1984

State of Utah v. Stanley Van Oldroyd : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff and Respondent,	*	
vs.	*	Case No. 19335
STANLEY VAN OLDROYD, Defendant and Appellant.	*	

BRIEF OF APPELLANT

Appeal from the Judgment of the
Sixth Judicial District Court for Sevier County
Honorable Don V. Tibbs, Judge

Marcus Taylor
Labrum & Taylor
108 North Main Street
Richfield, Utah 84701
Telephone: 896-6484
Attorney for Appellant

Earl F. Dorius
Office of the Attorney General
State Capitol Bldg.
Salt Lake City, Utah 84114
Telephone: 533-7627
Attorney for Respondent

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff and Respondent, vs. STANLEY VAN OLDROYD, Defendant and Appellant.	*	Case No. 19335

BRIEF OF APPELLANT

Appeal from the Judgment of the
Sixth Judicial District Court for Sevier County
Honorable Don V. Tibbs, Judge

Marcus Taylor
Labrum & Taylor
108 North Main Street
Richfield, Utah 84701
Telephone: 896-6484
Attorney for Appellant

Earl F. Dorius
Office of the Attorney General
State Capitol Bldg.
Salt Lake City, Utah 84114
Telephone: 533-7627
Attorney for Respondent

TABLE OF CONTENTS

AUTHORITIES CITED

CASES

STATUTES

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	*	
Plaintiff and Respondent,	*	
vs.	*	Case No. 19335
STANLEY VAN OLDROYD,	*	
Defendant and Appellant.	*	

STATEMENT OF KIND OF CASE

This is a criminal case. By Information filed in the Tenth Circuit Court of Sevier County, the Appellant, Stanley Van Oldroyd (referred to hereinafter as "Oldroyd"), was charged with two crimes; aagravated assault, contrary to U.C.A., 1953, §76-5-103, and assault on a peace officer, contrary to U.C.A., 1953, §76-5-102.4 (R.1). Proceedings in the Circuit Court resulted in a dismissal of the offense of assault on a peace officer, and Oldroyd was arraigned in the District Court on the single charge of aggravated assault (R.15). The case was jury tried to a jury.

DISPOSITION IN THE LOWER COURT

The jury returned a verdict of guilty to the offense of aggravated assault (R.70). The District Court sentenced

Olrdoyd to a three year term of probation, which called for the payment of a fine of $2, 00.00, and incarceration in the County Jail for sixty days. Oldroyd appeals from the verdict and judgment of the District Court.

RELIEF SOUGHT ON APPEAL

Oldroyd seeks an order of this Court vacating the judgment, and a remand to the District Court for a new trial. He claims as error that the District Court failed to charge the jury with an instruction regarding a lesser included offense of "threatening with a dangerous weapon", contrary to U.C.A.,1953, §76-10-506. The Docketing Statement filed by Oldroyd herein states that he would assign as error for appeal the claim that the evidence was insufficient to support a conviction. A necessary element for conviction was the commission of a "threat", as that term is employed in U.C.A., 1953, §76-5-102(b). Oldroyd's initial theory was that a threat had to be a verbal or written communication. A review of applicable authorities would show that a threat can be premised on action alone. Therefore, the earlier contention is hereby abandoned in favor of the claim that error was committed in failing to charge the jury with an instruction regarding a lesser included offense.

STATEMENT OF FACTS

At the time of the alleged crime Oldroyd was married to Joan Freeman. They had experienced marital difficulties

and were living seperate and apart. She was residing in a basement apartment in Richfield, Utah (TR.69).

At approximately 8:20 p.m. on February 24, 1983, Oldroyd appeared at the door to Miss Freeman's apartment. He apparently requested admittance, but she declined and requested that he leave (TR.70). She testified that she was afraid of him and telephoned the police for assistance (TR.71).

Oldroyd stood at the doorway for about thirty minutes (TR.70). He and Miss Freeman could see one another through a closed glass door, but she did not see any gun in his possession (TR.74).

Officer John Evans of the Richfield City Police Department responded to the telephone call of Miss Freeman (TR.76, 77). Two other officers followed him to the apartment (TR.77). Officer Evans walked to the top of the basement stairwell which was dark at the time. He testified that he then heard a sound which he characterized as the cocking of a revolver (TR.77).

