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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001133-MR

TIMOTHY QUINN BEELER — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 07-CR-00451

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND WINE, JUDGES.

COMBS, JUDGE: Timothy Beeler appeals from his conviction in the Hardin Circuit Court of conspiracy to manufacture methamphetamine. After carefully examining the record and the pertinent law, we vacate the conviction.

On June 26, 2007, Detective Chris Thompson of the Greater Hardin County Narcotics Task Force received a report from an employee of Walgreens in

Elizabethtown that "a suspicious woman" had purchased a package of pseudoephedrine. The employee identified the woman as Sandra Beeler and gave Thompson a description of her vehicle, including its license plate number.

Thompson found the vehicle at another Walgreens in Elizabethtown and observed Timothy Beeler purchasing a package of pseudoephedrine. Thompson followed the Beelers after they left the second Walgreens. As they approached the interstate, officers of the Radcliffe Police Department pulled over the Beeler vehicle.

The Beelers consented to allow the officers to search their car, including the trunk. The officers discovered two 48-count packages of pseudoephedrine and four boxes of matches.[1] Thompson then asked the Beelers if he could search their home, and the Beelers both signed forms consenting to the search.

Officers progressed to the Beelers' residence, which is in Hart County. They collected various items necessary for the production of methamphetamine and two jars with phosphorous solution. Thompson obtained a statement from Mr. Beeler in which Beeler admitted that he had manufactured methamphetamine in the past. Subsequently, Beeler was arrested.

On September 25, 2007, a Hardin County grand jury indicted Beeler for conspiracy to manufacture methamphetamine pursuant to Kentucky Revised Statutes (KRS) 218A.1432 and 502.020. On June 3, 2008, a grand jury in Hart County **relied on the same two statutes** when it indicted Beeler for conspiracy to

[1] The strikeplates on matchboxes are a source of phosphorous, an essential ingredient of methamphetamine.

manufacture methamphetamine. In early 2009, Beeler pled guilty to an amended lesser charge of attempt to manufacture methamphetamine in Hart County. Following his guilty plea in Hart County, he was tried and convicted of conspiracy to manufacture methamphetamine in Hardin County. He now appeals the Hardin County conviction.

Beeler's dispositive argument is that the Hardin County conviction violates double jeopardy protections provided by the Fifth Amendment of the United States Constitution, the Thirteenth Section of the Kentucky Constitution, and KRS 505.020. We agree.

Preliminarily, the Commonwealth argues that we are precluded from considering the issue of double jeopardy because the Hart County record was not presented to the trial court. However, the record shows that the trial court watched a tape of Beeler's guilty plea. The record also contains several pertinent documents from Hart County, including the indictment. The parties do not dispute that the Hart County case was resolved by Beeler's guilty plea for attempt to manufacture methamphetamine. We do not agree that our review is precluded – especially considering the seriousness of the consequences of a double jeopardy violation. Therefore, we have elected to examine the case on its merits. *See Beaty v. Commonwealth*, 125 S.W.3d 196, 210 (Ky. 2003); *Sherley v. Commonwealth*, 558 S.W.2d 615, 618 (Ky. 1977).

Section 13 of the Kentucky Constitution mandates that "[n]o person shall, for the same offense, be twice put in jeopardy of his life or limb[.]" This precept is codified in KRS 505.020.

The Supreme Court of Kentucky has expressly provided the test for whether double jeopardy has occurred in *Commonwealth v. Burge*, 947 S.W.2d 805, 809 (Ky. 1996). In *Burge*, it adopted the test of *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932), holding that "[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.'" *Burge, supra*.

In this case, Beeler was charged in two separate jurisdictions for crimes based on the same statute. The governing statute is KRS 505.030(1)(b):[2]

> When a prosecution is for a violation of the same statutory provision and is based upon the same facts as a former prosecution, **it is barred by the former prosecution** under the following circumstances:
> (1) The former prosecution resulted in:
> (b) A conviction which has not subsequently been set aside[.] (Emphasis added.)

The commentary of the Legislative Research Commission (LRC) that is applicable to this statutory provision states in part that "[t]his principle is **so fundamental that descriptive commentary is unnecessary** except for a few brief statements … . '[C]onviction,' as used in this subsection, is intended to be broad enough to

[2] KRS 505.030(4) was held unconstitutional by our Supreme Court in *Cardine v. Commonwealth*, 283 S.W.3d 641 (Ky. 2009). However, this decision does not affect the case that is before us.

include a plea of guilty accepted by a court." (Emphasis added.) KRS 505.030(1)(b) and its LRC commentary are wholly on point in this case.

