1984

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

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 19335
STANLEY VAN OLDROYD,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM THE JUDGMENT OF THE SIXTH
JUDICIAL DISTRICT COURT FOR SEVIER COUNTY
HONORABLE DON V. TIBBS, JUDGE

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

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

DISPOSITION IN THE LOWER COURT

Appellant was tried before a jury which found him guilty of aggravated assault on May 3, 1983, in the Sixth Judicial District Court of Sevier County, the Honorable Don V. Tibbs presiding (R. 70). The District Court sentenced

appellant to a three-year term of probation, which called for a fine of $2,500.00 and incarceration in the County Jail for sixty days. Appellant appeals from the verdict and judgment.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the appellant's conviction and sentence.

STATEMENT OF FACTS

At the time of the crime, appellant and his wife were experiencing marital difficulties and were living separate and apart. Mrs. Oldroyd was residing in a basement apartment (apartment No. 5) in Richfield, Utah (T. 69).

On February 24, 1983, at approximately 8:20 p.m., appellant appeared at the door of Mrs. Oldroyd's apartment. She refused him admittance to the apartment and requested that he leave (T. 70). Mrs. Oldroyd testified that she was afraid of him and telephoned the police for assistance (T. 71).

Appellant remained near the doorway for about thirty minutes (T. 70). He and Mrs. Oldroyd could see one another through a closed glass door, but Mrs. Oldroyd did not see a gun in appellant's possession (T. 74).

Officer John Evans of the Richfield Police Department responded to Mrs. Oldroyd's telephone call (T. 76). Officers Rex Dana and Virgil Sickels of the Richfield Police Department also arrived at the apartment building at approximately the same time as did Officer Evans (T. 86).

Officer Evans testified that he did not know where apartment No. 5 was located (T. 76), but as he approached the stairwell of the apartment, followed by officers Dana and Sickels (T. 77), he heard the sound of a revolver being cocked. On hearing the sound, he turned on his flashlight and saw appellant seated on the fourth or fifth step of the stairway leading down to the apartment, with a revolver pointed directly at him (T. 77, 78, 82). Officer Evans jumped back and went to his patrol car for a radio and a shotgun (T. 78).

Officer Evans returned to the scene and asked appellant several times to throw his gun out. After five to eight minutes, appellant did so. Officer Evans picked the revolver up from the ground and found it to be in an uncocked position and with no bullets in it (T. 82, 83). When Officer Evans first saw appellant on the stairway, he could not see whether the hammer of the revolver was in a cocked position (T. 82, 83).

When Officers Dana and Sickels arrived at the apartment building, Officer Dana walked over to appellant's truck which was parked on the shoulder of the road. Finding no one in the truck, he walked over to the other two officers near the stairway to apartment No. 5 (T. 86, 87). Officer Dana testified that as he approached the two officers he heard what sounded like the turning of a cylinder on a revolver (T. 88,90).

Officer Sickels testified that when Officer Evans went to his patrol car for a radio and shotgun, he was at the

top of the stairway looking down into the stairwell where from the light of Officer Dana's flashlight he saw appellant standing with his revolver pointed up the stairway (T. 93, 97). While Officer Evans was asking appellant to throw his gun out, Officer Evans heard a cylinder turn and the clicking of a revolver (T. 94).

After appellant was arrested, six bullets were found in his left front pocket (T. 89) and a holster for the revolver in his right rear pocket (T. 81).

Appellant testified in his own defense. He testified that he stood at the doorway to his wife's apartment talking to her for some time before the police officers arrived (T. 105). He had the revolver with him which he intended to leave with his wife (T. 111). Although he had bullets in his pocket, he never took them out (T. 106, 107). When the revolver is opened, the cylinder falls out. The cylinder was open all the time and was never closed (T. 109, 112). When asked if the cylinder rotated making a clicking sound heard by Officers Dana and Sickels, appellant replied that it did (T. 109, 110).

Appellant testified that because of the flashlight shining in his eyes, did not recognize Officer Evans, nor did he observe a police uniform (T. 107). He said he did not point his revolver at anyone (T. 108) or ever aim it up the stairway (T. 114), but that when Officer Evans shined his flashlight down the stairwell, he was leaning against the east

wall away from the steps with his right arm hanging down along his side and the revolver hanging on his finger with the cylinder open (T. 114).

