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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001258-MR

SHIRLEY T. DURBIN

APPELLANT

v. APPEAL FROM HENDERSON CIRCUIT COURT
HONORABLE STEPHEN A. HAYDEN, JUDGE
ACTION NO. 02-CR-00076

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, TACKETT, AND VANMETER, JUDGES.

TACKETT, JUDGE: Shirley Durbin appeals from a judgment of the Henderson Circuit Court convicting him of first-degree, second-degree, and third-degree sodomy and first-degree, second-degree (three counts), third-degree sexual abuse. Durbin entered a conditional guilty plea to these charges after the trial court denied his motion to find that they constituted double jeopardy due to prosecution in federal court for charges arising out of the same incident. We hold that the trial court correctly

determined that there was no double jeopardy and, therefore, we affirm the convictions.

On January 26, 2002, Durbin drove a juvenile boy, age twelve, from Henderson, Kentucky, to Evansville, Indiana, where he picked up a second boy, age thirteen. He then drove both boys to Morganfield, Kentucky, and Shawneetown, Illinois, before returning to Henderson where the sexual assaults occurred. Durbin, who was sixty-one years old, took the boys to a secluded area in the woods and molested them repeatedly over a period of time. Unbeknownst to Durbin, some of his actions toward the boys were observed by a group of hunters in a goose blind. They immediately called the police and reported the license plate number on Durbin's truck. Because the case involved possible violations of a federal statute, an agent from the Federal Bureau of Investigation interviewed one of the hunters and filed an affidavit in the case.

Durbin was charged with sodomy and sexual abuse in the Henderson Circuit Court and, contemporaneously, with transporting a minor across state lines with intent to engage in sexual activity in the federal court. He pled guilty to the federal charges and was sentenced to 144 months. Afterwards, he filed a motion to dismiss the charges in the Henderson Circuit Court, alleging that the state prosecution violated federal and state constitutional prohibitions against double jeopardy. The

trial court denied the motion and allowed Durbin to enter a conditional guilty plea. This appeal followed.

The sole issue under review is whether the trial court correctly determined that the dual prosecutions in state and federal court did not constitute double jeopardy. If the state and federal statutes each contained at least one element of required proof that differed from each other, then the dual prosecutions were not double jeopardy. Blockburger v. United States, 284 U.S. 299, 113 S.Ct. 180, 76 L.Ed. 306 (1932); Benton v. Crittenden, Ky., 14 S.W.3d 1 (1999). Durbin was convicted in federal court of three counts of violating 18 U.S.C. 2423(a), which required proof that he knowingly transported a minor in interstate commerce with the intent to engage in sexual activity, and one count of 18 U.S.C. 2423(b), which required proof that he knowingly transported a minor in interstate commerce for the purpose of engaging in sexual activity. The Kentucky statutes governing sodomy and sexual abuse offenses contain no requirement of interstate transport, nor do the federal statutes in question require proof that sexual activity actually occurred. Durbin argues that, in order to prove that he intended to engage in sexual activities, the federal prosecutor would have relied on the same actions charged under the state statutes on sodomy and sexual abuse. This argument fails for two reasons. First of all, Durbin pled guilty in

federal court; therefore, it is purely speculative to claim that the federal prosecutor would have attempted to prove that he actually engaged in sexual conduct. Furthermore, the federal statute requires proof only of the intent or purpose to engage in sexual activity, not that such activity actually occurred. Consequently, the trial court correctly determined that there was no double jeopardy bar to prosecuting Durbin on both the state and federal charges.

For the forgoing reason, the judgment of the Henderson Circuit Court is affirmed.

ALL CONCUR.

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