

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001930-MR

ROBERT ELLIS MILLS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN K. MERSHON, SENIOR JUDGE
ACTION NO. 09-CR-001920

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART AND
REVERSING IN PART

** ** * * * * *

BEFORE: MOORE AND WINE, JUDGES, AND TAYLOR, CHIEF JUDGE.

MOORE, JUDGE: Robert Ellis Mills appeals the Jefferson Circuit Court's judgment convicting him of Theft of Identity. After a careful review of the record, we reverse the Jefferson Circuit Court's judgment in part to the extent that a fine was imposed against Robert despite his indigency status, but we affirm the remainder of the judgment because Robert's claims lack merit or they were not preserved for appellate review.

I. FACTUAL AND PROCEDURAL BACKGROUND

According to Robert's arrest warrant, Louisville Metro Police Department Officer Scott McConnell was called after Robert was detained by Walmart loss prevention employees for stealing merchandise. Robert told Officer McConnell that he did not have any identification. Officer McConnell warned Robert "that giving false information was a crime." Robert nevertheless proceeded to give Officer McConnell personal information that belonged to the victim, who was Robert's brother, David Mills. This information included David's name, date of birth, and social security number. The arrest warrant states that this information was given to the officer for the purpose of avoiding detection by police. Because Robert gave the incorrect information to the officer, David was charged with theft by unlawful taking under \$300.00. After David learned of the charge, he contacted the officer and informed him that this was not the first time Robert had used his information.

Robert filed a waiver of rights stating he understood that by doing so, he was waiving his right to a preliminary hearing to determine if there was probable cause to believe he had committed a felony and that he was also waiving the right to have his case presented to the grand jury so that "felony charges against [him would be] prosecuted only by an indictment returned by the Grand Jury." The waiver further stated that Robert understood that after he signed the waiver, the Commonwealth's attorney would file an information against him charging him with the offense of Theft of Identity.

That same day, the Commonwealth executed an information charging Robert with Theft of Identity, a Class D Felony, pursuant to KRS¹ 514.160. The information provided that Robert had

committed the offense of Theft of Identity when he knowingly possessed or used identifying information of another person, such as name, social security number, birth date, personal identification number or code, which is kept in documents, photo or electrical copies, computer storage, or any other form of document retrieval and storage, and the theft was committed with the intent to represent that he was the other persons [sic] for the purpose of

- a) Depriving the other person of property;
- b) Obtaining benefits or property to which he or she would otherwise not be entitled;
- c) Making financial or credit transactions using the other person's identity;
- d) Avoiding detection; or
- e) Commercial or political benefit.

The Commonwealth propounded an offer on a plea of guilty, which stated that the charge of Theft of Identity carried a possible penalty of one to five years of imprisonment. It provided that the facts of the case were as follows: "On 5/10/09, [Robert] gave victim's name and personal info[rmation] to avoid detection by police after [Robert] took items from Walmart." Additionally, the Commonwealth's offer stated that in exchange for Robert's guilty plea to the Theft of Identity charge, the Commonwealth would recommend a sentence of two years of imprisonment, with probation in the court's discretion. The Commonwealth's

¹ Kentucky Revised Statute(s)

offer further noted that Robert's guilty plea was conditional, pending the Kentucky Supreme Court's decision in *Crouch v. Commonwealth*, 323 S.W.3d 668 (Ky. 2010).

Robert moved to enter a guilty plea in accordance with the Commonwealth's offer on a plea of guilty. The circuit court accepted Robert's conditional guilty plea and subsequently sentenced him to two years of imprisonment, but "rendition of [the] judgment [was] withheld and [Robert was] placed on probation under the supervision of the Division of Probation and Parole for a period of five years." The court also ordered Robert to pay \$250.00 of his \$1,000.00 felony fine, with the remaining \$750.00 being probated.

Robert now appeals,² contending that: (a) the Commonwealth was required to prosecute him for the misdemeanor offense of Giving a Peace Officer a False Name under KRS 523.110, rather than the felony offense of Theft of Identity under KRS 514.160; (b) the arbitrary prosecution violated his due process and equal protection rights; (c) the title of the Theft of Identity statute, the fact that there was no pecuniary gain in this case, the rule of lenity, and the absurd or unreasonable result that occurred from applying the felony statute are all miscellaneous reasons for overturning his conviction; and (d) the trial court erred in assessing a fine against him despite the fact he was indigent.

II. ANALYSIS

² We note that when Robert filed his opening brief on appeal, *Crouch* had not yet been decided by the Kentucky Supreme Court. The Commonwealth thereafter moved to hold the appeal in abeyance pending a decision in *Crouch*, which this Court granted. Once *Crouch* was rendered by the Supreme Court, the Commonwealth moved to return the case to the active docket. Robert then filed a reply brief addressing *Crouch*.

A. CLAIM THAT ROBERT SHOULD HAVE BEEN PROSECUTED FOR A MISDEMEANOR INSTEAD OF A FELONY

Robert first alleges that the Commonwealth was required to prosecute him for the misdemeanor offense of Giving a Peace Officer a False Name under KRS 523.110, rather than the felony offense of Theft of Identity under KRS 514.160. Pursuant to KRS 523.110,

(1) A person is guilty of giving a peace officer a false name or address when he gives a false name or address to a peace officer who has asked for the same in the lawful discharge of his official duties with the intent to mislead the officer as to his identity. The provisions of this section shall not apply unless the peace officer has first warned the person whose identification he is seeking that giving a false name or address is a criminal offense.

