2-24-1969

Allen v. People

NO. 23563

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

A. J. ALLEN,	)	Error to the
	)	District Court
Plaintiff in Error,	)	in and for the
	)	County of El Paso
vs.	)	State of Colorado
	)	
THE PEOPLE OF THE	)	
STATE OF COLORADO,	)	HONORABLE
	)	HUNTER D. HARDEMAN
Defendant in Error.	)	Judge

ANSWER BRIEF OF DEFENDANT IN ERROR

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February, 1969.

I N D E X

TABLE OF CASES CITED

STATUTES

OTHER AUTHORITIES CITED

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INTRODUCTION

The plaintiff in error will be referred to as the defendant or by name and the defendant in error as the People. References to the record on error will be by folio and designated in parenthesis as (f.).

SUPPLEMENTARY STATEMENT OF FACTS

The defendant was stopped in his automobile while in the company of a female passenger by two police officers, Tysver and Gearhart, in the early morning hours of October 24, 1967, due to the fact that the temporary license tag on his automobile

had expired on October 23rd. The officers contacting Mr. Allen could read the expiration date on the temporary license from their vehicle and, after checking with their dispatcher to determine if the owner had until the next business day to renew (ff. 103, 278) they turned on their car's red lights and the defendant pulled to the roadside. At this point neither officer had any knowledge of who was operating the car which they had contacted.

Officer Gearhart stood at the right rear fender of the stopped car while Officer Tysver approached the driver, the defendant, and asked for his driver's license (f. 108). When the driver leaned forward Officer Tysver observed a gun in his back pocket. The officer stepped back as the defendant attempted to draw the weapon from his pocket (f. 109). In his haste to draw the weapon it dropped or slipped from the defendant's hand and fell in the center of the auto seat. However, the defendant's hand, sans gun, continued across his chest (ff. 110, 111). At this point Officer Tysver drew his service revolver and ordered the defendant from the car. Instead of complying the defendant lunged for the gun unsuccessfully (f. 112). He was again ordered from the car. This time the defendant opened the car door, placed his feet on the ground as though exiting but again lunged for the weapon. At this point Officer Tysver placed his revolver

at the defendant's head, cocked it and stated, "Move and I will blow your God damned brains out." (f. 114) Officer Tysver testified that the only reason he did not shoot the defendant at that point was because he feared the bullet would pass through the defendant and strike his passenger (ff. 115, 227). Officer Tysver recognized the defendant as a police character and known narcotics user at the time Mr. Allen made his second attempt to grab the weapon, but to that point had been unaware of his identity (ff. 117, 202).

During the occurrences to which Officer Tysver testified Officer Gearhart was standing to the rear of the automobile. Although Officer Gearhart observed a "commotion" in the front seat of the automobile and saw Officer Tysver draw his gun, his vantage point did not permit him to see in any detail what transpired in the automobile's front seat (ff. 282, 283, 303). Specifically, he could not see the defendant's weapon and could not see any threatening gestures performed with reference to it (ff. 285, 310).

The defense presented by Mr. Allen was to the effect that he was merely attempting to conceal the weapon he admittedly was carrying and attempted no assault (f. 453). This was corroborated by the testimony of his passenger, Mrs. Whitehurst, from whose possession the defendant's gun ultimately

was recovered (f. 119). At the scene of the transaction prior to recovery of the weapon Mrs. Whitehurst had denied knowledge of any gun (f. 118).

After trial to a jury the defendant was found guilty as charged and was sentenced to from 30 months to 5 years in the penitentiary (f. 66). The sentence so imposed was stayed pending appeal and the defendant was ordered released upon the posting of a satisfactory bond (f. 67).

SUMMARY OF THE ARGUMENT

I. The information properly charged the defendant with a crime as defined by the laws of the State of Colorado.

II. Defendant's tendered Instruction Number 1 was properly refused by the trial court.

ARGUMENT

I.

THE INFORMATION PROPERLY CHARGED THE DEFENDANT WITH A CRIME AS DEFINED BY THE LAWS OF THE STATE OF COLORADO.

The core question presented for resolution is whether a person may be charged with an attempted aggravated assault. The defendant has cited authority to the effect

that such a crime cannot exist because the crime of assault is itself comprised of the element of attempt and to charge an attempted assault is therefore to charge an attempt to attempt -- a claimed impossibility.