Using a flashlight, Officer Evans then identified Oldroyd (TR.77,82)[1] who was seated on the stairwell steps, and according to the Officer, Oldroyd was pointing a revolver at him (TR.78).

Officer Evans then jumpted back from the stairwell and obtained his radio and shotgun from his patrol car (TR.78).

[1]Oldroyd was a former peace officer (TR.111), and he was well acquainted with Officer Evans (TR.108).

He walked back to the scene, and asked Oldroyd several times to throw the revolver out. After five to eight minutes, Oldroyd did so (TR.79,80).

When Officer Evans observed Oldroyd in the stairwell with the revolver, he could not determine if the hammer was in a cocked position, and when he picked the gun up from the ground the hammer was in an uncocked posision, and it was empty of any bullets (TR.82,83).

Oldroyd took the stand in his own defense. He testified that he stood at the doorway of his wife's apartment talking to her for some time before the police officers arrived (TR.1[illegible]). He had the revolver in question with him at that time, but it was unloaded. Although he had bullets in his pocket, he never took them out (TR.106,107).

Because of the flashlight shining in his eyes, Oldroyd did not recognize Officer Evans, nor did he observe a police uniform (TR.107). He testified that he did not point his revolver at anyone (TR.108), and it was not his intent to frighten or threaten Officer Evans or to cause hurt or injury to anyone else (TR.108).

Oldroyd also stated that the cylinder of the revolver was open at all times during the incident (TR.109), and that he never aimed the gun up the stairwell (TR.114).

Oldroyd requested the Court to charge the jury with the lesser included offense of "threatening with a dangerous

weapon, contrary to U.C.A., 1953, §76-10-506 (R.51). The Court refused and exception was taken (TR.122,123).

ARGUMENT

THE TRIAL COURT COMMITTED ERROR IN REFUSING THE PROFFERED JURY INSTRUCTION REGARDING THE LESSER INCLUDED OFFENSE OF "THREATENING WITH A DANGEROUS WEAPON".

In State v. Baker, Case No. 18245, filed in this Court on September 21, 1983, this Court discussed in depth the standard which should apply in charging a jury with a lesser included offense. Oldroyd relies primarily upon the rules and principles announced in that case as his authority herein.

In Baker, supra, at 2, the Court observed that two standards have developed by statutory and case law to govern the giving of jury instructions regarding lesser included offenses. One standard calls for an abstract comparison of the statutory elements of the offenses in question. The prosecution is held to this standard.

> "Thus, when the prosecution seeks instruction on a proposed lesser included offense, both the legal elements and the actual evidence or inferences needed to demonstrate those elements must necessarily be included within the original charged offense.

Baker, supra, at 5. Since all elements of law and fact as to a lesser offense will of necessity be present in any charging information or indictment for the greater offense, a defendant, under this standard, is afforded the fundamentals

of notice and opportunity to prepare his defense.

As to the rule which should apply when the defendant requests an instruction for a lesser included offense, this Court in Baker, supra, calls for an evidence-based standard. The more liberal standard for the defendant was justified in part because:

> The prosecution faces no loss of life or liberty at trial and is not constitutionally entitled to the same protections afforded the defendant.

Baker, supra, at 5. It was further observed that the benefit to the defendant of the reasonable doubt standard is enhanced, under some circumstances, if the jury is given the additional option of a lesser included offense. Where there exists reasonable doubt as to one of the elements of the greater offense, but the evidence at trial shows the defendant guilty of some lesser or related offense, then the jury can properly find guilt as to the lesser offense, and thus avoid an "all or nothing" situation, which would require a decision at odds with the evidence.

The Baker decision calls for three tests to be met for a defendant to be entitled to an instruction for a lesser included offense. Those three tests can be stated as follows:

1. There must exist some overlapping in the statutory elements of the greater and lesser offenses in question.

2. Evidence as received must provide a rational basis for a verdict acquitting the defendant of the

greater offense.

3. The evidence as received must show a rational basis for a conviction of the defendant of the proffered included lesser offense.

The foregoing standards were found to be soundly based upon the provisions of U.C.A., 1953, §76-1-402.

