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**Unloaded Pistol As A Dangerous Weapon Within
The Robbery Statute**

*Hayes v. State*¹

Defendant was indicted for attempted robbery with a dangerous and deadly weapon. After trial before the court sitting without a jury, he was found guilty and sentenced to twenty years in the Maryland Penitentiary. On appeal, he contended that the verdict was erroneous because the evidence clearly showed that the pistol used in the robbery attempt was unloaded, and therefore not a dangerous and deadly weapon. The Court of Appeals affirmed the conviction, holding that the unloaded gun was "dangerous" under the robbery statute and that it was not necessary to consider the question of "deadly", for the conditions were in the alternative.

¹ 211 Md. 111, 128 A. 2d 576 (1956).

In so holding an unloaded pistol to be a dangerous weapon within the meaning of the robbery statute,² the Court of Appeals aligned itself with the overwhelming position in this country. Casewise, only the state of Wisconsin is opposed to this view;³ and the legislature of that State amended its robbery statute to bring the rule there in line with the rest of the United States. A later amendment, however, may have restored the minority rule of the Wisconsin cases.⁴

² MD. CODE (1951) Art. 27, Sec. 574A. "Every person convicted of the crime of robbery or attempt to rob with a dangerous or deadly weapon . . . shall . . . be sentenced to imprisonment in the Maryland Penitentiary (*sic*) for not more than twenty years."

³ *Lipscomb v. State*, 130 Wis. 238, 109 N. W. 986 (1906); *Schiner v. State*, 178 Wis. 83, 189 N. W. 261, 262 (1922); *Luitze v. State*, 204 Wis. 78, 234 N. W. 382, 74 A. L. R. 1202 (1931).

⁴ The original amendment, which the Court of Appeals cited in the subject case is found in WIS. STAT. (1953), Title XXXII, Sec. 340.39:

"Assault and theft, being armed. Any person who shall assault another and shall feloniously rob . . . such robber being armed with a dangerous weapon, or any firearm, loaded or unloaded, with intent, if resisted, to kill or maim the person robbed, and being so armed, who shall wound or strike the person robbed, shall be punished by imprisonment . . . not less than 3 years nor more than 30 years."

However, a Wisconsin statute, Chapter 623, Laws of 1953, was enacted to revise Title XXXII ". . . for the purpose of enacting a new criminal code." Section 343.28 of this new code read:

"Aggravated Robbery. Whoever intentionally commits robbery under either of the following aggravating circumstances may be imprisoned not more than 30 years:

(1) The actor commits robbery while armed with a dangerous weapon; or

(2) the actor, in committing the robbery, accidentally or otherwise causes death or great bodily harm to the owner or another who is present."

The above section was designed to replace Title XXXII, Sec. 340.39 of the 1953 Code. Although the proposed Code never went into effect, a provision substantially similar for present purposes to Section 343.28 was adopted in the new Wisconsin criminal code. LAWS OF WIS. 1955 c. 696 repealed the old criminal code and the present provision, WIS. STAT. (1955), TITLE XLV, Sec. 943.32, which repealed the old Sec. 340.39, reads:

"943.32. Robbery. (1) Whoever, with intent to steal, takes property from the person or presence of the owner by either of the following means may be imprisoned not more than 10 years: . . .

(2) Whoever violates sub. (1) while armed with a dangerous weapon may be imprisoned not more than 30 years. . . ."

Thus, in both the proposed revision of the criminal code and in the current code, the words referring to "firearms, loaded or unloaded" have been completely omitted. This would seem to present ample basis for the contention that an unloaded pistol may not be a dangerous weapon in Wisconsin. Whether, by rewording the statute, the Wisconsin Legislature determined to revert to the case law of that State, is a matter that only the Supreme Court of Wisconsin can determine. The Supreme Court of Tennessee, *infra*, n. 26, may have had this legislative history in mind when in 1956 it treated *Luitze v. State*, *supra*, n. 3, as valid Wisconsin authority.

For a discussion of the development of the present Wisconsin criminal code, see Platz, *The Criminal Code*, 1956 Wis. L. Rev. 350.

The Court, in the instant case, wisely refused to rule on the concept "deadly weapon", which might have introduced confusion unnecessary to its decision. Elsewhere, many courts accord the same definition to both "dangerous" and "deadly", while generally admitting that the former term is included in the latter;⁵ other jurisdictions either confuse the terms outright or attempt to distinguish them in various ways, some of which are eminently reasonable and others wholly unrealistic.⁶ The contradictions used in applying the term "dangerous" are likewise indulged in when discussing "deadly", and there seems to be a high degree of overlap.⁷ Still further distinctions are attempted according to whether the courts seek to apply the terms to robbery, assault or concealed weapons statutes.⁸ Beyond thus observing the possible confusion in use of the two terms, this note deals only with the term "dangerous weapon" as applied to the crime of robbery with a dangerous weapon.

