

1983

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Respondent, :
-v- : Case No. 18180
WENDELL IRVING HILL, :
Defendant-Appellant. :

BRIEF OF RESPONDENT

Appeal from a judgment and conviction of Aggravated Burglary, Aggravated Robbery, Theft, and Aggravated Assault in the Third Judicial District Court in and for Salt Lake County, the Honorable Christine M. Durham, Judge, presiding.

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Respondent, :
-v- : Case No. 18180
WENDELL IRVING HILL, :
Defendant-Appellant. :

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with one count of Aggravated Burglary in violation of Utah Code Ann., § 76-6-203 (1978), one count of Aggravated Robbery in violation of Utah Code Ann., § 76-6-302 (1978), one count of Theft in violation of Utah Code Ann., § 76-6-404 (1978), one count of Aggravated Assault in violation of Utah Code Ann., § 76-5-103 (1978), and a second count of Aggravated Assault which was dismissed prior to the trial.

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury and was found guilty of one count each of Aggravated Burglary, Aggravated Robbery, Theft, and Aggravated Assault on December 2 and 3, 1981 in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Christine M. Durham presiding. On December 16, 1981, the trial court sentenced appellant to two indeterminate terms of not less than five years which may be for life, one indeterminate term of not

less than one year nor more than fifteen years and one indeterminate term not to exceed five years, the sentences to run concurrently.

RELIEF SOUGHT ON APPEAL

Respondent seeks a judgment and order of this Court affirming the jury verdict and sentence of the lower court.

STATEMENT OF FACTS

Late in the evening of October 7, 1981, or the early morning of October 8, 1981, Richard Salamone, manager of the Stratford Hotel, and John Savage, his guest, were watching television in the office of Salamone's apartment in the hotel (T. 41, 46). Salamone's living quarters were in Room 202 of the Stratford Hotel, connected to the adjoining manager's office in Room 201 by an open doorway (T. 38, 40). Both of the adjoining rooms had doors that opened to the hotel's hallway (T. 41).

As Mr. Salamone went into the kitchen in Room 202 to get a piece of pie, there was a knock on or shaking of the door to Room 201 (T. 43, 47, 108). Mr. Salamone opened the door to Room 202 and saw two men--appellant, Wendell Irving Hill, and Paul Miller (T. 44). Appellant and Miller forced their way into the apartment and appellant struck Mr. Salamone (T. 45, 46, 64, 97, 109). Appellant threatened Mr. Salamone and Mr. Savage with a "German Ruger" and told Mr. Salamone that he was going to kill him (T. 47, 51, 55, 65, 89-90, 99-100).

Appellant asked Mr. Salamone where the hotel's money was kept (T. 49). Mr. Salamone pointed to the desk in Room 201 (T. 49). Appellant and Miller took about \$50 from the drawer of the desk (T. 50-51, 86, 101). Later, appellant went through the drawer again and found more money, approximately \$20, which he took (T. 56). The two men also took a portable color-television, a clock radio, a short-wave radio, a cassette recorder and a pillowcase from Mr. Salamone's apartment (T. 59-60).

During the incident, Miller bound Mr. Salamone and Mr. Savage with nylon stockings and gagged them with washrags (T. 54-55, 85, 101). Appellant repeatedly threatened to kill Mr. Salamone and Mr. Savage (T. 51, 55-56, 99, 104, 107).

Appellant and Miller fled the scene in a Cadillac, but were apprehended approximately two and one-half blocks to three blocks from the Stratford Hotel (T. 57, 62, 104, 113, 117). The stolen television set was found in the front seat of the Cadillac and the other items taken from Mr. Salamone's apartment were found in the trunk of the car (T. 62, 119, 137-139). Seventeen dollars in one-dollar bills was found scattered in the trunk of the car (T. 140, 147). The gun with which appellant threatened Mr. Salamone and Mr. Savage fell out of the car onto the street when one of the apprehending officers opened the door to the front passenger seat of the car where appellant was sitting (T. 119-120, 123, 146-147).

Appellant was charged with Aggravated Burglary, Aggravated Robbery, Theft and two counts of Aggravated Assault (T. 13-14).

At trial, appellant successfully argued that an Aggravated Assault charge relating to Mr. Salamone should be dismissed because that crime was a lesser included offense of the crime of Aggravated Robbery of Mr. Salamone, as alleged in Count II of the Information.

Appellant also contended that because Theft, charged in Count III of the Information, was a lesser included offense of Aggravated Robbery, charged in Count II of the Information, Count III of the Information should be dismissed. The court denied appellant's motion and found that the offenses of Theft and Aggravated Robbery, as charged in the Information, were separate offenses (T. 199).

On appeal, appellant contends that the trial court erred in failing to find as a matter of law that theft is a lesser included offense of aggravated robbery. Appellant does not challenge his convictions on other counts.

ARGUMENT

POINT I

THEFT IS NOT A LESSER INCLUDED OFFENSE OF AGGRAVATED ROBBERY.

