ORIGINAL

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 Appellate District, Case No. 24716
vs.	*	
KEVIN D. TOLLIVER,	*	
Defendant-Appellee.	*	

MERIT BRIEF OF APPELLEE, KEVIN D. TOLLIVER

Mathias H. Heck, Jr.
Prosecuting Attorney, Montgomery County, Ohio

Andrew T. French (0069384)
Montgomery Cty. Prosecutor's Office
Appellate Division
PO Box 972
301 West Third Street, 5th Floor
Dayton OH 45422
Tel.: (937) 225 5027
Attorney for Plaintiff-Appellant

Charles M. Blue (0074329)
Murr, Compton, Claypoole &Macbeth
401 E. Stroop Rd.
Kettering, OH 45429-2829
Tel.: (937) 298 1054
Fax: (937) 293 1766
Email: cblue@mccmlawyers.com
Attorney for Defendant-Appellee

MURR, COMPTON,
CLAYPOOLE & MACBETH
ATTORNEYS AT LAW
401 E. STROOP ROAD
KETTERING, OHIO 45429
(937) 298-1054
TELEFAX (937) 293-1766

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MURR, COMPTON,
CLAYPOOLE & MACBETH
ATTORNEYS AT LAW
401 E. STROOP ROAD
KETTERING, OHIO 45429
(937) 298-1054
TELEFAX (937) 293-1766

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MURR, COMPTON,
CLAYPOOLE & MACBETH
ATTORNEYS AT LAW
401 E. STROOP ROAD
KETTERING, OHIO 45429
(937) 298-1054
TELEFAX (937) 293-1766

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 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. The State of Ohio argues that the Second District Court of Appeals reached the wrong conclusion in its decision. Appellant's Merit Brief, filed herein August 12, 2013, p.3 (hereafter "Appellant Brief").

The Court of Appeals reached its conclusion by identifying and applying the *Wac/Maxwell* approach which this Court reaffirmed as the proper test for the application of R.C. 2901.21(B) in *State v. Horner*, supra. *Tolliver* at ¶23. The *Wac/Maxwell* approach incorporates this Court's prior holdings in *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. The Appellant agrees that this is the correct analysis to be applied in interpreting the statute, but argues that the Court of Appeals misapplied the *Wac/Maxwell* analysis to R.C. 2911.02(A)(3),

MURR, COMPTON,
CLAYPOOLE & MACBETH
ATTORNEYS AT LAW
401 E. STROOP ROAD
KETTERING, OHIO 45429
(937) 298-1054
TELEFAX (937) 293-1766

thereby reaching the wrong conclusion in this particular matter. Appellee agrees with Appellant that the *Wac/Maxwell* analysis is appropriate, but disagrees with Appellant's contention that the analysis compels a result different from that reached by the Court of Appeals.

Appellant attempts to show a misapplication of the *Wac* and *Maxwell* cases by analyzing the holdings of each and applying them to the statute at issue in this matter. In doing so, Appellant misconstrues the holdings of *State v. Wac* and *State v. Maxwell*. Further, Appellant ignores this Court's application of the *Wac/Maxwell* analysis in *State v. Horner* by omitting the second part of the approach. Appellant argues that a proper application of the *Wac* and *Maxwell* holdings to the issue at hand requires a finding that R.C. 2911.02(A)(3) is a strict liability offense. Appellant Brief, pp. 5-8. This argument misreads those cases to stand for the proposition that the existence of an express mens rea applicable to any element of an offense mandates a finding of strict liability as to all other elements.

This Court construed its holding in *Wac* thus:

> Thus, in R.C. 2915.02 (bookmaking), we concluded that when a single subsection of a statute with two discrete clauses contains one clause that expresses a culpable mental state and another discrete clause that does not, the General Assembly has plainly indicated a purpose to impose strict criminal liability under R.C. 2901.21(B). In addition, in R.C. 2915.03 (gambling house), which involved two separate divisions of the statute rather than a single subsection with two discrete clauses, we concluded that the inclusion of a culpable mental state in one division and the omission of a culpable mental state from another division means that the General Assembly plainly indicated a purpose to impose strict criminal liability for the second division. *Horner* at ¶34.

MURR, COMPTON,
CLAYPOOLE & MACBETH
ATTORNEYS AT LAW
401 E. STROOP ROAD
KETTERING, OHIO 45429
(937) 298-1054
TELEFAX (937) 293-1766

The specific issue in *Wac* is not present in the matter sub judice. The robbery statute, R.C. 2911.02, contains three discrete forms of the offense, all of which omit an express mens rea. Appellant argues that because the robbery offenses incorporate a theft offense as an element, the absence of an express mens rea within the robbery statute is analogous to the statutes considered in *Wac*. This is not so. All subdivisions of R.C. 2911.02 incorporate the commission or attempted commission of a theft offense as an element, and no subdivision contains a express culpable mental state, thus the holding of *Wac* is not applicable. *Wac* dealt with separate subdivisions or discrete clauses within a subdivision, each defining a separate form of the offense. The robbery offenses contained in R.C. 2911.02 each define a single offense, and each incorporate as an element thereof another offense. There are no discrete offenses which contain an express mens rea.

