1982

State of Utah v. Wendell Irving Hill : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Respondent	:	
vs.	:	
WENDELL IRVING HILL,	:	Case No. 18180
Defendant/Appellant	:	

BRIEF OF APPELLANT

Appeal from a judgment and conviction of aggravated burglary, a felony of the first degree, aggravated robbery, a felony of the first degree, theft, a felony of the second degree, and aggravated assault, a felony of the third degree, in the Third District Court in and for Salt Lake County, State of Utah, the Honorable Christine M. Durham, presiding.

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STATEMENT OF NATURE OF THE CASE

The appellant, Wendell Irving Hill, was convicted in a criminal proceeding of one count of Aggravatated Burglary, a felony of the fist degree, one count of Aggravated Robbery, a felony of the first degree, one count of Theft, a felony of the second degree, and one count of Aggravated Assault, a felony of the third degree, before the Honorable Christine M. Durham, on December 2, 1981, in the Third Judicial District Court, in and for Salt Lake County, State of Utah.

DISPOSITION IN THE LOWER COURT

Wendell Irving Hill was tried and convicted of the above counts, and sentence on December 10, 1981, to an indeterminate sentence as provided by law at the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment rendered by the Court below, and a new trial, or in the alternative that the case be remanded for resentencing.

STATEMENT OF FACTS

The facts relevant to the issues to be raised on appeal are that on or about October 7, 1981, at the Stratford Hotel located at 169 East 200 South in Salt Lake City, Utah, the apartment of Richard Salamone, manager of the Stratford Hotel, was entered by two men, one of whom was armed with an automatic pistol. Salamone and a guest, John Savage, were subsequently bound. The two men threatened Salamone and Savage; taking money from the manager's desk and personal property belonging to Salamone before leaving the apartment. Aprroximately five to ten minutes later appellant and co-defendant were stopped in co-defendant Paul Miller's car, some two and one-half to three blocks from the Stratford Hotel. Found in the trunk of the car, upon impound, were all items of personal property reported missing by Salamone. A television set was in possession of appellant in the front seat of the car. At appellant's trial, appellant testified that he had had a prior relationship with Salamone, and that the items taken from the apartment that evening had been won by him from Salamone in a series of card games. Also found in appellant's possession at the time of his arrest was a .20 caliber pistol, which appellant testified that he had also won from Salamone.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FAILING TO FIND AS A MATTER OF LAW THAT THEFT IS A LESSER INCLUDED OFFENSE OF AGGRAVATED ROBBERY.

The standard for determining when an offense is a lesser included offense is set out by statutue in Section 76-1-402(3)(a), Utah Code Ann. (1953 as amended), which provides:

> (3) A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when: (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged. . .

This court set out the requirements for an included offense in State v. Brennan, 371 P.2d 27 (Ut. 1962) as follows:

> The rules as to when one offense is included in another is that the greater offense includes a lesser one, when establishment of the greater would necessarily include proof of all of the elements necessary to prove the lesser. Conversely, it is only when the proof of the lesser offense requires some element not involved in the greater offense that the lesser would not be an included offense.

Both theft and robbery are crimes of larceny, both requiring the union of an act with the intent to permanently deprive another of his property by otaining unauthorized control over it. The common law in this state and in other jurisdictions has long required the presence of "animus furundi," or intent to steal as an essential element of the offenses of theft and

and robbery. People v. Hughes, 39 P. 492 (Ut. 1895); People v. Gallegoes, 2 F 4P.2d 608 (Colo. 1954); State v. Hardin, 406 P.2d 466 (Ariz. 1965); State v. Brighter, 608 P.2d 855 (Haw. 1980); Richardson v. U.S., 403 F.2d 574 (N.C. Cir. 1968).

Professors W. LaFave and A. Scott state the common law as follows:

> Robbery consists of all six [common] elements of larceny . . . plus two additional requirements: (1) that the property be taken from the person or presence of the other and (2) that the taking be accomplished by means of force or putting in fear. Handbook on Criminal Law §94 (1972) at 692.

The Utah Supreme Court has recognized the compound nature of robbery in dismissing a verdict of guilty on a conviction of grand larceny where the appellant was also convicted of the crime of robbery. This, on the basis that, the grand larceny charge was a lesser-included offense. State v. Donovan, 294 P. 1108 (1931); State v. Montagne, 474 P.2d 958 (1966).