First, both prosecutions were for violations of the same statutory provision. Both Hardin and Hart Counties indicted Beeler under the same statutes – KRS 218A.1432 and KRS 502.020. Although Beeler pled to a lesser offense in Hart County (attempt to manufacture methamphetamine), we are not persuaded that his plea bars him from asserting a double jeopardy violation. As the LRC commentary states in expansive and inclusive language, a conviction is broad enough to include a guilty plea. Furthermore, our court recently held that a defendant had been convicted in violation of double jeopardy protection when he pled guilty to an amended lesser charge in one county and then was prosecuted and convicted on the original charges in a second county.[3] *Foley v. Commonwealth*, 233 S.W.3d 734 (Ky. App. 2007).

The prosecutions arose from the identical bundle of facts. The Commonwealth's Attorney in the Hardin County case claimed that the traffic stop in Elizabethtown and the search of the residence in Hart County were different occurrences. Nonetheless, both cases relied on evidence seized in both locations. One of the reasons that the trial court did not dismiss the charges was that the Hart County indictment did not list the items found in Beeler's car. However, it did not list any of the items found in the house either.

[3] Coincidentally, Hardin County was the pertinent jurisdiction, and the prosecuting officer was Detective Thompson.

Rather, the record contains the Commonwealth's response to discovery, incorporating a police report signed by Thompson. That report includes a request for evidence examination. The exhibits enumerated are substances that were retrieved from the house. The form includes a space in which to describe the case history. Thompson had written, "consent search [a]fter a traffic stop in Hardin County."

Most of Thompson's testimony in Beeler's Hardin County trial involved describing items found and actions taken at the Beeler residence in Hart County. The Hardin County case was based on KRS 218A.1432(1)(b), which makes it a crime for one to possess two or more ingredients of methamphetamine **along with the intent** to manufacture methamphetamine. In order to demonstrate proof of intent, the Hardin County prosecutor had to include evidence and testimony concerning the search of the residence. Thus, neither case could be prosecuted adequately without evidence from the other case.

We are mindful that the Supreme Court of the United States has warned that "[t]he Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." *Brown v. Ohio*, 432 U.S. 161, 169, 97 S.Ct. 2221, 2227, 53 L.Ed.2d 187 (1977).

We have already analyzed the final portion of the statute by noting that Beeler's guilty plea in Hart County constitutes a conviction. The record does not give any indication that that conviction has been set aside. Thus, after examining

KRS 505.030(1)(b), we note that each and every one of its elements has been met so as to indicate that double jeopardy has indeed been violated by the Hardin County prosecution and conviction.

Because the issue of double jeopardy is dispositive, we decline to address Beeler's other arguments. His conviction in Hardin Circuit Court is vacated.

CLAYTON, JUDGE, CONCURS WITH THE OPINION OF JUDGE COMBS AND DELIVERS SEPARATE OPINION FOR THE COURT.

WINE, JUDGE, CONCURS IN RESULT ONLY WITH THE OPINION OF JUDGE COMBS AND CONCURS WITH THE OPINION OF JUDGE CLAYTON.

CLAYTON, JUDGE, FILES SEPARATE OPINION FOR THE COURT. I agree with the majority that the incident involving Beeler is one continuous act or transaction and that double jeopardy warrants vacating Beeler's conviction. I write separately to expound on this important issue of law.

In *Simpson v. Com.,* 159 S.W.3d 824 (Ky. App. 2005), a confidential informant notified the police of a drug buy which was then observed by the police. The police conducted a pat-down of Simpson and found marijuana as well as other items. He was charged with misdemeanor trafficking which was later amended to possession of marijuana. Three days after the initial stop, pursuant to a search warrant, the police found other evidence which led them to believe that Simpson was trafficking in marijuana. Simpson argued that jeopardy had attached to the second charge, but our Court disagreed and determined that the charges did not

arise from the same incident. Unlike the defendant in the case of *Simpson*, Beeler was not found with illegal substances when first stopped by the state trooper.

In this case, Timothy Beeler and his wife Sandra were not charged with any offense upon the initial stop. The police found two boxes of pseudoephedrine and four boxes of matches which caused them to be suspicious but did not constitute enough evidence to charge or arrest either Beeler or his wife. The stop in Hardin County resulted in the police officer asking if he could search the Beelers' home in Hart County. In the home, the police found bottles of peroxide, tubing, drain cleaner, jars, acid, processed red phosphorus, coffee filters, miscellaneous drug paraphernalia and marijuana. Beeler took sole responsibility for the methamphetamine. It was only upon the conclusion of the search that Timothy Beeler was charged with any offenses. The initial stop and search of the home were both the same transaction or incident.

