1983

State of Utah v. Wayne Sterling Pearson : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH	:	
Plaintiff-Respondent	:	
-vs-	:	Case No. ~~19053~~
WAYNE STERLING PEARSON	:	19028
Defendant-Appellant	:	

BRIEF OF APPELLANT

This is an appeal from a verdict of guilty and a Judgment based thereon in the Third District Court in and for Salt Lake County, State of Utah, the Honorable David B. Dee, Judge presiding.

JOSEPH C. FRATTO, JR. ESQ.
431 South 300 East #101
Salt Lake City, Utah 84111
Telephone: 322-1616

Attorney for Appellant

DAVID WILKINSON
Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114

Attorney for Respondent

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Attorney for Appellant

DAVID WILKINSON
Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114

Attorney for Respondent

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-vs-	:	Case No. 19053
WAYNE STERLING PEARSON	:	
Defendant-Appellant,	:	

BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

Appellant was convicted of the offenses of Attempted Robbery and Attempted Burglary before the Honorable David B. Dee, a Judge of the Third Judicial District. Appellant was sentenced to the indeterminate term as provided by law of not more than 5 years on each such offense to run concurrently with the offense to which he is presently incarcerated.

DISPOSITION IN THE LOWER COURT

Appellant was sentenced to the Utah State Prison for a term as provided by law, of not more than 5 years for each offense to run concurrently with the offense with which he is presently incarcerated.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment rendered or in the alternative, a new trial.

STATEMENT OF THE FACTS

Defendant was tried on the offenses of Attempted Burglary and Attempted Robbery, both third degree felonies. The allegation was that he, along with Robert Steven Smith and Mike N. Pappadakis, attempted to burglarize and rob Udell J. and Myra Kuhre, in Salt Lake County, on the 15th of October, 1981. The evidence indicated that two juveniles, Brian Scott Moss and Anthony Gilbert Sisneros, were solicited by Robert Steven Smith to go to the house of the Kuhres where they would enter and steal property of value including jewelry (T. Vol II pg 84). On October 15th, the juveniles were picked up by Robert Steven Smith and driven to the gas station owned by Mike N. Pappadakis (T. Vol III pg 8). At that location they were joined by Wayne Sterling Pearson, appellant herein. A conversation took place and Pearson provided gloves and tape which would allegedly be used in the course of committing the offense (T. Vol III pg 25). They then drove to the residence of Brian Scott Moss, one of the juveniles, for the alleged purpose of securing a mask for use in the robbery (T. Vol III pg 29).

The four individuals, Smith, Sisneros, Moss and Pearson then drove to the residence of Pearson's brother in Salt Lake County, at 2808 South 200 East (T. Vol III pg 37). Pearson exited the vehicle and went into his brother's house. During the few minutes, in which the other individuals remained in the automobile, a detective from South Salt Lake Police Department became suspicious and began an investigation. Pearson left his brother's home and reentered the car. The allegation was that at this point he provided a toy pistol to the juveniles. The car began to move down the street a few feet where it was stopped by the police. The suspicions of the police were aroused by the fact that, during school time, two of these two juveniles were in the automobile. (T. Vol V pg 22-25).

All the individuals were taken to the South Salt Lake Police Department and were interrogated. After an interrogation at the South Salt Lake Police Department, a business card from the Pappadakis service station was discovered with a fingerprint from Pearson and the address of the Kuhre's home at 1909 East 5150 South, Salt Lake County. The juveniles were released to their parents. Further interrogation of the two adults including the appellant herein, was conducted. The police became suspicious after having discovered gloves, tape, a woman's stocking and a business card (T. Vol IV pg 206-208) that the four individuals had been planning an illegal

offense. The two juveniles were then recalled back to the police station where further interrogation took place.

Upon this reinterrogation, the police learned, from the statements of the juveniles that they had been solicited to commit the burglary and robbery. However, the juveniles did not know the name and address of the person they were to rob other than it was an elderly lady who lived on the east side of Salt Lake County. The card, with the address on it, led them to Kuhre's residence where they learned that the house cleaner was connected to an employee of Mike Pappadakis. There was no evidence that the Kuhres were at their home at or around the time of this incident and the juveniles were unaware whether Smith in leaving Pearson's brother's home, was headed directly to the Kuhres or planned any intervening activity.

In addition the evidence was conflicting regarding the assent by the juveniles to the commission of the offense. Witness Moss maintained he had been expressing doubt to the defendants that he was sure whether he wanted to participate in the burglary, (Vol II pgs 22, 38, 98-100), and testified about witness Sisneros reluctance.

