

1967

State Of Utah v. Donald Hansen : Brief of Respondent

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In The Supreme Court of the State of Utah

STATE OF UTAH,

DONALD FRANCHIN

BRIEF OF

Appellant
That

FILED

NOV 20 1967

Clerk, Supreme Court, Utah

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In The Supreme Court of the State of Utah

STATE OF UTAH

Plaintiff-Respondent

- vs. -

DONALD HANSEN

Defendant-Appellant

} Case No.
10999

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Donald Hansen, appeals from a conviction on jury trial for the crime of assault with a deadly weapon with intent to commit robbery.

DISPOSITION IN THE LOWER COURT

The appellant was convicted on jury trial for the charged offense of assault with a deadly weapon with intent to commit robbery.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the conviction in the lower court, or, in the alternative, a new trial.

STATEMENT OF FACTS

Respondent agrees with the statement of facts as contained in the brief of appellant.

ARGUMENT

POINT I

AN AUTOMATIC WEAPON WHICH CAN BE LOADED WITHIN A MATTER OF MOMENTS IS A DEADLY WEAPON WHEN THE OFFENSE INVOLVED IS ASSAULT WITH A DEADLY WEAPON WITH INTENT TO COMMIT ROBBERY.

The appellant asserts as a basis for the relief he seeks on appeal the refusal of the trial court to instruct the jury as requested by appellant. The requested instruction which was refused provides:

You are instructed that before you can find the defendant guilty of the crime of Assault with a Deadly Weapon with the Intent to Commit Robbery, you must find beyond a reasonable [doubt] that defendant did in fact use a deadly weapon.

You are urther instructed that an unloaded gun is not a deadly weapon. The State must prove beyond a reasonable doubt that the gun held by Don Hansen in this case was loaded at the time. If it is reasonable to believe that the gun was not loaded, you should acquit the defendant." (Emphasis Added.)

The instruction in question demands an acquittal if it is found by the jury that the defendant's gun was unloaded, the conclusion being that an unload-

ed gun is not a "deadly weapon" within the meaning of Utah Code Ann. § 76-51-3 (1953).

That an unloaded gun may constitute a "deadly weapon" has been recognized by the courts. **People v. White**, 115 Cal. App.2d 828, 253 P.2d 108 (1953). See 79 ALR2d 1412, 1417. Generally this recognition is based on the fact that an unloaded gun may be used as a bludgeon and may, therefore, be a "deadly" weapon, depending on the circumstances of size, weight, and manner of use. See I Wharton, Criminal Law and Procedure § 361 (12th ed. 1957).

An unloaded gun need not actually be used as a bludgeon in order for it to be classified as a "deadly" weapon. It is sufficient if the gun may be so used, as was stated in **People v. White**, 116 Cal. App.2d 828, 253 P.2d 108 (1953):

If a person is armed with a pistol at the time he perpetrates a crimes, this evidence is sufficient to sustain a finding by the trier of fact that he was armed with a dangerous or deadly weapon, even though it was not loaded.

Thus, an instruction that absolutely precludes a finding that an unloaded gun is a deadly weapon is improper and the trial court did not err in refusing to give the instruction in question.

Assuming, which the respondent does not, that the actual or attempted use of the gun as a bludgeon is not involved, and that the gun is deadly only with

respect to its inherent capacity as a firearm to inflict death or serious bodily harm, it is submitted by respondent that the trial court did not err in instructing the jury with respect to that which constitutes a "deadly weapon" as that term is used in Utah Code Ann. § 76-51-3 (1953). The court's instruction number thirteen provided:

... A 'deadly weapon' as that term is used in these instructions, means a weapon which in the particular manner used is then and there capable of producing death or great bodily harm. A loaded gun capable of being fired, or a gun capable of being fired and which can then and there be immediately loaded within a matter of moments, is a deadly weapon.

The appellant attacks that portion of the instruction which implicitly dictates that an unloaded gun is a deadly weapon if it can be "immediately loaded within a matter of moments." The attack is based on those cases which have held that a gun is a deadly weapon even if certain mechanical movements must be made before the gun is capable of being fired, if the movements and the possible ultimate discharge of the cartridge can be effected "instantly." **People v. Pearson**, 150 Cal. App.2d 811, 311 P.2d 142 (1957); **People v. Simpson**, 134 Cal. App. 646, 25 P.2d 1008 (1933). Cf. **People v. Young**, 105 Cal. App.2d 612, 233 P.2d 155 (1951). Apparently it is the appellant's contention that an "immediate" loading "within a matter of moments" is something less than the law demands as a basis for a determination that a "deadly weapon" was used since the capability of

producing a discharge of the cartridge would not be reached "instantly."

