

# Take It or Leave It Alone: A Comment on *Valenzuela v. People*

Diana Joy G. Dizon\*

I. INTRODUCTION.....	762
II. FACTS OF THE CASE.....	763
III. SURVEY OF LAWS AND CASES.....	764
A. <i>Theft and the Stages in the Commission of a Crime</i>	
B. <i>The Stages of Theft in Jurisprudence</i>	
IV. RESOLUTION OF THE COURT AND ANALYSIS OF THE DECISION	774
A. <i>When is the felony produced?</i>	
B. <i>Diño and Flores</i>	
C. <i>Unlawful Taking</i>	
V. CONCLUSION.....	779

## I. INTRODUCTION

The tenets of criminal law are generally fixed. In the Philippines, crimes are defined and offenders are punished based on the presence of the elements constituting the crime as stated in the Revised Penal Code (RPC).<sup>1</sup> In addition, courts determine whether the crime was committed in its attempted, frustrated, or consummated stage.<sup>2</sup> While some crimes such as arson, adultery, and physical injury<sup>3</sup> do not admit of a frustrated stage, theft has, until recently, been deemed to have an attempted, frustrated, and consummated stage. In the landmark case *Valenzuela v. People*<sup>4</sup> decided by the Supreme Court *en banc* on 21 June 2007, the possibility of frustrated theft being committed under the RPC was erased once and for all. Consequently, one may only be accused and convicted of either attempted theft or

---

\* LL.M. J.D. cand., Ateneo de Manila University School of Law. Member, Board of Editors, *Ateneo Law Journal*. She was Associate Lead Editor for the second issue of the 53rd volume and the first issue of the 54th volume.

Cite as 54 Ateneo L.J. 762 (2009).

1. An Act Revising the Penal Code and Other Penal Laws [REVISED PENAL CODE], Act. No. 3815 (1932).
2. *Id.*
3. See LEONOR D. BOADO, NOTES AND CASES ON THE REVISED PENAL CODE 40 (2002 ed.).
4. *Valenzuela v. People*, 525 SCRA 306 (2007).

consummated theft. By virtue of this decision, the Court removed frustrated theft as a crime that had merited convictions for decades.<sup>5</sup>

This Comment examines the rationale for the Court's declaration and agrees that frustrated theft may not be admitted as a crime under the RPC as explained by the Court. Nevertheless, this Comment posits that an argument for permitting frustrated theft exists as exhibited by jurisprudence and that as a result of the Court's strict interpretation of the law, a conviction for consummated theft becomes more likely than attempted theft. Furthermore, this Comment points out that contrary to the Court's assertion, it would be possible to formulate a reasonable classification that could fall under a conviction for frustrated theft.

## II. FACTS OF THE CASE

On 19 May 1994, Aristotel Valenzuela emerged from a supermarket in SM North EDSA (Epifanio de los Santos Avenue) wheeling a shopping cart full of cases of detergent.<sup>6</sup> He unloaded them in the open parking lot and left them with Jovy Calderon before proceeding to retrieve another cartload from the supermarket. After his second trip, he and Calderon loaded the cartons into a taxi. Lorenzo Lago, a security guard, was intently watching the duo and stopped the taxi before it left the premises; he requested Valenzuela to show his receipt for the merchandise. Instead of showing a receipt, Valenzuela and Calderon ran away. Lago fired a warning shot and with the help of security guards who had come to his aid, Valenzuela and Calderon were apprehended. The total amount of detergent that the culprits tried to steal was ₱12,090.00.<sup>7</sup>

Valenzuela and Calderon were charged with theft.<sup>8</sup> They pleaded not guilty claiming that they were innocent bystanders when the commotion broke out and were collared by the security guards as a result. Nevertheless, given the evidence against them, the Regional Trial Court of Quezon City found them guilty of consummated theft in a decision promulgated on 1 February 2000.<sup>9</sup> Both filed a notice of appeal but Calderon's appeal was subsequently deemed abandoned and was dismissed. Valenzuela argued before the Court of Appeals (CA) that he should have been convicted of frustrated, and not consummated, theft. His argument rested on the premise that due to the timely intervention of the security guards, he was never in "a position to freely dispose of the articles stolen."<sup>10</sup> The CA rejected this

---

5. See *Empelis v. Intermediate Appellate Court*, 132 SCRA 398 (1984); *People v. Flores*, 63 Phil. 443 (1936); *People v. Abuyen* 52 Phil. 722 (1929).

6. *Valenzuela*, 525 SCRA at 314.

7. *Id.* at 315.

8. *Id.*

9. *Id.* at 317.

10. *Id.* at 318.

argument and affirmed his conviction. Valenzuela elevated his appeal to the Supreme Court on a Petition for Review on Certiorari seeking that his conviction be modified to frustrated theft only. Valenzuela had already admitted his felonious intent and participation in the theft of the detergent.<sup>11</sup> Thus, the single issue left for the Court to decide was whether, given the facts, Valenzuela indeed consummated the theft or if his acts amounted to frustrated theft only.

