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(FILE NO. 2006-SC-0802-D)

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001089-MR

ALLEN DAVID JONES — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
INDICTMENT NO. 04-CR-00840

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY, JOHNSON, AND SCHRODER, JUDGES.

HENRY, JUDGE: On April 1, 2005, Allen David Jones entered a conditional guilty plea relating to a number of charges resulting from his arrest for driving under the influence and driving with a suspended license. He now appeals on the grounds that the trial court erroneously allowed the Commonwealth to amend the indictment against him, and that he has been subjected to double jeopardy. Upon review, we affirm.

On July 12, 2004, Jones was indicted by the Fayette County Grand Jury on charges of (1) operating a motor vehicle while DUI (fourth or greater offense),[1] (2) driving on a suspended license (which had been suspended for DUI) while again driving under the influence (third offense),[2] (3) second-degree wanton endangerment,[3] (4) driving with no insurance,[4] and (5) being a first-degree persistent felony offender.[5] On July 15, 2004, Jones appeared before the Fayette Circuit Court with counsel and entered a "not guilty" plea to all charges.

On August 12, 2004, Jones moved to dismiss Count Five of the indictment on the ground that the Commonwealth was attempting to use for PFO enhancement purposes the same DUI convictions that were the basis for the felony charge in Count One, thus creating an impermissible double enhancement. On September 8, 2004, the Commonwealth moved to amend Count One of the indictment down to DUI second offense, Count Two of the indictment down to a second offense, and Count Five of the indictment to being a first-degree PFO. In doing so, the Commonwealth intended to apply one of Jones' prior DUI convictions to the PFO charge instead of the DUI charge to avoid

[1] Pursuant to Kentucky Revised Statutes ("KRS") 189A.010.

[2] Pursuant to KRS 189A.090.

[3] Pursuant to KRS 508.070.

[4] Pursuant to KRS 304.39-080.

[5] Pursuant to KRS 532.080.

the double enhancement problem. Jones argued in response to the Commonwealth's motion to amend that KRS 189A.010 and KRS 189A.120 prohibited the DUI charge in Count One from being amended down to a misdemeanor and, accordingly, the PFO charge in Count Five had to be dismissed.

On October 6, 2004, the trial court entered an order sustaining the Commonwealth's motion to amend the indictment and rejecting Jones' motion in opposition. In doing so, the court held that Riley v. Commonwealth, 120 S.W.3d 622 (Ky. 2003) and Flynt v. Commonwealth, 105 S.W.3d 415 (Ky. 2003) "both address the discretion of the Commonwealth to choose how to proceed in prosecuting cases and allows for the amendment of an indictment to add status charges for purposes of enhancing penalty." The court continued: "PFO is a status, not a criminal offense. . . . An amendment such as this does not affect the defendant's substantial rights because he is or should be aware of his own criminal record." The court further cited to State v. Whitten, 622 A.2d 85 (Me. 1993) and Howard v. State, 377 N.E.2d 628 (Ind. 1978) for the proposition that "[o]ther jurisdictions have held that the amendment of an indictment or information to add 'habitual criminal' count did not charge separate offense[s] but only provided a more severe penalty for the indicted offense." The court finally noted:

> Furthermore, the legislature did not exclude the offenses set forth in KRS Chapter 189A from the persistent felony offender statute. While the Court agrees that the Commonwealth cannot use the persistent felony offender statute and a DUI Fourth or greater offense to enhance the same charge, the Court finds that the Commonwealth has complete discretion in choosing how to proceed with prosecuting criminal cases, including the strategic manipulation of offenses in order to proceed at trial and argue for the maximum punishment allowable by law.

On April 1, 2005, Jones filed a petition to enter into a conditional guilty plea as to Counts One, Two, and Five of the indictment. In return for this plea, the Commonwealth recommended a sentence of 14 days and a $350.00 fine for Count One, a ten-year PFO-enhanced sentence for Count Two, and dismissal of Counts Three and Four. This petition was accepted by the trial court, and on April 6, 2005, the court entered a judgment finding Jones guilty of the aforementioned counts. On May 10, 2005, the court entered a final judgment dismissing Counts Three and Four and sentencing Jones to 30 days' imprisonment for Count One (in lieu of a $350.00 fine) and a ten-year PFO-enhanced sentence for Count Two. However, after considering the pre-sentence investigation report, the court suspended imposition of this sentence and ordered Jones to be placed on probation for five years, subject to a number of conditions. This appeal followed.

On appeal, we first address Jones' argument that the trial court erred in allowing the Commonwealth to amend Count One of the indictment from DUI fourth offense to DUI second offense. He specifically contends that KRS 189A.010 requires that his crime be prosecuted as a felony, and that KRS 189A.120 prohibits an amendment down where a defendant refuses an alcohol or drug test.

