

1989

Utah v. Dorton : Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS

UTAH

BRIEF

50

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, 890273 :

Plaintiff-Respondent, : Case No. 890273-CA

v. :

HARVEY DORTON, : Priority No 2

Defendant-Appellant. :

BRIEF OF RESPONDENT

APPEAL FROM AN ORDER OF THE DISTRICT COURT
DENYING DEFENDANT'S MOTION TO SET ASIDE
SENTENCE, JUDGMENT AND COMMITMENT IN THE
THIRD JUDICIAL DISTRICT COURT, IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH, THE
HONORABLE LEONARD H. RUSSON, JUDGE,
PRESIDING.

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BRIEF OF RESPONDENT

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JURISDICTION AND NATURE OF PROCEEDINGS

Defendant appeals from an order of the district court denying his Motion to Set Aside Sentence, Judgment, and Commitment and bases this appeal on Utah Code Ann. § 77-35-26(2)(b) (Supp. 1989), which provides that an appeal may be taken from an order made, after judgment, affecting the substantial rights of the defendant, and Utah Code Ann. § 78-2-2(3)(j) (Supp. 1989), which provides that the Supreme Court has jurisdiction over orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction. The order was entered by the Honorable Leonard H. Russon, Judge, Third District Court, Salt Lake County, State of Utah, on October 3, 1988.

STATEMENT OF THE ISSUES PRESENTED ON APPEAL

1. Whether this Court should entertain defendant's appeal which is based on an untimely motion to set aside a judgment?

2. Whether defendant's convictions for aggravated burglary, aggravated kidnapping, and aggravated robbery are appropriately based upon separate acts, or are barred because they arose from a single criminal episode or are lesser-included offenses of one another?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann. § 76-6-202 (1978):

76-6-202. Burglary--

(1) A person is guilty of burglary if he enters or remains unlawfully in a building or any portion of a building with intent to commit a felony or theft or commit an assault on any person.

(2) Burglary is a felony of the third degree unless it was committed in a dwelling, in which event it is a felony of the second degree.

Utah Code Ann. § 76-6-203 (1978) (amended 1989):

76-6-203. Aggravated Burglary--

(1) A person is guilty of aggravated burglary if in attempting, committing, or fleeing from a burglary, the actor or another participant in the crime:

(a) Causes physical injury to any person who is not a participant in the crime; or

(b) Uses or threatens the immediate use of a dangerous or deadly weapon against any person who is not a participant in the crime; or

(c) Is armed with a deadly weapon or possesses or attempts to use any explosive or deadly weapon.

(2) Aggravated burglary is a felony of the first degree.

Utah Code Ann. § 76-6-301 (1978):

76-6-301. Robbery--

(1) Robbery is the unlawful and intentional taking of personal property in the possession of another from his person, or immediate presence, against his will, accomplished by means of force.

(2) Robbery is a felony of the second degree.

Utah Code Ann. § 76-6-302 (1978) (amended 1989):

76-6-302. Aggravated Robbery--

(1) A person commits aggravated robbery if in the course of committing robbery, he:

(a) Uses a firearm or a facsimile of a firearm, knife or a facsimile of a knife or a deadly weapon; or

(b) Causes serious bodily injury upon another.

(2) Aggravated robbery is a felony of the first degree.

(3) For the purposes of this part, an act shall be deemed to be "in the course of committing a robbery" if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.

Utah Code Ann. § 76-5-301 (1978) (amended 1983):

76-5-301. Kidnaping--

(1) A person commits kidnaping when he intentionally or knowingly and without authority of law and against the will of the victim:

(a) Detains or restrains another for any substantial period; or

(b) Detains or restrains another in circumstances exposing him to risk of serious bodily injury; or

(c) Holds another in involuntary servitude; or

(d) Detains or restrains a minor without consent of its parent or guardian.

(2) Kidnaping is a felony of the third degree.

