendant-Appellant. :

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BRIEF OF RESPONDENT

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STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with aggravated sexual assault in violation of Utah Code Ann. § 76-5-405(1)(a)(ii) (1953, as amended).

DISPOSITION IN THE LOWER COURT

Appellant was tried to the Court, the Honorable Allen B. Sorensen presiding and was found guilty of the crime charged.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the guilty verdict.

STATEMENT OF THE FACTS

On the afternoon of October 17, 1977, appellant and a co-defendant, Luther Lee Cook, drove a furniture van in front of Union High School and forced a young woman waiting at the school to enter the van. (Tr. 12, 13 49, 50). Appellant was driving the van and proceeded toward Vernal. Cook warned the girl that if she said anything, he and appellant would use a knife which appellant was holding in his hand (Tr. 14, 15). While driving, Cook put his arm around the girl and appellant told Cook that he would kill him if he didn't leave the girl alone. Cook complied (Tr. 45).

The van eventually turned off onto a dirt road fourteen to sixteen miles outside of Roosevelt where it became high-centered (Tr. 16-17).

Appellant, Cook, and the girl left the van and the girl attempted to escape (Tr. 18). Cook chased her, threatened her with a knife and put her in the back of the van (Tr. 18). While in the back of the van, the girl heard Cook threaten appellant (Tr. 18-19), although Cook denied making the threat.

Eventually Cook entered the back of the van and told the girl to undress (Tr. 21-22). She finally agreed after Cook again threatened her with the knife (Tr. 22).

Cook began raping the girl and appellant entered the van from the front. He watched briefly and when the girl continued to struggle, appellant put a screwdriver to her side, scratched her with it, and told her to stop fighting and to "move." (Tr. 22, 23). The victim couldn't remember everything that happened, but it is possible that appellant then attempted to rape her (Tr. 56).

Appellant and Cook left the back of the van and attempted to free it (Tr. 24). While appellant and Cook were digging under the van, appellant became ill, apparently because of a hypoglycemic reaction and a peptic ulcer (Tr. 24, 103, 106).

While appellant and the victim were digging out the van, Cook disappeared (Tr. 24). The victim asked appellant to let her go and he finally relented and allowed her to leave (Tr. 24-25).

Appellant's theory of the case was that Cook threatened him and forced him to aid in the rape (Tr. 10).

Appellant's testimony, however, established that he was bigger than Cook (Tr. 95), and other testimony indicated that appellant likewise threatened Cook (Tr. 45).

The trial court, acting as the finder of fact, concluded that appellant aided and abetted in the commission of the aggravated sexual assault and found him guilty.

Appellant now appeals claiming the Court did not give sufficient weight to his theory of the case.

ARGUMENT

POINT I.

THE TRIAL COURT'S DECISION IS CORRECT AND APPELLANT DID NOT ACT UNDER COERCION OR THREAT OF IMMINENT HARM.

Appellant contends that he was forced by Cook to assist in Cook's rape of the victim and is therefore not guilty. Appellant bases this argument on Utah Code Ann. § 76-2-302 (1953, as amended), which states (inter alia):

> (1) A person is not guilty of an offense when he engaged in the proscribed conduct because he was coerced to do so by the use or threatened imminent use of unlawful physical force upon him or a third person, which force or threatened force a person of reasonable firmness in his situation would not have resisted.
>
> (2) The defense of compulsion provided by this section shall be unavailable to a person who intentionally, knowingly, or recklessly places himself in a situation in which it is probable that he will be subjected to duress.

Appellant suggests that subsection (1) above posits a subjective test and therefore, because of his apparent illness, his conduct was reasonable and not culpable.

This contention is unsupported by the clear language of the statute and the facts of this case and case law.

First, subsection (1) establishes an objective test rather than a subjective one. Naturally, the conduct of the accused will be viewed under the circumstances as they existed. However, the accused's conduct must conform to that of "a person of reasonable firmness" under these circumstances.

Any other construction of subsection (1) makes the above-quoted phrase meaningless, contrary to the standard rule of statutory construction which assumes legislative purpose and meaning for every word in a statute.

Therefore, appellant's conduct must be measured against that of a person of reasonable firmness. This construction is supported by a New Mexico case, Esquibel v. State, 91 N.M. 498, 576 P.2d 1129 (1978). The Esquibel Court was asked to construe New Mexico's Duress instruction, N.M. U.J.I. Crim. 41.20, which states:

> Evidence has been presented that the defendant was forced to _____ under threats. If the defendant feared immediate great bodily harm to himself or another person if he did not commit the crime and if a reasonable person would have acted in the same way under the circumstances, you must find the defendant not guilty. The burden is on the State to prove beyond a reasonable doubt that the defendant did not act under such reasonable fear.

The New Mexico Supreme Court found that:

> Duress and coercion are defenses to a criminal charge, if the accused feared immediate great bodily harm to himself or another person if he did not commit the crime charged and if a reasonable person would have acted the same way under the circumstances. State v. LeMarr, supra; State v. Lee, 78 N.M. 421, 432 P.2d 265 (Ct.App. 1967), N.M. U.J.I, Crim. 41.20; Annot., 69 A.L.R. 3d 678 at 684 (1976).

(Emphasis in original).

