

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000315-MR

LARRY HENRY SIMPKINS

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
ACTION NO. 05-CR-00252

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: STUMBO AND VANMETER, JUDGES; PAISLEY,¹ SENIOR JUDGE.

PAISLEY, SENIOR JUDGE: Larry Simpkins waived his right to a jury trial and after a bench trial was found guilty of resisting arrest, assault in the third degree, violating a domestic violence order and two counts of terroristic threatening. He was sentenced to serve four years. He brings two issues to this Court for review: whether the trial court erred when it denied his motion for directed verdict and whether convictions for resisting

¹Senior Judge Lewis G. Paisley, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

arrest and assault in the third degree resulted in a double jeopardy violation. After a review of the record, we find no error and affirm.

A domestic violence order (hereinafter DVO) was in effect requiring Simpkins to remain at least 500 feet away from the occupant of a certain apartment in Paducah. Police were called to that location after receiving a report that Simpkins had violated the DVO and was in the area of the woman's apartment. They found Simpkins within 500 feet of the apartment. Simpkins saw the police officer, turned and began to walk away. The officer ordered Simpkins to stop and he complied. After confirming his identity, the officer attempted to place Simpkins under arrest for violation of the DVO. Simpkins was handcuffed, but as he was being led to the cruiser, he tried to kick the officer in the shins. When they reached the cruiser, Simpkins wedged himself against the roof and floor of the vehicle, refusing to be placed inside. Eventually, two officers were able to lift him into the rear of the cruiser and place him in the back seat. Simpkins again kicked at the officer, striking him in the chest but causing no injury. At the jail, the officer warned the jailers that Simpkins had kicked him. Simpkins then shouted out that he would do it again and went on to say he was going to return and kill the occupant of the apartment.

Simpkins first argues that the trial court erred when it failed to grant a directed verdict of acquittal. We disagree. The test on appellate review is whether it would be clearly unreasonable for the trier of fact to find guilt when reviewing the evidence as a whole. *Commonwealth v. Benham*, 816 S.W.2d 186 (Ky. 1991). The

record in this case provides sufficient evidence to convict. He was within 500 feet of the person who was protected by the DVO. He struggled, kicked at the officer and made it difficult for the police to put him into the cruiser. It was not clearly unreasonable to consider this evidence and come to the conclusion that Simpkins was guilty of the offenses charged. There was no error.

Simpkins argues that he could not be found guilty of third degree assault because he did not cause any injury to the officer. KRS 508.025 provides that a person is guilty of assault in the third degree when they intentionally cause or attempt to cause physical injury to a peace officer. The evidence in this case clearly supports a finding that Simpkins attempted to injure the officer by kicking him in the chest.

Simpkins then argues that he did not create a substantial risk of causing physical injury and therefore he could not be guilty of resisting arrest. KRS 520.090 states that a person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a peace officer from effecting a lawful arrest by using or threatening to use physical force or violence against the police officer. It is clear that Simpkins' actions were well within the behavior prohibited by the statute.

Finally, Simpkins argues that his convictions for both assault in the third degree and resisting arrest violate the prohibition against double jeopardy. We disagree. Those charges did not arise from the same conduct. Simpkins' actions supporting the resisting arrest charge occurred before he was finally placed in the police vehicle. His actions which supported the assault charge, attempting to kick the officer in the face and

striking him in the chest, occurred after the officers had succeeded in arresting him and had placed him in the vehicle. Even if a double jeopardy analysis was required, the appropriate test is whether the offenses require proof of an element that the other does not. *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Simpkins relies on the fact that the same physical injury was arguably used to satisfy the necessary elements of the two crimes. Kentucky has abandoned that form of analysis and returned to the *Blockburger* test. *Commonwealth v. Burge*, 947 S.W.2d 805 (Ky. 1997).

The test under *Blockburger* is whether each offense requires proof of a fact which the other does not. Assault third requires proof that the accused caused or attempted to cause physical injury to the officer. KRS 508.025 Resisting arrest does not. Resisting arrest requires proof that the officer was arresting or attempting to arrest someone. KRS 520.090. Assault third does not. They are two separate and distinct crimes. There was no violation of the constitutional prohibition against double jeopardy.

The judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

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