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Criminal Law—Conditional Intent as Satisfying Specific Intent Requirement for Aggravated Assault, State v. Chevlin, 284 S.W.2d 563 (Mo. 1955)

MISSOURI SECTION

COMMENTS

CRIMINAL LAW—CONDITIONAL INTENT AS SATISFYING SPECIFIC INTENT REQUIREMENT FOR AGGRAVATED ASSAULT

State v. Chevlin, 284 S.W.2d 563 (Mo. 1955)

Defendant, an official of a local union, became involved in an argument in his office with members of the union's board of trustees.[1] After leaving the room and returning with ten or twelve men, defendant produced a gun and stated, "Start something and I will blow your —— —— guts all over the wall." He then forced the members of the board from his office and, while continuing his threats, followed them to the street door. Defendant was convicted of assault with intent to kill or do great bodily harm.[2] Although reversing on other grounds,[3] the Supreme Court of Missouri stated that the specific intent requirement for assault with intent to kill or do great bodily harm was satisfied if the jury reasonably could have found that the threatened act would have been executed if the condition of leaving the building had not been met.

A conditional intent is the intention that one's conduct will be governed by the occurrence or nonoccurrence of a future event. In assault cases such an intent is manifested by menacing acts accompanied by a conditional threat that physical harm will result unless the threatened person acts, or refrains from acting, in a specified manner.[4] Since the commission of an aggravated assault requires a specific intent,[5] the issue presented by the principal case is whether a conditional intent to use an unlawful amount of force[6] fulfills this intent require-

1. The local had been placed in "trusteeship" by the international organization.

2. MO. REV. STAT. § 559.190 (1949) provides: "Every person who shall be convicted of an assault with intent to kill, or do great bodily harm, or to commit any robbery, rape, burglary, manslaughter or other felony . . . shall be punished . . . ."

3. The conviction was reversed because the trial judge had refused to give a requested instruction to the effect that the jury could not convict even if they found that the defendant had committed a common assault. State v. Chevlin, 284 S.W.2d 563, 567 (Mo. 1955). The information charging the assault was not filed until more than one year after the incident occurred, and therefore a conviction for common assault was barred by the statute of limitations. MO. REV. STAT. §§ 559.200, 556.040, 541.200 (1949).

4. A different situation exists where the threat of violence is negatived by making it conditional on an existing fact. No assault is committed under such circumstances. State v. Crow, 23 N.C. 375 (1841) ("[W]ere you not an old man I would knock you down."). See CLARK & MARSHALL, CRIMES 270 (5th ed. 1952).

5. Stroud v. State, 131 Miss. 875, 95 So. 738 (1923); CLARK & MARSHALL, *op. cit. supra* note 4, at 274; Perkins, *Criminal Attempt and Related Problems*, 2 U.C.L.A.L. REV. 319, 346 (1955).

6. One who makes a conditional threat may be in one of four legal positions. He "may be (1) privileged to carry out his threat if disobeyed; (2) privileged to make the threat as a bluff but not to carry it out; (3) entitled to impose the

ment where the condition is performed subsequently to the threat but before the cessation of the menacing acts.[7]

While very few cases have arisen in this area, there are three possible views as to whether a conditional intent satisfies the specific intent requirement of aggravated assault: (1) a specific intent exists if the condition is unlawful, but not if it is lawful; (2) a conditional intent can never satisfy the specific intent requirement; (3) a conditional intent may constitute a specific intent.

(1) In *Hairston v. State*[8] defendant threatened to shoot a trespasser unless he discontinued the trespass.[9] Although the condition was one which could be *lawfully* demanded by defendant, it was accompanied by a threat to use an excessive amount of force to compel performance of the condition.[10] The Supreme Court of Mississippi held that although defendant was guilty of common assault he could not be convicted of assault with intent to murder since an intent to kill would not be inferred from the fact that a gun was aimed at the threatened party within shooting distance.[11] In contrast to the *Hairston* case, *People v. Connors*[12] was concerned with a threat to kill accompanied by an *unlawful* condition.[13] In the *Connors* case, the Supreme Court of Illinois held that although the intent was conditional defendant could be convicted of assault with intent to murder.[14] *Peo-*

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condition but not to make such a threat; or (4) not entitled to impose the condition." Perkins, *supra* note 5, at 346. It is only in the last three situations that a specific intent problem may arise.

7. A problem of conditional intent does not arise where the condition has not been performed inasmuch as it appears that if the menacing acts are voluntarily discontinued, the mere existence of a conditional threat accompanied by such acts is not in and of itself sufficient to establish a conditional intent. See Smith v. State, 39 Miss. 521 (1860); Price v. State, 168 Tenn. 378, 79 S.W.2d 283 (1935). Thus, where a conditional threat is made and the party who is threatened fails to perform the condition, the specific intent required for an aggravated assault cannot be established unless the person who made the threat does other acts which would indicate an unconditional intent. *Compare* cases cited *supra with* Beall v. State, 203 Md. 380, 101 A.2d 233 (1953) (Defendant fired a gun into a house after making a conditional threat.); Smith v. State, 49 So. 2d 244 (Miss. 1950) (defendant beat person threatened).

