Supreme Court Copy

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

Deputy

In re J.H.

A Person Coming Under

the Juvenile Court Law,

Supreme Court
Consolidated
No. S177654

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff-Respondent,

v.

J.H.,

Minor-Appellant.

Second Appellate District, Division Eight, No. B21635
Juvenile Court No.GJ25587
Honorable R. Leventer, Referee

APPELLANT'S REPLY BRIEF ON THE MERITS

NANCY L. TETREAULT
Attorney at Law
State Bar No. 150352
346 No. Larchmont Boulevard
Los Angeles, California 90004
Telephone: (310) 832-6233

Attorney for Appellant

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INTRODUCTION

The crime of arson requires proof that the defendant "willfully and maliciously" caused a fire. (Pen. Code, § 451.)[1] This Court has interpreted the phrase "willful" and "malicious" as requiring proof that an arson defendant purposely ignite some type of fire with the intent of causing a harmful result. (*People v. Atkins* (2001) 25 Cal.4th 76, 82.) The present

[1] All statutory references are to the Penal Code unless otherwise stated.

case presents the issue of whether the malice component of arson is met where the defendant intentionally causes a firecracker to be ignited to hear a loud noise and tosses the firecracker near combustible bushes, but does so with no intention of causing a harmful result.

Respondent acknowledges that appellant acted without express malice in lighting the firecracker, but urges this Court to construe the malice component of arson as including a form of "implied malice" encompassing conduct lacking any intent to do harm. According to respondent, the intent element of arson is satisfied if the surrounding circumstances make a defendant's act of willfully lighting a fire "wrongful." (Respondent's Brief on the Merits ("RB"), at p. 6.) Respondent interprets the meaning of malice too broadly. The crime of arson requires that the defendant act "willfully" *and* "maliciously." Respondent's brand of implied malice does not account for the requirement that a defendant's willful conduct be intentionally malicious. (See, e.g., *People v. Dellinger* (1989) 49 Cal.3d 1212, 1221-1222 [defining implied malice in the context of murder].)

Without question, appellant acted recklessly. His reckless conduct resulted in a forest fire. He, however, did not "willfully" commit a "malicious" act. The total absence of malice in this case prevents appellant from committing the crime of arson.

ARGUMENT

THE COURT OF APPEAL'S CONCLUSION THAT THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN THE ARSON COUNT SHOULD BE AFFIRMED, BECAUSE THE ACT OF LIGHTING A FIRECRACKER WITHOUT ANY INTENT OF STARTING A FIRE, OR OTHERWISE DOING HARM IS NOT ARSON.

A. Section 451's Requirement of Both Willful *And* Malicious Conduct Means an Arson Defendant must Purposefully Cause the Lighting of a Fire for an Evil Purpose.

Respondent contends that the intent element of arson does not require that the defendant intend to do harm, but merely commit a willful act that is wrongful. Respondent defines a "wrongful act" as including the throwing of a lighted firecracker near flammable material. (RB, at pp. 10-11.) According to respondent, it makes no difference that the person throwing the firecracker intended no harm. In respondent's view, malice is implied in the "inherently wrongful act" of throwing a lighted firecracker near combustible brush. (RB, at p. 11.) Thus, under respondent's construction of arson's malice component, an "inherently wrongful act" in which the defendant intended no harm is the same as willfully malicious act where the defendant intended a criminal consequence. Neither the existing law, nor the facts of this case support respondent's overly-broad definition of willful and malicious conduct.

What distinguishes arson from other crimes involving fires is the requirement of a *willful and malicious* intent. (§ 451.) "Malicious"

conduct means a "wish to vex, defraud, annoy, or injure another person, or an intent to do a wrongful act." (§ 450.) "Willfully" requires proof that the defendant acted with a purpose or willingness to commit the subject act. (§ 7, subd. (1).)

