

RENDERED: March 25, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000761-MR

JERRY DOUGLAS BATES

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 03-CR-00574

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * * * * *

BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

BARBER, JUDGE: Appellant, Jerry Douglas Bates (Bates), appeals from a judgment on a conditional plea of guilty to a charge of theft of identity. Bates' one year sentence was probated. We affirm Bates' conviction.

Bates was involved in a traffic stop. At that time, there was a warrant out for Bates on a probation violation. When questioned regarding his identity, Bates informed the

police officer that he was Brian Patrick Bates, his brother. Bates gave the officer his brother's name to avoid being detected and arrested by the police. Bates was cited as his brother for failure to have a driver's license, registration or insurance. Bates did, in fact, have a driver's license, registration and insurance at the time, but they were in his own name, rather than in his brother's name. Bates then obtained a duplicate driver's license in his brother's name, and produced it to the court to obtain dismissal of the charges. The charges were dismissed in reliance upon the duplicate license.

Bates was indicted for a violation of KRS 514.160, identity theft, a Class D felony. He pled guilty to the charge. At sentencing, counsel for Bates argued that the statute requires that the offense be committed for pecuniary gain in order to be punishable. Bates moved the court to set aside the indictment because he did not assume his brother's identity for the purpose of pecuniary gain. Bates asserted that the only offense he was guilty of was the misdemeanor offense of providing a false name to a police officer, a violation of KRS 523.110.

The trial court found Bates guilty of identity theft for the purpose of avoiding detection, pursuant to KRS 514.160(d). Bates requests that this Court set aside that conviction as being unsupported by the facts of the case.

KRS 514.160 provides that:

- (1) A person is guilty of the theft of identity of another when he or she knowingly possesses or uses any current or former identifying information of the other person or family member or ancestor of the other person, such as that person's or family member's or ancestor's name, address, telephone number, electronic mail address, Social Security number, driver's license number, birth date, personal identification number or code, and any other information which could be used to identify the person, including unique biometric data, with the intent to represent that he or she is the other person for the purpose of:
 - (a) depriving the other person of property;
 - (b) obtaining benefits or property to which he or she would otherwise not be entitled;
 - (c) making financial or credit transactions using the other person's identity;
 - (d) avoiding detection; or
 - (e) commercial or political benefit.

Id. Bates admits to using his brother's name in an attempt to avoid detection. He asserts, however, that he intended no pecuniary gain by the act, and thus should not have been charged under the statute.

Bates cites to an article from The Advocate, Volume 26, pp. 34-40, which states that the identity theft statute must be interpreted to require some type of actual theft in order to be applicable. The article explains that subsection (d), which finds a violation where a defendant has assumed someone else's identity to avoid detection, only applies where a defendant is attempting to "avoid detection to obtain some economic gain (for

example, if the defendant has prior bankruptcies, bad credit, service on civil cases he wishes to avoid). . . ." The article also asserts that the placement of the statute in the section listing theft and related offenses shows that the legislature intended an actual theft to take place before the penalties attached. Bates contends that he was not seeking pecuniary gain when he gave the officers a false name, and that he was improperly charged under the statute. We disagree with this article and reject Bates' argument that pecuniary gain is a necessary argument of the offense. Under KRS 514.160 theft of identity of another person for the purpose of avoiding detection does not require pecuniary gain.

The trial court concurred that Bates could have been charged either with identity theft or with giving a police officer a false name. The court ruled that the prosecutor did not abuse his discretion in determining which statute to charge Bates under. A prosecutor may choose to indict under any applicable statute. Malone v. Commonwealth, 30 S.W.3d 180,182 (Ky. 2000). We agree with the trial court's ruling. Therefore, based upon the foregoing, we affirm the conviction.

ALL CONCUR.

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