

IN THE SUPREME COURT OF OHIO
Case No. 2008-0363

STATE OF OHIO :
Appellant :
-vs- :
TIMOTHY EVANS :
Appellee :
On Appeal from the
Cuyahoga County Court
of Appeals, Eighth
Appellate District Court
of Appeals
CA: 89057

MEMORANDUM IN OPPOSITION
TO JURISDICTION

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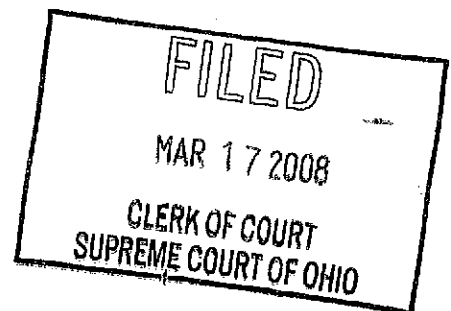


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In Opposition to Appellant’s Proposition of Law (as formulated by Appellant):

Because an offense should be considered a lesser-included offense after analyzing
the facts and circumstances of each case, rather than from simply analyzing the
statutory elements in a vacuum, robbery under R.C. 2911.02(A)(2) may be
considered a lesser included offense of aggravated robbery under R.C.
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**EXPLANATION OF WHY THIS CASE DOES NOT PRESENT SUBSTANTIAL
CONSTITUTIONAL QUESTIONS AND IS NOT A MATTER
OF GREAT PUBLIC OR GENERAL INTEREST**

The State of Ohio asks this Court to reverse its prior caselaw and to develop a new rule of law which would expand the definition of lesser-included offenses. The issue presented by the State in this case is similar to an issue raised in *State v. Zima* (2004), 102 Ohio St.3d 61, where this Court unanimously¹ declined to establish a rule of law akin to that proposed by the State in this case. This Court should decline the State's invitation to reverse well-established precedent. The upheaval proposed by the State would create a system where neither trial courts, prosecutors nor defense attorneys would be able to know prior to trial what lesser-included offenses will be available at trial. The State's proposition also fails to adequately appreciate the right to a grand jury indictment guaranteed by the Ohio Constitution.

The State proposes that this Court adopt a new rule of law that defines lesser-included offenses under the factual circumstances of the case, as opposed to engaging in the elemental-comparison analysis currently employed by this Court and the United States Supreme Court in federal cases. E.g., *State v. Deem* (1988), 40 Ohio St.3d 205; *Blockburger v. United States* (1931) 284 U.S. 299.² The State's Proposition of Law is impractical. Under the current test, whether an offense is or is not a lesser-included of another is predictable: the elements of the two offenses are compared in the abstract and, if the offense carrying a greater penalty cannot be committed without

¹ The Court's opinion in *Zima* was written by Justice Resnick. Three current members of the Court concurred: The Chief Justice and Justices Lundberg Stratton and O'Connor. Justice Pfeiffer concurred in judgment only. Judge Frederick Young of the Second District Court of Appeals sat for Justice O'Donnell.

² As discussed *infra*, the Supreme Court later reversed *Blockburger*, only to reinstate its holding in *United States v. Dixon* (1993), 509 U.S. 688.

also committing the offense with a lesser penalty, then the less-serious offense is also a “lesser included” offense.

But the State’s Proposition of Law will replace the *Deem-Blockburger* standard with a fact-based test that will cause lesser-included offenses to be defined, not in the abstract, but by looking at the individual circumstances of offenses on a case-by-case basis. Thus, depending upon how the evidence at trial develops, the less-serious offense may or may not be a “lesser-included” offense. Such a test will frustrate efforts to resolve cases or even to develop a coherent trial strategy. Defendants and prosecutors who are not certain as to how the evidence will develop at trial will be unable to determine what offenses will or will not eventually be considered by the fact-finder, whether it be a judge sitting alone or a jury. Without such information, it becomes difficult, if not impossible, to handicap the likelihood of what verdict the jury will reach. Plea bargaining will be hampered. Moreover, without predictability, prosecutors and defense counsel will find themselves unable to know what offenses the fact-finder will eventually be considering, which hampers the ability to make intelligent tactical decisions on the basis of the evidence being presented.

