

1960

State of Utah v. Carl Mack Courtney : Brief of Respondent

Utah Supreme Court

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In the Supreme Court of the State of Utah

15 1960

Clerk, Supreme Court, Utah

STATE OF UTAH,

Plaintiff and Respondent,

-vs-

CARL MACK COURTNEY,

Defendant and Appellant.

Case No. 9189

BRIEF OF RESPONDENT

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In the Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff and Respondent,

-vs-

CARL MACK COURTNEY,

Defendant and Appellant.

} Case No. 9189

BRIEF OF RESPONDENT

STATEMENT OF FACTS

Respondent is in essential agreement with appellant's statement. However, the following facts should be mentioned. As to the matter of the "clicking" of the gun (T. 64 to T. 67) the expert said he didn't know about a clicking sound. (T. 64). At T. 65 the Court mentions a slight clicking sound. A demonstration of slight clicking occurs

at T. 66. While Irwin was not completely clear as to whether the gun was pointed at his stomach at the time of the shot, he did emphasize that the appellant's head and arm were pointed at him.

STATEMENT OF POINTS

POINT I.

THE COURT HAD JURISDICTION OVER THE DEFENDANT AND ITS JUDGMENT WAS PROPERLY RENDERED.

POINT II.

AN INSTRUCTION AS TO INCLUDED OFFENSES NEED NOT HAVE BEEN GIVEN AS A MATTER OF LAW IN THE ABSENCE OF A REQUEST BY DEFENDANT.

POINT III.

THE VERDICT WAS BASED ON PROPER EVIDENCE.

ARGUMENT

POINT I.

THE COURT HAD JURISDICTION OVER THE DEFENDANT AND ITS JUDGMENT WAS PROPERLY RENDERED.

Appellant has set out the text of Sections 77-21-6 and 77-21-8, U.C.A. 1953, and relies greatly on them. As far as the two sections are pertinent, they read as follows:

77-21-6. "The information may be in substantially the following form * * * "

77-21-8. "(2) The information or indictment may refer to a section or subsection of any statute creating the offense charged therein * * *."

Clearly the two statutes, by use of the term "may" are made directory and permissive rather than mandatory. Otherwise the term "shall" would have been used.

Subsection (1) of Section 77-21-8 states:

"(1) The information or indictment may charge, and is valid and sufficient if it charges the offense for which the defendant is being prosecuted in one or more of the following ways:

(a) By using the name given to the offense by the common law by a statute.

(b) By stating so much of the definition of the offense, either in terms of the common law or of the statute defining the offense or in terms of substantially the same meaning, as is sufficient to give the court and the defendant notice of what offense is intended to be charged."

Respondent believes that the information used in this case fully complies with both paragraphs (a) and (b). The information uses the words " * * * assaulted Gorman W. Irwin with a deadly weapon * * *."

This wording is extremely close to the language in the

heading of Section 76-7-6 which defines the offense. The information also, in words of substantially the same meaning, gives enough of the definition of the crime to provide notice of the offense intended to be charged.

In the case of *People v. Hill*, 3 Utah 334, 3 Pac. 75, the Court stated:

“ * * * It would appear to be sufficient if the charge be stated with so much certainty that defendant may know what he is called upon to answer, and the court how to render judgment. In other words, substantial justice should be more sought after than artificial nicety.”

It would be absurd to assume that appellant was, or possibly could have been, being properly represented by experienced counsel, in doubt as to the fact that the acts alleged, if true, constituted a crime against the State of Utah, and not, as suggested in appellant's brief, page 12, a crime against religion, nature, morals, or ethics.

Furthermore, if appellant was mystified over the nature of the charge he was at perfect liberty to request a bill of particulars as provided by the terms of Section 77-21-9, U.C.A. 1953, a right the defendant must be given on demand and one not discretionary with the Court. *State v. Solomon*, 93 Utah 70, 71 P.2d 104.

Moreover, appellant could have made, but did not make, a motion to quash the information. This could have been done up to the time of his entering his plea thereto.

It is clear, therefore, that (1) the crime was properly charged; (2) appellant was properly apprised of the crime charged; (3) appellant could have requested and received a bill of particulars but failed to do so; (4) appellant could have moved to quash the information, but failed to do so and thus waived his objections to it.

Since the information was in all respects proper, and since appellant did not call any supposed error to the attention of the Court, the allegations of his first point must now be disregarded.

POINT II.

