1979

State of Utah v. Kenneth Sharp et al : Brief of Appellants

Utah Supreme Court

Ronald J. Yengich; Brad P. Rich; Kevin Kurumada; Attorneys for Appellants;
Robert Hansen; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

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

BRIEF OF APPELLANTS

Appeal on behalf of appellants, KENNETH SHARP, GEORGE CHRISTENSEN, and JAMES N. TUCKER, from the judgment and conviction of the crime of 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.

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BRIEF OF APPELLANTS

STATEMENT OF THE NATURE OF THE CASE

KENNETH SHARP, GEORGE CHRISTENSEN, and JAMES N. TUCKER, were convicted as charged of the offense of Aiding Escape, and Theft of an Operable Motor Vehicle, in the District Court of the Third Judicial District, in and for the County of Salt Lake, State of Utah, the Honorable Bryant H. Croft, Judge presiding.

This brief is intended to apply to Appellants KENNETH SHARP, GEORGE CHRISTENSEN, and JAMES N. TUCKER, and treats the conviction of the crime of Theft of an Operable Motor Vehicle, pursuant to §76-6-404, Utah Code Annotated (1953 as amended).

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 Escape, Appellant TUCKER; Aiding Escape, Appellants SHARP and CHRISTENSEN; and Theft of an Operable Motor Vehicle, all Appellants.

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 identification 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 occassion to see three young men walking down the street side by side. (R. 231) Darlene Ruark testified for the State that on April 19th, 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 19th, 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 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, eventually following into an area of Butterfield Canyon. (R. 291) 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 turn themselves in. (R. 237)

Appellant TUCKER further states 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 TRIAL COURT ERRED IN REFUSING TO GIVE TO THE JURY THE REQUESTED INSTRUCTION RELATING TO THE LESSER INCLUDED OFFENSE OF DEPRIVING THE OWNER.

The appellants throughout the course of the trial attempted to introduce evidence relating to the intention of the defendant relative to the taking of the car. The owner of the car, Darlene Ruark, testified on cross examination that there was no damage done to the car other than that it was dirty and dusty, and had been fingerprinted by the police. (R. 243) On cross examination, counsel for one of the appellants elicited from the daughter of the owner of the vehicle testimony that the vehicle was in no way damaged, that the license plate hadn't been altered, that the vehicle hadn't been repainted, and that there was no other alteration of the vehicle in any way. (R. 253-254) Leonard Smock, Chief of Police of Riverton, Utah, testified that the vehicle was driven only about five miles from its location in Riverton (R. 299),

and that he and other police officers were in pursuit of that vehicle throughout almost all of that distance. Police Chief Smock testified that when he reached the vehicle that it's condition did not appear to have been altered in any way. (R. 300)

Counsel for the Appellant TUCKER, after having laid a foundation regarding the police chief's expertise as a police officer, and as having established his background in previous escape searches, put to the witness the question "Chief, in your experience as a police officer, are you aware that individuals, and individuals that might escape, would generally not keep a vehicle that they take, true?", at which point (R. 300), to this question, the prosecution interposed an objection which objection was sustained. (R. 301) After laying further foundation, counsel put the question to the police chief again. Counsel for the respondent once again raised an objection which objection was once again sustained. (R. 301)

The Appellant TUCKER testified in his own behalf and in behalf of the co-defendants that none of them intended to permanently deprive the owner of the car and that they only intended to use the car to get back to the prison itself. (R. 346)

In Appellant TUCKER's proposed instructions Numbers 2 and 3*, Appellant properly requested the trial court to instruct the jury on the offense of Depriving an Owner Temporarily of his Vehicle, a violation of §41-1-109, Utah Code Annotated (1953 as amended). (R. 55) This instruction was denied as an alternative theory to Count I of the Information by the trial court. (R. 56) Counsel for all Appellants also moved to dismiss the charge of Auto Theft, a Second Degree Felony, at the end of the State's case on the theory that at most, the State had proved the misdemeanor offense of Depriving an Owner. (R. 329-326) Counsel for Appellants also moved for a Directed verdict of not guilty as to Count I, Theft of an Operable Motor Vehicle, at the end of all of the evidence. (R. 404-405) This motion was also denied by the trial court. (R. 406)

Depriving an owner is a necessarily included offense of Theft of an Operable Motor Vehicle; consequently, the court's failure to instruct the jury on Depriving an Owner

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* These same instructions were submitted by Appellants CHRISTENSEN (R. 70-71) and SHARP (R- 86-87). Counsel for appellants requested both Instructions 2 and 3 in writing and took exception to the trial court's failure to give such requests to the jury, properly preserving this issue on appeal. Utah Rules of Civil Procedure, Rule 51. State v. Erickson, Utah, 568 P.2d 750 (1971); State v. Bell, 563 P.2d 186 (1977); and State v. Gleason, 17 U.2d 150, 405 P.2d 793 (1965). Accord: Rules of Practice in the District Courts, Rule 5.4.

constituted prejudicial error and the appellants' conviction for Theft on an Operable Motor Vehicle should be reversed and a new trial granted.

