

1961

George L. Tillman v. State of Utah : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

FILED

1961

GEORGE L. TILLMAN,

Clerk, Supreme Court, Utah

Appellant,

vs.

STATE OF UTAH,

Respondent.

:

:

:

:

Case No.

9562

BRIEF OF APPELLANT

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GEORGE L. TILLMAN, :
Appellant, :
Case No. :
vs. :
9562 :
STATE OF UTAH, :
Respondent. :

STATEMENT OF FACTS

Earlier that evening Curley and Carl Holland had illegally entered the Utah Builders Supply Company, 503 West 4th South, Salt Lake City, Utah. (R.94-5.) They found a television set and various items of business equipment.

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Mr. Curley wanted appellant to drive his truck from the Pacific Hotel to the Utah Builders Supply Company and back. (R.93) Appellant accepted the offer. While Curley and Holland reentered the Utah Builders Supply Company appellant remained in his truck. He was in his truck during the entire transaction. (R.93)

Police Officer Arthur Kent located the truck, appellant, Curley and Holland in front of the Pacific Hotel shortly after midnight. (R.76-77) Officer Kent arrested Vernon Curley and requested the other men to remain in the vicinity for further questioning, (R.78) and called Officer Gary L. Parke of the Detective Bureau to the scene. (R.78)

Officer Parke saw a television set and several business machines in the bed portion of appellant's truck. (R.85)

Vernon Curley and appellant were taken to the Salt Lake Police Station (R.87) and later Carl Holland was taken into custody.

(R.87) All three were booked for burglary.

(R.

On April 5, 1961 the three men were charged in a complaint signed by Richard Hoagland with burglary in the second degree and grand larceny. (R.6) The three men were bound over to the District Court May 17, 1961 for trial. (R.2)

An information containing one count for second degree burglary and one count for grand larceny was filed May 26, 1961. (R.8-9)

On June 2, 1961 appellant, Curley and Holland were tried together and the jury returned a verdict of guilty against each party for second degree burglary and grand larceny. (R. 19-20)

Sentence was imposed on appellant June 19, 1961. He was first sentenced for the crime of burglary in the second degree. (R.39) There was, however, a phrase - "said sentence to run concurrently with sentence for grand larceny", but there was no specific sentence for grand larceny. (R.39)

Appellant filed a notice of appeal in his own behalf August 18, 1961. (R.42-49)

On September 14, 1961 an amended commitment and sentence issued specifically sentencing appellant for grand larceny and second degree bur

POINT

The trial court exceeded its jurisdiction by imposing two sentences upon a verdict of guilty of grand larceny and second degree burglary, when only one single act or transaction was established by the evidence, and the imposition of dual sentences, even though made to run concurrently, may mislead the adult authority into believing a harsher treatment should be imposed.

ARGUMENT

The evidence in this case discloses that appellant George L. Tillman was offered \$2.00 to haul a television set and certain business equipment in his truck from the Utah Builders Supply Company to the Pacific Hotel. The evidence further discloses that Mr. Tillman remained in his truck the entire time. For this act or transaction Mr. Tillman was sentenced to the Utah State Penitentiary for both grand larceny and second degree burglary.

Utah Code Annotated 1953, § 76-1-23, prohibits such dual punishment for a single act.

The section provides:

An act or omission which is made punishable in different ways by different provisions of this Code may be punished under any one of such provisions, but in no case can it be punished under more than one. * * *

This provision has been interpreted by the Utah Supreme Court. The most recent case from my research is State vs. Huntsman, 115 Utah 283, 203 P.2d 448 (1949). Justice Wade stated that under this section a defendant could be prosecuted in a case where an unmarried man by force had sexual intercourse with his married daughter, who was between the ages of 13 and 18 years, for adultery, incest, fornication, rape and carnal knowledge, "but could only be convicted or acquitted for one offense for the same act".

California Penal Code, § 654, is identical to our Utah Code, § 76-1-23. The most recent California Supreme Court interpretation of their statute is contained in Neal vs. State, 357 P.2d 839 (1961) in an opinion written by Justice Trayner. The case involved a conviction for arson and attempted murder for the act of throwing gasoline into the bedroom of a Mr. and Mrs. Raymond and igniting it. The court held that the conviction for both arson and attempted murder violated Penal Code § 654, and the arson

conviction, being in excess of the trial court's jurisdiction, was set aside.

Dual punishment for a single act or transaction has been considered by federal courts. In *Halligan vs. Wayne*, 179 F. 112 (1910) the question was whether one accused of burglary and larceny may be convicted and punished for both offenses. The court stated that reason and authority sustains the view that one may not be punished for both grand larceny and burglary.