As a general rule, "an 'independent' motion by a prosecutor to dismiss or amend an indictment must be sustained unless clearly contrary to manifest public interest." Hoskins v. Maricle, 150 S.W.3d 1, 24 (Ky. 2004), citing United States v. Cowan, 524 F.2d 504, 513 (5th Cir. 1975). Moreover, "it is beyond dispute that the executive branch's prosecutorial function *includes* 'the decision whether or not to prosecute, and what charge to file or bring before a grand jury.'" Flynt v. Commonwealth, 105 S.W.3d 415, 424 (Ky. 2003), quoting Commonwealth v. McKinney, 594 S.W.2d 884, 888 (Ky.App. 1979), in turn quoting Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978). As our Supreme Court further noted in Hoskins: "Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought." Hoskins, 150 S.W.3d at 20, quoting Newman v. United

States, 382 F.2d 479, 480 (D.C. Cir. 1967). Thus, "[a] judge in our system does not have the authority to tell prosecutors which crimes to prosecute or when to prosecute them." Id., quoting United States v. Giannattasio, 979 F.2d 98, 100 (7th Cir. 1992).

Here, Jones in essence argues that the Commonwealth is prohibited from choosing under which section or sections of KRS 189A.010 it wishes to proceed in prosecuting a particular defendant for DUI. We disagree. There is nothing within any of the provisions of KRS 189A.010 that purport to limit a prosecutor's discretion to bring whatever charges he or she sees fit against a defendant or to amend those charges. Moreover, Jones has cited us to no case law in support of his position, and we can find none in our own research. Indeed, our Supreme Court has repeatedly held that a case may be prosecuted pursuant to KRS 189A.010 on multiple theories. See Commonwealth v. Reynolds, 136 S.W.3d 442 (Ky. 2004); Commonwealth v. Wirth, 936 S.W.2d 78 (Ky. 1996). Accordingly, we must reject Jones' contention that KRS 189A.010 prohibits the amendment to the indictment that was allowed in this case.

We next consider Jones' argument that KRS 189A.120 prohibited what occurred here. KRS 189A.120(1) provides as follows:

> When an alcohol concentration for a person twenty-one (21) years of age or older in a prosecution for violation of KRS 189A.010 is

> 0.08 or above, is 0.02 or above for a person under the age of twenty-one (21), *or when the defendant, regardless of age, has refused to take an alcohol concentration or substance test, a prosecuting attorney shall not agree to the amendment of the charge to a lesser offense and shall oppose the amendment of the charge at trial, unless all prosecution witnesses are, and it is expected they will continue to be, unavailable for trial*.

(Italics added).

After much consideration, we do not agree that the language of KRS 189A.120 prohibited the amendment that occurred in this case. As grounds for this conclusion, we believe that the phrases "shall not agree to the amendment of the charge to a lesser offense" and "shall oppose the amendment of the charge at trial" anticipate that the impetus for amending a charge is not that of an independent prosecutorial decision. In reaching this conclusion, we particularly note the General Assembly's use of the words "agree" and "oppose." Merriam-Webster's Collegiate Dictionary gives many definitions for the word "agree" including: "to concur in (as an opinion): ADMIT, CONCEDE", "to consent to as a course of action", "to accept or concede something (as the views or wishes of another)", "to achieve or be in harmony (as of opinion, feeling, or purpose)", "to get along together", and "to come to terms".[6] Merriam-Webster's

[6] As "agree" is not defined anywhere within KRS Chapter 189A, it must be construed according to its common and approved usage. KRS 446.080(4); Withers v. University of Kentucky, 939 S.W.2d 340, 345 (Ky. 1997), citing Coots v. Allstate Ins. Co., 853 S.W.2d 895 (Ky. 1993); Gateway Construction

Collegiate Dictionary 26 (11th ed. 2003). The plain and literal meaning of "agree," then, contemplates consensus, agreement, or compromise among different parties as to a course of action or an issue in disagreement - not an independent decision by one party to proceed in a certain way as to a particular matter. Likewise, a prosecutor being put in a situation in which he would be required to "oppose the amendment of the charge at trial," anticipates that he did not request such an amendment of his own initiative and that it instead came from another party. We are obliged to follow and give effect to the plain language of KRS 189A.120(1) as it is written. See Bailey v. Commonwealth, 70 S.W.3d 414, 416 (Ky. 2002); Commonwealth v. Harrelson, 14 S.W.3d 541, 547 (Ky. 2000). Moreover, our decision is consistent with our courts' views on the broad authority afforded prosecutors to amend indictments on their own accord where warranted, as noted above.[7] Accordingly, we find no error as to this issue.