The question presented in this appeal is whether the crime of theft is a lesser included offense of the crime of

aggravated robbery. The standard for determining when an offense is a lesser included offense of another is codified in Utah Code Ann., § 76-1-402(3) (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; or
 - (b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or
 - (c) It is specifically designated by statute as a lesser included offense.

In State v. Brennan, 13 Utah 2d 195, 371 P.2d 27, 29 (1962) this Court set forth the requirements of an included offense as follows:

The rule 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 the elements necessary to prove the lesser. Conversely, it is only when proof of the lesser offense requires some element not involved in the greater offense that the lesser would not be an included offense [Footnote omitted].

See also: State v. Cross, Utah, 649 P.2d 72 (1982); State v. Elliott, Utah, 641 P.2d 122 (1982); State v. Williams, Utah,

636 P.2d 1092 (1981); State v. Laine, Utah, 618 P.2d 33 (1980); State v. Gandee, Utah, 587 P.2d 1064 (1978); State v. Woolman, 84 Utah 23, 33 P.2d 640 (1934). The determination of whether the lesser offense of theft is included within the offense of aggravated robbery requires an examination of the respective elements of those offenses.

The jury was instructed that the statutory elements of aggravated robbery, Utah Code Ann., § 76-6-302 (1953), as amended, were:

INSTRUCTION NO. 18 (T. 79)

The defendant is charged by Count II of the Information in this case with a violation of the statute which provides, in part pertinent to this case, as follows:

". . . a person commits Aggravated Robbery if in the course of committing robbery, he . . . uses a firearm or facsimile of a firearm . . . or a deadly weapon . . ."

* * *

". . . for the purpose of this part, an act shall be deemed to be in the course of committing a robbery if it occurs in an attempt to commit, during the commission of, or the immediate flight after the attempt or commission of a robbery"
(Emphasis added).

See also: Jury Instruction No. 31 (T. 92). The jury was instructed that the statutory elements of robbery, Utah Code Ann., § 76-6-301 (1953), as amended, were:

INSTRUCTION NO. 20 (T. 81)

The elements of Robbery, as they relate to this case, are;

1. The taking of personal property from another person; and
2. The possession or immediate presence of such other person of said property; and
3. The taking of such property against the will of such other person; and
4. The accomplishment of such taking by such means of force and fear; and
5. Such taking being then and there unlawful;
6. Such taking being then and there intended.

See also: Jury Instruction No. 19 (T. 80). The jury was instructed that the statutory elements of theft, Utah Code Ann., § 76-6-404 (1953), as amended, were:

INSTRUCTION NO. 23 (T. 84)

The defendant is charged by Count III of the Information in this case with a violation of a statute which provides, in part pertinent to this case, as follows: "A person commits theft if he obtains or exercises unlawful control over the property of another with the purpose to deprive him thereof" (Emphasis added).

See also: Jury Instruction No. 32 (T. 93). Jury Instruction No. 25 (T. 86) defined "purpose to deprive":

. . .

The same statute defines "purpose to deprive" to mean . . . "to have the conscious object: [either] to withhold property permanently or for so extended a period . . . that a substantial portion of its economic value, or of the use and benefit thereof, would be lost; or to dispose of the property under circumstances that make it unlikely that the owner will recover it" [Brackets in original; emphasis added].

The elements required for proof of aggravated robbery that are not required for proof of theft are, first, that the person was "in the course of committing robbery," § 76-6-302(1)(a); and second, that the taking is accomplished by means of force or fear, § 76-6-301(1).

The elements required for proof of theft that are not required for proof of aggravated robbery are less easily ascertained at first glance. Although confusing, the transcript does provide some insight into the trial court's basis for holding that theft requires an element additional to those that are required for aggravated robbery. The State's position at trial was that the element of "obtain[ing] . . . control . . . with the purpose to deprive" (§ 76-6-404) was an essential element of theft, State v. Laine, supra, at 359, but not an essential element of aggravated robbery, State In the Interest of R.G.B., Utah, 597 P.2d 1333, 1335 (1979). The trial court recognized that the additional element in theft that is not an element of aggravated robbery is the obtaining control with the purpose to deprive (T. 26, 29, 192).

The "purpose to deprive" required by the theft statute is a more specific kind of intent which goes beyond that required for aggravated robbery. An "intentional taking" is required by § 76-6-301, the robbery statute.

"Intentionally" is defined in Utah Code Ann., § 76-2-103(1)

(1953), as amended, as:

A person engages in conduct:

(1) Intentionally, or with intent or wilfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.

See also: Jury Instruction No. 28 (T. 89). Theft, however, requires that the taking be with the "purpose to deprive," which is defined in Utah Code Ann., § 76-6-401(3) (1953), as amended, as:

(e) "Purpose to deprive" means to have the conscious object:

(a) To withhold property permanently or for so extended a period or to use under such circumstances that a substantial portion of its economic value, or of the use and benefit thereof, would be lost; or
(b) To restore the property only upon payment of a reward or other compensation [this subsection was not included in the Jury Instructions in this case]; or
(c) To dispose of the property under circumstances that make it unlikely that the owner will recover it.

