

RENDERED: February 4, 2005; 10:00 a.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court Of Appeals**

NO. 2004-CA-000769-MR

DENNIS SEELEY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE REBECCA OVERSTREET, JUDGE  
ACTION NOS. 99-CR-804-4 & 99-CR-1267

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DYCHE, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: In July 1999, the Fayette County grand jury indicted Dennis Seeley for trafficking in marijuana.<sup>1</sup> The offense was alleged to have occurred in June 1999. While this indictment was pending, a federal district court in Alabama indicted Seeley for marijuana trafficking allegedly occurring in

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<sup>1</sup> KRS 218A.1421(4).

1995 and 1996. He was convicted of the federal charge in May 2003 and was sentenced to seventy-eight months' imprisonment. A pre-sentence report referred to the trafficking alleged in the Kentucky indictment as conduct "relevant" to Seeley's federal sentence. When Seeley's Kentucky prosecution resumed, he moved to have the trafficking charges dismissed on the ground that, by considering the alleged Kentucky offense prior to sentencing, the federal court had already punished him for that offense. The Fayette Circuit Court denied Seeley's motion, whereupon he pled guilty to the Kentucky charge, but retained the right to appeal.<sup>2</sup> He contends that statutory guarantees against double jeopardy precluded his Kentucky prosecution for the alleged June 1999 offense once the federal court considered that allegation in determining the federal sentence. For several reasons we disagree and therefore affirm the trial court's judgment.

The double jeopardy clauses of the Fifth Amendment to the United States Constitution and § 13 of the Kentucky Constitution protect citizens from both successive prosecutions and multiple punishments for the same offense.<sup>3</sup> Prosecutions by

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<sup>2</sup> Judgment sentencing Seeley to five years' imprisonment was entered March 31, 2004.

<sup>3</sup> Witte v. United States, 515 U.S. 389, 115 S. Ct. 2199, 132 L. Ed. 2d 351 (1995); Commonwealth v. Burge, 947 S.W.2d 805, 809 (Ky. 1996) (noting that our Supreme Court has interpreted § 13 of the Kentucky Constitution "as affording protections which parallel those guaranteed by the Fifth Amendment.").

separate sovereigns, however, such as Kentucky and the United States, even if based on the same conduct, are not prosecutions for the "same offense" for constitutional purposes and so do not violate the double jeopardy guarantees.<sup>4</sup>

Seeley relies instead, therefore, on KRS 505.050 which bars a subsequent prosecution in Kentucky if the defendant has been conclusively prosecuted by a separate sovereign with concurrent jurisdiction and if "the subsequent prosecution is for an offense involving the same conduct" as gave rise to the foreign prosecution.<sup>5</sup> Seeley apparently argues either that the federal sentencing procedure amounted to a prosecution based on his illegal Kentucky conduct so that the statute bars a subsequent Kentucky prosecution, or that KRS 505.050 implicitly bars multiple punishments for the same offense (as do the constitutional double jeopardy clauses) even if successive prosecutions were not involved. This alternative argument includes the implied assertion that the federal sentence amounted to punishment for Seeley's Kentucky offense. Neither alternative bears scrutiny.

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<sup>4</sup> Benton v. Crittenden, 14 S.W.3d 1 (Ky. 1999).

<sup>5</sup> KRS 505.050(1).

The first alternative fails because, as our highest court held in Lem v. Commonwealth,<sup>6</sup> the mere consideration of a second offense during sentencing for a first offense does not convert the first proceeding into a prosecution of the second offense.

The second alternative fails, even assuming that KRS 505.050(1) bars multiple punishments in the absence of successive prosecutions, because Seeley has not shown that his federal sentence was enhanced as a result of the Kentucky allegations. Even if it was, moreover, the United States Supreme Court and several sister states have held that, for double jeopardy purposes, sentence enhancement in light of a separate offense does not constitute punishment for that offense.<sup>7</sup> We agree. Although these cases construe constitutional provisions, we see no reason, and Seeley has suggested none, to construe KRS 505.050 differently. KRS 505.050 after all, is clearly intended to protect the same interests the double jeopardy clauses protect.

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<sup>6</sup> 419 S.W.2d 759 (Ky. 1967).

<sup>7</sup> Witte v. United States, *supra*; State v. Bonham, 28 P.3d 303 (Alaska, 2001); State v. Johnson, 956 S.W.2d 181 (Ark. 1997); Khan v. State, 694 A.2d 485 (Md.App. 1997). *And cf.* Corbett v. Commonwealth, 717 S.W.2d 831 (Ky. 1986) (holding that persistent-felony-offender sentencing does not amount to punishment for the prior offense).

In sum, though it may have considered the pending Kentucky allegations of marijuana trafficking when it sentenced Seeley, the federal court neither prosecuted nor punished him for that offense. KRS 505.050 did not bar, therefore, Seeley's later Kentucky prosecution. Accordingly, we affirm the March 31, 2004, judgment of the Fayette Circuit Court.

ALL CONCUR.

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