

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

FILED

MAY 08 2009

SUPREME COURT CLERK

TERRY GLENN HOBSON

APPELLANT

VS.

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

COMMONWEALTH OF KENTUCKY

APPELLEE

REPLY BRIEF FOR APPELLANT, TERRY GLENN HOBSON

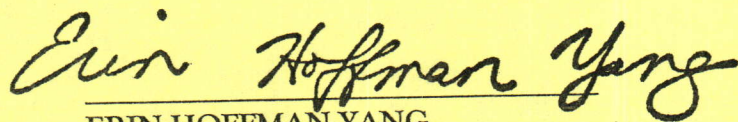
Submitted by

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply 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 7th day of May 2009. I also certify that the record on appeal was not checked out for the purpose of this Reply Brief.



ERIN HOFFMAN YANG

PURPOSE OF REPLY BRIEF

The purpose of this reply brief is to respond to arguments set forth in Appellee's brief. Any issue not specifically addressed herein should not be construed as an adoption of or concession to Appellee's position. Rather, Mr. Hobson believes his original brief has sufficiently and correctly addressed the matter.

STATEMENT REGARDING 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.

Williams conflicts 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.

The Appellee's Brief Fails to Address Mr. Hobson's Argument on the Merits

The Commonwealth ignores the fact that other states which adopted the "continuous attempt theory" which punishes force used to facilitate escape, did so because their state criminal laws "specifically define robbery to include the use of force to retain property or to escape." See, *State v. Owens*, 20 S.W.3d 634, 638 (Tenn. 2000). Instead, the Commonwealth urges this Court to assume the legislators' intent to include the escape stage was "relatively obvious." (Appellee's Brief AB, at 6.)

Mr. Hobson explained that the Commentary to KRS 551.020 follows Michigan law, which states “in the course of committing a theft” includes the escape stage-law *Michigan no longers considers valid*. See, *People v. Randolph*, 648 N.W.2d 164, 172 (Mich. 2002). The Michigan Supreme Court acknowledged that several states have rejected the common law approach in favor of the MPC “continuous offense theory.” *Id.* at 171. However, it 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). 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” under the current statutory scheme. *Id.* at 173. The Court of Appeals’ holding in *Williams v. Commonwealth*, 639 S.W.2d 786 (Ky. App. 1982) is based on an incorrect, outdated interpretation of the law.

Regardless, conduct is not a criminal offense unless a statute makes it a criminal offense, KRS 500.020. 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). The Commonwealth implicitly conceded that the statute is ambiguous when it argued that its meaning is “relatively obvious.”

The term “relatively” is defined as “to a relative degree or somewhat. See <http://www.merriam-webster.com/dictionary/relatively>.

A statute that only makes it "somewhat" clear what actions are punishable must be construed against the state. *Granderson, supra*. The rule of lenity requires any ambiguity in a statute be resolved in favor of a criminal defendant. *White v. Commonwealth*, 178 S.W.3d 470, 484 (Ky.2005).

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

Mr. Hobson disagrees with the Commonwealth's allegation that he "failed to fully explain that at the time (he was being led to the loss prevention room), he was continuing with his ruse to accomplish the crime of or at least his escape" (AB at p. 9) and that he "never fully relinquished control of the stolen goods (AB p. 10).

In fact, Hobson apparently left the goods and stolen contents of Stamper's wallet at the cash register. There is simply no evidence to suggest that Hobson was scheming to retain the merchandise-he simply wanted to stay out of trouble. There was a sufficient lapse of time to distinguish the attempted theft from the escape.

Even among the states adopting the MPC's enlarged view of robbery- Alabama, Arkansas, Delaware, New Hampshire, New Jersey and Delaware- those statutes 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 the 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

Based on the foregoing, this Court should overturn *Williams*, and vacate Mr. Hobson’s conviction for first degree robbery.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Erin Hoffman Yang". The signature is written in black ink and is positioned to the left of a horizontal line.

Erin Hoffman Yang
Counsel for the Appellant