Utah Code Ann. § 76-5-302 (1978) (amended 1983):

76-5-302. Aggravated kidnaping--

(1) A person commits aggravated kidnapping when he intentionally or knowingly, by force, threat or deceit, detains or restrains another against his will with intent:

(a) To hold for ransom or reward, or as a shield or hostage, or to compel a third person to engage in particular conduct or to forbear from engaging in particular conduct; or

(b) To facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony; or

(c) To inflict bodily injury on or to terrorize the victim or another; or

(d) To interfere with the performance of any governmental or political function.

(2) A detention or moving is deemed to be the result of force, threat, or deceit if the victim is mentally incompetent or younger than sixteen years and the detention or moving is accomplished without the effective consent of the victim's custodial parent, guardian, or person acting in loco parentis to the victim.

(3) Aggravated kidnaping is a capital felony unless the actor voluntarily releases the victim alive and in a safe place before trial, in which event aggravated kidnaping is a felony of the first degree.

Utah Code Ann. § 76-1-402 (1978):

76-1-402. Separate offenses arising out of single criminal episode--included offenses--

(1) A defendant may be prosecuted in a single criminal action for all separate

offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of the code, the act shall be punishable under only one such provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision.

(2) Whenever conduct may establish separate offenses under a single criminal episode, unless the court otherwise orders to promote justice, a defendant shall not be subject to separate trials for multiple offenses when:

(a) The offenses are within the jurisdiction of a single court, and

(b) The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment.

(3) 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, solicitation, 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.

(4) 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.

(5) If the district court on motion after verdict or judgment, or an appellate court on appeal or certiorari, shall determine that there is insufficient evidence to support a conviction for the offense charged but that there is sufficient evidence to support a conviction for an included offense and the trier of fact necessarily found every fact required for conviction of the included offense, the verdict or judgment of conviction may be set aside or reversed and a judgment of conviction entered for the included offense, without necessity of a new trial, if such relief is sought by the defendant.

STATEMENT OF THE CASE

Defendant, Harvey Dorton, was originally charged with attempted second degree murder, aggravated burglary, aggravated kidnapping, aggravated robbery, and aggravated sexual assault. After a preliminary hearing, the attempted murder charge against him was dismissed. The matter was tried before a jury on January 18 and 19, 1982, in Third District Court, Salt Lake County, State of Utah, before the Honorable Bryant N. Croft, Judge. The aggravated sexual assault charge was dismissed on motion of the defense at the close of the state's case. The jury returned a verdict of guilty of aggravated burglary, in violation of Utah Code Ann. § 76-6-203 (1978); aggravated robbery, in violation of Utah Code Ann. § 76-6-302 (1978) and aggravated kidnapping, in violation of Utah Code Ann. § 76-5-302 (1978). Defendant was sentenced to three concurrent terms of five years to life. He appealed from the convictions and the judgment was affirmed. State v. Dorton, No. 18667, slip op. (Utah Oct. 26, 1983).

Defendant was also convicted of bail jumping as a result of his failure to appear for the second day of trial while

released on bail in violation of Utah Code Ann. § 76-8-312 (1978) and was sentenced to up to five years in the Utah State Prison. The conviction was appealed, and was affirmed in State v. Dorton, 696 P.2d 1218 (Utah 1985).

STATEMENT OF THE FACTS

On December 23, 1980, at approximately 7:00 p.m., two men wearing ski masks and armed with a sawed-off shotgun and pistol entered the home of John and Betty Thomas in Murray, Utah, without permission (R. 443, 491). The taller of the two men was later identified as defendant (R. 462, 481, 502, 522-525, 533, 547-548). The other was later identified at Ronald Leroy Hall.

At the time of the illegal entry, John and Betty were not home; Garn Edwards, Betty's stepfather, was in the home tending his two young grandsons, Johnny Thomas and Chancey Pllum. No one else was home. Betty Thomas, Johnny's mother, and Barbara Pllum, Chancey's mother, had gone out to do some last-minute Christmas shopping. (R. 442-489, 519, 527.)

