Commonwealth of Kentucky
Supreme Court
No. 2007-SC-645

TERRY GLENN HOBSON — **APPELLANT**

On Discretionary Review from Court of Appeals 06-CA-582
Appeal from Boyd Circuit Court
Hon. C. David Hagerman, Judge
Indictment No. 05-CR-241

v.

COMMONWEALTH OF KENTUCKY — **APPELLEE**

Brief for Commonwealth

Submitted by,

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CERTIFICATE OF SERVICE

I certify that the record on appeal has been returned to the Clerk of this Court and that a copy of the Brief for Commonwealth has been delivered, via U.S. Mail, postage prepaid, to the Hon. C. David Hagerman, Judge, Boyd Circuit Court Courthouse, 2800 Louisa Street, Post Office Box 417, Catlettsburg, Kentucky 41129-0417;via messenger mail to the Hon. Erin Hoffman Yang, Department of Public advocacy, 100 Fair Oaks Lane, Suite 302, Frankfort, Kentucky 40601, *counsel for appellant,* and via electronic mail to the Hon. J. Stewart Schneider, Commonwealth's Attorney, 2901 Louisa Street, Catlettsburg, Kentucky 41129 on this 24th day of April 2009.

Wm. Robert Long, Jr.
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INTRODUCTION

The Boyd Circuit Court convicted Terry Glenn Hobson (hereinafter referred to as "appellant") of Robbery, First Degree, Receiving Stolen Property under $300.00 and Giving a Peace Officer a False Name, then sentenced him to ten (10) years imprisonment. The Court of Appeals, following prior precedent, properly found that the Robbery includes the escape stage and affirmed appellant's convictions.

STATEMENT REGARDING ORAL ARGUMENT

The Commonwealth does not believe oral argument will be necessary in this matter.

RECORD ON APPEAL

The record on appeal consists of one (1) volume of transcript of trial (referred to a TE); and two (2) volumes of court records (referred to as TR I and TR II)

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

On July 11, 2005, the appellant stole multiple items from Rod Stamper's pick-up truck, including credit cards, attempted to use Mr Stamper's credit cards at Wal-Mart, then injured an officer during his attempted escape. For these actions a Boyd County Grand Jury indicted the appellant for First Degree Robbery; Receiving Stolen Property under $300; Giving Peace Officer a False Name or Address; and First Degree Persistent Felony Offender. (TR I at 8-11). Following trial, a jury returned a guilty verdict on all counts except for the PFO charge. (Id. at 36-39). The court sentenced the appellant to a total of ten (10) years imprisonment. (Id).

On the evening of July 11, 2005, the appellant entered a Boyd County Wal-Mart wearing clothes stolen from Mr. Stamper's truck. (TE at 106). Using one Mr. Stamper's stolen credit cards, the appellant presented items for purchase at the Wal-Mart. (TE at 74). Fortunately, the cashiers has been made aware of the theft and were looking out for the stolen credit cards. (TE at 72). As such, when the cashier noticed the appellant attempting to purchase the goods with one of the stolen credit cards, she stalled. (TE at 72; 74). By chance, Officer J.R. Schoch of the Ashland Police Department was at the Wal-Mart on another criminal matter. (TE at 110). The officer accompanied a store manager to the cash register and asked the appellant his name. (TE at 74; 111).

The appellant gave the name of Rod Stamper as his own and voluntarily produced the victim's identification. Given that the appellant did no look anything lie the photo on Mr. Stamper's I.D., the officer became suspicious an informed the appellant that is was illegal to provide a false name to an officer. (TE at 74, 97, 112-113). This prompted the appellant to concede that he was not Rod Stamper, Despite being caught in that lie, the

appellant persisted in his attempt to allude arrest by claiming he was Mr. Stamper's cousin and that he had been given permission to use the credit card and I.D. card he had presented. (TE 113). The officer then asked if they were to call his alleged "cousin" would he confirm the familial relationship and the permission to use the credit cards. (TE at 113). The appellant responded affirmatively and agreed to accompany the officer and a manager to the loss prevention room. (TE at 97,114). While walking to the room, the appellant demanded that the manager not to stand so close to him and became confrontational by raising in his voice and insisting that he did not do anything wrong. (TE at 98, 114, 115).