The evidence-based standard is applicable to the instant case. Oldroyd was charged with, and convicted of, a violation of U.C.A., 1953, §76-5-103(1)(b). That crime required the use of a deadly weapon while committing simple assault as proscribed by U.C.A., 1953, §76-5-102. This latter code provision defines two types of assault. One is "an attempt, with unlawful force or violence, to do bodily injury to another", U.C.A. 1953, §76-5-102(1)(a). The other is defined as "a threat, accompanied by a show of immediate force or violence, to do bodily injury to another", U.C.A., 1953, §76-5-102(1)(b). It is this latter type of assault which Oldroyd was charged with and convicted. The former kind is not at issue. The provisions of U.C.A., 1953, §76-5-103 simply provide one additional element to consider, that of the use of a deadly weapon.

The provisions of U.C.A., 1953, §76-10-506, the lesser included offense which Oldroyd contends should have been considered, characterizes as criminal conduct the drawing or exhibiting of any dangerous weapon in an angry and threatening manner. Thus, it is readily apparent, that these two statutory provisions share two elements in common. One is the element of a threat, or in a

threatening manner, and the other is use of a weapon. Therefore, the "overlapping" test required by Baker, supra, is clearly met in the instant matter.

The testimony received at trial of Officer Evans and Oldroyd show that the balance of the Baker test is satisfied. Looking at that evidence in a light most favorable to the prosecution, the criminal conduct of Oldroyd can be simply stated. He pointed a revolver at a police officer. No words were spoken. No shots were fired. The prosecution does not contend that any other act or ommission on the part of Oldroyd contributed to an element of the offense. Using the language of U.C.A., 1953, §76-10-506, Oldroyd exhibited a dangerous weapon to Officer Evans in a threatening manner. Under the facts of this case, the two statutes in question proscribe the same conduct.

In State v. Verdin, 595 P.2d 862 (1979), this Court had occasion to compare the crime of aggravated assault with that of threatening with a dangerous weapon. Verdin was convicted of aggravated assault in a trial without a jury, but contended that he was entitled to be sentenced for the crime proscribed by U.C.A., 1953, §76-10-506 (threatening with a dangerous weapon). His theory was that the two criminal statutes censored the same conduct and that he was entitled to be sentenced under the section providing the lesser penalty. Verdin's argument was rejected, but in so doing the Court employed an analysis of comparing in the abstract the statutory elements of the two crimes in question

Baker, supra, requires the application of a different standard.

In any event, Verdin, supra, stands on its own when viewed in light of the Baker decision and the instant matter because the lesser included offense issue did not arise in the context of a requested jury instruction. Furthermore, the judge as the trier of fact in Verdin, supra, had found facts sufficient to meet the demand of the elements of aggravated assault which this Court was not at liberty to disregard. The instant case is far different. Oldroyd has been wholly denied the opportunity for any trier of fact to entertain a consideration of a lesser included offense. In Verdin, the judge necessarily had to consider any lesser included offenses. The Court in that case simply found that aggravated assault had in fact been committed.

There are obviously many and varied circumstances, differing from the facts in this case, which would call for the application of the Code provisions defining threatening with a dangerous weapon, and not those proscribing assault. For example, if a person drew and exhibited a gun, and angrily threatened to shoot another person's property, he would be guilty of threatening with a dangerous weapon, and not aggravated assault. Futhermore, if there was an attempt on the part of the defendant, as opposed to a mere threat, then the other type of assault would come into play, that defined by U.C.A., 1953, §76-5-102(1)(a).

SUMMARY

In Beck v. Alabama, 447 U.S. 625, the Supreme Court

recognized that any [illegible] alternative when it has only the choice of conviction or acquittal. The availability of a third option of a lesser included offense softens that sometimes dangerous position. Oldroyd was backed into that very corner in this case. He was precluded by the error of the District Court from the opportunity to have the jury consider whether his conduct was within the confines of U.C.A., 1953, §76-10-506, and not such as to constitute a far more serious crime.

Respectfully submitted,

MARCUS TAYLOR
LABRUM & TAYLOR
108 NORTH MAIN STREET
RICHFIELD, UTAH 84701
Telephone: 896-6434

Attorney for Appellant

DELIVERY CERTIFICATE

I herewith and hereby certify that two copies of the foregoing Brief of Appellant was delivered to the office of Earl F. Dorius, Assistant Attorney General, State Capitol Building, Salt Lake City, Utah, this 5th day of December, 1983.