

1981

State of Utah v. Walter Darwin Barker : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE
STATE OF UTAH

STATE OF UTAH,

Plaintiff-Appellant,

-vs-

WALTER DARWIN BARKER,

Defendant-Respondent.

Case No. 11555

BRIEF OF APPELLANT

APPEAL FROM THE
DISTRICT COURT,
LAKE COUNTY,
HONORABLE JUDGE
PRESIDING.

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Salt Lake City, Utah 84111

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IN THE SUPREME COURT OF THE
STATE OF UTAH

----- : -----
STATE OF UTAH, :
Plaintiff-Appellant, :
-vs- : Case No.
WALTER DARWIN BARKER, : 16676
Defendant-Respondent. :

----- : -----
BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The defendant is charged with the offense of Criminal Mischief, Utah Code Ann. § 76-6-106(1)(c) (1953), as amended, in that he intentionally damaged, defaced or destroyed the property of another, causing pecuniary loss in excess of \$1,000.00 in value.

DISPOSITION IN LOWER COURT

The Third Judicial District Court for Salt Lake County rendered a final order granting the defendant's Motion to Quash. Said order was entered on August 22, 1979, the Honorable Peter F. Leary, presiding.

RELIEF SOUGHT ON APPEAL

The State seeks to have the order granting the defendant's Motion to Quash set aside, pursuant to Utah Code Ann. § 77-39-4 (1953), as amended.

STATEMENT OF FACTS

On March 8, 1979, Walter Darwin Barker damaged the windshields of sixteen separately owned motor vehicles. The vehicles were all parked in the parking lot of P.J.'s Lounge in Salt Lake City, and were all damaged during a period of several minutes. The total value of the damage to all sixteen vehicles was approximately \$1,800.00. Damage to any single vehicle did not exceed \$250.00 (R.8). Because appellant acted "intentionally" in damaging property not belonging to him, and because the aggregate damage resulting from the same criminal act exceeded the \$1,000 statutory minimum, the State charged the defendant (respondent in this appeal) with the third degree felony offense of Criminal Mischief pursuant to Utah Code Ann. § 76-6-106 (1953), as amended.

The defendant filed a motion to quash the motion stating that "the facts alleged constituting a third degree felony establish that no third degree felony exists, but rather a series of misdemeanors with different

victims." (R.18). On August 17, 1979, a hearing on the motion was held (R.34). The trial court then took the motion under advisement, and subsequently ordered that the motion be granted (R.26).

The State appeals from that order.

ARGUMENT

POINT I

BECAUSE THE SIXTEEN SEPARATELY OWNED VEHICLES WERE ALL DAMAGED BY A SINGLE CRIMINAL ACT PROCEEDING FROM THE SAME WRONGFUL INTENT THE TRIAL COURT ERRED IN QUASHING THE THIRD DEGREE FELONY CHARGE.

The only issue on appeal is whether respondent's criminal act of damaging the windshields of sixteen separately owned automobiles at the same time and place may be charged as one offense or must be charged as sixteen separate offenses against the State.

Appellant submits that the ruling of the trial court was in error, and that under the circumstances presented in this case the law permits the aggregation of all damages to property resulting from one continuous act of criminal mischief proceeding from the same criminal intent.

At the outset, appellant notes that this is a question of first impression in this State, and consequently

there is no Utah state case or statutory law directly on point.

A

CRIMINAL MISCHIEF IS AN OFFENSE
AGAINST PROPERTY, NOT AGAINST THE
VARIOUS OWNERS OF THE DAMAGED
PROPERTY.

Under the common law, an element of the malicious mischief offense was malice against the owner of the property. Territory v. Olsen, 6 Utah 284, 22 Pac. 163 (1889). Because malice against the owner was an element of the crime, each piece of property separately owned involved a different criminal intent. Therefore, damage to property of different owners constituted a separate offense regardless of how closely related in time and space the offenses may have been.

However, in adopting the Criminal Mischief Statute (Utah Code Ann. § 76-6-106 (1953), as amended), the State of Utah departed significantly from the common law. The relevant portions of Section 76-6-106 state:

(1) A person commits criminal mischief if: . . .

(c) He intentionally damages, defaces, or destroys the property of another. . .

(2)(a) A violation of section 76-6-106(1)(a) is a felony of the third degree.

(b) A violation of section 76-6-106(1) (b) is a class A misdemeanor.

(c) Any other violation of this section is a felony of the third degree if the actor's conduct causes or is intended to cause pecuniary loss in excess of \$1,000 value; a class A misdemeanor if the actor's conduct causes or is intended to cause pecuniary loss in excess of \$500; a class B misdemeanor if the actor's conduct causes or is intended to cause pecuniary loss in excess of \$250; and a class C misdemeanor if the actor's conduct causes or is intended to cause loss of less than \$250.

