STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	FOR PUBLICATION April 8, 2010
v	No. 284585 Muskegon Circuit Court
GLENN TERRANCE WILLIAMS, a/k/a GLEN TERRANCE WILLIAMS, Defendant-Appellant.	LC No. 06-053640-FC Advanced Sheets Version

Before: OWENS, P.J., and TALBOT and GLEICHER, JJ.

GLEICHER, J. (*dissenting*).

I respectfully dissent. In my view, the Legislature did not intend that its 2004 amendment of the armed robbery statute would fundamentally alter the elements of that offense by eliminating the requirement of a completed larceny.

I. UNDERLYING FACTS AND PROCEEDINGS

On July 13, 2006, a man matching defendant's description entered a Clark gas station in Norton Shores, declared that he had a gun, and ordered the attendant to give him all the money in the cash register. After the attendant complied, the assailant pushed her into a back room and fled. The next day, defendant entered the Admiral tobacco shop (Admiral Tobacco) in Roosevelt Park, approached the clerk with his hand in his jacket, and announced, "[Y]ou know what this is, just give me what I want." The clerk did not give defendant any money or property, and defendant fled from the store without having stolen anything. Defendant apparently broke his leg in flight from the store, and the police eventually apprehended him. When the police arrested defendant, they noted that he wore on his body and possessed in his vehicle the same clothing worn by the man who had robbed the Clark station the previous day.

The prosecutor charged defendant with armed robbery of the Clark station (Case No. 06-053668-FC). In a separate complaint arising from the Admiral Tobacco events, the prosecutor charged defendant with assault with intent to rob while armed, MCL 750.89, and armed robbery, MCL 750.529 (Case No. 06-053640-FC). At a January 2007 hearing, the prosecutor informed the circuit court "that [defendant] will be offering . . . pleas of guilty in both files." The prosecutor advised that in the Admiral Tobacco case, the prosecution had elected to dismiss the assault with intent to rob while armed charge and accept defendant's guilty plea to a charge of armed robbery. Defense counsel summarized the parties' agreement that defendant's sentence

would "not . . . exceed 24 years on the minimum-maximum at the Michigan Department of Corrections."

After apprising defendant of his constitutional and other rights, the circuit court moved on to establish a factual predicate for defendant's plea to the Clark station robbery. However, defendant denied having represented to the station attendant that he possessed a weapon. When the circuit court offered to allow the parties additional time to further discuss defendant's guilty plea, the prosecutor suggested that the court instead establish the "factual scenario of the Admiral" Tobacco incident. Under questioning by the prosecutor, defendant admitted that he had entered Admiral Tobacco with the intent to steal money, had his hand "up under" his coat, and told the clerk, "[Y]ou know what this is, just give me what I want." The prosecutor's questioning continued as follows:

> [*Prosecutor*]: Okay. And it was your intent, at that time, for her to give you the money out of the cash register, is that right?
>
> *Defendant*: Yeah.
>
> [*Prosecutor*]: All right.
>
> *The Court*: Great—
>
> [*Prosecutor*]: And I think that satisfies.
>
> *The Court*: Great. I think we're all set on Admiral.

The parties then returned to presenting a factual basis for defendant's plea to the Clark station robbery. Defense counsel averred that defendant was high on cocaine during the Clark station robbery and could not recall the details of the crime. Defense counsel proposed that defendant could enter a no contest plea. The circuit court agreed it would resort to a police report to establish the factual predicate for defendant's no contest plea, summarizing,

> I think we've established here a lack of memory is the reason for the nolo plea about the Clark station, in file number 668. The report established that Mr. Williams, is guilty of the crime, on that file, to which he pleads no contest. The court finds the plea to be knowing, voluntary, understanding, and accurate. On that file, the court will accept the plea.
>
> On the other file, Mr. Williams's testimony does that for me. The court finds his testimony to establish commission of that crime and location here in Muskegon County. The court finds that plea as well to be knowing, voluntary, understanding, and accurate. So the court accepts that plea.

On February 9, 2007, the court sentenced defendant to concurrent terms of 24 to 40 years' imprisonment for the Clark station and Admiral Tobacco robberies.

