1990

The State of Utah v. Nina Mincorelli : Brief of Respondent

Utah Court of Appeals

Robert L. Steele; Attorney for Defendant/Appellant.
Virginia Christensen; Attorney for Plaintiff/Respondent.
VIRGINIA CHRISTENSEN Attorney for Plaintiff/Respondent Salt Lake County Attorney's Office 2001 S. State Street, Suite S3700 Salt Lake City, Utah 84190-1200 (801) 468-3422
ROBERT L. STEELE Attorney for Defendant/Appellant Salt Lake Legal Defender 424 East 500 South, #300 Salt Lake City, Utah 84111 (801) 532-5444

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Respondent,	:	
v.	:	Case No. 900265-CA
NINA MINCORELLI	:	Priority #2
Defendant/Appellant.	:	

BRIEF OF RESPONDENT

Appeal from judgment and conviction for Criminal Mischief, a class C misdemeanor, in the Third Circuit Court in and for Salt Lake City, State of Utah, the Honorable Paul G. Grant, Judge presiding.

VIRGINIA CHRISTENSEN
Attorney for Plaintiff/Respondent
Salt Lake County Attorney's Office
2001 S. State Street, Suite S3700
Salt Lake City, Utah 84190-1200
(801) 468-3422

ROBERT L. STEELE
Attorney for Defendant/Appellant
Salt Lake Legal Defender
424 East 500 South, #300
Salt Lake City, Utah 84111
(801) 532-5444

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Respondent,	:	
v.	:	Case No. 900265-CA
NINA MINCORELLI	:	Priority #2
Defendant/Appellant.	:	

BRIEF OF RESPONDENT

Appeal from judgment and conviction for Criminal Mischief, a class C misdemeanor, in the Third Circuit Court in and for Salt Lake City, State of Utah, the Honorable Paul G. Grant, Judge presiding.

VIRGINIA CHRISTENSEN
Attorney for Plaintiff/Respondent
Salt Lake County Attorney's Office
2001 S. State Street, Suite S3700
Salt Lake City, Utah 84190-1200
(801) 468-3422

ROBERT L. STEELE
Attorney for Defendant/Appellant
Salt Lake Legal Defender
424 East 500 South, #300
Salt Lake City, Utah 84111
(801) 532-5444

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

STATUTES

JURISDICTIONAL STATEMENT

Jurisdiction is conferred upon this court under Utah Code Ann. Sec. 78-2a-3(2)(d) (1988) whereby a defendant in a criminal case may take an appeal to the Court of Appeals from a final judgment of conviction. In this case, the appellant was found guilty after a jury trial held in the Third Circuit Court, Salt Lake City, State of Utah, the Honorable Paul G. Grant presiding.

DETERMINATIVE STATUTORY PROVISION

Utah Code Ann. Sec. 76-2-302(1) (1973):

> A person is not guilty of an offense when he engaged in the proscribed conduct because he was coerced to do so by the use of threatened imminent use of unlawful physical force upon him or a third person, which force or threatened force a person of reasonable firmness in his situation would not have resisted.

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Respondent,	:	
v.	:	Case No. 900265-CA
NINA MINCORELLI	:	Priority #2
Defendant/Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF FACTS

On February 24, 1990, Ms. Mincorelli painted "We, the homeless of Utah, want ten minutes, Bangerter, now," on the floor of the Utah State Capitol. Ms. Mincorelli was convicted of Criminal Mischief, a class B misdemeanor, on April 16, 1990. Before trial, defendant raised a motion in limine to present evidence toward the defense of necessity. The motion was denied by the trial court.

On appeal, the defendant claims she was denied due process of law when the trial court refused to allow the introduction of evidence by an expert witness on the conditions of the homeless and argument on the necessity of the defendant's actions.

SUMMARY OF ARGUMENT

The defense of necessity does not apply to Ms. Mincorelli. Even if it did, the evidence Ms. Mincorelli proffered did not go toward proving the elements of the defense. Instead, Mr. Fox,

Ms. Mincorelli's expert witness, would have testified about the perils of homelessness generally. Since Ms. Mincorelli did not present evidence sufficient to prove the defense and it does not apply to her conduct, she was not improperly denied the opportunity to present it.

ARGUMENT

THE NECESSITY DEFENSE DOES NOT APPLY TO MS. MINCORELLI; THEREFORE, SHE WAS NOT DENIED DUE PROCESS WHEN SHE WAS NOT PERMITTED TO PRESENT EVIDENCE OF THE DEFENSE.

