1983

State of Utah v. Thomas F. Dyer : Brief of Appellant

Utah Supreme Court

Ronald R. Stanger; Attorney for Appellant;
David L. Wilkinson; Attorney for Respondent;

IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff/Respondent,	:	
vs.	:	Case No. 18,337
THOMAS P. DYER,	:	
Defendant/Appellant.	:	

BRIEF OF APPELLANT

APPEAL FROM THE FINAL JUDGMENT CONVICTION RENDERED BY
THE HONORABLE J. ROBERT BULLOCK, JUDGE,
IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT
IN AND FOR UTAH COUNTY, STATE OF UTAH

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AUTHORITIES

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BRIEF OF APPELLANT

NATURE OF THE CASE

The State of Utah filed an Information charging the defendant with murder in the second degree, a felony of the first degree, in violation of Section 76-5-203, Utah Criminal Code, as amended. Subsequent thereto, the State of Utah amended the Information charging the defendant with the crime of manslaughter, a felony of the second degree, in violation of Section 76-5-205, Utah Criminal Code, as amended.

The charging part of the amended Information accused the defendant as follows:

> "[That] THOMAS PETERSON DYER did recklessly cause the death of Nina Marie Fuelleman."

DISPOSITION IN THE LOWER COURT

The case was tried in the Fourth Judicial District Court in

and for Utah County, State of Utah, sitting in Provo, Utah, on March 3 and 4, 1982, with the Honorable J. Robert Bullock, Judge, presiding.

The case was heard without a jury pursuant to defendant's Waiver of a Jury Trial. Judge Bullock rendered a judgment finding that he could not find the defendant guilty of manslaughter beyond a reasonable doubt. After a subsequent hearing Judge Bullock found the defendant guilty of negligent homicide.

The defendant was sentenced to a term of one year in the Utah County Jail and to pay a fine in the amount of $1,000.00.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment of the lower Court.

STATEMENT OF FACTS

In the late evening of August 21, 1981, defendant, in the company of his brother, Rob, and the victim, went to a tavern known as the Forrest Inn, where all partook of alcoholic beverages. All three left the Forrest Inn at approximately 1:30 o'clock a.m. (August 22, 1981) and arrived at the residence of defendant and Rob at about 2:00 a.m. Defendant and Rob were arguing as they arrived at their residence. Victim went upstairs to the second floor and defendant and Rob pursued the argument on the first floor. The argument culminated when Rob struck defendant several times, knocked him down, and began choking defendant. Defendant never struck back, and was passive during the fight. The argument was over prior to the time that the rifle was discharged. (R. 308, Line 30, 309, Lines 1-5)

During the argument the victim was upstairs on the second

floor, and the defendant and Rob were on the first floor.

Rob let defendant up, and defendant went to the bedroom where he obtained a .30-.30 caliber lever action rifle. Rob had used the rifle last (R. 305, Line 4). Rob testified that he never did see defendant use the gun after Rob had used it (R. 305, Lines 9-10).

The first recollection that Rob testified to was that he saw the gun exploding (R. 294, Line 2). Rob's testimony was that at no time was the gun pointed in his direction (R. 294, Line 15; 307, Lines 14-16; 312, Line 22). Rob testified that the rifle was pointed down and not in his direction (R. 294, line 19). Rob testified that the gun was never at any time used by the defendant to threaten Rob (R. 307, lines 10-15; 310, lines 5-9). Rob testified that the defendant did not draw the gun with the intention of shooting (R. 307, lines 5-13). The State did not produce any evidence showing that the defendant loaded the gun or knew that the gun was loaded. The gun was accidentally discharged (R. 300, Line 28; 308, Lines 6-9), causing the death of the victim who, unknown to both defendant and Rob, had walked from the second floor to the first floor.

ARGUMENT

The Points in appellant's argument are intended to present to the Court legal premises in an order which, if accepted by the Court as a basis for reversal, would preclude consideration of subsequent points.

POINT I

THE TRIAL COURT IS WITHOUT AUTHORITY TO CONSIDER A LESSER AND INCLUDED OFFENSE IN VIEW OF ITS FINDING OF NOT GUILTY AS TO

THE CHARGE OF MANSLAUGHTER.

(A) The Fifth Amendment to the Constitution of the United States of America provides,

> "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb...".

At the conclusion of argument by counsel, the Court, in essence, rendered a verdict of not guilty to the charge of manslaughter:

> "THE COURT: Okay. I am convinced -- well, let's put it another way: that the evidence is not convincing that the defendant intentionally pulled the trigger on the rifle. I'd have to find that, I think, in order to find this man guilty of the offense charged beyond a reasonable doubt, and I can't do that. However, I agree with what you say with respect to the negligence involved in bringing a loaded, taking a loaded rifle under the circumstances, being intoxicated, having it on his lap, having it in a condition that it can be discharged accidentally with people around, and I believe that that is negligent homicide under Section 76-5-206. However, I'm not going to pass sentence--strike that. I'm not going to find that he's guilty of that offense this afternoon. I'm going to give you an opportunity to brief the law on that matter, and you can come back here tomorrow morning." (R. 355, lines 7-22)

Neither plaintiff nor defendant requested a lesser included offense.