The two men entered the house through the kitchen door, confronted Mr. Edwards and the boys, and demanded to know if John Thomas was home. Mr. Edwards told them he was not. They said they were there to get some money. To show that they were serious, one of the men fired a shot and then defendant struck Mr. Edwards on the side of the head with the pistol. (R. 444-45, 520.) Defendant compelled Mr. Edwards to go upstairs with him to look for jewelry; they found none. Defendant then took all the money Mr. Edwards had on his person. (R. 446-47.)

A few hours later, Betty Thomas returned home. The two men accosted her as she entered the house and demanded that she give them her jewelry. She gave them two rings and some chains and bracelets. (R. 450-51, 490, 499.) Mrs. Thomas gave her son Johnny some medicine for his strep throat; he was soon asleep. The shorter man, Hall, accompanied Mrs. Thomas upstairs as she went to prepare her little boy's bed. (R. 452, 292, 493.) In the bedroom, Hall forced her to disrobe and lean over the end of the bed. He then forced Mrs. Thomas to engage in anal sodomy and sexual intercourse. (R. 494.) After Hall and Mrs. Thomas had dressed and gone back downstairs, he took her alone into the dining room where he forced her to engaged in oral sodomy and, again, sexual intercourse. (R. 495-496.)

At about 11 p.m., Barbara Pellum drove up to the house (R. 454-496, 528-29). She was accompanied in the car with her children Kimberly and Kevin and her brother Grant Davis. Mrs. Pellum went into the house to get her son Chancey to take him home. Defendant opened the door and was holding a sawed-off shotgun. (R. 454, 528-29.) Mrs. Thomas, Garn Edwards, and Chancey Pellum all had their hands tied (R. 452-453, 496). The men threatened to kill all of them if they did not cooperate and then told Mrs. Pellum that they had been paid \$5,000 to kill John Thomas. (R. 530.) Later, Mrs. Pellum overheard the two men arguing between themselves, saying, "Let's just kill Betty. We will get \$2,000 for killing her. Let's kill her and get the job done and get out of here." (R. 530.) During the time Mrs. Pellum was in the house, the men fired several shots, one of

which hit the television, shattering the tube. (R. 455-56, 498, 529.)

Defendant demanded a cigarette. Mrs. Pellum said she had some in the car. Defendant took her out to the car at gunpoint to get the cigarettes. (R. 454, 497, 530-31.) When they came back in the house with the cigarettes, Hall became agitated because the people left in the car had been left unguarded and might contact the police. Defendant went out again and brought Grant Davis and Kevin Taylor into the house. Mrs. Pellum's daughter Kimberly had already left. (R. 457, 497, 532.) After taking Mr. Davis's money and money clip, the two men had all of them lie down on floor and count to 100. Defendant and Hall then left. (R. 458-59, 498, 533.)

Betty Thomas stated that the taller of the two men wore an unusual spoon-type ring (R. 500-01). Defendant was arrested on January 2, 1981, wearing a spoon-type ring (R. 330, 518). Mrs. Pellum saw defendant's face when he raised the ski mask to smoke his cigarette (R. 533).

Defendant was tried by jury before the Honorable Bryant H. Croft on January 18 and 19, 1982. He was present for the first day of trial but failed to appear for the second day, and the trial proceeded in this absence. He was convicted of aggravated burglary, aggravated robbery, and aggravated kidnapping. (R. 282, 312-25, 333.)

SUMMARY OF THE ARGUMENT

The order denying defendant's untimely motion to set aside the judgment was not an order affecting his substantial

rights; this Court may, therefore, wish to decline to review the merits of this appeal.