The necessity defense is available in Utah. State v. Tuttle, 730 P.2d 630, 633 (Utah 1986), Utah Code Ann. Sec. 76-2-302(1) (1973). To assert the defense, the defendant must show that:

1. the act charged must have been done to prevent a significant evil;
2. there must have been no adequate alternative; and
3. the harm caused must have not been disproportionate to the harm avoided.

Cleveland v. Municipality of Anchorage, 631 P.2d 1073, 1078 (Alaska 1981). As appellant states in her brief, the first two elements require a subjective assessment of the defendant's belief. However, *in addition to the subjective assessment*, "[a]n ***objective*** determination must be made as to whether the defendant's value judgment was correct, given the facts as he reasonably perceived them." Id. (emphasis added). The third element requires only an objective assessment.

Furthermore, the defense of necessity is unavailable if:

1. there is a third alternative available to the defendants

that does not involve violation of the law;

2. the harm to be prevented is not **imminent**; and

3. the actions were not reasonably designed to actually prevent the threatened greater harm.

State v. Marley, 509 P.2d 1095, 1101 (Hawaii, 1973). The Marley standards have been upheld within the tenth circuit. "Marley fairly and correctly states the law which must be applied to a case such as this." United States v. Best, 476 F.Supp. 34, 47 (D. Colo. 1979) (prosecution for trespass on nuclear power plant property while defendants were protesting).

In discussing the necessity defense, the United States Supreme Court reasoned that "[u]nder any definition of these defenses [duress and necessity] one principle remains constant: if there was a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm,' the defense will fail." United States v. Bailey, 444 U.S. 394, 410 (1980).

By implementing the standards set out by Cleveland, Marley, and Bailey, it is clear that the necessity defense does not apply to Ms. Mincorelli's actions. Therefore, she was not denied due process when she was denied the defense. "Where . . . there is no reasonable basis in the evidence to support the defense or its essential components, it is not error for the trial judge to either refuse to instruct the jury as to the defense, or to instruct them to disregard it." State v. Harding, 635 P.2d 33, 34 (Utah 1981).

First, Ms. Mincorelli had plenty of adequate alternatives other than criminal mischief to attempt to remedy her homelessness or homelessness generally. "In a free society, neither the political process nor the avenue of lawful protest is an exhaustible remedy for an unwise policy decision . . . *Illegal conduct designed to influence policies cannot be considered 'necessary'* where such lawful avenues are available." In re Weller, 164 Cal. App. 3d 44, 49, 210 Cal. Rptr. 130, 133 (Cal. App. 1 Dist. 1985) (emphasis added). The Marley court observed that "[o]ther forms of non-criminal protest were and are available to defendants to enable them to dramatize, and hence hopefully terminate, conduct which they view as harmful." Marley, 509 P.2d at 1109 (trespass defendants protested the Vietnam War). Some reasonable alternatives available to Ms. Mincorelli included lobbying the legislature, lawful leafletting, attracting press attention and peaceful protesting. Even if Ms. Mincorelli subjectively believed she had no alternative to painting the capitol floor, the objective prong of the test dictates that no reasonable person would come to that conclusion. Therefore, Ms. Mincorelli's claim that no adequate alternatives were available is invalid.

Ms. Mincorelli faced no **imminent** harm. Nothing was threatening Ms. Mincorelli at the time she painted the capitol. The necessity defense developed to aid defendants in emergency situations. Ms. Mincorelli was not facing an emergency. Like the defendant in Marley, the potential harm was, "at best, only

tenuously connected with the situs of the crime, and would be only tenuously affected by defendants' acts . . . We cannot find any real 'necessity'" to act. Marley, 509 P.2d at 1109. The evidence proffered by Ms. Mincorelli in this case would not have gone toward proving the existence of an emergency.

Ms. Mincorelli's actions were not reasonably calculated to prevent the harm of homelessness. There must be a "direct causal relationship . . . reasonably anticipated to exist between the defend[ant]'s action and the avoidance of harm." Marley, 509 P.2d at 1109. Under any possible set of hypotheticals, Ms. Mincorelli could see that painting the floor would not end her or others' condition of homelessness or protect them from the dangers of the street.

