RENDERED: MARCH 26, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001376-MR

ANTHONY HILL — APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 07-CR-003793

COMMONWEALTH OF KENTUCKY — APPELLEE

AND NO. 2008-CA-001527-MR

CHARLES BONNER — APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 07-CR-003793

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: ACREE, STUMBO AND WINE, JUDGES.

ACREE, JUDGE: Anthony Hill and Charles Bonner (collectively Appellants) appeal the judgments of conviction and sentence of the Jefferson Circuit Court convicting them each of three counts of first-degree robbery, one count of tampering with physical evidence, and one count of misdemeanor fleeing/evading.[1] They were sentenced to ten years to run concurrently for each robbery count, one concurrent year for tampering with physical evidence, and six months for fleeing/evading. For the following reasons, we affirm in part and reverse in part.

In the early morning hours of September 13, 2007, plainclothes officers apprehended the Appellants for the suspected first-degree robbery of three persons in a parked vehicle at a lot outside a bar in Louisville. Officers had observed Hill and Bonner approach the vehicle, brandish guns, then walk away from the vehicle. As Appellants moved away from the vehicle, the officers announced their presence and ordered Hill and Bonner to stop. Instead of complying with the officers' instruction, they fled. Both were apprehended outside a nearby building. Investigators also found a semi-automatic handgun and a revolver, both loaded, in the area in which Hill and Bonner were apprehended.

Appellants now assert the trial court committed reversible error by: (1) denying their motions for directed verdict; (2) declining to instruct the jury on lesser included offenses; and (3) assessing certain fines, fees, and costs.

[1] Although Bonner and Hill have filed separate appeals, they were tried together, and their arguments on appeal are substantially similar. We therefore address their appeals together for convenience. Where their arguments or circumstances differ meaningfully, we will make note of the differences.

They first claim they were entitled to a directed verdict of acquittal. Specifically, they urge this Court either to overturn the statutory interpretation articulated in *Merritt v. Commonwealth,* 386 S.W.2d 727 (Ky. 1965), and reaffirmed in *Kennedy v. Commonwealth*, 544 S.W.2d 219 (Ky. 1976), and to conclude the Commonwealth presented insufficient evidence to support a conviction, or to find that the jury instructions required the Commonwealth to demonstrate beyond a reasonable doubt the firearms used in commission of the robbery were operable. Both are questions of law to be reviewed *de novo. See Carroll v. Meredith,* 59 S.W.3d 484, 489 (Ky.App. 2001). We will address each of Appellants' arguments in turn.

> Kentucky Revised Statute (KRS) 515.020(1) provides,
>
> A person is guilty of robbery in the first degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he:
>
> (a) Causes physical injury to any person who is not a participant in the crime; or
>
> (b) Is armed with a deadly weapon; or
>
> (c) Uses or threatens the immediate use of a dangerous instrument upon any person who is not a participant in the crime.

KRS 515.020(1). KRS 500.080, in relevant part, defines a deadly weapon as "[a]ny weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged." KRS 500.080(4).

The history of the cases interpreting Kentucky's laws regarding first-degree robbery is well-known. The Supreme Court ruled in *Merritt,* with respect to the version of the armed robbery statute then in effect, KRS 433.140, that "any object that is intended by its user to convince the victim that it is a pistol or other deadly weapon and does so convince him *is* one." *Merritt*, 386 S.W.2d 728 (emphasis in original). In *Kennedy*, the Kentucky Supreme Court affirmed the viability of *Merritt* in the context of the current first-degree robbery statute. *Kennedy*, 544 S.W.2d at 221.

The holdings of *Merritt* and *Kennedy* have been criticized. Robert G. Lawson & William H. Fortune, *Kentucky Criminal Law* §13-7(c)(3)(1998);[2] *see also Whalen v. Commonwealth,* 205 S.W.3d 238, 243 (Ky. 2006). Indeed, although the Supreme Court has noted the time has come to revisit *Merritt*, the opportunity to do so directly has not yet arisen. *Moore v. Commonwealth,* 2008 WL 3890168, *5 (Ky. 2008)("We recently indicated twice that '*Merritt*'s continuing viability warrants further analysis.'"), *citing Fegley v. Commonwealth*, 2008 WL 466150 at *2 (Ky., Feb.21, 2008), *and McIntoshi v. Commonwealth*, 2008 WL 2167894 at *9 (Ky., May 22, 2008)(holding that "our continuing reliance upon *Merritt* has drawn scholarly criticism . . . , and in a case where the issue is properly preserved would warrant further consideration.").

[2] A more recent edition of *Kentucky Criminal Law* is attributed to George Seelig. There are no inconsistencies between the 2007 version and the portions of the version by Professors Lawson and Fortune cited in this opinion.

