1982

The State of Utah v. Michael George Durant : Brief of Appellant

Utah Supreme Court

Nancy Bergeson; Manny Garcia; Attorneys for Appellant;
David L. WIlkinson; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent	:	
vs.	:	
MICHAEL GEORGE DURANT,	:	Case No. 18051
Defendant-Appellant	:	

BRIEF OF APPELLANT

Appeal from a verdict of guilty of Aggravated Arson, a felony in the Second Degree, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Peter F. Leary, presiding.

NANCY BERGESON
Salt Lake Legal Defender Association
333 South Second East
Salt Lake City, Utah 84114
Telephone: 532-5444
Attorney for Appellant

MANNY GARCIA
Research Assistant

DAVID L. WILKINSON
Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114
Attorney for Respondent

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BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

The appellant, MICHAEL GEORGE DURANT, appeals from the conviction and judgment of Aggravated Arson, a felony in the Second Degree, in the Third Judicial District Court, in and for Salt Lake County, State of Utah, the Honorable Peter F. Leary, presiding.

DISPOSITION IN THE LOWER COURT

The appellant, MICHAEL GEORGE DURANT, was tried and convicted of Aggravated Arson, a Second Degree felony. Appellant was sentence to an indeterminate term not to exceed five years pursuant to §76-3-402 Utah Code Annotated (1953 as amended) wherein the judge lowered the penalty to the next lower category and imposed sentence accordingly.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment rendered by the Court below and a new trial.

STATEMENT OF THE FACTS

On December 1, 1980, at approximately 1:50 a.m. the house where the appellant and the owner resided was set on fire. The fire was allegedly caused by a liquid-pour accellerant (T. 5, L.16-18). Bullet holes were found in the kitchen walls. Bullet casings and fragments were also found (T. 7, L.21-25; 8, L.1-6). Appellant gave the police a statement later that morning, and also another one on June 5, 1981. In the first statement, appellant said he and Rose (the owner) had been out drinking earlier that evening of November 30, and that Rose's car broke down. They came home, then left to return to the car, then spent the entire evening with a friend in West Valley (T. 27, L.20-25; 28, L.1-2).

Miss Martin, the witness who lived next door, said that she saw appellant and Rose together in the house the night of November 30 when the shots were fired (T. 18, L.1-7). Then Rose left a few minutes before the fire started (T. 18, L.10-11; 24, L.2-5). After the fire started, Miss Martin said she saw appellant leaving the scene (T. 18, L.15-25). She said both appellant and Rose returned the next morning asking what had happened (T. 21, L.23-24).

After appellant was arrested on June 5, 1981, he gave a statement (STate's Exhibit 8-P), which differed from his prior one (T. 28, L.6-8). In that statement, appellant admitted that he started the fire but was acting under the directions of Rose, the owner.

Counsel made a motion to dismiss at the end of the State's case. The motion was based on the argument that defendant did not act "unlawfully" nor commit aggravated arson in setting the fire, using Christendon (infra) as authority. The motion was denied.

Appellant was found guilty of Aggravated Arson as charged. That crime normally carries a penalty of one to fifteen years, but at sentencing, Judge Leary decided to reduce the penalty in appellant's case to zero to five years. §76-3-402 Utah Code Annotated (1953 as amended), reads:

> 76-3-402. Conviction of lower category of offense.--(1) If the court, having regard to the nature and circumstances of the offense of which the defendant was found guilty and to the history and character of the defendant, concludes that it would be unduly harsh to record the conviction as being for that category of offense established by statute and to sentence the defendant to an alternative normally applicable to that offense, the court may enter a judgment of conviction for the next lower category of offense and impose sentence accordingly.

In his judgment, Judge Leary recorded the conviction as "Aggravated Arson, a Third Degree felony," meaning he decided the charge was appropriate, but that the normal penalty would be unduly harsh. He sentenced appellant according to the next lower

category resulting in appellant's zero to five years sentence.

This sentencing procedure does not affect the substance of appellant's argument wherein it is contended that he should not have been found guilty of Aggravated Arson initially.

ARGUMENT

POINT I

APPELLANT SHOULD NOT HAVE BEEN CONVICTED OF THE CRIME OF AGGRAVATED ARSON SINCE HE DID NOT "UNLAWFULLY" BURN A HATITABLE STRUCTURE.

The following statutes are relevant to a determination of the appellant's criminal culpability in this case:

> 76-6-104. Reckless burning.--(1) A person is guilty of reckless burning if he:
>
> (a) Recklessly starts a fire or causes an explosion which endangers human life; or
>
> (b) Having started a fire, whether recklessly or not, and knowing that it is spreading and will endanger the life or property of another, either fails to take reasonable measures to put out or control the fire or fails to give a prompt fire alarm; or
>
> (c) Damages the property of another by reckless use of fire or causing an explosion.
>
> 76-6-102. Arson.--(1) A person is guilty of arson, if under circumstances not amounting to aggravated arson, by means of fire or explosives, he unlawfully and intentionally damages:
>
> (a) Any property with intention of defrauding an insurer; or
>
> (b) The property of another.
>
> 76-6-102. Aggravated arson.--[(1)] A person is guilty of aggravated arson if by means of

fire or explosives he intentionally and unlawfully damages:

(a) A habitable structure; or

(b) Any structure or vehicle when any person not a participant in the offense is in the structure or vehicle.