The questions to be asked under this standard are: (1) was appellant coerced or threatened with the imminent use of physical force upon himself or the victim to compel his aid in committing the crimes, and (2) would a person of reasonable firmness have resisted the threats?

The facts of the case indicate that appellant failed both parts of the test. The testimony suggests that Cook may have verbally threatened appellant several minutes before the rape (Tr. 18-19, 59). However, Cook was smaller than appellant (Tr. 95), and had altered his behavior earlier because of a threat by appellant (Tr. 45).

Cook entered the back of the van before appellant, during which time appellant could have secured a weapon, escaped, or summoned help. Appellant entered the truck without coercion and threatened the victim without inducement from Cook (Tr. 22-23).

It should be noted that there is a fundamental difference between Cook's threats to the victim during the rape which established the prima facie case and his conduct toward appellant which purportedly activates the compulsion defense. The rape was accomplished because of an imminent threat of violence to the victim (Tr. 21-23). However, appellant's aiding and abetting was not the result of threats to the victim or himself, and is not justified by threats used to accomplish the rape.

Appellant argues that his hypoglycemia and ulcer diminished his ability to resist. The testimony, however, established that appellant did not become ill until after the rape (Tr. 24). The medical testimony did not show or even suggest any dimination in willpower or courage because of hypoglycemia or peptic ulcer. Appellant was not threatened during the course of the rape and the evidence shows that during the rape Cook was not holding a weapon (Tr. 35-36).

Cases from other jurisdictions dealing with the defense of compulsion or duress posit that the threat must be of imminent and present violence. Threats of some future violence or injury are insufficient to invoke the defense. State v. Milum, 516 P.2d 984 (Kan. 1973); People v. LaCicero, 459 P.2d 241 (Calif. 1969). The facts here do not satisfy the requirements of immediacy established by case law.

Respondent asserts that a person of reasonable firmness under the circumstances presented by the evidence would have resisted the compulsion to aid in the commission of the rape. Indeed, under the circumstances here it appears that appellant could have prevented the rape by exercising reasonable resistance and yet made no effort to do so.

The second part of § 76-2-302 is also fatal to appellant's position. Subsection (2) quoted supra states:

> (2) The defense of compulsion provided by this section shall be unavailable to a person who intentionally, knowingly, or recklessly places himself in a situation in which it is probable that he will be subjected to duress.

The evidence indicates that appellant was aware of Cook's criminal intentions long before the crime occurred (Tr. 51-54). After appellant and Cook forced the victim into the truck, it was apparent that appellant sensed what was going to occur. A reasonable person in appellant's situation should have surmised Cook's intentions a considerable time before the crime.

Under subsection (2), therefore, appellant intentionally and knowingly placed himself in a situation in which it was probable that a crime would occur and probable that he would be subjected to duress to aid in the commission of a crime.

Two recent Federal Circuit Court cases indicate that where a defendant has opportunity to avoid the situation in which compulsion will occur, the defense cannot be asserted. United States v. Seattle, 585 F.2d 307 (8th Cir., 1978); United States v. Atencio, 586 F.2d 744 (9th Cir., 1978). In the present case, even assuming that the alleged threats here were authentic and compelling, appellant had many opportunities to avoid the situation. He could have refused to go with Cook to look for girls. No testimony was offered that he considered this option. He could have driven away when Cook initially confronted the victim, yet no testimony was offered that he considered this alternative. Even after the victim was in the van, appellant could have taken another route or helped her escape. Appellant did not pursue either opportunity. Thus, appellant had several chances to totally avoid the situation in which he was allegedly forced to aid in the rape and yet willingly continued his involvement. All of these factors preclude appellant from asserting the compulsion defense.

Appellant proposes that Chacon v. People, 488 P.2d 56 (Colo. 1971), dealing with self-defense and apparent necessity should apply to this case. Such a proposal is without merit.

First, the Utah compulsion statute establishes a requirement of imminent force. The "appearance of real danger" theory suggested in Chacon, supra, is inconsistent with the existence of imminent force. Respondent concedes that apparent necessity may be sufficiently compelling when a person is defending himself, but submits that a higher standard of necessity is needed when the circumstances require not only self-protection, but also affirmative assistance in committing a known felony unrelated to the act of self-defense. Respondent suggests that one who asserts the compulsion defense must do everything reasonably possible to test the authenticity of a threat of imminent force before aiding in the commission of a felony. Appellant here did nothing to determine whether Cook was actually willing to fulfil his alleged threat and did nothing to dissuade Cook from raping the victim.

CONCLUSION

Appellant has failed to meet the requirements of the compulsion statute, Utah Code Ann. § 76-2-302. There was no showing of threatened imminent use of unlawful physical force to compell assistance to the commission of the rape. The force or threat of forced used to accomplish the rape does not satisfy the requirement of compulsion to assist in the rape. Appellant did not act as a person of

reasonable firmness would have acted under the circumstances. The test for determining reasonable firmness is objective, not subjective. Appellant's illness was not shown to diminish his will power, courage, resistance, or thinking.

Under the circumstances of the crime and statutes and case law dealing with compulsion, appellant's defense must fail. The Court, acting as trier of fact, properly found that appellant aided and abetted in the commission of a rape and that conviction should be affirmed by this Court.

Respectfully submitted,

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