In *Munson vs. McClaughry*, 198 F. 72 (1912) the court held that the trial court exceeded its jurisdiction in sentencing Charles Munson for larceny after imposing a burglary sentence. The court stated:

A criminal intent to commit larceny of property of the government is an indispensable element of each of the offenses of which the petitioner was convicted, and there can be no doubt that where one attempts to break into or breaks into a post office building with intent to commit larceny therein, and at the same time commits the larceny, his criminal intent is one, and it inspires his entire transaction, which is itself in reality but a single continuing criminal act. It seems to be unauthorized, inhumane, and unreasonable to divide such a single intent and such a criminal act into two or more separate

offenses, and to inflict separate punishments upon the various steps in the act or transaction, such as one for breaking, or for the attempt to break with the criminal intent, and another for a larceny with the same intent, or such as one for the attempt to break, a second for the breaking, a third for the entering, a fourth for the taking of stamps, a fifth for the taking of other property, a sixth for the conversion of the property, and a seventh for carrying it away, all with the same single criminal intent. And there is evidently no limit to the number of offenses into which a single criminal intent may be divided, if this rule of division and punishment is once firmly established.

In *Stevens vs. McLaughry*, 207 F. 13, (1913) the court stated the rule as follows:

The most familiar illustration of the rule is that burglary with intent to commit larceny and larceny committed at the same time and as one continued act do not subject the perpetrator to two punishments, one for the burglary and another for the larceny, because the same intent is indispensable to each and they are each parts of a continuing criminal act.

In *O'Brien vs. McLaughry*, 209 F. 816 (1913)

James O'Brien was sentenced for larceny and burglary. The court held that the trial court had exceeded its jurisdiction and approved the Rule of Law that when larceny and burglary are inspired by a single intent there may be but a single punishment.

This rule of law suffered a setback in *Morgan vs. DeVine*, 237 U.S. 632 (1915). The court stated that it is within the competency of Congress to say what shall be offenses against the law. Congress had enacted two penal provisions, one for breaking and entering a Post Office and one for actually taking property therefrom. The court held that Congress intended to create two separate offenses, both of which were punishable.

The problem thus becomes one of legislative intent. The Utah Legislature has clearly expressed its intent in Utah Code Annotated 1953, § 76-1-23. An act constituting larceny and burglary may be punished under either the larceny or burglary provision, but in no case can it be punished under both.

The United States Supreme Court has further considered this dual punishment problem in *Bell vs. United States of America*, 349 U.S. 81 (1955). The defendant was charged with violating the Mann Act. The violations were laid in two counts, each of which referred

and fifteen years for "entering". The United States Supreme Court reversed, holding that under the statute the crime of entering a bank with intent to commit robbery was merged with the crime of robbery when the latter was consummated.

In *Ladner vs. United States of America*, 358 U.S. 169 (1958) the defendant had been convicted of assaulting two federal officers with a deadly weapon in violation of former provision 18 U.S.C. § 254. The defendant argued that in having fired a single discharge from a shotgun wounding two officers he was guilty of but one "assault" and subject to only one punishment. The District Court and the Court of Appeals for the Fifth Circuit held that the wounding of two federal officers from the single discharge of a shotgun constituted a separate offense against each officer under the statute. The judgment was reversed by the United States Supreme Court. The court held that the single discharge of a shotgun wounding two federal officers constitutes only a single

violation of the statute, because Congress had not made it clear that a multiple offense was intended.

In *Heflin vs. United States of America*, 358 U.S. 415 (1959) the Federal Bank Robbery Act was again construed. The defendant had been convicted and sentenced for "robbing" a bank and "receiving, possessing, concealing, storing and disposing of the stolen money". The United States Supreme Court reversed the multiple conviction on the ground that the provision for "receiving, possessing, disposing," etc. of stolen money was not designed to increase the punishment for one who robs a bank, but only to provide punishment for those who receive the loot from the robber.

Summarizing the above argument, Utah Code Annotated 1953, § 76-1-23 controls this matter. It provides one sentence for multiple offenses committed by one act or transaction. This Court has so interpreted this statute in *State vs. Huntsman*, 115 Utah 283, 204 P.2d 448 (1949).

~~and has~~ construed it in State vs. Neal, 357 P.2d 839 (1961) to mean one sentence for one transaction or act, though multiple offenses are committed. The United States Supreme Court has shown great lenity in construing federal legislation to mean one sentence for multiple offenses.

CONCLUSION

It is respectfully submitted that the trial court exceeded its jurisdiction in imposing a sentence of grand larceny upon appellant after having sentenced him for burglary in the second degree for the same act or transaction; therefore appellant respectfully prays that this court declare the second sentence void.

Respectfully submitted,

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