See also: Jury Instruction No. 25 at p. 7 above. The "purpose to deprive" is a culpable mental state required as an essential element of the crime of theft which is by definition more specific than the intentional, knowing or reckless mental state generally required by the Criminal Code. State v. Laine, supra. It is an element of theft which is required in

addition to proof that the person acted intentionally, knowingly or recklessly (See Jury Instruction No. 32, T. 93). The "purpose to deprive" is not, however, an element of aggravated robbery, and it is not "embraced within the legal definition thereof." State v. Sunter, Utah, 550 P.2d 184, 185 (1976). Thus, theft cannot be a lesser included offense of robbery.

The trial court noted an additional distinction which is pertinent to this case:

THE COURT: . . . [T]he court finds that the offenses of theft and aggravated robbery are separate offenses as defined by the legislature in the statutes of the State of Utah. And I want to make it clear that I am being asked to find that theft is a lesser included not of robbery, but of aggravated robbery, because I think that is an important distinction (T. 199).

The distinction between robbery and aggravated robbery referred to in the foregoing excerpt takes its importance from the fact that an intentional taking of personal property in the possession of another need not be proved for aggravated robbery (see the trial court's comments at T. 195, line 27 through T. 196, line 1). This is because, for the purposes of § 76-6-302, the completed act of robbery is not required; an attempt to commit robbery is sufficient. Section 76-6-302 states in pertinent part:

(1) A person commits aggravated robbery if in the course of committing a robbery, he:
. . .

(3) For the purposes of this part, an act shall be deemed to be "in the course of committing a robbery" if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of the robbery (Emphasis added).

Under Utah Code Ann., § 76-4-101(1) (1953), as amended, a person is guilty of an attempt if:

. . . [A]cting with the kind of culpability otherwise required for the commission of the offense, he engages in conduct constituting a substantial step toward commission of the offense.

Thus, while an "unlawful and intentional taking . . ." is required for robbery, under the attempt theory provided in the aggravated robbery statute, no actual taking of property need be proved to make out aggravated robbery. Theft does require a taking, specifically that the person "obtain or exercise control . . . with the purpose to deprive," and therefore requires an element which is not required for aggravated robbery when aggravated robbery is proved through the use of the attempt theory. The result is that theft is not necessarily and always a lesser included offense of aggravated robbery. In State v. Williams, supra, at 1096, (1981), this Court adopted the following language from People v. Escarcega, 43 Cal. App. 391, 117 Cal. Rptr. 595 (1974):

It is of no consequence that the evidence at trial might also establish guilt of another and lesser crime than that charged. As indicated, to constitute a "lesser and necessarily included offense" it must be of such a nature that as a matter of law and considered in the abstract, the greater crime as defined by statute or charged in the accusatory pleading "cannot be committed without necessarily committing [such other] offense." This rule has been constantly reiterated. . . . The lesser offense must "necessarily and at all times [be] included within another one." . . . "If, in the commission of acts made unlawful by one statute, the offender must always violate another, the one offense [i.e., the latter] is necessarily included in the other" [Citations omitted; emphasis and bracketed language in original].

See also: State v. Gandee, supra. Because it is possible to commit aggravated robbery without also committing theft, theft is not a lesser included offense of aggravated robbery. Thus, appellant was properly charged and convicted of both theft and aggravated robbery.

POINT II

AGGRAVATED ASSAULT IS NOT A LESSER INCLUDED OFFENSE OF AGGRAVATED ROBBERY AS THOSE CRIMES WERE CHARGED IN THIS CASE.

Appellant makes the statement on page 10 of his brief that:

. . . the charge of the lesser included offense of aggravated assault should have been dropped and only the aggravated robbery charge should have been pursued.

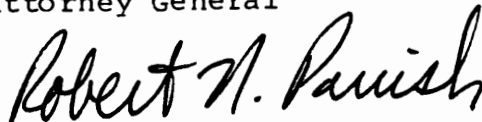
If this is an argument additional to his contention that theft is a lesser included offense of aggravated robbery, the argument fails because appellant was charged and convicted of the aggravated robbery of Richard Salamone, but was charged and convicted of the aggravated assault of a different victim, John W. Savage. Counts II and IV of Jury Instruction No. 1 verify this (T. 63-64). Because the counts pertain to different victims, neither crime alleged therein can be a lesser included offense of the other.

CONCLUSION

Based upon the foregoing, respondent respectfully requests that this Court affirm the conviction of the lower court.

Respectfully submitted this 9th day of March, 1983.

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CERTIFICATE OF MAILING

I hereby certify that I mailed three true and exact copies of the foregoing Brief, postage prepaid, to Brooke C. Wells, Attorney for Appellant, Salt Lake Legal Defender Assoc., 333 South 200 East, Salt Lake City, Utah, 84111, this 10 day of March, 1983.

Susan Patton