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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001501-MR

JENNIFER SAPP — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 07-CR-01167

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND CLAYTON, JUDGES; HARRIS,[1] SENIOR JUDGE.

CLAYTON, JUDGE: Appellant, Jennifer Renee Sapp (Sapp), brings this appeal from a final judgment entered July 15, 2008, by the Warren Circuit Court. Sapp entered a conditional guilty plea on two counts of first degree wanton

[1] Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

endangerment and was sentenced to two years' imprisonment. She has been released on bond until the present appeal is decided. For the reasons stated herein, we affirm the order of the Warren Circuit Court.

BACKGROUND INFORMATION

On July 27, 2007, Sapp was arrested for driving under the influence of alcohol (DUI) after an automobile collision. She was indicted on December 19, 2007, by a Warren County grand jury for two counts of wanton endangerment, first degree; one count of operating a motor vehicle under the influence of intoxicants, second offense within five years; one count of criminal mischief, third degree; and one count of possession of an open alcoholic beverage container in a motor vehicle. Sapp initially pled not guilty to the charges, but later entered a conditional plea to all of the above listed offenses.

Sapp conditioned her guilty plea on her right to appeal the trial court's denial of her March 28, 2008, motion to dismiss the indictment and her May 29, 2008, motion to dismiss the wanton endangerment felony charge. The Warren Circuit Court denied these motions by separate orders entered June 16, 2008, and August 5, 2008, both *nunc pro tunc* to June 2, 2008. This appeal follows.

Sapp's first argument is that KRS 508.060, the wanton endangerment statute, does not include the operation of a motor vehicle while under the influence of alcohol. Sapp claims, therefore, that she cannot be charged with wanton

endangerment. Second, Sapp argues that she entered a binding plea agreement prior to her indictment for her DUI charge and any subsequent prosecution for wanton endangerment violated her right against double jeopardy under both state and federal constitutions. Sapp admits that the double jeopardy argument may not be ripe for appeal since it was not raised in the trial court. However, we will consider the argument as alleging palpable error.

According to Kentucky Rules of Criminal Procedure (RCr) 10.26, "[a] palpable error is one that 'affects the substantial rights of a party' and will result in 'manifest injustice' if not considered by the court[.]" *Schoenbachler v. Com.,* 95 S.W.3d 830, 836 (Ky. 2003). The Court in *Schoenbackler* goes on to hold that "a conviction in violation of due process constitutes '[a] palpable error which affects the substantial rights of a party' which we may consider and relieve though it was insufficiently raised or preserved for our review." *Id.* at 837. We see no palpable error in this case.

"A person is guilty of wanton endangerment in the first degree when, under circumstances manifesting extreme indifference to the value of human life, he wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person." KRS 508.060(1). Sapp argues that because this statute fails to expressly include the operation of a motor vehicle as prohibited conduct, she cannot be convicted thereunder of wanton endangerment. Moreover, she contends that because KRS 507.040 which addresses manslaughter and KRS 507.020 which addresses murder, expressly included the operation of a

motor vehicle as an element, the legislature intentionally omitted this element from the wanton endangerment statute. We reject these contentions.

The crime of wanton endangerment is not limited in any way to a specific form of prohibited conduct. *Hancock v. Com.,* 998 S.W.2d 496 (Ky. App. 1998). The issue of wanton endangerment in a DUI case was previously addressed in *Ramsey v. Com.,* 157 S.W.3d 194 (Ky. 2005). In *Ramsey,* the Supreme Court concluded that evidence of driving while intoxicated with a minor child in the car is sufficient to qualify as wanton endangerment. *Id.* In this case, Sapp has previously admitted to operating a motor vehicle under the influence on July 27, 2007. Unlike *Ramsey,* Sapp was not endangering any other passenger in the car; however, her conduct in drinking alcohol and then operating a motor vehicle endangered fellow motorists which resulted in the collision.

The amendments to, KRS 507.020 and 507.040 were made in 1984 as part of the "Slammer Bill" to combat drunk driving. The only commonality between KRS 507.020, 507.040 and KRS 508.060 is the "wanton" element. According to Sapp's reasoning, a person operating a motor vehicle while under the influence of alcohol is incapable of committing wanton endangerment because the legislature did not expressly prohibit it under KRS 508.060. Our case law clearly indicates that engaging in such conduct can qualify as an extreme indifference to human life likely to result in death or serious bodily injury. This is the very behavior that the legislature is trying to prohibit through the statute. Therefore, we

find that one who operates a motor vehicle while under the influence of alcohol or drugs is capable of committing wanton endangerment.

Sapp next contends that her right not to be subjected to double jeopardy was violated when she was prosecuted for wanton endangerment after she was not allowed to enter a guilty plea for the DUI on November 13, 2007, in the Warren District Court. Sapp argues that her wanton endangerment charge arises from the same factual transaction as the DUI. She claims the DUI charge qualifies as a lesser included offense of the wanton endangerment charge. Prosecuting both crimes, she argues, should be barred by the double jeopardy doctrine. We disagree.

The Fifth Amendment to the United States Constitution provides that, no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb[.]" Section 13 of the Kentucky Constitution is identical to this federal provision. In addition, "[d]ouble jeopardy does not occur when a person is charged with two crimes arising from the same course of conduct, as long as each statute 'requires proof of an additional fact which the other does not.'" *Com. v. Burge,* 947 S.W.2d 805, 809 (Ky. 1996), *quoting Blockburger v. U.S.*, 284 U.S.299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932).

In this instance, the operation of a motor vehicle while under the influence, KRS 189A.010, and first degree wanton endangerment, KRS 508.060, each requires proof of additional and different facts. KRS 189A.010 requires, among other elements, of being under the influence of alcohol. This is not an

element required to prove wanton endangerment. Moreover, KRS 508.060 requires wanton conduct which creates a substantial danger of death or serious physical injury to another person. This is not required in proving the defendant was driving under the influence. Therefore, each offense requires proof of an additional fact that the other does not. This "element based" analysis was followed in *Burge* and *Blockburger* and was codified in KRS 505.020. *Dixon v. Com.,* 263 S.W.3d 583, 588 (Ky. 2008).

In conclusion, we hold that the circuit court did not err in denying Sapp's motions to dismiss the indictment or the felony charge. Thus, we affirm the judgment and sentence entered by the Warren Circuit Court on July 15, 2008.

ALL CONCUR.

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