LEXSEE 54 OHIO ST. 2D 444

THE STATE OF OHIO, APPELLANT, v. TATE, APPELLEE

No.77-872

Supreme Court of Ohio

54 Ohio St. 2d 444; 377 N.E.2d 778; 1978 Ohio LEXIS 597; 8 Ohio Op. 3d 441

June 28, 1978, Decided

PRIOR HISTORY: [***1] APPEAL from the Court of Appeals for Cuyahoga County.

The defendant-appellee, Richard Tate, was indicted for the commission of the crime of felonious assault in violation of R. C. 2903.11. He was convicted after a jury trial and sentenced pursuant to law.

On appeal to the Court of Appeals, the judgment of the trial court was reversed and the defendant ordered discharged.

The state then sought appeal and the cause is now before this court upon the allowance of a motion for leave to appeal.

DISPOSITION: *Judgment reversed.*

HEADNOTES

Criminal law -- Felonious assault -- Elements of crime proven, when.

COUNSEL: *Mr. John T. Corrigan,* prosecuting attorney, and *Mr. George J. Sadd,* for appellant.

Messrs. Koblentz & Koblentz and *Mr. Richard S. Koblentz,* for appellee.

JUDGES: O'NEILL, C. J., HERBERT, P. BROWN, SWEENEY and LOCHER, JJ., concur. CELEBREZZE and W. BROWN, JJ., dissent.

OPINION BY: PER CURIAM

OPINION

[*445] [**778] The controlling issue is presented by the following accurate summary of the evidence of the case which appears in the opinion of the Court of Appeals.

"* * * the State presented direct evidence that the appellant pointed a gun at Officer Munaretto. [***2] This evidence was disputed by the testimony of the appellant and Sandra Tate [estranged wife of the appellee]. * * * From the direct evidence presented the jury could conclude that the appellant did point a gun at the police officer.

"The evidence that the gun was empty, however, was totally undisputed. Both the State and the defense presented testimony that the gun was not loaded at the time that the appellant pointed it at the officer. Also undisputed was the fact that the appellant did not attempt to pull the trigger. Additionally, the appellant's testimony that he knew the gun was empty was not refuted by the State."

The Court of Appeals concluded that "* * * the State failed to present sufficient evidence on all of the elements of felonious assault such that a jury of reasonable persons could find beyond a reasonable doubt that the appellant

knowingly attempted to cause physical harm to Officer Munaretto by means of a deadly weapon."

R. C. 2903.11, in pertinent part, provides:

"(A) No person shall knowingly:

"(1) Cause serious physical harm to another;

"(2) Cause or attempt to cause physical harm to another by means of a deadly [**779] weapon or dangerous [***3] ordnance as defined in section 2923.11 of the Revised Code."

A deadly weapon is defined in R. C. 2923.11(A) as "any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon."

A dangerous ordnance is defined in part as "any automatic [*446] or sawed-off firearm, or zip-gun." R. C. 2923.11(J)(1); see, also, R. C. 2923.11(K).

The record in the instant cause does not establish that the gun used was an automatic firearm or a sawed-off firearm or zip-gun.

The question to be determined by this court may be stated thus: Did the state present sufficient evidence to prove beyond a reasonable doubt all the elements of the crime of felonious assault where the record demonstrates that the accused pointed a gun at another person, but it is undisputed that the gun was unloaded, that the accused knew it was unloaded, and that the accused made no attempt to pull the trigger or to use the weapon in any other manner as a deadly weapon?

There is no contention by the defendant that he did not know what he was doing when he pointed the gun at Officer Munaretto. The jury could find from the [***4] evidence presented that the defendant acted knowingly when he pointed the gun at the officer.

Thus, the only element of the offense of felonious assault at issue in this cause is whether the unloaded gun used in the assault was a "deadly weapon."

That question was determined by this court in *State* v.. *Meek* (1978), 53 Ohio St. 2d 35, where the court held that an unloaded gun used in the course of a robbery was a "deadly weapon." Since an unloaded gun used in a robbery has been determined to be a "deadly weapon," an unloaded gun used in an assault is likewise a "deadly weapon."

The judgment of the Court of Appeals is reversed.

Judgment reversed.

DISSENT BY: CELEBREZZE

DISSENT

CELEBREZZE, J., dissenting.

Conspicuous by its absence is any reference, within the majority opinion, to evidence [*447] tending to prove the second element of the offense of felonious assault, viz., to cause or attempt to cause physical harm.

The majority concedes that the gun was unloaded, that appellee knew it was unloaded, and that no attempt was made to pull the trigger or to use the gun as a bludgeon. Thus, it would seem that appellee did not knowingly intend to cause physical harm, did [***5] not in fact cause physical harm, and did not commit a direct ineffectual act toward that result.

Certainly appellee's behavior was criminal and warrants punishment. However, I cannot fairly vote to uphold the conviction on the instant charge since the prosecution failed to prove a central element of that crime. In my opinion appellee should have been charged under R. C. 2903.21, the aggravated menacing statute, which section proscribes knowingly causing another to believe that the offender will cause serious physical harm to that person. Although appellee's conduct fits squarely within the definition of that crime, aggravated menacing is not a lesser included offense with regard to felonious assault (See *State* v.. *Beaty* [1975], 45 Ohio App. 2d 127), and therefore appellee should be discharged from custody. Accordingly, I dissent from the opinion of the majority.

W. BROWN, J., concurs in the foregoing dissenting opinion.