The culpable mental state under the statute is simply that the actor "intentionally" damages the property of another. Utah Code Ann. § 76-6-101(3) defines "the property of another":

Property is that of another, if anyone other than the actor has a possessory or proprietary interest in any portion thereof.

Therefore, as long as the accused intentionally damages property not belonging to him he is culpable under the Criminal Mischief Statute. Any requirement that the action stem from malice towards the property owner is noticeably absent.¹ The statute focuses on the property and not the property owner. Therefore, unlike the common law offense

¹ Colorado has a statute similar to Utah's Criminal Mischief Statute. The statute does not require malice against the property owner as an element of the crime. In People v. Cisneros, 566 P.2d 703 (Colo. 1977), the Supreme Court of Colorado held that the element of malice against the property owner was intentionally omitted, and the statute should not be interpreted as having malice as an element.

of malicious mischief, a person charged under Utah's Criminal Mischief Statute for damaging several pieces of property at the same time and place may act with single, continuous criminal intent even though the property is owned by different owners. Where this is the case, the proper charge would be a single charge alleging a single offense. Corpus Juris Secundum states:

Where several violations of a statute constitute but one offense, as where committed at one time, a fine for each violation cannot be imposed.

54 C.J.S. Malicious Mischief § 12, p. 947.

Implicit in this statement is the notion that if the damage to several property items resulted from a single or continuous criminal act, the damages may be aggregated and one offense charged.

B

RESPONDENT'S ACTIONS CONSTITUTE A SINGLE OFFENSE BECAUSE THE DAMAGE TO EACH CAR WAS PART OF THE SAME CRIMINAL ACT PROCEEDING FROM THE SAME WRONGFUL INTENT.

In the area of theft the notion that property losses resulting from a continuous criminal act may be aggregated and one offense charged has long been recognized. Because the policy behind both theft and criminal mischief

statutes is the same (i.e., the protection of private property) the case law governing theft should be applied by analogy to criminal mischief cases.

Concerning larceny cases where a person in a single continuous act or transaction steals property items belonging to several different owners, A.L.R.2d states:

In the vast majority of cases wherein the issue of a single or multiple larcenies has arisen, or been discussed, the courts have held or stated that the stealing of property from different owners at the same time and at the same place constitutes but one larceny.

28 A.L.R.2d 1182.

Thus, according to the majority rule, if property belonging to several different owners is stolen "at the same time and at the same place" the value of the individual property items is aggregated and only one offense is charged. The defendant need not be separately charged for each piece of stolen property belonging to a separate owner.

The rationale for this rule is that the crime:

. . . is an offense against the public, and the prosecution is conducted not in the name of the owner of the property, nor in his behalf, but in the name of the state, the primary object being to protect the public against such offenses by the punishment of the offender, and, although

it is necessary to set out in the indictment the ownership of the property, this the law requires in order that the prisoner may be informed as to the precise nature of the offense charged against him, and further to enable him to plead a former conviction or acquittal, in bar of a subsequent prosecution for the same offense. So, it seems clear to us, on principle, that the taking of several articles of property under such circumstances constitutes but one felony.

State v. Warren, 77 Mo. 121, 26 A. 500 (1893).

This reasoning has repeatedly been affirmed and applied. See 2 Wharton's Criminal Law and Procedure § 451; Annotation: 28 A.L.R.2d 1152. In Hearn v. State, 55 So.2d 559 (Fla. 1951), a case involving the theft of livestock belonging to different owners, the Supreme Court of Florida adopted the majority rule stating:

Each case of this nature must be determined by the facts and circumstances of the particular case. There is some conflict in the cases, but the clear weight of authority is to the effect that the stealing of several articles at the same time and place as one continuous act or transaction is a single offense, even though the property belongs to different owners, for the reason that it is only a single act or taking.

We will align ourselves with majority rule in this country. . . .
(Emphasis added.)

This rule has also been adopted by the State of Utah.

State v. Mickel, 23 Utah 507, 65 Pac. 458 (1901).

Although respondent was charged with Criminal Mischief, not theft, Criminal Mischief is not only an offense against private property, but is an offense against the public, and it is prosecuted by the state to protect the public. Individual property owners may obtain redress from the offender through civil litigation. But the charge of criminal mischief is an action to vindicate the public and to punish the offender, not an action for or on behalf of the owners of the damaged property. Therefore, once it has been established that the damaged property did not belong to the defendant the focus is not on the ownership of the property, but on whether the property was damaged in a single continuous criminal act proceeding from the same criminal intent.

