

1983

The State of Utah v. Marvin Arthur Powell : Brief of Respondent

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Recommended Citation

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
Plaintiff-Respondent, :
-v- : Case No. 19068
MARVIN ARTHUR POWELL, :
Defendant-Appellant. :

BRIEF OF RESPONDENT

Appeal from a conviction of Attempted Theft by
Receiving in the Third Judicial District Court in and for Salt
Lake County, the Honorable Dean E. Conder, Judge, presiding.

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FILED

JUN 17 1968

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Defendant-Appellant. :

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant, Marvin Arthur Powell, was charged with attempted theft by receiving, a third-degree felony, under Utah Code Ann., § 76-6-408 (1953), as amended, and with carrying a concealed dangerous weapon, a third-degree felony, under Utah Code Ann., § 76-10-504 (1953), as amended.

DISPOSITION IN THE LOWER COURT

After a jury trial, appellant was found guilty of attempted theft by receiving and not guilty of carrying a concealed dangerous weapon. On February 7, 1983, judgment on the verdict was entered, and appellant was sentenced to the Utah State Prison for an indeterminate term not to exceed five years and fined \$1,000.00. Execution of the sentence was stayed and appellant was placed on probation and ordered to pay the \$1,000.00 fine.

RELIEF SOUGHT ON APPEAL

Respondent seeks an order of this Court affirming the judgment and sentence of the trial court.

STATEMENT OF FACTS

Respondent agrees with appellant's statement of the facts. A copy of the stipulation of facts referred to by appellant appears in the record at pages 190-192.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY REFUSED TO DISMISS THE CHARGE OF ATTEMPTED THEFT BY RECEIVING AND CORRECTLY INSTRUCTED THE JURY THAT THAT OFFENSE IS COMMITTED EVEN THOUGH THE PROPERTY RECEIVED HAS NOT ACTUALLY BEEN STOLEN.

Appellant was convicted of attempted theft by receiving, a violation of Utah Code Ann., § 76-6-408 (1953), as amended. Utah Code Ann., § 76-4-101(3)(b), the provision within Utah's attempt statute pertinent to this appeal, reads:

(3) No defense to the offense of attempt shall arise: . . . (b) Due to factual or legal impossibility if the offense could have been committed had the attendant circumstances been as the actor believed them to be.

In State v. Sommers, Utah, 569 P.2d 1110 (1977), this Court addressed both the constitutionality of that section and its application to the theft by receiving

statute. Holding that the attempt statute's elimination of the defense of impossibility was constitutional, the Court said:

Thus to exculpate defendant solely on the ground the television set he purchased was not, in fact, stolen property would shock the common sense of justice. The defense of impossibility is not a fundamental right essential to an Anglo-American regime of ordered liberty. The express abolition of such a defense advances the fundamental principles of liberty and justice which support all of our civil and political institutions.

569 P.2d at 1111. Because the Court is referring specifically to a defendant charged with attempted theft by receiving, it is extremely difficult to read the above quote and the rest of the Sommers opinion and come to any understanding other than that this Court concluded that a person is guilty of attempted theft by receiving even though the property received is not actually stolen. Other courts agree with this conclusion. See People v. Rojas, 10 Cal. Rptr. 465, 358 P.2d 921 (1961); People v. Wright, 105 Cal. App. 3d 329, 164 Cal. Rptr. 207 (1980); Darr v. People, 193 Colo. 445, 568 P.2d 32 (1977) (en banc) (following statute); State v. Rios, Fla. App., 409 So.2d 241 (1982); Darnell v. State, 92 Nev. 680, 558 P.2d 624 (1977); State v. Korelis, 21 Or App. 813, 537 P.2d 136, aff'd., 273 Or. 427, 541 P.2d 468 (1975); Bandy v. State, Tenn., 575 S.W.2d 278 (1979); State v. Davidson, 20 Wash. App. 893, 584 P.2d 401 (1978).

Appellant's citations to State v. Murphy, Utah, 617 P.2d 399 (1980), and State v. Lamm, Utah, 606 P.2d 229 (1980), are not helpful in that those cases dealt with the crime of theft by receiving, not an attempt to commit that crime. This distinction is critical, and is completely ignored by appellant. State v. Sommers, supra, is dispositive of the issue raised by appellant. Accordingly, the trial court properly refused to dismiss the charge of attempted theft by receiving and correctly instructed the jury that that offense is committed even though the property received has not in fact been stolen.

CONCLUSION

Based upon the foregoing, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted this 17th day of June, 1983.

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J. STEPHEN MIKITA
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CERTIFICATE OF MAILING

I hereby certify that I mailed two true and exact copies of the foregoing Brief, postage prepaid, to H. Ralph Klemm, Attorney for Appellant, 500 Clark Leaming Office Ctr., 175 South West Temple, Salt Lake City, Utah, 84101, this 17th day of June, 1983.

Susan Patten