In determining when double jeopardy attaches, the Kentucky Supreme Court in *Com. v. Burge,* 947 S.W.2d 805 (Ky. 1996), adopted the test outlined in *Blockburger v. U.S.,* 284 U.S. 299, 52 S.Ct. 180, 181, 76 L.Ed. 306 (1932). The Supreme Court in *Blockburger,* at 302, cited *Wharton's Criminal Law* § 34, note 3 (11th Ed.) which stated, "[t]he test is whether the individual acts are prohibited, or the course of action which they constitute. If the former, then each act is punishable separately. . . . If the latter, there can be but one penalty." It was Beeler's course of action which was prohibited, not the purchasing of two boxes of

pseudoephedrine and matches. It is also important to note that a search of the home would not have been conducted without the initial stop.

As set forth by the majority, in determining whether jeopardy attaches, we must also examine whether the transaction constituted a violation of two distinct statutory provisions. Beeler was indicted for Complicity to Commit Manufacturing in Methamphetamine in Hardin County pursuant to KRS 218A.1432; 502.020. In Hart County, Beeler was indicted for Manufacturing Methamphetamine, pursuant to KRS 218A.1432 and to Manufacturing Methamphetamine Complicity, pursuant to KRS 502.020. He was prosecuted in both counties on the same charges. He pled guilty in Hart County to Attempt to Manufacture Methamphetamine. He was found guilty of Complicity to Commit Manufacturing Methamphetamine. The complicity statute, KRS 502.020 does not create a new offense; it only means that one who aids another in an offense is guilty of that offense too. Proof of manufacturing would have to be demonstrated whether the Commonwealth was proceeding under the complicity theory or not. Attempt to manufacture methamphetamine is a lesser included offense of manufacturing methamphetamine. These are not two distinct statutory provisions.

The facts necessary to prove attempt to manufacture are not different from the facts needed to prove manufacturing methamphetamine. KRS 218A.1432 provides that:

> (1) A person is guilty of manufacturing methamphetamine when he knowingly and unlawfully:
> (a) Manufactures methamphetamine; or

> (b) With intent to manufacture methamphetamine possesses two (2) or more chemicals or two (2) or more items of equipment for the manufacture of methamphetamine.

Beeler was prosecuted under subsection (b), "Criminal attempt" is defined in KRS 506.010 as:

> (1) A person is guilty of criminal attempt to commit a crime when, acting with the kind of culpability otherwise required for commission of the crime, he:
> (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or
> (b) Intentionally does or omits to do anything which, under the circumstances as he believes them to be, is a substantial step in a course of conduct planned to culminate in his commission of the crime.
>
> (2) Conduct shall not be held to constitute a substantial step under subsection (1)(b) unless it is an act or omission which leaves no reasonable doubt as to the defendant's intention to commit the crime which he is charged with attempting.
>
> **(3) A person is guilty of criminal attempt to commit a crime when he engages in conduct intended to aid another person to commit that crime, although the crime is not committed or attempted by the other person, provided that his conduct would establish complicity under KRS 502.020 if the crime were committed by the other person.** (Emphasis added).

As discussed in *U.S. v. Dolt,* 27 F.3d 235, 239 (6th Circuit 1994), "[c]riminal attempt requires that the defendant intend to engage in criminal conduct and that he commit an overt act which is a substantial step toward the commission of the offense." Beeler was not actually manufacturing methamphetamine but had the chemicals or equipment to do so. He had taken a

"substantial step" toward the commission of the offense. Interestingly, even the charge of manufacturing methamphetamine does not require that a defendant actually manufacture it, but merely that the defendant intended to do so. The statute effectively eliminates the distinction between manufacturing and attempting to manufacture. Beeler's guilty plea to attempt to manufacture methamphetamine should have resulted in the dismissal of the Hardin County charge because of the prohibition on multiple prosecutions. KRS 505.020 is the controlling statute. It provides that:

> (1) When a single course of conduct of a defendant may establish the commission of more than one (1) offense, he may be prosecuted for each such offense. He may not, however, be convicted of more than one (1) offense when:
>
> **(a) One offense is included in the other, as defined in subsection (2);** or
>
> (b) Inconsistent findings of fact are required to establish the commission of the offenses; or
>
> (c) The offense is designed to prohibit a continuing course of conduct and the defendant's course of conduct was uninterrupted by legal process, unless the law expressly provides that specific periods of such conduct constitute separate offenses.
>
> (2) A defendant may be convicted of an offense that is included in any offense with which he is formally charged. An offense is so included when:
>
> (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or
>
> **(b) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein**; or
>
> (c) It differs from the offense charged only in the respect that a lesser kind of culpability suffices to establish its commission; or

> (d) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest suffices to establish its commission. (Emphasis added).

Because both convictions arose from the same transaction and were not two distinct statutory provisions, I agree with the majority that jeopardy had attached to the second conviction in Hardin County and therefore, that the conviction must be vacated.

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