ARGUMENT

POINT I

THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE OFFENSES OF

ATTEMPTED BURGLARY AND ATTEMPTED ROBBERY.

It is appellant's contention that the evidence, if true, failed to establish the commission of the offenses of attempted robbery and attempted burglary. The actions of appellant did not constitute an attempt to commit an offense both as defined by the criminal code and as analyzed by the case law in relation to the facts of this case. The best the evidence was able to show was that preparations were made to commit a theft from the Kuhres. Because the theft was to take place at their home we can assume that it was necessary to commit at least a burglary to secure the property desired. The evidence further showed that preparations were made to commit a robbery if necessary. It may even be assumed that the participants in this offense anticipated that somebody would be home and consequently the commisson of a robbery necessary to secure the property desired. However, no evidence was offered which would indicate that the Kuhres were home around the time of the incident at the appellant's brother's apartment. Consequently, the best the evidence was able to show is a conspiracy among these participants to commit a burglary and contingently a robbery. The participants had committed a conspiracy and were engaging in overt acts in furtherance of that conspiracy.

A distinction needs to be made between an overt act in relation to a conspiracy and an overt act which amounts to

an attempt. A conspiratorial overt act need not amount to an attempt. However, an attempt must be something more than preparation, planning or gathering of the devices to be used in the offense. An overt act in relation to a conspiracy, may be in itself an innocent action although it is in the nature of preparation or planning for commission of the ultimate offense. An action, in relation to an attempt, cannot not be an innocent action or, standing alone, unequivocal as an action in committing an offense. One may buy a weapon for any number of legal purposes. Such a purchase, in relation to a conspiracy, may be an overt act and as such be used in making a case for conspiracy to commit murder. However, the purchase of a weapon, although in preparation for the commission of a murder may not be used as the basis for making the case for attempted murder because such action does not constitute the unequivocal step needed to show that the crime is being attempted. If the perpetrator of the attempted murder pointed the weapon or fired the weapon in such a way as all reasonable doubt would be eliminated that he was firing at a particular person, this would then constitute attempted murder.

The problem revolves around the definition of an attempt as used in the Utah Code. 77-4-101, Utah Code Annotated (1953, as amended), defines an attempt as

"...conduct constituting a substantial step towards commission of the offense". The phrase seemingly includes any action however removed which might be viewed as activity in relation to committing the offense. However, appellant would urge the Court to add the proper emphasis to the words substantial and commission.

There is a distinction between an attempt and preparation to commit the offense. As stated in People vs. Miller, 42 P.2d 308 (Cal. 1935), "where the crime remains unfinished and the defendant is charged with attempt, two important elements are essential: A specific intent to commit the crime and a direct and ineffectual act done towards its commission. Mere intention to commit a specific crime does not amount to an attempt. Preparation alone is not sufficient. Something more is required than menaces, preparation or planning." at page 309.

Citing Whartons On Criminal Law (12th Edition. Volume 1, Page 280) the California Court quotes:

> "If the preparation is not in itself indictable or will not of itself, if not interrupted extraneously result in crime, the weight of reasoning is that it cannot be made per se indictable as an attempt. For, first, there is not evidence as a general rule, that can prove that a particular preparation was designed for a particular end. Thus, a gun may be bought as well for hunting as for homicide. Nor can we lay down any intelligible line between preparations which betray more clearly than those which betray less clearly a felonious purpose. Secondly, between preparation and execution there is a gap which criminal jurisprudence

> cannot fill up so as to make one continuous offense. There may be a change of purpose, or the preparation may be a vague precautionary measure, to which the law cannot append a positive criminal intent, ready to ripen into guilty act." at page 309.

In People vs. Anderson, 37 P.2d 67 (Cal. 1934), the defendant had gone to a movie theater for the purposes of robbing it. On lifting his revolver to point it at the cashier it accidentally discharged killing the employee. The defendant was charged with felony murder but contended that the best the evidence showed was that he merely intended to commit a robbery but fell short of actually attempting the robbery and consequently it was not a felony murder. The Court concluded:

> "Defendant's conduct in concealing the gun on his person and going to the general vicinity of the Curran Theater with intent to commit robbery may, for present purposes, be classified as mere acts of preparation. But, when he walked into the theater, about two feet from the grill and pulled out the gun and was going to put it in the cage when it went off, we are satisfied that his conduct passed far beyond the prepatory stage and constituted direct and positive overt acts that would have reasonably tended toward the perpetration of the robbery had the gun not exploded, for one reason or another and frustrated the plan to consummate the offense." at page 68.