8. 54 Miss. 689 (1877).

9. *Id.* at 693. While defendant was helping to remove property of another from the latter's place of former employment, the complaining witness placed his hands on defendant's mules in an attempt to stop him from removing the property.

10. Defendant had drawn a pistol and while pointing it at the person threatened stated: "I came here to move Charles Johnston, and by G-d I am going to do it, and I will shoot any G-d d—d man who attempts to stop my mules." *Id.* at 692.

11. *Id.* at 693-94. *Contra,* State v. Epperson, 27 Mo. 255 (1858).

12. 253 Ill. 266, 97 N.E. 643 (1912).

13. Defendant had threatened to kill a man unless he would take off his overalls and quit work.

14. The court pointed out that an unlawful condition, similar to an impossible condition, would not be considered as a mitigating factor in determining criminal liability. It was indicated that where one does not have the right to demand performance of the condition, there is a presumption that the person making the threat knows that the condition will not be performed. Hence, an unlawful condition is no condition. 253 Ill. at 280, 97 N.E. at 648.

ple v. Connors distinguished the facts of *Hairston v. State* on the ground that the latter case involved a lawful condition. If these two cases are read in juxtaposition, one might conceivably conclude that in aggravated assault cases where a conditional intent exists and the required condition has been performed, criminal liability is determined by the lawfulness or unlawfulness of the condition.[15] It is submitted, however, that the *Connors* case cannot be considered authority for this proposition, inasmuch as the court relied on cases which actually involved lawful conditions but in which defendants were nevertheless held guilty of aggravated assault.[16] In fact, no case has been found where the specific intent requirement for aggravated assault was made to depend upon the lawfulness of the condition.[17]

(2) Subsequent to the *Hairston* and *Connors* decisions, the Mississippi court was faced with the problem whether a conditional intent based on an unlawful condition would meet the specific intent requirement for aggravated assault and held that, regardless of the lawfulness of the condition, the existence of a conditional intent cannot satisfy the specific intent requirement.[18] The court reasoned that a specific intent is not formed when one conditions his acts upon the happening of an event which may or may not occur since at that time there is a possibility that the condition will be met.

(3) All other jurisdictions which have considered the problem have held that a conditional intent may satisfy the specific intent requirement regardless of whether the condition is lawful or unlawful.[19] These jurisdictions would allow a jury to find the accused guilty of aggravated assault if they find that the threatened act would have been executed were the condition not met.[20] This view has been based upon treatment of performance of the condition as the equivalent of

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15. See 30 C.J., *Homicide* § 159(2)(a) (1923).

16. The following cases which involved lawful conditions were cited in *Connors*: State v. Morgan, 25 N.C. 186 (1842) (threat to prevent a trespass); State v. Dooley, 121 Mo. 591, 26 S.W.2d 558 (1894) (dictum) (threat to recover personal property). Although the reasoning of the court in *Connors* was based on the fact that the condition was unlawful, the court does not make it clear what its position would have been if the condition were lawful. See note 14 *supra*.

17. The following are cases from the only jurisdictions which have considered the conditional intent problem in aggravated assault cases. Stroud v. State, 131 Miss. 875, 95 So. 738 (1923); State v. Morgan, 25 N.C. 186 (1842); Thompson v. State, 37 Tex. Crim. 448, 36 S.W. 265 (1896); State v. Dooley, 121 Mo. 591, 26 S.W. 558 (1894) (dictum).

18. Stroud v. State, 131 Miss. 875, 95 So. 738 (1923); Craddock v. State, 204 Miss. 606, 37 So. 2d 778 (1948).

19. State v. Morgan, 25 N.C. 186 (1842); Thompson v. State, 37 Tex. Crim. 448, 36 S.W. 265 (1896); State v. Dooley, 121 Mo. 591, 26 S.W. 558 (1894) (dictum). See also WIS. STAT. § 943.30 (1955).

20. Cases cited note 19 *supra*. State v. Fine, 324 Mo. 194, 23 S.W.2d 7 (1929) (dictum). The fact that the menacing acts are continued until the condition is performed is sufficient evidence for the jury to find that a conditional intent existed. *Ibid.*; *cf.* State v. Epperson, 27 Mo. 255 (1858).

an intervening circumstance under the law of criminal attempts;[21] where the consummation of a criminal attempt is prevented by an intervening circumstance, criminal liability may be predicated upon a finding by the jury that the crime would have been completed in the absence of the intervening circumstance.[22] Thus, under this view, considering the performance of the condition as an intervening circumstance, it is reasoned that the specific intent required for an aggravated assault may be found to exist even though the intent was conditional.[23]

The first view, while never having been adopted by a court,[24] could be based upon the argument that one who conditionally intends to use an excessive amount of force to accomplish that which he may lawfully demand should not be punished as severely as one who conditionally intends to use the same amount of force to accomplish an unlawful end. It should be noted, however, that the presence of a lawful condition will not lessen the degree of criminal liability if a failure to perform the condition is met with the use of an excessive amount of force.[25] For example, if one carries out a conditional threat to kill because the condition was not performed, the actor would be guilty of murder regardless of the lawfulness of the condition.[26] Therefore, if any criminal liability is to be imposed where the condition has been performed, it is submitted that the degree of liability should be the same regardless of the lawfulness of the condition.

