

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

CASE NO. 2013-0351

Plaintiff-Appellant,

ON APPEAL FROM THE
MONTGOMERY COUNTY
COURT OF APPEALS,
SECOND APPELLATE DISTRICT

vs.

KEVIN D. TOLLIVER

COURT OF APPEALS
CASE NO: CA 24716

Defendant-Appellee.

REPLY BRIEF OF APPELLANT, THE STATE OF OHIO

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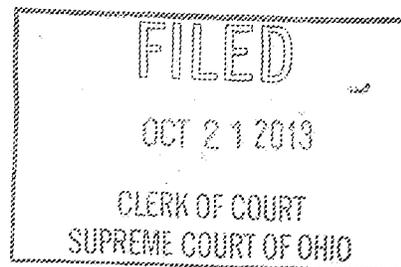
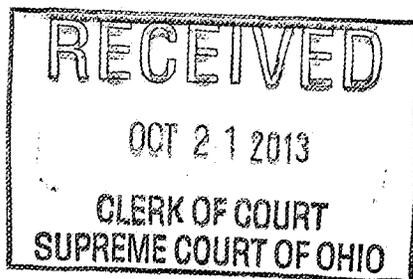


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ARGUMENT IN REPLY

The arguments set forth in the Brief of Amicus Curiae, the Ohio Public Defender, require a response on two points.

1. The invitation to overturn established precedent should not be accepted.

The arguments advanced by the Ohio Public Defender in its amicus brief serve less as an attack on Appellant's argument than as a condemnation of the precedent set forth by this Court upon which much of Appellant's argument relies. Specifically, amicus appears to accept the fact that, in light of this Court's binding precedent, Appellant's arguments have merit. Consequently, to avoid an unfavorable result based on past precedent, amicus argues that "this Court's precedent has not been faithful to the General Assembly's repudiation of strict liability as the default mens rea," *Brief of Amicus Curiae*, p. 3, and asks that this Court "limit or disavow its precedent" in *State v. Horner*, 126 Ohio St.3d 486, 2010-Ohio-3830, 935 N.E.2d 26, *State v. Lester*, 123 Ohio St.3d 396, 2009-Ohio-4225, 916 N.E.2d 1038, *State v. Warf*, 86 Ohio St.3d 375, 715 N.E.2d 172 (1999), and *State v. Maxwell*, 95 Ohio St.3d 254, 2002-Ohio-2121, 767 N.E.2d 242. *Brief of Amicus Curiae*, p. 9.¹ Such a request should not be granted.

Other than disagreeing with the rationale set forth in this Court's prior decisions, amicus offers nothing of substance to suggest that this Court erred in *Horner*, *Lester*, *Warf* and *Maxwell*. And more importantly, amicus ignores completely the importance of stare decisis.

"Stare decisis is the bedrock of the American judicial system" and is of fundamental importance to the rule of law. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-849,

¹See also *Brief of Amicus Curiae*, p. 6 ("This Court should limit or disavow those portions of its precedent that fail to anchor its analysis to the language of section defining the offense."); p. 10 ("This Court should re-evaluate its analysis in *Horner* because it violates R.C. 201.21(B) * * *"); and p. 12 ("Limiting or disavowing *Horner*, *Lester*, *Wharf*, and *Maxwell* is necessary to harmonize the Court's precedent with the General Assembly's intent * * *").

797 N.E.2d 1256, ¶ 1; *Wampler v. Higgins*, 93 Ohio St.3d 111, 120, 752 N.E.2d 962 (2001). The doctrine “is designed to provide continuity and predictability in our legal system,” and to serve “as a means of thwarting the arbitrary administration of justice as well as providing a clear rule of law by which the citizenry can organize their affairs.” *Galatis* at ¶ 43. “Those affected by the law come to rely on its consistency” and, therefore, “stare decisis is long revered.” *Id.*

This Court is certainly entitled, however, to re-examine and discard prior decisions that were decided erroneously. But a prior decision of this Court should not be overturned unless three questions can be answered in the affirmative: “(1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practicable workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied on it.” *Galatis* at ¶ 48. This is where amicus’s argument for overturning years of precedent fails.

