

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

*

S.C. Case No. 2013-0351

Plaintiff-Appellant,

*

On Appeal from the Montgomery
County Court of Appeals, Second

vs.

*

Appellate District, Case No. 24716

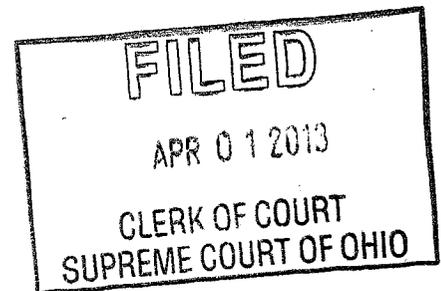
KEVIN D. TOLLIVER,

*

Defendant-Appellee.

*

MEMORANDUM OF APPELLEE IN OPPOSITION TO JURISDICTION



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THIS CASE IS NOT ONE OF
GREAT PUBLIC AND GENERAL INTEREST

The Second District Court of Appeals correctly decided in *State v. Tolliver*, Montgomery App. No. 24716, 2013-Ohio-115, that the applicable mens rea for the use of force element of robbery under R.C. 2911.02(A)(3) is recklessness. The Court of Appeals reached its decision after analyzing the statute in accordance with the approach promulgated by this Court in *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26.

Contrary to the assertions of the Appellant, the Second District conducted the proper analysis and interpreted the statute correctly. The State of Ohio simply disagrees with the Court of Appeals' holding. There is no misapplication of established law, nor is there need for clarification thereof. Appellant's Proposition of Law is incorrect. This case is not one of public or great general interest and jurisdiction should be declined.

ARGUMENT

Appellant's Proposition of Law I:

Applying the analysis in *State v. Wac*, 68 Ohio St.2d 84, 428 N.E.2d 428 (1981), and *State v. Maxwell*, 95 Ohio St.3d 254, 2002-Ohio-2121, 767 N.E.2d 242, to robbery as described in R.C. 2911.02(A)(3), indicates that the use-of-force element of the robbery statute does not require a mens rea; robbery, in violation of R.C. 2911.02(A)(3), therefore, is a strict-liability offense.

The State argues that the Court of Appeals did not apply the correct test for determining if a statute is a strict liability offense. Memorandum in Support of Jurisdiction (Memo in Support), filed herein March 1, 2013, pp. 4,5. The State argues that the correct test is derived from the cases of *State v. Wac*, 68 Ohio St.2d 84, 428 N.E. 428 (1981), and *State v. Maxwell*, 95 Ohio St.3d 254, 2002-Ohio-2121, 767 N.E.2d 242. This Court reaffirmed the use of the *Wac/Maxwell* analysis in *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26. Appellee agrees with Appellant that this is the appropriate analysis. The State is, however, incorrect in its assertion that the Court of Appeals did not apply this exact test in its decision below.

The ratio decidendi of the Second District's holding is in accord with and an application of the *Wac/Maxwell* analysis. In fact, the Court of Appeals' decision quotes the portion of the *Horner* decision which applies the *Wac/Maxwell* analysis. *Tolliver* at ¶23. The Second District's decision utilized the standard urged by the State; the State simply disagrees

with the conclusion reached by the majority.

The analysis conducted by the Court of Appeals in determining whether R.C. 2911.02(A)(3) is a strict liability offense, which the State dismisses as “subjective,” is precisely the same analysis applied by this Court to R.C. 2911.01(A)(3) in *State v. Horner*. The Court of Appeals decision specifically discussed the rationale of *Horner*, which found that R.C. 2911.01(A)(3), aggravated robbery, plainly indicated a purpose to impose strict liability by the General Assembly due to the “heightened potential for even accidental physical harm that results from the commission of the robbery.” *Tolliver* at ¶23, citing *Horner*, ¶¶52-53.

After its discussion of the *Horner* decision, the Court of Appeals went on to apply the test to R.C. 2911.02(A)(3), ultimately distinguishing it primarily on the basis of the lesser threat of physical harm posed by the offense. *Tolliver* at ¶¶24-26. The lesser potential for physical harm is a result of material differences in the conduct prohibited. Robbery under R.C. 2911.02(A)(3) prohibits the use of force or the threatened use of force in commission of a theft offense. The potential for physical harm from this offense is far less than the other subsections of robbery or aggravated robbery, all of which deal with either use or possession of deadly weapons, or the infliction or attempted infliction of actual physical harm. This is the core of the Court of Appeals' holding that R.C. 2911.02(A)(3) does not plainly indicate a purpose to impose strict liability:

In other words, the dire consequence of the offender's commission of a Theft offense - serious physical harm, which animated the Supreme Court of Ohio to hold, in *Horner*, that the offense in that case was a strict-liability offense, is missing in the case before us. *Tolliver* at ¶25.

The State further argues that the Court of Appeals ignored the holding of *State v. Wac*. Memo in Support, p. 6. The State posits that the incorporation of a theft offense into the definition of robbery plainly indicates a purpose to impose strict criminal liability on the remaining elements. The State argues that because a theft offense has its own mens rea, the absence of any additional mens rea in the robbery statute is a clear indication of strict liability. This is a misapplication of the *Wac* decision.

State v. Wac concerned a statute where one subsection of an offense contained an express culpable mental state and the other subsection did not. Each subsection was an alternate version of the same offense. The *Wac* Court held that such a construction was a plain indication of a purpose to impose strict criminal liability in the subsection that omitted a mens rea. The *Wac* analysis is not applicable to R.C. 2911.02, the robbery statute, where all divisions incorporate the commission or attempted commission of a theft offense as an element, and no division contains a express culpable mental state. The State attempts to apply the logic of the *Wac* decision to separate elements of a single offense. This is not a proper application of the *Wac* holding. Notably, this Court did not apply *Wac* in this manner to the aggravated robbery statute at issue in *Horner*.

The decision of the Court of Appeals applied the appropriate analysis based upon this

Court's precedent: it examined R.C. 2911.02(A)(3) using the *Wac/Maxwell* analysis urged by this Court in *Horner*. The Court of Appeals' discussion closely follows this Court's analysis of R.C. 2911.01(A)(3), a statute of similar construction, in *Horner*. The only distinction arises in the ultimate holding of the Court of Appeals, that R.C. 2911.02(A)(3) does not plainly indicate a purpose to impose strict liability. Moreover, that holding is premised upon the very factors this Court considered in *Horner*.

CONCLUSION

The Second District's decision was correct both in its interpretation of precedent and its application to the issue of law presented. The Court of Appeals' holding should not be disturbed. Appellee respectfully requests that this Court decline to accept jurisdiction and dismiss this appeal.

Respectfully Submitted,

**MURR, COMPTON,
CLAYPOOLE & MACBETH**

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing and attached documentation was served upon Andrew T. French, Montgomery County Prosecutor's Office, 301 West Third Street, Suite 500, PO Box 972, Dayton OH 45422, via regular US Mail this 1st day of April 2013.


Charles M. Blue
Attorney for Defendant-Appellee