COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
CASE NO. 2007-SC-645

TERRY GLENN HOBSON — APPELLANT

VS.

APPEAL FROM BOYD CIRCUIT COURT
HON. C. DAVID HAGERMAN, JUDGE
INDICTMENT NO. 05-CR-00241

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLANT, TERRY GLENN HOBSON

Submitted by

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellant has been served by first-class mail upon Hon. C. David Hagerman, Judge, Boyd Circuit Court, Courthouse, 2800 Louisa Street, P.O. Box 417, Catlettsburg, Kentucky 41129-0417; Hon. J. Stewart Schneider, Commonwealth Attorney, 2901 Louisa Street, Catlettsburg, Kentucky 41129; Hon. Brian Hewlett, Assistant Public Advocate, Department of Public Advocacy, P.O. Box 171, Catlettsburg, Kentucky 41129; and to the Hon. Robert Long, Asst. Attorney General, Criminal Appellate Branch, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on this 12th day of January 2009. I also certify that the record on appeal was returned to the Clerk of the Kentucky Supreme Court on this date.

Erin Hoffman Yang by jp
ERIN HOFFMAN YANG

INTRODUCTION

Terry Glen Hobson was convicted in the Boyd Circuit Court of First Degree Robbery. Hobson's robbery conviction was affirmed on appeal despite the fact that he had abandoned the property he had attempted to steal, and the only use of force came during his attempt to flee the scene. Hobson comes to this Court on discretionary review.

STATEMENT CONCERNING ORAL ARGUMENT

Mr. Hobson requests oral argument as he believes it will assist the Court in rendering a fair and just decision in this case.

STATEMENT CONCERNING CITES TO THE RECORD

The record on appeal consists of one volume of trial transcripts of evidence, and two volumes of trial transcripts. Cites to the transcripts of evidence shall be TE, page #. Cites to the trial transcripts will be TR, page #.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The facts of this case are simple and not in dispute. In July 2005, the Ashland Kentucky Wal-Mart had been told to be on the lookout for anyone using a particular credit card belonging to Roderick Stamper. (TE, 165-166). Mr. Stamper's truck had been broken into and the credit card along with some clothing had been stolen and the credit card had been used at another Wal-Mart. (Id. at 62). On July 15th, Terry Hobson entered the Ashland Wal-Mart and proceeded to the cashier with the items he wished to buy. (Id. at 166). He handed the cashier, Lisa Wheeler, the credit card that had been stolen from Stamper. (Id.) Wheeler told Hobson that there was something wrong with the register and that she needed to go to the office to check it out. (Id. at 166) She then went to go alert her managers that she had the stolen credit card. (TE, 166). When Wheeler returned, she asked Hobson for his driver's license, and he gave her Stamper's photo ID. (Id. at 167) In the meantime, Mr. Hobson waited at the cash register. He was nervous, but remained pleasant. (Id. at 166).

As these events were unfolding, Officer J.R. Schoch of the Ashland Police Department was in the loss prevention office with Robert Suttles, the Customer Service Manager, attending to another issue. Schoch and Suttles walked back to the cash register where Hobson was waiting. Schoch asked Hobson his name. Hobson replied that he was Roderick Stamper. (TE, 112). Schoch responded that it was illegal to give a police

officer false information and then asked for his correct name. (Id.) Hobson told him that he was Stamper's cousin. (Id.) Schoch then asked Hobson if he were to call Stamper, would Stamper tell him that he gave Hobson permission to use the card. (Id. at 114). Hobson told Schoch Stamper would confirm that he had permission to use the card. (Id.)

Hobson then placed a Wal-Mart credit card, a Visa, and Stamper's driver's license on the counter. (TE 74). Schoch told Hobson to accompany him to the loss prevention room so that the call to Stamper could be made. Hobson agreed and they walked to the loss prevention office. Hobson complained that Schoch and Suttles were too close but continued to walk. (Id. at 98).

The office was occupied so Hobson and Schoch had to wait for it to clear. Hobson waited calmly for a few minutes. (Id. at 81). He then ran out of the "buggy door" where shopping carts are pushed into the store and into the parking lot. (Id. at 76). Schoch pursued and tackled Hobson. As the two fell to the asphalt Schoch's ankle was broken. When they hit the ground Schoch was on the bottom, facing up and Hobson was on top of Schoch, also facing up. (Id. at 83). They rolled around and at one point Schoch was on top and Hobson was face down. By all accounts Hobson was trying to get away from Schoch. (Id. at 86). Hobson never used any other physical force against Officer Schoch other that attempting to get away.