Appellant would contend that a distinction between preparation and acts directed towards the direct commission of the offense which would constitute an attempt must be made. "There must be some appreciable fragment of the crime committed, and it must be in such progress that it will be

consummated unless interrupted by circumstances independent of the will of the person attempting it." 14 Cal Jur 2nd, Section 27. In short, preparation is tied to conspiracy while an attempt must be connected to the actual commission of the offense.

No act was done in terms of committing the burglary. A burglary requires an unlawful entry with the purpose of committing a felony or theft, refer 76-6-202, Utah Code Annotated (1953, as amended). The best the evidence showed was that the parties intended to commit a burglary and conspired in that regard. They did not enter or do any act which would have resulted in an entry. They were not on the property nor was there evidence that indicated that their next step was the house to be burglarized.

The evidence is further removed regarding the attempted robbery which requires "...the unlawful and intentional taking of personal property in possession of another from his person or immediate presence against his will accomplished by means of force or fear." Refer 76-6-301, Utah Code Annotated, (1953, as amended). The best the evidence showed was that the parties were prepared to commit a robbery, if in fact there were people at home at the time they intended to enter and steal.

The defendant conspired to commit a robbery and their actions were overt acts directed towards the furtherance of that conspiracy but, no action was taken to attempt a robbery. No victim was detained or confronted. No force or fear used to any degree. The defendants were miles from the location of the planned offense. There was even doubt as to whether the juveniles, who were to commit the offense, were in agreement with the defendants about its commission.

This is not to say that a distinction between preparation and attempt is a distinct line, as recognized in U.S. vs. Judith Coplon, 185 F.2nd 629 (2nd Cir. 1950). In the Coplon case the defendant had left Washington, D.C., for New York with documents which she was prepared to hand over to a foreign agent. While waiting in the New York Airport with those documents she was arrested and charged with attempted espionage.

The Circuit Court, recognizing the distinction between preparation and an attempt, concluded that, in this matter, her acts, which put her one step removed from the actual completion of the offense, i.e. handing over the documents to the foreign agent, constituted an attempt.

Logically, the Circuit Court reasoned, an attempt must include at least part of the commission of the offense. But, where the offense is such that any act of commission completes

the offense the conclusion is either that there is no "attempt" in relation to that crime or acts of preparation are so closely related to the offense that such acts become an attempt. In the Coplon case, she had traveled to New York for the purpose of meeting her connection. She had in her possession the documents and was about to turn them over. If nothing else, she was at least at the location where the offense was to be committed.

A recent decision of this Court further explains the nexus needed between an action as it ripens into an attempt to commit an offense. In State of Utah vs. William W. Castonguay, filed May 9, 1983, the defendant was charged with attempted homicide. The evidence was that shots had been fired by the defendant. It was the State's contention that those shots were fired in an attempt to murder a police officer. As stated by this Court, one of the pivotal questions in that case was whether the defendant's conduct disclosed a concious deliberate preparation, "which was foiled only through some extraneous interference and not through a volitional act or omission on the part of the defendant." at page 3. This Court concluded, citing State v. Lamm, 606 P.2d 229 (Utah 1980), State v. Manus, 597 P.2d 280 (N.M. 1979) and State v. Whittinghill, 163 P.2d, 342 (Utah 1945), "All the circumstances, when taken together, must admit

of no other reasonable hypothesis than that of guilt to warrant conviction." at page 4. Where there was a conflict in the evidence even regarding whether the juveniles would perform the acts requested and a question regarding what further actions were to be taken by the defendant even before approaching the property to be burglarized it is clear that an attempt was far removed from what had already been accomplished. Couple that with the questions raised regarding the robbery in that preparations in that regard were contingent and speculative and it is apparent that no attempt had been accomplished.

CONCLUSION

The best the evidence showed was that the defendant had conspired to commit a burglary and/or robbery and had prepared and engaged in actions of preparation prior to its commission. No attempt had been accomplished because no action had been taken which was a substantial step towards the commission of those offenses and consequently the charges of attempted burglary and robbery were premature.

DATED this 1st day of _____, 1983.

RESPECTFULLY SUBMITTED,

_____
JOSEPH C. FRATTO, JR.
Attorney for Defendant Pearson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I DELIVERED three copies of the foregoing Brief of Appellant Pearson to the Attorney General of the State of Utah, Office of the Attorney General, State Capitol Building, Salt Lake City, Utah, this 2 day of _____, 1983.

Joseph C. Fratto, Jr.