In October 2007, defendant moved to withdraw both his pleas, contending that the circuit court neglected to secure an adequate factual foundation for either plea. According to defendant, the Admiral Tobacco plea discussions revealed no evidence that he had committed a larceny, and

the police report used to supply the factual basis of the Clark station plea did not sufficiently identify defendant as the robber. The circuit court denied defendant's motions, ruling (1) with respect to the Admiral Tobacco plea, that the language of the armed robbery statute allows conviction based on an attempted larceny, which the plea discussions substantiated, and (2) concerning the Clark station robbery, that the entirety of the police report and plea proceeding amply established defendant's participation in the Clark station robbery. This Court granted defendant's delayed application for leave to appeal, "limited to case no. 06-053640-FC [Admiral Tobacco] on the issue of a completed larceny only. In all other respects, the delayed application for leave is denied." *People v Williams*, unpublished order of the Court of Appeals, entered June 16, 2008 (Docket No. 284585).

II. ANALYSIS

"There is no absolute right to withdraw a guilty plea once it has been accepted by the trial court." *People v Montrose (After Remand)*, 201 Mich App 378, 380; 506 NW2d 565 (1993). Where, as here, a defendant moves to withdraw his or her plea after sentencing occurs, "[t]he trial court's decision will not be disturbed on appeal absent a clear abuse of discretion that resulted in a miscarriage of justice." *People v Boatman*, 273 Mich App 405, 406-407; 730 NW2d 251 (2006). "In reviewing the adequacy of the factual basis for a plea, this Court examines whether the factfinder could properly convict on the facts elicited from the defendant at the plea proceeding." *People v Brownfield (After Remand)*, 216 Mich App 429, 431; 548 NW2d 248 (1996), citing *People v Booth*, 414 Mich 343, 360; 324 NW2d 741 (1982).

Defendant insists that because he "never stole, moved or touched property" during the Admiral Tobacco incident, a fact-finder could not have convicted him of an armed robbery. Defendant emphasizes that larceny constitutes "an integral and necessary element of armed robbery," and absent evidence of a completed larceny, the circuit court erred by accepting his guilty plea to violating MCL 750.529. The majority rejects defendant's argument, holding that the Legislature's 2004 amendment of the robbery statute "specifically considers and incorporates acts taken in an attempt to commit a larceny, regardless of whether the act is completed." *Ante* at 5. In my estimation, the majority erroneously reaches its holding by reading into the statute language that the Legislature did not incorporate into the statute.

I approach my analysis bearing in mind that "[u]nderlying the criminal statutes of this state is the common law." *People v McDonald*, 409 Mich 110, 117; 293 NW2d 588 (1980). The common-law definition of a crime binds Michigan courts until the Legislature modifies the elements of the crime. *People v Perkins*, 468 Mich 448, 455; 662 NW2d 727 (2003). In *People v Covelesky*, 217 Mich 90, 100; 185 NW 770 (1921), our Supreme Court instructed:

> A well recognized rule for construction of statutes is that when words are adopted having a settled, definite and well known meaning at common law it is to be assumed they are used with the sense and meaning which they had at common law unless a contrary intent is plainly shown.

When a statute incorporates general common-law terms to describe an offense, we thus construe the statutory crime through the lens of common-law definitions. *People v Riddle*, 467 Mich 116, 125; 649 NW2d 30 (2002). In *Riddle*, our Supreme Court quoted approvingly the following relevant passage from *Morissette v United States*, 342 US 246, 263; 72 S Ct 240; 96 L Ed 288 (1952):

> [W]here [a legislature] borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Michigan's original robbery statutes derived from the common-law crime of robbery, and fashioned that crime into two grades. *People v Calvin*, 60 Mich 113, 120; 26 NW 851 (1886). In *Calvin*, our Supreme Court distinguished the two grades of robbery as "one in which the robbery is committed by an assault and robbery from the person, the robber being armed with a dangerous weapon, . . . the other in which the offense is perpetrated by force and violence, or by assault or putting in fear, and robbing, stealing, and taking from the person of another, the robber not being armed with a dangerous weapon . . . ." *Id*. at 119. Today, MCL 750.530 delineates the elements of an unarmed robbery, and MCL 750.529 defines armed robbery by adding to MCL 750.530 the element that the robber possessed a dangerous weapon or "an article used or fashioned in a manner to lead any person present to reasonably believe the article [was] a dangerous weapon, or [the robber] represent[ed] orally or otherwise that he or she [was] in possession of a dangerous weapon . . . ."