The two did not struggle for long. One of the security guards intervened and placed handcuffs on Hobson. (Id. at 84). Hobson was charged with First Degree Robbery, Receiving Stolen Property, Giving an Officer a False Name, and with being a Persistent Felony Offender. At the preliminary hearing, the district court found no probable cause for the First Degree Robbery charge, but found probable cause on charges of Assault, Third Degree and Fleeing and Evading Police, First Degree. (TE 19) The grand jury, however, returned an indictment for First-Degree Robbery, Receiving Stolen Property, and Giving an Officer a False Name. At trial Hobson only presented a defense to the First Degree Robbery charge. Hobson was convicted on all counts and sentenced to a total of ten (10) years.

Hobson appealed, arguing that the Commonwealth had failed to prove all the elements of First Degree Robbery as any force used on Office Schoch was after he had abandoned the merchandise at the cash register. The Court of Appeals affirmed his conviction.

ARGUMENT

I. The holding of Williams and the above styled case is in conflict with the plain language of KRS 515.020. Hobson's actions did not meet the elements necessary for first degree robbery as defined by the statute; thus a directed verdict is warranted.

Kentucky's first degree robbery statute 515.020 states in relevant part:

> 1) A person is guilty of robbery in the first degree when, *in the course of committing theft*, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he:
> (a) Causes physical injury to any person who is not a participant in the crime...

As this court ruled in *Morgan v. Commonwealth*, 730 S.W.2d 935 (Ky. 1987), robbery is a combination of two crimes, theft and assault. In order to prove robbery, there must be sufficient proof that the perpetrator used force "with the intent to accomplish the theft." However, the Court of Appeals held otherwise, and expanded the definition of robbery, in *Williams v. Commonwealth*, 639 S.W.2d 786 (Ky. App. 1982) which this Court adopted in *Mack v. Commonwealth*, 136 S.W.3d 434 (Ky. 2004). According to *Williams*, "in the course of committing theft" includes the "escape stage." The *Williams* court held that "escape stage" means "all steps or events in the process of escape which would fall within the active or continuous pursuit of the criminal actor." *Williams*, 639 S.W.2d at 788.

At common law, robbery required the taking of property by force and the force had to precede or accompany the taking. *Williams*, 639 S.W.2d at 787. When Kentucky adopted the Penal Code the legislature included a requirement that the force be used with the intent to accomplish the theft. KRS 515.020(1). On its face, the statute does not extend the common law rule to the extent the *Williams* court and the Court below extend it.

In drafting the Kentucky Penal Code the legislature largely adopted the Model Penal Code. The Model Penal Code explicitly includes the use of force solely to escape from an attempted theft in its definition of robbery. MODEL PENAL CODE AND COMMENTARY §222.1 at 96 (1980). In the Commentary accompanying the Model Penal Code, its drafters noted that "in the course of committing a theft" includes the period in which the actual theft occurs and thus they added a definition to extend robbery to include conduct that occurs in flight. *Id.* at 99. In order to properly reflect the MPC's enlarged view of robbery, several states have specifically incorporated the use of force in the escape stage in their statutory definition of robbery.[1] By contrast, Kentucky's robbery statute *does not* have this definition.

Further, the MPC approach to robbery is not universally accepted. Oklahoma and South Dakota employ identical language which specifically excludes the escape stage by statute when the perpetrator has abandoned the property. "To constitute robbery, the force or fear must be employed either to obtain or retain possession of the property, or to prevent or overcome resistance to the taking. If employed merely as a means of escape, it does not constitute robbery." OK ST T. 21. § 793; SDCL § 22-30-2. Likewise, North Carolina's Statute specifically punishes "robbery as defined at common law." N.C.G.S.A. § 14.87-1. Many other states' robbery statutes require the force be used in "carrying away" the

[1] Appellant has included the statutes embracing the MPC definition of robbery in Appendix 3, with the relevant language highlighted.

property. *See, e.g.*, WIS. STAT. ANN 943.32, M.G.L.A. 277 § 39 (Mass.); ME ST. T. 17-A, p. 2; "Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking;" RCWA 9A.56.190 (Wash.).