Regardless, on the facts of this case, defendant's convictions for aggravated burglary, aggravated robbery, and aggravated kidnapping were based on separate acts involving multiple victims, and were not the result of one act during a single criminal episode. Further, the crimes charged are not lesser-included offenses of one another. Specifically, aggravated kidnapping is not a lesser-included offense of aggravated robbery, and aggravated robbery is not a lesser-included offense of aggravated kidnapping.

ARGUMENT

POINT I

BECAUSE DEFENDANT'S MOTION, FROM WHICH THIS APPEAL WAS TAKEN, WAS OUT OF TIME, THIS COURT MAY WISH TO DECLINE REVIEW ON THE MERITS.

Defendant was convicted by a jury in January 1982, of aggravated burglary, aggravated robbery, and aggravated kidnapping. He appealed from his convictions, claiming he was entitled to a new trial because of a defect in the information and an error in a jury instruction. The Supreme Court affirmed. State v. Dorton, No. 18667, slip op. (Utah Oct. 26, 1983).¹ Defendant did not claim at trial that his convictions were inappropriate because they were committed during a single criminal episode or because they were lesser included offenses of

¹Defendant was also convicted in a separate proceeding of bail jumping in violation of Utah Code Ann. § 76-8-312 (1978); he appealed and his conviction was affirmed at State v. Dorton, 686 P.2d 1218 (Utah 1985).

one another, and he did not raise the issue in his initial appeal.

On July 11, 1988, defendant filed a pro se Motion to Set Aside Sentence, Judgment and Commitment (R. 674). Lynn Brown was appointed to represent him on August 24, 1988 (R. 690). The State, represented by Ralph D. Crockett, Deputy Salt Lake County Attorney, opposed the motion (R. 691). The motion was heard and denied on September 26, 1988, by the Honorable Leonard H. Russon, Judge (R. 714, 719). Defendant now appeals the denial of his motion and claims that the trial court erred in denying his motion because he could not be convicted of separate offenses arising out of a single criminal episode or of multiple offenses which are lesser included offenses of one another.

Defendant's jurisdictional bases in this Court is that the order was a final order affecting his substantial rights under Utah Code Ann. § 77-35-26(2)(b). The Utah appellate courts have not defined what constitutes a final order affecting substantial rights. In Cahoon v. Cahoon, 641 P.2d 140 (Utah 1982), the court stated that the final judgment rule does not preclude review of all postjudgment orders. The order may be reviewable depending upon its substance and effect. While the case was decided under former Utah R. Civ. P. 72(a), which has been superseded by the Rules of the Utah Supreme Court and the Rules of the Utah Court of Appeals, the court indicated that an appellate court should look to the substance of a postjudgment order to determine whether it is appealable.

While the Utah appellate courts have not decided what constitutes a final order affecting the "substantial rights" of an appellant under the new rules, it appears that in this case, the order of the district court from which defendant appeals did not affect his substantial rights. The order denied a frivolous motion, as set forth in point II. Further, appellate review is not appropriate for other reasons. First, defendant waived his claim by not timely preserving this issue for appeal in the trial court. Second, defendant has already had one direct appeal from his convictions in which he should have, if the claims were not waived, raised the issue he now raises. Third, if the trial court erred, and defendant has suffered a substantial denial of a constitutional right, his remedy is not direct review but, rather, a collateral proceeding under Utah R. Civ. P. 65B(i), so long as the claim has not been previously adjudged.

Other courts that have considered the issue of untimely appellate review under similar circumstances have ruled that an appellant in defendant's position is not entitled to a review of the merits of his claim. In People v. Cantrell, 170 Cal.App.2d 40, 16 Cal. Rptr. 905, (1961), cert. denied, 371 U.S. 853 (1962), the defendant's direct appeal from his arson conviction was dismissed for failure to timely file a brief. Over six years later, he filed a motion for modification of judgment; the motion was denied and he appealed. The court of appeals dismissed the appeal, finding that the motion upon which it was based was unauthorized. The defendant's "substantial rights" were not affected and the matters could have been reviewed on timely

appeal. To rule otherwise would have allowed the defendant two appeals or could have the effect of indefinitely extending the time in which to appeal.

