

STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DEVON DECARLOS GLENN, JR.,

Defendant-Appellee.

SUPREME COURT NO. 144979

COURT OF APPEALS NO. 302293

CIRCUIT COURT NO. 09-005862-FC

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APPELLANT'S REPLY BRIEF

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STATEMENT OF THE QUESTION PRESENTED

Where defendant (1) struck a convenience store teller on the head with his gun knocking him to the floor during an armed robbery, (2) struck someone else on the head with the gun, and (3) thrust both victims behind the counter during the robbery, does some evidence support scoring OV 7 as a "50" ("conduct designed to substantially increase the fear and anxiety a victim suffered during the offense")?

The Court of Appeals answered:
Plaintiff-Appellant answers:

No
Yes

STATEMENT OF FACTS

Plaintiff relies on the Statement of Facts from its August 3, 2012, brief with the following additions.

The full cite to this Court granting leave to appeal in this case is 481 Mich 934; 814 NW2d 294 (2012).

On September 28, 2012, this Court denied leave to appeal in codefendant Kyle Ybarra's case. ___ Mich ___; ___ NW2d ___ (2012).

ARGUMENT

Because defendant (1) struck a convenience store teller on the head with his gun knocking him to the floor during an armed robbery, (2) struck someone else on the head with the gun, and (3) thrust both victims behind the counter during the robbery, some evidence supports scoring OV 7 as a "50" ("conduct designed to substantially increase the fear and anxiety a victim suffered during the offense").

Plaintiff is filing this reply brief to make four points.

First, defendant's brief ignores what the Court of Appeals said in *People v Hunt*, 290 Mich App 317; 810 NW2d 588 (2010). *Hunt*, in finding that OV 7 is properly scored a "O" under its own facts, specifically stated that the defendant "did not fire the gun, threaten to fire it, or hit the victims with it." 290 Mich App 326. Defendant fails to explain why each of these three points should not be considered as conduct "designed to substantially increase the fear and anxiety a victim suffered during the offense." He also fails to explain why firing a gun meets the standard (as he admits) and hitting someone on the head hard enough so as to knock him to the ground does not fit that standard (as he argues).

Second, defendant's brief does not deny plaintiff's main assertion: "A person hit to the floor on the head during an armed robbery with what looks like a sawed-off shotgun and then told to go behind the counter will naturally think that he is about to die."

Third, defendant has not addressed plaintiff's point (repeated by the Attorney General) that the Court of Appeals' interpretation has rendered nugatory the phrase "or conduct designed to substantially increase the fear and anxiety a victim

suffered during the offense.” Defendant still fails to come up with a single example that is not “sadism,” “torture,” or “excessive brutality,” but is still “conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” Courts usually do not interpret a statute making a clause meaningless. As pointed out in *Corley v United States*, 556 US 303, 314; 129 S Ct 1558; 173 L Ed 2d 443 (2009), “[a] statute should be construed so that effect is given to all of its provisions so that no part shall be inoperative or superfluous, void or insignificant.”

In concluding that the “plain language of OV 7 reveals that it was meant to be scored in particularly egregious cases involving torture, brutality, or similar conduct designed to *substantially* increase the victim’s fear” (68a), the Court of Appeals ignored the statute’s structure. Not only does nothing in the statutory structure say that the fourth alternative is to be like the first three, but the structure says otherwise. It says: “sadism, torture, *or* excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.” MCL 777.37(1)(a). (Emphasis added.) If the fourth alternative was meant to be the same type of conduct as the first three alternatives, the first “or” would not have been placed there. In placing in the first “or,” the legislature intended the fourth alternative as a free standing catch all. The Court of Appeals’ interpretation not only eliminates the fourth alternative, but ignores the statute’s sentence structure.

Fourth, defendant’s brief incorrectly states that this Court reversing the Court of Appeals on this first-impression issue would somehow violate the Due Process Clause. As he admits, the *Ex Post Facto* Clause, by its own terms, does not apply to

judicial decisions. *Rogers v Tennessee*, 532 US 451; 121 S Ct 1693; 149 L Ed 2d 697 (2001).

Further, a judicial interpretation can violate due process only if it overrules a previous interpretation. This is a first-impression issue, however. This Court has nothing to overrule.

In *People v Schaefer*, 473 Mich 418, 444 n 80; 703 NW2d 774 (2005), this Court found no due process violation even though it overruled its own 9-year-old case. In the present case, *a fortiori*, because nothing exists to be overruled in this first-impression issue, due process does not require this Court to affirm. Defendant's interpretation of the Due Process Clause would essentially turn the Court of Appeals into the court of last resort whenever it rules for a criminal defendant.

RELIEF

ACCORDINGLY, once again, plaintiff asks this Court to reverse and reinstate the sentence.

Respectfully submitted,

October 11, 2012


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