

2006

Utah v. Powell : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff / Appellee

vs.

GEORGE AARON POWELL,

Defendant / Appellant

Case No. 20060465-CA

BRIEF OF APPELLANT

APPEAL FROM THE FIFTH DISTRICT JUDICIAL COURT, WASHINGTON COUNTY,
STATE OF UTAH, FROM A JUDGMENT, SENTENCE AND COMMITMENT
AFTER A CONVICTION BY JURY BEFORE THE HONORABLE ERIC A. LUDLOW

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MAR 05 2007

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STATE OF UTAH,
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Plaintiff / Appellee :
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vs. : Case No. 20060465-CA
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GEORGE AARON POWELL, :
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Defendant / Appellant :
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This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated § 78-2a-3(2)(e).

Whether the state presented sufficient evidence of the defendant's mental state to sustain the conviction. A jury verdict is overturned "if the evidence presented at trial is so insufficient that reasonable minds could not have reached the verdict[,]" where the evidence presented at trial is viewed in a light most favorable to the verdict. *State v. Colwell*, 2000 UT 8 ¶ 42, 994 P.2d 177, 185 (Utah 2000). Only where all required elements of the crime can be reasonably found from the evidence and reasonable inferences drawn therefrom should the verdict be sustained. *Id.* at ¶ 42, 994 P.2d at 186.

CONTROLLING STATUTORY PROVISIONS

All relevant statutory provisions are set forth in the Addenda of the Appellant's Brief.

STATEMENT OF THE CASE

A. Nature of the Case

The Defendant, George Aaron Powell ("Powell"), appeals from the judgment, conviction and sentence in Fifth District Court of assault against a peace officer, a class A misdemeanor; interference with an arresting officer, a class B misdemeanor; and no evidence of security, a class B misdemeanor.

B. Trial Court Proceedings and Disposition

Powell was charged by information with assault against a peace officer, in violation of § 76-5-102.4, Utah Code Ann.; interference with an arresting officer, in violation of § 76-8-305, Utah Code Ann.; and no evidence of security, in violation of § 41-12a-303.2, Utah Code Ann. (R. 1-2). Trial on all charges was held on March 10, 2006 (R. 103).

During the course of the trial, Powell pled guilty to count 2, interference with an arresting officer (R. 59).¹ The jury returned verdicts of guilty on the other two counts as well (R. 63, 103:82).

¹ Despite an indication in the minute orders that Powell pled guilty to count 2 during a meeting in chambers (R. 58-59), the plea was apparently not transcribed and there is no written documentation of it in the record. Despite the presumptive

On April 25, 2006, Powell was sentenced to one year in jail on the assault charge and six months on each of the other two counts (R. 80-82, 104:5). All jail time was suspended and Powell was placed on 24 months probation (*id.*).

Powell filed timely *pro se* notices of appeal on May 2, 2006 and May 9, 2006 (R. 83, 84-85) and his attorney also filed a timely notice of appeal on May 9, 2006 (R. 87). This appeal follows.

STATEMENT OF RELEVANT FACTS

All charges arose from an incident that occurred on March 19, 2005, in which Officer Clayton Lucas of the St. George City Police Department observed a van being operated with both a temporary registration permit and a license plate (R. 103:15, 16). Officer Lucas initiated a traffic stop, approached the driver (Powell), explained the reason for the stop, and asked to see Powell's driver's license, registration, and proof of insurance (R. 103:17-18). Powell handed the vehicle registration of Lucas and held his driver's license up for Lucas to see (R. 103:18). Lucas ultimately reached through the window and took the license from Powell (R. 103:18). Officer Lucas testified that he again asked for the proof of insurance, but instead of answering Powell began to open his car door (R. 103:18).

noncompliance with the requirements of Utah R. Crim. P. 11, Powell did not seek to withdraw his plea and the issue is not presently before this Court.

