

1979

# State of Utah v. Eugene Frank Torres : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH,	:	
	:	
Plaintiff-Respondent,	:	
	:	
-v-	:	
	:	
EUGENE FRANK TORRES,	:	Case No. 16629
	:	
Defendant-Appellant.	:	

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BRIEF OF APPELLANT

Appeal from a jury verdict of guilty and the sentence  
based thereon by the Honorable David B. Dee, Judge of the  
Judicial District Court.

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Appeal from a jury verdict of guilty and the judgment based thereon by the Honorable David B. Dee, Judge of the Third Judicial District Court.

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged by Information with the crime of Aggravated Assault wherein he was alleged to have assaulted a Salt Lake City Police Officer with a deadly weapon on September 16, 1978.

DISPOSITION IN THE LOWER COURT

The matter was tried before the Honorable David B. Dee sitting with a jury on April 18 and 19, 1979. Appellant was found guilty of the charge and was committed to the Utah State Prison for the term provided by law, zero to five years.

RELIEF SOUGHT ON APPEAL

Appellant seeks the reversal of the conviction and a remand for a new trial.

## STATEMENT OF THE FACTS

A Salt Lake City Police Officer, John Foster, was in the vicinity of 1300 South State on September 16, 1978, at approximately midnight when he saw a fight and saw two men chasing two other men (R. 109-122). Officer Foster testified that appellant was one of the men chasing two other persons and that he, Officer Foster, stopped appellant and appellant challenged him to a fight (R. 124,131). A crowd was forming in the area and numerous people were gathered about. Officer Foster testified that appellant then left the scene running and Officer Foster gave chase on foot. According to the officer appellant stopped and again challenged the officer to a fight and kicked at the officer (R. 133,137,138). The officer testified that in his own defense he swung his nightstick whereupon appellant grabbed the officer and threw him to the ground and hit him over the head several times with the nightstick (R. 141,142). When appellant ran away from the officer appellant was not under arrest nor had he been handcuffed (R. 154, 158).

A citizen who was visiting a nearby business establishment, Michael Jackson, testified that he saw basically the same thing as Officer Foster related but from a short distance away.

Appellant testified that he was involved in an altercation at the scene with other parties and those other parties were responsible for inflicting a cut injury on appellant's arm (R. 267).

Appellant testified that when the officer arrived, the officer grabbed appellant and not the other persons responsible for appellant's injury and slapped appellant on the side of the head (R. 268). Appellant admitted verbally giving the police officer a difficult time and calling him names and challenging him to fight. Appellant then left the scene by running away and when he saw Officer Foster was chasing him he testified that he turned and said "I give up, man" (R. 270). According to appellant Officer Foster moved towards appellant with a nightstick swinging and appellant was hit in the midsection and was almost hit in the head by one of the swings, and so in his own defense, appellant grabbed the police officer and threw him to the ground (R. 271, 272). As the officer fell to the ground the nightstick was dropped and appellant picked it, and appellant testified that he saw the officer's hand go for the officer's gun, and fearing that he would be shot, he hit the officer three or four times with the nightstick and then ran away (R. 273, 275, 276).

Other persons who were with appellant, Robert Baca and Samuel Torres, testified similarly to appellant and said that the police officer was swinging his nightstick at appellant and when the police officer went down he was reaching for his gun before appellant hit him with the nightstick (R. 226, 230, 232, 245, 248).

The State produced a rebuttal witness who was a citizen observing the events and he basically confirmed the testimony of Officer Foster and rebutted the testimony of appellant's wit-

nesses.

The jury deliberated from approximately 4:30 p.m. to 11:10 p.m. before returning a verdict of guilty (R. 316).

## ARGUMENT

### POINT I

THE COURT BELOW ERRED IN FAILING TO INSTRUCT IN ACCORDANCE WITH APPELLANT'S REQUEST CONCERNING THE BURDEN OF PROOF RELATING TO SELF DEFENSE.

Appellant contends that the court below made reversible error in failing to instruct the jury properly on the burden of proof necessary in a self defense case. The Court instructed on the general principles of self defense (R. 85). This was given at appellant's request (R. 58). However, the Court erred in not instructing the jury on the burden of proof in such matters. Appellant in his Requested Instruction No. 9 (R. 62) requested the following instruction:

You are instructed that Mr. Torres need not prove that the assault was justified to any particular degree of proof. If upon the whole testimony, both for the State and for the defendant, you have a reasonable doubt as to whether or not Mr. Torres acted in self defense, he is entitled to an acquittal. That is, if Mr. Torres produces sufficient evidence of justification to raise a reasonable doubt as to whether the assault was justified or not, he is entitled to an acquittal.