Under the common law, the crime of robbery indisputably included as an essential element the commission of a larceny. "Since, by definition, robbery includes larceny, robbery requires a caption and asportation of the property of another." Wharton's Criminal Law (15th ed), § 457, p 13. Wharton further instructs that a defendant accomplishes "a caption when . . . [he] takes possession; he takes possession when he exercises dominion and control over the property." *Id*. Professors Wayne LaFave and Austin Scott also explain, in relevant part:

> Robbery, a common-law felony, and today everywhere a statutory felony regardless of the amount taken, may be thought of as aggravated larceny—misappropriation of property under circumstances involving a danger to the person as well as a danger to property—and thus deserving of a greater punishment than that provided for larceny. [LaFave & Scott, Criminal Law, (Hornbook Series, 1972), § 94, p 692.]

Larceny, in turn, "requires that there be a 'trespass in the taking,' i.e., that the thief take the property out of the possession of its possessor. . . ." *Id*., § 85, p 622.

In *Covelesky*, 217 Mich at 96-97, our Supreme Court observed that Michigan's robbery statutes embody the common-law offense of robbery:

> Robbery at common law is 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. This definition has been followed by most of the statutes, and even where the language has been varied sufficiently to sustain, by a literal interpretation, a narrower definition of the offense, it has usually been held that it could not be presumed that the legislature intended to change the nature of the crime as understood at common law. [Quotation marks and citation omitted.]

In *Saks v St Paul Mercury Indemnity Co*, 308 Mich 719, 723-724; 14 NW2d 547 (1944), the Supreme Court quoted approvingly the following from a decision of the Washington Supreme Court, *Cartier Drug Co v Maryland Cas Co*, 181 Wash 146, 149; 42 P2d 37 (1935): "'In the administration of criminal law, two distinct elements are held to be necessary to the crime of robbery: (1) Putting the victim in fear of violence to his person or property; and (2) the taking of money, property, or thing of value from his person or in his presence.'" And in *People v LaTeur*, 39 Mich App 700, 706; 198 NW2d 727 (1972), this Court noted that "[l]arceny is one of the essential elements of an armed robbery charge." More recently, in *People v Jankowski*, 408 Mich 79, 87; 289 NW2d 674 (1980), the Supreme Court reiterated the proposition that "[r]obbery has long been defined in this jurisdiction to be nothing more than a 'larceny committed by assault or putting in fear'." "When the taking is accomplished by force or assault, the offense is aggravated to one of robbery." *Id*. at 88.

With these principles in mind, I conclude that the Legislature did not intend that the armed robbery statute would permit a conviction absent an accomplished larceny. In 2004, the Legislature reworked Michigan's robbery statute, MCL 750.529, to read, in relevant part, as follows:

> A person who engages in conduct proscribed under section 530 and who in the course of engaging in that conduct, possesses a dangerous weapon or an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or who represents orally or otherwise that he or she is in possession of a dangerous weapon, is guilty of a felony punishable by imprisonment for life or for any term of years.

Concomitantly, the Legislature enacted a revised unarmed robbery statute, MCL 750.530, that described as follows the unlawful "conduct" referenced in § 529:

> (1) A person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.
>
> (2) As used in this section, "in the course of committing a larceny" includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property.

The majority holds that when the Legislature amended § 530 in 2004, it intended to eliminate a larcenous taking as a requisite element of a robbery. In the majority's opinion, "[t]he legislative definition of 'in the course of committing a larceny' specifically 'includes acts that occur in an attempt to commit the larceny,'" reflecting the Legislature's intent to punish both complete and incomplete larceny-related actions. *Ante* at 5.

When construing statutory language, which we review de novo, this Court must ascertain and give effect to the Legislature's intent. *People v Pasha*, 466 Mich 378, 382; 645 NW2d 275 (2002); *People v Hill*, 269 Mich App 505, 514; 715 NW2d 301 (2006). "Because the Legislature is presumed to understand the meaning of the language it enacts into law, statutory analysis must

begin with the wording of the statute itself." *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000); see also *Pasha*, 466 Mich at 382 ("The first step in that determination is to review the language of the statute itself.") (quotation marks and citation omitted). In *Bush v Shabahang*, 484 Mich 156, 167-168; 772 NW2d 272 (2009), our Supreme Court offered this additional guidance regarding statutory interpretation:

> A statute must be read in conjunction with other relevant statutes to ensure that the legislative intent is correctly ascertained. The statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme. Moreover, courts must pay particular attention to statutory amendments, because a change in statutory language is presumed to reflect either a legislative change in the meaning of the statute itself or a desire to clarify the correct interpretation of the original statute. Finally, an analysis of a statute's legislative history is an important tool in ascertaining legislative intent.

