

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-001684-MR

MARY RUTH DANIELS

APPELLANT

v. APPEAL FROM CASEY CIRCUIT COURT  
HONORABLE JAMES G. WEDDLE, JUDGE  
ACTION NO. 01-CR-00035

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

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BEFORE: BARBER, GUIDUGLI, AND PAISLEY, JUDGES.

BARBER, JUDGE. Appellant Mary Ruth Daniels, who was convicted of two counts of trafficking in a controlled substance, claims that her due process rights were violated when the trial court considered later offenses for which she had been indicted, but not convicted, in imposing consecutive sentences instead of the concurrent sentences recommended by the jury. Daniels also claims that her decision not to testify at her trial or during the "Truth in Sentencing" phase was held against her by the

trial court in imposing the consecutive sentences, thus violating her privilege against self-incrimination.

Daniels sold oxycodone and hydrocodone tablets to an undercover informant on two occasions in January 2001. She was convicted after a jury trial of first and second degree trafficking in controlled substances. The jury recommended the minimum sentence for each count, ten years and five years respectively, to be run concurrently.

Final sentencing was conducted on July 8, 2002. The trial court first arraigned Daniels on a new indictment which alleged that she had committed four counts of trafficking in controlled substances on March 20 and 22, 2002. The court then proceeded to the final sentencing. It began by reviewing the case and mentioned Daniels' decision not to testify at her trial or at the "Truth in Sentencing" phase. The court noted the evidence which had been presented to the jury and then stated: "I'll be very candid with you . . . I think the jury was extremely, extremely lenient when imposing the minimum sentence." The court commented:

The thing that upsets me about this is the fact that there are other charges pending. Now the indictment on which she was arraigned today . . . alleges that on March 22, 2002 - that's back in the spring of this year, while this case was pending . . . and while she was on bond, these other allegations come in. Which to me shows her

total, total disregard for the law, and her total disregard for what she's been doing.

The court also commented that Daniels "has been dealing in dope far too long" referring to Daniels' prior convictions for drug offenses, one of them dating back to 1993. The court alluded briefly to some of the societal problems caused by drug dealing and then stated: "I don't have the authority to go more than consecutive which I'm going to . . . But I wish I had it in my power to give this lady more than fifteen years."

The Commonwealth has argued that the March indictments played no part in the court's decision to impose consecutive sentences on Daniels. We disagree. The statements of the court clearly show that the recent indictment, as well as Daniels' prior convictions, influenced its decision to disregard the recommendation of the jury.

Daniels claims that under KRS 532.050 and RCr 11.02 the trial court is only authorized to consider, in addition to the jury's recommendation, the presentence investigation report and any information offered in mitigation of punishment. Since the information about her pending indictment was not made available to the jury during the sentencing portion of the trial, Daniels claims that it was improper for the sentencing court to consider it. We have carefully reviewed KRS 532.055 and RCr 11.02 as well as the other pertinent statutes (KRS

532.050 which sets out the presentence procedure for felony convictions and KRS 532.110 which governs concurrent and consecutive terms of imprisonment) and we cannot agree with the appellant that the language of the statutes or the rule in any way limits what evidence the trial court may use in determining whether to follow a jury's recommendation.

Indeed, the Kentucky sentencing statutes and RCr 11.02 give the trial judge broad discretion to accept or reject the recommendations of the jury regarding whether sentences should be served concurrently or consecutively. "The jury's recommendation is only that, and has no mandatory effect." Murphy v. Commonwealth, Ky., 50 S.W.3d 173, 178 (2001), citing Swain v. Commonwealth, Ky., 887 S.W.2d 346, 348 (1994).

Daniels also claims that her due process rights were violated because she is in effect being punished for the unproven offenses charged in the indictment. Because Kentucky law does not provide for an adversarial proceeding at final sentencing, Daniels was not given the opportunity to challenge the validity of the March indictment. She further argues that if she is convicted and sentenced for the charges in the March indictment, she will have been subjected to double jeopardy in that she will have been punished for the same offense twice because her sentence for the present offenses was increased as a result of the court's consideration of the March indictments.

The United States Supreme Court has held that the admission of evidence of unadjudicated offenses at a sentencing proceeding does not violate due process. See Williams v. New York, 337 U.S. 241, 250-51, 69 S.Ct. 1079, 1085 (1949), see also Nichols v. United States, 511 U.S. 738, 747, 114 S.Ct. 1921, 1928 (1994) (citing Williams and stating that "sentencing courts have not only taken into consideration a defendant's prior convictions, but have also considered a defendant's past criminal behavior, even if no conviction resulted from that behavior.")

The Williams court described the role of the sentencing judge as follows:

A sentencing judge . . . is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant - if not essential - to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. Williams at 247, 69 S.Ct. at 1083.

The Court explained its decision not to apply full due process protections to the sentencing process thusly:

The due-process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due-process clause would hinder if not preclude all courts - state and federal - from making progressive efforts to improve the

administration of criminal justice. Id. at 251, 69 S.Ct. at 1085.

