IN THE SUPREME COURT OF FLORIDA

EDWARD BEN, :

Petitioner, :

vs. :

STATE OF FLORIDA, :

Respondent. :

:

Case No. 66,483

PETITIONER'S BRIEF ON MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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CITATION OF AUTHORITIES

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PRELIMINARY STATEMENT

Petitioner, Edward Ben, was the Appellant in the Second District Court of Appeal and the defendant in the trial court. Respondent, the State of Florida, was the Appellee in the Second District Court of Appeal. The record on appeal, which was utilized on the District Court level and is contained in one volume, will be referred to be the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE

On September 15, 1982, the State Attorney in and for the Sixth Judicial Circuit, Pinellas County, Florida, filed an information which it amended on the day of trial charging the Appellant, Edward Ben, with Robbery occurring on August 24, 1982, contrary to Florida Statute 812.13(2)(c) (R2,123-125). Mr. Ben was allowed to withdraw his previously entered guilty plea on December 12, 1983, and had a jury trial with the Honorable Susan Schaeffer, Circuit Judge, presiding on February 23, 1984 (R4,43).

On February 23, 1984, the jury deliberated and found Mr. Ben guilty as charged (R16,149,150). On March 1, 1984, Mr. Ben was sentenced to seven years of imprisonment with credit for three hundred forty-four days served (R22-25). Mr. Ben was declared a habitual offender and was sentenced in accordance with the guidelines (R21-27). Mr. Ben timely filed his Notice of Appeal on March 14, 1984 (R28).

On appeal Mr. Ben attacked the sufficiency of his conviction for Robbery inasmuch as no force was used until after the taking. The Second District Court of Appeals disagreed with Mr. Ben and followed the decision of the Fifth and Third District Court of Appeals [1]. in holding that a robbery occurs if force is used in order to escape.

STATEMENT OF THE FACTS

On August 24, 1982, Brad Holcomb was employed with Maas Brothers as a store security guard whose duties included watching out for shoplifters (R53). Mr. Holcomb worked in an undercover capacity, wearing blue jeans and a T-shirt in order to look like a customer (R53,54). On August 24, 1982, Mr. Holcomb observed Mr. Ben select several Ralph Lauren polo shirts and walk into the men's fitting room (R54-56). Mr. Holcomb selected some slacks from the rack and followed Mr. Ben into the fitting room in order to observe Mr. Ben (R56). Mr. Holcomb observed Mr. Ben stuff the T-shirts under his pants (R56). Mr. Ben then left the dressing room with one shirt in his hand and left the store (R57,58). During this time period, a female who had entered the store with Mr. Ben, waited in the men's department, glancing around the area (R53-58).

When both Mr. Ben and the female exited the store, Mr. Holcomb approached them, identified himself, and tried to talk with them (R58). At this time, the female went south and Mr. Ben ran towards the west (R58). Mr. Holcomb pursued Mr. Ben and was able to grab him (R50). Mr. Ben then punched Mr. Holcomb in the face and continued heading west (R58). Mr. Holcomb followed Mr. Ben again; and at this point a man named Henry Fultz came along and assisted MR. Holcomb in detaining Mr. Ben (R60,97-99). Mr. Fultz blocked Mr. Ben's path so that Mr. Holcomb could catch up

to Mr. Ben and detain him (R60,100). Upon being tackled a second time, Mr. Ben kicked Mr. Holcomb several times (R61,100,101).

Mr. Ben was able to break away a second time just as the female drove up in a car (R62,101). Both Mr. Holcomb and Mr. Fultz grabbed Mr. Ben and prevented Mr. Ben from getting inside the car (R62,101,102). At this time, Police Officer DeSantis drove up and the female took off (R62,102,108-110). Mr. Ben was then taken into custody (R62,63,110).

Police Officer Sahr removed the T-shirts from around the calves of both of Mr. Ben's legs, and these items were placed in an evidence locker in a back room of Maas Brothers (R63,113,114). Officer Sahr also took into custody a pair of booster socks from around Mr. Ben's legs (R114). Officer Sahr noted that these booster socks are used by professional shoplifters in which to stuff items and then conceal the socks with baggie pantlegs (R114,115).

It was noted that seven shirts were recovered from Mr. Ben, and each shirt had a retail selling price of thirty-one dollars (R64-66,78,79).

