1964

State of Utah v. Wayne Pearson : Brief of Respondent

IN THE SUPREME COURT
OF THE
STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

— vs. —

WAYNE PEARSON,
Defendant and Appellant.

Case No. 10057

BRIEF OF RESPONDENT

Appeal from the Judgment of the
Third Judicial District Court for Salt Lake County
Hon. Ray VanCott, Jr., Judge

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STATEMENT OF THE CASE

The appellant was convicted, along with one Joseph Newton Cummings, of the crime of escape from the Utah State Prison, and appeals from his conviction in the Third Judicial District Court.

STATEMENT OF FACTS

The respondent submits the following statement of facts as being a more accurate record of what actually was presented in the lower court.

On May 22, 1963, between approximately 7:45 and 8:00 p.m., Officer Robert Warren, a Prison guard at the Utah State Prison, then on duty at Tower 1, noticed two inmates who had climbed over both fences surrounding the main Prison building, head towards the prison parking lot (R. 35, 36). Officer Warren fired in their direction (R. 37).

The two prisoners got into a Comet automobile and forced the people who were in the automobile to get out. Thereafter the prisoners drove the car out through the front gate of the Prison and down the road for a short distance (R. 38, 40). A State car containing Prison officers followed (R. 38, 40), and a short distance from the abandoned vehicle Joseph Newton Cummings, the accomplice of Wayne Pearson, the appellant herein, was found hiding in some rocks. Although the appellant had been shot in the back of the head during the escape (R. 56), he managed to continue his flight to his brother's home, approximately 15 miles away. On the 23rd of May, the next day after the escape, his brother called Deputy Warden Garnett Fitzgerald and indicated that the appellant was ready to turn himself in (R. 44).

At the time of trial the appellant attempted to raise the defense of coercion (R. 47). The evidence in this regard was that approximately two weeks prior to the escape, the appellant broke a radio belonging to another prisoner. The other prisoner indicated he wanted him to pay, but the appellant indicated he had no money. Thereafter appellant was beat up (R. 47). Subsequently he was beat up two more times (R. 50, 51). The appellant requested to be moved to another part of the Prison for protection and Prison guards had informed him that the move would have to be okayed by higher officials (R. 49). On the night of the escape the appellant testified that he was beat up by three convicts and that during the course of the beating he was cut on the hand by one of them who had a knife. They told him that they were going to kill him (R. 49). Subsequently, the appellant removed himself from their presence, contacted inmate Cummings and indicated a desire to attempt

to escape. Thereafter Cummings and the appellant hid in the Prison Chapel, left the Prison, climbed over the fences and made their get-a-way (R. 60). There was no coercion or threat to the appellant at the time he left the convicts who had beat him, at the time he was hiding in the Chapel or after he had left the fenced premises (R. 58 through 60). The appellant testified that he could have walked around to the guard tower after having climbed over the fences (R. 60). During the course of his testimony, the appellant refused to mention the identity of the persons who were allegedly threatening him (R. 52).

The trial court struck the evidence of coercion against the appellant, ruling that as a matter of law there was no showing that at the time the act of escape occurred that there was an imminent threat of physical harm or injury (R. 62). The trial court also refused to instruct the jury on the issue of coercion.

ARGUMENT

POINT I.

THE DEFENSE OF COERCION IS NOT PROPERLY RAISED IN THE INSTANT CASE SINCE EVEN ASSUMING THE THREATS WERE SUFFICIENT TO CONSTITUTE COERCION, THE COERCION WAS NOT DIRECTED AT THE ACT OF ESCAPE.