As a constitutional matter, expanding the law of lesser-included offenses to include those offenses which fall outside the elemental-comparison test invites convictions never contemplated by the grand jury, or even considered and rejected by the grand jury. The State’s proposition thus unconstitutionally diminishes the role of the grand jury. This Court has long recognized that the Ohio Constitution’s right to indictment guarantees that a defendant will be tried upon the same essential facts upon which the grand jury found probable cause. *State v. Headley* (1983), 6 Ohio St.3d 475. The elemental comparison employed by *Deem* and *Blockburger* ensures that the grand jury’s indictment defines the parameters of the case because, by having found probable cause for every element of the greater offense, the grand jury has necessarily also found probable cause for

every element of the lesser-included offense which is nested within the greater offense. But the State's proposed factual-circumstance test will destroy this kind of uniformity and allows a petit jury to consider elements of "lesser-included" offenses that may well exceed or even contradict the prior contemplation of the grand jury.

Another adverse effect of the State's Proposition of Law is to invite jury compromise. As the number of potential lesser-included offenses expands, based on the facts and circumstances of the individual case, the jury will be tempted to pick and choose lesser offense on the basis of what they believe to be the correct outcome in the case, as opposed to having the jury stay focused on the elements of the crime charged. The State's approach presents a greater likelihood that jurors will go off on their own tangent and decide cases based on what they believe the law should be. Such an approach is fundamentally unsound.

Ironically, the State's Proposition will provide increased double jeopardy protection to many criminal defendants. By expanding the definition of "lesser-included" offenses via its fact-and-circumstance approach, the State's Proposition will concomitantly restrict the opportunity the State has to subsequently prosecute a person who has previously been convicted of a less-serious offense that does not fit into the *Deem-Blockburger* standard but which could now nonetheless be considered "lesser-included" under the State's expansive proposition.

In light of such policy concerns, there is little wonder why this Court and the United States Supreme Court have previously rejected such circumstance-based tests in favor of the elemental-analysis correctly employed by the Eighth District in this case. The United States Supreme Court actually adopted a test similar to that sought by the State, in *Grady v. Corbin*, only to reject that test three years later and return to the Blockburger standard. See, *United States v. Dixon* (1993), 509 U.S. 688, overruling *Grady v. Corbin* (1990), 495 U.S. 508. See also, *Zima*, supra.

Finally, even if this Court were of the mind to consider this issue, this is not the appropriate case for the issue to be litigated. In *State v. Merriweather* (1980), 64 Ohio St.2d 57, this Court determined that robbery is not a lesser-included offense of a previous version of aggravated robbery.³ Nonetheless, this Court noted that, even if it were to have concluded that robbery was a lesser included offense of aggravated robbery, the Court's newly-established precedent might not apply to Mr. Merriweather, who went to trial under the reasonable belief that robbery was not a lesser-included offense. *Id.*, at n. 3. These same concerns would necessarily prevent application of the State's Proposition to Mr. Evans, even if that Proposition were adopted by this Court. Simply put, Mr. Evans went to trial believing that, if the State did not prove a deadly weapon was involved, then Mr. Evans could only be convicted of misdemeanor theft. To now tell him that he was wrong because the rules have been changed since his trial would deny him due process under the Ohio and United States Constitutions. See generally, *Bouie v. South Carolina* (1964), 378 U.S. 347 (federal due process limits retroactive application of judicial precedent).

For all these reasons, this Court should decline to exercise jurisdiction over this case.

³ The version of R.C. 2911.01(A)(1) that was effective when *Merriweather* was decided has since been amended as part of the legislative reform of the criminal code in 1996. The prior version of R.C. 2911.01(A)(1) prohibited the commission of a theft offense while having a deadly weapon on or about one's person or under one's control. *Merriweather* held that theft via the threat of imminent force, which constituted robbery under R.C. 2911.02(A)(2), was not a lesser included offense of this form of aggravated robbery.

STATEMENT OF THE CASE AND FACTS

Defendant-appellee, Timothy Evans, was originally charged in a single-count indictment that charged him with aggravated robbery, R.C. 2911.01, a felony of the first degree.

In a bench trial the court acquitted the accused of aggravated robbery. The court then found Mr. Evans guilty of robbery under R.C. 2911.02, a felony of the second degree, which the trial court determined was a lesser-included offense of the offense charged in the indictment.

At trial the complaining witness, Ms. Catrice Stewart, made claims that the accused approached her and attempted to take her purse on November 18, 2005. Ms. Stewart testified that, as she got out of her truck, a man came from behind her and grabbed her purse. Ms. Stewart claimed the assailant indicated he had a gun. A passing motorist pulled up and blew her car horn but did not get out of her auto. The assailant then fled. No gun was recovered and the witness testified she never saw a gun. Ms. Stewart claimed she was treated at a hospital for injuries, however, no documentation of medical treatment was offered.