SUMMARY OF ARGUMENT

Mr. Ben argues that his case conflicts with prior Florida Supreme Court decisions as to what constitutes a robbery. According to prior Supreme Court cases, violence must precede the taking in order to constitute a robbery; and force used in an escape does not constitute a robbery. The Second District Court of Appeal's opinion in Mr. Ben's case finding that force used after the taking in order to escape constitutes a robbery conflicts with the existing Florida Supreme Court law.

Mr. Ben also argues that he could not be convicted of robbery in this case, because the security guard Mr. Ben was accused of robbing did not have lawful custody over the items taken.

ISSUE I

DID THE TRIAL COURT ERR IN NOT GRANTING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON HIS ROBBERY CHARGE WHEN NO FORCE WAS USED UNTIL AFTER THE TAKING?

After the state rested, Mr. Ben argued that a judgment of acquittal should be granted to the robbery charge inasmuch as the taking of the shirts was complete at the time Mr. Ben started to fight with Mr. Holcomb (R121,122,125-128). Thus, there had been no force in the actual taking. The trial court denied the motion and its renewal (R129,134).

A "robbery" is "the taking of money or other property which may be the subject of larceny from the person or custody of another by force, violence, assault, or putting in fear," 812.13(1), Florida Statutes (1981), whereas a "theft" occurs where a person "knowingly obtains or uses, or endeavors to obtain or use, the property of another with the intent to deprive the other person of a right to the property or a benefit therefrom." 812.014, Florida Statutes (1981). Thus, the distinction between the two offenses is the presence vel non of force used in the actual taking of the property or money.

> [T]he distinction between larceny and robbery is a nice one. The criterion which distinguishes these offenses is the violence which precedes the taking. There can be no robbery without violence, and there can be no larceny

> with it. It is violence that makes robbery an offense of greater atrocity then larceny. Robbery may thus be said to be a compound larceny composed of the crime of larceny from the person with the aggravation of force, actual or constructive, used in the taking. (citation omitted).
>
> An intent to steal is essential, so is violence or putting in fear. (citation omitted). The violence or intimidation must precede or be contemporaneous with the taking of the property.

Montsdoca v. State, 84 Fla. 82, 93 So. 157,159 (1922) (emphasis added).

Traditionally, where force occurs in an effort to escape apprehension after a theft has occurred or been attempted, the force constitutes a separate crime and the force cannot be used to make the theft a robbery. Colby v. State, 46 Fla. 122, 35 So. 189 (1903). In Colby the defendant was caught with his hand in his victim's pocket and struggled to escape. The Florida Supreme Court overturned the conviction for attempted robbery, stating:

> If the defendant struggled or clinched with Bousman in an effort to overpower him for the purpose of enabling him to secure the money in the pocket, there would be such force as the statute contemplates, but the force used merely in an effort to escape from the grasp of [the victim] or to avoid arrest would not be such force as is contemplated by the statute. We think the testimony shows clearly that the tussling or clinching spoken of by the witnesses occurred in an effort to escape from Bousman and to avoid arrest, and not in an effort to secure the

> property. The testimony does not, therefore, support the conviction for an attempt to rob. ...

Colby, id. at 190.

Recently, however, the Florida appellate courts have been erroneously interpreting s. 812.13 [2.] to create a robbery out of a theft and a subsequent assault or battery. This trend began innocently enough with the case of Andre .v State, 431 So.2d 1042 (Fla. 5th DCA 1983), where the Fifth District Court of Appeal affirmed a robbery conviction. The decision reflects that the defendant had "snatched money from the hand of the victim while in the process of discussing a drug deal." Id. at 1042, (emphasis added). The court correctly held that the act of "snatching" the money was force sufficient to constitute robbery pursuant to McCloud v. State, 335 So.2d 257 (Fla. 1976), but the court went on to state the following:

> The second reason appellant is wrong when he asserts the jury could not find him guilty of robbery is because the statutory definition of robbery includes not only the act of forcibly taking, but it also includes the use of force "in flight after... the commission."

Andre, supra at 1043 (emphasis added).

Petitioner respectfully submits that the court's "second reason" was but incorrect dicta. The reasoning was not necessary to correctly resolve the appeal. It is incorrect because the

term "in the course of committing" is NOT used to define the crime of robbery, but is instead used to establish the correct punishment for the amount of force used in the course of committing the robbery - not in the course of committing a theft.

