

RENDERED: JUNE 24, 2005; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-000545-MR

WILLIE RAY HINES

APPELLANT

APPEAL FROM LOGAN CIRCUIT COURT  
v. HONORABLE WILLIAM R. HARRIS, SPECIAL JUDGE  
ACTION NO. 02-CR-00006

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.<sup>1</sup>

TAYLOR, JUDGE: Willie Ray Hines brings this appeal from a March 11, 2004, judgment of the Logan Circuit Court upon a jury verdict finding appellant guilty of theft by failure to make required distribution of property (Kentucky Revised Statutes (KRS) 514.070). We affirm.

Appellant was originally indicted for various offenses on January 8, 2002; however, an amended indictment was returned

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<sup>1</sup> Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

on March 4, 2003, charging appellant with, *inter alia*, Count II, which alleged:<sup>2</sup>

That on or about the 24<sup>th</sup> day of October, 1999, in Logan County, Kentucky, the above named defendant unlawfully obtained property upon agreement or subject to a known legal obligation to make a specified payment or disposition and intentionally dealt with the property as his own wherein defendant kept approximately eight (8) head of cattle valued at more than \$300.00.

Being in violation of KRS 514.070 - UOR  
0232300 (Theft by failure to Make Required  
Disposition of Property - Over \$300.00)

At trial, the evidence indicated that appellant was traveling in another state on October 24, 1999, and thus, could not have committed the offense upon that date. After the close of the Commonwealth's proof, the Commonwealth sought to amend the indictment so as to conform with the evidence. Specifically, the Commonwealth sought to amend the date so that the offense of theft by failure to make required distribution in Count II occurred between the time period of October 29, 1999, through January 15, 2003. Appellant made a motion for a directed verdict of acquittal upon Count II. The trial court denied appellant's motion for directed verdict and granted the

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<sup>2</sup> As to the March 2003 amended indictment, no true bill was returned upon Count II; therefore, the trial court renumbered the amended indictment by omitting the charge which no true bill was returned. Thus, Count III of the amended indictment became Count II. To avoid confusion, we shall refer to Count II as renumbered by the trial court. Appellant was charged with three counts altogether. The trial court granted a directed verdict of acquittal upon Count I, and the jury returned a verdict of acquittal upon Count III.

Commonwealth's motion to amend Count II. The court, however, gave appellant a continuance of two weeks to prepare a defense in light of the date amendment to Count II.

After submission to the jury, the jury returned a verdict finding appellant guilty of Count II and recommended a sentence of 27 months' imprisonment. By judgments entered on February 9, 2004, and March 11, 2004, appellant was sentenced pursuant to the jury recommendation of 27 months in the penitentiary; however, the sentence was probated for a period of five years. This appeal follows.

Appellant contends the trial court committed reversible error by amending Count II of the indictment from the date of October 24, 1999, to "on or about October 29, 1999, through January 15, 2003." As the date amendment was erroneous, appellant maintains he was entitled to a directed verdict of acquittal upon Count II. We disagree.

Ky. R. Crim. P. 6.16 allows amendment of an indictment before the return of a jury verdict under limited circumstances:

The court may permit an indictment, information, complaint or citation to be amended any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced. If justice requires, however, the court shall grant the defendant a continuance when such an amendment is permitted.

It is clear the amendment to Count II did not charge appellant with any additional or different offense. The amendment simply changed the date the offense occurred. Generally, an amendment changing the time or date of an indicted offense is considered an amendment of form and not of substance. 42 C.J.S.

Indictments and Informations § 193 (1991); 41 Am. Jur. 2d Indictments and Informations § 184 (1995). An amendment to date or time, however, must not prejudice defendant. Such amendment is generally permissible if the charged act was committed within the statute of limitations, prior to the return of the indictment date, and the date is not a material element of the charged crime. 41 Am. Jur. 2d Indictments and Informations § 184 (1995).

In the case at hand, appellant argues the amendment prejudiced his defense. Specifically, appellant maintains that he intended to present a time specific defense by proving that on the original indictment date of October 24, 1999, he was in California. Moreover, appellant contends the two-week continuance did not cure the resulting prejudice; instead, appellant believes a continuance of some 30 days was needed to prepare a new defense.

This dispute enjoys a long drawn out litigious history that simply cumulated in the instant criminal action. Appellant unsuccessfully defended a civil action concerning the disputed

cattle. It is incredulous that appellant was somehow surprised and prejudiced by the date amendment; rather, it is more probable that appellant was fully aware of the true date of the indicted offense. Considering the particular facts of this case, we conclude a two-week continuance was sufficient for appellant to revamp his defense and cured any resulting prejudice. Accordingly, we hold the circuit court did not commit reversible error by amending the date in Count II of the indictment to read "on or about October 29, 1999, through January 15, 2003."

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

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