Approximately two months later the witness saw Mr. Evans walking down the street; she called the police and indicated to them that she believed he was the person who robbed her previously.

Ms. Stewart identified the accused as the person who grabbed at her purse that day. She also acknowledged that she was shown a photo line up by the police but failed to identify anyone.

ARGUMENT

In Opposition to Appellant's Proposition of Law (as formulated by Appellant):

Because an offense should be considered a lesser-included offense after analyzing the facts and circumstances of each case, rather than from simply analyzing the statutory elements in a vacuum, robbery under R.C. 2911.02(A)(2) may be considered a lesser included offense of aggravated robbery under R.C. 2911.01(A)(1).

The State's argument should be rejected. The Eighth District Court of Appeals correctly held that robbery under R.C. 2911.02(A)(2) is not a lesser-included offense of aggravated robbery under R.C. 2911.01(A)(1), as charged in this case. While the State of Ohio was free to seek a second count of indictment against Mr. Evans for robbery under R.C. 2911.02(A)(2), the trial court was not free to consider a robbery offense that had never been indicted. See generally, *State v. Bozeman*, Montgomery App. No. 13741, 1994 Ohio App. LEXIS 1747 ("When an offense is not a lesser included offense but may be reasonably supported by the evidence, it should be set out separately in the indictment.").

An offense may be a lesser included offense of another if (i) the offense carries a lesser penalty than the other; (ii) the greater offense cannot, *as statutorily defined*, ever be committed without the lesser offense, as statutorily defined, also being committed; and (iii) some element of the greater offense is not required to prove the commission of the lesser offense.

State v. Deem (1988), 40 Ohio St.3d 205, paragraph three of the syllabus (emphasis added).

Applying *Deem* to the statutes in question here reveals that not all the criteria for being a lesser included are met as commission of the greater offense will not necessarily result in the commission of the lesser offense. Contrary to the State's argument, one can indicate that he or she possesses a deadly weapon without ever threatening to use it and while never even

threatening to inflict physical harm. Claiming possession of the weapon does not necessarily mean that one has threatened to use it.⁴

Finally, the State's reliance on the 1974 legislative history of the pertinent code sections is entirely misplaced. The statutes have been amended since that time. Moreover, in *Merriweather*, this Court specifically eschewed reliance on the very legislative history cited by the State when this Court concluded that robbery under R.C. 2911.02(A)(2) was not a lesser included offense of aggravated robbery under R.C. 2911.01(A)(1):

This court is bound by the language of criminal provisions, not unofficial Legislative Service Commission Notes. Additionally, this court is required to construe such criminal provisions "strictly * * * against the state, and liberally * * * in favor of the accused." R.C. 2901.04(A). Accord *Harrison v. Ohio* (1925), 112 Ohio St. 429. *State, ex rel. Moore Oil Co., v. Dauben* (1919), 99 Ohio St. 406.

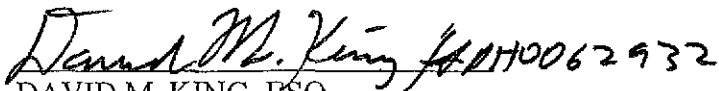
Merriweather, 64 Ohio St.2d at 59.

⁴ The State maintains that it is "unable to grasp" how one could indicate he or she possesses a deadly weapon yet not threaten physical harm against the victim. This Court need consider but one scenario to realize that the State's concerns are misplaced and that robbery "as statutorily defined" is not nested within aggravated robbery as statutorily defined. *Deem*. For example, assume the defendant is a shoplifter in a hardware/sporting goods store who purchases a hunting knife at the same time he is shoplifting a bag of nails that he has placed in his pocket. After paying for the knife, he exits the store. Thus, he has committed a theft offense while indicating that he possesses the newly purchased weapon. This is aggravated robbery under R.C. 2911.01(A)(1), because the General Assembly is concerned about what would happen if the armed thief were then to react to store security trying to thwart the shoplifting. However, the thief has never made either a direct or even implicit threat of harm and thus did not commit robbery under R.C. 2911.02(A)(2).

CONCLUSION

Wherefore, this Court should decline to exercise jurisdiction over the instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum was hand delivered to Hon. William D. Mason, Cuyahoga County Prosecutor, and or a member of his staff, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this 1st day of March, 2008.


DAVID M. KING, ESQ.