

SUPREME COURT OF GEORGIA

Gutierrez v. State

290 Ga. 643 (2012) · Decided February 6, 2012

OPINION

CARLEY, J.

CARLEY, Presiding Justice. Francisco Gutierrez was indicted in superior court for armed robbery and other offenses even though he was 16 years old at the time of the alleged crimes. See OCGA § 15-11-28 (b) (2) (A) (vii) (giving superior court exclusive jurisdiction over the trial of any child 13 to 17 years old accused of armed robbery committed with a firearm).

Gutierrez moved to transfer the case to juvenile court. See OCGA § 15-11-28 (b) (2) (B). At a hearing on that motion, the State presented evidence that Gutierrez and four other males, armed with a handgun and other weapons, entered the back door of a restaurant and began demanding money and using an aluminum baseball bat to strike Susan Jiang, who was the owner of the restaurant.

Ms. Jiang informed them that the money was in the cash register. The intruder with the gun unsuccessfully attempted to open the cash register and then told Ms. Jiang's 11-year-old son Jeffery to open it. Ms. Jiang also told Jeffery to open the cash register and give the armed intruder the money so that the men would leave. Jeffery went to the cash register, opened the drawer, and lifted the flap that held the money in place.

While the armed assailant was hunched over the cash register, an undercover police officer shot at him through the front window. The perpetrators ran out the back door, where they were arrested by officers who had been following them because they were suspected of other armed robberies.

Although the superior court found that no money was actually physically removed from the cash register, the trial court denied the motion to transfer, concluding that a taking and thus an armed robbery had occurred.

On interlocutory appeal, the Court of Appeals affirmed, determining that "the armed robbery was completed at the time the son opened the cash register and raised the flap resting on top of the cash, thereby ceding control of the money to the perpetrators." *Gutierrez v. State*, 306 Ga. App. 371, 374 (1) (702 SE2d 642) (2010).

We granted certiorari to consider this ruling. Like the trial court, we initially note that it was authorized to *644test the sufficiency of the evidence as follows: In the special case of juvenile offenders indicted under OCGA § 15-11-[28] (b) (2) (A), evidence sufficient to support the

allegations of the indictment is necessary to establish the superior court's authority to exercise original subject matter jurisdiction over a matter ordinarily within the jurisdiction of the juvenile court.

The judgment of a court having no jurisdiction of the person or subject matter is void and a nullity, OCGA § 17-9-4, and "it is always the duty of a court to inquire into its jurisdiction." [Cits.] In this case, the superior court correctly inquired into its jurisdiction to try juvenile [] [Gutierrez] after [he] raised the issue by motion. *State v. Watson*, 239 Ga. App.

482, 483-484 (1) (520 SE2d 911) (1999). Since the current criminal code was enacted in 1968, both the robbery and armed robbery statutes in Georgia have required, among other elements, that the accused, "take[] property of another from the person or the immediate presence of another..." OCGA §§ 16-8-40 (a), 16-8-41 (a); Ga. L. 1968, pp. 1249, 1298, § 1. Since *James v. State*, 232 Ga. 834, 835 (209 SE2d 176) (1974), this Court has held that, for the offense of armed robbery to be complete under OCGA § 16-8-41 (a), the " ' "slightest change of location whereby the complete dominion of the property is transferred from the true owner to the trespasser is sufficient asportation" '

And it is not necessary that the property taken be permanently appropriated. [Cits.]" *Bradley v. State*, 272 Ga. 740, 742 (2) (533 SE2d 727) (2000). See also *Tarver v. State*, 278 Ga. 358, 360 (1) (602 SE2d 627) (2004); *State v. Johnson*, 558 NW2d 375, 377 (Wis. 1997); 77 CJS, Robbery § 4; 67 AmJur2d, Robbery § 13.

Thus, Georgia has consistently required the conjunction of both the "slightest change of location" and the transfer of "complete dominion" over the property. It is therefore inappropriate to "focus[]" only "on whether complete dominion of the property shifted," as the Court of Appeals did in *Sharp v. State*, 255 Ga. App. 485, 488 (2) (565 SE2d 841) (2002).

As a result, the Court of Appeals erroneously held in *Sharp* that the evidence supported a conviction for armed robbery even though there was absolutely no movement of the property, which was the victim's car, or of the keys to the car.

Accordingly, we hereby overrule *Sharp v. State*, supra. See *State v. Johnson*, supra at 378 (rejecting an automobile exception to the asportation requirement, which "creates an easily identifiable distinction between attempted armed robbery and armed robbery").

Although *Sharp* relied on the "focus" on "complete dominion" in *State v. Watson*, supra at 484 (2), *645the Court of Appeals went on in *Watson* to hold correctly as follows: It is also a common sense conclusion that when a robber threatens his victim with a firearm, issues a direct order to the victim to place property in a particular location, and the victim complies with the order, the victim has relinquished and the robber has exercised control over the property.

State v. Watson, supra at 485 (2) (where robber ordered victim at gunpoint to drop the money and the victim complied). In this case, the armed intruder threatened the victims and demanded money and the opening of the cash register.

The victims complied by opening the drawer which contained the money and thereby moving it from its secured location in the cash register to an unsecured location which was easily accessible to the intruder, who immediately took up a physical position close above it.

The single act of pulling a cash drawer out from the register constitutes the requisite slightest change of location. Miller v. State, 223 Ga. App. 453-454 (1) (477 SE2d 878) (1996). “[I]t is not necessary that the property be taken into the hands of the robber...” Johnson v. State, 432 S2d 758, 759 (Fla. App. 1983).

As worded in State v. Watson, supra at 484 (2), it is not “required that the defendant physically touch the property.” (Emphasis in original.) Furthermore, “[t]he slightest movement is sufficient to meet the element of asportation,” so long as it is “a movement away from the area where the object was intended to be. [Cit.]” State v. Johnson, supra at 377-378.

In this case, the money was removed “ ‘from its original position or place where the [victims] wanted it to be’ ” and instead was placed and uncovered in front of the armed intruder in the place where he wanted it to be, and in this way, the money “came within the dominion and control of [Gutierrez] and his accomplice [s], and the asportation, or taking, was complete....” Johnson v. State, supra.

Accordingly, the Court of Appeals correctly affirmed the superior court’s denial of the motion to transfer. Judgment affirmed. All the Justices concur, except Hunstein, C. J., Benham and Melton, JJ., who dissent.