1973

State of Utah v. Dennis R. Baker : Brief of Appellant

IN THE SUPREME COURT

OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No.
vs.	:	13257
DENNIS R. BAKER,	:	
Defendant-Appellant.	:	

BRIEF OF APPELLANT

Appeal from convictions of assulting a guard with a deadly weapon, false imprisonment, robbery and escape by a convict.

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IN THE SUPREME COURT

OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff-Respondent, vs. DENNIS R. BAKER, Defendant-Appellant.	:	Case No. 13257

BRIEF OF APPELLANT

STATEMENT OF NATURE OF CASE

Appellant herein seeks reversal of his conviction in the Second Judicial District Court, in and for the County of Davis, State of Utah, for the crimes of assaulting a guard with a deadly weapon, false imprisonment, robbery and escape by a convict, or, in the alternative, a new trial on said charges.

DISPOSITION IN LOWER COURT

Appellant was tried by jury in the Lower Court and was found guilty of assaulting a guard with a deadly weapon,

false imprisonment, robbery and escape by a convict.

RELIEF SOUGHT ON APPEAL

Appellant prays for a reversal of his conviction, or, in the alternative, a new trial on said charges.

STATEMENT OF FACTS

On the 8th day of September, 1972, appellant DENNIS R. BAKER, was serving a term of from one (1) to twenty (20) years in the Utah State Prison pursuant to a conviction of burglary in the second degree (T. 409). EDWARD D. PASS, appellant's co-defendant at trial, on the 8th day of September, 1972, was also an inmate in the Utah State Prison, serving a term of ten (10) years to life pursuant to a conviction of second degree murder (T. 433 - 434).

During the morning hours of the 8th day of March, 1973, appellant BAKER and co-defendant PASS were enroute to the Brigham City Court from the Utah State Prison (T. 216 - 217). They were traveling

by auto with officers DAVID SHAND (T. 215), who was driving (T. 223), DAVID MEYERS, the senior officer, who was in the front seat on the passenger side (T. 223) and THEODORE F. HARRIS, who was in the back seat on the driver's side (T. 223). Appellent BAKER was in the rear seat on the passenger side (T. 223) and co-defendant PASS was in the rear seat in the center (T. 224).

While traveling through Davis County, appellant BAKER pulled a hand gun and exhibited it to the officers in the car (T. 410). Officer MEYERS ordered the driver, officer SHAND, to stop the car (T. 276). Officer MEYERS then exited the car on the right side (T. 277) and officer SHAND exited on the left side (T. 227). Officer MEYERS then went around to officer HARRIS' door and tried to assist him out of the car, but he failed (T. 277).

Thereafter, appellant BAKER and co-defendant PASS removed their shackles and

got out of the car (T. 257). Co-defendant PASS motioned to officer HARRIS to also get out but he did not do so (T. 257). Appellant BAKER and co-defendant PASS then got into the front seat of the car and drove from the scene with officer HARRIS still in the back seat (T. 257).

Appellant BAKER and co-defendant PASS were later apprehended in the hills east of the scene.

ARGUMENT

POINT I

AS A MATTER OF LAW, THERE WAS NOT SUFFICIENT EVIDENCE ADDUCED AT TRIAL FOR THE JURY TO FIND APPELLANT GUILTY OF ASSAULTING A GUARD WITH A DEADLY WEAPON.

Appellant was charged in the information of "assault by a convict" pursuant to Utah Code Ann. § 76-7-11 (1971 Supp.) (R 14). The Court instructed the jury on this charge as follows:

> "3. At the time such threat was made, the defendant (appellant) or others acting in concert was armed with a deadly weapon. A deadly

> weapon is defined as any weapon capable of inflicting death or serious bodily harm when used in the manner in which it was threatened to be used."

