

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
vs. : District
DANIELLE SMITH : Court of Appeals
Case Number C-060077
Defendant-Appellant :

MERIT BRIEF OF PLAINTIFF-APPELLEE

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Defendant-Appellant	:	

STATEMENT OF THE CASE AND FACTS

a) 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. (T.d. 32) She filed a direct appeal with the First District Court of Appeals. (See T.d. 1) Her conviction was affirmed on December 29, 2006. (T.d. 22) She filed a Memorandum in Support of Jurisdiction, and this Court accepted the appeal on the First Proposition of Law on May 7, 2007. (T.d. 30) Defendant-appellant's brief was filed on July 2, 2007.

b) Facts:

Rachel Cornett was a loss prevention supervisor for Macy's at the Tri-County Mall. (T.p. 32) 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.

(T.p. 34) She immediately noticed that there were empty shopping bags in the cart. (T.p. 34) 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. (T.p. 35, 36) Customarily, the person goes into the fitting room with both items but exits with only one, which is placed back on the rack. (T.p. 36)

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. (T.p. 36) 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. (T.p. 27)

At this point, a trained sales associate called Ms. Cornett to make a report. (T.p. 36) When the fitting room was checked, employees found empty hangers left behind. (T.p. 37)

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. (T.p. 38) The children and woman “proceeded past all points of sale.” (T.p. 38) The children had walked out of the store with the woman following when a security guard, referred to as Roger, stopped the group. (T.p. 38) This all occurred in Ms. Cornett’s presence. The guard saw Smith watching this. Smith turned around and “tried to enter her way back into the department.” (T.p. 38) The guard stopped her and identified himself. All individuals were to be escorted back to the store office to be processed. (T.p. 38)

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. (T.p. 38) She told Smith that “all I wanted to do was go fill out some paperwork and, you know, we would proceed from there.” (T.p. 39)

“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.” (T.p. 39, 40)

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. (T.p. 40) 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. (T.p. 40)

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 became more cooperative. (T.p. 40, 41) During the time the employees were dealing with Smith, the other woman left the store. (T.p. 41)

The state presented a surveillance videotape filmed by Ms. Cornett that depicts Smith and another woman as they selected clothes from the racks and filled the shopping cart. (T.p. 42; State’s Exhibit 3) Smith can be seen going in and out of the fitting room, taking more clothes with her each

time. (T.p. 42) 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. (T.p. 47)

Smith testified that on April 7, 2005, she went to a friend's house. (T.p. 75) She was picking up her friend's children and going to the Newport Aquarium. She was going to meet her boyfriend there. (T.p. 76) She said that another friend, Lashay Meadows, was also at the friend's house. (T.p. 76) Smith testified that Meadows had a Macy's gift card worth \$400, given to her by her mother. (T.p. 60, 65) Meadows, who was unemployed, was trying to sell the card for cash. (T.p. 60, 74-76) Meadows also told Smith she was going to the mall. Smith said she needed to buy some things and decided to go with her. (T.p. 75) They agreed that Meadows would pay for Smith's purchases with the gift card, and that Smith would reimburse her with cash. (T.p. 61) She said Meadows told her that "she would give me a good deal on, you know, going to get some clothes." (T.p. 59, 60) 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." (T.p. 75, 76)

Smith rode with Meadows and Meadows' children to the Tri-County Mall. She admitted that she accompanied them into the dressing room. (T.p. 69) 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. (T.p. 62, 69) She had picked out about seven outfits for herself. (T.p. 62)

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. (T.p. 62) Smith admitted that she saw that her clothes were not hanging on the cart "in plain view" anymore. (T.p. 70) 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 * * * ." (T.p. 73) 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." (T.p. 63) 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," (T.p. 64) 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." (T.p. 64)

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." (T.p. 65) 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." (T.p. 65)

Smith wrote out two statements for the police. (State's Exhibits 1 and 2) 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." (T.p. 77; State's Exhibit 2) At trial, she said this statement was not correct, but that

she “just wrote something so I could be able to go home.” (T.p. 78) She also wrote: “When we got down to the clothes, she says just pick what I want and give it to her.” (T.p. 80)

Smith acknowledged 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. (T.p. 66, 68)

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

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.¹ The state cites to *State v. Davis*, an earlier Ohio Supreme Court case that held that theft *is* a lesser included offense of robbery.² The First District Court of Appeals, when it affirmed Smith's convictions, also relied on the *Davis* case for its analysis. It did not mention the case of *State v. Carter*.

