

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellant,

v.

BOBBY NOLAN

Appellee.

Case No. 13-1290

On Appeal From the Portage
County Court of Appeals,
Eleventh Appellate District

Court of Appeals
Case No. 2012-P-0047

REPLY BRIEF OF THE STATE OF OHIO

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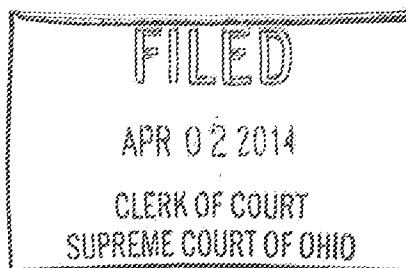
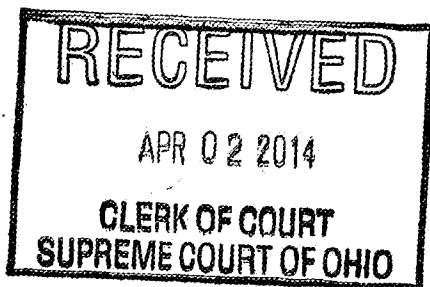


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An appellate district court errs in finding attempted felony murder by means of a deadly weapon is not a viable criminal offense in Ohio because that decision is in conflict with *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937.

Authorities Relied Upon to Support Proposition of Law

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STATEMENT OF THE CASE AND FACTS

PROCEDURAL HISTORY

The state provides the following procedural history of the case for purposes of clarification. The Portage County Grand Jury indicted Bobby Nolan on two counts of attempted murder with firearms specifications under R.C. 2903.02(A), R.C. 2923.02(B), R.C. 2929.02 and R.C. 2941.123. (Transcript of the docket, journal entries and original papers hereinafter "T.d." 1). He was also indicted for felonious assault with a firearm specification pursuant to R.C. 2903.11(A)(2). (T.d. 1). A week later, the Portage County Grand Jury returned a supplemental indictment charging Nolan with having a weapon under disability pursuant to R.C. 2923.12(A)(3)(C). (T.d. 11).

At trial, the court provided jury instructions on the four indicted offenses and two lesser included offenses. The court instructed on the offenses of attempted murder pursuant to R.C. 2923.02(A), 2903.02(A) and (B). (Transcript of the March 1, 2012 Jury Trial, hereinafter "T.p. book three" 52, 56). Then, the court provided a jury instruction on the lesser included offense of attempted involuntary manslaughter. (T.p. book three 60). After the court instructed the jury on felonious assault, it provided the jury instruction for the lesser included offense of negligent assault. (T.p. book three, 63, 65). The jury instructions concluded with an instruction on having weapons under disability. (T.p. book three, 66).

ARGUMENT

State of Ohio's Proposition of Law: An appellate district court errs in finding attempted felony murder by means of a deadly weapon is not a viable criminal offense in Ohio because that decision is in conflict with

State v. Williams, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937.

Contrary to Nolan's assertion on brief, this Court rendered a holding not dicta in finding that Williams, "[C]ommitted the offenses of attempted murder [R.C. 2903.02(B)] and felonious assault with a single act and animus. Accordingly, while he may be found guilty of both offenses, he may be sentenced for only one." *Williams*, 2010-Ohio-147, ¶ 24. If Ohio did not recognize the offense of attempted felony murder, there would have been no allied offenses of similar import issue for this Court to accept on review in *Williams*.

When Williams knowingly fired a gun at McKinney and paralyzed McKinney with one bullet, this Court held Williams, "[K]nowingly engaged in conduct that, if successful, would have resulted in the death of another as a proximate result of committing felonious assault." *Id.* *Williams* described the offense of attempted felony murder with a deadly weapon when the victim lived despite sustaining gunshot injuries.

Just as in *Williams*, Nolan knowingly engaged in conduct that, if successful, would have resulted in the death of another as a proximate result of committing the offense of felonious assault. R.C. 2903.02(B), 2923.02(A). When Nolan placed a loaded firearm within close proximity to the victim's body and shot, he was aware that his conduct would probably cause a certain result; harm to the victim. Medical testimony established that the bullet narrowly missed the victim's femoral artery and femur. (Transcript of Proceedings from February 28, 2012, hereinafter "T.p. book two", 169-170). Had the bullet struck his femur or femoral artery, the victim would have rapidly bled to death. (T.p. book two, 169-170).

Under *Williams*, Nolan committed the offense of attempted murder pursuant to R.C. 2903.02(B), 2923.02(A). *Williams* remains good law in Ohio. As it is the role of an appellate court under Ohio law to apply the law as declared by this Court on a given subject and *Williams* is evidence of the law on this topic, a reversal of the Eleventh District's decision in *Nolan* is warranted. The Appellant, State of Ohio, respectfully moves this Court to sustain its proposition of law, reverse the decision of the Eleventh District Court of Appeals and affirm the judgment of the Portage County Court of Common Pleas.

Respectfully submitted,

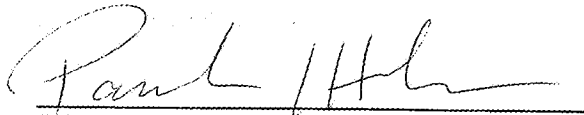
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of the State of Ohio has been sent by ordinary U.S. mail to Richard E. Hackerd at 2000 Standard Building, 1370 Ontario Street, Cleveland, Ohio 44113-1726 and Allen Vender Assistant State Public Defender at 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, this 1st day of April 2014.



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