

1999

Utah v. Rick Keith Cates : Brief of Appellant

Utah Court of Appeals

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STATE OF UTAH,

V.

Defendant and Appellant.

Priority No. 2

Appeal from the Judgment and Order of Commitment
Eighth District Court
Uintah County, State of Utah
Honorable John R. Anderson

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,)	
)	
Plaintiff and Appellee,)	
)	Appellate Case No. 990402-CA
v.)	
)	Priority No. 2
RICK KEITH CATES,)	
)	
Defendant and Appellant.)	

BRIEF OF THE APPELLANT

Appeal from the Judgment and Order of Commitment
Eighth District Court
Uintah County, State of Utah
Honorable John R. Anderson

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BRIEF OF THE APPELLANT

Appeal from the Judgment and Order of Commitment
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STATEMENT OF JURISDICTION

Rick Keith Cates, Defendant and Appellant, through counsel, appeals his conviction on one count of burglary of a dwelling, a second degree felony, in violation of Utah Code Ann. § 76-6-202 (1973). The court of appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2a-3(2)(e) (1996).

STATEMENT OF ISSUE PRESENTED FOR REVIEW,
WITH STANDARD OF REVIEW

Issue

The sole issue for review is whether the trial court erred in interpreting the burglary statute to include the victims' rented trailer, briefly situated in the mountains for use during the deer hunt, within the meaning of a "dwelling" rather than "building," with the result that Cates was convicted of second degree not third degree felony burglary.

Standard of Review

The court of appeals reviews the trial court's interpretation of a statute for correctness, giving no deference to the trial court's determinations. *State v. Maguire*, 924 P.2d 904, 906 (Utah App. 1996), *cert. denied*, 931 P.2d 146 (Utah 1997).

DETERMINATIVE CONSTITUTIONAL PROVISIONS,
STATUTES, ORDINANCES AND RULES

Utah Code Ann. § 76-6-202 (1973).

This statute is reproduced verbatim below.

STATEMENT OF THE CASE

A. Nature of the Case

On November 5, 1998 Cates initially was charged with seven counts: (I) aggravated burglary, a first degree felony, in violation of Utah Code Ann. § 76-6-203; (II) aggravated robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302; (III) theft, a second degree felony, in violation of Utah Code Ann. § 76-6-404; (IV) unlawful

possession or use of a controlled substance, marijuana, a class B misdemeanor, in violation of Utah Code Ann. § 58-37-8(2)(a)(I); (V) possession of drug paraphernalia, a class B misdemeanor, in violation of Utah Code Ann. § 58-37a-5(1); (VI) purchase, possession or transfer of a handgun by a restricted person, a third degree felony, in violation of Utah Code Ann. § 76-10-503(3)(a); and (VII) attempted dangerous weapon penalty enhancement, in violation of Utah Code Ann. § 76-3-203.

B. Course of Proceedings

On December 16, 1998 Cates had a preliminary hearing. The trial court dismissed count (VI), purchase, possession or transfer of a handgun by a restricted person. However, it bound Cates over on, and he denied, the other counts.

On January 27, 1999, at a change of plea hearing, Cates admitted to an amended information charging him with three counts: (I) aggravated robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302; (II) burglary of a dwelling, a second degree felony, in violation of Utah Code Ann. § 76-6-202; and (III) theft, a second degree felony, in violation of Utah Code Ann. § 76-6-404. All other charges were dismissed.

C. Disposition at Trial Court

On April 6, 1999 the trial court sentenced Cates to concurrent terms at the Utah State Prison as follows: count (I), aggravated robbery, five years to life; count (II), burglary of a dwelling, one to fifteen years; and count (III), theft, one to fifteen years.

Cates presently is serving his sentence in state prison.

RELEVANT FACTS

The facts, which Cates does not dispute, may be stated briefly. Early in the evening of November 3, 1998 Cates and co-defendant Ben Cates, his brother, were driving in the vicinity of Blue Mountain Road, a remote area on Blue Mountain, inside Utah near the border with Colorado. They saw a trailer. They stopped, armed themselves with a shotgun and pistol, and entered the trailer where they encountered Andrew Sunkees, his wife and a baby. Tr. Preliminary Hearing 6-9. Cates and his brother questioned the victims about items in their possession and ultimately stole a muzzle-loader, a hunting knife, and a small amount of money. *Id.* at 9-12. They then left. Sunkees immediately used a cellphone, which he had denied having, to call for help. *Id.* Police apprehended Cates and his brother on the highway near Blue Mountain. All the stolen property, along with marijuana and drug paraphernalia, was recovered in Cates' vehicle. *Id.* at 49-54.