This question and virtually all the authority cited by the defendant have been considered directly by the Oregon Supreme Court in State v. Wilson, 218 Or. 575, 346 P.2d 115 (1959). After a full review of the precise issue raised by the defendant the Oregon court rejected that rationale as "little more than a barren logical construct" and adopted the position that an attempted aggravated assault was a proper and consistent charge. 346 P.2d at 122.

The Wilson case is so closely in point and so complete in its consideration of the issue as to make extended comment in this brief unnecessary. Suffice to say that in that case it was held that an "attempt coupled with a present ability" to do corporal injury was so materially different from the general definition of an "attempt" as to separate the two concepts completely. The court noted as follows:

> ". . . (I)t seems evident that a definition which describes conduct in terms of 'present ability' to consummate a further act adds something to the idea of attempt as it is used to describe the steps leading up to a final substantive crime.

> One may be guilty of an attempt to commit a crime under circumstances where there is no present ability to consummate the crime attempted. This suggests that the word 'attempt' as used to describe assault is not meant to describe the preparatory stages pointing toward a battery but contrast assault with battery by speaking of the former as something less than the latter." (Emphasis the court's.) 346 P.2d at 120

The court goes on to make clear that there exists an area of conduct lying between the overt act which commences an "attempt" and arriving at a point of possessing "present ability" which may properly and consistently be denominated an "attempted assault".

The Oregon court illustrates this concept with two factual examples involving "reaching distance" drawn from an early New York case. (People v. O'Connell, 60 Hun. 109, 14 N.Y.S. 485 (1891)). In the first example, a man with a gun takes his weapon and moves with it towards his intended victim until he is within firing range. Until he comes within "reaching distance" the perpetrator would have no "present ability" to consummate an assault -- a necessary ingredient. Compare C.R.S. 1963, 40-2-33. He could therefore, if stopped, be charged with an "attempted assault". The second

example is the same situation but envisages an attacker with an axe. In such a case one might raise the axe but by virtue of distance have no present ability to strike until "reaching distance" was achieved. Only then could there exist an "assault" but up to that point an assault could be attempted. The facts in Wilson provide a third example. There the defendant entered a building with a loaded shotgun intending to shoot his wife. Because she hid from him behind a locked door Wilson had no present ability to inflict an injury upon her, i.e., he was not within "reaching distance". Under such circumstances the Oregon court held he was properly charged and found guilty of attempted assault with a dangerous weapon.

The facts in the present case fall easily into the pattern of the Wilson rationale. The defendant on three occasions reached for but was unable to grasp a loaded gun. Because he at no time had firm control over this weapon he had no "present ability" to effectuate an assault with a deadly weapon. He was, so to speak, not within "reaching distance". He did, however, take overt action. Therefore, he may quite logically and meaningfully be said to have attempted an aggravated assault. See also State v. Skillings, 98 N.H. 203, 97 A.2d 202 (1953).

Additionally, the Colorado Inchoate Crimes statute expressly envisions convictions

for "attempted assault". Attention is directed to C.R.S. 1963, 40-25-5(1)(a)(c):

> "Penalties. - A person convicted of an attempt to commit a crime may be fined or imprisoned or both in the same manner as for the offense attempted, but such fine or imprisonment shall not exceed one-half the largest fine, or one-half the longest term of imprisonment, or both, prescribed for the offense attempted; provided that:
>
> * * *
>
> "(c) If the offense is an attempt to commit any felony involving bodily injury OR AN ASSAULT ON ANY PERSON, other than one punishable by death or life imprisonment, the penalty shall not exceed fourteen years imprisonment in the state penitentiary:
>
> * * *
>
> (Emphasis supplied.)

If, as defendant argues, there can be no attempt to assault, what meaning can be ascribed to the legislature's language?

In a related argument, the defendant makes the further assertion that, even if it be admitted that such a crime as attempted assault with a deadly weapon exists, the evidence

adduced at the trial showed only a completed act and therefore precluded any charge of attempt. This argument does not bear up for several reasons.