Summarized, the *Davis* court held that the crime of robbery cannot be committed without also committing the crime of theft; it therefore concluded that theft is a lesser included offense of robbery. In *State v. Carter*, the court held that aggravated robbery can be committed without committing theft, as one can commit aggravated robbery while attempting to commit a theft; therefore, the court concluded that theft is *not* a lesser included offense of aggravated robbery. Although the *Carter* case analyzed aggravated robbery, rather than robbery, the issue of whether the greater crime can be committed without committing the lesser crime remains the same.

In the present case, the First District Court of Appeals held that robbery can be committed without committing felony theft, e.g., by stealing property worth less than \$500, the threshold for

¹ *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.

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

a felony vs. a misdemeanor crime. However, the court stated that it was “constrained” from ruling in favor of Smith due to *State v. Davis*, and ultimately affirmed Smith’s conviction for theft.

As a practical matter, the ruling in this case will most likely effect defendants in two ways. It is not uncommon for defense attorneys to request a jury instruction on theft, as a lesser included offense, when a defendant is charged with the crime of robbery. This would be precluded if this Court rules in favor of Smith’s proposition of law. Secondly, a trial judge would be prevented from making the finding that was stated by the judge at Smith’s bench trial, e.g., that while he was convinced the defendant was involved in a theft offense, he was “not convinced with regard to the robbery * * * .” The choices available to the judge, or to a jury, would be solely to convict or acquit. As an alternative, the state could develop a new policy of indicting on both felony theft and robbery in a factual situation such as the one in the case sub judice.

The Davis and Carter Cases

In *State v. Davis*, this Court set forth the test for lesser included offenses as enunciated in *State v. Wilkins*.³ That case held that an offense may be a lesser included offense of another only if:

- (1) the offense is a crime of lesser degree than the other,
- (2) the offense of the 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.⁴

³ *State v. Davis* (1983), 6 Ohio St.3d 91, 451 N.E.2d 772; *State v. Wilkins* (1980), 64 Ohio St.2d 382, 415 N.E.2d 303.

⁴ *Id.* at 95, 776.

After applying *Wilkins*, the court concluded that theft is a lesser included offense of robbery.⁵

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.”⁶

In *State v. Carter*, the court applied the test for lesser included offenses as set forth in *State v. Deem*.⁷ That test concluded that an offense may be a lesser included offense 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, also being committed; and
- (iii) some element of the greater offense is not required to prove the commission of the lesser offense. (Italics added)⁸

In *Deem*, the court stated that it was modifying the language to *State v. Wilkins*, in part, to alleviate the confusion caused by an analysis of lesser included offenses and inferior degree offenses.

The court explained:

“The confusion between such lesser included offenses and ‘inferior degree[s]’ of the indicted offense lies in their common characteristic: *both* groups carry penalties of lesser degree than the indicted offense.”⁹

⁵ *State v. Davis* (1983), 6 Ohio St.3d 91, 451 N.E.2d 772.

⁶ *Id.* at 95, 776.

⁷ *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.

⁸ *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.

⁹ *State v. Deem* (1988), 40 Ohio St.3d 205, 209, 533 N.E.2d 294.

In *State v. Carter*, this Court compared the crimes of aggravated robbery and theft. The court found that the first and third prongs of the test were 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:

“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.”¹⁰

One appellate court noted the difference between the *Wilkins* and *Deem* tests as follows:

“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.”¹¹ (This distinction was not noted as affecting the court’s analysis of murder under R.C. 2903.02(B) and aggravated murder under R.C.2903.01(C))

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. 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.

¹⁰ *State v. Carter*, *supra*, at 601, 353.

¹¹ *State v. Johnson-Millender*, 5th Dist. No. 2004 CA 00288, 2005 Ohio 4407.