Sunkees' trailer was a twenty-four foot Mallard with sleeping quarters inside. He had rented the trailer from a dealer in Vernal and taken it to Blue Mountain for use during the deer hunt. It had been on site for one full day and night. It was to be returned to the dealer after the hunt. *Id.* at 7, 18-19.

At the preliminary hearing, Cates, through counsel, attempted *inter alia* to persuade the court that Sunkees' trailer was not a dwelling and therefore the burglary charge should be dismissed. *Id.* at 58-60. The court rejected this argument, saying that

because the trailer was used for sleeping it was a dwelling within the meaning of the burglary statute. *Id.* at 65-66. At the change of plea hearing, specifically in reference to count (II), burglary of a dwelling, Cates renewed his claim that the trailer was not a dwelling. The court allowed him to argue the matter further but, in the end, remained unconvinced. Tr. Plea Hearing 9-12. As a result, Cates' plea to count (II) was made conditionally, preserving the right to appeal the trial court's interpretation, pursuant to *State v. Sery*, 758 P.2d 935 (Utah App. 1988). Tr. Plea Hearing 8. Paragraph 23 of Cates' affidavit of defendant in advance of guilty plea and agreement also expressly preserved the right to appeal this particular issue.

SUMMARY OF THE ARGUMENT

A rented trailer, briefly situated in the mountains for use during the deer hunt, is not a dwelling within the meaning of the burglary statute, Utah Code Ann. § 76-6-202 (1973). Arguably, while a dwelling must be used for overnight occupancy, it also must have the attributes of a home, such as permanency in one location and placement in an area regularly used for residential purposes. The trailer, in this case, had none of the attributes of a home and more properly should have been deemed to be a building, subjecting Cates to less severe punishment. The wording of the statute itself supports such a view. Also, cases from other jurisdictions hold that trailers are not dwellings and, for the offense of burglary of a dwelling to lie, the structure involved must be permanently affixed to the ground or otherwise immobile. Finally, a Utah search and

seizure statute, along with search and seizure case law generally, distinguishes trailers and dwellings and provides a useful analytical framework for determining when a trailer can and does rise to the level of a dwelling. Applying the framework to this case leads to the result that the victims' trailer is not a dwelling and should not be regarded as such under the burglary statute.

ARGUMENT

At issue is whether a rented trailer, briefly situated in the mountains for use during the deer hunt, is a dwelling within the meaning of the burglary statute, Utah Code Ann. § 76-6-202 (1973). Section 76-6-202 provides:

(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.

“Building” and “dwelling” are not defined in the section. However, they are given some definition, statutorily, in Utah Code Ann. § 76-6-201 (1973):

(1) “Building,” in addition to its ordinary meaning, means any watercraft, aircraft, trailer, sleeping car, or other structure or vehicle adapted for overnight accommodation of persons or for carrying on business therein and includes:

(a) each separately secured or occupied portion of the structure or vehicle; and

(b) each structure appurtenant to or connected with the structure or vehicle.

(2) “Dwelling” means a building which is usually

occupied by a person lodging therein at night, whether or not a person is actually present.

Judicial interpretation of the burglary statute, specifically where the phrases “building” and “dwelling” are applied to particular facts, is minimal in this jurisdiction. The case most in point, *State v. Cox*, 826 P.2d 656 (Utah App. 1992), holds that a cabin in the mountains which is occupied less than fifty percent of the time is a dwelling within the definition in subsection 76-6-201(2). To date, no appellate court has determined whether a movable trailer, briefly situated in the mountains for use during the deer hunt, as opposed to a cabin, permanently located in the mountains for at least part-time residential living, is a dwelling, or as Cates believes, a building.

In *Cox* the court of appeals did not deal with the possible significance of the movability or immovability of a structure, that is, its permanency or lack of permanency in one location, in deciding whether it was a dwelling. The case involved a mountain cabin permanently affixed to the ground. The issue that defendant raised was the extent to which the cabin was occupied. Defendant argued that the cabin that was not “usually occupied.” The victim testified that indeed he spent just two or three days a week at the cabin. The court rejected defendant’s argument and implicitly declined to specify any period of time that someone must occupy a structure before the structure constitutes a dwelling. The court instead looked to the purpose for which a structure is used.

If the structure is one in which people typically stay overnight, it fits within the definition of dwelling under the burglary statute. ...[O]ur second degree burglary statute is intended

to protect people while in places where they are likely to be living and sleeping overnight, as opposed to protecting property in buildings such as stores, business offices, or garages.