The only aspect of the *Galatis* test that amicus addresses is the first – amicus unmistakably believes that *Horner*, *Lester*, *Warf* and *Maxwell* were all wrongly decided. But nothing amicus argues addresses the second and third aspect of the *Galatis* test, perhaps because nothing favorable to amicus’s position can be said – the holdings and rationale in *Horner*, *Lester*, *Warf* and *Maxwell* have proven to be workable in practice and abandoning them as precedent would wreak havoc upon courts and practitioners that have come to rely on them.² Thus, amicus’s invitation to this Court to overturn years of precedent should not be accepted.

²A quick Westlaw search shows that the four cases amicus asks this Court to overturn have been and relied upon by Ohio courts of appeals more than 100 times. The number of times these cases have been relied upon at the trial-court level, the State is confident, is exponentially greater.

2. The State's argument is premised on a proper interpretation of *Horner*.

A second invitation made by amicus is for this Court to dismiss this appeal as improvidently allowed because, in amicus's belief, the State's argument depends upon a "mistaken premise." *Brief of Amicus Curiae* at p. 13. But unfortunately, it is amicus who is mistaken in its reading of *State v. Horner, supra*, or, alternatively, in its reading of Appellant's argument.

In particular, amicus quotes the following paragraph from *Horner*:

R.C. 2911.01(A) includes the element of attempting or committing a theft offense, which incorporates all the elements of theft, including its mental state. However, that mental state is applicable to the theft aspect of division (A) only, and its incorporation into division (A) does not provide a mental state for the physical-harm element described in subsection (A)(3). *See Maxwell*, 95 Ohio St.3d 254, 2002-Ohio-2121, 767 N.E.2d 242, ¶ 23 (rejecting the argument that the mental state in a division of the relevant statute for one element of an offense also applies to a subsection in that division that does not specify a mental state).

Horner, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26, ¶ 49.

Amicus contends that by stating in *Horner* that incorporation of the applicable mental state for theft into R.C. 2911.01(A) "does not provide a mental state for the physical-harm element described in subsection (A)(3)," this Court meant that the applicable mental state for the theft aspect of the statute is irrelevant to the determination of applicable mental state for the physical-harm element of the statute. But in reading ¶ 49 of *Horner* in the context of the decision as a whole, it appears that this is not what this Court meant.

Rather, the State reads ¶ 49 of *Horner* to mean that the mental states applicable to the theft aspect of robbery statute (i.e. *purposely* deprive the owner and *knowingly* obtain the property) do not provide a mental state for the physical-harm element of the statute, in the sense that “purposely” and “knowingly” are not the mental states for that element. That is why this Court held in *Horner* that serious-physical-harm aggravated robbery, in violation of R.C. 2911.01(A)(3), is a strict-liability offense. *Id.* at ¶ 52. And that is also why the State argues here that the same analysis should be applied and the same conclusion should be reached regarding the use-of-force element of robbery, in violation of R.C. 2911.02(A)(3). The State’s argument does not, therefore, depend upon a mistaken premise.

CONCLUSION

In view of the foregoing law and argument, as well as the law and argument set forth in Appellant’s August 12, 2013 Merit Brief, it is respectfully requested that this Court reverse the decision of the court of appeals below and find that application of this Court’s precedent 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 separate mens rea, and that use-of-force robbery is a strict-liability offense.

Respectfully submitted,

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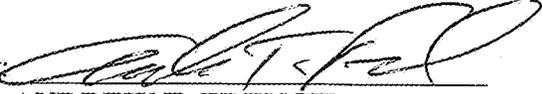
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief was sent by first class mail on this 18TH day of October, 2013, to the following: Charles M. Blue, Murr, Compton, Claypoole & Macbeth, 401 East Stroop Road, Kettering, OH 45429-2829 and Kenneth R. Spiert, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.

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