Appellant submits that the instruction is correct and comports with the standard established by this Court in State v. Ireland, 22 U.2d 17, 447 P.2d 375 (1968) wherein it was stated

> ". . . the state had the burden of establishing beyond a reasonable doubt that the instrument used was dangerous in the manner in which it was used." 22 U.2d at 19

Appellant contends that the evidence presented by the state was insufficient for the jury to find that the hand gun appellant displayed in the prison vehicle was a deadly weapon as required by the foregoing instruction.

At the outset, appellant testified at trial that his gun, state's Exhibit D, wouldn't fire (T. 412). This statement was corroborated by two other defense witnesses, RAYMOND DODGE (T. 396 - 398) and HURBERT ROSS MONTAIN (T. 401 - 404) each of whom

testified that the gun was without a firing pin. Officer HUNT, who found the gun, testified that when he found it, it had a firing pin; however, when he turned it over to officer PETERS, the custodian of the evidence, it was broken and was without a firing pin. Officer HUNT had no adequate explanation as to how the gun was broken (T. 321 - 340). He further testified that the gun was never test fired, although he opined that it would fire (T. 334). Moreover, officer PETERS, the custodian of the evidence, testified on cross-examination, that he never test fired appellant's gun and that he didn't know whether it worked or not (T. 364). In addition, the record is silent as to whether or not appellant ever fired a shot from his gun during the entire episode.

As to this contention, this Court had stated in State v. Schad, 24 U.2d 255, 470 P.2d 246 (1970) as follows:

> ". . . whether the evidence justifies the verdict, we survey the

> evidence and any reasonable inferences that fairly may be drawn therefrom in the light favorable to the jury's verdict." 24 U.2d at 257

Based on the evidence enumerated above, one cannot reasonably infer that appellant's gun, state's Exhibit D, was a deadly weapon. It is an uncontroverted fact that the gun presently doesn't fire; moreover, there is ample evidence that it wouldn't fire prior to the episode here in question. To find otherwise requires one to disbelieve all evidence presented except that of officer HUNT wherein he speculated that the gun was broken after the escape. Such a conclusion is not based upon a reasonable inference as required in Schad above; rather, it is premised on mere speculations.

Appellant is therefore entitled to a reversal of his conviction on this charge.

POINT II

THE COURT ERRED IN NOT GRANTING APPELLANT'S MOTION FOR A TRIAL SEPARATE FROM HIS CO-DEFENDANT.

Appellant herein moved the trial court for a trial separate from his co-defendant (R. 28). This request was again made in appellant's motion for a new trial (R. 82 - 86).

Utah Code Ann. § 77-31-6 (1953) provides:

> "When two or more defendants are jointly charged with any offense, whether felony or misdemeanor, they shall be tried jointly, unless the court in its discretion on the motion of the prosecuting attorney or any defendant orders separate trials . . ."

In State v. Faulkner, 23 U.2d 257, 461 P.2d 470 (1969) this court held that the discretion of the trial court would be sustained on this issue unless the denial of separate trials was prejudicial to either or both of the defendants.

In the instant case, appellant and his co-defendant were each charged with the same offenses (R. 14). Each had separate counsel, although they were tried jointly. Moreover, each was convicted of like offenses except for the charge of

"assault on a guard" (R. 78 - 79). As to that charge, co-defendant PASS was found not guilty while appellant was found guilty.

Appellant contends that either both should have been convicted of the charge of "assault on a guard" or neither should have been. Clearly, both were acting in concert regarding the alleged offense and thus both were equally culpable or both were not guilty.

Jury Instruction No. 8, sub-para 3, provides:

> "3. At the time such threat was made the defendant or others <u>acting in concert</u> was armed with a deadly weapon . . ." (R. 54)
> (Emphasis added)

The jury was instructed that culpability should be found where the defendants were acting in concert.

Therefore, the jury must have decided the guilt or innocence of appellant and co-defendant on this issue based upon something other than the evidence presented at trial.