Lucas pushed against the door with his hand and asked Powell to remain in the vehicle (R. 103:18-19). Powell pushed the door open, pushing the officer back and off balance, and got out of the van (R. 103:19).

Officer Lucas testified that Powell's fists were clenched, his teeth were gritted, and he was breathing hard (R. 103:19). Lucas backed away, warning Powell "at least four times" to get back in the vehicle, and pulled his taser from its holster (R. 103:20). The taser was never deployed, however (*see, e.g.*, R. 130:23). Lucas also called for backup because he feared for his safety (R. 103:22). However, Powell never verbally threatened Lucas nor did he attempt to strike him (R. 103:40-41).

Powell told Lucas, "I can do whatever I want and I'm not getting back in" (R. 103:23). Powell then opened the rear door of his van, grabbed the temporary permit and pulled it off the window, wadded it up and threw it into the back of the van, and got back into the driver's seat (R. 103:23).

At that point the backup officers had arrived and Lucas had decided to arrest Powell for assault on a police officer (R. 103:23). He asked Powell to get out of the vehicle; Powell did so, with the "same demeanor" as previously (i.e., fists clenched, gritted teeth, and visibly angry) (R. 103:23-24). Powell then dropped his head and arms and turned around to be arrested (R. 103:24).

After obtaining a medical clearance for a Powell's pre-existing knee injury, Lucas processed the arrest on the aforementioned charges (R. 3-4, 103:41-42). Trial and appeal followed accordingly.

SUMMARY OF THE ARGUMENT

Because the jury was instructed that it must find Powell acted *intentionally* in his interactions with Officer Lucas and because there was no evidence introduced that Powell intended to harm the officer, the evidence was insufficient to sustain the verdict.

ARGUMENT

I. The Evidence Was Insufficient to Show that Powell Intended to Assault Officer Lucas.

Where the evidence presented at trial, viewed in the light most favorable to the verdict, does not support a finding beyond a reasonable doubt on each element a crime, the verdict cannot be sustained. *See Colwell*, 2000 UT at ¶ 42, 994 P.2d at 185-86. Here, the state lacked evidence supporting a critical element of assault – the *mens rea*.²

With regard to the charge that Powell assaulted a police officer, the jury in this case was instructed in pertinent part as follows (R. 74):

The following are the elements of the crime of ASSAULT
AGAINST A PEACE OFFICER:

1. the defendant *intentionally*:

² The issue was preserved when trial counsel moved for dismissal based on the prosecution's "failure to meet the burden of proof in this matter" (R. 103:57; *see also* 103:83, defense motion for judgment notwithstanding the verdict.)

- a. attempted, with unlawful force or violence, to do bodily injury to another;
 - b. threatened, accompanied by a show of immediate force or violence, to do bodily injury to another; or
 - c. committed an act, with unlawful force or violence, that caused or created a substantial risk of bodily injury to another;
2. the victim was a peace officer;
3. at the time the defendant committed any act(s) described in element 1, the defendant knew that the victim was a peace officer;
4. at the time the defendant committed any act(s) described in element 1, the peace officer was acting within the scope of his authority as a peace officer ...

(emphasis added).

The *mens rea* of “intentionally” is therefore appropriately applied to each subset listed below section (1). The jury could convict Powell only if it found that he intentionally attempted to bodily injure a peace officer; intentionally threatened bodily injury with a show of violence; or intentionally committed an act that caused or created a substantial risk of injury. A person acts “intentionally,” as the jury was instructed, “when it is the person’s conscious objective or desire to engage in the conduct or cause the result” (R. 73; *see also* §76-2-103(1), Utah Code Ann.)