In the recent case of State v. Potter, 627 P.2d 75 (1981) this court reversed, inter alia, a conviction for aggravated robbery, where the instruction did not adequately state the requirement of specific intent for the offense of aggravated robbery. Justice Stewart's concurring opinion focused on the inadequacy occasioned by the failure of the instructions to reflect the elements of the crime of aggravated robbery; stating:

> The instructions were worded in the statutory language, but in this case, that was not sufficient. The instructions do not require the jury to find that the taking which occurs in a robbery must be with the intent to deprive. 627 P.2d at 80.

Justice Stewart further noted that the 1973 amendment to Section 76-6-301, U.C. Ann. (1953), wherein "felonious taking" was changed to an "unlawful and intentional taking:"

> . . . did not change that element of the crime requiring an intent to deprive which has always accompanied the crime of robbery. See People v. Hughes 11 Utah 100, 39 P.492 (1895). 627 P.2d at 80.

The Nevada Supreme Court in reversing a conviction of first-degree nurder for failure to instruct the jury as to specific intent in a charge of robbery held, in Turner v. State, 605 P.2d 1140 (Nev. 1980):

> Although the statute is silent regarding intent, this court has held that the "taking in the crime of robbery must be with the specific intent permanently to deprive the owner of his property." State v. Sala, 63 Nev. 270, 169 P.2d 524 (1946). And, we note that instructions regarding the specific intent required for robbery were given in Brimmage v. State. 93 Nev. 434, 567 P.2d 54 (1977), and Rogers v. State, 83 Nev. 376, 432 P.2d 331 (1967). 605 P.2d at 1141.

During the trial in the instant case, the judge conceded that theft appeared to be a lesser included offense of robbery (T. 199). The trial court, however, found that aggravated robbery does not have the element of intent to deprive the owner (T. 29). On the basis of State v. Potter, supra, and prior case law, appellant contends that this ruling is erroneous.

At trial the prosectuion relied on the peculiar treatment of aggravated robbery in as much as Section 76-6-302(3), U.C. Ann. (1953 as amended), is inclusive of an attempt to, commission of, or immediate flight after the attempt or commission of a robbery.

On the face of the statute and in light of State v. Potter, supra, there is nothing in the expansion of the actus rea that changes the mens rea requirement of this crime.

The attempt statute, Section 76-4-101, U.C. Ann. (1953 as amended), requires a person to "[act] with the kind of culpability otherwise required for the commission of the offense." Sub-part (2) of the attempt statute requires that for conduct to constitute a substantial step, it must be strongly corroborative of the actor's intent to commit the offense.

If the actor's conduct does not corroborate an intent to deprive in the aggravated robbery situation, then there is no attempted robbery or theft, but rather evidence of assault or aggravated assault. See State v. Dugan, 608 P.2d, 771 (Ariz. (1980).

That there is no legislative intent to change the mens rea requirement of aggravated robbery is further illustrated by the retention of the statute under offenses against property, and not offenses against persons.

Appellant does not deny that the enhanced penalty for aggravated robbery is directed at the danger created by the risk of, or actual occurance of bodily injury, to the victim. Clearly, the definition of "in the course of robbery" is aimed at this risk, to the victim, which is equally great either before, during or following the course of an aggravated robbery. See People v. Wells, 592 P.2d 1321 Colo. 1979).

Appellant further contends that in the instant case the legislative intent in the creation of the more serious crime of

aggravated robbery meets the legislator's penal objectives unless there are legislative indications to the contrary. Here, there was one criminal episode made up of a continuous flow of conduct with one objective sought. Therefore, where the imposition of a greater punishment is provided for in the greater offense, the statute is inclusive of the lesser. State v. Cloutier, 596 P.2d 1278 (Or. 1979).

POINT II

WHERE ON THE FACE OF THE PLEADINGS, THE SAME COURSE OF CONDUCT IS ALLEGED FOR BOTH OFFENSES, IT IS PREJUDICIAL ERROR TO CHARGE BOTH THE GREATER AND THE LESSER INCLUDED OFFENSES.