### III. SURVEY OF LAWS AND CASES

The Supreme Court made its decision based on basic principles established in criminal law and jurisprudence, which are briefly discussed in this section.

#### *A. Theft and the Stages in the Commission of a Crime*

Under the RPC, theft is punished as a “Crime Against Property.”<sup>12</sup> Specifically, Article 308 provides that generally, “theft is committed by any person who, with intent to gain but without violence against or intimidation of persons nor force upon things, shall take personal property of another without the latter’s consent.”<sup>13</sup> From this definition, the following have been repeatedly cited and upheld as the elements constituting simple theft:<sup>14</sup>

---

11. *Id.*

12. *See* REVISED PENAL CODE, Title Ten — Crimes Against Property, art. 308.

13. Article 308 further provides three alternative means by which theft may be committed, to wit:

- (1) Any person who, having found lost property, shall fail to deliver the same to the local authorities or to its owner;
- (2) Any person who, after having maliciously damaged the property of another, shall remove or make use of the fruits or objects of the damage caused by him; and
- (3) Any person who shall enter an enclosed estate or a field where trespass is forbidden or which belongs to another and without the consent of its owner, shall hunt or fish upon the same or shall gather fruits, cereals, or other forest or farm products.

REVISED PENAL CODE, art. 308, ¶ 2.

14. The Revised Penal Code also punishes qualified theft, as opposed to simple theft, as follows:

*Qualified Theft.* — The crime of theft shall be punished by the penalties next higher by two degrees than those respectively specified in the next preceding articles, if committed by a domestic servant, or with grave abuse of confidence, or if the property stolen is a motor vehicle, mail matter or large cattle or consists of coconuts taken from the premises of the plantation or fish taken from a fishpond or fishery, or if property is taken on the occasion of fire, earthquake, typhoon,

- (1) There is a taking of personal property;
- (2) The property belongs to another;
- (3) The taking was done with intent to gain;
- (4) The taking was done without the consent of the owner;  
and
- (5) The taking was accomplished without the use of violence against or intimidation of persons or force upon things.<sup>15</sup>

These five elements must be sufficiently alleged in the complaint or information.<sup>16</sup> The issue of when the “taking” occurs was the bone of contention in *Valenzuela* and will be discussed in the following Section. The Supreme Court has held in numerous decisions that personal property includes both tangible and intangible properties, whether corporeal or incorporeal, as long as it is capable of appropriation.<sup>17</sup> Appropriation simply means depriving the lawful owner of the thing, and does not require that the thing is capable of “asportation” (carrying away).<sup>18</sup> Intent to gain or *animus lucrandi* may be presumed from the act of unlawfully taking personal property without the owner’s consent or knowledge.<sup>19</sup> Once the taking is accomplished with the use of violence against, or intimidation of persons or force upon things, the crime is elevated to robbery.<sup>20</sup> For purposes of this Comment, the discussion of the frustrated stage will be limited to theft, not robbery, as determined in *Valenzuela*. In addition, the Court in *Valenzuela* distanced itself from charges of frustrated theft under special laws.<sup>21</sup>

---

volcanic eruption, or any other calamity, vehicular accident or civil disturbance.

REVISED PENAL CODE, art. 310.

15. See 2 LUIS B. REYES, THE REVISED PENAL CODE 729 (17th ed. 2008); BOADO, *supra* note 3, at 647; see also *People v. Mercado*, 65 Phil. 665, 671 (1938); *People v. Sison*, 322 SCRA 345, 363-64 (2000).
16. 2000 REVISED RULES OF CRIMINAL PROCEDURE, rule 110, § 6; see also *Estrada v. Sandiganbayan*, 377 SCRA 538, 561-62 (2002).
17. *Laurel v. Abrogar*, 576 SCRA 41, 50-51 (2009).
18. *Id.* at 51-52.
19. See 3 RAMON C. AQUINO, THE REVISED PENAL CODE 197-98 (1988 ed.) and 2 REYES, *supra* note 15, at 737.
20. See REVISED PENAL CODE, art. 239.
21. *Valenzuela*, 525 SCRA at 313-14, n.3. See, e.g. *People v. Concepcion*, C.A. G.R. CR No. 28280 (July 11, 2005).