Yet no matter how persuasively they argue their case, this Court is bound by Supreme Court precedent. Supreme Court Rule (SCR) 1.030(8)(a). Because the Supreme Court is aware of the criticism levied against *Merritt*, we shall not add to it. For the time being, we must and shall follow *Merritt* and *Kennedy*. Hill's and Bonner's cases properly preserve the issue. Whether this is a proper case to revisit *Merritt* and *Kennedy* is for the Supreme Court to decide.

Without regard to the applicability of *Merritt* and *Kennedy*, we have no doubt that the defendants were armed with deadly weapons when they committed the robbery. The deadly weapons were observed by the officers being used by the Appellants during the robbery; the crime victims also observed the weapons and were scared by the display; the weapons were later recovered and determined to be loaded. Appellants' first argument must fail.

Appellants' alternative argument is based on their interpretation of *Thacker v. Commonwealth,* 194 S.W.3d 287 (Ky. 2006). They argue that *Thacker* requires the Commonwealth to prove their weapons were operable. Appellants' reading of *Thacker* as establishing the operability of a firearm as an element of first-degree robbery would not depend, if one accepts Appellants' argument, on a rejection of *Merritt* and *Kennedy*. The argument focuses on the jury instruction. It was not possible, they argue, for the jury to find Appellants guilty of first-degree robbery under the instructions they received because the Commonwealth presented no evidence that the weapons were operational.

Appellants' interpretation of *Thacker* is simply not the law in Kentucky. First, *Thacker* itself states

> The gun in this case was a deadly weapon *regardless of its operability*. For purposes of first degree robbery, the gun's operability is immaterial to the question of whether it is a deadly weapon. *Helpenstine v. Commonwealth*, 566 S.W.2d 415, 416 (Ky. 1978) ("Whether the handgun was operable is not relevant.").

Thacker, 194 S.W.3d at 291 n.2. The impact of *Thacker* is that the determination whether an object used in a robbery was in fact a deadly weapon became, thereafter, a question of fact for the jury. Contrary to the Appellants' view, the jury instructions in *Thacker* did not specifically require that a jury find a gun used in a robbery was operable.[3] The jury in the instant case was given instructions very similar to those approved in *Thacker*.[4]

Furthermore, even presuming a finding of operability is implicitly required in the jury's determination that the weapons were deadly, there was sufficient evidence upon which the jury could infer operability.

> Apart from expert testimony or demonstrations of operability, circumstantial evidence of various kinds has been used to establish operability, depending on the circumstances. In a typical case, the court, upholding the

[3] The court in *Thacker* ruled proper jury instructions would have been as follows: "C. That when he did so, he was armed with a deadly weapon, to wit: a .22-caliber revolver. D. As a matter of law, a deadly weapon is defined to include any weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged."

[4] The Appellants' jury instructions were identical, and required the jury to find "C. That is when [the defendant] did so, he was armed with a pistol. AND D. That the pistol is a deadly weapon as defined in Instruction No: 9[.]" Instruction No. 9 defined a deadly weapon as "including any weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged."

> sufficiency of such evidence, noted that (1) the gun in question was introduced into evidence; (2) a police officer testified that the gun was loaded; (3) the defendant was seen with the gun in his hand; and (4) the defendant fled when he saw the police officer.

Jeffrey F. Ghent, *"Fact that gun was broken, dismantled, or inoperable as affecting criminal responsibility under weapons statute,"* 81 A.L.R.4th 745 § 2[b] (1990 & 2010 Supp.). Evidence of each of these factors was present in the case before us. Consequently, even if *Thacker* and *Helpenstine* did not make the weapons' operability immaterial, there was substantial evidence from which the jury could infer that the weapons were operable and the trial court properly denied the Appellants' motions for directed verdict.

We agree with the majority of states that have addressed the issue that the Commonwealth's burden of showing the operability of a weapon "is not a heavy one." *Commonwealth v. Nieves*, 43 Mass.App.Ct. 1, 680 N.E.2d 561, 562 (Mass.App.Ct. 1997)(Commonwealth's burden to show operability of weapon "is not a heavy one"); *see also, e.g., State v. Valles*, 162 Ariz. 1, 780 P.2d 1049, 1055 (Ariz. 1989)("Absent reasonable doubt as to the operability of a firearm, the state has no burden to prove the gun was not permanently inoperable.").