(B) The State unilaterally amended the charge to manslaughter.

Defense counsel, on the other hand, based upon what he determined was in the best interests of defendant, took the strategic position that the evidence would not sustain a conviction of manslaughter.

The trial court held that the evidence was not sufficient to support a conviction of manslaughter. The trial judge entered into the prosecutorial strategy of the case by reevaluating the case when he determined that the charge should have been

negligent homicide. The strategy of the defense, having been an all or nothing approach, was also violated. It needs to be accepted at this point that a cardinal rule of trial practice regarding the three principal participants (the judge, and the two opposing lawyers) is that (1) the judge will not act in any manner which will influence the outcome of the trial; and (2) the opposing lawyers are entitled to their strategy in dealing with their case. In the present case, the judge modified the rules. He challenged and defeated the competency of the prosecutor; he in essence told the prosecutor that his evaluation of the case was wrong. The Judge, by his actions, deprived the defense attorney of conducting that strategy which, in his judgment, was in the best interest of his client.

(C) The State of Utah has previously taken a position that is consistent with and supports the position urged by the defendant in this case.

In State v. Boggess (Case No. 16232), the State of Utah argued:

> "...the appellant did not establish any basis upon which he could be convicted of the lesser offense because he desired an acquittal based on an all or nothing theory of the defense. In State v. Mora, 588 P.2d 1335 (Utah, 1977) this Court distinguished situations similar to this one and stated that lesser included offense instructions were not absolutely necessary where the appellant was attempting an all or nothing theory of defense." (Page 4)
>
> "...The apellant was informed of his options by his counsel and decided to attempt to gain an acquittal by proceeding on an all or nothing defense theory...". (Page 5-6)

POINT II

NEGLIGENT HOMICIDE IS NOT A LESSER INCLUDED OFFENSE OF

MANSLAUGHTER.

From a statutory point of view, the Code does not specifically provide that negligent homicide is a lesser included offense of manslaughter. Section 76-2-101, Utah Code Annotated, defines the "requirements of criminal conduct and criminal responsibility" as follows:

> "No person is guilty of an offense unless his conduct is prohibited by law and:
>
> (1) He acts intentionally, knowingly, recklessly or with criminal negligence with respect to each element of the offense as the definition of the offense requires; or
>
> (2) His acts constitute an offense involving strict liability."

The states of mind that will sustain a conviction are set forth disjunctively as "intentionally, knowingly, recklessly or with criminal negligence". The issue is whether the mental state sufficient to establish criminal negligence is a lesser and included aspect of recklessly. It is the position of the defendant that it is not.

In view of the fact that convictions on the charge of manslaughter may be obtained on proof of facts other than reckless conduct, [Section 76-2-206 (b) and (c)], negligent homicide cannot be deemed a lesser and included offense thereof. The statutory language defining "recklessly" and "with criminal negligence" [Section 76-2-103 (3) and (4), Utah Code Annotated] are similar with the following exceptions:

(3)	(4)
Recklessly, or maliciously,	with criminal negligence or is criminally negligent
with respect to circumstances	

surrounding his conduct or the result of his conduct when he

is aware of but consciously disregards

ought to be aware of

a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that

its disregard

the failure to perceive it

constitutes a gross deviation from the standard of care that an ordinary person would exercise

under

in

all the circumstances as viewed from the actor's standpoint.

Section 76-5-201, Utah Code Annotated, specified five different designations of homicide. Thereafter, in the same chapter, each designation is defined as to the act and intent necessary to make it out. The victim in each designation is no less dead as a result of the described acts and intent that are necessary to make out the offense. The legislature has followed an accepted pattern of treating defendants on the basis of the types of acts committed in order to prescribe punishment. The acts are the products of the culpable mental state partially described above. The presumption, with regard to the issue set forth, is that the offense of negligent homicide is not a lesser included offense of manslaughter, vis-a-vis recklessly and with criminal negligence. Here the burden of proof does not lessen because the elements are different.

It will be argued that one ought to be aware of that which he is aware of, but an examination of the most significant

differences in the subsections of the statute deal with "...its disregard..." as the reckless element as opposed to "...the failure to perceive it..." in the criminally negligent element; the former being an active disregard of the risk, the latter being a passive oblivion regarding the risk.

State v. Howard, 597 P.2d 878, stands for the proposition that negligent homicide is not a lesser included offense of the charge of manslaughter. Paragraph (3) of Section 76-1-402, Utah Criminal Code, provides as follows:

> "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, conspirary or form of preparation to commit the offense charged or an offense otherwise included therein; or
> >
> > "(c) It is specifically designated by a statute as a lesser included offense."

Subparagraph (c) is not helpful in that nowhere in the Utah Criminal Code is negligent homicide specified as a lesser included offense of manslaughter.

Subparagraph (b) is also of no help in that the offense of negligent homicide is not an inchoate offense. It is a completed act and in no way can be considered an attempt, solicitation, conspiracy or form of preparation for the crime of manslaughter.