The RPC also provides that there are three stages in the commission of a crime. These are (1) attempted; (2) frustrated; and (3) consummated. The RPC states:

A felony is consummated when all the elements necessary for its execution and accomplishment are present; and it is frustrated when the offender performs all the acts of execution which would produce the felony as a consequence but which, nevertheless, do not produce it by reason of causes independent of the will of the perpetrator. There is an attempt when the offender commences the commission of a felony directly by overt acts, and does not perform all the acts of execution which should produce the felony by reason of some cause or accident other than his own spontaneous desistance.<sup>22</sup>

Thus, the elements of an attempted felony are:

- (1) The offender commences the commission of the felony directly by overt acts;
- (2) He *does not perform all the acts of execution* which should produce the felony;
- (3) The offender's act is not stopped by his own spontaneous desistance; and
- (4) The non-performance of all acts of execution was due to cause or accident other than his spontaneous desistance.<sup>23</sup>

A frustrated felony has the following elements:

- (1) The offender *performs all the acts of execution*;
- (2) All the acts performed would produce the felony as a consequence;
- (3) But the felony is not produced;
- (4) By reason of causes independent of the will of the perpetrator.<sup>24</sup>

Finally, a felony is consummated once the offender no longer has to do anything to consummate the offense; he no longer has control over his acts precisely because he has done all that is necessary to accomplish the deed.<sup>25</sup> All the elements necessary to be culpable of the particular offense have been done and there is nothing left to do.

---

22. REVISED PENAL CODE, art. 6.

23. See I LUIS B. REYES, THE REVISED PENAL CODE 96-97 (17th ed. 2008) (emphasis supplied).

24. *Id.* at 105 (emphasis supplied).

25. SEE BOADO, SUPRA NOTE 3, AT 38 & I REYES, SUPRA NOTE 23, AT 110.

While in both attempted and frustrated crimes, the offender has not accomplished his criminal purpose, when it is frustrated, the offender has nevertheless performed all the acts of execution. When it is attempted, however, the offender has merely begun to commence the commission of the felony directly by overt acts, but he does not perform all the acts of execution. Commentators distinguish between a subjective phase and an objective phase to illustrate the difference between an attempted felony, and a frustrated or consummated felony.

The subjective phase consists of the “*portion of the acts constituting the crime, starting from the point where the offender begins the commission of the crime to the point where he still has control over his acts ....*”<sup>26</sup> If the offender does not pass the subjective phase, then the crime is only attempted.

The objective phase begins when the offender who has begun to commit the crime and continues to do so until the last act constituting the crime is performed no longer has control over his acts and the natural consequences of these acts.<sup>27</sup> At that point wherein the offender no longer has control over his acts, then the crime has passed from the subjective to the objective phase. Once in the objective phase, however, and the crime is nevertheless not produced by causes independent of the offender’s will, then the crime is frustrated. If the crime is produced, then it is consummated.

### *B. The Stages of Theft in Jurisprudence*

This survey of cases presents those cases of theft that deliberate upon or mention a particular stage in which theft was committed. In reviewing these cases, it is important to note whether it may be inferred that the Court found that the offender had breached the objective phase or was still in the subjective phase of the crime.

#### 1. Consummated Theft

##### *i. U.S. v. Adiao*<sup>28</sup>

The first ruling to squarely discuss whether or not a theft was frustrated or consummated was *U.S. v. Adiao* in 1918. Here, Tomas Adiao, a customs inspector, took a leather belt from the baggage he was inspecting and kept it in his desk in the Customs House.<sup>29</sup> Adiao was being observed as he took the belt and was unable to leave the premises of the Customs House with the belt.<sup>30</sup> Although the lower courts ruled that Adiao had merely

---

26. 1 REYES, *supra* note 23, at 104.

27. *Id.*

28. *United States v. Adiao*, 38 Phil. 754 (1918).

29. *Id.* at 755.

30. *Id.*

committed frustrated theft, the Supreme Court held that Adiao had performed all the acts of execution necessary to be liable for consummated theft.<sup>31</sup> All the elements of theft were present.<sup>32</sup>

In support of its decision, the Court cited three decisions of the Supreme Court of Spain.<sup>33</sup> Two of these decisions ruled that theft had been consummated while the third case ruled that robbery had been consummated.<sup>34</sup> In the first case, decided on 14 October 1898, the accused was seen taking fruit from another person's land by a policeman but was not caught by that policeman until sometime later.<sup>35</sup> He was deemed to have committed consummated, not frustrated theft.<sup>36</sup> This was because it did not appear that he was caught as he was taking the fruit and therefore, nothing prevented him from "taking full possession of the thing stolen."<sup>37</sup> In the second decision, promulgated on 1 December 1897, the defendant picked a person's pocket during mass.<sup>38</sup> Although the latter noticed the act, he did not stop the defendant right away but managed to get back the money while the defendant was still in the church.<sup>39</sup> The Spanish Court ruled that the theft was consummated.<sup>40</sup>

Lastly, in the case of consummated robbery decided on 13 June 1882, the defendant had entered a room in a house, opened a case containing a small box, and had taken a purse of money from within that box. As he was taking the money, he was caught.<sup>41</sup> The Spanish Court held that the crime was consummated robbery because the defendant had already taken material possession of the money with the intent to appropriate it; he had executed all the acts necessary to produce the crime and only the act of making use of the thing was frustrated, which is not an element of the consummated crime.<sup>42</sup>

---

31. *Id.* at 754-55.

32. The Court did not specify the particular elements constituting the theft but was satisfied with stating that "all the elements of the completed crime of theft are present."