The appellants requested that the trial court instruct the jury on Depriving an Owner as a lesser included offense. (R. 55)

A. THE DEFENDANT IN A CRIMINAL CASE HAS A RIGHT TO SUBMIT HIS THEORY OF THE CASE TO THE JURY IN THE INSTRUCTIONS.

It has long been the law in the State of Utah, that an accused in a criminal action has a right to submit to the jury his theory of the case, and that such theory, when properly requested, should be given to the jury in the form of written instructions. State v. Stenbeck, 78 U.350, P.2d 1050 (1931). In Utah, this right allows for the presentation of instructions on all defenses and theories, including lesser included offenses, when such are properly requested by the accused. State v. Gillian, 23 U.2d 372, 374, 463 P.2d 811 (1970); State v. Mitcheson, Utah, 560 P.2d 1120 (1977).

An accused may make the decision as a matter of trial strategy to go "for broke" and decline to request instructions on lesser included offense if his theory of defense so dictates. State v. Mora, Utah, 558 P.2d 1335, 1137 (1977); State v. Gellaty, 22 U.2d 149, 152, 449 P.2d 993 (1969); State v. Valdez, 79 U.2d 426, 428, 432 P.2d

53 (1967); State v. Mitchell, 3 U.2d 70, 278 P.2d 618 (1955). However, when the accused as his theory of the case requests instructions on lesser included offenses and is willing to submit his guilt or innocence to the jury on that theory, the trial court as a general rule is duty bound to submit these alternatives to the trier of the fact. State v. Gillian, 23 U.2d 374, 375, 463 P.2d 811 (1970).

When the theory of defense embraces an argument, in effect in mitigation, that he is guilty of not the crime as charged in the Information, but some lesser offense, the teachings of Gillian yet apply. On this point, the Gillian court stated:

> One of the fundamental principles to the submission of issues to juries is that where the parties so request they are entitled to have instruction given on their theory of the case; and this includes on lesser offenses if any reasonable view of the evidence would support such a verdict. (State v. Gillian, supra, 23U.2d at 374).

In Gillian, this court poined out the reasons for this rule and the instant case illustrates the soundness of such a rule. This court said it should not be the prerogative of the trial court to direct the jury as to what degree of crime they may find a defendant guilty or to direct them that they must find him not guilty if they do not find him guilty of the greater offense. To allow

this permits the court to be a judge of the facts and to, in effect, direct a verdict on the lesser included offenses. Such a procedure violates the historical spirit as well as letter of our system on jury trial under the Sixth and Fourteenth Amendmens to the United States Constitution and Article I, Sections 10 and 12 of the Constitution of Utah. State v. Ferguson, 74 Utah 263, 279 P.2d (1929) (Straup, J. concurring). See also United States v. Skinner, 437 F.2d 164, 165 (5th Cir., 1971).

B. DEPRIVING AN OWNER IS A LESSER INCLUDED OFFENSE OF THEFT OF AN OPERABLE MOTOR VEHICLE.

The test most recently given to determine if one offense is a lesser included offense of another is that found in the recently revised Utah Criminal Code. Utah Code Annotated §76-1-402(3) (1953 as amended), provides in pertinent part:

> A defendant may be convicted of an offense included in the offense charged, but may not be convicted of both the offense charged and the included offense. An offense is so included when:
> (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
> (b) It constitutes an attempt, solicitaion, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or
> (c) It is specifically designated by a statute as a lesser included offense.

This statute was recently interpreted in State v. Lloyd, Utah, 568 P.2d 357 (1977) and its companion case, State v. Cornish, Utah, 568 P.2d (1977) wherein this court held that the Utah Depriving an Owner statute is a lesser included offense of Theft of an Operable Motor Vehicle.