Subparagraph (a) needs to be considered in light of the comparison given above; however, negligent homicide in no way can be considered a lesser included offense of manslaughter under the

circumstances provided in subparagraphs (b) and (c) to paragraph 1 of Section 76-5-205, Utah Criminal Code.

The following portion of respondent's (State of Utah) Brief in the case of State vs. Boggess, (Case No. 16232) is quoted in support of defendant's position

> "STATUTORY AND CASE LAW SUPPORT THE FINDING THAT NEGLIGENT HOMICIDE IS NOT A LESSER INCLUDED OFFENSE OF MANSLAUGHTER OR SECOND DEGREE MURDER.
>
> "The analysis in the respondent's initial Brief (P. 5-8) has been adopted by this Court in State v. Hendricks, 695 P.2d 633 (Utah, 1979) where this Court determined that criminal trespass possessed intent elements which differed from the alleged greater offense of burglary. Thus, proof of burglary does not 'necessarily include proof of all the elements necessary to prove the lesser' crime of criminal trespass, and in accordance with the standard established in State v. Brennan, 13 Utah 2d 195, 371 P.2d 27 (1962) criminal trespass is not a lesser included offense of burglary. Similar to that case, in the present case the alleged lesser included offense contains a mental element which distinguishes it from the alleged greater offense of manslaughter and second degree murder. The crimes of second degree murder and manslaughter contained a different element of intent than that required for a conviction of negligent homicide. The difference, when read in light of the Hendricks and Brennan, supra, line of cases, demonstrates that negligent homicide is not necessarily a lesser included offense of manslaughter or second degree murder."

POINT III

THE EVIDENCE PRESENTED AT TRIAL IS INSUFFICIENT TO SUSTAIN A VERDICT OF GUILTY TO THE CHARGE OF NEGLIGENT HOMICIDE.

Criminal negligence is defined in Section 76-2-103 (4) as follows:

> "With criminal negligence or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint."

The language of the statute seems to use a relatively large number of words to state that criminal negligence is acting where one ought to be aware of a certain risk. The types of risk that may come within the definition of "certain risk" are uncertain.

Nevertheless, it is important to remember that the application is subjective, "...as viewed from the actor's viewpoint." [Section 76-2-103 (4), Utah Criminal Code].

The evidence presented by the State at trial is summarized as follows:

(a) That during the period before the shooting, defendant, in the presence of victim, had been arguing with Robert Dyer (brother) during which time defendant had been consuming intoxicating liquor.

(b) That upon the three returning home from the Forrest Inn, brother took the keys to defendant's car, thereby prohibiting defendant from going elsewhere.

(c) Victim went upstairs to brother's room and was not heard from between that time and the time of the shooting.

(d) That brother knew that defendant had been drinking intoxicating liquor and continued to press the argument.

(e) That brother struck defendant several times, began choking him, and then let him up when he felt shame for taking advantage of defendant.

(f) That defendant went straight to his bedroom and had the rifle out when brother reached the doorway.

(g) That defendant could not see the victim when the rifle accidentally discharged.

(h) That the discharge of the rifle was not

intentional, but was an accident.

(i) That victim was struck in the face by a portion of the projectile after it passed through the door jam, resulting in her death.

There is no evidence before the Court that the defendant loaded the rifle or knew that it was loaded. The argument had terminated prior to the time that the gun was accidentally discharged. Defendant's contention is that sufficient proof is necessary to sustain a conviction.

The Court's finding was that "...the evidence is not convincing that the defendant intentionally pulled the trigger on the rifle..." (R. 355, Line 8 - 10) It seems that the Court's judgment at that point may have been based upon other considerations, but that the quoted finding was the most obvious fact that precluded a finding of guilty to the charge of manslaughter. Had the evidence convinced the Court that the trigger had been intention ally pulled in a careless act of frustration, the "from the actor's standpoint" issue would have been seriously analyzed in order to find guilt beyond a reasonable doubt to the charge of manslaughter.

It is important to remember that the evidence was that the gun was not pointed at anyone, the gun was never used to threaten anyone, and the gun was not part of the argument. The argument was over prior to the accidental shooting.

CONCLUSION

Defendant urges that the judge sitting alone can do nothing which he would not be empowered to do with the aid of a jury. He also urges that the consideration by the trial judge in this case

of a lesser included offense without the express request of defendant constitutes a violation of his sixth amendment right not to be twice placed in jeopardy for the same offense, as well as an open participation by the judge in the prosecution of the case. For these reasons defendant respectfully requests a reversal of his conviction.

Defendant urges that, under the present state of the law and under the facts of this case, negligent homicide is not a lesser and included offense of manslaughter. For this reason defendant requests that his conviction be reversed.

Defendant urges that the facts in this case do not support a conviction to the charge of negligent homicide; rather, the evidence supports a conclusion that the shooting was accidental - not criminal. Defendant requests that his conviction be reversed.

Submitted this 25th day of October, 1982.

RONALD R. STANGER
Attorney for Defendant

MAILED two (2) copies of the foregoing Brief of Appellant to Mr. David N. Wilkinson, Attorney General, 236 State Capitol Building, Salt Lake City, Utah, 84114, this 25th day of October, 1982.