

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-002086-MR

DEMETRIUS LEAR

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE REBECCA M. OVERSTREET, JUDGE  
ACTION NO. 02-CR-00647

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION

### AFFIRMING

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BEFORE: EMBERTON, CHIEF JUDGE; McANULTY AND MINTON, JUDGES.

McANULTY, JUDGE. Demetrius Lear (hereinafter appellant) entered a conditional guilty plea to charges of flagrant non-support and being a persistent felony offender (PFO) in the second degree. Appellant was sentenced to one year in prison, enhanced to five years by the PFO charge. Appellant conditioned his guilty plea on the right to challenge the Commonwealth's amendment of the indictment. We affirm.

The Fayette County Grand Jury, in June 2002, indicted appellant for committing the offense of flagrant non-support "[f]rom February 14, 1992 to present." The grand jury also indicted appellant for being a persistent felony offender in the second degree for his felony conviction in 1998. Appellant filed a motion to dismiss the PFO count on the ground that the alleged offense date for the charge of flagrant non-support was prior to the conviction referred to in the PFO count, citing Bray v. Commonwealth, Ky., 703 S.W.2d 478 (1985), and Dillingham v. Commonwealth, Ky. App., 684 S.W.2d 307 (1984). The trial court denied the motion to dismiss. The Commonwealth moved to amend count one of the indictment to charge appellant with flagrant non-support "from August 7, 1998 to present." The trial court granted the motion to amend. Subsequently, appellant entered his conditional plea. This appeal followed.

The Commonwealth argues that appellant failed to properly preserve this issue in writing for appellate review. RCr 8.09 states that, with the court's approval, "a defendant may enter a conditional plea of guilty, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified trial or pretrial motion." We conclude appellant satisfactorily preserved this issue by his written motion to dismiss and entry of his plea. The trial court and the Commonwealth certainly were aware of the issue

being appealed by appellant's conditional guilty plea. Gabbard v. Commonwealth, Ky., 887 S.W.2d 547 (1994). The Judgment on Guilty Plea specifically states that appellant "entered a conditional guilty plea upon agreement of the Commonwealth Attorney . . . reserving the Defendant's rights to an appeal on the issue of the motions to dismiss Ct. 2 and to amend the indictment." We do not believe that anything more was required of appellant to preserve this issue.

Pursuant to RCr 6.16, an indictment may be amended at any time prior to the verdict as long as the amendment does not state an additional or different offense and does not prejudice the defendant's substantial rights. We agree that the Commonwealth's amendment did not charge a new or different offense by condensing the time frame in which the flagrant nonsupport charge was alleged to have occurred. Furthermore, appellant was not deprived of his substantial right to be charged by a grand jury. The dates of the amended indictment were contained within the time period stated in the original indictment. Thus, these facts necessarily were found by the Grand Jury. We conclude that the Commonwealth's amendment of the indictment was properly allowed.

For the foregoing reasons, we affirm appellant's conviction in the Fayette Circuit Court for flagrant nonsupport.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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