*Adiao*, 38 Phil. at 755.

33. *Id.* at 755-56.

34. *Id.*

35. *Id.* at 755.

36. *Id.*

37. *Id.*

38. *Adiao*, 38 Phil. at 755-56.

39. *Id.*

40. *Id.* at 756.

41. *Id.*

42. *Id.*

Drawing on these Spanish cases, it is clear that the Court held Adiao liable for consummated theft precisely because he had managed to take possession of the belt. It did not matter that he had not managed to leave with the belt or make use of it because as far as the Court was concerned, Adiao had breached the objective phase of the crime such that he had performed all the acts necessary to produce the felony and the felony was in fact produced.

*ii. People v. Sobrevilla*<sup>43</sup>

In a public market, Faustino Sobrevilla took a man's pocketbook from his trousers.<sup>44</sup> The offended party immediately noticed the loss and caught Sobrevilla.<sup>45</sup> In holding groundless that the latter committed frustrated theft only, the Court held that the fact that Sobrevilla successfully took the pocketbook determines the theft.<sup>46</sup> The recovery of the pocketbook does not affect his criminal liability.<sup>47</sup> Like *Adiao*, it appears that the fact of Sobrevilla's physical possession of the thing was sufficient to produce the crime of theft.

2. Attempted Theft

*i. People v. Soriano*<sup>48</sup>

Pedro Soriano was charged with frustrated theft but convicted of attempted theft.<sup>49</sup> The facts show that Soriano was in the act of carrying away Antonio Borja's fighting rooster when the latter approached him. Soriano let go of the cock and ran away but he was eventually caught in pursuit.<sup>50</sup> On the conviction for attempted theft, Soriano claimed that the evidence was insufficient to convict him of the crime but the Court stated that "[t]he facts as established by the evidence, fully support the finding of the defendant's guilt."<sup>51</sup>

The Court did not discuss the details of the crime or the particular evidence which would support the conviction. The information for frustrated theft alleged that Soriano had in fact performed all the acts of

---

43. *People v. Sobrevilla*, 53 Phil. 226 (1929).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *People v. Soriano*, 56 Phil. 95 (1931).

49. *Id.* at 96-97

50. *Id.* at 97.

51. *Id.*



execution which would produce the theft except that Borja's appearance was a cause independent of the will of the accused.<sup>52</sup>

Finding him guilty of attempted theft, it appears the Court was of the opinion that Soriano was still in the subjective phase of the crime and had not performed all the acts of execution that would produce the crime.<sup>53</sup> It may be gleaned that Soriano still had some degree of control over his acts such that letting go of the rooster meant that all the acts necessary to produce the felony were not performed. It is curious that having stated and admitted that Soriano had taken the cock such that he was in the act of carrying it away already, the Court did not find him guilty of consummated theft as held in *Adiao* and *Sobrevilla*.

*ii. Venturina v. Sandiganbayan*<sup>54</sup>

Similar to *Soriano*, the Court upheld Benjamin Venturina's conviction for attempted theft even if he was charged with frustrated qualified theft. As a trackman of the Philippine National Railways (PNR), Venturina was a member of a team assigned to retrieve rails along an abandoned rail line.<sup>55</sup> He excused himself from his team's mission to the Manila-Cabanatuan line saying he had to take his wife for an emergency check-up.<sup>56</sup> Meanwhile, the PNR's Security Investigation Officers, headed by Rolando Marinay, were dispatched to Bulacan to look into reports of persons cutting rails of PNR abandoned lines.<sup>57</sup> Once there, Marinay found three persons in the process of cutting the rails of the tracks with an acetylene torch; about 23 rails had already been cut and were going to be loaded onto a waiting truck.<sup>58</sup> One of the culprits turned out to be Venturina while the others were not employees of PNR. Venturina presented a letter in PNR stationery authorizing him to retrieve the rails.<sup>59</sup> The authorization was proven to be anomalous<sup>60</sup> and Venturina was convicted of attempted simple theft.<sup>61</sup>

The Supreme Court upheld his conviction stating that his unexplained presence in Bulacan supervising two non-PNR employees, surrounded by 23 pieces of cut rails and the fact that the authorization letter proved to be

---

52. *Id.* at 96.

53. *Id.* at 98.

54. *Venturina v. Sandiganbayan*, 193 SCRA 40 (1991).

55. *Id.* at 41.

56. *Id.*

57. *Id.*

58. *Id.* at 42.

59. *Id.*

60. *Venturina*, 193 SCRA at 45.

61. *Id.* at 43.

spurious, were sufficient to find him guilty beyond reasonable doubt.<sup>62</sup> He was caught red-handed in attempting to steal government property and if it were not for the PNR officers' timely intervention, Venturina and his co-conspirators would have succeeded in loading the rails onto a waiting truck and disposing of the rails for their personal benefit.<sup>63</sup>

Based on the *Adiao* and *Sobrevilla* rulings, it could be argued that the rails had already been taken by Venturina and that he was merely frustrated in disposing of the rails such that he should have been guilty of consummated theft. Nevertheless, he was convicted of attempted theft only.<sup>64</sup> Thus, it seems not all the acts of execution which would produce the theft had been accomplished yet and Venturina had simply commenced the commission of the felony by overt acts — he was still in the realm of the subjective phase.

