RENDERED: March 5, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-000166-MR

CARLEEN THOMAS — APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
ACTION NO. 02-CR-00178

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING
** ** ** ** **

BEFORE: COMBS, KNOPF, AND McANULTY, JUDGES.

KNOPF, JUDGE: In December 2002, Carleen Thomas conditionally pled guilty to a misdemeanor charge of driving under the influence and to a felony charge of operating a vehicle while her license was suspended. By order entered January 17, 2003, the Madison Circuit Court sentenced her to concurrent terms of incarceration of six months and one year, respectively. Thomas contends that in the circumstances of her case, these two

offenses merge and thus that the double jeopardy clauses of the state and federal constitutions preclude her being punished for both. It is from the trial court's rejection of that contention that Thomas appeals. We agree with Thomas, and so must vacate and remand.

In September 2002, a Richmond police officer caught Thomas driving erratically through a Richmond subdivision. He arrested her and she was eventually indicted for having operated her vehicle under the influence of alcohol (DUI), in violation of KRS 189A.010(1)(b), and for having operated her vehicle while her license was suspended for DUI, in violation of KRS 189A.090.

Ordinarily a violation of KRS 189A.090 is a Class B misdemeanor.[1] Because of two aggravating circumstances, however, the Commonwealth alleged that Thomas's offense was a felony. The first circumstance was that Thomas had a prior conviction under the statute. KRS 189A.090(2)(b) provides in part that violators of the statute shall "[f]or a second offense within a five (5) year period, be guilty of a Class A misdemeanor." The second circumstance was that Thomas was under the influence at the time of this second offense. Subsection (2)(b) further provides that if (in addition to the prior offense), "at the time of the offense the person was also operating . . . a vehicle in violation of KRS 189A.010 . . . he shall be guilty of

[1] KRS 189A.090(2)(a).

a Class D felony and have his license revoked by the court for a period of two (2) years."

DUI, Thomas contends, is thus a lesser included offense of the felony offense with which she was charged. She should not, therefore, have been convicted of both the felony and the lesser included DUI. If Thomas is correct in characterizing DUI as a lesser included offense of the suspended-license offense, then clearly her contention is correct. The double jeopardy clauses prohibit multiple prosecutions for the same offense, and under Blockburger v. United States[2] and Commonwealth v. Burge,[3] a lesser-included offense is the same offense, for double-jeopardy purposes, as the greater offense, which, of course, contains all of the elements of the lesser.[4]

The Commonwealth contends that DUI should not be characterized as an element or lesser included offense of aggravated driving on a suspended license. That offense, rather, is the unlicensed driving, the elements of which differ from those of DUI. The DUI, the Commonwealth maintains, is merely a sentencing factor justifying a stiffer penalty.

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[2] 284 U.S. 299, 76 L. Ed. 306, 52 S. Ct. 180 (1932).

[3] Ky., 947 S.W.2d 805 (1996).

[4] Barth v. Commonwealth, Ky., 80 S.W.3d 390 (2001).

The United States Supreme Court, however, has rejected this approach. In Apprendi v. New Jersey,[5] the Court ruled that "if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact-—no matter how the State labels it-—constitutes an element [of the offense]."[6] In Apprendi the Court was concerned with the constitution's jury-trial and beyond-a-reasonable-doubt guarantees, not with the Double Jeopardy Clause. Recently, however, Justice Scalia (writing on behalf of two other justices) observed, "[w]e can think of no principled reason to distinguish, in this context, between what constitutes an offense for purposes of the Sixth Amendment's jury-trial guarantee and what constitutes an 'offence' for purposes of the Fifth Amendment's Double Jeopardy Clause."[7] We agree.

Because the fact of driving under the influence increased the maximum penalty to which Thomas was exposed from one year in jail to five years in the penitentiary, Apprendi requires that that fact be deemed an element of the alleged offense and not merely a sentencing factor. Thus viewed, the

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[5] 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000).

[6] Sattazahn v. Pennsylvania, ___ U.S. ___, 154 L. Ed. 2d 588, 598, 123 S. Ct. 732, 739 (2003) (citing Apprendi v. New Jersey, 530 U.S. at 482-84, 490).

[7] Sattazahn v. Pennsylvania, 154 L. Ed. 2d at 599, 123 S. Ct. at 739.

alleged suspended-license felony, as Thomas insists, includes the lesser offense of DUI. Under Blockburger and Burge, therefore, the offenses are the same. The Commonwealth should have chosen one and not have prosecuted for both.[8]

Accordingly, we vacate the January 17, 2003, judgment of the Madison Circuit Court and remand for the Commonwealth to elect which offense it wishes to prosecute and for the Madison Circuit Court to then proceed consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

David Eucker
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General of Kentucky

Perry T. Ryan
Assistant Attorney General
Frankfort, Kentucky

[8] Dotye v. Commonwealth, Ky., 289 S.W.2d 206 (1956).