Cox, supra, at 662. The cabin, in the facts of the case, was deemed to be a dwelling.

Defendant's second degree burglary conviction was affirmed.

Cox is in accord with a trend, in some jurisdictions, to extend the definition of dwelling, from its strict common law meaning of the fixed place of abode of another, to various structures and objects. However, little thought appears to have been given to what some of these structures are in reality. The question arises whether a slippery slope has been created, such that structures are considered to be dwellings when they truly are not and individuals convicted of burglary are sentenced more harshly than they should be. Query if a large cardboard box, used as overnight accommodations by a transient in the inner city, can be the subject of burglary of a dwelling. Query if a boat in the driveway, used as lodgings by an errant spouse, banished from the bedroom, can be the subject of burglary of a dwelling. Query if a mountain shelter, temporarily erected by a hiking club and used as a place to spend the night in inclement weather, can be the subject of burglary of a dwelling. Query if, in this case, a rented trailer, briefly situated in the mountains for use during the deer hunt, can be the subject of burglary of a dwelling.

At least two jurisdictions, considering whether a structure is a dwelling, treat occupancy as significant, as Utah does. However, occupancy is not controlling. These

jurisdictions also view, as very important, the attributes of the structure, in particular its permanency.

Virginia has considered the matter extensively. The rule that has emerged there is that “in order for a structure to be the subject of burglary, [it] must be permanently affixed to the ground so as to become part of the realty at the time of the unlawful entry.” *Dalton v. Commonwealth*, 418 S.E.2d 563, 565 (Va. App. 1992). Thus, a chicken house may be the subject of burglary. *Compton v. Commonwealth*, 55 S.E.2d 446, 449 (Va. 1949). However, a converted school bus, not permanently affixed to the ground, may not be. *Crews v. Commonwealth*, 352 S.E.2d 1, 4 (Va. App. 1987). An office trailer, permanently affixed to the ground, may be the subject of burglary. *Buie v. Commonwealth*, 465 S.E.2d 596, 598 (Va. App. 1996). Significantly, the trailer, in *Buie*, rested on blocks positioned along its underside, had fixed steps from the ground to an elevated doorway, was surrounded by a secure fence, and was serviced by electricity. *Id.* at 597-98. But a trailer, not permanently affixed to the ground, may not be the subject of burglary. *Graybeal v. Commonwealth*, 324 S.E.2d 698, 739-40 (Va. 1985).

Missouri also has considered the matter in depth. Two cases from that jurisdiction are particularly instructive. *State v. Ryun*, 549 S.W.2d 141, 144 (Mo. App. 1977), holds that a house trailer or mobile home, which was the sole place of abode and living quarters of occupants, was a “dwelling house” within the meaning of the burglary statute. Defendant contended that the trailer was not a dwelling and that he improperly was

convicted of burglary of a dwelling. However, the court rejected the argument. It determined that the trailer was a dwelling because it had not been moved since being towed to its resting place three years before, it was skirted from floor to ground to block air circulation and drafts, and it was connected to an electricity transmission line. *Id.* On the other hand *State v. Scilagy*, 579 S.W.2d 814, 819 (Mo. App. 1979), holds that a forty-foot semitrailer, despite the fact that it contained a bedroom facility which was used for that purpose, could not be the subject of burglary. The trailer was parked at a shopping center and part of carnival that went from place to place. At the time of the offense, to-wit a break-in and theft of a cash bag, the trailer was on wheels and fully mobile and it was not equipped for water or sewer hookup. *Id.* at 816-17. The court expressly contrasted the semitrailer with the victims' trailer in *Ryun*. At 819.

On the basis of these cases from other jurisdictions, Cates believes that not only the purpose of a structure but its physical attributes and characteristics should be considered in determining, in Utah, whether that structure is a dwelling within the meaning of the burglary statute. There is arguably support for this position in the very language of the statute. A "dwelling" is "a building which is usually occupied by a person lodging therein at night, whether or not a person is actually present." Utah Code Ann. § 76-6-201(2). However, a "building" includes, in its definition, "*any ... trailer ... or vehicle adapted for overnight accommodation of persons*" Utah Code Ann. § 76-6-201(1) (emphasis added). The plain meaning is that any trailer used for sleeping

overnight is a building, not dwelling. Any interpretation to the contrary is erroneous. “A fundamental principle of statutory interpretation is that unambiguous language in the statute itself may not be interpreted so as to contradict its plain meaning.” *Johnson v. Utah State Retirement Board*, 770 P.2d 93, 95 (Utah 1988). Accordingly, burglary committed in a dwelling, where people live and sleep, is a second degree felony, but burglary in a trailer, despite the fact that people may be sleeping there, is only a third degree felony.