Our Supreme Court has explained that the Legislature enacted the current version of the robbery statute in response to the Supreme Court's decision in *People v Randolph*, 466 Mich 532; 648 NW2d 164 (2002). In *Randolph*, the Supreme Court considered whether the robbery statute then in effect embraced the "transactional approach" to robbery, under which "a defendant has not completed a robbery until he has escaped with stolen merchandise. Thus, a completed larceny may be elevated to a robbery if the defendant uses force after the taking and before reaching temporary safety." *Id*. at 535. The Supreme Court in *Randolph* rejected the transactional approach, holding that under the common law the force or violence element of robbery "had to be applied before or during the taking." *Id*. at 538. When the Legislature subsequently amended the robbery statutes, it "explicitly stated that unarmed robbery is a transactional offense." *People v Morson*, 471 Mich 248, 265 n 2; 685 NW2d 203 (2004) (CORRIGAN, C.J., concurring).

Distilled to its essence, the majority's position here is that, in addition to legislatively overruling *Randolph*, the Legislature's 2004 amendments to MCL 750.529 and MCL 750.530 also fundamentally altered the common-law underpinnings of the crime of robbery by eliminating the requirement of a completed larceny. But my analysis of the statutory language and the legislative history reveals no support for the majority's conclusion. Although the Legislature has the authority to abrogate the common law, "[w]hen it does so, it should speak in no uncertain terms." *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006). Neither § 529 nor § 530 contains definite, clear, or plain language evincing the Legislature's intent to fundamentally alter the understanding of more than a century, that "[l]arceny is one of the essential elements of an armed robbery charge." *LaTeur*, 39 Mich App at 706.

Furthermore, the plain language of MCL 750.530 refutes that the amended robbery statutes permit conviction without proof of a completed larceny. Pursuant to § 530(1), a person who uses force or violence, puts in fear, or assaults another "in the course of committing a larceny" is guilty of a felony. Subsection 530(2) sets forth that the phrase "in the course of committing a larceny" includes "acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property." Section 530 does not specifically define "in the course of," but according to *Webster's New World Dictionary* (2d college ed, 1970), "in the

course of" means "in the progress or process of; during." Applying this meaning in the context of § 530, subsection 530(1) signifies that a person who uses force or violence at any point from the inception of the larceny until its conclusion is subject to prosecution for armed robbery. By elucidating in § 530 the "acts" constituting robbery, the Legislature intended to expand the temporal scope of the crime, transforming it into a transactional offense. Reading §§ 530(1) and (2) as a contextual whole, it appears that the Legislature sought to make clear that robbery encompasses acts that occur before, during, and after the larceny, not that the Legislature intended to eliminate larceny as an element of the crime. Nor does the legislative history suggest any purpose other than "to include any crime of larceny that involved the use of force or violence, or fear, at any time during the commission of the crime." House Legislative Analysis, HB 5105, February 12, 2004.

"Before accepting a guilty plea, a trial court must question the defendant to ascertain whether there is support for a finding that the defendant is guilty of the offense to which he is pleading guilty." *People v Watkins*, 468 Mich 233, 238; 661 NW2d 553 (2003). When questioning the defendant, the circuit court "must establish support for a finding that the defendant is guilty of the offense charged or to which the defendant is pleading." MCR 6.302(D)(1). Here, no evidence exists that defendant committed a larceny at Admiral Tobacco. Without evidence that defendant's actions at Admiral Tobacco included a larceny, I believe that the circuit court abused its discretion by denying defendant's motion to withdraw his guilty plea. Consequently, I would vacate defendant's conviction and sentence with regard to the Admiral Tobacco incident.[1]

/s/ Elizabeth L. Gleicher

[1] Because the length of the sentence imposed by the circuit court in the Clark station robbery (Case No. 06-053668-FC) was directly linked to and packaged with defendant's plea in the Admiral Tobacco case as part of a bargain made pursuant to *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993), I believe that defendant should be permitted to withdraw the nolo contendere plea in Case No. 06-053668-FC.