### 3. Frustrated Theft Upheld: Free to Dispose

#### *i. People v. Diño*<sup>65</sup>

*People v. Diño*, decided by the Court of Appeals, was heavily relied upon by Valenzuela in making his case for frustrated theft. Here, Roberto Diño was a driver of the United States Army.<sup>66</sup> He had just unloaded some articles from the truck he was driving but was stopped at the checkpoint as he was leaving the 670th Medium Port.<sup>67</sup> Upon inspection, three boxes each containing ten caliber .30 army rifles were found.<sup>68</sup> Diño said in a written statement that four men stopped him and loaded the boxes in the truck telling him to bring the boxes outside the port area where they would be waiting for him and where he would be receiving a share in the articles.<sup>69</sup> The lower court found Diño guilty as an accomplice in qualified theft.<sup>70</sup>

The CA ruled that the theft could not have been fully consummated in this case because “the fact determinative of consummation is the ability of the thief to *dispose freely* of the articles stolen, even if it were more or less momentary.”<sup>71</sup> In support of this, the CA cited Salvador Viada, a noted Spanish commentator, who in turn cited a case decided by the Spanish

---

62. *Id.* at 46.

63. *Id.*

64. *Id.*

65. *People v. Diño*, 45 O.G. 3446 (Court of Appeals 1948).

66. *Id.* at 3447.

67. *Id.*

68. *Id.*

69. *Id.* at 3448.

70. *Id.* at 3447.

71. *Diño*, 45 O.G. at 3450 (emphasis supplied).

Supreme Court on 24 January 1888.<sup>72</sup> Thus, the appellate court concluded that:

[I]n order to make the booty subject to the control and disposal of the culprits, the articles stolen must first be passed through the M.P. check point, but since the offense was opportunely discovered and *the articles seized after all the acts of execution had been performed, but before the loot came under the final control and disposal of the looters*, the offense cannot be said to have been fully consummated, as it was frustrated by the timely intervention of the guard. The offense committed, therefore, is that of *frustrated theft*.<sup>73</sup>

Luis B. Reyes, a respected commentator on the RPC, opines that the *Diño* ruling should be applied in the theft of bulky goods.<sup>74</sup> The distinction between bulky goods and those capable of being easily disposed was elaborated in the *Flores* case.

*ii. People v. Flores*<sup>75</sup>

The CA decision of *People v. Flores* relied upon *Diño* in convicting Flores of frustrated theft. Jose Flores was a sea van checker of the Luzon Stevedoring Company (LUSTEVECO).<sup>76</sup> A purportedly empty sea van was loaded onto Flaviano Javier's truck and the latter was issued a delivery receipt by Flores stating that the sea van was empty.<sup>77</sup> The guard on duty at the LUSTEVECO terminal, Fausto Cruz, insisted on checking the van despite the receipt stating it was empty.<sup>78</sup> The van was opened and it was not empty but contained cargo for which LUSTEVECO was responsible.<sup>79</sup> Flores was implicated as one of the orchestrators of the theft because he attempted to bribe Cruz and the latter's superior to forgo checking the van.<sup>80</sup> The CA held that the theft was frustrated and not attempted, as argued by Flores, because the circumstances were similar to *People v. Diño*.<sup>81</sup> Further, "the intervening act which literally frustrated the theft was the inspection made by Cruz and not any spontaneous desistance on the part of the appellant."<sup>82</sup> Once the truck was out of the compound, Flores and his cohorts would

---

72. *Id.* at 3450.

73. *Id.* at 3451 (emphasis supplied).

74. 2 REYES, *supra* note 15, at 732.

75. *People v. Flores*, 6 C.A. Rep. 834 (1964).

76. *Id.* at 835.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 840.

81. *Flores*, 6 C.A. Rep. at 840.

82. *Id.*

have control over the goods and the *freedom to dispose* of them.<sup>83</sup> The CA denied the claim that the theft was consummated because the appellant could not have disposed of the goods at once since the van and the truck were unable to leave the compound.<sup>84</sup> The appellate court added that the case was different from one wherein a “much less bulk and more common thing as money was the object of the crime, where freedom to dispose or make use of it is palpably less restricted.”<sup>85</sup>

In this case, it appears that the CA emphasized that in order for the theft to have been consummated, the takers should have been in a position to dispose of the goods at once, after having placed these goods under their control.<sup>86</sup> Because the goods were not yet in Flores’s control, these being within the sea van on the truck inside LUSTEVECO’s premises, the theft was merely frustrated.<sup>87</sup>