Conduct is not a criminal offense unless a statute makes it a criminal offense, KRS 500.020, and ambiguous penal statutes are to be strictly construed against the state. *United States v. Granderson*, 511 U.S. 39, 114 S.Ct. 1259, 1267 (1994). K.R.S. 500.030 mandates that "All provisions of this code shall be liberally construed according to the fair import of their terms..." In divining the "fair import" of the term "in the course of" a majority of states have held that a robbery charge is not applicable to force used in the "escape stage" unless specifically provided by statute. *Dixon v. State*, 673 A.2d 1220, 1226 (Del. 1996).

For example, in *Dixon, supra*, the appellant, like Mr. Hobson, abandoned the items he was attempting to steal as soon as he was discovered. *Id.* at 1223. A struggle ensued when he attempted to flee. *Id.* Like Hobson, Dixon was convicted of First Degree Robbery, 11 Del.C. § 832, which applies when a person "commits the crime of robbery in the second degree ..." in combination with certain aggravating factors. The statute proscribing robbery in the second degree provides that:

A person is guilty of robbery in the second degree when, *in the course of committing theft*, to:

(1) *Prevent or overcome resistance to the taking of the property or the person uses or threatens the immediate use of force upon another person with intent to the retention thereof* immediately after the taking; or

(2) Compel the owner of the property or another person to deliver up the property or to engage in other conduct which aids in the commission of the theft.

Id. at 1225, (emphasis in original).

Like Mr. Hobson, Dixon only used force in his failed attempt to escape after he was pursued by the intended theft victims. *Id.* Since Dixon was no longer in possession of the property, the force could not have been used in the "course of committing theft" to "overcome resistance to the taking or the retention" of the property. *Id.*

In *Dixon*, the state echoed the argument adopted by the *Williams* court and promoted by the Commonwealth in the instant case-that the phrase "in the course of committing theft" in Delaware's second degree robbery statute evidences an intent to include escape, without the property, within the coverage of the statute. *Id.* at 1227. However, the Delaware statute did not specifically define the phrase "in the course of committing theft." *Id.* The Commentary to the Delaware Criminal Code merely requires a "causal connection between the use or threat of force and the theft...." *Id.* Similar to Kentucky, the Delaware statute also does not explicitly include escape within its coverage. *Id.* Thus, the Court held that "Dixon had abandoned the property before employing force.

The use of force, therefore, had no causal connection with a theft. Under these facts, the conviction for robbery under the Delaware statute was improper." *Id.*

The Court noted that if the Delaware General Assembly had adopted the MPC formulation, the State would have a convincing argument. *Id.* Because the Delaware statute contains a different formulation, it was for the General Assembly, not the courts, to define the elements of a criminal offense.

Likewise, Tennessee rejected the MPC approach to robbery in favor of the common law definition. *State v. Owens*, 20 S.W.3d 634 (Tenn. 2000). Owens grabbed clothing from a store and left without paying. *Id.* at 636. He was pursued by two employees; when they closed in, he dropped the stolen items and brandished a box cutter. *Id.* Owens walked away from the altercation, but he was later apprehended and convicted of robbery. *Id.* The Court sought to determine the requisite temporal relationship between a taking and the use of violence or fear as they constitute the offense of robbery under the criminal code. *Id.* They noted that the element which distinguishes robbery from theft was the use of violence or fear to gain control over another's property. *Id.* at 638. Further, they noted while several states had adopted the "continuous attempt theory," which punishes force used to facilitate escape, the majority of those did so due to "statutes which specifically define robbery to include the use of force to retain property or to escape." *Id.*

As Tennessee's statue lacks this specific language, the Court held that "we must not unduly restrict or expand a statute's coverage beyond its intended scope." *Id.* at 640, [internal citations omitted]. Instead, they would ascertain a statute's purpose from the plain and ordinary language without forced or subtle construction that limits or extends the meaning of the language. *Id.* The Court reversed Owens' conviction, embracing the common law view that "the act of violence or putting a person in fear must precede or be concomitant to or contemporaneous with the taking of property to constitute robbery." *Id* .at 637.