(Utah Code Ann. 1953 as amended)

Appellant asserts that while his conduct may be proscribed by the provisions of §76-6-104 and §76-6-102, it does not fall within the provisions of §76-6-103, and he is therefore not guilty of aggravated arson.

A traditional principle of law is that it is not "unlawful" for an owner to destroy his own property by burning it. See 17 ALR 1168. At common law, an owner had autonomy over his own property and could dispose of it, or destroy it, as he so desired. This principle remains in tact, except insofar as the legislature has modified it. The legislature has created three distinct offenses which proscribe the act of burning and destroying property.

One of these offenses, "reckless burning," conspicuoulsy omits the word "unlawful," and seeks to punish even those who choose to destroy their own property. The "reckless burning" statute is offended if one recklessly starts a fire which endangers human life, or endangers or damages the property of another. The obvious intent of the legislature is to protect the person and property of others that may be nearby the fire, regardless of any justification that may exist for the burning itself.

Thus, even though an individual burns down his own property in an exercise of autonomy, he is guilty of reckless burning if there is a danger of the fire spreading to adjoining property or harming people nearby. Appellant's conduct, even though he was acting at the direction of the owner of the property, and thus burning "his own" property, is clearly sanctioned by the "reckless burning" statute.

The "arson" statute, on the other hand, clearly incorporates the common law notion by using the word "unlawful". The legislature has specifically defined the unlawful conduct; a person may not burn any property with the intent of defrauding an insurer, nor may an individual burn the property of another, under circumstances not amounting to aggravated arson. In this case, Rose could be found guilty of arson if it is shown that his intent in procuring appellant to burn the property was to defraud an insurer. (References to that effect are found in Plaintiff's Exhibit 8-P) Appellant, of course, would also commit the fraud if he knew the owner's intent. He could not, however, be convicted under subsection (b) (destroying the property of another) where he had permission from the owner.

The "aggravated arson" statute also incorporates the word "unlawful" in its language. Aggravated arson is "arson" plus two specifically defined aggravations. Under subsection (a) if an individual commits "arson" (burns any property to defraud an insurer, or burns the property of another), and that property is habitable, the offense becomes aggravated. The common law notion that an individual may destroy his own property, as long as he doesn't endanger

victims, remains intact. Under subsection (b), however, the legislature creates an aggravation that occurs when any property is damaged. The common law notion is thus modified where a victim is inside the structure.

The policy behind the aggravated arson statute is not abrogated by incorporating the interpretation of "unlawful" into its provisions as that word is illuminated by the arson statute. Under subsection (a), the aggravated arson statute addresses itself to other people's habitable structures, like hotels, warehouses, offices, and homes.

On the other hand, under subsection (b) a person can be guilty of the offense if he or she damages by fire or explosives any structure or vehicle when a person is inside. Thus, where an individual may be harmed within the structure, ownership of the structure is irrelevant. The statute is obviously worded and sensibly interpreted to apply to another's property under subsection (a) and any property under subsection (b).

Appellant, therefore, cannot be guilty of aggravated arson. The circumstances surrounding the incident indicate complicity between appellant, the actor, and Rose, the owner. Appellant was procured by Rose, the owner, to burn the house. The relationship is one of agent/principal or principal and accomplice. The focus must necessarily shift to the owner because the agent cannot be any more responsible than the principal, where the agent is merely following the principal's directives.

A case directly on point and supportive of appellant's position is State v. Christendon, 468 P.2d 153 (Kansas 1970). In that case, the defendant applied the torch to the owner's property (a hotel) at the owner's request. The owner had procured the defendant to do the deed. There, the owner was found guilty of "insurance arson" a third degree felony, but could not be found guilty of first degree arson of the building. The court said a necessary element of first degree arson (comparable to Utah's 76-6-103) is that "the building burned be the property of another person", id at 155. The cases dealing with the owner's culpability were State v. Parrish, 468 P.2d 143 (Kansas 1970), and State v. Parrish, 468 P.2d 150 (Kansas 1970).

In Christendon, the defendant could not be found guilty of first degree arson and his conviction on that charge was reversed. The court explained that the defendant "could not be guilty of a more serious crime than the owner who hired him," 468 P.2d at 154. The Parrish cases established that the owner intended to defraud or injure an insurer. The evidence showed that the defendant expected renumeration for his deed.