Prior to the jury being instructed a conference on jury

instructions was held and appellant excepted to the failure of the Court to give that proposed instruction (R. 264, 265). Appellant contended in the court below and contends now that the proposed instruction was taken directly from decisions of this Court and must be given in a self defense case so that the jury is clear as to what is necessary to be proven.

Of course the instructions must be read as a whole but the only instruction given dealing with burden of proof is the general instruction that the defendant is presumed innocent and is not to be convicted unless his guilt is proved beyond a reasonable doubt (R. 77). No other instructions were given dealing with burden of proof and what must be shown by defendant to obtain an acquittal on the issue of self defense.

This Court has often repeated the rule appellant sought in his instruction in the court below. For example, in State v. Jackson, 528 P.2d 145 (Utah 1974), this Court dealt with a case where the defendant claimed self defense after being convicted in a manslaughter case. The Court said:

It is the law of this jurisdiction that a defendant is not required to establish his claim of self defense beyond a reasonable doubt or by a preponderance of the evidence. A defendant is entitled to an acquittal if based upon the whole evidence in the case there is a reasonable doubt as to whether or not the defendant acted in self defense.

Before and after the Jackson case this Court has reiterated that same rule in cases too numerous to require citation. It is

clearly the rule in the State of Utah that the burden remains with the State to prove guilt on all elements beyond a reasonable doubt and if the defendant's evidence of self defense creates a reasonable doubt as to whether or not he acted in self defense he is entitled to an acquittal.

This Court has not dealt specifically with such a requested instruction but other state courts have recently done so. For example, in State v. Denny, 579 P.2d 1101 (Ariz. 1978) the Supreme Court of Arizona reversed and remanded the case where the defendant had been convicted of involuntary manslaughter. The defendant claimed self defense and on appeal cited as error the fact that the jury was not properly instructed on the defendant's burden of proof in defense of self defense. The Arizona Supreme Court reversed the conviction and held:

Although the trial court instructed the jury that the burden of proving the defendant guilty beyond a reasonable doubt is upon the State and that this burden never shifts during the trial, an instruction should have been given to make it clear to the jury that the defendant did not have to prove she acted in self defense, but that she merely had to raise a reasonable doubt that she was justified in shooting her husband.

The Court's reasoning for such a rule was stated thusly:

The very purpose of a jury charge is to flag the juror's attention to concepts that must not be misunderstood, such as reasonable doubt and burden of proof [citations]. It is vital that the jury not misunderstand the concept of the defendant's burden of proof on self defense; the jury must be instructed with great care to prevent the misunderstanding of this concept.

In the Denny case the Arizona Supreme Court relied in part on State v. Garcia, 560 P.2d 1224 (Ariz. 1977), a case which reversed and remanded for a new trial a conviction for assault with a deadly weapon because the jury was not properly instructed on the burden of proof even though the jury was "extensively instructed as to the burden of proof." Generally, the instructions dealing with the burden of proof as to self defense were inadequate.

In this case a reading of the transcript makes it clear that appellant did not deny hitting Officer Foster but claimed only that he was acting in self defense out of fear for his life after he had been hit by the officer for no apparent reason and after it appeared to him and others that the officer was reaching for his gun. The only issue in the trial was whether or not appellant acted in self defense and that fact is made clear by a reading of the entire transcript. Appellant requested numerous instructions dealing with self defense and the Court, appellant argues, correctly saw that there was an issue of self defense and that there was sufficient evidence to warrant the giving of a general instruction on self defense from our statute. However, the court below erred fatally in failing to give some of the other instructions, specifically the one appellant complains of here, and thereby simply told the jury that there was such a thing as self defense but did not make it clear to the jury what must be shown and by whom for them to reach a proper verdict.

Appellant contends that where the only issue at trial

was whether or not appellant acted in self defense that the failure to give such a proposed instruction, properly excepted to when the Court indicated it was not going to give such an instruction, is reversible error.

#### CONCLUSION

For the reason above stated, that the Court below erred in not properly instructing the jury on the burden of proof necessary in a self defense case, appellant respectfully submits that the conviction should be reversed and the matter remanded for a new trial.

DATED this \_\_\_\_ day of September, 1979.

Respectfully submitted,

BRUCE C. LUBECK  
Attorney for Appellant