

IN THE
SUPREME COURT OF OHIO

STATE OF OHIO	:	NO. 2007-0268
Plaintiff-Appellee	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
vs.	:	
DANIELLE SMITH	:	Court of Appeals Case Number C-060077
Defendant-Appellant	:	

MEMORANDUM IN RESPONSE

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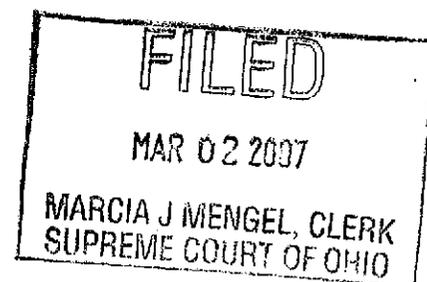


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EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT
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CONSTITUTIONAL QUESTION

This case does not depend on constitutional issues for its resolution. It raises the identical issue as that resolved in a prior case decided by this Court, *State v. Davis*.¹ The court employed a “lesser-included-offense” test that was enunciated in *State v. Wilkins* and compared the elements of theft and robbery to conclude that theft is a lesser included offense of robbery.² This requires a statutory interpretation of the elements of the crime and raises no constitutional issue. The case is not of public or great general importance, as its resolution depends on a straight-forward application of the law as explained in *State v. Davis*. The First District has followed that case in a consistent manner and the case law that has followed presents no new or novel issues on the subject. For these reasons, jurisdiction should be denied.

¹ *State v. Davis* (1983), 6 Ohio St.3d 91, 451 N.E.2d 772.

² *State v. Wilkins* (1980), 64 Ohio St.2d 382, 415 N.E.2d 203.

STATEMENT OF THE CASE AND FACTS

Procedural Posture:

Smith was indicted on one count of Robbery on April 15, 2005. A hearing on a Motion to Suppress was held on September 29, 2005. The motion was overruled, and on the same date, Smith's case was tried to the bench. The court found her guilty of a reduced charge of Theft, a fifth degree felony. Smith was sentenced to serve eleven months with the Ohio Department of Corrections. The case was appealed to the First District Court of Appeals in Case No. C-060077. The First District affirmed Smith's conviction in an opinion announced December 29, 2006.

Facts:

Rachel Cornett was a loss prevention supervisor for Macy's at the Tri-County Mall. She had held this position for four-and-a-half years. On April 7, 2005, Ms. Cornett was walking out of the employee break room when she noticed two women with several children and a shopping cart. She immediately noticed that there were empty shopping bags in the cart. Ms. Cornett went into a room set up with closed-circuit cameras and watched the women. She said that they were "double-selecting" items of clothing. When a customer double-selects, the person chooses two of the same blouse, for example, which are on hangers. When both are picked up simultaneously, it appears that the customer only took one item off the rack. Customarily, the person goes into the fitting room with both items but exits with only one, which is placed back on the rack.

Ms. Cornett observed both women, one of whom she identified as Smith, taking multiple items into the boys' fitting room. They also took the shopping cart with the empty bags into the fitting room. Smith exited the room with only two or three items. She pulled the shopping cart

behind her and handed it off to a small boy. At this point, a trained sales associate called Ms. Cornett to make a report. When the fitting room was checked, employees found empty hangers left behind.

The group of women and children started to leave the store. The children walked in front, pushing the shopping cart themselves. The other woman followed and Smith walked about five feet behind her. The children and woman "proceeded past all points of sale." The children had walked out of the store with the woman following when a security guard, referred to as Roger, stopped the group. This all occurred in Ms. Cornett's presence. The guard saw The guard stopped her and identified himself. All individuals were to be escorted back to the store office to be processed. The group began to walk through the store toward the office. Partway there, Smith asked Ms. Cornett to show her some identification. Ms. Cornett had run out of the camera room so quickly to respond to the shoplifting in progress that she did not take her identification card with her. She told Smith this, but stated that she had her store radio and handcuffs with her. She told Smith that "all I wanted to do was go fill out some paperwork and, you know, we would proceed from there."

