1984

The State of Utah v. Fermin Miera Jr. : Brief of Respondent

Utah Supreme Court

Linda E. Carter; Attorney for Appellant;
David WIlkinson; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent, vs. FERMIN MIERA, JR., Defendant-Appellant.	:	Case No. 18357

BRIEF OF RESPONDENT

AN APPEAL FROM A CONVICTION OF BURGLARY, A FELONY OF THE THIRD DEGREE, IN THE THIRD DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE JAY E. BANKS, JUDGE, PRESIDING

DAVID L. WILKINSON
Attorney General
EARL F. DORIUS
Chief, Governmental Affairs Division
Assistant Attorney General
STANLEY H. OLSEN
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Attorneys for Plaintiff-Respondent

LINDA E. CARTER
Salt Lake Legal Defender Association
333 South 200 East
Salt Lake City, Utah 84111
Attorneys for Defendant-Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent, vs. FERMIN MIERA, JR., Defendant-Appellant.	Case No. 18357

BRIEF OF RESPONDENT

AN APPEAL FROM A CONVICTION OF BURGLARY,
A FELONY OF THE THIRD DEGREE, IN THE
THIRD DISTRICT COURT OF SALT LAKE COUNTY,
STATE OF UTAH, THE HONORABLE JAY E. BANKS,
JUDGE, PRESIDING

DAVID L. WILKINSON
Attorney General
EARL F. DORIUS
Chief, Governmental Affairs Division
Assistant Attorney General
STANLEY H. OLSEN
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Attorneys for Plaintiff-Respondent

LINDA E. CARTER
Salt Lake Legal Defender Association
333 South 200 East
Salt Lake City, Utah 84111
Attorneys for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

STATUTES CITES

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent, vs. FERMIN MIERA, JR., Defendant-Appellant.	Case No. 18357

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with violation of Utah Code Annotated, 1953, § 76-6-202, Burglary, a third degree felony. Appellant appeals from a conviction of that offense in the Third District Court of Salt Lake County.

DISPOSITION IN THE LOWER COURT

Appellant Miera was charged with violation of UCA, 1953, § 76-6-202 (1953), Burglary, a third degree felony. A jury trial was held in Third District Court, Salt Lake County, on March 8, 1982 before the Honorable Jay E. Banks, where appellant was convicted as charged.

RELIEF SOUGHT ON APPEAL

Respondent, State of Utah, seeks an Order affirming the conviction and judgment of the trial court.

STATEMENT OF THE FACTS

On December 31, 1981, shortly before 2:00 a.m., Officer Vantielen of the Salt Lake City Police Department observed a broken window at an office building in Salt Lake City. Shortly thereafter the appellant was observed inside the building (R.99).

Officer Vantielen gained entrance to the building and approached the defendant who was against the front door of the business with his hands in the air (R.105).

The officer requested appellant to get down on his stomach and appellant complied without hesitation (R.107). Officer Vantielen testified that the defendant answered questions with coherent speech, was responsive to questions and appeared to be sober as the officer watched him walk. The officer further testified that he did not smell the odor of an alcoholic beverage about the defendant (R.114).

Upon searching the premises it was determined that the defendant was alone (R.113) inside the building and that he had a roll of stamps and a pen and pencil set in his pockets (R.109). These items were subsequently identified by the owner of the building as having been taken from his office (R.136-137).

Officer Vantielen also testified that after an appropriate Miranda warning that the appellant said he had taken the writing instruments and stamps out of a desk in

one of the offices in the building (R.107-108,111).

Officer Green testified that he assisted Officer Vantielen in the apprehension of the appellant (R.121-126), and that he observed the appellant walk in a normal manner (R.125). This officer also indicated that the appellant was alert and responsive to questions (T.125).

Mr. Richard Gordon, the owner of the building (R.129), took the stand and testified that the stamps and pens which had been found on the appellant's person were taken from his (Gordon's) office (R.135-136).

Additionally, Mr. Gordon testified that items in his office had been moved, including a radio which had been unplugged and had the cord wrapped around it (R.137). Mr. Gordon also testified that he heard the officers ask the appellant why he was in the building to which the appellant answered, in substance, that he broke in because he needed some money (R.142-143).

Mr. Gordon further testified that the appellant did not appear to be intoxicated (R.143) and responded to questions understandably and intelligently and did not appear to have difficulty standing (R.141).

The appellant elected to take the stand and testified about his toluene and alcohol usage (R.151-152). Appellant admitted entering the building and admitted throwing rocks through the window of the building and

indicated that he remembered doing both acts (R.157-160).

Appellant's second witness was Dr. Bryan Finkle who testified extensively and hypothetically about alcohol and its physiological effects (R.168-193), but without any personal knowledge of the appellant or the amount of alcohol consumed by him (R.174-175).

Dr. Finkle testified that his expertise was not in the area of the effects of alcohol on mental functions and that appellant's alleged level of intoxication would not necessarily create unconsciousness or a blackout (R.188-189,191).

Dr. Finkle also indicated that determining a person's state of mind after consuming alcohol and sniffing solvent was "far beyond" his "professional capacity" and that alcohol can impair but not necessarily destroy mental processes (R.191).