Appellant was therefore prejudiced and is thus entitled to a new trial on this issue separate and apart from co-defendant PASS.

POINT III

AS A MATTER OF LAW, THERE WAS NOT SUFFICIENT EVIDENCE ADDUCED AT TRIAL FOR THE JURY TO FIND APPELLANT GUILTY OF THE LESSER INCLUDED OFFENSE OF FALSE IMPRISONMENT.

The standard of law applicable to this point is the same as that applied in POINT I above.

Jury Instruction No. 6 defined the elements of the lesser included offense of "false imprisonment" as follows:

> "1. That the defendant captured Theodore Harris and controlled his place of being, against his will." (R. 52)

The evidence adduced from officer HARRIS' own testimony fails to support the element stated in the foregoing instructions. When appellant and his co-defendant got out of the car, appellant

got under the wheel of the car and co-defendant PASS indicated that officer HARRIS should also get out (T. 257). Later, on cross-examination, the following testimony was adduced from officer HARRIS.

Q. Now prior to his (PASS) getting out of the car, did he say anything to you or anyone else in the car?

A. To the best of my recollection, no.

Q. I think you indicated earlier that after he got out of the car it was your impression that he wanted you to get out of the car. Now this is Mr. PASS?

A. Yes.

Q. And in fact, Mr. PASS actually told you to get out of the car?

A. I don't remember the specific words. I can't say.

Q. How did you get the impression that he wanted you to get out of, to leave?

A. Something was said to me, to that effect.

Q. That he actually wanted you to get out of the car?

A. That is correct.

Q. After the car started let me ask you this, did anyone ever tell you, you had to stay in the car?

A. I don't remember whether the words were spoken or the words, let's go. I don't remember.

Q. Now think about it. Did anyone tell you to get out or stay there or did you stay there at your own volition?

A. I did not stay there at my own volition.

Q. Who prevented you from leaving, you voluntarily jumped out later?

A. The door was closed.

Q. Couldn't you open it the same way that you opened it later?

A. I could have.

Q. Did you make any attempt?

A. I did not.

(T. 262 - 263)

Again, on further cross-examination of officer HARRIS, the following dialogue occurred:

Q. Were you afraid?

A. Of what.

Q. While you were in the back seat of that car? I am just asking you if you were afraid?

A. I don't remember any real fears, just concerned.

Q. You are saying you weren't afraid at that time, you weren't afraid at any time while you were in the car? (T. 264)

From the foregoing, one can't reasonably conclude that officer HARRIS was FIRST - "captured" and SECOND - "controlled" against his will.

Moreover, there is no evidence that the control, if in fact there was any, was intentional on appellant's part. He said nothing to officer HARRIS, he made no threat to him, nor did he make any indication that he was to stay in the car.

Appellant is thus entitled to a reversal on this charge.

POINT IV

AS A MATTER OF LAW, THERE WAS NOT SUFFICIENT EVIDENCE ADDUCED AT TRIAL FOR THE JURY TO FIND APPELLANT GUILTY OF ROBBERY.

Count I of the information charged appellant with the offense of robbery, as follows:

"Said defendants did feloniously take personal property, namely, a 1969 Chevrolet Impala 4-door Sedan EX53358, in the possession of THEODORE HARRIS, GERALD MEYERS and DAVID SHAND, against their will by means of force or fear." (R. 14)

Utah Code Ann. § 76-51-1 (1953) defines robbery as:

". . .the felonious taking of personal property in the possession of another from his person, or immediate presence, against his will, accomplished by means of force or fear."

The facts do not support a felonious taking of property from the person or the immediate presence of the officers.

When appellant exhibited his hand gun, officer SHAND testified that appellant ordered him to stop the car (T. 225). Officer MEYERS then grabbed the hand mike and jumped out of the car (T. 226) after which officer SHAND also jumped from the car (T. 227). Never during this sequence of events did appellant order the two officers to leave the car or to leave the keys therein after they left.