There can be no doubt that one who makes a conditional threat and who has a concurrent conditional intent to use an excessive amount of force to secure performance of the condition should be punished in some way. It is submitted, however, that where the condition is performed and there has been no physical violence it would be erroneous to convict for aggravated assault. The intent necessary for the crime of attempt is a present desire[27] to accomplish the crime asserted to have been attempted.[28] Thus, since an aggravated assault is an at-

21. State v. Dooley, 121 Mo. 591, 26 S.W. 558 (1894) (dictum).

22. People v. Miller, 2 Cal. 2d 527, 42 P.2d 308 (1935); CLARK & MARSHALL, CRIMES 175 (5th ed. 1952).

23. *Query*, should performance of a condition which one would prefer to happen in order to avoid resorting to violence to gain compliance with a stated condition be considered an extrinsic act and a device upon which to predicate a finding of specific intent?

24. *But compare* People v. Connors, 253 Ill. 266, 97 N.E. 643 (1912) (*semble*).

25. Stacey v. Commonwealth, 189 Ky. 402, 225 S.W. 37 (1920).

26. *Ibid.* Defendant threatened to shoot if a trespass were not discontinued, and there being no compliance with the condition he killed the party threatened. *Held*, the trespass would not mitigate liability for murder.

27. See note 30 *infra*.

28. Lee v. Commonwealth, 144 Va. 594, 131 S.E. 212 (1926); Perkins, *Criminal Attempt and Related Problems*, 2 U.C.L.A.L. REV. 319, 340 (1955). See MARKBY, ELEMENTS OF LAW § 220 (5th ed. 1896); SALMOND, JURISPRUDENCE 378-81 (10th ed. 1947).

tempted battery[29] the specific intent required for aggravated assault is a present desire to consummate a battery. But in the conditional intent situation, the primary objective of the person making the threat is to secure performance of a condition. This objective is manifested by his forbearing to consummate the battery in order to give the threatened party an opportunity to perform the condition and by non-execution of the battery when the condition is performed. This delay, when considered in the light of the objective, indicates that during the time allowed for performance of the condition there is no present desire to commit a felonious battery and therefore no specific intent.[30]

Thus, it is submitted that the third view, adopted in the principal case, which would allow the imposition of punishment for aggravated assault, is erroneous inasmuch as conditional intent does not satisfy the specific intent requirement. It would further appear that the second view, which would allow a conviction for common[31] but not for aggravated assault, is the correct and more logical doctrine.

EVIDENCE—EXTRAJUDICIAL CONFESSION INADMISSIBLE WITHOUT CORROBORATIVE EVIDENCE TO ESTABLISH CORPUS DELICTI

St. Louis v. Watters, 289 S.W.2d 444 (Mo. App. 1956)

Defendant, after reporting to the police that he had been robbed, confessed extrajudicially that the report was false and that he had used the money which was said to have been stolen to pay bills. His conviction of violating a city ordinance, which makes it a misdemeanor to knowingly submit a false report of a law violation to a police officer of the city,[1] was based on his uncorroborated confession. In reversing the conviction, the court of appeals held that since the corpus delicti had not been established the confession could not be introduced as evidence of guilt.[2]

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29. State v. Morgan, 25 N.C. 186 (1842); Perkins, *supra* note 28, at 344.

30. Intent has been defined more broadly than a desire to accomplish a certain result. For example, it has been said that advertence to a consequence which will necessarily result from an act may also constitute intent. Cook, *Act, Intention and Motive in the Criminal Law*, 26 YALE L.J. 645, 657-58 (1917). It is submitted, however, that the preceding analysis is in no way affected by the more broadly stated definition. When an actor is waiting to ascertain whether his demanded condition will be performed he surely can have no present advertence to consequences of an act for the simple reason that he has not yet acted.

31. It is to be noted in this regard that logical consistency would allow conviction for common assault only in those states where the unlawful placing of another in apprehension constitutes that crime, see CLARK & MARSHALL, CRIMES 268-69 (5th ed. 1952). In those states where an actual intention on the part of the actor to commit a battery is required for common assault, *ibid.*, it would appear that an adoption of the analysis suggested in this comment would logically require that a conditional intent be held not to satisfy even the intent requirement for common assault.

1. ST. LOUIS REV. CODE c. 46, § 23 (1948).

2. St. Louis v. Watters, 289 S.W.2d 444 (Mo. App. 1956).