Respondent cannot subscribe to such an artificial distinction in cases of this nature. Historically, in the days when the muzzle loader was the ultimate weapon, it might have been of logical significance to determine if all steps immediately preceding the actual pulling of the trigger had been accomplished. This might have been important in that a failure to accomplish such steps prior to confrontation would have afforded the individual at whom the gun was directed the opportunity of retreating or disarming the assailant.

The modern automatic weapon presents a context much different than that described above insofar as the gun being "unloaded" might be relevant. With a clip containing ammunition readily available, all things necessary for bringing the weapon to the brink of firing can be completed in such a short span of time that the opportunity for safety is not presented to the victim as might be the case with other less sophisticated weapons.

A distinction drawn between an "instant" capacity to fire and one which is "immediate" and "within a matter of moments" is at best slight. The description of the mechanical process which would have been necessary to discharge a cartridge (appellant's brief P. 8), assuming the clip was not in the gun, is sophistic in its portrayal of the process as extended and time-consuming. A use of automatic

weapons, particularly those of the type used by appellant, clearly demonstrates that the entire operation is of such brief duration that it is inappropriate to argue that a "deadly weapon" was not used.

In determining whether a deadly weapon has been used in the perpetration of a crime, attention should be directed to the totality of the circumstances rather than to arbitrary standards which have become outmoded. If the potential effective use of the weapon is the same whether the clip is in the gun or can be inserted quickly, then a classification of the weapon as "deadly" should logically follow in both cases. That the clip containing live rounds was readily at hand is not disputed in this case.

Finally, it must be noted that generally those cases which have held that an unloaded gun is not a deadly weapon have so held where the offense involved was "assault with a deadly weapon."

It is submitted by respondent that a distinction must be drawn between that which constitutes a "deadly weapon" as anticipated by the offense of mere "assault with a deadly weapon," see Utah Code Ann. § 76-7-6 (1953) and that which can be considered as a "deadly weapon" within the offense of "assault with a deadly weapon with intent to commit robbery," see Utah Code Ann. § 76-51-3 (1953).

It is clear that what may not be a "deadly weapon" in one context may be a "deadly weapon" in another. Thus, while the general rule appears to

be that an unloaded gun, when considered as a firearm, is not a deadly weapon when the charge is "assault with a deadly weapon," an unloaded gun may be a deadly weapon when some other criminal offense is involved. Thus, an unloaded gun may be a "deadly weapon" within those statutes denouncing the carrying and concealing of such weapons. **People v. Ekberg**, 94 Cal. App.2d 613, 211 P.2d 316 (1949). Similarly, being unloaded does not take a gun out of the "deadly weapon" class under those statutes proscribing the exhibition of such weapons. **Cittadino v. State**, 199 Miss. 235, 24 So2d 93 (1945). And an unloaded gun is a "deadly weapon" within the meaning of statutes establishing first degree robbery, i.e., robbery perpetrated while one is armed with a deadly weapon. E.g., **People v. Navarro**, 212 Cal. App.2d 299, 27 Cal. Rptr. 716 (1963). See generally 79 ALR2d 1412 (1961).

An examination of the various forms of criminal assault which involve the use of a deadly weapon reveals that, where a firearm is the weapon in question, the state of being unloaded is relevant only with respect to certain assaults.

Thus, where the offense of "assault with a deadly weapon" is under consideration, the question of whether the gun is loaded or not becomes highly relevant. The gravamen of the offense is the use of a dangerous or "deadly" weapon "with intent to hurt." See 1 Wharton, Criminal Law and Procedure

§ 361 (12th ed. 1957); 92 A.L.R.2d 635 (1963) and cases cited. If the gun is unloaded the offense is incomplete since, depending on the jurisdiction, either or both the intent to harm and the requisite present ability to inflict the harm would be lacking. See 79 A.L.R.2d 1412, 1418, 1421 (1961).

Similarly, where the offense involved is "assault with the intent to commit murder" or "to do bodily harm" by the use of a deadly weapon, the use of an unloaded gun negates criminal responsibility, the reason being that the necessary intent is nonexistent or that the accused is incapable of effecting the desired result.