Appellant submitted to the District Court his requested Jury Instruction No. 2, which charged that the jury should consider two lesser included instructions to the offense of aggravated assault, one being "threatening with a dangerous weapon" as proscribed by U.C.A. 1953, § 76-10-506, and the other being ordinary "assault" as proscribed by U.C.A. 1953, § 76-5-102 (R. 51,52). The Court refused to give the requested Instruction and appellant took exception thereto (T. 122, 123). In his brief to this Court, under Relief Sought on Appeal, appellant claims the District Court committed error in failing to charge the jury with an instruction regarding a lesser included offense.

ARGUMENT

THE TRIAL COURT PROPERLY REFUSED TO GIVE APPELLANT'S PROFFERED JURY INSTRUCTION REGARDING THE LESSER INCLUDED OFFENSE OF "THREATENING WITH A DANGEROUS WEAPON."

Appellant contends that the District Court erred when it refused to give a proferred jury instruction regarding the lesser included offense of "threatening with a dangerous weapon" as proscribed by U.CS.A. 1953, § 76-10-506. In his argument, appellant states that as authority for his position, he relies primarily on the rules and principles announced by this Court in the recent case of State v. Baker, Case No.

18245, filed on September 21, 1983. Respondent also relies on that case as authority for its position.

In Baker, this Court clarified the standards to be used in giving a jury instruction with respect to a lesser included offense. After reviewing case and statutory law in depth, the Court concluded, for reasons set forth in detail in its decision, that there are two standards to be applied. First, when the prosecution requests the jury instruction, the "necessarily included offense" standard should be applied. This standard relies upon a comparison of the abstract statutory elements of the offenses, i.e., 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, slip op. at 217). Second, when the defendant requests the jury instruction, the "evidence-based" standard should be applied. This standard requires an analysis of the evidence offered at trial and is incorporated in U.C.A. 1953, § 76-1-402(4), which is discussed below (Baker, slip op. at 219).

The definitions of an "included offense" and the rule for charging the jury in respect to the lesser included offense are contained in U.C.A. 1953, § 76-1-402, which provides in the part pertinent to this case:

> (3) A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

* * *

(4) The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the including offense.

The requirements of Section 76-1-402(3)(a) were explained by the Court in Baker, supra (slip op. at 9), as follows:

> Paragraph (3)(a) says that an offense is included in a charged offense when "it is established by proof of the same or less than all the facts required to establish the commission of the offense charged." The analysis of whether an offense is included for purposes of deciding whether to grant a defendant's request for a jury instruction must therefore begin with the proof of facts at trial. If the same facts tend to prove elements of more than one statutory offense, then the offenses are related under § 76-1-402. The application of § 76-1-402(3)(a) will thus require some reference to the statutory elements of the offenses involved in order to determine whether given facts are "required to establish the commission of the offense charged."

Appellant was charged with the crime of aggravated assault which is proscribed by U.C.A. 1953, § 76-5-103. This section must be read in conjunction with U.C.A. 1953, § 76-5-102. The portions of these statutes pertinent to this case provide:

76-5-102(1) Assault is:

* * *

(b) A threat, accompanied by a show of immediate force or violence, to do bodily injury to another.

76-5-103. (1) a person commits aggravated assault if he commits assault as defined in Section 76-5-102 and;

* * *

(b) He uses a deadly weapon or such means of force likely to produce death or serious bodily injury.

The crime of "threatening with a dangerous weapon" is proscribed by U.C.A. 1953, § 76-10-506, which provides:

76-10-506. Every person, except those persons described in Section 76-10-503, who, not in necessary defense in the presence of two or more persons, draws or exhibits any dangerous weapon in an angry and threatening manner or unlawfully uses the same in any fight or quarrel is guilty of a class B misdemeanor.