Before the three men could enter the loss prevention room, the appellant ran out the shopping-cart door and into the parking lot. (TE at 76, 115). The officer gave chase, and caught the appellant. (Id.) While the testimony varies as to if the appellant deliberately threw himself backwards onto the officer, it is undisputed that once the officer caught him, the men fell and the officer sustained a broken ankle. (TE at 116-117, 131). It is also undisputed that the appellant used force in an attempt to extricate himself from the officer's hold, and in doing so he reached for the officer's utility belt and, according to the officer, perhaps side-arm as well. (TE at 77, 91-92, 100, 116. 131). The appellant struggled to get free and continue his escape. (TE at 83, 86). Before the appellant could free himself or get the officer's weapon, mall security was on the scene and helped subdued the appellant. (TE at 77). Even after being arrested, the appellant acted aggressively. (TE at 163).

The appellant proceeded to trial. At trial, the Commonwealth called a number of witnesses including the principle actors. While the testimony varied in minor details, it

clearly established the pertinent facts above. After hearing all of the above mentioned evidence, the trial court's instructions and arguments of counsel, the jury retired to deliberate and thereafter returned a verdict finding the appellant guilty of First Degree Robbery; Receiving Stolen Property under $300; Giving Peace Officer a False Name or Address. (TR I at 36-38; 65-68). Thereafter, in the sentencing phase of the trial, the parties were given the opportunity to present additional evidence and make arguments with regard to sentence. Having considered the additional evidence and arguments, the jury found the appellant not to be a persistent felony offender in the first degree and recommended the appellant be sentenced to a total of ten years imprisonment. (TR I at 39-42; 68-68). On February 27, 2006, the trial court entered its Final Judgment/Sentence of Imprisonment in which it formally convicted and sentenced the appellant in accordance with the jury's verdicts and sentence recommendation. (TR I at 79-81).

Thereafter, the appellant appealed his convictions to the Kentucky Court of Appeals. On August 17, 2007, the Court of Appeals rendered a unanimous decision affirming appellant's convictions and sentence. Appellant sought discretionary review, which was granted by this Court on August 13, 2008. Additional facts may be developed as needed to support the argument below.

ARGUMENT

The appellant argues that the trial court erred by denying his motion for a directed verdict of acquittal. In support of this claim the appellant makes two alternative arguments. First, appellant argues that the plain language of KRS 515.020 does not encompass the "escape stage" as part of a robbery. Thus, appellant contends that the contrary holding of the Court of Appeals in Williams v. Commonwealth, 639 S.W.2d 786

(Ky. App. 1982), and adopted by this Court in Mack v. Commonwealth, 136 S.W.3d 434 (Ky. 2004) are wrong and must be overruled. (See Appellant's Brief at 3-4). Second, the appellant contends that even if the "escape stage" is properly considered part of the robbery under KRS 515.020, there was a sufficient division between the attempted theft and the escape so as to constitute two separate offenses. (See Appellant's Brief at 13). However, the language of KRS 515.020 was clearly broadened for the express purpose of including the escape stage as part of a robbery. Thus, appellant's first claim of error must fail. Further, the Commonwealth's evidence as to the first degree robbery charge was clear and the testimony at trial showed that the appellant employed a ruse in order to create an opportunity to escape. Since that escape occurred in the course of an attempted theft, the trial court and the Court of Appeals properly found that appellant's motion for a directed verdict could not be sustained.

I.

THE EXPRESS LANGUAGE OF KRS 515.020 IS BROAD ENOUGH TO INCLUDE THE ESCAPE STAGE AND IT IS CLEAR THAT THE LEGISLATURE'S INTENT IN MODIFYING THE LANGUAGE OF THAT STATUTE WAS SEE THAT THE ESCAPE STAGE BECAME PART OF THE OFFENSE OF ROBBERY.

In relevant part KRS 515.020 states that, "[a] person is guilty of Robbery in the first degree when, in the course of committing a 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." The offense is predicated on the use of force or injury in the course of committing the theft and this encompasses the escape stage which means all steps or events in the process of

escape which would fall within the active or continuous pursuit of the accused. Williams v. Commonwealth, 639 S.W.2d 786 (Ky. App. 1982).