The cases of *Diño* and *Flores* make the distinction that in order for theft to be consummated, the offender must have been able to dispose freely of the goods. They were unable to freely dispose of the goods because they were bulky goods so that the ability to dispose of the goods was restricted. Reyes points out that *Diño* and *Flores* provide a reasonable rule to use when considering the theft of bulky goods.<sup>88</sup>

### iii. *Empelis v. Intermediate Appellate Court*

This case involved Elpidio Empelis, Emilio, Salvador, and Mamerto Carbungco who were caught carrying away about 50 coconuts from Guillermo Catarining’s coconut plantation.<sup>89</sup> When the accused saw Catarining approach, they dropped the coconuts they were carrying and fled the plantation.<sup>90</sup> The Court ruled that the petitioners committed frustrated qualified theft, and not consummated qualified theft because they were not able to *perform all the acts of execution* which would produce the felony — they were not able to carry the coconuts outside the plantation because of Catarining’s timely arrival.<sup>91</sup>

The facts of the case are similar to those in *Soriano*. The offenders in both cases were in the act of carrying away the property involved but

---

83. *Id.* (emphasis supplied).

84. *Id.* at 841.

85. *Id.*

86. *Id.* at 840-41.

87. *Flores*, 6 C.A. Rep. at 840-41.

88. 2 REYES, *supra* note 15, at 732.

89. *Empelis*, 132 SCRA at 400.

90. *Id.*

91. *Id.* at 401 (emphasis supplied).

released the property and fled when they realized they were being watched.<sup>92</sup> While Soriano was convicted of attempted theft and therefore was still within the subjective phase, *Empelis* was found guilty of frustrated theft and therefore was already in the objective phase of the commission of the crime.<sup>93</sup> There does not seem to be a material difference between both cases that can explain why one theft was considered attempted and the other frustrated. Nevertheless, as noted by the *Valenzuela* Court and commentator Antonio L. Gregorio, the *Empelis* Court made an inaccurate statement in saying that the crime was frustrated because the offenders “were not able to perform all the acts of execution.”<sup>94</sup> By its very definition, all the acts of execution have already been performed in a frustrated crime, but the felony was not produced by causes independent of the will of the perpetrator.<sup>95</sup> Given the facts, the crime should have only been treated as attempted<sup>96</sup> like in *Soriano*.

*Empelis* is the only case wherein the Supreme Court itself ruled that the correct conviction for theft should be in its frustrated stage and not in its consummated stage. Its persuasive force, however, was discounted in *Valenzuela* wherein it was characterized as a regrettable, stray decision.<sup>97</sup>

All the cases presented thus far serve to highlight the inconsistency with which the Court has approached the dividing line between attempted, frustrated and consummated theft. The pivotal issue in determining when all the acts of execution constituting the crime are performed revolves around when the felony is actually produced — that is, at what point is theft produced so that it may be deemed consummated?

#### IV. RESOLUTION OF THE COURT AND ANALYSIS OF THE DECISION

In the instant case, after a thorough discussion of the elements and stages of theft in relation to jurisprudence, the Court ruled that *Valenzuela* was guilty of consummated, not frustrated theft, because there is no crime of frustrated theft as defined in the RPC.<sup>98</sup>

In making this determination, the Court took a two-tiered approach. First, the Court laid down the basic principles regarding attempted, frustrated and consummated felonies. From here stems the following question: At what point is a felony “produced” such that it is no longer attempted but may be

---

92. *Id.* at 400.

93. *Id.* at 401.

94. See *Valenzuela*, 525 SCRA at 336-37; ANTONIO L. GREGORIO, FUNDAMENTALS OF CRIMINAL LAW REVIEW 35 (10th ed. 2008).

95. REVISED PENAL CODE, art. 6.

96. *Valenzuela*, 525 SCRA at 337.

97. *Id.* at 347.

98. *Id.*

deemed frustrated or consummated? In order to answer this, it is necessary to determine the elements constituting the crime. Thus, after laying the foundational basis of theft, the Court discussed the jurisprudence supporting its contention that theft is produced upon the “taking” of the thing.

The Court’s second approach in resolving the issue centered on the *Diño* and *Flores* rulings. Similar to the line of reasoning used to buttress its first argument, the Court delved into the legal foundational basis for *Diño* and *Flores*. Between the two foundations thus laid, the Court found that the foundation of the *Diño* and *Flores* rulings were not strong enough to rebut the foundation supporting claim that there is no frustrated theft. Consequently, the Court speaking through Justice Dante O. Tinga, concluded that under the RPC, there is no crime of frustrated theft.<sup>99</sup>

*A. When is the felony produced?*

The primary step towards resolving whether or not Valenzuela consummated the theft or was merely frustrated hinges on when these terms (i.e., consummated and frustrated) are triggered. The frustrated and consummated stages are at odds with each other because both require that all acts of execution that would produce the felony have been performed. At which point the felony is produced depends on the statutory definition of the crime.

