619 P.2d 1336

49 Or.App. 529
Court of Appeals of Oregon.

STATE of Oregon, Respondent,
v.
Richard Allen BURNEY, Appellant.

No. C 79-12-34385; CA 17827.
|
Argued and Submitted Oct. 24, 1980.
|
Decided Dec. 1, 1980.

Synopsis

Defendant was convicted before the Circuit Court, Multnomah County, R. William Riggs, J., of being felon in possession of firearm, and defendant appealed. The Court of Appeals, Gillette, P. J., held that: (1) trial court erred in refusing to consider "choice of evils" defense in assessing evidence presented at trial, and (2) new trial was required to determine defendant's intent in keeping weapon after threat to his person ended.

Reversed and remanded for new trial.

West Headnotes (3)

[1] **Criminal Law**
Compulsion or necessity; justification in general
Weapons
Self-protection or necessity

"Choice of evils" defense is available to those who have been previously convicted of felony and, in appropriate circumstances, might justify their resort to a weapon which it would otherwise be unlawful for them to possess. ORS 161.200, 166.270.

1 Cases that cite this headnote

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

Defendant is entitled to "choice of evils" defense if there is evidence that his conduct was necessary to avoid threatened injury, the threatened injury was imminent, and it was reasonable for defendant to believe that need to avoid injury was greater than need to avoid injury which the other statute seeks to prevent. ORS 161.200.

Cases that cite this headnote

[3] **Criminal Law**
Ordering new trial

Though "choice of evils" defense is available in prosecution for being felon in possession of a firearm where there was evidence from which trial court could have found that defendant was guilty of being felon in possession of firearm for period of time during which, by his own admission, he retained gun after threat to his person had ended, but evidence did not require trial court to find defendant guilty; new trial was ordered to answer factual question of defendant's intent in keeping gun. Const. Art. 7, § 3; ORS 161.200, 166.270.

Cases that cite this headnote

Attorneys and Law Firms

***529 **1337** Hollis K. McMilan, Metropolitan Public Defender, Portland, argued the cause and filed the brief for appellant.

***530** John C. Bradley, Asst. Atty. Gen., argued the cause for respondent. With him on the brief were James M. Brown, Atty. Gen., John R. McCulloch, Jr., Sol. Gen., and William F. Gary, Deputy Sol. Gen., Salem.

Before GILLETTE, P. J., and ROBERTS and CAMPBELL, JJ.

Opinion

***531** GILLETTE, Presiding Judge.

This is a criminal case in which the defendant was charged with the offense of being a felon in possession of a firearm. ORS 166.270. He was found guilty after a trial to the court. The sole issue on his appeal is whether the trial court erred in refusing to apply the "choice of evils" defense, ORS 161.200, despite finding that all elements of the defense were present. We reverse and remand.

The principle facts are not in dispute. Defendant, who is a convicted felon, moved from Boise, Idaho, to Portland on November 6, 1979. The weekend prior to moving, he had been fishing with a friend. That friend left a pistol in defendant's pickup, without defendant's knowledge. Several weeks later, on the evening of the incident in question, the defendant found the pistol. The circumstances surrounding its discovery led to the crime charged in this case.

Shortly after midnight on December 2, 1979, defendant was returning home from a birthday celebration. He pulled into the lot behind the Burger King, at Broadway and Burnside in Portland, to have a hamburger. The ***532** Burger King was closed. When defendant went back to his pickup, it would not start.

Thinking the pickup would start again if he let it sit for a while, defendant went to call his wife to let her know what was happening. While waiting, he had a glass of wine and played a few games of pool for money in Mary's Club, a nearby establishment. Defendant won ten to sixteen dollars and decided to leave. He had just left Mary's at around 2:00 a.m. when he noticed Patrick Griffin, one of the persons from whom he had won money, coming out of the club with a broken-down ****1338** cue stick. Because Griffin had been belligerent and was acting strangely, defendant was afraid of him. Specifically, defendant feared Griffin would try to take his money back.

Defendant stopped and asked what Griffin wanted. He walked beside Griffin for a short distance, until Griffin became involved in an altercation with an unknown person who bumped into him on the sidewalk. Another unknown person intervened. Defendant left as Griffin and the other two were straightening things out.

