

**FILED**

SID J. WHITE

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IN THE SUPREME COURT OF FLORIDA

EDWARD BEN,  
Petitioner,  
v.  
STATE OF FLORIDA,  
Respondent.

Case No. 66,483

RESPONDENT'S BRIEF ON MERITS

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## SUMMARY OF ARGUMENT

### I.

Petitioner employed force to retain possession of property unlawfully taken and to make good an escape. This case is not in conflict with Colbey v. State, 46 Fla. 112, 35 So. 189 (1903) which holds that following an attempted larceny, force used merely as a means of escape does not supply the element of force necessary to constitute robbery. The use of force to prevent recapture of the property and to make good an escape does constitute an element of robbery within the meaning of the amended robbery statute, Sec. 812.13 Fla. Stat. (1981). The amended statute changes the common law definition of robbery to include the use of force employed "in flight after the attempt or commission" Sec. 812.12(3), Fla. Stats. (1951).

### II.

Testimony that the security guard was employed by the department store was sufficient evidence of custody.

ARGUMENT

ISSUE I

WHETHER THE LOWER COURT ERRED IN  
DENYING APPELLANT'S MOTION FOR  
JUDGMENT OF ACQUITTAL ON THE BASIS  
THAT FORCE WAS USED AFTER THE TAKING.

After taking goods from a department store, the petitioner used force against a security guard who was trying to prevent his departure from the store's parking lot. The Second District Court of Appeal held in Ben v. State, 461 So.2d 286 (Fla. 2d DCA 1985) that these facts were sufficient to constitute robbery within the meaning of the amended robbery statute, Sec. 812.13, Fla. Stats (1981). The court further held that the amended statute changes the rule enunciated in Colbey v. State, 46 Fla. 112, 35 So. 189 (1903), which provides that violence or force used on the part of a thief in an effort to escape is not force contemporaneous with the taking of the property and does not constitute robbery. In adopting this view, the court aligned itself with other District Courts of Appeal. See Stufflebean v. State, 436 So.2d 244 (Fla. 2d DCA 1983) and Andre v. State, 431 So.2d 1042, 1043 (Fla. 5th DCA 1983). This court accepted jurisdiction to resolve the conflict between this case and Colbey.

At common law, robbery was defined as "the felonious taking of money or goods of value from the person of another, or in his presence, against his will, by violence, or putting him in fear." Williams v. Mayo, 126 Fla. 871, 172 So. 86, 87 (1937). The general rule is that violence or intimidation must precede or be contemporaneous with the taking of the property. Montsdoca v. State, 54 Fla. 82, 93 So. 157, 159 (1922); McCloud v. State, 335 So.2d 257 (Fla. 1976). In order to constitute robbery, the force or fear may and must be employed either to obtain or retain possession of the property or to prevent or overcome resistance to the taking. 77 C.J.S. Robbery, §11 (1952). However, as discussed in Colbey v. State, supra, force employed in attempting to escape, rather than in the physical taking of the property, does not supply the element of force or intimidation essential to a conviction for robbery. In Colbey, the evidence showed that the victim, Bousman, while on a crowded street, felt the defendant's hand in his pocket, grabbed his arm and tussled with the defendant until the police arrived. This court reversed a conviction for attempted robbery and held that the evidence did not meet the force or violence required by the robbery statute. Distinguishing a situation where force is used to accomplish the robbery, the court reasoned that force used only in an effort to escape is not sufficient. The court said:

If the defendant struggled or clinched with Bousman in an effort to overpower him for the purpose of enabling him to secure the money in the pocket, there would be such force as the statute contemplates, but the force used merely in an effort to escape from the grasp of Bousman or to avoid arrest would not be such force as is contemplated by the statute.

35 So. at 190

The petitioner in this case used force to prevent recapture of the property and to make good his escape. This case is not in conflict with Colbey which holds that following an attempted larceny, force employed in attempting to escape, rather than in the physical taking of the property, does not supply the element of force or intimidation essential to a conviction for robbery.

Some courts have adopted the view that the use of force or intimidation to prevent recapture of the property does constitute an element of robbery, to apply even where the force is used in escaping if it has the effect of enabling the accused to retain possession of the property. In this context, the robbery is viewed as a "continuous transaction," See 93 ALR 3d 643, 649-650. This rule was followed by the First District Court of Appeal in State v. Douglas, 337 So. 2d 407 (Fla. 1st DCA 1976), cert. denied, 34 So.2d 946 (Fla. 1977). In Douglas, the manager of a food store saw the defendant grab some pieces of meat and drop them into his

co-defendant's shoulder bag. The manager intercepted the two as they attempted to leave the store by the front door and while the three were walking to the rear of the store, the defendant struck the manager, and his co-defendant began stabbing the manager. The defendants then ran out of the store. The First District held that "where the owner of property takes action to prevent a thief from taking his goods from his premises and the thief uses force in order to get away with the goods, the thief's use of force is concurrent with the taking and constitutes robbery, "Id. at 1099-1100.