In Stufflebean v. State, 436 So.2d 244 (Fla. 3d DCA 1983), the Third District Court of Appeal adopted the falty dicta from Andre over a strong dissent by Judge Baskin. Judge Baskin argued in part the following:

> The majority's interpretation of section 812.113(3) [sic] is misguided. The definition of robbery has not been changed by the legislature. An examination of the title of a bill offers guidance in the determination of legislative intent. Parker v. State, 406 So.2d 1089 (Fla. 1981). The title of the robbery statute, Chapter 74-383, Laws of Florida, describes the law as "An Act relating to the criminal law ... defining the crimes of and providing the penalties for robbery. ..." The common law definition of robbery, set forth in subsection (1) of section 812.13, has remained unchanged since the days of Blackstone. Subsection (2) provides the penalties for robbery. The title of the act establishes that these provisions are separate. Only subsections 2 and 3 contain the phrase "in the course of committing the robbery." Subsection 3 is clearly directed to the sentencing portion of the statute and not to the subsection which defines the crime of robbery; thus subsection 3 is not part of the definition. I therefore disagree with the majority that force used in an effort to flee from a larceny converts a larceny followed by an assault into robbery.

Stufflebean, supra at 247. Because the definition concerning flight after the robbery or its attempt only goes towards the penalties, it does not change the actual definition of robbery.

In Royal v. State, 452 So.2d 1098 (Fla. 5th DCA 1984)(En Banc), the Fifth District Court of Appeal expressly interpreted the "in the course of committing" phrase to allow the creation of a "Robbery" if force is used in the flight after commission of a theft. After a thorough analysis of the distinction between theft and robbery, Judge Cowart in a dissenting opinion concluded as follows:

> In short, I agree with Judge Natalie Baskin in the dissent in Stufflebean v. State, 436 So.2d 244 (Fla. 3d DCA 1983), that the force or fear required for robbery must be the means by which the taking of property is accomplished and that element of robbery is not established by "force or fear" occurring after a non-violent taking. Robbery was intended only to protect an owner from being intimidated by force or fear in having his property wrongfully taken from him or from his immediate presence and from the use or threat of violence to accomplish such a taking and was not intended for the purpose of enhancing the punishment for a non-violent taking (a completed larceny) when violence occurs only as the result of a courageous owner endeavoring to recover his property or apprehend the thief. The usual penalty for unlawful assaults and batteries occurring in these instances is sufficient without introducing the notion that a taking of property is not complete as long as its possession

> is in "continuing dispute" and distorting the established law relating to the distinctions between the offenses of theft and robbery.

Royal, supra at 1104.

As can be seen from the above well-reasoned dissents in Stufflebean and Royal, the principles enunciated by this Honorable Court in Colby and Montsdoca should still be applied. Citing from general legal authorities, Judge Baskin noted that Florida applies the "generally accepted rule" on the use of force to escape:

> "The force or intimidation must precede or be concomitant or contemporaneous with the taking. Hence, although the cases are not without conflict, the general rule does not permit a charge of robbery to be sustained merely by a showing of retention of property, or an attempt to escape, by force or putting in fear. The above doctrine has found frequent application where force or intimidation has been exercised after the property came into the defendant's hands through stealth. ..."
>
> 67 Am.Jr.2d Robbery, sec. 26 (1973). Thus, "subsequent force cannot relate back to the act of taking so as to be considered force accompanying the act, ... violence or intimidation subsequent to a taking by other means will not render the act robbery." 77 C.J.S., Robbery, sec. 11 (1952).

Stufflebean, supra at 247.

Even though other states have changed their laws to encompass acts of force in escape as part of robbery, Judge Baskin notes that Florida legislature has not undertaken a similar course:

> The statutes cited by the majority in advocating a new rule of law were enacted by the legislatures in other states; the Florida legislature, however, has not undertaken a similar course. The fact that other states have enlarged their robbery statutes to include those situations where force is used after the taking reinforces the position that Florida's more limited statute does not authorize Stufflebean's conviction for robbery. The legislature is empowered to define crimes; the court plays a different role. Unless an act clearly comes within the terms of the statute, it cannot be punished under the statute. Bradley v. State, 79 Fla. 651, 84 So. 667 (1920). Because I believe it is inappropriate for this court to legislate and because the courts of Florida have already reached a contrary conclusion, I must dissent. In my view the offense constituted a theft under Florida law. I would therefore reduce the conviction to theft.