Similarly, Missouri declined to punish conduct similar to Hobson's under the robbery statute. *State v. Kelly*, 43 S.W.3d 343 (Mo. App. W.D. 2001). Mr. Kelly gathered a pile of clothing from a store and walked out without paying for it. *Id.* at 349. When he was confronted by a loss prevention agent in the parking lot, he dropped the clothes and ran. *Id.* When the agent attempted to block him from fleeing in his car, he threatened her with a gun. *Id.* The Court reversed his conviction, since Kelly did not use or threaten force in order to retain the property. *Id.* Alaska rejected the notion that force used to escape rather than retain property could be punished as robbery. *Beatty v. State*, 52 P.3d 752 (Alaska App. 2002). The *Beatty* court held that a completed robbery required the use of force or the threat of force to take property from the victim. *Id.* at 756. If a defendant uses or threatens force to accomplish a taking, the offense is robbery regardless of whether the defendant is

successful or not. *Id.* However, if the crime is foiled before the defendant uses or threatens force, it is, at best, an attempted robbery. *Id.*

Michigan has abandoned the construction of robbery cited in KRS 515.020

Likewise, the Michigan Criminal Code is instructive in this case. The Kentucky Commentary to 515.020 notes that the phrase "in the course of committing theft" expanded the scope of the robbery to allow a conviction for an incomplete theft, citing the Michigan Code's rationale for enlarging the offense:

> The present approach is that unless property is actually taken from the person or presence of the victim, there is no robbery. This emphasizes the property aspects of the crime and treats it as an aggravated form of theft. If, however, one is primarily concerned about the physical danger or appearances of physical danger to the citizen, and his inability to protect himself against sudden onslaughts against his person or property, then the actual taking of property diminishes in importance.... **For this reason, [the revision utilizes] the Model Penal Code language of "in the course of committing theft" which extends from the attempt stage through the phase of flight. Michigan Revised Criminal Code § 3310, Commentary at 257 (1967).**
> *Id.*

However, Michigan has since rejected the notion that inclusion of the phrase "in the course of committing a larceny," by itself, made force used in the escape stage of a theft punishable as robbery. In *People v.*

Randolph, 648 N.W.2d 164, 172 (Mich. 2002), the defendant walked out of a Meijer store with stolen items. He did not use force until a guard tried to restrain him in the parking lot. *Id.* Thus, Randolph's use of force was not to take property, but retain it and escape apprehension. *Id.* The Court acknowledged that several states have rejected the common law approach in favor of the MPC "continuous offense theory." *Id.* at 171. However, they noted most of those states explicitly defined "in the course of" to include either "escape," "flight," retention," or "subsequent to the taking." *Id.*; see also *Morgan v. State*, 703 S.W.2d 339, 340-41 (Tex. App. 5 Dist., 1985) (violence used or threatened "in the course of committing theft" is defined in Section 29.01 to include violence accompanying an escape immediately subsequent to a completed or attempted theft.) And in other jurisdictions using the continuous approach, the statutes specifically include the expressions "resisting apprehension," "facilitate escape," "fleeing immediately after," or used to "retain possession." *Id.* Thus, the Court was left with no "satisfactory explanation of why the use of force that does not accomplish a taking would escalate the crime of larceny to unarmed robbery." *Id.* at 173. As such, Randolph's robbery conviction was reversed.

Thus, in 2004, the Michigan legislature amended the statute to explicitly reflect the MPC approach to robbery. Michigan's amended robbery statute provides that "As used in this section, "in the course of committing a larceny" includes acts that occur in an attempt to commit

the larceny, or during commission of the larceny, *or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property."* M.C.L.A. 750.530 [emphasis added].

Kentucky has not adopted the Model Penal Code's expansive definition of robbery.

California, for one, has acknowledged that their definition of robbery is far less expansive than the Model Penal Code. *People v. Nguyen*, 14 P.3d 221 (Cal. 2000). Unlike the State of New Jersey, California has not adopted the Model Penal Code definition of robbery, which broadens the common law definition of robbery. *Id.* at 226. California's highest court took no position on which of these differing approaches was preferable. "Our Legislature has adopted the traditional approach, as reflected in the language of section 211." *Id.* Thus, the court recognized it was the job of the Legislature to amend the statute to conform with the Model Penal Code if they determined that approach was desirable. *Id.*