Respondent stresses that this Court in *Atkins* defined arson as a general intent crime. (RB, at pp. 6-7; *People v. Atkins*, *supra,* 25 Cal.4th 76 [provision of arson statute that act be done "maliciously" does not require that it be done with specific intent].) Appellant does not disagree. What appellant disputes is respondent's claim that the crime of arson can be committed accidentally and without an intent to do anything wrong.

Arson is a general intent crime because section 451 does not require that the defendant ignite a fire to burn a specific object. (See *People v. Atkins, supra,* 25 Cal.4th at p. 86.) A person can be guilty of arson if he willfully causes a fire for a malicious purpose, without the additional requirement that the defendant personally light the fire or intend to burn a specific object. (*Ibid.*) Even so, the defendant must "willfully" participate in igniting a fire with the malicious intent that the fire cause harm. Thus, individuals who do not actually strike the match can be guilty of arson, provided they intend that the match is struck to cause an evil result.

The arson statute is not meant to criminalize the mere act of acquiescing in the igniting of a fire with no malicious motive at all. This is so, even if the fire unexpectedly burns a structure, forest or property. It is the Legislature's inclusion of the phrase "willfully *and* maliciously" in the arson statute that prevents such a result. (§ 451.) The requirement that the arson defendant act both "willfully" *and* "maliciously" means the defendant must have purposefully caused a fire with the intention of causing harm. Though the resulting harm does not have to be the actual

harm intended by the defendant, the intent element of the arson statute requires proof that the resulting harm was not the accidental result of reckless conduct. (See *People v. Atkins, supra,* 25 Cal.4th at pp. 88-89.)

B. The Malice Required for Arson Cannot be Implied.

Because arson requires conduct that is both willful and malicious, respondent is incorrect that the element of malice can be implied. (See RB, at p. 7.) The concept of implied malice comes from the law governing the crime of murder. As set out more fully in appellant's opening brief, the concept of "malice" for purposes of murder can be express or implied. (§§ 187, 188.) Express malice means the defendant willfully killed another human being. (§ 188.) Malice can be implied if the defendant did not intend to kill anyone, yet acted with a knowing disregard for the danger to human life. (§ 188.)

The crime of arson requires that the defendant act both "willfully" and "maliciously." (§ 451) This precludes a finding that the malice element of arson can be implied. An arson defendant must willfully cause a fire for an evil purpose. The concept of implied malice allows a crime to be predicated on a finding that the defendant disregarded a known risk of danger. (See *People v. Dellinger, supra,* 49 Cal.3d at pp. 1221-1222.) Express malice is analogous to acting "willfully *and* maliciously." (§ 451.) Implied malice is not.

Even if implied malice satisfied the intent element of arson, appellant's conduct was merely reckless. Criminally reckless conduct is analogous to criminal negligence. (See, e.g., *People v. Penny* (1955) 44 Cal.2d 861, 879.) A defendant acts with criminal negligence if he

exercises so slight a degree of ordinary care as to "raise a presumption of conscious indifference to the consequences." (*People v. Bennett* (1991) 54 Cal.3d 1032, 1036.) Such was the case here.

C. Appellant's Conduct was Reckless, but Not Willfully Malicious.

The facts of this case are not in dispute. Appellant brought firecrackers on an excursion with his friends to climb a hillside. (I RT, at pp. 46-47, 54.) While in a wilderness area, co-appellant V.V. lit one of the firecrackers and handed it to appellant. Appellant did not light the firecracker. Appellant threw the lighted firecracker onto a concrete slab to avoid a fire. The intent of the boys in lighting the firecracker was to hear a loud noise. (I RT, at pp. 44-45.) Neither boy meant to ignite a forest fire nor cause any other harmful result. (I RT, at p. 44.) They thought it was safe to light the firecracker outdoors in that open area because the vegetation was green. The boys made these ill-advised assumptions while they were still minors. (I RT, at p. 45.) Their conduct, while admittedly reckless, did not meet the definition of willful malice for purposes of arson.