In Williams the Kentucky Court of Appeals discussed whether "in the course of committing theft," was intended to expand the scope of the robbery statute to include the escape stage. The Court in Williams recognized the modern statute expanded the offense of robbery to be a crime against a person, not property. The force element may occur "sometime after and some distance from the taking . . ." Id. at 788. Further, the official commentary accompanying KRS 515.020 and KRS 515.030 (Robbery in the Second degree) provides that, ". . .KRS 515.030 makes an important change in the traditional robbery offense. **This change results from the language, "in the course of committing theft," which is intended to expand the scope of robbery to permit a conviction even though the theft was incomplete.**" The purpose of this expansion was to emphasize that robbery was to be considered an offense against the person and to create greater protection for individuals. Id. Thus, the Court of Appeals decision in Williams not only fit with the plain language of the robbery statutes, but also followed the commentary prepared by the Legislative Research Commission (LRC) explaining the meaning a purpose of the phrase, "in the course of committing theft."

The Model Penal Code illustrates the broad nature of the phrases used in the Kentucky Robbery Statute. The Model Penal Code at section 222.1 explicitly states that the phrase "in the course of committing a theft" includes an attempt to commit theft or in flight after the attempt or commission. MPC §222.1(1). The broad nature of this definition of robbery will encompass an unsuccessful theft combined with an injury inflicted upon fleeing. Since the Kentucky Legislature included such broad language in

the statute, and given explanation for the use of that broad language in the commentary prepared by LRC, it is relatively obvious that the legislature intended that the offense of robbery would include the escape stage of the crime. The broad intent of the language used in the robbery statute is also evidenced by the well reasoned opinions of both the Court of Appeals Williams, supra, and this Court in Mack v. Commonwealth, 136 S.W.3d 434, 437 (Ky.,2004).

The appellant now requests that Kentucky take a leap backward and restrict the scope of the offense of robbery. It is simply unwarranted. In Mack v. Commonwealth, 136 S.W.3d 434, 437 (Ky.,2004), this Court rejected a similar argument holding in accord with the Court of Appeal's decision in Williams that, "a use or threat of force during escape from a completed or attempted theft will ... satisfy the requirement [of "in the course of committing theft"] and support a conviction." Id. at 437; quoting Robert G. Lawson & William H. Fortune, *Kentucky Criminal Law,* § 13-7(b)(2) (LEXIS, 1998). It has been long settled in Kentucky that since the modification of Kentucky's robbery statutes in 1974, "in the course of committing theft" includes the escape or fleeing stage. Thus, appellant's arguments must fail and this Court should affirm his convictions and the opinion rendered by the Court of Appeals.

II.

THE TRIAL COURT PROPERLY OVERRULED APPELLANT'S MOTION FOR DIRECTED VERDICT.

The appellant maintains that even if the escape stage is encompassed by Kentucky's robbery statute, the force used by the appellant during his attempted escape

was removed enough from the attempted theft so as to constitute two separate offenses (i.e. simple theft and/or fleeing or evading). However, it is evident that appellant use of a ruse to create an opportunity to flee was not sufficient to distance his escape from the attempted theft. Thus, the trial court and the Court of Appeals properly held that the appellant was not entitled to a directed verdict.

The standard for determining whether or not a directed verdict is warranted was stated by the Kentucky Supreme Court in Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991):

> On a motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purposes of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.
>
> On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

Beaty v. Commonwealth, 125 S.W.3d 196, 203 (Ky. 2003); Holland v. Commonwealth, 114 S.W.3d 792, 808-809 (Ky. 2003); Estep v. Commonwealth, 957 S.W.2d 191, 193 (Ky. 1997). Under the evidence as a whole, it was clearly reasonable for the trial court to find appellant guilty of robbery, first degree.

When ruling on a motion for a directed verdict of acquittal, the trial court is required to take all the evidence in the light most favorable to the Commonwealth.

Dishman v. Commonwealth, 906 S.W.2d 335 (Ky. 1995); Benham, supra. The trial court is required to assume that all the evidence presented by the Commonwealth is true. Baker v. Commonwealth, 973 S.W.2d 54 (Ky. 1998); Benham, supra. Furthermore, the trial court is required to "consider not only the actual evidence, but also must draw all *fair and reasonable inferences* from the evidence in favor of the Commonwealth." (Emphasis original.) Lawson v. Commonwealth, 53 S.W.3d 534, 548 (Ky. 2001).