Conclusion

In *Chestnut v. Commonwealth*, this Court held that it did not consider changing settled law with a cavalier attitude. 250 S.W.3d 295 (Ky. 2008). "However, we do not feel that the doctrine compels us to unquestioningly follow prior decisions when this Court finds itself otherwise compelled. The doctrine of stare decisis, like almost every other legal rule, is not without its exceptions. *Id.* at 295-96. It does not

apply to a case like Mr. Hobson's "where it can be shown that the law has been misunderstood or misapplied, or where the former determination is evidently contrary to reason." *Id.* Thus, while respect for the doctrine guides this Court, it does not demand that this Court be precluded from change. *Id.*

The "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). Hobson's conviction for conduct that is not criminalized by statute is a violation of the rule of lenity and Hobson's due process rights under the Sixth and Fourteenth Amendments to the United States Constitution and Sections Two and Eleven of the Kentucky Constitution. Reversal is warranted.

II. Hobson was entitled to a directed verdict because his pursuit of a theft had been interrupted, creating a clear division between the attempted theft and attempted escape.

Even if the escape stage is "in the course of" a theft, the Court of Appeals erred when it found that "the fact that the force was used sometime after and some distance from the taking is only incidental." (Opinion, 2006-CA-582, p. 6). According to the Opinion Affirming:

> In the case herein, Hobson attempted to commit theft by purchasing goods with stolen credit cards. He then agreed to follow Officer Schoch to the loss prevention room, while maintaining that he had permission to use the stolen credit cards and continuing to conceal his true identity. Just a few minutes later, Officer Schoch

> broke his ankle while apprehending Hobson. This brief period between the attempted theft and the injury to Officer Schoch cannot be construed as sufficient to constitute two separate events. As stated in *Williams*, "[t]he fact that force was used sometime after and some distance from the taking is only incidental. The force used was in the course of committing the theft because it happened during the escape stage." Id. (Emphasis in original).
> Hobson tries to distinguish *Williams*, by claiming that when he started his escape, he was no longer in possession of any of the stolen objects. That may be true. However, Hobson's attempt to distinguish Williams is flawed. Hobson began his attempt to avoid apprehension when he lied to Officer Schoch about having permission to use the credit cards. Because of this, we agree with the Commonwealth that the escape stage for Hobson did not start when he ran through the "buggy" door, as he claims, but rather started when he attempted to avoid being detained, by claiming to have permission to use the stolen items. *Id.* at 5-6.

The Court of Appeals held that the escape stage began when Hobson told Officer Schoch that he had permission to use Stamper's credit card. (Opinion, 5). At this point he was no longer in possession of any of the items he attempted to purchase. They were left at the cash register.

Even among the states adopting the MPC's enlarged view of robbery- Alabama, Arkansas, Delaware, New Hampshire, New Jersey and Delaware- explicitly require the use of force in "immediate" flight from the theft or attempted theft.

In *State v. Harney*, 51 P.3d 519, 535 (Mo. App. W.D. 2001), the Court explained this requirement of proximity. The "limitation is, of

course, reasonable and logical in that otherwise, although days, weeks, months, and even years might pass after the initial theft before physical force is used in an attempt to retain the stolen property, a charge of robbery would lie. This would defy any commonly-held notion of robbery." *Id.* Common sense dictates that an aggravating circumstance must be reasonably proximate in time to the underlying act that it aggravates.

Conclusion

Hobson agreed to go with police officer Schoch and the manager. Any active or continuous pursuit of the theft was interrupted by being detained by a police officer. Thus, the decision of the Court of Appeals was erroneous. The robbery statute includes a specific intent requirement that the force be used to accomplish the theft. KRS 515.020. The theft could not be accomplished once Hobson abandoned the merchandise and went to the office with the police officer. This case is distinguishable from *Williams, supra,* because the there was a series of events separating Hobson's attempts to obtain the merchandise and his attempt to escape punishment.

In short, this Court should reverse the Court of Appeals because Kentucky's legislature has not adopted the MPC definition of robbery, and the Court of Appeals' Opinion conflicts with the plain language of KRS 515.020. The Court should also reverse the Court of Appeals

because the use of force here did not occur during Hobson's "immediate" flight.

Hobson's conviction for conduct that is not criminalized by statute is a violation of Hobson's due process rights under the Sixth and Fourteenth Amendments to the United States Constitution and Sections Two and Eleven of the Kentucky Constitution. Reversal is warranted.

Respectfully Submitted,

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