

1990

State of Utah v. Robert T. Haston : Brief in Opposition to Certiorari

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

~~STATE OF UTAH,~~ ^{910021-CA} :

Plaintiff/Respondent, : Case No. 910266

v. : Priority No. 13

ROBERT T. HASTON, :

Defendant/Petitioner. :

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS

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FILED

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UTAH

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QUESTION PRESENTED FOR REVIEW

Petitioner requests that this Court consider whether attempted depraved indifference murder is a crime in Utah.

OPINION BELOW

The court of appeals opinion appears in State v. Haston, 160 Utah Adv. Rep. 32 (Utah Ct. App. May 6, 1991).

JURISDICTION OF THIS COURT

This Court has jurisdiction to consider a petition for a writ of certiorari pursuant to Utah Code Ann. § 78-2-2(3)(a) (Supp. 1991).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

No constitutional provisions, statutes or rules are pertinent to this Court's resolution of the question presented by petitioner.

STATEMENT OF THE CASE

Petitioner, Robert T. Haston, was found guilty of attempted second degree murder, a second degree felony, in

violation of Utah Code Ann. §§ 76-5-203, 76-4-102(2) and 76-4-101 (1990) after a jury trial (R. 137). Petitioner was sentenced to a term of one to fifteen years at the Utah State Prison. A firearm enhancement was added to the sentence, and petitioner was also ordered to pay fines and restitution (R. 112, 119-120).

Petitioner filed a petition for rehearing with the court of appeals, and that petition was denied on May 30, 1991. Petitioner's petition for a writ of certiorari was timely filed.

STATEMENT OF THE FACTS

A statement of the facts of this case is not pertinent to the resolution of the issue presented by petitioner.

SUMMARY OF ARGUMENT

Because petitioner did not raise the issue he now presents to this Court at the court of appeals, his petition for a writ of certiorari should be denied.

ARGUMENT

PETITIONER FAILED TO PROPERLY PRESERVE THE ISSUE HE NOW PRESENTS TO THIS COURT AT THE COURT OF APPEALS.

In urging this Court to issue a writ of certiorari in the instant case, petitioner raises the issue of whether attempted depraved indifference murder is a legal possibility in this state, an issue not properly raised in the court of appeals. In support of his argument, he asserts that the court of appeals refused to consider that issue below, notwithstanding his requests that it do so. However, that question was neither briefed nor orally argued by petitioner in the court of appeals,

and it was not addressed by that court. Petitioner's "preservation" of the question consisted of a brief reference to that issue in a footnote (a copy of which is attached hereto in the Addendum).

Although granting of a petition for a writ of certiorari lies within the broad discretion of this Court, petitioner's justification for requesting a writ falls outside of the normal considerations governing review of certiorari outlined in rule 46, Utah Rules of Appellate Procedure. The United States Supreme Court has refused to consider a claim presented in a petition for a writ of certiorari when it was not passed on by the court of appeals and did not appear to have been presented to that court as a distinct ground for its decision. City of Canton, Ohio v. Harris, 109 S.Ct. 1203 n. 5 (1989). See also Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981). But see Carlson v. Green, 446 U.S. 14, 17 n. 2 (1980) (where, in the interests of judicial administration, an issue not previously raised was considered by the Court, when the respondent did not object to the Court deciding the question and the question had been properly raised and briefed in a subsequent case before the Court).


In the instant case, petitioner limited his arguments at the court of appeals to the adequacy of the depraved indifference jury instruction and did not afford that court the opportunity to substantively address the issue he now raises. His attempt to do so now should be rejected.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

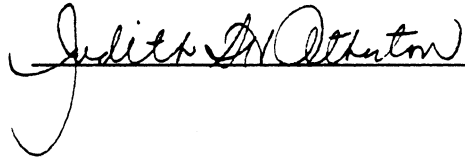
RESPECTFULLY SUBMITTED this 11 day of July, 1991.

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Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the Utah Court of Appeals were mailed, postage prepaid, to Ronald S. Fujino, Salt Lake Legal Defender Assoc., attorney for Defendant/Petitioner, 424 East 500 South, Suite 300, Salt Lake City, Utah, 84111, this 11 day of July, 1991.



ADDENDUM

(R. 78); see Addendum E. Appellant excerpted most of this language from State v. Bolsinger, 699 P.2d 1214, 1220 (Utah 1985).

Nevertheless, the trial court deemed the deleted portion, language authoritatively adopted by the Utah Supreme Court in Bolsinger and more recently in State v. Standiford, 769 P.2d 254 (Utah 1988), as "surplusage" (T. 312). The trial court reasoned:

The instruction as modified[, Instruction No. 13,] provided the essential elements insofar as the definition of depraved indifference is concerned, that the "in other words" language or clause which was stricken by the court was indeed surplusage,

(T. 312).

A. THE JURY COULD NOT HAVE CONSIDERED ALL THE FACTORS NECESSARY FOR AN "ATTEMPTED DEPRAVED MURDER" CONVICTION.

"Depraved indifference" is not a crime. Rather, it is a single component of "depraved murder," the third variation of second degree murder," or, in other words, one element listed in paragraph three of the attempted criminal homicide charge (R. 90). "Depraved murder" and attempted depraved murder⁹ both require proof of the depraved indifference element and are virtually identical,

⁹ The crime of "attempted depraved murder" is, in all likelihood, a legal impossibility. "[T]he crime of attempted murder requires proof of intent to kill." State v. Bell, 785 P.2d 390, 394 (Utah 1989). Depraved murder, however, requires only that the defendant act knowingly in creating a grave risk of death. State v. Standiford, 769 P.2d 254 (Utah 1988). Depraved murder does not require a specific intent to kill. Id. Since attempted murder requires a specific intent to kill and depraved murder does not, the crime of "attempted depraved murder" could not exist. Cf. People v. Collie, 30 Cal.3rd 43, 62, 634 P.2d 534, 545, 117 Cal. Rptr. 458, 469 (1981) cited in Bell, 785 P.2d at 393 n.13 (wherein additional cases are cited supporting this proposition).