Section 76-1-402(3), U.C. Ann. (1953 as amended) provides that a defendant may be convicted of an included offense or the greater, but not both.

Reason dictates, that where a defendant may not be convicted and punished for both the greater and the lesser offense, it is unfair and prejudicial to charge both separatly were on the fact of the pleadings the prosecution alleges the same conduct for both crimes.

In the instant case, count II of the Information, Aggravated Robbery, alleges in the statutory language the crime charged, and further that the defendant(s):

> . . . took personal property in the possession of Richard Salomone, against his will, and in the course of committing said robbery, said defendant(s) used a firearm. . .

In count III, Theft, the Information alleges in the statutory language the crime charged, and further that the defendant(s):

> . . . obtained and exercised unauthorized control over the property of Richard Salamone with the purpose to deprive the owner thereof, from the person of Richard Salamone and said defendant(s) were then and there armed with a deadly weapon, to-wit: a firearm. . . (emphasis added).

On the face of the Information the prosecution charged appellant with the greater and the lesser offenses. Proof of the allegations in count II of the Information would also have been proof of count III, as alleged.

Either count is inclusive of both counts, under either the "statutory theory" where one offense is the lesser under the statutory definition, or the "pleading theory," where an offense is an included offense if it is alleged in the Information as a means or element of the commission of the higher offense. See Section 76-1-102(3)(a), U.C. Ann. (1953 as amended); State v. Washington, 543 P.2d 1058, 1062 (Or. 1975); State v. Thompson, 614 P.2d 970 (Idaho 1980); People v. Lohbauer, 627 P.2d 183 (Cal. 1981).

The instant case illustrates the fairness to both the defendant and the prosecution of using the specific accusatory pleading as a yardstick for charging purposes. The prosecution may thereby anticipate that evidence at trial might develop in such a fashion that only the lesser included offense should be presented to the jury. Further, the defendant is put on notice that he should be prepared to defend against the allegations as made in the Information, including the lesser offense, People v. Marshall, 309 P.2d 456 (Cal. 1957).

Appellant contends that he was prejudiced in the instant case by "charge stacking." Several federal circuits have focused on the impropriety of charging both the lesser and the greater in different counts.

The Eighth Circuit in United States v. Howard, 507 P.2d 559 (8th Cir. 1974) held that not only was it improper to convict a defendant of both a major offense and a lesser included offense arising out of the same facts, but it was improper to charge the defendant with both crimes. To hold otherwise would result in "charge stacking" which would be prejudicial to the defendant.

In Drew v. United States, 331 P.2d 85 (D.C. Cir. 1964) defendant was charged with robbery and attempted robbery. The court set out the argument against the multiple charges faced by defendant. Referring to the defendant, the court stated that he may be prejudiced for one or more of the following reasons:

> (1) he may become embarassed or confounded in presenting separate defenses;
> (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or
> (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separtely, it would not so find. Id. at 88.

The court continued:

> A less tangible, but perhaps equally persuasive element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one. Id. at 88.

The above arguments against multiple charges are of particular importance in the instant action. A jury may look

at the stacked charges and feel hostility or prejudice towards the defendant for a fictitious propensity to commit multiple offenses when clearly only aggravted robbery is really at issue. For this reason alone, the charge of the lesser included offense of aggravated assault should have been dropped and only the aggravated robbery charge pursued.

POINT III

THE IMPOSITION OF SENTENCE FOR BOTH AGGRAVATED ROBBERY AND THEFT ARISING OUT OF A SINGLE CRIMINAL EPISODE WAS ERROR.

In the instant case, appellant has been sentenced and is presently serving time for both the greater and the lesser included offenses that he was charged with in separate counts.

Section 76-1-402(3) U.C. Ann. (1953 as amended) is dipositive of this issue. Farrow v. Smith, 541 P.2d 110F (Ut. 1975).

CONCLUSION

For the above reasons appellant respectfully requests that his sentence be vacated and a new trial ordered on the charge of aggravated robbery, or in the alternative that the case be remanded for sentencing consistent with a conviction for the charge of aggravated robbery alone.

Respectfully submitted,

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I hereby certify that I delivered two (2) copies of the foregoing Brief to the Attorney General, 236 State Captiol Building, Salt Lake City, Utah, this 9th day of August, 1982.

Edwin M. Bates