"That is when she pushed me and told the other female to take the children and go. My manager then turned around, seen what was going on. * * * She then picked up hangers, proceeded to hit Roger and myself with the hangers, attempted to pick up manikins, was throwing them all over the department.

There was a table of gowns that were folded. She tipped that over. We tried to restrain her. Every time we would try to restrain her, she would fight back. She bit me on my left arm."

Ms. Cornett said the security tried to calm Smith and get her back to the office. She continued to "cuss and carry on" and knock over merchandise tables. Ms. Cornett said that the security guard tried to hold Smith so that Ms. Cornett could place handcuffs on her. He grabbed Smith from behind, and she bit him, also.

Smith's yelling during the commotion could be heard by a management team that was meeting in executive offices nearby. A member of the team, a corporate safety auditor, came out and approached. At that time, Smith appeared became more cooperative. During the time the employees were dealing with Smith, the other woman left the store.

The state presented a surveillance videotape filmed by Ms. Cornett that depicts Smith and other woman as they selected clothes from the racks and filled the shopping cart. Smith can be seen going in and out of the fitting room, taking more clothes with her each time. The shopping bags that were observed in the cart - previously empty - were now filled with clothes. The total amount of the clothes was \$1,674.95. One bag held a cookware set that had been purchased by Smith. She had a receipt for this. Smith testified that on April 7, 2005, she went to a friend's house. She was picking up her friend's children and going to the Newport Aquarium. She was going to meet her boyfriend there. She said that another friend, Lashay Meadows, was also at the friend's house. Smith testified that Meadows had a Macy's gift card worth \$400, given to her by her mother. Meadows, who was unemployed, was trying to sell the card for cash. Meadows also told Smith she was going to the mall. Smith said she needed to buy some things and decided to go with her. They agreed that Meadows would pay for Smith's purchases with the gift card, and that Smith would reimburse her with cash. She said Meadows told her that "she would give me a good deal on, you know, going to get some clothes." She explained:

"Well, actually, she came with the card, saying she had the card, she was trying to sell it. Of course, you know, I was like, yeah, I wanted to buy it because, regardless, I was going to have to buy some things, so it was better to get a discount than to pay, you know, full, and because she was going to sell her card, regardless."

Smith rode with Meadows and Meadows' children to the Tri-County Mall. She admitted that she accompanied them into the dressing room. She said she left the dressing room to find the clothes she wanted to buy and then hung them on the cart they had taken into the fitting area. She had picked out about seven outfits for herself.

On the surveillance tape, Meadows can next be seen pushing the shopping cart and walking towards the exit. Smith said she didn't know what Meadows was doing and assumed she would come back to a counter where Smith was standing. Smith admitted that she saw that her clothes were not hanging on the cart "in plain view" anymore. She said she went to look for Meadows by walking down another aisle. She saw a man bringing Meadows back into the store. She testified that when she saw this, she began putting it all together. "Then when I see these security people, that's when it all registered to me what was going on * * * ." Smith said the security guard told her to accompany them to an office.

Smith testified that she asked "Why am I going back there? I didn't do anything, and I wasn't stealing anything." She said Ms. Cornett became very rude and threatened to handcuff her if she did not cooperate. Smith said the security guard walked by Meadows and Ms. Cornett walked closer to her. She said she "cussed a little tiny bit" at Ms. Cornett because she was "just on my back, looking like I was trying to run off or something," Smith said that at one point when they were walking to the office, she didn't know whether they were turning right or left. At that time, according to Smith, Ms. Cornett said to her "Oh, it's robbery now."

Smith said she did not feel that she was resisting in any way. She said that Ms. Cornett did not try to understand "that it was a simple mistake that, you know, I didn't know which way we were going. I mean, she jumped on my back. That's how her thumb ended up in my mouth." Smith said

she did not intentionally bite Ms. Cornett, but that because she was taller than Ms.Cornett, “she couldn’t, I guess, estimate which way it went, or whatever.”