Following the testimony, appellant submitted three instructions relating to the lesser-included offense of criminal trespass (R.41-43). The request for these instructions was denied, and the court instructed the jury as to the elements of burglary and on the issue of voluntary intoxication (R.44-70).

Following trial defendant was convicted as charged of burglary, a third degree felony.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY DECLINED TO GIVE APPELLANT'S REQUESTED JURY INSTRUCTIONS ON CRIMINAL TRESPASS.

Appellant was charged with burglary and the jury instructed on the elements of that offense. Appellant contends that he was entitled to jury instructions on the lesser included offense of criminal trespass.

This Court recently discussed in some detail the issue of lesser included offenses and specifically discussed the question of jury instructions relating to the offenses of burglary and criminal trespass.

In State v. Baker, 671 P.2d 152 (Utah, 1983), this Court held that, "The defendant's right to a lesser included offense instruction is limited by the evidence presented at trial." Id. at 157. Further amplication of this standard was established by the Court in setting forth the provisions of UCA, 1953, § 76-1-402(4):

> The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

Id. at 158.

This Court further indicated that, "The analysis of whether an offense is included for purposes of deciding whether to grant a defendant's request for a jury

instruction must . . . begin with the proof of facts at trial." Id. at 158.

Also, this Court clarified the application of this standard by holding:

> Under § 76-1-402(4), the court is obligated to instruct on the lesser offense only if the evidence offered provides a "rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense."

Id. at 159.

This Court also held in relation to a request for a criminal trespass instruction that it is an offense which requires specific intent. Id. at 160.

Applying these standards, this Court held in Baker, supra, that the evidence was not ambiguous or subject to any alternative interpretation and the requested criminal trespass instruction was not required.

The facts of Baker, supra and the case now before the Court are remarkably similar. In that case the defendant was found inside a locked building and he did not deny unlawful entry. Id. at 160.

In the present case, the appellant admitted on direct examination throwing rocks through the building window and entering the building (R.157). As in Baker, supra, the appellant does not deny unlawful entry into the building. This leaves as the only disputed factual issue

the intent of the appellant.

In order to receive an included offense instruction, it must be shown that, first there is a rational basis for acquittal of the charged offense and conviction of the included offense.

Assuming arguendo that criminal trespass is an included offense of burglary, the facts presented at trial do not justify the giving of the "lesser included" instructions.

Appellant argues that his conviction for criminal trespass is supported by evidence of his recklessness. Specifically, appellant asserts in his brief that ". . . he acted with an awareness but disregard of the risks to any potential persons inside the building." (Appellant's Brief, page 8.) Appellant's testimony in this respect is extremely equivocal. At pages 156 and 157 of the record the following exchange took place between appellant and his counsel:

> Q Now, Fermin, did you have occasion to pass a building at 254 West and First South?
> A Yes.
> Q Do you know what that building is? What was in there?
> A Now I do. I didn't then.
> Q You didn't then. Did you ever [sic] that building?
> A Yes.
> Q Do you remember entering it?
> A Vaguely. But I--yeah. I entered it.
> Q Do you remember throwing rocks through the window?
> A Yeah.

> Q Were you aware that you were in the building?
> A No--yeah--yeah.
> Q Do you want to explain that? To what extent were you aware?
> A Well, the cop came and busted me in there. He had a--looked like a .38 in my head now.
> Q So, you were aware because the officers came?
> A I heard Jake Green yell. Yes.
> Q Why did you enter the building, Fermin?
> A I don't know.
> Q Why don't you know?
> A Because I wasn't aware what was happening.
> Q Why do you think you weren't aware?
> A Because I was pretty loaded. I mean, I was high. (Emphasis added.)

This testimony not only negates any specific intent but also negates the "awareness" required for recklessness.

UCA, 1953, § 76-2-103, defines recklessly as follows:

> A person engages in conduct: . . .
> (3) Recklessly, or maliciously, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards 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 constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint. (Emphasis added.)

In order to be "reckless" under the criminal trespass statute, UCA, 1953 § 76-6-206, one must be shown to be "reckless as to whether his presence will cause fear for

the safety of another." Appellant testified he was not aware of what was happening (R.157).

The appellant cites no evidence which shows that he was reckless as to his presence in the business causing fear for the safety of another. No evidence was submitted by the appellant which would show that he was even aware that anyone was in the building. Indeed, the testimony was that no one else was in the building (R.113).

The record shows that the entry into the building probably occurred in the early hours of the morning at approximately 2:00 a.m. (R.98) when the presence of other persons was most unlikely.

Applying the facts of this case to the standard enunciated in Baker, supra, it is evident that those facts do not justify the giving of a criminal trespass instruction, for the reason that no evidence was presented by the appellant which would justify a finding of either specific intent or recklessness.