(2) Giving a peace officer a false name or address is a Class B misdemeanor.

However, KRS 514.160, under which Robert was convicted, provides as follows:

(1) A person is guilty of the theft of the identity of another when he or she knowingly possesses or uses any current or former identifying information of the other person or family member or ancestor of the other person, such as that person's or family member's or ancestor's name, address, telephone number, electronic mail address, Social Security number, driver's license number, birth date, personal identification number or code, and any other information which could be used to identify the person, including unique biometric data, with the intent to represent that he or she is the other person for the purpose of:

* * * *

(d) Avoiding detection

Robert's statutory construction argument is not preserved. Robert signed a waiver of his rights that specified he waived his right to have the felony charge against him prosecuted only by grand jury indictment. Additionally, the waiver of his rights stated that Robert understood that by signing the waiver, "the Commonwealth's Attorney will file an information in the Jefferson Circuit Court charging me with the following offense[]: Theft of Identity." Accordingly, an information was filed charging him with the offense of Theft of Identity, rather than charging him with the misdemeanor of Giving a Peace Officer a False Name. Thus, Robert waived any right to challenge the prosecutor's decision to charge him with the felony, as opposed to the misdemeanor, by acquiescing in writing to being charged with the felony. Consequently, this claim is not preserved for appellate review.

B. CLAIM THAT PROSECUTOR ACTED ARBITRARILY

Next, Robert argues that the prosecutor's act of choosing to prosecute him for Theft of Identity rather than Giving a Peace Officer a False Name was arbitrary and resulted in a violation of Robert's due process and equal protection rights. His argument is founded on the *Crouch* case recently rendered by the Supreme Court. *See Crouch*, 323 S.W.3d 668.

The appellant in *Crouch*, like Robert, argued that "he should have been prosecuted for the misdemeanor offense of giving a false name to a police officer instead of the felony offense of theft of identity." *Id.* at 671. However, in his reply brief, Robert concedes that *Crouch* is distinguishable from his case. It is

distinguishable because: (1) Crouch was indicted by a grand jury on the felony charge, while Robert was charged by an information filed by the prosecutor; and (2) Crouch was not warned by the officer that giving false identification to an officer was a crime, but Robert was given this warning.

In *Crouch*, the Kentucky Supreme Court held that, contrary to Crouch's argument

that it is a personal choice on the part of the officer or the Commonwealth's Attorney to make the decision under which statute to charge a person[. . .] the choice of which—if any—offenses for which an indictment should be returned is a matter within the province of the grand jury. So, contrary to Crouch's argument, a prosecutor does not have unfettered discretion to charge a defendant on a whim. The prosecution's decision to seek identity theft charges against Crouch was not arbitrary or otherwise improper because the lack of a warning by the arresting officer meant that Crouch could not properly have been charged with giving a false name to a peace officer.

Id. at 672-73 (internal quotation marks and footnotes omitted). The Court in *Crouch* then rejected the argument “that prosecutorial vindictiveness or, alternatively, sheer randomness was the reason he was charged with the felony theft of identity offense instead of the misdemeanor offense of giving a false name to a peace officer.” *Id.* at 673. Thus, according to *Crouch*, when a defendant is charged by indictment, it is the grand jury's decision which crimes to charge him with, not the prosecutor's.

However, as previously noted, Robert's case is different from Crouch's because Robert acquiesced in his waiver of rights to the prosecutor charging him by information with the felony of Theft of Identity, rather than by

indictment. Additionally, Robert's conduct met the elements of the crime of Theft of Identity. Therefore, he cannot now claim error when the prosecutor charged him with a felony when Robert essentially agreed to the charge when he voluntarily waived his right to be prosecuted by a grand jury indictment. Consequently, this claim lacks merit.

In any case, because Robert waived his right to indictment by grand jury, he granted the prosecutor discretion to decide whether to charge him with the felony or the misdemeanor. Thus, there is no error.

C. MISCELLANEOUS CLAIMS FOR OVERTURNING CONVICTION

Robert also argues in his appellate brief that the title of the Theft of Identity statute, the fact that there was no pecuniary gain in this case, the rule of lenity, and the absurd or unreasonable result that occurred from applying the felony statute are all miscellaneous reasons for overturning his conviction. However, Robert did not raise these claims in the circuit court. Thus, we will not consider them for the first time on appeal. *See Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976) (“The appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court.”).

D. CLAIM REGARDING FINE

Finally, Robert contends that the trial court erred in assessing a fine against him despite the fact he was indigent. The Commonwealth acknowledges that the fine should not have been imposed because the record reveals that Robert was represented by the public defender's office.

Because Robert had counsel appointed for him in the trial court, as is evidenced by the fact that he was represented by the public defender's office, he was necessarily indigent. *See Travis v. Commonwealth*, 327 S.W.3d 456, 459 (Ky. 2010) (citing *Simpson v. Commonwealth*, 889 S.W.2d 781, 784 (Ky. 1994)). Therefore, pursuant to KRS 534.030(4) and KRS 31.110(1)(b), he should not have been fined by the trial court.

Accordingly, the judgment of the Jefferson Circuit Court is reversed in part, concerning the imposition of the fine. The remainder of the Jefferson Circuit Court's judgment is affirmed.

ALL CONCUR.

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