In the present case, defendant's untimely motion, couched as a motion to set aside sentence, judgment and conviction, was not provided for by the Utah Rules of Criminal Procedure.² It consequently should have been dismissed on procedural grounds because it was out of time. Regardless, it does not appear to be an order affecting the substantial rights of the defendant which would entitle him to appellate review. For these reasons, this Court may wish to summarily affirm the trial court's order without reaching the merits.

POINT II

DEFENDANT'S THREE CONVICTIONS WERE PROPER AND ARE NOT BARRED BECAUSE THE ACTS OF DEFENDANT OCCURRED DURING A SINGLE CRIMINAL EPISODE OR BECAUSE TWO CONVICTIONS ARE LESSER-INCLUDED OFFENSES OF ONE CONVICTION.

Defendant contends that aggravated kidnapping is a lesser-included offense of aggravated robbery since a person must be detained or restrained to be robbed. His contention that aggravated kidnapping is a lesser-included offense of aggravated robbery because detainment or restraint is inherent in a robbery can be summarily disposed of. In State v. Couch, 635 P.2d 89

² Rule 12 provides for various pretrial motions; motions related to defects in the information, etc., must be made five days prior to trial. A motion for arrest of judgment pursuant to Rule 23 (which provides for motions similar in substance to defendant's motion in this case) must be made prior to imposition of sentence. A motion for new trial pursuant to Rule 24 must be made within ten days of imposition of sentence, unless otherwise ordered prior to the expiration of the ten days.

(Utah 1981), the Supreme Court stated that a literal application of the kidnapping statute could transform virtually every robbery into a kidnapping as well. The Court held that to support a kidnapping charge, the detention must be for a substantial period and "requires a period of detention longer than the minimum inherent in the commission of a rape or robbery." Id. at 93. If the kidnapping is not "merely incidental or subsidiary to some other crime," it is separately punishable for the kidnapping itself. Id. In this case, the victims were detained over four hours--certainly a substantial period and a period longer than the amount of time inherently necessary to commit a robbery.

The second aspect of defendant's argument is likewise without merit. He contends that because aggravated burglary was charged as requiring the state to prove that he entered a dwelling with the intent to commit a "theft, assault or felony," and the facts here established that he entered with the intent to commit a "felony," aggravated robbery is a lesser-included offense of aggravated burglary. Defendant's argument is not supported by reference to specific facts or legal principles to establish his position. He correctly points out that to determine whether a lesser-included offense situation exists, the court must apply, under some circumstances, both a principle and secondary test. The principle test requires an analysis of the statutory elements of each crime. An offense is a lesser-included offense when it is established by proof of the same or less than all of the facts required to establish the commission of the offense charged. The secondary test only becomes relevant

when a crime charged has multiple variations; that is, the test must be applied to determine whether the greater-lesser relationship exists between the specific variations of the crimes actually proved at trial. For example, under some circumstances, but not all, theft is a lesser-included offense of aggravated robbery. Specifically, aggravated robbery may be proved in any one of three ways--when a weapon is used during an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of the robbery. When a weapon is used during the actual commission of a robbery, theft is necessarily a lesser-included offense. However, it is not a lesser-included offense of the other variations of aggravated robbery. State v. Hill, 674 P.2d 96 (Utah 1983).

Applying the principle test articulated by the Supreme Court in Hill-- that is, comparing the elements of the crimes³ to determine if one is proved by proof of the same or less than all of the facts required to establish the commission of the greater offense charged--it is obvious that aggravated kidnapping is not a lesser-included offense of aggravated robbery, and that aggravated robbery is not a lesser-included offense of aggravated burglary, as defendant contends. The elements are, at a minimum, not sufficiently similar or overlapping to bring the lesser-included offense doctrine into consideration. The secondary aspect of the Hill test is, in this case, inaposite.