The Christendon court referred to the annotation in 54 A.L.R. p. 1236 which commented on State v. Craig, 259 P.2d 802 (Kansas 1927). The court said that:

> . . . in a number of other cases, the courts have discussed the criminal liability of one who burns a building with the sanction of the owner at the times of the burning, and have held that such a person is not guilty of arson, since, at common law and under most statutes, one cannot be criminally liable for burning his own building, and an agent cannot be more liable than his principal would be if he did the act. [citing cases]

As to the culpability of the agent, the court referred to 5 Am. Jur. 2d, Arson and Related Offenses, §23, p. 818:

> If the owner in possession is not guilty of arson in burning his own property, then one who assists the owner in burning it or who burns it at the owner's request is not guilty of arson, for the agent's guilt can only be coextensive with that of the principal.

In holding the agent's guilt to be coextensive with the owner's, the Ohio Supreme Court in Haas v. State, 132 N.E. 158 (1921) said:

> It is but the application of ordinary logic to say that if the aider and abettor is guilty of the same crime as the principal, and may be prosecuted as a principal, that the principal is guilty of the same crime as the aider and abettor; that in law the action of the one is treated as the action of both, and that the actions of both are no different than though the separate acts of each were performed by one person. * * * (132 N.E. at 159)

The Christendon Court summed up its position by stating that under statutes similar to its first degree arson statute, the cases were quite uniform in holding that an agent who burns the owner's building at the request of the owner cannot be held guilty of burning the property of another. It cited these cases: [Haas v. State, supra; Commonwealth v. Makely, 131 Mass. 421 (1881); State v. Haynes, 66 Me. 307 (1876); Roberts v. The Sate, 7 Cold. (42 Tenn) 359 (1870); Heard v. State, 81 Ala. 55, 1 So. 640 (1887); Dedieu v. The People, 22 N.Y. [Appeals] 178 (1860); State v. Sarvis, 45 S.C. 668, 24 S.E. 53 (1896); State v. Greer, 243 Mo. 599, 147 S.W. 968 (1912). See also Wharton's Criminal Law and Procedure [Anderson] Vol. II, Arson §405, p.20 The court went on to say that:

> Although the relationship of principal and agent is not technically applicable to criminal law, yet responsibility for burning property generally depends upon the intent or mens rea of the owner who procures the burning. If the owner desires to rid himself of a building by burning and can limit the fire to his own building he may do so. Without a willful or malicious intent he commits no crime. An owner can hire someone to do to his property what he himself may do. The person hired to burn the property of the owner commits no greater crime than the owner.
>
> The reasoning which limits the guilt of the agent arises out of the law of principals and accessories. The person who applies the torch to the property is the principal. The person who procures, counsels and aids the principal to burn the property is the accessory. In theory the accessory (owner) is regarded as constructively present, giving aid, counsel and encouragement to successfully accomplish the common purpose. The separate acts of the accessory (the owner) and of the principal (the torch) unite in one purpose. (See Perkins on Criminal Law [University Textbook Series], Parties to Crime, p. 572). The purpose in this case, which makes the burning criminal in nature is the owner's intent to defraud the insurer by burning the property. If the defendant knew he was assisting the owner in defrauding the insurer when he set fire to the owner's property he too was guilty of accomplishing the crime proscribed by Kansas' Third Degree Arson Statute. Bur in any event the purpose accomplished by both accessory and principal remains the same. The purpose was not to burn the property of another person.

Thus, the reasoning of the controlling authorities support appellant's position that his actions as "the torch" can be no more culpable than those of Rose, the owner. Here, the evidence shows that appellant acted at the request of and under the direction of Rose.

The neighbor testified that Rose and appellant were both in the house when the shots were fired at about 12:30 a.m. on December 1. (T. 18, L.1-8). The neighbor also said

Rose left the house just before it was set ablaze (T. 18, L.10-11). If the fire started at 1:50 a.m. as testified to, then Rose remained inside for more than one hour after the shots. Soon after Rose left, the fire started and appellant was seen leaving the area (T. 18, L.15-25). Later that morning, both Rose and appellant returned to the scene.

In his June 5 statement, appellant said that Rose would pay him $1,000 if he would participate in setting the house on fire. In preparing to set the fire, appellant said Rose first secured his personal papers, titles etc., and his gun, and then told appellant where (what area of the house) to dump the laquer thinner. After this was done, Rose left in the car and appellant immediately started the fire as per Rose's instructions. He then ran out to meet Rose who was waiting for him in front of a shack a short distance away from the burning house. Then they both "took off" in the car. Appellant explained "how Rose set up their alibi with Fred Butler in West Valley." He also stated that he was never paid for helping Rose burn his house down.

CONCLUSION

Appellant's conviction of aggravated arson cannot stand. His culpability can be no greater than that of the owner, Rose. Under the aggravated arson statute, a defendant cannot be guilty of destroying his own property unless an innocent person was inside the structure. Since no victims were involved, and

the burning was not of the habitable structure of another, appellant's conviction must be reversed.

DATED this 2 day of September, 1982.

NANCY BERGESON
Attorney for Appellant

DELIVERED a copy of the foregoing to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114, this ____ day of September, 1982.