

1983

State of Utah v. Robert McCullar : Brief of Appellant

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IN THE SUPREME COURT
OF THE STATE OF UTAH

THE STATE OF UTAH,

*

Plaintiff/Respondent.

*

VS.

*

ROBERT McCULLAR,

*

Case No. 19150

Defendant/Appellant.

*

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BRIEF OF APPELLANT

AN APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT
COURT OF SALT LAKE COUNTY, STATE OF UTAH
BEFORE THE HONORABLE DEAN E. CONDER

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MAY 10 1983

Clock Supreme Court, Utah

THE SUPREME COURT
OF THE STATE OF UTAH

THE STATE OF UTAH,

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Plaintiff Respondent,

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vs.

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IN THE SUPREME COURT
OF THE STATE OF UTAH

THE STATE OF UTAH,

Plaintiff/Respondent.

vs.

ROBERT McCOLLAR,

Defendant/Appellant.

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Case No.

STATEMENT OF THE NATURE OF THE CASE

Appellant appeals from the verdict of a jury in and for Salt Lake County, State of Utah, which found him guilty of aggravated robbery, aggravated burglary and theft.

Appellant also appeals the denial of the trial Court of his motion for dismissal of the theft charge.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of his conviction and a new trial.

STATEMENT OF FACTS

On December 15, 1980 in Salt Lake County, Utah, Brent and Linda Holland were robbed at gun point by two black men. One of the men was wearing a mask. Several items of property were stolen from the Hollands. The Hollands were tied up with tape and held at

the residence of the Hollands were shown a group of photos, including a photo of Brent M. Hill and the defendant. They both picked

out pictures of the person(s) whom they felt robbed them.

In October, 1981 Mr. Nix was given immunity from prosecution of various offenses, including this case, and at trial he admitted to being one of the men who robbed the Hollands. He also testified that the other man was the defendant, Robert McCullar. Nix also testified that the crime was planned by the co-defendant Robert Smith and one Jay Sanchez.

Jay Sanchez was also given immunity and testified at the trial, implicating Mr. McCullar.

Evidence was added during cross examination of the Hollands which cast doubt on their identification of Robert McCullar. Mrs. Holland testified that she picked out another man as the one who accompanied Mr. Nix into their house. [TR 73]

The jury found the defendant guilty of all charges and the Court sentenced the defendant on all charges to the Utah State Prison, the sentences to run concurrently.

PRELIMINARY STATEMENT

The appellant's complaint of error in this case is two pronged. First he contends that the evidence presented was insufficient to sustain a finding of guilty by the jury.

Secondly, that the Court erred in not granting his motion at the conclusion of the evidence, to dismiss the theft count as being included in the charge of aggravated robbery and further erred in granting the same motion at sentencing on the basis that the theft conviction being a lesser included offense, merged into the conviction for aggravated robbery.

APPEALMENT

POINT T

The appellant is aware that standards for reviewing a criminal conviction upon a claim of insufficient evidence is as follows:

"We reverse a jury conviction for insufficient evidence (viewed in the light most favorable to the jury's verdict) is sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt..." State vs. Petree
P2d (No. 18015), filed 2/4/83.

Appellant urges the Court that the testimony of Mr. and Mrs. Holland concerning their identification of the perpetrators of the crime, meets the above standard and thus requires reversal of his convictions.

Mr. Holland identified the appellant at trial during direct examination as one of the robbers. [T 46]

He testified on redirect examination that he was shown a group of photographs in Idaho, and that he picked one picture of which he was positive (Mr. Nix) and two others which were possibly the other men. [T 57-8]

On recross examination he testified that he felt the other two men were men who were probably not one of the men who robbed the appellant.

On the appellant's direct examination, the appellant testified that he identified the appellant as one of the men who robbed the appellant during the prosecutor's direct examination. [T 67]

On the appellant's cross-examination, Mrs. Holland testified that at the time she was asked to identify the appellant, she had said her identification of the appellant

was not positive. [T 72]

Mrs. Holland, when questioned regarding the groups of photographs shown her in Idaho, (exhibit 5) testified that she was only able to pick out one photograph as being one of the men who robbed her. She testified that she had only seen one of the men during the robbery and that man was the appellant, as was the photograph she picked out. [T 73]

However, the photograph Mrs. Holland picked out and initialed during the trial was not the appellant, but was Robert Taylor [T 94]

In view of the inconclusive identification of the appellant as set out above, the appellant would submit that he is entitled to a reversal of the verdict of the jury and dismissal of all charges.

ARGUMENT

POINT II

At the conclusion of all the evidence and prior to the instruction of the jury, appellant orally moved the Court to dismiss the charge of theft as being a lesser included offense of the charge of aggravated robbery. [T 217] The Court took the matter under advisement. [T 218].

At the sentencing hearing, the appellant reviewed the motion on the additional ground that the theft conviction merged in to the aggravated robbery conviction, and therefore the appellant could not be sentenced on both convictions. The motion was denied. [T 269-70]

U.C.A. 76-6-302 provides that the elements of aggravated robbery are:

- 3) Intentional taking of personal property
- 4) From the possession of another.
- 5) From his person or immediate presence against his will.
- 6) Accompanied by means of fear or force.
- 7) With the use of a firearm.

U.C.A. 76-6-104 sets forth the elements necessary for a theft conviction:

- 1) Obtains or exercises unauthorized control over property of another.
- 2) With a purpose to deprive him thereof.

The degree of theft is based on the value of the property involved.

In State vs. Clayton 641 P2d 122 (1982) this Court held that an offense is included in a greater 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."

Appellant would submit that the proof of the elements of aggravated robbery also proves a theft. That being so, under U.C.A. 76-6-104, the appellants conviction and sentence should be set aside and the charges dismissed.

The State would argue that under 76-1-402(1) all elements of the aggravated robbery are included in the theft offense and that the act(s) of the aggravated robbery was the act(s) of the theft charge. Therefore although the conviction for aggravated robbery may be imposed thereon,

CONCLUSION

The appellant submits that he is entitled to have the verdicts set aside and released from prison or that he be granted the requested relief regarding the theft conviction.

Respectfully submitted this ____ day of May, 1983.

STEPHEN P. McCAUGHEY
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I certify that a copy of the foregoing was placed for delivery, by messenger, to the Attorney General of Utah, State Capitol Building, Salt Lake City, Utah, on this ____ day of May, 1983.