Appellant argues that "threatening with a dangerous weapon" is a lesser included offense to the offense charged. He states that two elements in Section 76-5-103 and 76-10-506 "overlap" in that they both contain the elements of a threat, or in a threatening manner, and the use of a weapon, and that under the facts of this case the two statutes proscribe the same conduct. In State v. Verdin, 595 P.2d 862 (Utah 1979), which case the appellant discusses at some length in his brief, this Court held that Section 76-5-103 and Section 76-10-506 do not proscribe the same conduct, saying: "the distinctions in levels of proscribed conduct are clear and

easily to be comprehended." In arriving at that conclusion, the Court employed the "necessarily included offense" standard. It appears in the instant case, however, that under the "evidence-based" standard, the offense of threatening with a dangerous weapon would be a lesser included offense to aggravated assault for the reason that there is an overlapping of certain elements of each offense, as stated by appellant, and the evidence produced by the prosecution would prove all of the elements of each offense.

Assuming that the offense of threatening with a dangerous weapon is a lesser included offense in the offense of aggravated assault, the court under Section 76-1-402(4) is still not obligated to charge the jury as to the lesser offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense. With respect to Section 76-1-402(4), this court said in the recent case of State v. Crick, et al., No. 18080, filed November 9, 1983 (slip op. at 6, 7):

> In determining whether there is a "rational basis" for acquitting the defendant of the offense charged and convicting him of a lesser included offense, the court must, of course, view the evidence and the inferences that can be drawn from it in the light most favorable to the defense. State v. Gillian, 23 Utah 2d at 376, 463 P.2d at 814. Similarly, as we said more recently in State v. Baker, supra, slip op. at 10:
>
> > [W]en the evidence is ambiguous and therefore susceptible to alternative

> interpretations, and one alternative would permit acquittal of the greater offense and conviction of the lesser, a jury question exists and the court must give a lesser included offense instruction at the request of the defendant.

The evidence in this case does not provide a rational basis for appellant's requested instruction on threatening with a dangerous weapon. The evidence presented by the prosecution is clear and unambiguous and not susceptible to any alternative interpretation permitting acquittal of the offense of threatening with a dangerous weapon. Officer Evans heard the cocking of a revolver, turned on his flashlight and saw defendant pointing a revolver at him; in a separate incident, Officer Sickels saw appellant standing in the stairwell with a revolver pointing up the stairway; while Officer Evans was asking appellant to throw his gun out, Officers Sickels and Dana heard a cylinder turn and the clicking of a revolver; upon arrest, six bullets were found in appellant's left front pants pocket and a holster in his right rear pocket; and during the time appellant was talking to his wife, she did not see a revolver.

Appellant contradicted the prosecutor's evidence. He testified that he removed the bullets from the revolver when he took it out of his truck; that he intended to give the revolver to his wife; that the cylinder of the revolver was open all the time he was in the stairwell; that at no time did he point the revolver at the police or up the stairway but was merely standing at the bottom of the stairwell with both arms

hanging at his sides with the revolver hanging down on one of his fingers.

Thus, the evidence is such that, if the jury were to believe appellant's testimony, no offense at all was committed because the element of a threat is missing, which element is a necessary element in both offenses. The evidence shows that appellant made no verbal threats and, according to his testimony, he did not exhibit the revolver in a threatening manner or otherwise threaten the police officers. Consequently, there was no rational basis for a verdict acquitting appellant of aggravated assault and convicting him of the lesser included offense of threatening with a dangerous weapon.

Appellant's argument that the District Court erred in failing to charge the jury with the lesser included offense of threatening with a dangerous weapon ignores the provision of U.C.A. 1953, § 76-1-402(4), which provides that the court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the inlcuded offense. The prosecution met its burden of proof with respect to the offense of aggravated assault and there is nothing in the evidence presented by the prosecutor that would warrant a finding that a lesser offense was committed. Likewise, there is nothing in the evidence presented by appellant that would warrant a finding that a

lesser offense was committed since his evidence, if believed by the jury, would only prove his complete innocence. This is a case wherein either the offense of aggravated assault was committed or no offense was committed.

CONCLUSION

The District Court did not err in refusing to submit to the jury the lesser included offense requestd by appellant and the verdict and judgment rendered in the District Court should be affirmed.

RESPECTFULLY submited this 30th day of March, 1984.

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CERTIFICATE OF MAILING

I hereby certify that I mailed two copies of the foregoing Brief of Respondent, postage prepaid, to Marcus Taylor, Labrum & Taylor, 108 North Main Street, Richfield, Utah 84701 on this 30th day of March, 1984.

Carol L. Frome