The appellant argues that the facts in the instant case raise an issue for the jury on the basis that the appellant was coerced into escaping. The appellant relies upon 76–1–41(9), U.C.A. 1953, which excuses criminal guilt from:

> "Persons, unless the crime is punishable with death, who commit the act or make the omission charged under threats or menaces sufficient to show that they have reasonable cause to believe, and do believe, their lives will be endangered *if they refuse.*"

It should be noted that the provisions of this statute require that the coercion be directed towards compelling the individual to commit the offense charged. This is obvious from the last three words, "if they refuse," which obviously indicate that the danger to the individual must arise from refusing to perform the particular act which he is being coerced into performing. Textual authorities generally support the position that the crime committed must be coerced and not that it be general coercion which the defendant relieves himself from by committing the crime. Williams, *Criminal Law,* 2nd Ed., G.P. 1961, states:

> "A crime is said to be committed under duress (or duress *per minas*) when there is a threat of physical harm in case *the act be not done.* * * *"

True coercion is directed to compelling a person to perform a specific act and does not involve a situation where the person takes an alternative choice because of necessitous circumstances. The concept of coercion is similar to the concept of necessity. Russell, Crimes, 7th Ed., p. 91;[1] Wharton, Criminal Law and Procedure, Sec. 1378.

In the instant case there was no compulsion that if the appellant did not escape he would be killed. The appellant determined himself to escape and was not told by others to perform the act. Consequently, the concept of coercion is not present as a matter of law. Since this is the only issue raised at trial by the appellant (R. 47), the fact that the doctrine of necessity might otherwise be applicable cannot be claimed of error since, (1) it was not raised in the trial court, nor instructions requested thereon; and (2) it is not

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[1] Russell states that necessity is closely related to compulsion but that it involves a choice of evils and not a specific compulsion towards the act done. The case most often cited for the concept of necessity is *Regina v. Dudley*, 14 QBD 273, where the court refused to excuse British sailors from killing and eating their cabin boy.

raised in the case on appeal.[2] The cases cited by the appellant in favor of applying the doctrine of coercion do not involve situations where the appellant committed the offense not because he was asked or compelled to commit the particular offense, but because he thought it might exculpate him from some other injury. All of the cases cited by the appellant involve situations where the individual acted in committing the specific crime because he was directed to commit the specific crime for fear of injury "if [he] refuse."

It is noteworthy that Section 2.09 of the Model Penal Code recognizes the defense of duress, but does so obviously with the intent that the coercion be directed towards the act done. Thus the section states:

> "It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced *to do so* * * *."

The cases which have specifically considered the problem of prison conditions as against the claim that escape is justified have refused to recognize that coercion in general, not directly requiring or compelling the individual to commit the crime of escape, is a sufficient justification to raise a defense to an escape charge. To do so would be to confuse the concept of duress or coercion with that of necessity. Compare Sections 5.15 and 5.16, Clark and Marshall, Crimes, 6th Ed.

In *People v. Whipple,* 100 Cal. App. 261, 279 Pac. 1008 (1929), the appellant sought to raise the contention that his escape was justified because he was being imprisoned under

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[2] The State contends that the concept of necessity is equally inapplicable in this case by virtue of the fact that at the time the offense was committed there was no necessitous circumstance immediately imminent compelling its commission. Additionally, the defense of necessity is applicable only so long as the necessity lasts, and since the necessity terminated in the instant case prior to the time the escape was effected, the doctrine is equally inapplicable.

unsanitary conditions and that he was being subjected to and was in fear of inhumane punishment inflicted by the custodian. The court refused to recognize the defense and wisely noted:

> "It is manifest that to allow a prisoner to decide whether the conditions justify him in attempting to escape would be destructive of the necessary discipline which must be maintained in any well ordered prison. As was said in one case: 'The escape or attempt to escape by a prisoner, whether from a local jail or a state prison, tends to the general disruption of the prison discipline, and, as often such conduct by prisoners has caused, may be the cause of the slaying or serious wounding of officers or guards of the prison from which the escape or attempt to escape is made. Hence, such an act by persons legally confined in prisons or jails before their terms of imprisonment have expired is justly regarded as among the most flagrant violations of the rules governing prison discipline.' "

Further, the court went on to note that the contentions made by the appellant would not excuse his escape, stating:

> "* * * It is, unfortunately, possible for the conditions of imprisonment to be so unwholesome as to seriously imperil the health and life of the prisoner by exposure to infection and disease, and unhappily it is possible for prison-guards to subject prisoners to abuses and serious physical injury unjustified by any disciplinary need. However, a prisoner who escapes for any such reason does so at his peril."