Thereafter, on appeal, the standard is whether is was clearly unreasonable for the fact-finder to have found guilt. Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983); Benham, supra. This appellate standard is even more deferential. Sawhill, supra at 5. Furthermore, "[t]he reviewing court does not have the authority to consider matters on appeal *de novo*. The court acting as an appellate court cannot reevaluate the evidence or substitute its judgment as to credibility of a witness for that of the trial court and the jury." Commonwealth v. Jones, 880 S.W.2d 544, 545 (Ky. 1994). See also: Bussell v. Commonwealth, 882 S.W.2d 111, 114 (Ky. 1994) ("A reviewing Court does not have to re-evaluate the proof because its only function is to consider the decision of the trial judge in light of the evidence presented at trial.") As observed by the United States Supreme Court in Jackson v. Virginia, 443 U.S. 307 (1979):

> the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements beyond a reasonable doubt.

Also as noted in Smith, 645 S.W.2d at 709:

> The combination of circumstances all of which fit the appellant in some measure, when considered as a whole renders the possibility of appellant's innocence so unlikely that we cannot say as a matter of law that it would be

clearly unreasonable for a jury to find the appellant guilty.

Taking the evidence as a whole, in the light most favorable to the Commonwealth, assuming it to be true and drawing all fair and reasonable inferences in favor of the Commonwealth, it was not clearly unreasonable for the trial court to have found appellant guilty of robbery first degree. Benham, supra. Appellant's argument to the contrary lacks substance.

While the appellant attempts to establish that the criminal acts ended when he was being led to the loss prevention room, he has failed to fully explain that at that time he was continuing with his ruse to accomplish the crime or at least his escape. By lying to the officer, the appellant laid a scheme or plan to effect an escape by buying time. In other words, he was continuing with his course of action. The appellant never gave up, never changed his story, and continued to maintain that Stamper was his cousin who gave him permission to use the credit cards. Presumably, the appellant believed he still maintained some avenue of accomplishing the criminal act. The appellant's use of force in attempt to flee also demonstrates that he never gave up his continuing plan of action. Even after being apprehended, the appellant still acted belligerently as well. The fact that the appellant was not successful in that act does not have any bearing on the offense of first degree robbery.

Kentucky requires that the fact finder examine the entire criminal episode rather than the single act itself in making a determination of which offense was committed. Bowling v. Commonwealth, 942 S.W.2d 293 (Ky. 1997). It is the criminal episode, not the single acts which define the offense. Thus, robbery may occur after a murder. See Bowling v. Commonwealth. In this instance, the appellant was on a one

man crime spree starting with the theft of items from Stamper's truck to the robbery at Wal-Mart. The crime spree finally ended when the officer finally subdued the appellant after the struggle.

The appellant cannot argue that the fact finder did not have sufficient grounds to find he used force in the course of his theft. As the Commonwealth argued at the trial court, the statute does not require that the force be used against the victim of the robbery, but merely be used to accomplish the theft, which includes escape. Since "theft" includes the escape, then the use of force during the escape means that the force was used during the theft. Since force was used during the theft, the jury could conclude the appellant was guilty of robbery, first degree.

The elements not included in the statute also show how the legislature intended to broaden the definition of robbery to include the acts of the appellant. Notice that the Kentucky statute does not require a successful theft or even specific intent to cause a physical injury. The statute merely requires that an injury occur. By removing intent from the injury requirement, the statute shows that as long as an injury results, then the offense will be considered robbery. The statute does not require that the theft be successful either, so it does not require a completion of the predicate offense of theft by unlawful taking in order to be defined as robbery.

The appellant focuses on the lapse of time to show that the course of conduct ended, or at least was interrupted, and became a new course of conduct. However, the appellant at that time never fully relinquished control of the stolen goods, claimed he had rightful possession of them, and he never surrendered or ended the course of theft. The mere investigation of the appellant did not end the conduct because the

appellant was continuing the action by using a ruse that his cousin gave him the credit cards. Thus a reasonable jury could conclude the appellant was guilty of robbery, first degree.

CONCLUSION

For the reasons stated herein, the opinion of the Court of Appeals and the convictions of the Boyd Circuit Court must be AFFIRMED.

Respectfully submitted,

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