The distinction that Cates is making is one that the State itself draws in Utah Code Ann. § 23-20-1(2), though admittedly in another context. Conservation officers, who have police powers, may engage in warrantless searches of “vehicles, camps, or other places,” including no doubt trailers located in the mountains during hunting season, if there is probable cause to believe that illegally taken wildlife is contained in those locations. However, officers may execute searches of “an occupied or unoccupied dwelling” only if they first obtain a warrant. A trailer and a dwelling are recognized as being quite different. Were a citizen to challenge warrantless police search of his trailer, briefly situated in the mountains for use during the deer hunt, the State certainly would argue that he had no Fourth Amendment or article I, section 14 protection because a trailer is not a dwelling within the meaning of the law.

There is irony here, and it goes further. That courts should take into account not just occupancy of a structure, but its physical attributes and characteristics, is an

argument advanced by the government in justifying warrantless intrusion into citizens' living quarters by armed, sometimes masked men, namely police in search and seizure cases. If the living quarters do not possess what *California v. Carney*, 471 U.S. 386 (1985), refers to as "the attributes of a home," an exception to the general warrant requirement may exist. It did exist in *Carney*. The United States supreme court determined that respondent's mobile home, which was the subject of a warrantless police search for drugs, had more of the characteristics of an automobile than a home. It was, for example, on wheels and easily could have been moved beyond the reach of police.

Whether trailers or mobile homes are dwellings, in search and seizure cases, is a fact-intensive question. *See generally* Wayne R. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment* § 7.2 (1996). Specific matters to inquire into include whether the trailer was readily mobile, whether it was subject to government regulation and control as a vehicle or house, whether it was in a place regularly used for residential purposes, whether it was connected to utilities, and whether it was in a place open to the public and available for public use. Significantly, in this case, application of such factors clearly suggests that Sunkees' trailer should not be considered to be a dwelling within the meaning of the burglary statute. It was mobile, not affixed to the ground or otherwise permanently placed in its location. Indeed it was only briefly situated in the mountains, for use during the deer hunt, and to be returned to the dealer afterwards. Presumably it was a vehicle, not a house, and licensed as a vehicle. It was in

a remote spot in the mountains, in a place not regularly used for residential purposes. There is no evidence that it was connected to utilities. It was not connected to a phone line; Sunkees used his cellphone to call police. Finally, as the trailer was located in the mountains, for the deer hunt, it was in a place open to hunting, that is, a place available for use of the general public with hunting licenses and permits.

Arguably, therefore, the court of appeals should add to the only criterion used in *Cox* to determine whether a structure is a dwelling, that is, the purpose for which it is used, to include the physical attributes and characteristics of the structure. Two criteria, nighttime occupancy and attributes of a home, should be used simultaneously for purposes of analysis. If both are present, the structure in question should be deemed to be dwelling under the burglary statute. However, if both are not present, the structure should be considered to be a building. Attributes of a home are necessary because, as the burglary statute even now recognizes, a trailer as well as a dwelling can be used for overnight occupancy but a trailer and a dwelling are clearly distinguishable. Cases from other jurisdictions hold that, for the crime of burglary of a dwelling to lie, a structure must possess certain attributes, in particular permanency. Utah Code Ann. § 23-20-1(2) differentiates between movable (vehicles, camps, etc.) and immovable (dwellings) places, in wildlife search and seizure cases, reminding us that the law does regard, as important, the nature of a structure, not just whether people may be sleeping inside it. The degree to which structures such as trailers and mobile homes are or are not like dwellings is an

important and recurrent issue in search and seizure cases generally, with application, Cates believes, to this case.

In short, for the reasons set forth above, the trial court erred in interpreting the burglary statute, Utah Code Ann. § 76-6-202, to include Sunkees' trailer within the meaning of a "dwelling." The trailer was a "building," not "dwelling." Cates should have been convicted of third degree rather than second degree felony burglary.

CONCLUSION

The court of appeals should reverse Cates' conviction on count (II), burglary of a dwelling, a second degree felony, and remand his case to the trial court for proceedings consistent with its opinion.

DATED this 12 day of November, 1999.



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NO ADDENDUM

Pursuant to Rule 24(a)(11), Utah R. App. P., notice is given that no addendum to the brief of the appellant is necessary.

CERTIFICATE OF SERVICE

On this 23 day of November, 1999 I mailed postage prepaid the original and eight copies of this page of the brief of the appellant to

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CERTIFICATE OF MAILING

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