In a case very similar to the instant one, *Hinkle v. Commonwealth,* 66 S.W. 816 (Ky. 1902), the appellant attempted to justify his forcible escape from the sheriff on the grounds that a third person was threatening to kill him, the third person being another prisoner. The court stated in rejecting the basis of the defense:

> "It also appears that the defendant claimed that one Steele, with whom he had had a difficulty, and from whom he had taken the pistol in question, was seeking to obtain and threatening to obtain a pistol for the purpose of shooting the defendant. This, in our opinion, does not constitute a sufficient defense for the defendant, and did not authorize him to escape from the deputy sheriff who

had the warrant of arrest, and who, in obedience to the magistrate, attempted to obtain control of the defendant and disarm him. * * *"

In Wharton's Criminal Law and Procedure, Sec. 1378, the author speaks of the concept of "necessity" that may be a defense to an escape. Even so, however, it is stated:

"The condition of the jail, or prison camp, or the unsanitary condition of the prisoner's cell, is not a sufficient justification for escape. *The defendant cannot raise the defense that he escaped because of the insecurity of the place of his confinement.*" (Emphasis added).

Other cases have clearly recognized this concept. *State v. Davis,* 14 Nev. 439, 33 Am. Rep. 563; *Johnson v. State,* 122 Ga. 172, 50 S.E. 65.

From what has been said it clearly appears that the appellant has erroneously selected his defense and, further, that even so, he is not entitled to raise the defense based upon his conduct. The appellant made no effort to seek the protection of the courts or bring the matter to the attention of the Board of Corrections by writing. It would be a serious weakening to prison discipline to allow a defendant to contend that because of some situation or condition in the prison which might be correctable and not be an immediate danger to his person, that he is justified in escaping.

POINT II.

THE FACTS IN THE INSTANT CASE DID NOT PROPERLY RAISE A DEFENSE OF COERCION OR DURESS.

Even assuming that the defense of coercion or duress may be applicable in the instant case, from the standpoint of an appropriate legal defense, it is submitted that the facts that were before the trial court did not raise an issue of coercion sufficient to constitute a defense. The cases have generally recognized that before the defense of coercion is

properly raised, that there must be a present danger at the time the offense is committed. *People v. Sanders,* 82 Cal. App. 778, 256 Pac. 251 (1927), and that a remote danger is not enough. *People v. Martin,* 13 Cal. App. 96, 108 Pac. 1034 (1910). The danger of death or serious bodily injury must be present, impending and imminent. *State v. Weston,* 109 Ore. 19, 219 Pac. 180 (1923); *People v. Villegas,* 29 Cal. App. 2d 658, 85 P.2d 480 (1939). Thus, in Clark and Marshall, Crimes, Sec. 516, p. 327, it is stated:

> "Compulsion does not amount to a defense where the threats are of future injury only. The threatened injury must be present and impending."

In *Shannon v. United States,* 76 F.2d 490 (10th Cir., 1935), it was stated:

> "Coercion which will excuse the commission of a criminal act must be immediate and of such nature as to induce a well-grounded apprehension of death or serious bodily injury if the act is not done. One who has full opportunity to avoid the act without danger of that kind cannot invoke the doctrine of coercion and is not entitled to an instruction submitting that question to the jury."

Further, it is well recognized that the threat must continue during the whole of the time during which the illegal act is occurring. Stephen, Digest of the Criminal Law, 31; Clark and Marshall, supra Sec. 516; *State v. Goode,* 165 N.E.2d 28 (Ohio App.); 22 C.J.S., Criminal Law, Sec. 44, p. 136. Thus, in 40 A.L.R.2d 908, 910, the rule that the force and fear must continue throughout the time of the act is recognized as respects the crime of treason.