However, contrary to those assaults where the intent to harm or kill and the present ability to do so are involved, the unloaded status of the gun is irrelevant where the offense charged is "assault with a deadly weapon with intent to commit robbery." The intent is not to actually hurt or kill the subject of the assault. Rather the intent is to create such fear and apprehension in the victim that he will give up his property without physical resistance. The emphasis is transferred from the status of the gun as it affects the intent and the present ability to inflict harm to the creation of the apprehension in the victim. And, of course, the apprehension may be created irrespective of the fact that the weapon is unloaded.

This distinction based on the nature of the specific type of assault involved was recognized and

ably discussed in **McNamara v. People**, 24 Colo. 61, 48 Pac. 541 (1897) wherein the court stated:

This diversity of opinion [as to the effect of a gun being unloaded] has arisen in cases wherein the alleged assault was made towards the perpetration of an offense that could not possibly be consummated unless the firearm was loaded, —such as murder or bodily injury. And we find no case wherein the facts essential to support the allegation of an assault with intent to commit robbery or a like crime is discussed or determined; this being an offense that may be committed by intimidation, as well as by actual force. The intimidation of a person may be just as effectually accomplished by an apparent, as well as an actual, ability to inflict the menaced injury; and therefore the reason of the rule adopted in the cases holding proof of actual ability necessary is not applicable to a case of this character.

The unloaded status of the gun not being determinative in cases of this type, the trial court did not err in denying the defendant's requested instruction or in instructing the jury as it did.

POINT II

THE TRIAL COURT DID NOT ERR IN REFUSING TO ALLOW TESTIMONY CONCERNING AN ACCIDENT ALLEGEDLY CAUSING BRAIN DAMAGE TO THE APPELLANT.

Council for the appellant attempted to elicit from the appellant testimony regarding an accident in which the appellant was involved. Mr. Ross asked:

"Now, Mr. Hansen, back in 1957 did you have an accident"? An objection to the question was sustained by the trial court. (R. 138). Counsel for the appellant later attempted to explain the relevance of the question. Apparently the appellant fell down a flight of stairs in 1957. He allegedly suffered brain damage, and a blood clot on the brain resulted which necessitated an operation for removal of the blood clot. As a result of the operation, appellant's tolerance for alcoholic beverages allegedly was reduced causing him to black out and engage in irrational behavior upon the consumption of lesser amounts of alcoholic beverages. It is not disputed that appellant had been drinking the evening on which the acts in question occurred. The evidence of the prior accident is purported to further substantiate the appellant's assertion that he "blackened out" for the period in question and, that he, therefore, had no specific intent to commit the crime for which he was convicted.

The nearly universal rule that voluntary intoxication is no defense to a crime has been codified in this state. Utah Code Annotated § 76-1-22 (1953). An exception to this rule is the relief from certain criminal responsibility which is afforded when the offense requires what has been described as a "specific intent" and the intoxication negates such an intent.

In attempting to prove intoxication and thus a negation of the requisite specific intent, evidence

introduced must be such that it relates to the state of intoxication of the appellant. Was the proffered evidence in this case such that it reasonably related to the question of whether the appellant was intoxicated at the time of the commission of the offense?

It was assumed by appellant that the operation on his brain directly affected his capacity to consume alcoholic beverages without suffering certain adverse affects such as black outs or loss of memory. There is nothing to indicate that the type of operation sustained by the appellant is in any way related to a tolerance for alcoholic beverages other than expressions by those not qualified to speak on such technical matters. Without such a showing, the evidence is irrelevant and was properly excluded, for it could not then be inferred from the fact of the operation that the defendant was intoxicated on the night in question. See generally 1 Wharton, Criminal Evidence § 148 (1955).

The operation occurred in 1957 and was considered to be too remote in point of time from the acts in question. Remoteness is a matter left to the sound discretion of the trial judge. **Evans v. Gaisford**, 122 Utah 156, 247 P.2d 431 (1952).

Assuming the proffered evidence was admissible, it was not prejudicial error to exclude such evidence. The record is replete with testimony concerning the possible intoxication of the appellant. If the jury had been inclined to believe that a spe-

cific intent to commit robbery was nonexistent, there was sufficient evidence on which it could have based such a belief.

CONCLUSION

An automatic firearm which can be loaded within a matter of moments is a "deadly weapon" when the offense charged is assault with a deadly weapon with intent to commit robbery.

The exclusion of the evidence of a prior accident is not grounds for reversal. The evidence is too remote in point of time and does not relate reasonably to the question of intoxication. The exclusion was not prejudicial if the evidence was admissible.

Respondent urges, therefore, that the conviction of the appellant be affirmed.

Respectfully submitted,

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