For a crime to exist in the Philippine jurisdiction, *mens rea* (a guilty or wrongful purpose or criminal intent) and *actus reus* (acts constituting the crime) must be shown.<sup>100</sup> The general definition of theft under Article 308 provides only one operative act of execution and descriptive circumstances surrounding the operative act.<sup>101</sup> The operative act is that element of theft which says that there must be “taking” of personal property; once there is taking, coupled with the four remaining elements of theft which are the descriptive circumstances, the transgression goes beyond the attempted stage.<sup>102</sup>

The dividing line between whether the transgression has moved into the frustrated stage or the consummated stage depends on whether or not the felony was produced, given that all acts of execution have been committed.<sup>103</sup> The Court concluded that the language of the law provides no alternative but that “theft is already ‘produced’ upon the ‘taking’ of personal property of another without the latter’s consent.”<sup>104</sup> At this point,

---

99. *Id.*

100. *Id.* at 322.

101. *Id.* at 324.

102. *Valenzuela*, 525 SCRA at 326.

103. *Id.* at 327.

104. *Id.*

the Court introduced the *Adiao* and *Sobrevilla* cases to support this position and concluded that these cases showed that it was sufficient for the offender to obtain physical possession of the thing, no matter how momentary, in order to consummate the theft.<sup>105</sup> The taking being sufficient, there is no gray area within which the theft might be in its frustrated stage.

Applying this contention to the instant case, the moment that Valenzuela had taken the cartons of detergent with intent to gain and without the consent of the owner and without the use of violence or force upon things, the crime of theft had been consummated. It did not matter that Valenzuela and Calderon were unable to leave the premises of SM, or that they were still in an area under SM's control, or most importantly, that they were not in a position to freely dispose of the merchandise.

### B. *Diño and Flores*

In opposing Valenzuela's position, which was based on the *Diño* and *Flores* rulings, the Supreme Court pointed out that the Court of Appeals in these rulings took an extra step by adding a sixth element of theft,<sup>106</sup> not found in the statutory definition of theft. This was that the theft had not been fully "produced" because "the fact determinative of consummation is the ability of the thief to dispose freely of the articles stolen, even if it were more or less momentary."<sup>107</sup> This addition was deemed contrary to the intent of the legislature in promulgating the RPC.<sup>108</sup>

The theory posited by *Diño*, then, was that "the ability of the actor to freely dispose of the items stolen at the time of apprehension is determinative as to whether the theft is consummated or frustrated."<sup>109</sup> This conclusion was drawn from the 1888 decision of the Supreme Court of Spain which implied that a theft could be deemed consummated if that actor had the capacity to freely dispose of the stolen items before being caught.<sup>110</sup> This claim was echoed in an opinion by Viada, whose comments to the 1870 *Código Penal de España*<sup>111</sup> did not question the possibility of frustrated theft being committed.

The Court introduced another Spanish commentator, Eugenio Cuello Calon, who called attention to the Spanish Court's inconsistent application of frustrated theft and who eventually disagreed that it was possible to

---

105. *Id.* at 330.

106. *Id.* at 342.

107. *Id.* at 330-331 (citing *Diño*, 45 O.G. at 3451).

108. *Valenzuela*, 525 SCRA at 342.

109. *Id.* at 331.

110. *Id.* at 333.

111. *Id.* at 339.

commit frustrated theft.<sup>112</sup> Calon's comments contended with how it would even be possible *not* to produce the effect of theft when all the acts necessary to complete the crime have been executed.<sup>113</sup> Having put side by side these two esteemed scholars, the Court concluded that the divergence of opinion only serves to show that there is no established application of frustrated theft such that the *Diño* and *Flores* rulings are built on a questionable foundation. Furthermore, between a close reading of the statutory definition of theft and when it is consummated versus an idea of frustrated theft grounded on conflicting opinions by Spanish scholars, the Court found that the former interpretation must prevail. Thus, there can be no frustrated theft.

If *Diño* and *Flores* were upheld, it would be possible to argue that Valenzuela had only committed frustrated theft because he was not able to dispose of the articles at the time he was caught. Furthermore, the goods could be considered as falling under "bulk" theft, which Reyes, as mentioned earlier, presents as a possible application of frustrated theft. In rebutting this, the Court stated:

[T]he adoption of the rule — the inability of the offender to freely dispose of the stolen property frustrates the theft — would introduce a convenient defense for the accused which does not reflect any legislated intent, since the Court would have carved a viable means for offenders to seek a mitigated penalty under applied circumstances that do not admit of easy classification. It is difficult to formulate standards as to when a stolen item is susceptible to free disposal by the thief.<sup>114</sup>

Although the Court makes a valid point in stating that it would be difficult to make a reasonable classification, nevertheless, this Comment presents the argument that the Court does not need to make a new and specific classification. If it were to adopt the *Diño* and *Flores* rulings as cases wherein frustrated theft may be possible, then it would be sufficient to state that (1) the goods stolen were bulky (i.e., not capable of being easily and freely disposed of, such as money) and (2) the offenders were caught while still within the premises under the control of the owner.