First, there was no evidence of a completed assault with a deadly weapon because, as stated above, the defendant at no time had adequate control of his loaded gun. He therefore lacked the "present ability" to consummate such an assault.

Second, as defendant admits in his brief, Colorado law provides in C.R.S. 1963, 40-25-3(2)(a)(d) that:

> "It shall not be a defense to a conviction of the crime of attempt to commit a crime that:
>
> * * *
>
> "The crime attempted or intended was actually perpetrated by the accused."

Defendant proposes that this provision has been repealed by implication with the passage of the 1967 amendment to Inchoate Crimes statute (C.R.S. 1963, 40-25-1 et seq. as amended) appearing in the 1967 Cumulative Supplement to the Colorado Revised Statutes. It is a well known and often repeated principle of construction, of course, that repeals by implication are not looked upon with favor.

Cassados v. People, 119 Colo. 444, 204 P.2d 557 (1949). Only where absolute imcompatability appears will such an implication be indulged in. Id.

No necessary conflict exists between the current C.R.S. 1963 40-25-1 as amended and C.R.S. 1963, 40-25-3. If any conflict can be said to exist presently it would also have existed previously. The 1963 Inchoate Crimes statute is virtually a verbatim recitation of that found in the American Law Institute Model Penal Code, with one important exception: Section 40-25-3(2)(a) through (d) has no counterpart in the Model Penal Code and seems unique to Colorado. Because it is not part and parcel of the Model Penal Code provisions the repeal of the 1963 Act by the 1967 Act would seem, especially in regard to this section, not to impliedly repeal the provisions there set out.

What does seem indisputably clear is the intention of the legislature to make all attempts lesser included offenses. This would appear to be the clear intendment of C.R.S. 1963, 40-25-3(2)(a)(d), especially when read together with C.R.S. 1963, 40-25-4:

> "Multiple convictions. -- No person shall be convicted of both the perpetration of a crime and the attempt to commit that crime where the acts

> constituting such attempt were part of the same conduct constituting the completed crime." (Emphasis supplied.)

Clearly this section also contemplates a completed crime not precluding a conviction for attempt. If such was not the case the section would serve no purpose. Must this too be repealed by implication?

It would seem logical that the accommodation between the present language of C.R.S. 1963, 40-25-1 and 40-25-3 need be no more complex than as stated in Specht v. People, 156 Colo. 12, 396 P.2d 838 (1964):

> "Specht next argues that one cannot be charged, as he was, with a completed act, and also with an attempt to do that act. It is true that one cannot be found guilty of both enticement and attempting to take immodest, immoral and indecent liberties. Martinez v. People, 111 Colo. 52, 137 P.2d 690. But nothing in the law prevents the People from charging the accused with the two offenses. 156 Colo. at 15. (Emphasis the court's.)

Specht does no more than reiterate the statutory directive. C.R.S. 1963, 40-25-4. That statutory section and C.R.S. 1963, 40-25-3 (2)(a)(d) make an attempt a "lesser included

offense" in every crime, although not a "necessarily included offense". See 8 Moore's Federal Practice, 2nd Ed., Par. 31.03. Stated another way, an attempt MAY be an included offense but ONLY when there is some supportive evidence. If there is some evidence that the crime has been completed this does not preclude a charge or conviction for an attempt. This is consistent with the common law attempt rulings in Colorado, the rulings under the 1963 statute and the entire scheme of the Inchoate Crimes statute as they presently exist. Additionally, it is consistent with Rule 31(c) of the Colorado Rules of Criminal Procedure, which has been in effect since November 1, 1961. Thus viewed the asserted inconsistency which defendant claims is sufficient for implied repeal appears less real than apparent.

In Cassados v. People, supra, the act there involved which, it was claimed, repealed another by implication contained the following language:

> "All acts or parts of acts in conflict herewith are hereby repealed."

The Colorado Supreme Court refused to find a repeal by implication in that case despite this language. No such clause is to be found in the 1967 amendment to the Inchoate Crimes statute and this court should be even more reluctant to find a repeal by implication,

especially where the traditional reconciliation of this problem is as applicable to the present law as it has been to the rules governing attempts extant in the past.