We next consider Jones' contention that convicting him of both DUI and driving on a license suspended for DUI (with the aggravating factor that he was DUI at the time of the offense) constitutes double jeopardy. Although this issue was not raised

Co. v. Wallbaum, 356 S.W.2d 247 (Ky. 1962).

[7] Further, the Kentucky Rules of Criminal Procedure contemplate broad discretion of prosecutors to amend charges. See RCr 3.13 and 6.16. We are also mindful that in DUI cases the degree of a charge must sometimes be amended when an underlying conviction proves invalid or cannot be proven for some reason other than the Commonwealth's inability to produce a witness.

below, as it involves a double jeopardy claim, we may consider it on appeal. See Phillips v. Commonwealth, 679 S.W.2d 235, 236 (Ky. 1984); Gunter v. Commonwealth, 576 S.W.2d 518, 522 (Ky. 1978); Sherley v. Commonwealth, 558 S.W.2d 615, 618 (Ky. 1977).

In Commonwealth v. Burge, 947 S.W.2d 805 (Ky. 1996), our Supreme Court "reinstated the 'Blockburger rule,' Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), as incorporated in KRS 505.020, as the sole basis for determining whether multiple convictions arising out of a single course of conduct constitutes double jeopardy." Taylor v. Commonwealth, 995 S.W.2d 355, 358 (Ky. 1999), citing Burge, 947 S.W.2d at 809-11. Applying the "Blockburger rule" in this case requires us "to determine whether the act or transaction complained of constitutes a violation of two distinct statutes and, if it does, if each statute requires proof of a fact the other does not. . . . Put differently, is one offense included within another?" Burge, 947 S.W.2d at 811, citing Eldred v. Commonwealth, 906 S.W.2d 694 (Ky. 1995).

Here, Jones pled guilty to a second-offense DUI and to operating a motor vehicle while his license was suspended for DUI. Because the suspended license charge was Jones' second offense within a five-year period, and because it occurred while he was DUI, the charge was enhanced to a Class D felony. KRS 189A.090(2)(b). Jones argues that a conviction for DUI and the

use of that DUI as an aggravating factor in his suspended license conviction place him in double jeopardy, as the same offense is involved in two separate charges against him. We disagree.

The fact that Jones was operating a motor vehicle while his license was suspended for DUI was sufficient, in and of itself, to support the suspended license conviction. KRS 189A.090(1).[8] The question of whether he was DUI at the time of the offense goes only to the enhanced penalties available against repeat offenders. KRS 189A.090(2)(b).[9] This fact is of importance because our Supreme Court has repeatedly held that "[a]ggravating circumstances are not criminal offenses subject to double jeopardy considerations." Furnish v. Commonwealth, 95 S.W.3d 34, 51 (Ky. 2002); see also Caudill v. Commonwealth, 120 S.W.3d 635, 677-78 (Ky. 2003) ("Nor is it double jeopardy to convict a defendant of robbery or burglary and then use the same offense as an aggravating circumstance authorizing capital punishment."); Woodall v. Commonwealth, 63 S.W.3d 104, 132 (Ky.

[8] KRS 189A.090(1) provides: "No person shall operate or be in physical control of a motor vehicle while his license is revoked or suspended under KRS 189A.010(6), 189A.070, 189A.107, 189A.200, or 189A.220, or operate or be in physical control of a motor vehicle without a functioning ignition interlock device in violation of KRS 189A.345(1)."

[9] KRS 189A.090(2)(b) provides: "For a second offense within a five (5) year period, be guilty of a Class A misdemeanor and have his license revoked by the court for one (1) year, unless at the time of the offense the person was also operating or in physical control of a motor vehicle in violation of KRS 189A.010(1)(a), (b), (c), or (d), in which event he shall be guilty of a Class D felony and have his license revoked by the court for a period of two (2) years."

2001) ("Simply because the aggravating circumstance duplicates one of the underlying offenses does not mean that the defendant is being punished twice for the same offense."); St. Clair v. Roark, 10 S.W.3d 482, 487 (Ky. 1999) ("Nor is it double jeopardy to impose a separate penalty for one offense while using the same offense as an aggravating circumstance authorizing imposition of capital punishment for another offense."). Because DUI is not an element of the charge of operating a motor vehicle on a license suspended for DUI, and because operating a motor vehicle on a suspended license is not an element of DUI, we find that each charge requires "proof of an additional fact which the other does not" and that Jones consequently was not subjected to double jeopardy. Therefore, his argument must be rejected.

Accordingly, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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