The First District's Analysis in State v. Smith

In the present case, 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.’ ”¹²

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*.¹³

The *Davis* case originated in the Twelfth District Court of Appeals. The appellate court held that the trial court erred by refusing to give a jury instruction on the lesser included offense of theft in a defendant’s trial for robbery. The court also held that a robbery conviction could be sustained by evidence that a defendant pretended to have a gun by holding his hand under his shirt. The Twelfth District found that its decision was in conflict with a First District Court of Appeals case,

¹² *State v. Smith*, 1st Dist. No. C-060077, ¶17.

¹³ *Id.* at ¶17.

State v. Bronough.¹⁴ Due to this, the Twelfth District certified the record to the Ohio Supreme Court. The Supreme Court granted a motion and cross-motion for leave to appeal and accepted the case. (Interestingly enough, *State v. Bronough* only concerned the issue of the implied threat of a gun; it did not address the lesser included offense of theft.)

In *State v. Stone*, the First District Court of Appeals cited to *State v. Davis* and held that theft is a lesser included offense of robbery.¹⁵ 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.’”¹⁶

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.¹⁷ 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.”¹⁸

¹⁴ *State v. Bronough* (April 1, 1981), 1st Dist. No. C-800253.

¹⁵ *State v. Stone* ((January 31, 1996), 1st Dist. No. C-950185.

¹⁶ *Id.* at 4.

¹⁷ *State v. Williams* (June 26, 1996), 1st Dist. No. C-950571.

¹⁸ *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.”¹⁹ Under the facts of the case, the court held that a theft instruction was not warranted.²⁰

Distinction Between Davis and Carter

The only distinction between the analysis used in the *Davis* and *Carter* cases that can easily be seen is that *Davis* concerned robbery and theft by threat, and *Carter* analyzed aggravated robbery and theft, without designating a “type,” such as without consent, by deception, or by threat. In *Davis*, the court held that theft was a lesser included offense of robbery, and proceeded to analyze the particular facts of the case to decide whether they warranted an instruction. In *Carter*, because the Court found that robbery can be committed without committing theft, the Court did not look further at the facts.

The state contends that the *Carter* analysis is incorrect because the robbery statute can be violated in two ways: either by attempting to commit a theft offense *or* by committing a theft offense during the course of a robbery. The elements of attempting to commit a theft offense and actually committing a theft offense are stated in the alternative. When the test for lesser included offenses is applied, it should be applied to find that both attempted theft and theft are lesser included offenses of robbery. A robbery cannot be committed without an attempted theft *or* a theft. It seems illogical to rule that theft is not a lesser included offense because the statute stated the elements of theft and

¹⁹ *State v. Pratt* (September 9, 1987), 1st Dist. No. C-860436).

²⁰ 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.

attempted theft in the alternative. The state contends that this is why the *Davis* court held that theft is a lesser included offense of robbery.

This Court discussed the policy reason behind the test enunciated in *State v. Deem* and stated that in all pre-*Deem* cases, it had strived to rule “in a manner which is truest to the legislative scheme of the General Assembly, and in a manner which is both clear and most just to all concerned.”²¹ The court explained further:

“Our adoption of a test which looks to both the statutory elements of the offenses involved and the evidence supporting such lesser offenses as presented at trial is grounded primarily in the need for clarity in meeting the constitutional requirement that an accused have notice of the offenses charged against him. Sixth Amendment to the United States Constitution; Section 10, Article I of the Ohio Constitution.”²²

Defendant-appellant Smith had notice through her indictment that she was charged with using or threatening the immediate use of force against Roger Sauerwein and Rachel Cornett while “* * * committing or attempting to commit a theft offense * * *” in violation of R.C. 2911.02(A)(3). The statute under which she was indicted made it very clear that the crime was completed either by committing a theft offense or by attempting to commit a theft offense. If this Court affirms the decision of the First District and applies the holding of the *Davis* case, these principles would be fully adhered to, and Smith’s Sixth Amendment right to proper notice would be protected.