AN INSTRUCTION AS TO INCLUDED OFFENSES NEED NOT HAVE BEEN GIVEN AS A MATTER OF LAW IN THE ABSENCE OF A REQUEST BY DEFENDANT.

Appellant is not entitled to a reversal of his conviction on the ground that no instruction was given as to lesser offenses included within the crime of assault with a deadly weapon.

The early Utah case, *State v. McCurtain*, 52 Utah 63, 172 Pac. 481, laid down the general rule that " * * * If counsel desire to have the court charge upon a particular phase of the case, or upon a collateral issue * * *, they must offer a proper request and if it is refused save an exception. Without this the question may not be reviewed."

The Utah case of *State v. Sullivan*, 73 Utah 582, 276 Pac. 166, mentioned by appellant, contains the following language:

“Moreover, the great weight of authority is that, before a defendant can be heard to complain because the trial court did not instruct upon the law of lesser offenses included within the crime charged, such defendant must have requested instruction upon the included offense or offenses.”

The Court then sets out the citations of 27 cases supporting this view, including those from Idaho, Colorado and California courts.

The Court then continues:

“Similar views have been expressed by this Court. *People v. Robinson*, 6 Utah 101, 21 Pac. 403; *State v. McCurtain*, 52, Utah 63, 172 Pac. 481. In the case of *People v. Robinson*, a distinction is made between a case where there are different degrees of the offense charged and a case where there may be a lesser offense included within the crime charged.”

The Sullivan case still appears to be the law in Utah despite the existence of Section 77-31-5, U.C.A. 1953, cited at appellant's brief, page 19.

Appellant relies strongly on *State v. Barkas*, 91 Utah 574, 65 P.2d 1130. There, however, the instruction was requested by defendant but denied by the Court. There is a vast difference between the right to have a certain instruction given when you ask for it, and to have it given even though you don't ask for it, as in this case.

The courts cannot properly be deemed in reversible error by the failure of criminal defendants, either pur-

posely or inadvertently, to ask for instructions as to included offenses.

Appellant waived his right to such an instruction by his failure to make the request, and his second point is without merit.

POINT III.

THE VERDICT WAS BASED ON PROPER EVIDENCE.

The jury had evidence before it sufficient to support a verdict of guilty.

At page 21 of his brief, appellant says that the prosecuting witness provoked a fight with the defendant. This is not true, since appellant recklessly drove his car in such a fashion as to throw oily gravel all over the windshield of Irwin's car. (T. 4, T. 37).

While the prosecuting witness admits, using crude language on appellant in his anger over having his car splattered, even so he had neither the present intention nor the ability to start a fight as long as appellant remained in his car. Nor are words alone sufficient provocation.

As to his intention, Irwin testified (T. 4):

“ * * * If he did that again I would punch him in the nose.”

By clear inference the intention expressed by this state-

ment insured that if appellant did not do the act again he would not be punched in the nose.

Appellant, therefore, had the full power to avoid any serious altercation of any kind. But this he did not choose to do. In his anger he continued for a short distance up the road, then pulled his car to the side of the highway, (T. 6, T. 38), stopped and parked it and got out of his car with a pistol in one hand and a beer bottle in the other, (T. 38). One can scarcely imagine an act more clearly indicative of an intention to commit bodily harm. Followed by the shooting, this clearly constituted the commission of an assault with a deadly weapon.

In view of the rather modest provocation provided by Irwin in response to the gravel incident and the present and complete ability of appellant to avoid any further difficulty whatsoever, it is obvious that appellant's acts were done without just cause or excuse and with no considerable provocation, thus bringing him fully within the requirements of the statute establishing the crime of assault with a deadly weapon.

The evidence clearly showed that appellant pointed his pistol in the direction of the prosecuting witness, pulled the trigger four times, even though, because of mechanical failure, successfully firing it only once. (T. 9, T. 18). Fortunately, Irwin was not hit, but this was due only to the poor marksmanship of appellant and not any kindly intentions in his heart. This is further suggested by the fact that when the gun failed to respond, appellant

began swinging violently at Irwin with his beer bottle. (T. 7, T. 8).

The Court is reluctant to substitute its judgment for that of the trial jury. The jury here was properly instructed in every particular and evidently it concluded that appellant had initiated the fight, that he did not act in self defense, and that he committed the assault without just cause or excuse.

Every necessary element of the crime of assault with a deadly weapon is present in the facts proved and therefore appellant's point three cannot be sustained.

CONCLUSION

For reasons set forth above the appeal of Carl Mack Courtney should be dismissed.

Respectfully submitted,

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