However interesting this problem may be in academic context, a point made earlier deserves reiteration and emphasis: the issue simply is not presented by the facts in this case. There is no evidence of a completed assault with a deadly weapon -- only of an attempted assault with a deadly weapon. If a completed crime was shown it was merely a completed simple assault, not an aggravated one and defendant was not charged with an attempted simple assault. Thus viewed the entire issue of completed acts versus attempts in this case is a specious one.

II.

DEFENDANT'S TENDERED INSTRUCTION NUMBER ONE WAS PROPERLY REFUSED BY THE TRIAL COURT.

The defendant tendered the following instruction which was refused by the court:

> "You are instructed that if, after considering the evidence, a reasonable doubt exists in your mind to the effect that the defendant did not intend to do bodily harm or injury, but rather intended solely to conceal the weapon you shall return a verdict of not guilty." (f. 22)

By the court's rejection of this instruction defendant claims he was denied an instruction on his "theory of the case". Wertz v. People, 160 Colo. 260, 418 P.2d 169 (1966).

It is clear that, while a defendant is entitled to an instruction on his theory of the case, refusal of a tendered instruction embracing such a theory is not error if it is covered by other instructions, Dennison v. People, __ Colo. __, 423 P.2d 839 (1966), or places undue emphasis on the defendant's evidence as opposed to the evidence adduced as a whole. Sterling v. People, 151 Colo. 127, 376 P.2d 676 (1962).

In rejecting the tendered instruction the trial court commented as follows:

> "The Court is aware that our Supreme Court has ruled that the theory of defendant's case shall be given in criminal cases in one form or another. I feel that defendant's tendered 1 amply covered by Instruction No. 3 wherein I have set up the material allegations of the Information which The People have to prove beyond a reasonable doubt, and No. 5 being that he then and there specifically intended to do Earl Tysver bodily harm, and if The People prove that, then obviously the jury, if the jury thinks that The People have proved it,

> then obviously the jury is not willing to accept the defendant's testimony that he was merely trying to get the gun out of his pocket and conceal it at the time he was stopped by the policeman and I feel then Instruction No. 3 covers defendant's defense here and certainly puts the burden on The People to prove the essential elements that I have set out beyond a reasonable doubt, so I will refuse defendant's tendered No. 1." (ff. 559-61)

Instruction Number 3 (ff. 29-31) referred to by the trial court in its ruling, contained in item #5:

> "That he [the defendant] then and there specifically intended to do Earl Tysver bodily harm."

The instruction concludes:

> "If you find from the evidence that the People have proven each and every of the material allegations above set out, beyond a reasonable doubt, then you should find the defendant guilty as charged in the Information. On the other hand, if you find the People have failed to prove any one or more of the material allegations above set out,

> beyond a reasonable doubt, then you should find the defendant not guilty." (f. 31)

As is evident from a comparison of the two quoted portions of Instruction #3 and defendant's tendered Instruction #1, all but the final descriptive phrase of the tendered instruction is fully covered, i.e., that the defendant ". . . intended solely to conceal the weapon."

As to this last mentioned phrase, the People contend that this was adequately covered by the language contained in Instruction #5, which defines the requisite intent to constitute the crime of assault with a deadly weapon:

> "The statutes of this state provide that an assault with a deadly weapon, instrument or other thing, with an intent to commit upon the person of another a bodily injury where no considerable provocation appears or where the circumstances of the assault show an abandoned and malignant heart, shall be punished as provided by the law."

The People contend that the phrase "intent to commit upon the person of another a bodily injury" in the above instruction is absolutely inconsistent with intent "solely to conceal the weapon" appearing in the tendered instruction; the intent of the defendant had either

to be one or the other, for it could not be both. This being the case, the instruction tendered was merely redundant and served only to place undue emphasis on the particular explanation advanced by the defendant. Because the content of the tendered instruction was adequately covered by instructions 3 and 5 and, further, because the tendered instruction in being redundant merely overemphasized certain facts, the trial court did not err in rejecting the tender. Certainly it cannot be said that the tendered instruction covered "an essential and critical issue not otherwise covered by the court's instructions." Zarate v. People, __ Colo. __, 429 P.2d 309, 312 (1967).

CONCLUSION

For the above stated reasons the People respectfully urge that the decision and verdict in the trial court be affirmed and the writ of error discharged.

Respectfully submitted,

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