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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000863-MR

JAMES D. PAYNE — APPELLANT

v. — APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NOS. 03-CR-00225, 03-CR-00225-0

COMMONWEALTH OF KENTUCKY — APPELLEE

AND

NO. 2007-CA-000989-MR

JERRY ENDSLEY — APPELLANT

v. — APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE JULIE REINHARDT WARD, JUDGE
ACTION NOS. 03-CR-00225, 03-CR-00225-0

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, STUMBO, AND WINE, JUDGES.

STUMBO, JUDGE: This appeal comes from a criminal case in which Jerry Endsley and James Payne, both Appellants, were charged with first-degree robbery, attempted murder, and other criminal offenses. For the purposes of this appeal however, only the counts of robbery and attempted murder, later amended to first-degree assault (as to Payne only), are relevant. Although the Appellants' appeals were filed separately, because they arise from the same criminal case, they will be heard together.

The details of the crimes are not pertinent to this opinion and both Appellants accepted plea agreements. After a jury convicted Endsley of robbery in the first degree and criminal attempt to commit murder, he pled guilty to a charge of first-degree persistent felony offender, and Payne pled guilty to first-degree robbery and first-degree assault. Endsley is appealing a post-conviction order of the Campbell Circuit Court which overruled his motion for the Commonwealth to produce a copy of the grand jury transcripts in his case. Payne is appealing an order denying his civil rule 60.02 and criminal procedure rule 10.26 motion for relief. Payne argues that his guilty plea was not knowingly and voluntarily made because his conviction for robbery and assault violated double jeopardy. We find that the circuit court properly denied Endsley's motion for the transcripts and that Payne's convictions for both robbery and assault do not violate double jeopardy.

According to Endsley's motion for transcripts, he intends to file an RCr 11.42 motion and wants the grand jury

transcripts to help him prepare it. Endsley argues that according to case law and CR 5.16, he is entitled to a copy of the grand jury transcripts, which he is unable to procure from his trial counsel, and that it was wrong for the circuit court to deny his motion. While Mr. Endsley is correct that CR 5.16 establishes a right to a transcript of the grand jury proceeding, the record reflects that Endsley's counsel was provided a copy as part of pre-trial discovery. While Mr. Endsley asserts on appeal that he is unable to procure the transcripts from trial counsel, there is no evidence of record that he has attempted to do so.

Because he pled quilty, Endsley is not entitled to post-conviction discovery. *See Sanders v. Commonwealth*, 89 S.W.3d 380 (Ky. 2002); *Haight v. Commonwealth*, 41 S.W.3d 436 (Ky. 2001). Endsley seeks the grand jury transcripts in order to help him prepare his RCr 11.42 motion. Motions for post-conviction relief are to provide a forum for known grievances, not to provide an opportunity to search for grounds for relief. *Haight* at 441. Endsley is on a fishing expedition for issues for his anticipated RCr 11.42 motion, which is not permitted.

Endsley is not, however, without recourse. By first filing his RCr 11.42 motion and making a colorable argument for obtaining the transcript, Endsley can file a motion for the transcript. *Gilliam v. Commonwealth*, 652 S.W.2d 856, 859 (Ky. 1983); *Sanders* at 394.

Payne argues that his guilty plea was not knowing, intelligent, and voluntary because he was unaware that his conviction of first-degree robbery and first-degree assault violated his constitutional right against double jeopardy. He claims that first-degree assault is a lesser included offense of first-degree robbery. He cites to *Sherley v. Commonwealth*, 558 S.W.2d 615 (Ky. 1977), and *Commonwealth v. Varney*, 690 S.W.2d 758 (Ky. 1985), to support his argument. Payne argues that because both his robbery and assault convictions arose out of the same act against the same person, it violates the prohibition against double jeopardy. In fact, he is relying heavily on the *Sherley* and *Varney* courts which state that assault was a lesser included offense of robbery and therefore merged into the robbery count.

These cases, however, have been distinguished. The case of *Taylor v. Commonwealth*, 995 S.W.2d 355 (Ky. 1999), specifically distinguishes *Sherley*. *Varney*, as well as *Taylor*, speaks of *Polk v. Commonwealth*, 679 S.W.2d 231 (Ky. 1984), which contradicts Payne's argument. *Polk* and *Taylor* state that assault is only sometimes merged into robbery. First-degree assault and first-degree robbery have a similar element, physical injury. KRS 515.020 defines first-degree robbery as:

> A person is guilty of robbery in the first degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he:

> (a) Causes *physical injury* to any person who is not a participant in the crime; or
> (b) Is armed with a deadly weapon; or
> (c) Uses or threatens the immediate use of a dangerous instrument upon any person who is not a participant in the crime. (Emphasis added).

KRS 508.010 defines first-degree assault as:

> A person is guilty of assault in the first degree when:
> (a) He intentionally causes serious *physical injury* to another person by means of a deadly weapon or a dangerous instrument; or
> (b) Under circumstances manifesting extreme indifference to the value of human life he wantonly engages in conduct which creates a grave risk of death to another and thereby causes serious physical injury to another person. (Emphasis added).

Only when the same physical force is used to cause the physical injury required by both crimes does assault merge into robbery. This was the case in both *Sherley* and *Varney*. However, *Taylor* and *Polk* state that as long as each offense requires an element of proof that the other does not, there is no double jeopardy issue.

In Payne's case, the robbery indictment only required proof that he used or threatened to use physical force while armed with a deadly weapon. The threatened use of force element found in robbery is not an element found in assault. Further, assault does not require the element of theft, as robbery does. Because first-degree assault requires an actual physical injury and first-degree robbery can be proven by other elements, i.e.

armed with a deadly weapon or use or threatened use of a dangerous instrument upon a person, assault is not always a lesser included offense of robbery. Each has an element the other does not, one requires a physical injury and the other requires a theft. Had Payne been indicted under KRS 515.020(1)(a) instead of a combination of 515.020(1)(b) and (c), his robbery charge would have all the elements of assault and a conviction on both would have violated double jeopardy. Since there was no double jeopardy violation and because Payne signed the offer and motion to enter a guilty plea and had a plea colloquy, we find that his guilty plea was made knowingly, intelligently, and voluntarily.

For these reasons, we affirm the decisions of the trial court as to these two Appellants.

ALL CONCUR.

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