

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003332-MR

WILLIAM SIM MCFADDEN

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 97-CR-000047

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING
** **

BEFORE: DYCHE, EMBERTON AND GARDNER, JUDGES.

GARDNER, JUDGE: William Sim McFadden (McFadden) appeals from a judgment of conviction of the Laurel Circuit Court. We reverse and remand the proceeding for a new trial.

On March 21, 1997, the Laurel County Grand Jury returned an indictment charging McFadden with two counts of burglary in the third degree and one count of being a persistent felony offender (PFO). The indictment arose from events which took place on February 1, 1997, when McFadden allegedly participated in the burglary of a commercial property in Laurel County, Kentucky.

The matter proceeded to trial on November 5, 1997. As the trial commenced, the Commonwealth moved to amend the indictment so that the two burglary counts were replaced with a single count of receiving stolen property valued more than \$300. McFadden objected, arguing that receiving stolen property was not a lesser included offense of burglary in the third degree, and that he was not prepared to defend the amended charge. The Commonwealth's motion was granted. McFadden renewed his objection before proof was taken and again at the conclusion of the evidence. The court again overruled McFadden's objection, stating that McFadden had not been prejudiced because the Commonwealth was offering the same proof whether the charge was burglary or receiving stolen property.

The jury returned a verdict of guilty on both charges, and McFadden was sentenced to ten years in prison. This appeal followed.

McFadden now argues that the circuit court committed reversible error in granting the Commonwealth's motion to amend the indictment to replace the burglary charges with the charge of receiving stolen property. He directs our attention to Kentucky Rule of Criminal Procedure (RCr) 6.16, which allows the court to permit an indictment to be amended if no additional or different offense is charged and if the defendant is not prejudiced by the amendment. He notes that the charge of receiving stolen property is a different offense from the charge of burglary in the third degree, and accordingly argues the court abused its discretion by allowing the Commonwealth to amend the indictment. The

Commonwealth concedes that receiving stolen property is a different offense than burglary in the third degree. However, it argues that RCr 6.16 requires McFadden to show not only that the new offense is different but also that he was prejudiced by the amendment. It maintains that McFadden has made no such showing, and thus that the circuit court's action cannot be found to run afoul of RCr 6.16. We have closely studied the record, the law, and the arguments of counsel, and must conclude that the circuit court erred in granting the Commonwealth's motion.

RCr 6.16 states that,

The court may permit an indictment . . . to be amended any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced. If justice requires, however, the court shall grant the defendant a continuance when such an amendment is permitted. (emphasis added)

As both the parties note, RCr 6.16 is written in the conjunctive (and) rather than the disjunctive (or). Thus, in order for the court to allow the indictment to be amended it must first be shown that 1) no additional or different offense is charged, AND 2) substantial rights of the defendant are not prejudiced. As such, it was impossible for the circuit court to have concluded that elements 1 AND 2 were met. Neither the cases annotated to the civil rules nor our own research has revealed any basis for drawing a contrary conclusion. The published opinion which most closely parallels the matter at bar is Frizzell v. Commonwealth, Ky., 511 S.W.2d 200 (1974). In Frizzell, no continuance was granted when the indictment was amended to drop the charge of forgery and add the charge of uttering a forged instrument. As

in the matter at bar, the latter charge was not a lesser included offense of the former charge, and the elements of the offenses were not shared. On appeal, the Attorney General conceded error, and the Court so ruled.

The Commonwealth offers the somewhat specious argument that we should construe RCr 6.16 to place the burden on McFadden to show error by proving that both elements were met. The Commonwealth states that "[r]ead literally, RCr 6.16 forbids the amendment of an indictment if the change creates as [sic] 'additional or different offense' AND if the substantial rights of the defendant are prejudiced.) (emphasis added). By rephrasing RCr 6.16 in the negative (i.e., "RCr 6.16 forbids the amendment of an indictment if...") rather than in the affirmative as actually drafted (i.e., "the court may permit. . ."), the Commonwealth fails to recognize that the language of RCr 6.16 should also change from the conjunctive to the disjunctive. The Commonwealth's restatement of RCr 6.16 should read as follows: Read literally, RCr 6.16 forbids the amendment of an indictment if the change creates an additional or different offense OR if the substantial rights of the defendant are prejudiced. The clear and unambiguous language of RCr 6.16 sets forth elements 1 and 2 as prerequisites to court action which amends the indictment, not as prerequisites for proving error on appeal. In sum, if the amended indictment charges the defendant with an additional or different offense, he is entitled to a continuance.

The purpose of the indictment is to "fairly inform . . . the defendant of the nature of the crime with which he is

charged." Howard v. Commonwealth, Ky., 554 S.W.2d 375, 377 (1977), citing Finch v. Commonwealth, Ky., 419 S.W.2d 146, 147 (1967). Receiving stolen property clearly is a separate and distinct offense from that of burglary in the third degree, as the Commonwealth has conceded. See generally Campbell v. Commonwealth, Ky, 732 S.W.2d 878 (1987). The elements of the offenses are not shared, the facts offered as proof of the offenses are not the same, and the defensive tactics necessary to rebut the Commonwealth's case are different. While we recognize the principle that the trial court's ruling are presumptively correct, City of Louisville v. Allen, Ky., 385 S.W.2d 179 (1964), we must conclude in the matter at bar that the circuit court committed reversible error in allowing the Commonwealth to amend the indictment without concurrently granting a continuance to McFadden. RCr 6.16.

For the foregoing reasons, we reverse the judgment of the Laurel Circuit Court and remand the matter for a new trial.

ALL CONCUR.

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