Defendant had crossed Burnside and was in the parking lot where his pickup was parked when he heard running footsteps behind him. He turned as he reached his truck and saw Griffin "coming out" at him. Defendant reached under the seat of the pickup for a tire iron to protect himself from what he feared was an impending attack. Instead of the tire iron, he felt his friend's pistol. He had not known until that moment that the pistol was there. Defendant pointed the pistol at Griffin's legs and told him to get away. Griffin left. Defendant tossed the pistol back under the seat and tried to restart his truck. Before he could start it, however, the police arrived.

James Powell, a Portland police officer, testified that on December 2, 1979, at 2:40 a. m. he received a radio call to go to the Sealander Restaurant. When Officer Powell arrived he observed Patrick Griffin, who had a cue stick in his hand, pointing to the defendant's vehicle and saying the defendant had a gun on his person. The police immediately approached the defendant's vehicle, ordered him out of his truck, and asked him whether he had a gun. Defendant exited the truck and—believing that the officers were asking specifically whether he had a gun on his person—answered in the ***533** negative. The police then searched the vehicle and found the handgun under the passenger seat. The defendant was then advised of his rights, whereupon he admitted he had pointed the gun at Griffin because Griffin was threatening him with a cue stick. He also admitted to the officers at the scene that he was a convicted felon.

After considering all of the evidence, and indicating that he believed the defendant's story with respect to the circumstances under which the incident occurred, the trial judge nonetheless found the defendant guilty of the charge. He specifically ruled that the "choice of evils" defense was not available in a case in which the defendant is charged with being a felon in possession of a firearm. The defendant argues that, because the evidence showed (and the trial judge apparently believed) that the defendant feared for his safety, the defense was applicable.

The "choice of evils" defense is set out in ORS 161.200 as follows:

> "(1) Unless inconsistent with other provisions of chapter 743, Oregon Laws 1971, defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when:

> "(a) That conduct is necessary as an emergency measure to avoid an imminent public or private injury; and
>
> "(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 in issue.
>
> "(2) The necessity and justifiability of conduct under subsection (1) of this section shall not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder."

***534** [1] We think that the trial judge's conclusion that ORS 161.200 is inapplicable to ****1339** the offense of being a felon in possession of a firearm is incorrect. The statute contains no such express exception, and we see no justification for implying one. To the contrary, a convicted felon is just as entitled to defend himself from an imminent threat of injury as is any other private citizen. We hold that the defense is available to those who have been previously convicted of a felony and, in appropriate circumstances, may justify their resort to a weapon which it would otherwise be unlawful for them to possess.

[2] We have previously stated that a defendant is entitled to the choice of evils defense if there is evidence that

> "(1) his conduct was necessary to avoid a threatened injury; (2) the threatened injury was imminent; and (3) it was reasonable for defendant to believe that the need to avoid the threatened injury was greater than the need to avoid the injury which the (other statute) seeks to prevent." State v. Matthews, 30 Or.App. 1133, 1136, 569 P.2d 662 (1977); State v. Lawson, 37 Or.App. 739, 588 P.2d 110 (1978).

The trial judge apparently found all of those elements present in this case, but declined to apply the defense solely because he believed it was unavailable in this kind of charge. Inasmuch as he was mistaken in this premise, his rationale in convicting the defendant was erroneous.

[3] A question remains as to whether or not this error requires reversal. The state argues that, even if we decide that the choice of evils defense was available to the defendant, the testimony establishes that the defendant maintained control of the gun even after it was necessary to do so in order to protect himself. In light of this evidence, the state argues, the defendant is guilty in any event, and we should affirm. See Oregon Constitution, Amended Article VII, s 3. Cf., State v. Mack, 31 Or.App. 59, 569 P.2d 624 (1977).

We agree with the state that there was sufficient evidence from which the trial court could find that the ***535** defendant retained the gun even after the threat to his person had ended. However, the reason for defendant's retention of the gun is not established, because he was never asked at trial what his intent was. His intent is crucial to a determination of his guilt. If he kept the gun merely so he could turn it over to a policeman as soon as possible, then he is not guilty, for it would be unconscionable to hold a defendant guilty merely for waiting for a reasonable opportunity to divest himself of the gun in a manner that would not create a public safety threat. On the other hand, if he kept the gun for another reason (e.g., to return it to his friend in Idaho), then he is guilty.

The question of Defendant's intent is one for a trier of fact. Therefore, we reverse and remand for a new trial.