The juvenile court agreed that appellant meant nothing more than to play with firecrackers. The court expressly recognized that appellant intended to *prevent* a fire by tossing the cherry bomb onto a cement slab. (I RT, at pp. 64, 66.)

Appellant "willfully" encouraged V.V. to light the firecracker. Thereafter, he took steps to prevent a fire. Though appellant failed to appreciate the "substantial and unjustifiable risk" his conduct created, he never intended a wrongful, criminal, or evil result. (*People v. Atkins,*

supra, 25 Cal.4th at pp. 85, 86; § 7, subd. (1); §450.) Appellant's conduct in throwing the firecracker was entirely devoid of malice. (§ 450, subd. (e); *People v. Atkins, supra,* 25 Cal.4th at p. 85.)

Arson, as a general intent crime, does not require proof that appellant intended to burn the hillside, but does require proof that in lighting the firecracker he intended to cause harm. The juvenile court was incorrect that appellant's conduct met the elements of arson by the mere fact he purposefully caused the firecracker to be lighted. Causing the firecracker to be lighted satisfied the "willful" component of the intent element for arson, but did not meet the additional requirement of malice. As this Court has recognized, lighting a match near combustible material with no intent to start a fire is not arson. (*People v. Atkins, supra,* 25 Cal.4th at p. 89.)

The complete absence of malice in this case precluded the juvenile court from finding appellant guilty of arson. The Court of Appeal's reversal of the juvenile court's decision should be affirmed.

CONCLUSION

For the foregoing reasons, and those set out in the opening brief, appellant respectfully requests that the Court affirm the Court of Appeal's interpretation of the terms "willfully"and "maliciously," and that the evidence here was insufficient to meet the intent requirement of arson.

Dated: November 1, 2010

Respectfully submitted,

NANCY L. TETREAULT
Attorney for Appellant

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.204, subd. (c)(1))

The text of this brief consists of 2,067 words as counted by the Corel WordPerfect version 10 word processing program used to generate this brief.

Dated: November 1, 2010

By

Nancy L. Tetreault, Esq.
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

Re: ***In re J.H.***; Case No. **S177654**

I, Nancy L. Tetreault, am employed in the County of Los Angeles, State of California. I am over 18 years of age, a member of the State Bar and not a party to the within action. My business address is 346 No. Larchmont Boulevard, Los Angeles, California. I served a copy of the attached **Appellant's Reply Brief on the Merits** on the parties listed below by placing a true copy thereof in an envelope addressed as follows:

Robert Snider
Deputy Attorney General
300 South Spring Street, Suite 500N
Los Angeles, CA 90013

California Appellate Project
520 South Grand Avenue, 4th Floor
Los Angeles, CA 90071

Peter Navarro, Esq.
714 W. Olympic Boulevard, Suite 450
Los Angeles, CA 90015
(Trial Attorney for Minor)

Holly Jackson, Esq.
6245 Bristol Parkway, Suite 239
Culver City, CA 90230
(Appellate Attorney for Minor)

Laini Millar Melnick
610 Anacapa Street
Santa Barbara, CA 93101
(Appellate Attorney V.V.)

Office of the District Attorney
300 East Walnut Street
Pasadena, CA 91101

Hon. R. Leventer, Commr.
Pasadena Juvenile Court
300 East Walnut Street, Dept. 271
Pasadena, CA 91101

California Court of Appeal
Second District, Division Eight
300 South Spring Street, Second Floor
Los Angeles, CA 90013

J.H.
c/o Nancy L. Tetreault, Esq.
346 North Larchmont Blvd.
Los Angeles, CA 90004

Each envelope was then sealed, fully prepaid postage was affixed, and each envelope was deposited in the United States mail at Los Angeles, California, on **November 1, 2010**.

I declare under penalty of perjury that the foregoing is true and correct. Executed on **November 1, 2010,** at Los Angeles, California.

NANCY L. TETREAULT