In *Lipscomb v. State*,⁹ the leading case for the overwhelmed minority jurisdiction of Wisconsin, the Supreme Court of that state said:

"It is an essential element of the crime of which the defendant was convicted that he be armed with a dangerous weapon. An empty revolver merely pointed at a person and not used to strike with, is not a dangerous weapon, however much the person at whom it is pointed may be put in fear."¹⁰

On the surface, this statement would seem quite sound, for if the revolver was utterly incapable of being fired at that time, and there was no threat, either real or apparent, that the pistol would have been used as a bludgeon, then it is difficult to see how it would fall within the most often quoted definition of a dangerous weapon, i.e., one likely to produce death or great bodily harm.¹¹

⁵ 11 WORDS & PHRASES (1940), 79. See also, p. 129.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ Annotation, 74 A. L. R. 1206. For an excellent compilation of pertinent material see Warnken, Is An Unloaded Pistol A Dangerous or Deadly Weapon Within The Robbery Statute of Maryland, *Daily Record*, November 22, 1954.

⁹ *Supra*, n. 3. See also concurring opinion of Finlayson, P. J., in *People v. Seawright*, 72 Cal. App. 414, 237 P. 796, 798 (1925), which approves this view.

¹⁰ *Supra*, n. 3.

¹¹ BOUVIER, LAW DICTIONARY (8th Ed., 3rd Rev. 1914) 754-755; BLACK, LAW DICTIONARY (4th Ed., 1951) 471. See also n. 5, *supra*. Also adopted by the Court of Appeals in the principal case, *supra*, n. 1, 114.

The Court of Appeals, in holding an unloaded pistol to be a dangerous weapon within the meaning of our robbery statute,¹² cited a series of California cases,¹³ based on a similar statutory provision of that State.¹⁴ In the first of these, *People v. Egan*,¹⁵ the court said:

"It is a matter of common knowledge that in committing robbery pistols are frequently used as bludgeons rather than as firearms."¹⁶

But in that case, there was no evidence that the pistol was attempted or threatened to be used as a bludgeon rather than as a firearm. Ignoring any question of public policy involved, and treating the issue as one of fact, this would seem, at first blush at least, to be a rather cavalier method of disposing of the contention that such an instrumentality is not one likely to produce death or great bodily harm. In *People v. Freeman*,¹⁷ the defendant used a large unloaded revolver, but no attempt was made either to shoot or to use it as a bludgeon. The Court said:

"The question as to whether a given instrument is . . . dangerous . . . depends . . . primarily upon the attendant circumstances, as well as upon the use which has been made or is proposed to be made, of the particular instrument."¹⁸

Further:

". . . if, considering the attendant circumstances, together with the present ability of its possessor, the instrument is *capable* of being used in a deadly or dangerous manner, for the purpose of the particular occasion only, the character of the instrument may be established."¹⁹

¹² *Supra*, n. 2.

¹³ *People v. Egan*, 77 Cal. App. 279, 246 P. 337 (1926); *People v. Freeman*, 86 Cal. App. 374, 260 P. 826 (1927); *People v. Ash*, 83 Cal. App. 2d 819, 199 P. 2d 711 (1948). Other pertinent cases in this series are *People v. Shaffer*, 81 Cal. App. 752, 254 P. 666 (1927); *People v. Milburn*, 89 Cal. App. 526, 265 P. 285 (1928); *People v. Coleman*, 53 Cal. App. 2d 18, 127 P. 2d 309 (1942); *People v. Ward*, 84 Cal. App. 2d 357, 190 P. 2d 972 (1948); *People v. Raner*, 86 Cal. App. 2d 107, 194 P. 2d 37 (1948); and *People v. White*, 115 Cal. App. 2d 828, 253 P. 2d 108 (1953).

¹⁴ CAL. PENAL CODE (1949), Sec. 211a: "All robbery . . . perpetrated . . . by a person being armed with a dangerous or deadly weapon is robbery in the first degree."

¹⁵ *Supra*, n. 13.

¹⁶ *Ibid.*, 389.

¹⁷ *Supra*, n. 13.

¹⁸ *Ibid.*, 827.

¹⁹ *Ibid.* Italics added.

The Court then went on to say that although the defendant was ten or twelve feet away, it was possible within a very short time to have used the pistol as a bludgeon or club, thus rendering it a dangerous weapon. This case, citing the *Egan*²⁰ and *Shaffer*²¹ cases, held to the highly speculative realm of "possibility", there being no factual basis, in the particular case, to justify it. The rationale of this line of cases seemingly reached its nadir, factually speaking, in *People v. Coleman*,²² where a toy metallic cap pistol was held to be a dangerous weapon within the California robbery statute.²³ To the same effect was *People v. Ward*,²⁴ where, although there was conflicting evidence as to whether the pistol used in the robbery was a toy, the court said that even if it were, it would have been a dangerous weapon, again dredging up the "possibility" rationale, even though there was no attempt or threat to use the pistol other than as a firearm.