This Court has said, in the context of KRS 527.020 (Carrying concealed deadly weapon), that a weapon's

> inoperability is an affirmative defense. *See, Stark v. Commonwealth*, Ky., 828 S.W.2d 603 (1991), *overruled in part on other grounds in Thomas v. Commonwealth*, Ky., 931 S.W.2d 446, 447 (1996). In *Mosely v. Commonwealth*, Ky., 374 S.W.2d 492, 493 (1964), the

Court held that the accused bore the burden of proving the operability of the weapon:

> In *Couch v. Commonwealth*, Ky., 255 S.W.2d 478, and *Prince v. Commonwealth*, Ky., 277 S.W.2d 470, it was stated that a pistol is a deadly weapon *per se* and when the Commonwealth has proved that the accused had such a weapon concealed on or about his person it has made out a case *and if the weapon was in such a defective condition that it could not be fired, the burden was upon the accused to prove such a fact in the way of an affirmative defense.* Counsel for appellant faces up to the fact that such is the law in this state, but suggests that the cases should be overruled and the burden placed upon the Commonwealth. We have been offered no sound reason for such action.

Arnold v. Commonwealth, 109 S.W.3d 161, 163 (Ky.App. 2003)(emphasis in original). *Arnold* is consistent with *Thacker's* interpretation of KRS 515.020(1) and we see no reason why we should not apply the same reasoning to the interpretation of both statutes. Appellants did not assert the affirmative defense of the inoperability of the weapons nor did they ask for an instruction relative to their inoperability.

For the foregoing reasons, we find Appellants' alternative argument that the Commonwealth failed to establish the operability of their weapons to be unpersuasive.

Appellants next argue the trial court erred in denying their motions to instruct the jury on three lesser included offenses and one defense. Specifically, Appellants argue the jury should have been given instructions regarding menacing,

wanton endangerment, criminal attempt to commit first-degree burglary, and the defense of renunciation. Our review of alleged errors in jury instructions is *de novo*. *Hamilton v. CSX Transp., Inc.*, 208 S.W.3d 272, 275 (Ky.App. 2006).

> A lesser included offense is one which
>
> (a) . . . is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
>
> (b) . . . consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or
>
> (c) . . . differs from the offense charged only in the respect that a lesser kind of culpability suffices to establish its commission; or
>
> (d) . . . differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest suffices to establish its commission.

KRS 508.020(2). A trial court should not give an instruction on a lesser included offense unless "the evidence is such that a reasonable juror could doubt that the defendant is guilty of the crime charged but conclude that he is guilty of the lesser included offense." *Luttrell v. Commonwealth*, 554 S.W.2d 75, 78 (Ky. 1977), *citing Muse v. Commonwealth*, 551 S.W.2d 564 (Ky. 1977).

Appellant Hill cites *Reed v. Commonwealth*, 738 S.W.2d 818 (Ky. 1987), for the proposition that an instruction on a lesser included offense should be given if there is *any* evidence to support it. That is not entirely correct. The court in *Reed* uses relatively strong language, which at first glance appears to require

broad application of the rule regarding instructing the jury on lesser included offenses. Quoting *Lee v. Commonwealth,* 329 S.W.2d 57 (Ky. 1959), the Court in *Reed* said, "Our law requires the court to give instructions 'applicable to every state of case covered by the indictment and deducible from or supported to any extent by the testimony.'" *Reed*, 738 S.W.2d at 822; *Lee* at 60. Ultimately, the court in *Reed* held the defendant was entitled to the requested jury instruction because "there was other evidence from which the jury could have *reasonably* concluded that he committed a lesser offense." *Id.* at 823 (emphasis added). Reasonableness, then, is the standard.

Critical to the analysis is whether the evidence before the jury could have reasonably supported all the elements of the lesser included offenses. The relevant elements of armed robbery are set forth above. Menacing is the intentional placement of "another person in reasonable apprehension of imminent physical injury." KRS 508.050(1). A person commits first-degree wanton endangerment "when, under circumstances manifesting extreme indifference to the value of human life, he wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person." KRS 508.060(1). For menacing or wanton endangerment to constitute a lesser included offense of first-degree robbery, there must be some evidence that the defendants' intention was not to commit theft. 1 Cooper and Cetrulo, *Kentucky Instructions to Juries, Criminal* § 6.14, Comment (5th ed. 2008). For menacing, there also must be evidence Appellants' intent was to merely frighten the victims, while for wanton

endangerment there also must be evidence Appellants' intent was to merely place them at risk of injury. *Id.*

We find no evidence of alternative intent in this case. The evidence which explained why Appellants pointed their guns at the victims uniformly indicated Appellants' goal was to take the victims' money. While Appellants' attorneys suggested other reasons in their cross-examination of the witnesses, there simply was no evidence to support their suggestions.[5] Appellants cite the fact they walked away from the confrontation with none of the victims' property as evidence on which the jury could have found Appellants did not intend to commit a theft. The significance of that fact, however, is speculative and would not permit a reasonable juror to conclude Appellants intended to accomplish anything other than commission of a theft. The trial judge's ruling was proper.