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.²³ As recently as July 12, 2007, in *State v. Thomas*, the Eighth

²¹ *State v. Deem* (1988), 40 Ohio St.3d 205, 210, 533 N.E.2d 294, 298.

²² *Id.* at 210.

²³ Interestingly, some of these courts cite to the *Deem* test and others do not.

District cited to *State v. Davis* and stated that theft is a lesser included offense of robbery. 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.*”²⁴ (Italics added) Again, 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.²⁵ “Accordingly, the trial court erred in failing to instruct on the lesser included offense” of theft.²⁶

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.²⁷ 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.²⁸

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

²⁴ *State v. Wolf*, 8th Dist. No. 83673, 2004-Ohio-4500.

²⁵ *State v. Williams* (August 5, 1999), 8th Dist. No. 74501.

²⁶ 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.

²⁷ *State v. Johnson* (March 29, 2000), 9th Dist. C.A. No. 19692.

²⁸ 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.

that this additional element was not met, the trial court should have instructed upon the lesser-included offense of theft.”²⁹ 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 dispute that theft under R.C. 2913.02(A) is a lesser included offense of robbery.”³⁰ 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. 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.”³¹ 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

The Twelfth District Court of Appeals has held to the contrary of the above districts on a number of occasions. In *State v. Jefferson*, the court cited to *State v. Carter* 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 Robbery, as defined by R.C.

²⁹ *State v. Deimling* (December 20, 2000), 9th Dist. No. C.A. NO. 99CA007496.

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

³¹ *State v. Delaney*, 10th Dist. No. 04AP-1361, 2005-Ohio-4067.

2911.02(A)(3).”³² The Twelfth District also relied on *Carter* to rule that theft is not a lesser included offense of aggravated robbery in the cases of *State v. Woods* and *State v. Gooden*.³³

Although the Eighth District has ruled that theft is not a lesser included offense of robbery, the court followed *State v. Carter* in at least two cases involving *aggravated robbery* and theft. In *State v. Rogers* and *State v. Ogletree*, the court the Eighth District Court of Appeals followed *Carter* and held that theft is not a lesser included offense of aggravated robbery.³⁴

³² *State v. Jefferson*, 2nd Dist. No. C.A. 20698, 2005-Ohio-4201; reversed and remanded for resentencing only.

³³ *State v. Woods*, 2nd Dist. C.A No. 19005, 2002-Ohio-2367; *State v. Gooden*, 2nd Dist. C.A. No. 19231, 2003-Ohio-905.

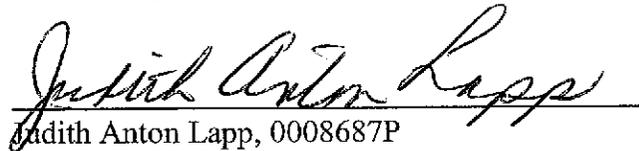
³⁴ *State v. Rogers* (November 16, 2000), 8th Dist. No. 77723. *Cf.* with *State v. Williams*, *supra*.

CONCLUSION

The state asks this Court to adopt the reasoning of the *Davis* court and to affirm Smith's conviction for theft. If this Court would do so, it would continue to protect "the need for clarity in meeting the constitutional requirement that an accused have notice of the offenses charged against him."³⁵

Respectfully,

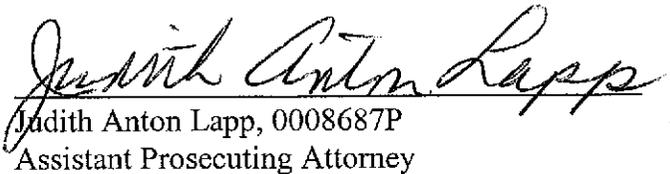
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CERTIFICATE OF SERVICE

I hereby certify that I have sent a copy of the foregoing Merit Brief of Plaintiff-Appellee, by United States mail, addressed to Michaela M. Stagnaro, 906 Main Street, Suite 403, Cincinnati, Ohio 45202, counsel of record, this 31st day of July, 2007.



Judith Anton Lapp, 0008687P
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³⁵ *State v. Deem* (1988), 40 Ohio St.3d 205, 210, 533 N.E.2d 294.