It might well be wondered where, having thus embarked into the nebulous realm of possibility, the California courts would attempt to draw a line as to what would be a dangerous weapon under their robbery statute.²⁵ Suppose a robbery were attempted with an instrument which, in the dusk of day, reasonably appeared to the intended victim to be a pistol, when it was in reality but a piece of black soft sponge-rubber, attempted to be employed as a pistol, and not even a bludgeon; or, how about the finger-in-the-coat-pocket use? Are these to be considered dangerous weapons?²⁶ Would such a holding justify taking four additional years of the defendant's freedom,²⁷ or in Maryland, an additional ten years?²⁸ It is submitted that it would not,

²⁰ *Supra*, n. 13.

²¹ *Ibid.*

²² *Ibid.*

²³ *Supra*, n. 14.

²⁴ 84 Cal. App. 2d 357, 190 P. 2d 972 (1948).

²⁵ CAL. PENAL CODE (1949), Sec. 211a.

²⁶ An interesting recent case is *Cooper v. State*, 297 S. W. 2d 75 (Tenn., 1956), where a toy pistol, appearing genuine, was employed in a robbery. A recent amendment to the Tennessee robbery statute allowed the death penalty if the robbery were committed by the use of a deadly weapon. Defendant was sentenced to thirty years under that amendment. The Supreme Court of Tennessee, in overruling and remanding the case, refused to follow the New York doctrine of *People v. Hunt*, 267 N. Y. 597, 196 N. E. 598 (1935), which, without opinion, held a toy pistol to be a deadly weapon in such situations. Although admittedly the term "dangerous weapon" was not used in the statute, the court recognized *Luitze v. State*, 204 Wis. 78, 234 N. W. 382, 74 A. L. R. 1202 (1931), as still being *valid* Wisconsin law, and viewed the Legislative intent as one designed to prevent *harm* to the victim rather than intimidation.

²⁷ *Supra*, n. 25, Sec. 213.

²⁸ Md. CODE (1951), Art. 27, Sec. 574A.

and that a sentence for the lesser degree of robbery would be quite suitable.²⁹

If what the courts are attempting to protect is the harm which might come to the victim through the use of a dangerous weapon, then clearly there is little justification in the facts of many of these cases to hold the weapon dangerous. If the courts are attempting to guard the victim from intimidation, a fact that is quite common in robbery not involving any weapon, it is submitted that, when balanced against the difference in the prison sentence, an unloaded gun which is not attempted to be used as a bludgeon and which is not reasonably believed by the victim to be attempted to be so used, is not a dangerous weapon within the meaning of the statute. This is not to say the felon is not to be punished to the fullest extent of the law, or that he should be in any way subsidized for his wrongdoing; it is merely suggested that the punishment fit the crime, and that under the circumstances of these cases it does not.

As a further basis for its opinion the Court of Appeals remarked that:

"The courts passing on the point have sometimes drawn a distinction between assault with a dangerous weapon and robbery or attempted robbery with a dangerous weapon. In the latter case, it is almost uniformly held that the offense is independent of the assault and may as well be accomplished by intimidation as by force. Hence, it is held to be immaterial whether the pistol used to effect the taking or attempted taking is loaded or unloaded."³⁰

Is it to be inferred that the term "dangerous weapon" when used in a robbery statute does not mean the same thing as a dangerous weapon in an assault situation? In the accepted definition in both types of situations it is almost universally declared to be a weapon likely to produce death or great bodily harm or injury, terms which do not seem susceptible to varying construction.

It should be observed that the majority of jurisdictions in this country when dealing with cases of *assault* with a dangerous weapon,³¹ apply the opposite approach of looking at the actual facts in the use of the weapon, as illustrated by the language of *Price v. United States*,³² where the court said:

²⁹ *Ibid*, Sec. 573.

³⁰ *Hayes v. State*, 211 Md. 111, 114-115, 126 A. 2d 576 (1956).

³¹ See Annotation: 74 A. L. R. 1206.

³² 156 F. 950 (9th Cir., 1907).

"[I]t is perfectly clear that an unloaded pistol, when used in the manner shown by the evidence in this case, is not, in fact, a dangerous weapon. If the defendant had struck or attempted to strike with it, the question whether it was or was not a dangerous weapon in the manner used, or attempted to be used, would be one of fact; but the courts quite uniformly hold as a matter of law that an unloaded pistol, when there is no attempt to use it otherwise than by pointing it in a threatening manner at another, is not a dangerous weapon."³³

With the presumption that a firearm so used is loaded, which is already followed by the great majority of robbery cases, and even by the Wisconsin cases, as indicated in the opinion of the principal case,³⁴ it might well be argued that the approach of the assault cases could be followed in the robbery cases with more justice than lies in the "possibility" approach above described. There would be greater consistency obtained in the two lines of cases, which seem to be dealing with essentially the same problem.

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³³ *Ibid.*, 952.

³⁴ *Supra*, n. 30, 115.