Applying the facts of this case to the requirement that the fear of death or bodily harm be imminent, it is obvious that in the instant case at the time the appellant effected his escape, the threat was no longer imminent. The appellant had removed himself from his tormentors, was in the pres-

ence of another prisoner who aided him in the escape, hid for a short period of time in the Prison Chapel where he was free from any imminent danger, was free from coercion after he removed himself from the immediate fenced portion of the Prison, but, continued to pursue his escape and did so even though he was being shot at and was wounded. His co-defendant gave up prior to the time the appellant was apprehended. It is clear, therefore, that there was no imminent danger which would justify an instruction of the jury on coercion, nor did the defendant cease his conduct at the first opportunity, which is a recognized prerequisite. The trial court properly refused to give an instruction on the matter and ruled correctly in striking the evidence because there was no showing that at the time the offense was committed that there was imminent danger of death or bodily harm. Perkins, Criminal Law, p. 845 (1958).

The appellant argues that the Utah statute cited infra, p. 3, does not require that the coercion be of an imminent and impending nature. It does not appear that the Utah Supreme Court has passed on this matter. However, the Utah statute is identical with that of California, and the California courts have still felt that the word "reasonable," as used in the statute, requires that the danger be impending, present and imminent. *People v. Martin,* supra; *People v. Otis,* 174 Cal. App. 2d 119, 344 P.2d 342 (1959); *People v. Simpson,* 66 Cal. App. 2d 319, 152 P.2d 339 (1944); *People v. Sanders,* supra; 40 A.L.R.2d 910. Consequently, the construction urged by the appellant of the Utah statute would be contrary to the construction of statutes from similar jurisdictions. This court has recognized that when the Legislature of a state has used the statute of another state or country as a guide for the preparation and enactment of a

statute, the courts of the adopting state will usually adopt the construction placed on the statute in that jurisdiction, and cases decided by the courts of a state from which a statute was borrowed, even though subsequent to the enactment of the statute in a sister state, are helpful in construing the legislation. *Donahue v. Warner Bros. Pictures,* 2 U.2d 256, 272 P.2d 177 (1954). Further, there is substantial reason for construing the Utah statute in line with common law principles. First, uniformity of application is achieved; secondly, the common law principles make certain that the defense raised is a genuine one and not merely an acquiescence in a temptation; third, the requirement of impending and imminent danger makes the test of reasonableness one capable of objective evaluation rather than one attendant with the vagaries of subjective analysis.

The appellant's contention of coercion is unmeritorious.

POINT III.

THE TRIAL COURT DID NOT ERR IN REFUSING THE INSTRUCTION PROFFERED BY THE DEFENSE.

As can be seen from the two previous points, the trial court did not commit error in refusing an instruction on the defense of coercion. First, the concept of coercion was inapplicable to the crime charged since there was no coercion requiring that appellant commit the specific crime. Rather, at best, he made the choice and consequently, the defense of duress was unavailable to him. Secondly, the evidence clearly demonstrated beyond reason that the defendant was not facing imminent, present and impending harm. Consequently, there was no issue for the jury to consider and no reason why they should be instructed on an inapplicable theory. There is no error on this point.

CONCLUSION

An analysis of the facts in this case disclose that the appellant has no basis for appeal. The legal theory to which he addresses himself for reversal is inapplicable, first, because the defense is not properly one of coercion, and, secondly, the harm to which the appellant may have been subjected was not impending, present and imminent so as to justify his conduct. Further, it should be noted that a substantial number of authorities have of recent questioned the concept of duress as a defense in the absence of a showing that the act was in fact involuntary. For an excellent analysis of the pros and cons to this position, see "A Penal Code Prepared by the Indian Law Commissioners," pp. 19–22, Calcutta Ed., in Kadish Criminal Law and Social Order, Vol. 2, p. 802.

Consequently, this court should affirm.

Respectfully submitted

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