Officer MEYERS testified that appellent ordered him not to move after the gun was drawn (T. 276). He then testified that he was the one who ordered officer SHAND to stop the car (T. 277) rather than appellant. Officer MEYERS further testified that he exited the car to help officer HARRIS get out from the back seat (T. 228). After leaving the car, he became fearful that appellant would drive away because he could hear the motor running. He then hailed a truck to ram the car to prevent its being moved (T. 277 - 278).

Facts such as these speak against a finding that there was intent to rob when the gun was shown. It appears that appellant determined to take the car only after officers MEYERS and SHAND exited the same on their own volition.

Moreover, it cannot reasonably be concluded that the car was taken from the immediate presence of the officers. In State v. Carcerano, 390 P.2d 923(Ore. 1964)

the court defined "taking from presence" as follows:

> "A thing is in the presence of a person in respect to robbery, which is so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession. 390 P.2d at 928.

In the instant case, after officers SHAND and MEYERS had exited the car, they had lost sufficient control thereof such that one could not reasonably conclude that appellant took the car from their immediate presence.

Moreover, the car was not taken from the person or immediate presence of officer HARRIS because he was inside the car when appellant took the same; nor was officer HARRIS placed in fear;

Q. Were you afraid?

A. Of what?

Q. While you were in the back seat of that car? I am just asking you if you were afraid?

A. I don't remember any real fear, just concern. (T.264)

As a consequence, appellant is entitled to a reversal of his conviction of robbery.

POINT V

THE COURT ERRED IN GIVING INSTRUCTION NO. 5.

The trial court gave the following instruction regarding the robbery charge:

> ". . .It would be sufficient if they took the car by use of fear and hauled a hostage away, capturing the use of the car by intentionally showing guns to and threatening the hostage by gestures or words." (R.48)

The robbery statute requires that there be a

> ". . .felonious taking . . . of . . .property in the possession of another from his person, or immediate presence . . .by means of force or fear." UCA § 76-51-1 (1953) (Emphasis added)

The foregoing instruction infers that robbery occurred if the jury finds that appellant took the car by force and hauled a hostage away. This portion of the instruction is ambiguous because it isn't clear whether the force is to be directed

toward someone else or the hostage. Clearly, the language can't mean that the force be directed toward the hostage because, though the hostage may be forced to go in the car, or be in fear, nothing has been taken from his person or immediate presence. Notwithstanding, the language of the instruction could easily lead the jury to believe that it is sufficient if the hostage was forced to go in the car, thereby negating the element that the property be taken from his person or immedaite presence.

Therefore, appellant is clearly entitled to a new trial on the robbery charge.

It is true that the record is silent as to any objection to the instruction being raised at trial; however, on appeal, though no objection was raised at trial, this court said in State v. Sanchez, 11 U.2d 429, 361 P.2d 174 (1961):

". . .we do not disagree with the

> defendants' contention that in serious criminal cases, under special circumstances, where the interests of justice so require, this court may notice palpable and significant error even though proper objections were not taken at the trial." 11 U.2d at 430.

Based on the foregoing, appellant urges this court to consider the merits of POINT V notwithstanding the fact that an objection on the issue was not raised in the trial court.

CONCLUSION

From the foregoing, it is clear that appellant is entitled to a reversal on the charges of assault upon a guard by a convict, false imprisonment and robbery due to insufficient evidence, or, in the alternative, a new trial on said charges, including the charge of escape, due to the fact that appellant was prejudiced in being tried with co-defendant PASS and due to the erroneous robbery instruction.

Respectfully submitted,

Darwin C. Hansen
Attorney for Appellant

CERTIFICATE OF DELIVERY

I hereby certify that I delivered TWO (2) copies of the foregoing APPELLANT'S BRIEF to Vernon B. Romney, Attorney General, counsel for respondent on Thursday, the 21st day of June, 1973.