Recomp - Grant Felony
7-1-83
Giles, Wells, Hood
#07

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

TIMOTHY SPYTMA,

Defendant-Appellant.

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No. 53427
Delayed Application
for Delayed Appeal

TO: Judges
FROM: Jack Borst
DATE: June 9, 1983; for submission June 28, 1983.

COMMISSIONER'S REPORT

FACTS:

"On December 16, 1974, Lawrence Doctor returned from school to find his mother lying on the floor of his room. When the police arrived, it was determined that she had been beaten to death by unknown assailants. A search of the house also disclosed that a wine bottle of pennies and Mrs. Doctor's were missing.

At about the same time Mrs. Doctor's body was discovered, defendant and Timothy J. Spytma, both 15 years of age, were involved in a traffic accident while driving Mrs. Doctor's car. Both boys tried to leave the scene of the accident, but Daniel Kruszynski, a witness to the accident, prevented them from leaving. Spytma exited from the car with a rifle in a case and placed it on the roof of the car. The two boys again tried to flee, but Kruszynski and another witness caught them. When Kruszynski placed defendant back in the car, defendant pulled a gun on him, but Kruszynski was able to disarm defendant. The police arrived at the scene of the accident and placed defendant and Spytma under arrest." People v Saxton, 118 Mich App 681, 683-684 (1982).

Timothy Spytma was tried before Visiting Judge William Porter in August, 1975, and he was found guilty of felony murder. He was sentenced to life in prison. He appealed, and this Court affirmed his conviction by unpublished memorandum opinion of February 13, 1978, No. 31487. Leave to appeal was denied on April 6, 1979.

Michael L. Saxton, the co-defendant, was also tried and convicted of felony-murder. His conviction was affirmed by this Court, and leave to appeal was denied. Later the Supreme Court remanded the case for hearing in leave granted, 411 Mich 865 (1981). The panel of Burns, Burns and Kelly reduced the charge to second degree murder, and remanded the case for resentencing. The opinion gave the following explanation, People v Saxton, 118 Mich App 681, 689, 691 (1982):

"Defendant contends that he could not be convicted of felony murder where the underlying felony, breaking and entering, was not one of the enumerated felonies contained in MCL 750.316; MSA 28.548. According to defendiant, the term 'burglary', as used in the statute, referred to the common-law offense of breaking and entering a dwelling house in the nighttime. He argues that since the breaking and entering occurred in the daytime, he could not be convicted of first-degree murder.

"On the date of Mrs. Doctor's death, MCL 750.316; MSA 28.548 read:

"'All murder which shall be perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate and premediatated killing, or which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery, burglary, larceny of any kind, extortion or kidnapping, shall be murder of the first degree, and shall be punished by solitary confinement at hard labor in the state prison for life.' (Emphasis supplied.)

"On March 11, 1980, 1980 PA 28 was passed amending the statute by deleting the word 'burglary' and replacing it with the words 'breaking and entering a dwelling'.

"At common law, burglary was defined as the breaking and entering of a dwelling house in the nighttime. LaFave and Scott, Handbook of Criminal Law, sec. 96, p 708. The requirement that the breaking and entering take place at night was a critical element of burglary. Cole v People, 37 Mich 544, 548 (1877). The Supreme Court has recognized that burglary is distinguishable from the various breaking and entering crimes passed by the Legislature. Harris v People, 44 Mich 305, 307; 6 NW 677 (1880).

"To determine the meaning of burglary as it was used in the felony-murder statute in effect in 1974, we must examine what the drafters of the 1981 felony-murder statute intended. People v MacDonald, 409 Mich 110, 119; 293 NW2d 588 (1980). Criminal statutes are to be strictly construed and any ambiguity is to be resolved in favor of lenity. People v Dempster, 396 Mich 700, 707, 715; 242 NW2d 381 (1976); People v Krist, 93 Mich App 425, 433; 287 NW2d 251 (1979), lv den 407 Mich 963 (1980). As discussed above, burglary was a crime distinguishable from the statutory crimeis of breaking and entering. As used in the Felony-murder statute, the term 'burglary' referred to the common-law crime which required a breaking and entering of a dwelling house in the nighttime.

"In the present case, the breaking and entering took place in the daytime. The breaking and entering therefore fails to establish the underlying felony and defendant's first-degree murder conviction cannot be affirmed. However, the judge

necessarily found defendant guilty of second-degree murder so we order his conviction reduced to that offense."

Leave to appeal was denied by the Supreme Court, 414 Mich 931.

Armed with this result defendant Spytma filed a motion to vacate conviction and to enter judgment of second degree murder. He also moved for resentencing by the original trial judge, William Porter. Judge Ronald Pannucci denied both motions on December 20, 1982. In this application Spytma seeks leave to appeal from both orders. The Muskegon County prosecutor has filed an answer in opposition.

ISSUES:

I. SHOULD DEFENDANT'S FIRST DEGREE FELONY-MURDER CONVICTION BE VACATED BECAUSE THE TERM 'BURGLARY, AS USED IN THE FELONY-MURDER STATUTE, REFERRED TO THE COMMON LAW OFFENSE OF BREAKING AND ENTERING A DWELLING HOUSE IN THE NIGHTIME, AND THE BREAKING AND ENTERING FOR WHICH DEFENDANT WAS CONVICTED OCCURRED IN THE DAYTIME?

II. IS DEFENDANT ENTITLED TO BE RESENTENCED BY THE JUDGE WHO PRESIDED AT HIS TRIAL AND SENTENCING?

FINDING:

The conviction and sentence should be set aside by peremptory order, and the cause should be remanded for resentencing before the original trial judge.

This case is factually indistinguishable from People v Saxton, supra. There is also a more recent case in accordance, People v Whetstone, 119 Mich App 546, 558 (1982).

The people do not argue any factual differences. Their argument is as follows:

"The Court of Appeals ordered the conviction of the co-defendant of this defendant for first degree murder vacated because of a 'legal technicality' of the most unjustifiable sort. * * *. It is the position of plaintiff-appellee that the holding of the panel of this Honorable Court in Saxton, supra, was erroneous and the error should not be compounded in the case at bar. The people of Muskegon County and the people of the State of Michigan deserve a better and more just result than the one found in Saxton, supra, which is unjustifiable on any grounds other than that of a 'legal technicality'. This should not be the standard by which this Honorable Court decides cases of such major significance.

The best answer to this line of argument is the following:

"'The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law.' McNabb v United States, 318 US at p 347. Cited in People v Roberts, 364 Mich 60, 72 (1961)."

With two controlling Court of Appeals opinions on point, it is recommended that a peremptory order be entered setting aside the conviction and sentence for first degree murder and remand for resentencing for second degree murder.

It is also recommended that resentencing should be done by the original trial judge, although this question is not entirely clear. Authority favoring such action includes GCR 1963, 532, People v Clemons, 91 Mich App 68, 73, 76-78 (1979), reversed, 409 Mich 939 (1979), People v McDonald, 97 Mich App 425, 430-434 (1980), People v Biondo, 76 Mich App 155 (1977), and People v Williamson, 113 Mich App 23, 25-29 (1982), reversed 413 Mich 895 (1982). Compare, People v Collins, 25 Mich App 609 (1970), People v McKinley, 5 Mich App 230 (1966), People v Blair, 11 Mich App 649 (1968), and People v Williamson, supra, 413 Mich 895 (1982).

In this case defendant has secured from Judge Porter in Gaylord a letter stating that he is available. Considering the facts of this case, including that defendant was 15 years old at the time of trial, it is recommended that the case be remanded rfor sentencing before Judge Porter.

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