

1983

State of Utah v. Robert McCullar : Supplemental Brief of Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Respondent, :
-v- : Case No. 19150
ROBERT MCCULLAR, :
Defendant-Appellant. :

SUPPLEMENTAL BRIEF OF RESPONDENT

- - - - -

APPEAL FROM CONVICTIONS OF AGGRAVATED
BURGLARY, AGGRAVATED ROBBERY AND THEFT IN
THE THIRD JUDICIAL DISTRICT COURT IN AND
FOR SALT LAKE COUNTY, STATE OF UTAH, THE
HONORABLE DEAN E. CONDER, JUDGE,
PRESIDING.

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Clk., Supreme Court, Utah

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STATE OF UTAH, :
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STATEMENT OF INCORPORATION

Respondent submits this supplemental brief to discuss a recent decision of this Court rendered after the filing of respondent's original brief. Respondent incorporates all portions of its original brief and supplements Point I of the Argument portion of its original brief as follows:

ARGUMENT

POINT I.C.

THEFT IS A LESSER INCLUDED OFFENSE OF AGGRAVATED ROBBERY WHEN THE AGGRAVATED ROBBERY IS COMMITTED BY USING A FIREARM DURING THE COMMISSION OF A ROBBERY.

In State v. Hill, Utah, No. 18180 (filed November 1, 1983), this Court reviewed the multiple variations of aggravated robbery to determine if theft was a lesser included offense of aggravated robbery. A defendant can be found guilty of aggravated robbery if he uses:

a firearm in one of three circumstances: (1) in an attempt to commit, (2) during the commission of, or (3) in the immediate flight after the attempt or commission of a robbery. § 76-6-302(1) and (3).

State v. Hill, Id., slip op. at 2.

Respondent's initial brief maintained that theft is not a lesser included offense of aggravated robbery according to a theoretical comparison of the statutory elements of each crime. However, for crimes (such as aggravated robbery) which have multiple variations, the Court has now said it must consider the evidence to determine whether the greater-lesser relationship exists between the specific variations of the crimes actually proved at trial." State v. Hill, Id., slip op. at 2. This Court then concluded that "the greater-lesser relationship does exist between theft and the second variation of aggravated robbery (use of a gun during the commission of a robbery)." Id., slip op. at 3.

In the case at bar, the evidence shows property was taken from the person of Lorna Holland and that other property was then taken from other rooms in the Holland home. The facts of this case indicate that aggravated robbery was committed by using a firearm during the commission of a robbery. Respondent concedes that, under the facts of this case, theft is a lesser included offense of aggravated robbery.

Respondent request that this Court reverse the appellant's conviction for theft but affirm the convictions for aggravated robbery and aggravated burglary.

RESPECTFULLY submitted this 9th day of November,

1983.

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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing Brief, postage prepaid to Stephen R. McCaughey, attorney for defendant, 72 East 4th South, Suite 300, Salt Lake City, Utah 84111, this 9th day of November, 1983.

Nathleen D. Kellersberger