COE defense NOT available - no evidence of imminent threat

SEAMONS
Or. Ct. App. 2000

Δ robbed annex for $ to pay debt owed to officer who had given Δ drugs to sell.

- STATUTE
- 3 elements from court
- Threat must be "present, imminent[,] and impending"

E1 case?
E2 case?
Both?

170 Or.App. 582
Court of Appeals of Oregon.

STATE of Oregon, Respondent,
v.
Walter Carzil SEAMONS, Appellant.

(C 97–2754 CR; CA A103744)

Argued and Submitted March 8, 2000.

Decided Nov. 1, 2000.

Synopsis
Defendant was convicted in the Circuit Court, Washington County, Berkeley A. Smith, J., of second degree robbery, second degree theft, and third degree escape, and defendant appealed. The Court of Appeals, Landau, P.J., held that defendant was precluded from relying on choice of evils defense.

Affirmed.

West Headnotes (4)

[1] **Criminal Law**
Compulsion or necessity; justification in general

Defendant was precluded from relying on choice of evils defense in his prosecution on charge of second-degree robbery, second degree theft, and third degree escape, despite defendant's contention that he was intimidated by dealing with a police officer who had recruited him to sell heroin and to whom he owed money for his use of drugs which were intended for sale, where there was no imminent threat, and fact that defendant was intimidated by dealing with police officer provided no basis for an inference that officer had made any threats. ORS 161.200(1).

4 Cases that cite this headnote

[2] **Criminal Law**
Evidence

Court of Appeals reviews a trial court's ruling on the state's motion in limine to preclude a defendant from relying on a choice of evils defense to determine whether there is any evidence as to each of the elements of the defense.

- a Δ's feeling of (implicit) intimidation ≠ evidence of threat

3 Cases that cite this headnote

[3] **Criminal Law**
Compulsion or necessity; justification in general

In order for conduct that would otherwise constitute an offense not to be criminal, there must be evidence that: (1) a defendant's conduct was necessary to avoid a threatened injury; (2) the threatened injury was imminent; and (3) it was reasonable for the defendant to believe that the threatened injury was greater than the potential injury his illegal actions. ORS 161.200(1).

6 Cases that cite this headnote

Attorneys and Law Firms

**573 *582 Kenneth Lerner argued the cause and filed the brief for appellant.

Ann Kelley, Assistant Attorney General, argued the cause for respondent. With her on the brief were Hardy Myers, Attorney General, and Michael D. Reynolds, Solicitor General.

Before LANDAU, Presiding Judge, and LINDER and BREWER, Judges.

Opinion

*584 LANDAU, P.J.

PROCEDURAL HISTORY

Defendant appeals a judgment of conviction for second-degree robbery, ORS 164.405, second-degree theft, ORS 164.046, and third-degree escape, ORS 162.165. He assigns error to the trial court's refusal to permit him to present a choice of evils defense. We affirm. outcome - affirmed

FACTS

The relevant facts are not in dispute. A police officer recruited defendant, a heroin addict, to sell heroin. Initially, the officer gave defendant 14 grams of heroin to sell. However, the officer demanded that defendant sell the heroin at such a high price **574 that defendant could not sell all of the drug. Meanwhile, defendant fell prey to temptation and started to use some of the heroin.

Three weeks later, the officer and defendant met. Defendant produced what money he could, and, although it was only a portion of what he owed the officer, the officer still give him more heroin to sell. Defendant used a substantial portion of that heroin himself. Meanwhile, defendant began to avoid having any contact with the officer. He failed to show up at scheduled meetings and failed to return the officer's phone calls.

Weeks later, the two met, and defendant paid the officer all but $400 of what he owed. The officer was upset and stated that he felt "screwed" by defendant. He then gave defendant four days to come up with the $400 and promised to "check up" on him by phone.

The officer did call defendant, but defendant avoided the calls. When the officer finally connected with defendant, he demanded a meeting. Defendant agreed, but did not attend the meeting. After that, he began to live in his car to avoid the officer. Eventually, he scheduled a meeting with the officer and promised to produce the $400 at that meeting. The day before the meeting, defendant purchased a toy gun and used it to rob a postal annex of $500. Defendant was caught fleeing the scene of the robbery.

PROCEDURAL HISTORY

At trial, defendant notified the state that he intended to rely on a choice of evils defense. According to defendant, he had no choice but to rob the postal annex to prevent the officer from doing him bodily harm. The state *585 moved to prohibit defendant from relying on the defense. The state's motion was supported by a police report containing an interview with defendant, which set out the foregoing facts. At the hearing on the motion, defendant offered no additional testimony.

The trial court ruled that the defendant was not entitled to rely on the choice of evils defense because he had failed to establish any evidence of the necessary element of an imminent threat that he sought to avoid through commission of the crime.

[1] [2] [3] On appeal, defendant argues that the trial court erred in granting the state's motion *in limine* to preclude him from relying on a choice of evils defense. We review the trial court's ruling to determine whether there is any evidence as to each of the elements of the defense. *State v. Brown,* 306 Or. 599, 605–07, 761 P.2d 1300 (1988).

RULES

ORS 161.200(1) provides that conduct that otherwise would constitute an offense may not be criminal when: statute makes COE defense available in OR.

> "(a) That conduct is necessary as an emergency measure to avoid an imminent public or private injury; and
>
> *586 "(b) The threatened injury is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense at issue."

Thus, there must be evidence that (1) a defendant's conduct was necessary to avoid a threatened injury; (2) the threatened injury **575 was imminent; and (3) it was reasonable for the defendant to believe that the threatened injury was greater than the potential injury of his illegal actions. *State v. Boldt,* 116 Or.App. 480, 483, 841 P.2d 1196 (1992). OR ct. interprets statute to create a 3-element test

To establish a choice of evils defense, defendant must offer evidence that there was a threat that was "present, imminent and impending." *State v. Fitzgerald,* 14 Or.App. 361, 371, 513 P.2d 817 (1973). Element specific rule

REASONING

In this case, there is a complete absence of evidence of an imminent threat. Defendant argues that an imminent threat may be inferred from the fact that he was dealing with a police officer. But even if the defendant was intimidated by dealing with a police officer, his intimidation provides no basis for an inference that the officer had actually threatened him. We conclude that the trial court did not err in granting the state's motion *in limine.*

Holding

Q: Is the ct. discussing E1 or E2 here?

Affirmed.

Implicit rule (?) - a Δ's feeling of intimidation ≠ evidence of imminent threat