³ The statutory elements of aggravated burglary, aggravated robbery, and aggravated kidnapping are set forth in this brief at pages 2-4.

In State v. Branch, 743 P.2d 1187 (Utah 1987), cert. denied, 108 S.Ct. 1597 (1988), the defendant was convicted of aggravated robbery of the store clerk, theft, and aggravated assault of a person who interrupted the robbery. He argued on appeal that the aggravated assault and theft were lesser-included offenses of the aggravated robbery. The Supreme Court summarily rejected his argument that the aggravated assault was a lesser-included offense of the aggravated robbery, stating that the aggravated robbery and aggravated assault were simply two offenses committed within the same criminal episode and the crimes required proof by different evidence.⁴ Id. at 1191.

Finally, defendant's convictions are not precluded by the concept that they were committed during a single criminal episode. Utah Code Ann. § 76-1-402(1) provides:

A defendant may be prosecuted in a single criminal action for all separate offenses arising out of a single criminal episode; however, when the same act of a defendant under a single criminal episode shall establish offenses which may be punished in different ways under different provisions of this code, the act shall be punishable under only one such provision; an acquittal or conviction and sentence under any such provision bars a prosecution under any other such provision.

(Emphasis added.)

Defendant's three convictions are not barred by this provision because his convictions were not the result of the "same act" punished in more than one way, but were rather

⁴ Applying the secondary aspect of the Hill analysis, the Court found that theft was a lesser-included offense of aggravated robbery on the facts of case.

separate and distinct acts. Branch, 743 P.2d at 1191. Defendant and co-defendant Hall forced their way into the home of Betty and John Thomas while armed with a pistol and a sawed-off shotgun; their expressed intent was to murder John Thomas. During the course of the next four hours, defendant and Hall beat Betty's stepfather over the head with a gun, and defendant forcibly took the stepfather's money. When Betty got home, she was beaten, raped and sodomized by Hall. She was also robbed of her jewelry and money from her purse. In the end, defendant and Hall held seven people captive. This, alone, was sufficient to result in seven counts of aggravated kidnapping. In State v. James, 631 P.2d 854, 855 (Utah 1981), the Supreme Court stated that "[i]n crimes against the person . . . a single criminal act or episode may constitute as many offenses as there are victims." In James, the defendant was convicted of five counts of kidnapping, one count for each victim; the court found the convictions to be appropriate and looked to the statute, which speaks in terms of the singular victim. See also State v. Eichler, 584 P.2d 861 (Utah 1978) (aggravated robbery and aggravated kidnapping convictions which arise from the same criminal episode were not barred as they were not the same act of the defendant).

If this Court reaches the merits of defendant's claims, it is clear that defendant was not "over-charged" or "over-convicted." If anything, his multiple acts against multiple victims could and should have resulted in additional charges and convictions. Defendant's crimes, although committed during one four-hour criminal episode, were separate acts done as the result

of intentional conduct. An examination of the elements of the crimes establish that aggravated kidnapping is not a lesser-included offense of aggravated robbery, and that aggravated robbery is not a lesser-included offense of aggravated burglary. His convictions, therefore, are not barred because they were a single act during a single criminal episode or because they are lesser-included offenses of one another.

CONCLUSION

The defendant, Harvey Dorton, was properly convicted of aggravated burglary, aggravated robbery, and aggravated kidnapping. For the foregoing reasons, and any additional reasons advanced at oral argument, the State of Utah respectfully requests that this Court affirm defendant's convictions.

RESPECTFULLY submitted this 20th day of August, 1989.

R. PAUL VAN DAM
Utah Attorney General


BARBARA BEARNSON
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to Lynn R. Brown, attorney for defendant, 424 East 500 South, Suite 300, Salt Lake City, Utah 84111, on this 28th day of August, 1989.