The state's evidence³ on Powell's mental state consisted of Officer Lucas's testimony that Powell pushed the car door against Lucas's hand and got out of the car breathing hard, with his teeth gritted and his arms "coming up" with fists clenched (R. 103:19). Powell was uncooperative about giving his driver's license to Officer Lucas (R. 103:18) and failed to comply with multiple commands that he get back into his vehicle (R. 103:20). Powell was undeterred by Lucas's implied threat to use a taser on him (R. 103:22) and told Lucas that he could do whatever he wanted and he was not getting back in his car (R. 103:23). Lucas also testified that Powell's demeanor was the same when he later commanded Powell to get out of the car (R. 103:23-24). Another police officer, who arrived after Powell had gotten back into the van, also testified that Powell appeared "very agitated, very angry ... just wanted to get out some frustration, some rage" (R. 103:50). This second officer testified that Powell "glared" at Officer Lucas and was "puffed up," with his fists clenched and a "real pissed-off" look on his face (R. 103:50).

However, Powell never verbally threatened Lucas (R. 103:40). He never attempted to strike the officer, nor did he voice any desire to do so (R. 103:40-41). As it turned out, Powell did not push the car door against Officer Lucas's hand to injure him, but rather to get out of the car and remove the temporary tag from the back of his van (R. 103:23). Officer Lucas never even felt sufficiently threatened

³ This paragraph marshals the evidence in the record on Powell's mental state and is intended to comply with Utah R. App. P. 24(a)(9), requiring that a "party challenging a fact finding must first marshal all record evidence that supports the challenged finding."

to deploy the taser (*see* R. 103:23).

Thus, there was no evidence whatsoever before the jury that Powell *intentionally* attempted to injure Officer Lucas, *intentionally* threatened an injury with a show of violence; or *intentionally* committed an act that caused or created a substantial risk of injury. All the prosecution established was that Powell intended to get out of his car, or that he intended to disregard Lucas's order to remain in the vehicle.⁴

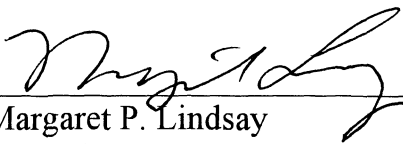
“ ‘[I]ntent to commit [a crime] may be found from proof of facts from which it reasonably could be believed that such was the defendant's intent.’ ” *Colwell*, 2000 UT at ¶ 42, 994 P.2d at 186, *citing* *State v. McClain*, 706 P.2d 603, 605 (Utah 1985) and *quoting* *State v. Kazda*, 15 Utah 2d 313, 317, 392 P.2d 486, 488 (1964)). Here, there was no evidence that Powell intended to harm or create a substantial risk of injury to Lucas. Lacking sufficient evidence on an essential element of the crime, the mental state, Powell's conviction for assault on a peace officer must be overturned.

⁴ The prosecutor argued in closing that Powell caused Lucas to get “pushed back into th[e] line of traffic,” which would “cause or create a substantial risk of bodily injury to the officer” (R. 103:67). However, Officer Lucas actually testified that “when that door was forced open it did push me back out into the street, but at the same time I'm stepping off of that line ... and go the other way so that I not only am not going into the street, but I can head towards my vehicle ...” (R. 44).

CONCLUSION AND PRECISE RELIEF SOUGHT

For the foregoing reasons and authorities, George Aaron Powell asks that this Court vacate his conviction and sentence for assault on a peace officer and remand for further proceedings.

RESPECTFULLY SUBMITTED this 2nd day of March, 2007.



Margaret P. Lindsay
Julia Thomas
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that I delivered two true and correct copies of the foregoing Brief of Appellant to Brock Belnap, Washington County Attorney, 178 North 200 East, St. George, Utah 84770, this 2nd day of March, 2007.



ADDENDA

§ 76-5-102. Assault

(1) Assault is:

- (a) an attempt, with unlawful force or violence, to do bodily injury to another;
- (b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or
- (c) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another.

§ 76-5-102.4. Assault against peace officer--Penalty

(1) Any person who assaults a peace officer, with knowledge that he is a peace officer, and when the peace officer is acting within the scope of his authority as a peace officer, is guilty of a class A misdemeanor.