Smith wrote out two statements for the police. In one, she wrote “Lashay was on her way to the mall. I asked could I ride with her because I was about to go to the Dayton Mall.” At trial, she said this statement was not correct, but that she “just wrote something so I could be able to go home.” She also wrote: “When we got down to the clothes, she says just pick what I want and give it to her.”

Smith acknowledged that her prior convictions: two for theft, one for attempted theft and one for falsification, all in 2000, and a series of felony forgery convictions in 2002.

ARGUMENT

FIRST PROPOSITION OF LAW: THEFT IS A LESSER INCLUDED OFFENSE OF ROBBERY.

Smith claims that she could not have been convicted of theft because it is not a lesser included offense of robbery. She cites to *State v. Carter*, an Ohio Supreme Court case that used the test for lesser included offenses enunciated in *State v. Deem*, as authority for this proposition.³ The state cites to *State v. Davis*, an earlier Ohio Supreme Court case that held that theft *is* a lesser included offense of robbery.⁴ The First District Court of Appeals, when it affirmed Smith's convictions, also relied on the *Davis* case for its analysis.

In *State v. Deem*, the Supreme Court of Ohio stated the test for whether an offense may be a lesser included offense of another.⁵ This may occur if 1) the offense is a crime of lesser degree than the principal offense, 2) the offense of greater degree cannot be committed without the offense of the lesser degree also being committed, and 3) some element of the greater offense is not required to prove the commission of the lesser offense.⁶ In *State v. Carter*, the court compared the crimes of aggravated robbery and theft. The court found that the first and third prongs of the test are met, as theft has a lesser penalty than aggravated robbery and because aggravated robbery carries an additional element regarding possession of a deadly weapon. The court found that the second prong cannot be met, however, and stated:

³ *State v. Carter*, 89 Ohio St.3d 593, 2000-Ohio-172, 734 N.E.2d 345; *State v. Deem* (1988), 40 Ohio St.3d 205, 533 N.E.2d 294.

⁴ *State v. Davis* (1983), 6 Ohio St.3d 91, 451 N.E.2d 772.

⁵ *State v. Deem* (1988), 40 Ohio St.3d 205, 533 N.E.2d 294.

⁶ *Id.* at syllabus paragraph three. The test was not "new," as it was set forth in 1980 in *State v. Wilkins* (1980), 64 Ohio St.2d 382, 415 N.E.2d 203.

“The issue becomes whether aggravated robbery, as statutorily defined above, can ever be committed without theft, as statutorily defined above, also being committed. We answer that question in the affirmative because aggravated robbery can be committed in the course of an ‘attempted theft.’ R.C. 2913.02; 2923.02. Theft requires the accused to actually obtain or exert control over the property or services of another; attempted theft does not. Since theft is not a lesser-included offense of aggravated robbery, the trial court did not err by not providing a lesser-including-offense instruction.”⁷

It should be noted that in the *Carter* analysis, the court compared the elements of aggravated robbery with those of attempted theft. The facts of the case sub judice involve the crimes of robbery and theft.

In *State v. Davis*, the Ohio Supreme Court set forth the same test as that enunciated in *Deem* but concluded that theft *is* a lesser included offense of robbery.⁸ The court analyzed the elements of the two crimes and stated:

“Theft by threat is undisputably a crime of lesser degree than robbery. In addition, theft by threat contains no element which is not also an element of robbery; therefore, one cannot commit a robbery without committing theft by threat. Lastly, theft by threat consists entirely of some, but not all, of the elements of robbery which are not required to constitute the offense of theft by threat.”⁹

The subsequent appellate history of the both the *Davis* and *Carter* cases does not reveal that the cases have been reversed or distinguished on this issue.

⁷ *State v. Carter, supra*, at 601, 353.