Ms. Mincorelli argues that the necessity defense is proper because the harm caused by her criminal mischief (approximately twenty five dollars) was less than the perceived harm she sought to prevent. The necessity defense does not protect criminal harm that is *less* than the harm avoided. The requirement is that the harm caused not be *disproportionate* to the harm avoided. Public policy demands that the necessity defense not be extended to protect the criminal destruction of public property simply because the actual damage did not amount to a significant sum.

The "significant evil" that appellant claims to have been preventing is the evil of her and others' conditions of homelessness. This is not the type of "significant evil" the necessity defense protects. If it were, crimes could be

justifiably committed to "prevent" poverty, alcoholism, illiteracy or disease, etc. Even if Ms. Mincorelli subjectively believed her or others' homelessness was a legitimate "significant evil," the objective prong of the test would preclude this element. No reasonable person would conclude that homelessness was a "significant evil" in the necessity defense context.

The testimony of Jeff Fox would not have proved the defense of necessity. Mr. Fox would have testified to the problems and dangers facing the homeless **generally**. He would not have testified that Ms. Mincorelli had to either paint the floor of the capitol or face imminent peril. The trial court did not err when it refused to allow Ms. Mincorelli to present Jeff Fox as a witness.

Ms. Mincorelli's goal appears to have been to gain Governor Bangerter's attention, not to avoid an emergency situation. This is not the type of situation that the necessity defense is intended to aid. There is not a sufficient causal relationship between the perceived harm and the crime of criminal mischief.

Recently, a District of Columbia court rejected the same issue appealed by appellant in the present case. In Reale v. United States, 573 A.2d 13, 14-15 (D.C. App. 1990), defendants were convicted of disorderly conduct within the United States Capitol. Defendants went into the gallery of the House of

Representatives and began shouting about bombs and homelessness. On appeal, the defendants argued they were improperly denied the opportunity to assert the necessity defense. The court affirmed, reasoning that

> [t]he [necessity] defense does not apply where there is a legal alternative available to the defendant, or where the defendant's actions could not have directly prevented the anticipated harm . . . Here, appellants could have made their views known to Congress in many ways which did not violate the law. Furthermore, *their protest could not have had any immediate impact on the crisis of homelessness.*

Id. at 15 (emphasis added).

In In re Weller, 164 Cal. App. 3d 44, 49, 210 Cal. Rptr. 130, 133 (Cal. App. 1 Dist. 1985), the defendants' contended that their proffer of evidence met all the elements of the necessity defense and that the trial court committed prejudicial error in failing to permit them to present the defense. The Court of Appeals denied their contentions and noted:

> We do not mean to ignore or trivialize this country's history of civil disobedience (e.g., the Boston Tea Party, the Underground Railroad, Freedom Marches in the South, and some of the Vietnam War protests). From the perspective of history many unlawful acts may be seen as justified or even "necessary." Some have been rendered lawful by finding constitutional defects in the prohibitory enactments. But the determination that these actions were "necessary" can only be made from a distance, and then not with legal precision. *Unless the laws are held unconstitutional, those challenging or defying them must be prepared to bear the short-term consequences of their actions in the hope that society will benefit* and that historians will look charitably upon them.

In re Weller, 210 Cal. Rptr. at 133 (emphasis added).

Since no reasonable person could find the defense of necessity to apply to appellant's actions, the trial court properly denied defendant's motion in limine.

CONCLUSION

The defense of necessity does not apply to Ms. Mincorelli. Even if it did, the evidence Ms. Mincorelli proffered did not go toward proving the elements of the defense. Since she did not make the proper showing, the trial court correctly declined to instruct the jury on the necessity defense. The state respectfully requests the Court of Appeals to affirm Ms. Mincorelli's conviction.

DATED this 14th day of Sept., 1990.

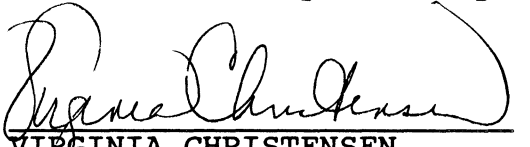
DAVID E. YOCOM
Salt Lake County Attorney

VIRGINIA CHRISTENSEN
Deputy County Attorney

CERTIFICATE OF DELIVERY

I certify that on this 14th day of Sept., 1990, a true and correct copy of the foregoing Memorandum to Robert L. Steele, Salt Lake Legal Defender Association, 424 East 500 South, #300, Salt Lake City, Utah 84111.

DAVID E. YOCOM
Salt Lake County Attorney



VIRGINIA CHRISTENSEN
Deputy County Attorney