Criminal attempt to commit first-degree robbery is a lesser included offense of first-degree robbery. *Pevlor v. Commonwealth*, 638 S.W.2d 272, 278 (Ky. 1982). KRS 506.010(1) provides:

> A person is guilty of criminal attempt to commit a crime when, acting with the kind of culpability otherwise required for commission of the crime, he:
>
> (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or
>
> (b) Intentionally does or omits to do anything which, under the circumstances as he believes them to be, is a

[5] Appellants' trial attorneys asked the victims if any of them had shouted a racial slur at Appellants or if they had been engaging in a drug transaction with Appellants. The victims all denied doing either.

> substantial step in a course of conduct planned to culminate in his commission of the crime.

KRS 506.010(1). This contemplates the inchoate commission of a crime; once a crime has been completed, however, there is no need for a jury instruction on criminal attempt. *See Kirkland v. Commonwealth*, 53 S.W.3d 71, 76 (Ky. 2001).

Appellants make much of the fact that they actually took nothing from the victims and told them to "Have a nice day" in support of their argument that the jury could have found the robbery was incomplete. However,

> The robbery statute requires only the use of force "in the course of committing theft" and "with intent to accomplish the theft." KRS 515.020(1). It does not require a *completed* theft.

Wade v. Commonwealth, 724 S.W.2d 207, 208 (Ky. 1986)(emphasis in original). That Appellants took nothing from the victims does not necessarily entitle them to an instruction on criminal attempt to commit first-degree robbery. As with other potential lesser included offenses, there must have been sufficient evidence to persuade reasonable jurors to believe Appellants only attempted robbery. The victims all testified Appellants demanded money while brandishing guns. There was no evidence that Appellants did anything less than fully commit a first-degree robbery. The trial judge properly declined to instruct the jury on criminal attempt to commit first-degree robbery.

Appellants also contend the trial court should have instructed the jury regarding the defense of renunciation. The trial court is required to instruct the jury on the whole law of the case, including lawful defenses. RCr 9.54(1). *See*

also Mondie v. Commonwealth, 185 S.W.3d 203 (Ky. 2005). Renunciation, however, is a defense to an *attempted* crime:

> In any prosecution for *criminal attempt to commit* a crime, it is a defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, the defendant abandoned his effort to commit the crime and, if mere abandonment was insufficient to avoid the commission of the crime, took the necessary affirmative steps to prevent its commission.

KRS § 506.020 (emphasis added). Appellants were not charged with criminal attempt to commit first-degree robbery and were not entitled to a jury instruction on that offense. Accordingly, they were not entitled to a jury instruction on renunciation.

Finally, Appellants assert the court costs, fines for felony convictions, and public defender fees assessed against them were contrary to statute. Hill was assessed $125 in court costs, $500 in public defender fees, and $1000 as a felony conviction fee. Bonner was assessed $125 in court costs, $1000 in public defender fees, and $1000 as a felony conviction fee.

The Commonwealth acknowledges that the court awarded these costs and fines, but argues that the matter is not ripe because they are not required to make payment until they complete their sentences. "[I]t is a fundamental rule that courts must refrain from deciding matters that have not yet ripened into concrete cases and controversies. Stated otherwise, courts are not authorized to render advisory opinions concerning moot or hypothetical issues." *Sullivan v. Tucker*, 29 S.W.3d 805, 808 (Ky.App. 2000) (citations omitted). However, this matter has

ripened. The portion of the sentence which requires Appellants to pay fees, costs, and fines is part of a final order and is just as ripe as any other portion of the sentence. It is the fact that Appellants have been ordered to pay these monies, and not the fact that they will only have to pay upon completion of their sentences, which creates a real, present controversy. Therefore, the matter properly may be considered on appeal.

KRS 23A.205(2) and KRS 534.040(4) prohibit the assessment of court costs and fines to indigent persons. Because Appellants were represented at trial by public defenders and permitted to proceed *in forma pauperis* on appeal, we can assume the trial court ruled them indigent. *See Simpson v. Commonwealth*, 889 S.W.2d 781, 784 (Ky. 1994). Imposing court costs and fines was therefore inappropriate, and we vacate that portion of the sentence. *Id.*

Additionally, before a defendant may be assessed a public defender fee, the trial court must hold a hearing at arraignment "to determine whether a person who has requested a public defender is able to pay a partial fee for legal representation, the other necessary services and facilities of representation, and court costs." KRS 31.211. The Commonwealth admits there was no such hearing. The portion of Appellants' sentences assessing fees, costs, and fines was imposed in direct contravention of the mandatory language of the relevant statutes.

For all the foregoing reasons, we affirm the trial court's denial of Appellants' motions for directed verdict and motions to instruct the jury on lesser included offenses and defenses, reverse the trial court's assessment of court costs,

public defender fees, and felony fines, and remand this case for further proceedings consistent with this opinion.

ALL CONCUR.

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