⁸ *State v. Davis* (1983), 6 Ohio St.3d 91, 451 N.E.2d 772. The *Davis* court relied on the test as enunciated in *State v. Wilkins* (1980), 64 Ohio St.2d 382, 415 N.E.2d 303. An appellate court noted a slight difference between the tests: “The first prong of *Wilkins* requires a court to consider whether the offense is a crime of a lesser degree than the other. Whereas, the first prong of *Deem* requires a court to consider whether the offense carries a lesser penalty than the other.” *State v. Johnson-Millender*, 5th Dist. No. 2004 CA 00288, 2005 Ohio 4407.

⁹ *Id. at* 94, 776.

First Appellate District

The First District Court of Appeals has held in a number of cases that theft is a lesser included offense of robbery. However, these cases predate *State v. Carter, supra*. In *State v. Stone*, the court cited to *State v. Davis* and held that theft is a lesser included offense of robbery.¹⁰ Having found that, the court went on to set forth the test for whether a jury instruction on a lesser included offense was warranted. The court stated:

“A trial court is required to charge the jury on a lesser included offense when ‘the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense.’ ”¹¹

The court reviewed the facts of the case and determined that the evidence presented could have reasonably sustained both an acquittal on the robbery charge and a conviction upon the lesser included offense of theft. Thus, the theft instruction should have been given. In *State v. Williams*, a 1996 case, there was no allegation that theft was not a lesser included offense of robbery.¹² This was presumed, however, as a footnote discussing the procedural posture stated the following:

“The aggravated robbery charge was dismissed by the state, and appellant pleaded guilty to and was convicted of the lesser-included offense of theft as to the robbery count.”¹³

¹⁰ *State v. Stone* ((January 31, 1996), 1st Dist. No. C-950185.

¹¹ *Id.* at 4.

¹² *State v. Williams* (June 26, 1996), 1st Dist. No. C-950571.

¹³ *Id.* at footnote 1.

In *State v. Pratt*, this Court cited to the *Wilkins* case (see footnote 4) and found that “[t]heft may constitute a lesser-included offense of robbery.”¹⁴ Under the facts of the case, the court held that a theft instruction was not warranted.¹⁵

In the case sub judice, the First District applied the test from *State v. Deem*. The court found that the first and third prongs of the test were met. The court found its analysis of the second prong was not as easily met because it was theoretically possible to commit robbery by depriving a person of property worth less than \$500. But the court concluded:

“But as a subordinate court we are constrained from sustaining Smith’s first assignment of error by the Ohio Supreme Court’s decision in *State v. Davis*, 6 Ohio St.3d at 95, 451 N.E.2d 772. In *Davis*, the supreme court was required to determine whether grand theft by threat, then punishable as a fourth-degree felony upon proof that the property or services stolen were valued at \$150 or more, was a lesser-included offense of robbery. In its decision, which predated *State v. Deem*, the supreme court applied an earlier, lesser-included-offense test, found in *State v. Wilkins* * * * that lacked the admonition that the offenses were to be examined ‘as statutorily defined.’ Although it recognized that value was an element of grand theft, the supreme court did not discuss the omission of value from the indictment. Nonetheless, in resolving the issue posed by the second *Deem* prong, the court held that ‘theft by threat contains no element which is not also an element of robbery; therefore, one cannot commit a robbery without committing theft by threat.’ ”¹⁶

The First District then concluded that: “[a]s Smith’s appeal raises the identical issue resolved in *State v. Davis*, we continue to adhere to the supreme court’s decision as we have previously * * * ” in the decisions of *State v. Stone*, *State v. Williams* and *State v. Pratt*.¹⁷

¹⁴ *State v. Pratt* (September 9, 1987), 1st Dist. No. C-860436).

¹⁵ See also *State v. Barnes* (June 11, 1980), 1st Dist. No. C-790530, *State v. Higgs* (April 30, 1980), 1st Dist. No. C-790402, and *State v. Baker* (October 19, 1977), 1st Dist. Nos. CA76-05-0064, CA76-06-0075, for cases holding that theft can be a lesser included offense of robbery.

