

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002439-MR

DWAYNE MCGUFFIN

APPELLANT

v. APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE SAM MONARCH, JUDGE
INDICTMENT NO. 96-CR-00084

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, DYCHE, and GUIDUGLI, JUDGES.

DYCHE, JUDGE: Dwayne McGuffin (McGuffin) appeals from a judgment of the Grayson Circuit Court finding him guilty of being a felon in possession of a handgun following a plea of guilty. Finding no error, we affirm.

In June 1996, McGuffin was indicted in Case No. 96-CR-42 on one felony count of assault in the first degree (KRS 508.010) in connection with the shooting of Adam Parks. During the trial on the assault charge, McGuffin took the stand and testified that on May 31, 1996, he used a .38 caliber handgun to

shoot Adam Parks. Several other witnesses also testified that they saw McGuffin in possession of a handgun. At the end of the trial, the jury convicted McGuffin. In November 1996, the trial court sentenced McGuffin to serve twenty (20) years in prison for assault in the first degree.

Based on the evidence in the assault trial, the Commonwealth sought an indictment of McGuffin for possessing a handgun. On November 11, 1996, the Grayson County Grand Jury indicted McGuffin on one felony count of possession of a handgun by a convicted felon (KRS 527.040) (Class C felony) based on a previous felony conviction in 1995. On August 28, 1997, McGuffin filed a motion to dismiss the indictment, claiming a violation of the prohibition of double jeopardy. In a written opinion and order, the trial judge denied the motion to dismiss.

On August 29, 1997, the day of trial, McGuffin entered a plea of guilty to the amended charge of possession of a firearm by a convicted felon (Class D felony) pursuant to a plea agreement with the Commonwealth. Under the agreement, the Commonwealth moved to amend the indictment to the lesser offense of possession of a firearm by a convicted felon and recommended a sentence of thirty (30) months to be served consecutively to any other prior sentence. The trial court accepted the guilty plea and immediately sentenced him to serve the recommended sentence of thirty (30) months consecutive to the twenty-year sentence on the assault conviction. This appeal followed.

McGuffin argues that the conviction for possession of a firearm by a convicted felon violates the protection against

double jeopardy because it was based on the same act involved in the assault in the first degree prosecution. However, McGuffin's position is based on the "single impulse" test adopted in Ingram v. Commonwealth, Ky., 801 S.W.2d 321 (1990), and abandoned in Commonwealth v. Burge, Ky., 947 S.W.2d 805 (1996), cert. denied sub nom Effinger v. Kentucky, ___ U.S. ___, 118 S. Ct. 422, 139 L. Ed. 2d 323 (1997). In Burge, the Kentucky Supreme Court returned to the "same elements" test first enunciated in Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), as the initial analysis for determining whether a person may be punished for two crimes under different statutes from the same course of conduct. Under the "same elements" Blockburger test, there is no double jeopardy violation for multiple punishment based on two distinct criminal statutes involving the same act "if each statute requires proof of a fact the other does not." Burge, 947 S.W.2d at 809, 811. The court in Burge explained that the "single impulse" test was an improper expansion of the requirements for satisfying a double jeopardy challenge and was based in part on the case of Grady v. Corbin, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), which was overruled by the United States Supreme Court in United States v. Dixon, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993).

The current state of the law focuses first on the traditional "same elements" Blockburger test for determining a double jeopardy violation involving prosecution under distinct statutes for the same act. McGuffin's reliance on Ingram, Walden

v. Commonwealth, Ky., 805 S.W.2d 102 (1991), and a line of cases predicated on the "single impulse" test is misplaced because they were specifically overruled in Burge. See Burge, 947 S.W.2d at 811.

In the case at bar, McGuffin has not established a double jeopardy violation as analyzed utilizing the "same elements" test. Assault in the first degree contains the element of serious physical injury, which is not required to prove possession of a firearm by a convicted felon. Meanwhile, possession of a firearm by a convicted felon requires proof of a prior felony conviction not required for assault in the first degree. The trial court correctly held that punishing McGuffin for both assault in the first degree and possession of a firearm by a convicted felon, even though the conduct involved in both statutes arose out of the same act of shooting Adam Parks, does not violate the prohibition of double jeopardy, and it properly denied the motion to dismiss the indictment.

We affirm the judgment of the Grayson Circuit Court.

ALL CONCUR.

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