1967

State Of Utah v. Dennis A. Hunter : Brief of Respondent

In The Supreme Co
of the State of U

STATE OF UTAH,

Plaintiff-Respondent,

- vs -

DENNIS A. HUNTER,

Defendant-App

BRIEF OF RESPO

Appeal from the judgment of the Th
Salt Lake County, State o
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In The Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff-Respondent,

- vs -

DENNIS A. HUNTER,

Defendant-Appellant.

Case No. 10893

BRIEF OF RESPONDENT

STATEMENT OF NATURE OF CASE

The appellant, Dennis A. Hunter, appeals from a conviction of assault with a deadly weapon on jury trial in the Third Judicial District Court of Salt Lake County, State of Utah.

DISPOSITION OF LOWER COURT

A complaint was filed in the District Court of Summit County on November 2, 1966, by Ted London, a member of the Utah Highway Patrol, charging Dennis A. Hunter with the crime of assault with a deadly weapon. Upon stipulation the matter was transferred to the District Court of Salt Lake County with jury trial held on the 8th day of December, 1966,

wherein the appellant, Mr. Hunter, was found guilty of assault with a deadly weapon. On the 30th day of December, 1966, the Honorable A. H. Ellett sentenced the appellant, Mr. Hunter, to an indeterminate term of imprisonment commencing from the date of first incarceration on the 23rd day of April, 1966, not to exceed five years.

RELIEF SOUGHT ON APPEAL

Respondent requests that the judgment of the trial court be affirmed.

STATEMENT OF FACTS

On April 23, 1966, Utah Highway Patrolmen on the belief a felony had been committed were pursuing the appellant, Dennis A. Hunter, and one Steve Clark, in a high-speed automobile chase up Echo Canyon. When the two automobiles were within approximately a hundred feet of each other, the appellant, Mr. Hunter, pointed a .357 Magnum pistol directly at the Utah Highway Patrolmen and fired three shots. (T. 48, 56) The Patrolmen were fearful of bodily harm and dropped further back and pulled over to the left side of the road so they would not be in direct line of the firing of the defendant, Mr. Hunter. (T. 39, 40)

At the conclusion of the presentation of evidence, counsel for the appellant requested an instruction on the includability of the lesser offense of simple assault within the charge of assault with a

deadly weapon. (R. 17 and 21) The lower court rejected this requested instruction stating that it felt that the issue at hand was either assault with a deadly weapon or nothing. (T. 67)

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY IN THE LESSER OFFENSE OF ASSAULT SINCE THE ISSUE WAS NOT RAISED BY THE EVIDENCE.

The appellant contends that the trial court erred in refusing to give a requested instruction on the claimed lesser included offense of assault. The appellant requested such an instruction and an exception was duly taken. (T. 67)

It is well settled in this state that an instruction on a lesser included offense is not required, unless the evidence raises the issue for the jury's consideration. It is submitted that even assuming assault as defined by Utah Code Ann. § 76-7-1 (1953), is a lesser included offense of assault with a deadly weapon, the evidence in the instant case did not raise the issue or warrant the jury's consideration of a simple assault. Therefore, it was not error for the trial court to refuse to instruct on the lesser offense of assault. **State v. Angle,** 61 Utah 432, 215 Pac. 531 (1923); **State v. Hyams,** 64 Utah 285, 230 Pac. 349 (1924); **State v. Ferguson,** 74 Utah 263, 279 Pac. 55 (1929).

In **State v. Angle, supra,** this court stated:

> **It is a well-settled rule that instructions as to lower grades of the offences charged should be given when warranted by the evidence. It is equally well settled that in a criminal prosecution error cannot be predicated on the omission of the trial court to instruct as to lesser grades of the offense charged where there is no evidence to reduce the offense to a lesser grade.**

In **State v. Ferguson, supra,** this court restated verbatum the above quote.

In the same case, Justice Straup, concurring, noted:

> **I concur in the result. I concur in the general statement as announced in some of the texts and cases that, when there is no evidence to support a conviction of a lesser offense, a court is not required to submit it to a jury, and concur in the statement in the prevailing opinion that instructions as to lower grades of a charged offense, when embraced and included therein, should be given when warranted by evidence.**

In **State v. Mitchell,** 3 Utah 2d 70, 278 P.2d 618 (1955), this court reiterated the doctrine that before a failure to instruct on a lesser included offense can be claimed as error, there must be evidence from which reasonable persons could conclude that the lesser offense was committed.

In **State v. Gleason,** 17 Utah 2d 150, 405 P.2d 793 (1965), the appellant complained that the trial court erred in a rape case in failing to instruct as to a lesser included offense of assault with intent to commit rape. In rejecting the contention, the court stated:

> **The evidence was so overwhelming that he committed the act, that no such instruction was either necessary or appropriate. . .**

Most recently in **State v. Dodge,** 18 Utah 2d 63 at 64, 415 P.2d 212 at 213 (1966), where the defendant was apprehended inside a building while attempting to peel a safe, this court said of appellant's requested instruction on the lesser offense of unlawful entry:

> **The facts indisputably show he was attempting to peel the safe. The jury would have been composed of unreasonable men had it even considered that the defendant had "unlawfully entered" for the altruistic "intent to damage property or to injure a person or annoy the peace and quiet of any occupant therein." The trial court also would have been an unreasonable person had he given such an instruction. The second degree burglary conviction is affirmed.**

In the instant case, it is clear that the evidence did not in any way warrant the instructions requested. The evidence is that from approximately one hundred feet the appellant, Mr. Hunter, pointed a

.357 Magnum pistol directly at the Utah Highway Patrolmen and fired three shots. (T. 48, 56)

When you point a deadly weapon like a .357 Magnum pistol directly at a person from the relatively close distance of one hundred feet and shoot three times, the only possible intent is to cause bodily harm to that person. This is especially true when considered in the light of the circumstances surrounding this case. No reasonable juror could in any way determine that in the instant case there was anything but assault with a deadly weapon.

Utah Code Ann. § 76-1-8 (1953) charges the court with the duty to pass sentence and impose the punishment prescribed.

It is submitted that in allowing the jury to consider lesser included offenses when not warranted by the evidence, the jury would be invited to reach a compromise verdict, 53 Am. Jur. **Trial,** § 798 (1945), and it would have the effect of allowing the jury to determine the punishment of the accused. As it is not the function of the jury to determine punishment, the jury should not be given the power to convict of lesser offenses when not raised by the evidence.

CONCLUSION

As the evidence did not raise the issue of lesser included offenses, the trial court correctly refused to grant appellant's requested instruction thereon.

It is respectfully submitted that the judgment of the trial court should be affirmed.

Respectfully submitted,

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