The holding of *Maxwell* provides more guidance on the issue presented herein. Therein, this Court held that "a court must be able to answer in the negative the following two questions before applying the element of recklessness pursuant to R.C. 2901.21(B): (1) does the section defining an offense specify any degree of culpability, and (2) does the section plainly indicate a purpose to impose strict criminal liability?" *Maxwell* at ¶21. Applying this test to the robbery offense contained in R.C. 2911.02(A)(3), the first question must be answered in the negative. The language of R.C. 2911.02 does not contain any express mens rea in any subdivision. Again the Appellant argues that simply because the offense incorporates a theft offense as an element, the mens rea for theft requires the opposite

MURR, COMPTON,
CLAYPOOLE & MACBETH
ATTORNEYS AT LAW
401 E. STROOP ROAD
KETTERING, OHIO 45429
(937) 298-1054
TELEFAX (937) 293-1766

conclusion. However, this Court's holding in *Horner* suggests the opposite.

In *Horner*, this Court analyzed a subsection of the aggravated robbery statute, R.C. 2911.01(A)(3), ultimately holding that the statute "plainly indicates a purpose to impose strict liability." *Horner* at ¶52. The Court noted that R.C. 2911.01(B) contains an express mens rea, whereas no mens rea is specified in subsection (A). This Court further noted that the underlying theft offense, which is an element of subsection (A) aggravated robbery, also contains a mens rea, but did not elaborate on this aspect further. Of particular relevance, the Court continued its analysis with the *additional* finding that the statute plainly indicates a purpose to impose strict liability. This additional finding would appear to be superfluous if the Court interpreted the incorporated theft offense to supply a mens rea for the offense of aggravated robbery or that the existence of any mens rea within the statute ended the inquiry.

The ratio decedendi of this Court's analysis in *Horner* is discussed at length by the majority decision of the Court of Appeals. *Tolliver* at ¶23. The Court of Appeals interpreted *Horner* to have held 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.

The analysis conducted by the Court of Appeals in determining the applicable mens rea for R.C. 2911.02(A)(3) mirrors the analysis applied by this Court to R.C. 2911.01(A)(3) in *State v. Horner*. After its discussion of the *Horner* decision, the Court of Appeals went on to

MURR, COMPTON,
CLAYPOOLE & MACBETH
ATTORNEYS AT LAW
401 E. STROOP ROAD
KETTERING, OHIO 45429
(937) 298-1054
TELEFAX (937) 293-1766

apply the test to R.C. 2911.02(A)(3), ultimately distinguishing it 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, which prohibit theft while in possession of a deadly weapon, or the attempted, threatened, or actual infliction of physical harm. The Court of Appeals noted that robbery under R.C. 2911.02(A)(3) is punished as the least severe of the robbery offenses, being a felony of the third degree, whereas the other subsections are felonies of the second degree. Of course, the various forms of aggravated robbery carry even greater potential for physical harm, and are punished more severely, as felonies of the first degree.

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 Court of Appeals holding that R.C. 2911.02(A)(3) is not a strict liability offense, unlike other forms of robbery or aggravated robbery, is due to a qualitative difference in the conduct prohibited.

MURR, COMPTON,
CLAYPOOLE & MACBETH
ATTORNEYS AT LAW
401 E. STROOP ROAD
KETTERING, OHIO 45429
(937) 298-1054
TELEFAX (937) 293-1766

The Appellant urges this Court to treat the offense of robbery under R.C. 2911.02(A)(3) the same as more grave and severe offenses such as aggravated robbery. This ignores the fact that each subsection of the aggravated robbery and robbery statutes are distinct offenses, prohibiting different conduct and specifying different punishments. Further Appellant disregards the second question of the *Maxwell* test, namely whether the statute "plainly indicates a purpose to impose strict liability." The State argues that strict liability should be found wherever mens rea can be found elsewhere within the statute. This is not the *Wac/Maxwell* analysis as applied by this Court in *Horner.* The existence of a mens rea in other subdivisions of a statute or within an incorporated offense is not dispositive, but merely one matter to be considered in the determination of whether a statute plainly indicates a purpose to impose strict liability. In *Horner,* this Court found strict liability to be applicable at least in part because of the nature of the offense. That rationale weighs against a finding of strict liability on the use-of-force element in the robbery offense at issue here.

CONCLUSION

The Second District Court of Appeals correctly applied existing precedent in interpreting R.C. 2911.02(A)(3) and holding that recklessness is the applicable mens rea. The holding should not be disturbed. Appellant's sole Proposition of Law should be rejected. Appellee respectfully requests that this Court affirm the decision of the Court of Appeals in its entirety.

MURR, COMPTON,
CLAYPOOLE & MACBETH
ATTORNEYS AT LAW
401 E. STROOP ROAD
KETTERING, OHIO 45429
(937) 298-1054
TELEFAX (937) 293-1766

Respectfully Submitted,

MURR, COMPTON,
CLAYPOOLE & MACBETH

By:

Charles M. Blue 0074329
401 E. Stroop Rd.
Kettering, OH 45429-2829
Tel.: (937) 298 1054
Fax.: (937) 293 1766
Email: cblue@mccmlawyers.com
Attorney for Defendant-Appellee

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 October 2013.

Charles M. Blue
Attorney for Defendant-Appellee

MURR, COMPTON,
CLAYPOOLE & MACBETH
ATTORNEYS AT LAW
401 E. STROOP ROAD
KETTERING, OHIO 45429
(937) 298-1054
TELEFAX (937) 293-1766