The Third District Court of Appeal in Stufflebean v. State, supra, applied the Douglas rationale to a situation where the thief had left the store with the goods. The court said:

We agree with the issue as framed and decided by the Douglas court but see no reason why the decision should be limited to the peculiar facts of that case. Whether the offense is a robbery rather than a larceny should not turn on the fortuitous circumstance that, owing in part to the victim's quick reaction, the taker is required to use force in order to make good his escape with the property before getting outside the building where the property is located... (emphasis in original).

Douglas at 245

Citing Stufflebean and Douglas, the Fifth District Court of Appeal in Royal v. State, 452 So.2d 1098 (Fla. 5th DCA 1984) held that force used against a store detective

after the defendants left a store from which they had taken several articles of clothing constitutes robbery "because possession of the property was still in "continuing dispute"." The "continuing dispute" theory is consistent with the result reached in cases applying the "continuous transaction" rule. State v. Douglas, supra; Stufflebean v. State, supra, (recognizing the principle). The continuing dispute theory is also consistent with the arrest powers accorded merchants and their employees under Sec. 812.015, Fla. Stats. (1981), the retail theft statute. Subsection (3)(a) of the statute<sup>1</sup> recognizes the owner's right to recover property by taking the thief into temporary custody. In this context, the result would be the same regardless of whether it is called a "continuing dispute" or a "continuous transaction".

The real issue, as stated by the First District Court of Appeal in Douglas, supra at 408, is "whether a person who finds it necessary to resort to violence in order to escape

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<sup>1</sup>Sec. 812.015(3)(a) provides: A law enforcement officer, a merchant, a merchant's employee, or a farmer who has probable cause to believe that merchandise or farm produce has been unlawfully taken by a person and that he can recover it by taking the person into custody may, for the purpose of attempting to effect such recovery or for prosecution, take the person into custody and detain him in a reasonable manner for a reasonable length of time. In the case of a farmer, taking into custody shall be effectuated only on property owned or leased by the farmer. In the event the merchant, merchant's employee, or farmer takes the person into custody, a law enforcement officer shall be called to the scene immediately after the person has been taken into custody.

with the property of another is chargeable with robbery." The common denominator in all the cases previously cited is the court's willingness to find robbery in those instances where force is used to prevent recapture of the property and make good an escape.

Reaching the same conclusion by statutory construction, the Second District Court of Appeal in this case said that under the amended robbery statute, the use of force during the attempt or commission of a theft or in immediate flight after the attempt or commission of a theft supplies the essential element of force necessary to constitute robbery. The court said this new definition of robbery thus proscribed the use of violence not only in the taking of the property but also in the immediate efforts of the thief to prevent recapture of the property. Ben v. State, supra at 287. See also, Stufflebean v. State, supra at 245.

The robbery statute under which petitioner was convicted provides as follows:

§812.13 Robbery.

(1) "Robbery" means the taking of money or other property which may be the subject of larceny from the person or custody of another by force, violence, assault, or putting in fear.

(2)(a) If in the course of committing the robbery the offender carried a firearm or other deadly weapon, then the robbery is a felony of the first degree, punishable by imprisonment or as provided in s.775.082, s.775.083, or s.775.084.

(b) If in the course of committing the robbery the offender carried a weapon, then the robbery

is a felony of the first degree, punishable as provided in s.775.082, s.775.083, or s.775.084.

(c) If in the course of committing the robbery the offender carried no firearm, deadly weapon, or other weapon, then the robbery is a felony of the second degree, punishable as provided in s.775.082, s.775.083, or s.775.084.

(3) An act shall be deemed "in the course of committing the robbery" if it occurs in an attempt to commit robbery or in flight after the attempt or commission.

The District Court of Appeal read subsection (3) of the statute as affecting a change in the common law which requires that the force or intimidation precede or be contemporaneous with the taking. Under the amended statute, force is considered to be contemporaneous with the taking if that force is used during "flight after the attempt or commission," Sec. 812.13(3). The Model Penal Code (1962) defines robbery, in Sec. 222.1(1), to include any violence or fear that is threatened or inflicted during an attempt or commission of theft or in flight after an attempt or commission of theft.