The process by which such a determination is made was described in State v. Woolman, 84 Utah 23, 33 P.2d 640 (1934):

> The only way this matter may be determined is by discovering all of the elements required by the respective sections, comparing them and by a process of inclusion and exclusion, determine those common and those not common, and, if the greater offense includes all legal and factual elements, it may safely be said that the greater includes the lesser, if, however, the lesser offense requires the inclusion of some necessary element or elements in order to cover the completed offense, not so included in the greater offense, then it may be safely said that the lesser is not necessarily included in the greater. (33 P.2d at 645)

C. WHEN MUST THE TRIAL COURT INSTRUCT THE JURY ON LESSER INCLUDED OFFENSES.

When one concedes that Depriving an Owner is a lesser included offense of Theft of an Operable Motor Vehicle under Utah's statutes, the issue then becomes when must the trial court instruct the jury on such a lesser included offense.

The need that such an instruction be given has been ruled to be a statutory requirement and is found in Utah Code Annotated §77-33-6 (1953 as amended), which states:

> The jury may find the defendant guilty of any offense the commission of which is necessarily included in that which he is charged in the indictment or information, or of an attempt to commit the offense.

This provision was expounded upon by the legislature in the 1973 Criminal Code Revision in §76-1-402(4), which provides:

> The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense. [Emphasis Supplied]

The foregoing provision, as this court has noted, codifies prior existing common law principles dating back to territorial times in Utah. People v. Robinson, 6 U.101, 21 P.403 (1889); State v. Bender, Utah, 581 P.2d 1019 (1978).

In State v. Barkas, 91 Utah 574, 65 P.2d 1130 (1937), this court noted that the failure to give an instruction on lesser included offenses when requested ". . .clashes with two fundamental rules of trial in criminal cases; It has the effect of the court weighing the evidence and, in effect, limiting the jury to a consideration of only part of the evidence (the defendant's); and it, in effect, casts

upon the accused the burden of proving his innocence or justification." (65 P.2d at 1132).

When the accused requests a lesser included instruction there should exist a presumption that the requested instruction be given.[1] Such is the tenor of this court's discussions in the past. In State v. Hyams, 64 U.285, 230 P.2d 349 (1924), it was stated:

> It is, however, always a delicate matter for a trial court to withhold from the jury the right to find the accused guilty of a lesser or included offense, and determine the question of the state of the evidence as matter of law. That should be done only in very clear cases. (64 U.2 at 287) Accord: State v. Barkas, 91 U. 574, 580, 65 P.2d 1130 (1937). [Emphasis Supplied]

In recent years this court has endeavored to set specific guidelines providing for the submission of lesser

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1. This seems to be the feeling of the court in State v. Gillian, supra, 23 U.2d at 376 wherein it is said:

> The usual rule on an appeal in which the challenge is to the sufficiency of the evidence to support the verdict, is that we review the record in the light favorable to the jury's verdict. However, in this situation where the question raised relates to the refusal to submit included offenses, it is our duty to survey the whole evidence and the inferences naturally to be deduced therefrom to see whether there is any reasonable basis therein which would support a conviction of the lesser offenses.

included offenses when requested.

The question that arises then when lesser included instructions are requested is: was there ". . . any evidence, however slight, on any reasonable theory under which the defendant might be convicted of the lesser [and] included offense . . ." of Depriving an Owner. State v. Doughtery, supra, at 177; State v. Bell, Utah, 563 P.2d 186, 188 (1977) (Justice Wilkins,concurring). If there was such evidence, then the instructions were properly requested and should have been submitted to the jury for consideration.

In the instant case the appellants conceded their presence in the vehicle. The thrust of the defense centered torally upon the element of his intent or mens rea in keeping the vehicle permanently as is required by Section 76-6-404, Utah Code Annotated (1953 as amended). The appellant TUCKER, at trial, offered testimony which indicated that he did not intend to keep the vehicle. (R. 346) Under Utah law, this defense would, if believed, negate the specific mens rea of "intent to permanently deprive the owner of the vehicle" required for a conviction under the Theft statute.

To be convicted of Theft under §76-6-404, Utah Code Annotated (1953 as amended), there must be a "purpose to deprive" of the owner of the property. "Purpose to deprive" is defined in §76-6-401(3) Utah Code Annotated (1953 as amended) as follows:

(3) "Purpose to deprive" means to have the conscious object:

(a) To withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or the use and benefit thereof, would be lost; or

(b) To restore the property only upon payment of a reward or other compensation; or

(c) To dispose of the property under circumstances that make it unlikely that the owner will recover it. [Emphasis Supplied]

At trial, there was no allegation of any of the above subsections of the Utah Code. The testimony at trial refuted any purpose to "permanently" deprive. Not only did Appellant TUCKER testify to the temporary nature of the deprivation of the vehicle, but both Darlene and Marsha Ruark, the owner of the vehicle and her daughter, testitifed that there was no substantial diminishment in value to the vehicle. (R. 70-84) For example, the paint on the vehicle had not been altered (R. 75, 85), the license plates were not removed (R. 74, 85), and the evidence indicated no alteration to the vehicle in any manner.

