

# 11-07: Robbery with a Toy Gun

**Case:** Hamilton v. State, 36 FLW D2242a (Fla. 4th DCA)

**Date:** October 12, 2011

**Subject:** Committing a robbery with a toy gun will generally not support a conviction for the enhanced offense of "Robbery with a Weapon," even though the victim did not know the gun was not real

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**FACTS:** Hamilton committed a robbery using a toy gun, and was subsequently convicted for Robbery with a Weapon in violation of Section 812.13(2)(b), Florida Statutes, which enhances the offense to a first degree felony. Hamilton appealed, arguing that since he used a toy gun instead of a real firearm, and therefore did not actually endanger the victim, his conviction for the first degree felony was improper.

**RULING:** The Fourth District Court of Appeal agreed with the appellant, and held that evidence that a perpetrator used a toy gun in the commission of a robbery, by itself, is insufficient to support a conviction for armed robbery with a "weapon." Accordingly, the court held that Hamilton should be convicted only of Robbery under 812.13(2)(c), Florida Statutes, a second degree felony.

**DISCUSSION:** The enhanced statute under which Hamilton was originally convicted provides that "(i)f in the course of committing the robbery the offender carried a weapon, then the robbery is a felony of the first degree." The Standard Jury Instruction (15.1) defines a "weapon" to be "any object that could be used to cause death or inflict serious bodily harm." In this case, the prosecution was unable to introduce any evidence to show that the toy gun could be used to cause death or inflict serious bodily harm. The court acknowledged that the victim did not know that the gun was not real, and was therefore understandably placed in fear. However, "Florida courts apply an objective test and look to the nature and actual use of the instrument and not to the subjective fear of the victim or intent of the perpetrator." (Citing *Williams v. State*, 651 So.2d 1242 (Fla. 2d DCA 1995).)

**COMMENTS:** The Hamilton court was careful to distinguish its decision in this case from the holding in *Gomez v. State*, 496 So.2d 982 (Fla. 2d DCA 1986,) where a conviction for Robbery with a Weapon was upheld when the perpetrator used a toy gun to strike the victim several times during the robbery. In that case, the toy gun could have inflicted serious bodily harm by the way it was actually used, even though it could not fire a projectile. In this case, however, there was no evidence that the toy gun was used in a similar manner.

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Officers should consult with their agency legal advisors to confirm the interpretation provided in this Update and to determine to what extent the case discussed will affect their