Critics of this construction of Sec. 812.13 say it violates the principles of statutory construction which provide that a statute designed to change the common law must speak in clear and unequivocal terms. Stufflebean supra at 247 (Baskin, J., dissenting in part"; Royal, supra at 1100 (Cowart, J., dissenting) However, the law in Florida is well settled that

the common law may be modified directly or indirectly, by the enactment of a statute that is inconsistent with it. Banfield v. Addington, 104 Fla. 661, 140 So. 893, 899 (1932); even if it substantially changes a common law rule. Brown v. People's Bank for Saving, 59 Fla. 163, 52 So. 719 (1910). In addition, a statute should be construed in its entirety and as a whole. State ex rel. Triary v. Burr, 79 Fla. 290, 84 So. 61 (1920); Sun Insurance Office, Ltd. v. Clay, 133 So.2d 735 (Fla. 1961). It is a cardinal rule of statutory construction that the entire statute under consideration must be considered in determining legislative intent and effect must be given to every part of the provision under construction and every part of the statute as a whole; from a view of the whole law in para materia, the reviewing court can determine legislative intent. State v. Gale Distributions, Inc., 349 So.2d 150 (Fla. 1977). The effect of subsection 812.13(3), defining the scope of a robbery as any act which "occurs in an attempt to commit robbery or in flight after the attempt or commission", is to effectively amend and modify the common law definition of robbery in Sec. 812.13(1) so as to include as an element of robbery, force or fear that may occur after a non-violent taking but during flight after commission of a theft where the owner or custodian attempts to regain possession of the stolen property or to apprehend the thief. This

construction is reasonable given an overall view of the statute and is consistent with developing Florida caselaw.

A Texas statute was given a similar interpretation in Lightner v. State, 535 S.W.2d 176 (Texas CA 1976) and the Texas Court of Appeals reached the same result. The defendant in Lightner took money from a store cash register. A police officer who happened to be patrolling the area in his car was flagged down by a store employee and immediately gave pursuit. The defendant was apprehended following a lengthy chase by the officer.

The relevant Texas statute, V.T.C.A., Penal Code, Section 29.02, defines robbery as follows:

"(a) A person commits an offense if in the course of committing theft as defined in Chapter 31 of this code and with intent to obtain or maintain control of the property, he:  
(1) intentionally, knowingly, or recklessly causes bodily injury to another; or...

A different part of the statute, V.T.C.A., Penal Code, Section 29.01, provides:

(1) "In the course of committing theft" means conduct that occurs in an attempt to commit, during the commission or in immediate flight after the attempt or commission of theft...

The Texas Court of Appeals construed Sections 29.01 and 29.02 to include any violence in the course of effectuating the theft as well as any violence while in immediate

flight from the scene of the theft. Lightner at 177.

An earlier Texas statute, Article 1408, V.A.P.C. (1925), defined robbery as follows:

"If any person by assault or violence or by putting in fear of left or bodily injury, shall fraudulently take from the person or possession of another any property with intent to appropriate the same to his own use, he shall be punished...

Under the earlier statute the threat or violence had to precede the taking of the property. The court ruled that the definition of robbery under the 1974 Penal Code was broader than the one contained under the former robbery statute, Article 1408. Lightner at 177. The court went on to state:

Under Sections 29.01 and 29.02, supra, the offense of robbery includes any violence in the course of effectuating the theft as well as any violence while in immediate flight from the scene of the theft. This new definition of robbery proscribes the use of violence not only in the taking of the property, but also in the immediate efforts of the thief to keep the stolen property.

Id. 177-178.

Similarly, the amended Florida Statute also effects a change in the common law rule that in order for there to be a robbery, violence or intimidation must precede or be

contemporaneous with the taking of the property. Pursuant to subsection (3) of the Florida statute, force or threat of violence is considered contemporaneous with the taking if the force or threat "occurs in an attempt to commit robbery or in flight after the attempt or commission". The District Court of Appeal's reading of Sec. 812.13 did not violate principles of statutory construction.

ARGUMENT

ISSUE II

WHETHER THE LOWER COURT ERRED IN  
DENYING APPELLANT'S MOTION FOR JUDG-  
MENT OF ACQUITTAL BECAUSE THE ALLEGED  
VICTIM DID NOT HAVE CUSTODY OF THE PROPERTY.

The exact state of title of stolen property is of no particular concern of the thief, except that it must have been in someone else. This rule is true through the one in possession may have held the property as bailee, trustee, or otherwise, having only a special and not a general ownership of the property. Therefore ownership is sufficiently proven where it is shown that the person alleged to be the owner had a special property in the stolen article, or that he held it in trust. Parker v. State, 75 Fla. 741, 78 So. 980 (1918)

Halcomb may be deemed an appropriate custodian of the clothing owned by the department store. Holcomb's duties as store security include caring for the merchandise to insure that it is not taken from the store without being paid for. (R63) Petitioner took the shirts without permission and without payment. Testimony that Halcomb was employed by the department store as a security guard was sufficient to establish custody of the subject property.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, respondent respectfully asks this court to affirm the judgment and sentence of the District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished by U.S. Mail to Deborah K. Brueckheimer, Assistant Public Defender, Criminal Courts Complex, 5100 - 144th Avenue North, Clearwater, Florida 33520 this *27<sup>th</sup>* day of June, 1985.

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