The cases relied upon by Daniels from other jurisdictions which have addressed this issue are of limited utility because of the wide variation that exists in sentencing procedures. In many states, for instance, the trial judge is solely responsible for sentencing. We note, however, that the majority of states (with notable exceptions such as North Carolina, see e.g. State v. Westall, 449 S.E.2d 24, 34 (N.C. Ct. App. 1994)) permit a trial court to consider pending indictments in sentencing. In Reese v. State, 639 So.2d 1067 (Fla. App. 1994), a case cited by the appellant, the Florida District Court of Appeal held that it was a violation of due process for a trial judge at criminal sentencing to consider "unsubstantiated allegations of misconduct" but also held that evidence of prior arrests which had not resulted in convictions could be considered if the defendant was given an opportunity to explain or offer evidence on the issue. Similarly, in People v. Jackson, 599 N.E.2d 926, 931 (Ill. 1992), the Illinois Supreme Court held that outstanding indictments may be considered in sentencing but stressed that the court had to ensure the relevance and reliability of such information. Four federal Circuit Courts of Appeal have held that the admission of evidence of unadjudicated offenses at a sentencing proceeding

does not violate due process. See Hatch v. Oklahoma, 58 F.3d 1447, 1465-66 (10<sup>th</sup> Cir. 1995); Devier v. Zant, 3 F.3d 1445, 1464-65 (11<sup>th</sup> Cir. 1993); Coleman v. Risley, 839 F.2d 434, 459 (9<sup>th</sup> Cir. 1988); Williams v. Lynaugh, 814 F.2d 205, 208 (5<sup>th</sup> Cir. 1987). See also United States v. Romano, 825 F.2d 725, 728 (2d Cir. 1987)(a sentencing judge may properly consider hearsay statements, evidence of uncharged crimes, dropped counts of an indictment and even criminal activity of which the defendant was acquitted.)

Under Kentucky's bifurcated sentencing procedure, it is the jury, not the judge, who determines the penalty. As Daniels acknowledges, the evidence presented to the jury at the "Truth in Sentencing" phase of the trial, while not as rigorously limited as that admitted during the determination of guilt or innocence, must nonetheless meet the standard of relevance outlined in KRS 532.055. See e.g. Robinson v. Commonwealth, Ky., 926 S.W.2d 853, 854 (1996). ("we fear that to allow any further relaxation in the rules of evidence [at the Truth in Sentencing phase] is inappropriate and dangerous to both our system of justice and the right of a defendant to have only admissible evidence presented to the jury.")

The trial judge thereafter has the power only to reduce the sentence pursuant to KRS 532.110, and to determine whether multiple sentences will be run concurrently or

consecutively. In Dotson v. Commonwealth, the Kentucky Supreme Court distinguished the roles of the judge and jury in the sentencing process, stating: "The trial judge always has the power to reduce a sentence and not to increase one." Ky., 740 S.W.2d 930, 931 (1987). As the Supreme Court explained, "KRS 532.055(2) provides in part that the jury will determine punishment. Such determination relates to the initial establishment of a sentence and not to how or in what manner the sentence is to be served." Id. at 931. "There is no statutory provision for the jury to fix the manner of serving a sentence." Id. at 932. Under the interpretation of the sentencing statutes in Dotson, therefore, the court in Daniels' case simply did not accept the jury's recommendation as to the **manner** in which her sentences were to be served. Daniels' argument that she may be subjected to double jeopardy is therefore mooted by Dotson in that her sentence was not "increased" by the trial court as a result of its consideration of her pending indictment. We are aware of Justice Leibson's well-reasoned dissenting opinion in Dotson, id. at 932-34, pointing out that to all intents and purposes, when the "manner" of serving multiple sentences is altered from concurrent to consecutive by the trial judge, the practical effect is an increase in the sentence. We are, nonetheless, bound to follow the holding of the majority in that case.

In light of the fact that there is no constitutional prohibition against the consideration of pending indictments by a sentencing court, that the majority of jurisdictions allow such indictments to be considered by sentencing courts, and that Kentucky's sentencing procedure assigns the primary role of determining the defendant's penalty to the jury, we refuse to hold that a trial court may not consider pending indictments when determining whether multiple sentences will be served concurrently or consecutively.

In regard to Daniels' second claim, that the court held her silence against her in violation of her privilege against self-incrimination, we see no indication of this in the record of the proceedings. The court was merely reviewing the case prior to imposing sentence, and ensuring that Daniels had not presented any mitigating evidence which might have been overlooked. It is clear from the record of the proceedings that Daniels' prior convictions and her recent indictment were the principal factors influencing the court's decision to depart from the jury's recommendation of concurrent sentences.

For the foregoing reasons, the sentence imposed by the Casey Circuit Court is affirmed.

GUIDUGLI, JUDGE, CONCURS.

PAISLEY, JUDGE, DISSENTS.

PAISLEY, JUDGE, DISSENTING: Respectfully, I dissent.

The cases relied upon by the majority deal with situations involving the introduction of evidence at sentencing regarding alleged criminal activity by the defendant which has not been adjudicated. Williams v. New York, 337 U.S. 241, 250-251, 69 S. Ct. 1079, 1085, 93 L. Ed. 1337 (1949), U.S. v. Romano, 825 F.2d 725, 728 (2<sup>nd</sup> Cir. 1987), Williams v. Lynaugh, 814 F.2d 205 (5<sup>th</sup> Cir. 1987), Coleman v. Risley, 839 F.2d 434, 459 (9<sup>th</sup> Cir. 1988), Hatch v. State of Oklahoma, 58 F.3d 1447, 1465 (10<sup>th</sup> Cir. 1995), Devier v. Zant, 3 F.3d 1445, 1464 (11<sup>th</sup> Cir. 1993), Reese v. State, 639 So.2d 1067 (Fla. App. 1994), People v. Jackson, 599 N.E.2d 926, 931 (Ill. 1992). Here, there was no evidence presented concerning appellant's alleged criminal activity while she was on bond. Instead, the trial court, by its own language, relied on the bare fact that new charges had been brought, without inquiring into the basis of those charges or allowing appellant to rebut or explain those charges. To do so effectively denied appellant her right to due process.

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