¹⁶ *State v. Smith*, 1st Dist. No. C-060077, ¶17.

¹⁷ *Id.* at ¶17.

Appellate Courts: Theft is a Lesser Included Offense of Robbery

Numerous cases from other appellate courts can be cited for the proposition that theft is a lesser included offense of robbery.¹⁸ In *State v. Wolf*, it is clear that the Eighth District considered theft to be a lesser included offense of robbery when, after discussing the facts presented at trial, the court concluded that “the trier of fact would have reasonably found him guilty of theft and not robbery, if the trial court had properly instructed the jury *on the lesser included offense of theft.*”¹⁹ (Italics added) In *State v. Johnson*, the Ninth District Court of Appeals reviewed a challenge to the trial court’s failure to give jury instructions on theft and attempted theft in a robbery trial.²⁰ In that case, a shoplifter had scuffled with a manager while fleeing. The court concluded that theft is a lesser included offense, but that the facts of the case did not warrant an instruction on theft or attempted theft. The court cited to a case that relied on *State v. Davis* for this proposition.²¹

Similarly, in *State v. Deimling*, the Ninth District Court of Appeals discussed the additional element in robbery of inflicting, attempting to inflict, or threatening to inflict physical harm. The court then concluded that “[i]f the evidence presented at trial is such that the trier of fact could find that this additional element was not met, the trial court should have instructed upon the lesser-included offense of theft.”²² This case was decided ten months after the *Carter* decision was published. In *State v. Oviedo*, the Sixth District Court of Appeals noted that “[a]ppellee does not

¹⁸ Interestingly, some of these courts cite to the *Deem* test and others do not.

¹⁹ *State v. Wolf*, 8th Dist. No. 83673, 2004-Ohio-4500.

²⁰ *State v. Johnson* (March 29, 2000), 9th Dist. C.A. No. 19692.

²¹ See *State v. Sills* (July 5, 1995), Wayne App. No. 95CA0004, citing *State v. Davis* (1983), 6 Ohio St.3d 91, 451 N.E.2d 772. See also *State v. Henderhan* (June 14, 1999), 5th Dist. Case No. 1998CA00323.

²² *State v. Deimling* (December 20, 2000), 9th Dist. No. C.A. NO. 99CA007496.

dispute that theft under R.C. 2913.02(A) is a lesser included offense of robbery.”²³ The court then ruled that under any reasonable view of the evidence, an acquittal on the robbery charge would not have been warranted. Thus, it was not error to not instruct on theft.

In *State v. Williams*, the Eighth District Court of Appeals discussed the fact that if the defendant’s testimony was believed, a jury could have acquitted him on robbery and found him guilty of theft.²⁴ “Accordingly, the trial court erred in failing to instruct on the lesser included offense” of theft.²⁵ In *State v. Delaney*, the Tenth District Court of Appeals paraphrased the *Deem* test, but did not cite to that case. The court stated that theft “may be a lesser included offense of robbery” because it is an offense of a lesser degree than robbery.”²⁶ The court went on to say that a robbery cannot be committed without a theft having been committed, and that robbery requires proof of the use of force or the threat to use immediate force, elements that need not be proven for a conviction of theft.

Appellate Courts Contra: Theft is Not a Lesser Degree of Robbery

While other districts have held to the contrary of the above-cited cases, those courts have not applied the law of *State v. Davis*. In *State v. Jefferson*, the Twelfth District Court of Appeals cited to *State v. Deem* and held that “[t]he trial court did not commit plain error by failing to instruct the jury on Theft, as defined by R.C. 2913.02, because that offense is not a lesser included offense of

²³ *State v. Oviedo* (July 30, 1999), 6th Dist. Court of Appeals No. WD-98-061.

²⁴ *State v. Williams* (August 5, 1999), 8th Dist. No. 74501.

²⁵ However in *State v. Rogers*, the Eighth District cited to *Carter* and held that theft is not a lesser included offense of *aggravated* robbery. (November 16, 2000), 8th Dist. No. 77723.