The trier of fact could have concluded that with this specific intent to permanently deprive the owner of the vehicle lacking, that appellant was guilty of depriving an owner of his vehicle under §41-1-109 Utah Code Annotated, (1953 as amended), as Class B Misdemeanor.

This court has ruled in the past that when the defense theory propounded at trial is that the defendant lacks

the appropriate mens rea and hence should be convicted of a lesser included offense, if anything, then it is reversible error to refuse to instruct on the lesser included offense. State v. Cornish, Utah, 586 P.2d 360 (1977).

In Cornish, the issue was whether the accused had the specific intent to derpive an owner permanently of a vehicle thus constituting the offense of Theft of an Operable Motor Vehicle under Utah Code Annotated §76-6-401(3) (1953 as amended), or whether the defendant intended to temporarily deprive the owner of his vehicle thus constituting the offense of Depriving an Owner of a Vehicle as in the instant case. In Cornish, the defendant testified and said his intent was to only temporarily deprive the owner of the vehicle, exactly as the appellant TUCKER testified in the instant case. This court ruled that the burden is clearly upon the State to prove the mens rea element (568 P.2d at 362), and ". . . If there is an issue of whether the prosecution has sustained this burden, or if the defendant presents evidence under his theory which negates the factors §76-6-401(3) [intent to permanently deprive], - the matter of circumstances of intent to deprive should be submitted to the trier of fact." (568 P.2d at 362)

The issue in the instant case is identical to that in Cornish. And since the issue was properly raised by

some evidence it should have been submitted to the trier of fact for consideration of the lesser included offense. The defense evidence was that appellant's conduct only amounted to depriving an owner, and the jury should have had their rightful opportunity to consider that evidence.

The failure of the trial court to instruct on the Appellant's theory was prejudicial error mandating reversal of their conviction as to Count I.

POINT II

THE EVIDENCE AT TRIAL AS TO COUNT ONE, THEFT OF AN OPERABLE MOTOR VEHICLE WAS SUFFICIENT TO SUSTAIN ONLY A CONVICTION FOR DEPRIVING AN OWNER OF A VEHICLE TEMPORARILY UNDER §41-1-109, UTAH CODE ANNOTATED (1953 as amended).

Appellants, at the end of all the evidence made a motion for a Directed Verdict of Not Guilty on Count One of the Information. (R. 406) As argued in Point I without reiteration herein, the State failed to show under §76-6-401(3) Utah Code Annotated, (1953 as amended), any purpose of Appellants to permanently deprive the owner of the vehicle. The evidence clearly indicated only a temporary deprivation under §41-1-109 Utah Code Annotated, (1953 as amended). This statute has been determined to be a lesser and included offense of Theft of an Operable Motor Vehicle, as charged in Count I of the Information

in the instant case. State v. Cornish, Utah 568 P.2d 3601 (1977); State v. Lloyd, Utah 568 P.2d 357 (1977).

There was no evidence before the trier of fact to show an intent to permanently deprive as required by the Theft statute.[2] There is no substantial evidence to support the verdict of the jury on Count I, State v. Romero, Utah, 554 P.2d 216 (1976), and the case should be remanded to the District Court with directions to enter a conviction and judgment for the misdemeanor offense of Depriving an Owner under §41-1-109 Utah Code Annotated (1953 as amended).

CONCLUSION

Appellants respectfully submit that there was no substantial evidence upon which the trier of fact could make a finding of guilt on Count I of the Information, Theft of an Operable Motor Vehicle. At best, the facts evidence an intent to "temporarily" deprive the owner of the vehicle under §41-1-109 Utah Code Annotated (1953 as amended), and a conviction and judgment on remand should be entered accordingly.

Alternatively, Appellants submit that the trial court's failure to instruct the jury on the lesser included offense of Depriving an Owner of his Vehicle, as requested in

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2. See argument in Point I of this brief.

proposed Instructions Two and Three, was reversible error and requires reversal of the verdict of the jury and judgment entered thereon as to Count One, and the instant case should be remanded to the District Court for a new trial on that count.

Respectfully submitted,

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