1982

State of Utah v. Shannon W. Richmond : Brief of Defendant-Appellant

Utah Supreme Court

Reed M. Richards; Attorney for Appellants;
C. Bruce Barton; Attorney for Respondent;

IN THE SUPREME COURT
OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff- Respondent, v. SHANNON W. RICHMOND, Defendant-Appellant.	)	Case No. 18325

BRIEF OF DEFENDANT-APPELLANT

Appellant appeals from the judgment of The District Court in and for Box Elder County, State of Utah, finding him guilty of theft, a class A misdemeanor.

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STATEMENT OF NATURE OF THE CASE

Appellant appeals from the judgment of the District Court in and for Box Elder County, State of Utah, finding him guilty of theft, a class A misdemeanor.

DISPOSITION IN THE LOWER COURT

On October 30, 1981, appellant was tried by the Court, having waived his right to a jury trial, on a charge of burglary, in violation of §76-6-202, U.C.A., a felony of the third degree. In a memorandum decision dated December 12, 1981 (R40), appellant was found guilty of theft of property having a value of more than $100.00 and less than $250.00. Counsel for appellant then timely filed a motion to arrest judgment, pursuant to §77-35-23, U.C.A., on the basis that the defendant had not been charged with the offense of theft (R50). At a hearing held January 25, 1982,

the motion was denied and appellant was sentenced to a term of six months in the Box Elder County Jail.

RELIEF SOUGHT ON APPEAL

Appellant petitions this Court for a reversal of the conviction.

STATEMENT OF FACTS

At trial, both parties stipulated to most of the factual matters with only limited testimony being presented. On May 5, 1980, the appellant along with three others entered Macks Pharmacy in Brigham City. After a short time, the appellant entered the pharmacy area, and then left the store with various drugs. He was later arrested and charged with burglary.

At the end of the evidence the issue of whether the State had proved beyond a reasonable doubt the required element of "an unauthorized or unlawful entry into a building or portion of a building" was argued. The Court found that the State had not met the burden of proof but found the appellant guilty of theft.

ARGUMENT

The conviction of the defendant of a crime with which he was not charged can be justified only if the crime of theft is an included offense of the crime of burglary.

As this Court said in State v. Clayton, 641 P2d 122 (1982)

an offense is included in a greater offense when,

> " . . . all of the elements thereof are included in the elements which constitute the greater offense. When such is the case, the greater offense cannot be committed without necessarily committing the lesser offense, and proof of the greater offense necessarily included proof of the elements necessary to prove the lesser offense."

The element of "obtaining or exercising unauthorized control over the property of another" in theft,[1] is not an element of burglary.[2] In order to be an included offense, the elements must not be such that,

> " . . . it is not possible to prove the offense . . . without also proving the elements of both lesser offenses . . ." Clayton, supra.

In State v. Sunter, 550 P2d 184 (Utah 1976), the Court ruled that the crime of possession of an instrument for burglary or theft was not an included offense of burglary.

> "For the crime of manufacture or possession of an instrument for burglary as charged in the information all of the elements of the lesser offense of the possession of an instrument for burglary must not only be a part of the greater offense of burglary, but must also be embraced within the legal definition thereof. The gist of the offense of burglary, is the unlawful entry into a building. No entry or attempted entry is a necessary element of the crime defined by Section 76-6-205, and we conclude that that offense is not necessarily embraced within the offense of burglary." (At 185)

This Court also noted in State v. Jones, 368 P2d 262, (1962) that,

1. U.C.A. 76-6-404 as amended 1973.
2. U.C.A. 76-6-202 as amended 1973.

"Obviously a burglary in and of itself is one act requiring no theft, and a larceny is another or second act requiring theft. (Emphasis in original)"

A recent, well reasoned case addressing the present issue is State v. Louk, 285 S.E. 2d 432 (W.VA. 1982):

"Other Courts which have addressed this problem have rather uniformly concluded that larceny is not a lesser included offense of burglary, e.g. State v. Madrid, 113 Ariz. 290, 552 P2d 451 (1976); People v. Tatem, 62 C.A. 3d 655, 133 Cal. Rptr 748 (1963); State v. Rand, supra; Young v. State, 220 Md. 95, 151 A. 2d 140 (1959), cert. denied, 363 U.S. 853, 80 S. Ct. 1634, 4 L.Ed.2d 1735 (1960); State v. Harris, 65 Ohio App. 2d 182, 19 O.O. 3d 1331, 417 N.E. 2d 573 (1979); Gransberry v. State, 64 Okl. Cr. 408, 81 P2d 874 (1938); State v. Parr, 298 N.W. 2d 80 (S.D. 1980). Typical of the reasoning is that contained in State v. Rand, supra, at 814:

'The crime of burglary is complete when the defendant makes an unauthorized entry into a structure if at the time his entry into the building he entertains the actual intent to commit a specific crime therein, which may be theft by unauthorized taking. State v. Field, Me., 379 A2d 393, 395 (1977). The burglar, after making his unauthorized entry with the intent to commit the crime of theft by taking, may change his mind and come out empty-handed; he still could be prosecuted for burglary. But, if he did commit the crime of theft by taking which he intended to commit when entering, he would be subject to prosecution for both burglary and theft, since he would have committed two crimes and could be convicted of both offenses.'"

CONCLUSION

The appellant submits that the crime of burglary does not include the crime of theft and thus gives no notice to a

defendant of what he may be convicted of and therefor the conviction must be reversed.

DATED this 9 day of June, 1982.

Respectfully submitted,

STEPHEN R. McCAUGHEY
Attorney for Appellant

CERTIFICATE OF DELIVERY

I hereby certify that on this 10th day of June, 1982, two (2) copies of the foregoing Brief of Defendant-Appellant was placed for delivery by messenger to the office of the Attorney General, State of Utah, State Capitol Building, Salt Lake City, Utah.