Since there is no denial of the unlawful entry, the only remaining factual dispute is the appellant's intent, which must be inferred from circumstantial evidence. State v. Baker, supra at 160. Here the appellant claims that his intoxication prevented him from forming the requisite intent for a burglary conviction, but the evidence relating to that claim is that the officers found the

appellant not sufficiently enough impaired to prevent his being able to hear, understand, communicate and walk without significant impairment (R.114 and 125). Also, Dr. Finkle could not testify as to any aspect of intent and indeed indicated that intoxication would not necessarily impair intent. (R.191).

Just as in Baker, supra, the thrust of the appellant's testimony and evidence of intoxication was to negate any specific intent, not towards proving one of the requisite intents required for criminal trespass, set forth in UCA, 1953, § 76-6-206(1) and (2).

The issue of jury instructions as it relates to burglary and criminal trespass was also addressed in State v. Hendricks, 596 P.2d 633 (Utah, 1979), where this Court held that the "defendants defense of lack of criminal intent is totally inconsistent with his request for an instruction on criminal trespass." Id. at 634.

While acknowledging defendant's right to have his theory of the case presented to the jury, this Court in Hendricks, supra, also held:

> However, the right is not absolute, and a defense theory must be supported by a certain quantum of evidence before an instruction as to an included offense need be given.

Id. at 634.

The evidence presented at trial does not justify

the giving of a criminal trespass instruction because that evidence does not provide a rational basis for a verdict of acquittal of burglary nor does that evidence provide a rational foundation upon which a verdict of guilty could be returned for the offense of criminal trespass.

POINT II

THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY ON THE ISSUE OF VOLUNTARY INTOXICATION.

Appellant claims that the trial court refused to include the negation of the affirmative defense of intoxication as an element which the State was required to prove. In fact, however, the trial court did clearly set out the burden of the State with respect to the affirmative defense of voluntary intoxication.

Appellant has asserted that the jury could have been confused in connection with the Court's giving of Instruction No. 12 and Instruction No. 13 on the issue of voluntary intoxication and the State's burden in connection with this defense. Appellant's apparently inadvertant reference to Instructions 12 and 13 is confusing since those instructions (R.53 and 54) relate to witnesses, resolving conflicting evidence, circumstantial and direct evidence. Those instructions bear no relationship to the defense of voluntary intoxication.

The trial court specifically instructed the jury

regarding this defense in Instruction No. 23 (R. 64). This Instruction provides:

> In this case the defendant has raised the defense of voluntary intoxication. Once this defense is raised the State has the burden of proving beyond a reasonable doubt that the degree of intoxication at the time in question did not destroy his ability to form the necessary intent required for the crime in question.

It is difficult to imagine a clearer statement of the State's burden as to the defense of voluntary intoxication. No ambiguity or confusion is reasonably possible on this issue. This is unlike the situation in State v. Torres, 619 P.2d 694 (Utah, 1980) where the trial court failed to give an appropriate instruction concerning the burden of proof when an affirmative defense is raised.

In United States v. Corrigan, 548 F.2d 879 (10th Cir. 1977) the Court held, in relation to instructing the jury on affirmative defenses that:

> The question is whether the instructions, taken as a whole, adequately informed the jury that the prosecution's burden of proof beyond a reasonable doubt applied to defendant's affirmative defense.

Id. at 882.

The Court also held:

> We are not saying the burden of proof should be reiterated in each separate instruction.

Id. at 883 (emphasis added).

Following the Instruction listed above, the Court then gave Instruction No. 24 (R. 65), which instructs further on the defense of voluntary intoxication. This instruction sets forth the nature of this defense and is couched in the precise terms of the voluntary intoxication statute, UCA, 1953, § 76-2-306.

Further, the trial court immediately followed up with Instruction No. 25 (R. 66) which established the elements of the crime of burglary, including the requisite intent. The required burden of proof was set forth and acquittal was directed if all elements were not proved beyond a reasonable doubt.

The Court's Instruction Nos. 23, 24 and 25 (R. 64, 65 and 66) do not require the jury to engage in the "tortious process" condemned in Torres, supra, to establish and define the burden on the State, but rather clearly set forth the elements of the offense and obligation of the State.

This Court in Torres, supra, indicated the purpose of jury instructions. This Court held:

> The purpose of the instructions is to set forth the issues and the law applicable thereto in a clear, concise and orderly manner, so that the jury will understand how to discharge its responsibilities.

Id. at 696.

This purpose was fully and adequately discharged

by the Court's instructions in all respects and particularly with regard to appellant's voluntary intoxication defense.

CONCLUSION

The trial court correctly refused to give the appellant's lesser included criminal trespass instruction in that the evidence presented did not justify such an instruction. Further, the Court fully and accurately instructed the jury on the issue of voluntary intoxication.

Respectfully submitted this 30th day of April, 1984.

DAVID L. WILKINSON
Attorney General
EARL F. DORIUS
Assistant Attorney General
Chief, Governmental Affairs Division

STANLEY H. OLSEN
Assistant Attorney General
Attorneys for Plaintiff-Respondent

CERTIFICATE OF MAILING

I hereby certify that two copies of the foregoing Brief of Respondent were mailed, postage prepaid, to the following this 30th day of April, 1984:

LINDA E. CARTER
Salt Lake Legal Defender Association
333 South 200 East
Salt Lake City, Utah 84111