Corpus Juris Secundum defines a criminal transaction as: "An act or series of acts proceeding from one wrongful impulse of the will. . . ." 22 C.J.S. § 3, p. 2. See 2 Wharton's Criminal Law and Procedure § 450, 451, and accompanying footnotes 5 and 6.

Because criminal mischief is a crime against property and the public, not the individual property owners, property damaged in one continuous act proceeding from the same wrongful conduct may be charged as one offense even though the damaged property has several different owners.

This conclusion is consistent with decisions in embezzlement and theft cases.

For example in State v. Gibson, 37 Utah 330, 108 Pac. 349 (1910), a defendant was convicted of grand larceny for embezzling some \$235.60 from the Theater Publishing Company over the course of 38 days. The statute in question made an offense grand larceny if the amount exceeded \$50.00. The largest single sum taken by the defendant at one time was \$48.60. The defendant requested an instruction that on a lesser charge of petit larceny could be found. This Court affirmed the trial court's refusal to give such an instruction stating:

We think no error was committed in the ruling. The case is not like that argued to us by appellant where the successive larcenies each complete and distinct, did not constitute one continuous transaction; or where properties belonging to different persons located at different places were purloined, and where each asportation constituted a separate and distinct offense . . . But it is one of embezzlement 'committed by a series of connected transactions from day to day' . . . and shown to be a 'continuous offense committed by a trusted servant by means of a series of connected transactions; and in such case a charge of embezzlement on a certain date will cover and admit evidence of the whole' . . . and is one constituting 'in fact and in law a single embezzlement' . . .

and where 'the one substantive charge of embezzlement was supported by proof of the receipt at different times of the amount' the appellant 'was charged to have embezzled and one conversion of the whole.'

37 Utah at 332-333 (citation omitted).

A similar result was reached in State v. McCarthy, 25 Utah 2d 425, 483 P.2d 890 (1971) where Justice Crockett concluded that the theft of nineteen hams (grand larceny) was not "a segmented transaction" requiring an instruction on petty larceny. See generally 53 ALR3d 398.

The statute defining the crime of "issuing a bad check" supports the contention that the trial court erred by quashing the information in this case. Utah Code Ann. § 76-6-505(3)(a)(b)(c) indicates that a series of checks drawn within a period of six months may be aggregated to determine the degree of offense.

Utah Code Ann. §76-6-506.1 which proscribes the fraudulent use of credit cards has a similar six-month aggregation provision.

The language of the penalty section of the Criminal Mischief Statute also supports the position of the appellant. Utah Code Ann. §76-6-106(2)(c) speaks of an actor's conduct causing pecuniary loss and then provides penalties commensurate with the amount of loss.

Appellant submits that the defendant's actions here are "conduct" within the meaning of §76-6-106(2)(c).

The necessity of such construction is emphasized by a hypothetical. If a person were to break into a china shop and maliciously destroy hundreds of pieces of china with several swings of a crow bar it would seem illogical to charge him or her with several hundred misdemeanor counts of criminal mischief for each broken cup, saucer or plate when the total value of the destruction was well over the felony

Forcing the State to charge the defendant here with sixteen separate misdemeanors when the property loss occurred in the same way, in the same place and at the same time cannot be consistent with the legislative intent of the criminal mischief statute.

C

THE APPROPRIATE CHARGE IS A
SINGLE THIRD DEGREE FELONY
BASED ON THE AGGREGATE VALUE
OF THE DAMAGE WHICH IS APPROX-
IMATELY \$1800.00.

Utah Code Ann. §76-6-106(2)(c) (1953), as amended, provides for different classes of offenses depending on the amount of pecuniary loss resulting from the property damage.

According to the statute, if the actor's conduct causes or is intended to cause pecuniary loss in excess of \$1000.00, then the violation is a felony of the third degree.

Utah Code Ann. § 76-6-101(4)(1) provides that in cases like the instant case the "value" of the damages referred to above is determined by "the cost of repairing or replacing the property within a reasonable time following the offense."

Because the damage to all 16 vehicles was the result of the same criminal act proceeding from the same wrongful intent, it constitutes a single criminal offense against the state. Consequently, in determining the damages resulting from the offense, the damage to each car should be aggregated. Based on the cost of repairs, the total value of the damage done to all 16 vehicles is \$1800.00, well above the \$1000.00 statutory requirement for a felony charge.

CONCLUSION

The proper charges in this case is a single third degree felony for the offense of Criminal Mischief, the offense is against property, and requires no malice towards the owner of the property. Because criminal mischief is an offense against property and not the property owner, if property belonging to several different owners is damaged by one continuous wrongful act one offense against the state may be charged. For purposes of that one charge the amount of monetary damage to the various property items may be aggregated. Appellant prays for reversal of the trial Court's decision.

Respectfully submitted,

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