Stufflebean, supra at 247.

In Mr. Ben's case, Mr. Ben already had obtained the merchandise and only used force to escape from Mr. Holcomb (R56-61). In fact, Mr. Ben and Mr. Holcomb were fifty yards from Maas Brothers when Mr. Holcomb first tackled Mr. Ben (R69,70). There was no force used in obtaining the property, but force was only used in an effort to escape. The definition of robbery under Florida Statute 812.13(1) still comports with the common law definition of robbery. There is no indicia of legislative intent that a robbery occurs when force is applied subsequent to

the taking. Thus, under Colby and Montsdoca, Mr. Ben should not have been convicted of robbery.

ISSUE II

DID THE TRIAL COURT ERR IN NOT GRANTING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL ON HIS ROBBERY CHARGE WHEN THE ALLEGED VICTIM DID NOT HAVE CUSTODY OVER THE ITEMS TAKEN?

During the trial Mr. Holcomb testified that he was employed at Maas Brothers as a store security guard to watch out for shoplifters (R53). When asked about having custody over the shirts taken by Mr. Ben, Mr. Holcomb stated that he was not the owner of the shirts nor did he ever have the shirts in his hands prior to the incident (R68). It was Cathy Cutlow, the Maas Brothers department manager for the men's sportswear department, who was responsible for the merchandise taken by Mr. Ben (R77). The information alleged that Mr. Holcomb had lawful custody of the shirts at the time of the taking by force (R2). When Mr. Ben argued that the State had failed to show Mr. Holcomb's lawful custody over the shirts, the State tried to cure the error by amending the information to state that the taking was to permanently deprive Holcomb or Maas Brothers of the property (R122-125,135). The amendment, however, failed to cure the real problem. Robbery requires the forceful taking from one in possession or custody of the property in question. The only force involved was between Mr. Holcomb and Mr. Ben (Mr. Ben was not alleged to have taken property from Maas Brothers by

assaulting Maas Brothers), and Mr. Holcomb did not have lawful custody over the items in question.

In Brown v. State, 413 So.2d 1273 (Fla. 1st DCA 1982), affirmed at 430 So.2d 446 (Fla. 1983), it was determined that two robbery convictions could be obtained when the defendant approached two different tellers and demanded money from their respective register drawers. Even though the money belonged to a single owner - the bank, the courts found that each teller had sole custody and responsibility for their individual registers. Because the taking by force was from two separate employees from two separate cash registers and one employee had no control over the other's register, it was determined that two different robberies had occurred.

In our case, Mr. Holcomb did not have control over or responsibility for the shirts in the men's sportswear department. Ms. Cutlow, as a clerk and department manager for that department, had the control and responsibility over the shirts taken by Mr. Ben. However, Ms. Cutlow was not assaulted or otherwise involved in the taking. Although Mr. Ben might have been guilty of battery on Mr. Holcomb, he did not rob Mr. Holcomb. The trial court erred in denying Mr. Ben's Motion for Judgment of Acquittal on the robbery charge.

FOOTNOTES

1. See Royal v. State, 452 So.2d 1098 (Fla. 5th DCA 1984); and Stufflebean v. State, 436 So.2d 244 (Fla. 3d DCA 1983). The case of Royal was recently accepted by this Honorable Court on a conflict jurisdiction basis. Royal v. State, Case No. 65,702.

2. 812.13 Florida Statute (1981), in pertinent part, provides:

> (1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another by force, violence, assault, or putting in fear.
> (2)(a) If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment for a term of years not exceeding life imprisonment...
> (b) If in the course of committing the robbery the offender carried a weapon, then the robbery is a felony of the first degree...
> (c) If in the course of committing the robbery the offender carried no firearm, deadly weapon, or other weapon, the the robbery is a felony of the second degree...
> (3) An act shall be deemed "in the course of committing the robbery" if it occurs in an attempt to commit robbery or in flight after the attempt or commission.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, Petitioner, respectfully asks this Honorable Court to reverse the judgment and sentence of the lower court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Robert J. Landry, Assistant Attorney General, Park Trammell Bldg., 8th Floor, 1313 Tampa Street, Tampa, FL 33602, and to Edward Ben, 054411, Brooksville Road Prison, P.O. Box 548, Brooksville, FL 34298, June 5th 1985.

Respectfully submitted,

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