²⁶ *State v. Delaney*, 10th Dist. No. 04AP-1361, 2005-Ohio-4067.

Robbery, as defined by R.C. 2911.02(A)(3).”²⁷ The Twelfth District relied on *Carter* and also held that theft is not a lesser included offense of aggravated robbery in *State v. Woods* and *State v. Gooden*.²⁸ In *State v. Rogers*, the Eighth District Court of Appeals followed *Carter* and held the same - that theft is not a lesser included offense of aggravated robbery.²⁹ The state submits that the better law was decided in *State v. Davis*, and that it should be followed uniformly across the state.

SECOND PROPOSITION OF LAW: WHEN THE INDICTMENT OR INFORMATION CHARGES AN OFFENSE, INCLUDING DIFFERENT DEGREES, OR IF OTHER OFFENSES ARE INCLUDED WITHIN THE OFFENSE CHARGED, THE DEFENDANT MAY BE FOUND NOT GUILTY OF THE DEGREE CHARGED BUT GUILTY OF AN INFERIOR DEGREE THEREOF OR LESSER INCLUDED OFFENSE.

Smith argues that the trial court did not have the authority to find her guilty of the lesser included offense of felony theft because the robbery indictment did not specify the value of goods stolen. She bases this on an interpretation of R.C. 2945.75(A)(1), which states:

(A) When the presence of one or more additional elements makes an offense one of more serious degree:

(1) The affidavit, complaint, indictment, or information either shall state the degree of the offense which the accused is alleged to have committed, or shall allege such additional element or elements. Otherwise such affidavit, complaint, indictment, or information is effective to charge only the least degree of the offense.

The state contends that R.C. 2945.75 is not applicable to this case. That statute deals with the form of the indictment that charges the principal offense, which in this case is Robbery under

²⁷ *State v. Jefferson*, 2nd Dist. No. C.A. 20698, 2005-Ohio-4201; reversed and remanded for resenting only.

²⁸ *State v. Woods*, 2nd Dist. C.A No. 19005, 2002-Ohio-2367; *State v. Gooden*, 2nd Dist. C.A. No. 19231, 2003-Ohio-905.

²⁹ *State v. Rogers* (November 16, 2000), 8th Dist. No. 77723. *Cf.* with *State v. Williams*, *supra*.

R.C. 2911.02(A)(3). The controlling statute is R.C. 2945.74, titled “Defendant may be convicted of lesser offense.” That statute reads in pertinent part:

“The jury may find the defendant not guilty of the offense charged, but guilty of an attempt to commit it if such attempt is an offense at law. When the indictment or information charges an offense, including different degrees, or if other offenses are included within the offense charged, the jury may find the defendant not guilty of the degree charged but guilty of an inferior degree thereof or lesser included offense.”

As stated previously, theft is a lesser included offense of robbery. The robbery indictment in this case is silent as to the value of the merchandise taken because value is *not* an element of robbery, which is the greater offense charged. When the indictment is silent as to value in a case such as this, the trial court may consider the value proven at trial in determining whether the lesser included offense of theft is a felony or misdemeanor. It was uncontested that the value of the merchandise taken from Macy’s was over \$1,600, which unquestioningly describes a felony theft.

The state’s position is that the value of the underlying theft offense is not an element of the robbery statute and need not be included in an indictment for robbery. It should not be incumbent upon the state to prepare indictments with an eye toward lesser included offenses that *might* come into play.

CONCLUSION

This case presents no issues of public or great general interest and does not raise a constitutional question. The First District Court of Appeals correctly affirmed the judgment of the trial court and jurisdiction should therefore be denied.

Respectfully,

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I hereby certify that I have sent a copy of the foregoing Memorandum in Response, by United States mail, addressed to Michaela M. Stagnaro, 906 Main Street, Suite 403, Cincinnati, Ohio 45202, counsel of record, this 1st day of March, 2007.



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