

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-001743-MR

HOMER SMALLWOOD

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT  
HONORABLE EDDY COLEMAN, JUDGE  
ACTION NO. 01-CR-00001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

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BEFORE: BAKER, COMBS, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. This is an appeal from the Pike Circuit Court denying appellant's pro se petition for an amendment of sentence pursuant to CR 60.02. Because appellant's conviction of the offenses at issue did not constitute double jeopardy, we affirm.

In April of 2002, after being indicted by the Pike County Grand Jury, Homer Smallwood (Smallwood) pled guilty to nine counts of various drug and weapons violations. Smallwood

was sentenced to a maximum term of ten years in the state penitentiary. Among the offenses for which Smallwood was convicted, pursuant to a guilty plea, were one count of possession of a firearm by a convicted felon,<sup>1</sup> one count of possession of marijuana while in possession of a firearm (Count 1),<sup>2</sup> possession of a Schedule III controlled substance (Count 3),<sup>3</sup> and use or possession of drug paraphernalia (Count 5).<sup>4</sup> Smallwood now argues it was a violation of double jeopardy principles where he was convicted of possession of a firearm by a convicted felon and his sentences were enhanced on Counts 1, 3, and 5, because the elements of the possession of a firearm offense were used to enhance Counts 1, 3, and 5.

Double jeopardy is not violated where a person is charged with more than one crime arising out of the same course of conduct as long as each statute "requires proof of an additional fact which the other does not". Commonwealth v. Burge, Ky., 947 S.W.2d 805, 809 (1996), quoting Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306 (1932). KRS 505.020 codifies this rule. Burge, 947 S.W.2d at 809.

This Court previously addressed the enhancement statute, KRS 218A.992, in the case of Adams v. Commonwealth, Ky.

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<sup>1</sup> KRS 527.040.

<sup>2</sup> KRS 218A.1422.

<sup>3</sup> KRS 218A.1416.

<sup>4</sup> KRS 218A.500.

App., 931 S.W.2d 465 (1996), and the double jeopardy prohibition. In Adams, the appellant had three drug charges enhanced by KRS 218A.992. This Court stated:

KRS 218A.992 provides an enhanced penalty for those violating Chapter 218A while in possession of a firearm. The severity of the penalty increases due to the dangerous status of the violator as an armed perpetrator. The possession of a firearm, however, is not an element necessary to determine guilt of the substantive offense. Consequently, KRS 218A.992 is nothing more than a sentencing statute reflecting the dangerous nature of a crime perpetrated by an armed criminal. . . .

[T]he appellant's possession of a firearm did not constitute an independent criminal offense but simply defined a particular status for purposes of punishment. []. We do not believe that the repeated use of the same fact, possession of a single handgun, to enhance punishment of these separate offenses occurring during a single course of conduct constitutes double jeopardy.

Adams, 931 S.W.2d at 468 (emphasis added).

In the present case, although the fact of possession of a firearm is an element to be proven in the crime of possession of a firearm by a convicted felon,<sup>5</sup> possession of a firearm is not an element of the crimes that were merely enhanced in Counts 1, 3, and 5. Accordingly, Smallwood's conviction for both possession of a firearm by a convicted felon

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<sup>5</sup> KRS 527.040.

and the enhancement of Counts 1, 3, and 5 per KRS 218A.922 did not constitute double jeopardy.

For the foregoing reasons, the judgment of the Pike Circuit Court is affirmed.

ALL CONCUR.

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