Contrary to the Court's assertion that it would allow offenders to seek a mitigated penalty, the *Venturina* case is an example of how the failure to apply theft in the frustrated stage permitted the offenders to be liable for attempted theft only. In *Venturina*, the rails they were stealing are arguably bulky goods because these could not be easily disposed of and needed to be transported on a truck.<sup>115</sup> In addition, *Venturina* and company were found within the vicinity of the railroad from where they were extracting the

---

112. *Id.* at 340.

113. *Id.* at 341.

114. *Valenzuela*, 525 SCRA at 345-46.

115. *Venturina*, 193 SCRA at 45.



rails.<sup>116</sup> They had completed all acts of execution because they had already managed to remove the rails from the rail bed; all that remained for them to do was dispose of the rails and therefore, the theft was not “produced.”<sup>117</sup> The elements of frustrated theft under *Diño* and *Flores* are present in this case.

### C. Unlawful Taking

The Supreme Court circled back to the basic premise that “unlawful taking” is the most material aspect in determining when the felony was committed in its consummated stage.<sup>118</sup> If there was no unlawful taking, then the offense would only be attempted theft, if at all.<sup>119</sup> Although it could be argued that the ability to freely dispose of the property should actually be part of the concept “unlawful taking” so that there would be no taking until the object is under the direct control of the offender, the Court opined that the result would be to “downgrade the crime to its attempted, and not frustrated stage, for it would mean that not all the acts of execution have been completed.”<sup>120</sup> To permit this, says the Court, would be contrary to the legislative intent “as expressed primarily in the language of the law as it defines the crime.”<sup>121</sup> Thus, the Court decided to strictly interpret “taking” under theft in deference to legislative intent.<sup>122</sup>

This Comment argues, however, that by strictly construing the provision, a conviction for consummated theft becomes even more likely than attempted theft as far as movable and tangible property is concerned. Because of the Court’s decision, taking is equated with and automatically results in the consummation of the crime. The challenge this interpretation faces is this: when is attempted theft then committed? In attempted theft, the offender has commenced directly by overt acts to commit the crime; the overt act must be directly related to the offense.<sup>123</sup> Since taking is the only operative act in theft, the offender must be performing an act directly related to taking; however, taking cannot be manifested until there is actual contact with the object. Thus, either the offender takes the object or leaves it alone. Once the offender takes the object, he is deemed to have consummated the theft. If he leaves it alone, there is no crime. If he is in the process of taking it and is caught, was it attempted or consummated? Applying the *Valenzuela*

---

116. *Id.* at 42.

117. *Id.*

118. *Valenzuela*, 525 SCRA at 345.

119. *Id.* at 345.

120. *Id.* at 344.

121. *Id.* at 342.

122. *Id.* at 347.

123. BOADO, *supra* note 3, at 39.

Court's declaration, the theft was consummated because the offender had nevertheless taken the object. This is supported by *Adiao* and the Spanish Supreme Court's rulings found therein. In particular, the third case cited by the Spanish Court decided in 1882, wherein the thief was caught at "the very moment" he had extracted the money in a purse.<sup>124</sup> He was essentially caught in the act of taking and was convicted for consummating the theft. Indeed, the Court added that

[t]he interval between the commission of the acts of theft and the apprehension ... proved of no consequence in those cases [Supreme Court of Spain rulings in *Adiao*], as it was ruled that the thefts in each of those cases was consummated by the actual possession of the property belonging to another.<sup>125</sup>

By stating that the interval does not matter, in effect, no distinction is made whether the offender was caught in the act or after the execution of the act. The result of the *Valenzuela* decision was that not only did it abolish frustrated theft from the RPC, it makes attempted theft almost impossible to commit because the element of taking is effectively equated with consummating the theft.

#### V. CONCLUSION

In the instant case, which "aims for prime space in the firmament of our criminal jurisprudence,"<sup>126</sup> the Court has closed the door to convictions for frustrated theft under the Revised Penal Code. By reviewing jurisprudence and aligning itself with the *Adiao* and *Sobrevilla* rulings, the Court has come to the conclusion that unlawful taking consummates the crime of theft; the free disposition of the goods taken does not determine whether the crime has been produced. This author advises the exercise of caution, however, when following the doctrine set in this case because a very thin line has been drawn between attempted and consummated theft. Although the Court argues that a narrow interpretation of the law is required in this case in deference to legislative intent,<sup>127</sup> it should also be remembered that penal laws should be strictly construed against the Government and liberally in favor of the accused.<sup>128</sup>

---

124. *Valenzuela*, 525 SCRA at 329.

125. *Id.* at 329.

126. *Id.* at 312.

127. *Id.* at 342 & 347.

128. I REYES, *supra* note 23, at 18 (citing *United States v. Abad Santos*, 36 Phil. 243 (1917)).