RENDERED: October 5, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001989-MR

MICHAEL ANTHONY HENRY — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LEWIS G. PAISLEY, JUDGE
ACTION NO. 2000-CR-00178

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: KNOPF, SCHRODER, AND TACKETT, JUDGES.

KNOPF, JUDGE: Michael Henry appeals from a judgment of the Fayette Circuit Court, entered August 15, 2000, convicting him of assault in the first degree,[1] of robbery in the first degree,[2] and of theft by unlawful taking of a firearm.[3] In conformity with the jury's decision, the trial court sentenced Henry to concurrent sentences of fifteen, fifteen, and five years' imprisonment, respectively. Henry contends that the federal and

[1] KRS 508.010 (1975).

[2] KRS 515.020 (1975).

[3] KRS 514.030(2)(a) (1998).

state constitutional provisions against double jeopardy[4] bar his convictions of both robbery and assault. Convinced that these convictions did not violate Henry's constitutional rights, we affirm.

In December of 1999, Henry stole a handgun that belonged to an acquaintance of his and a few days later used the gun during a robbery at a Citgo gas station and convenience store in Lexington. Brandishing the gun, Henry approached the cashier and demanded that she give him the store's money. At some point, the cashier tried either to push the gun away from herself or to wrestle it from Henry. The gun discharged, and the shot seriously injured the cashier. When police officers arrested Henry a couple of days later, he confessed to the incident. At trial in July 2000, Henry argued that he had not intended to shoot the cashier, but that the gun had fired accidently during their struggle. Because of this and because of his young age--he was eighteen years old at the time of the incident--Henry urged the jury to be lenient.

On appeal, Henry contends that the robbery and the assault constitute a single offense for which he should not have been convicted twice.[5] Although it involves additional details, which we shall address below, Henry's argument is essentially as follows: Assault in the first degree requires proof of an assault plus proof of aggravating circumstances. The aggravating

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[4] Constitution of the United States, Amendment V; Constitution of Kentucky, Section 13.

[5] Because we have concluded that no double-jeopardy violation occurred in this case, we need not address whether Henry properly preserved this issue at the trial level.

circumstances justify a more severe punishment than would be appropriate in their absence. The aggravating circumstance in this case was the robbery. The robbery thus provided a necessary element of first-degree assault, and Henry was punished for the robbery when he was subjected to the more severe penalty attached to that high degree of the assault offense. Having been punished once for the robbery, Henry asserts that the federal and state double-jeopardy clauses, which include among their guarantees protection against improperly cumulative sentences,[6] forbid his being subjected to punishment again for that offense by way of the separate conviction of robbery. Although this is by no means an unreasonable interpretation of the double-jeopardy guarantee, the short answer to Henry's argument, and the answer we are constrained to make, is that both the United States Supreme Court and our Supreme Court have rejected it.[7]

Both Supreme Courts have endorsed the Blockburger[8] test for determining whether a violation of two distinct statutory provisions is, for double-jeopardy purposes, two offenses or only one.[9] There are two offenses if "each provision requires proof

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[6] *See* Wayne R. LaFave, Jerold H. Israel, and Nancy J. King, *Criminal Procedure, Second Edition,* § 17.4(b) - (c) (1999).

[7] *See* United States v. Dixon, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993); Commonwealth v. Burge, Ky., 947 S.W.2d 805, 809-11 (1997), *cert. denied sub nom.,* Effinger v. Kentucky, 522 U.S. 971, 118 S. Ct. 422, 139 L. Ed. 2d 323 (1997).

[8] Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932).

[9] United States v. Dixon, *supra;* Commonwealth v. Burge, *supra.*

of an additional fact which the other does not."[10] Rather than an abstract or functional approach to the elements of the offense such as Henry's argument employs (basic offense, say, and aggravating factor), the Blockburger test requires a literal parsing of the statutory language. In this case, for example, as the Commonwealth points out, Henry's first-degree robbery conviction required proof of a theft,[11] which was not required to convict of assault. On the other hand, the first-degree assault conviction required proof of an intentionally- or wantonly-inflicted serious physical injury,[12] which the robbery conviction did not require.[13] The robbery and the assault were not the same

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[10] Taylor v. Commonwealth, Ky., 995 S.W.2d 355, 358 (1999) (quoting Blockburger, 284 U.S. at 304, 52 S. Ct. at 182).

[11] The first-degree robbery statute, KRS 515.020(1), provides as follows:
A person is guilty of robbery in the first degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he: (a) Causes physical injury to any person who is not a participant in the crime; or
(b) Is armed with a deadly weapon; or
(c) Uses or threatens the immediate use of a dangerous instrument upon any person who is not a participant in the crime.

As was the defendant in Taylor v. Commonwealth, *supra,* Henry was charged with and tried for the violation of section (b).

[12] KRS 508.010, assault in the first degree, provides that

[a] person is guilty of assault in the first degree when,
(a) He intentionally causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument; or
(b) Under circumstances manifesting extreme indifference to the value of human life he wantonly engages in conduct which creates a grave risk f death to another and thereby causes serious physical injury to another person.

[13] *Cf.* Taylor v. Commonwealth, *supra* (addressing a similar double-jeopardy challenge to (continued...)

offense, therefore, and Henry's convictions of both of them did not violate the constitutional guarantee against double jeopardy.

Against this conclusion and in an attempt to reconcile his interpretation of the double-jeopardy clause with Blockburger, Henry notes that the jury found him guilty of wantonly injuring the cashier. The robbery, he argues, in its entirety, is the evidence upon which the jury must have based its finding of wantonness. But that would bring all the elements of the robbery within the elements of the assault, and, under Blockburger, the robbery and the assault would thus constitute a single offense. We disagree.

To find Henry's conduct wanton in this case, the jury had only to believe that in brandishing the gun Henry consciously disregarded a grave risk of death[14] and that he did so in circumstances manifesting extreme indifference to the value of human life. It need not have believed that he did so with the intent to further a theft. This latter belief was necessary, however, if the jury was to convict Henry of robbery. Because an element of robbery remained outside the elements of assault--even the wantonness theory of assault--Henry's convictions did not, under our precedents, amount to a double-jeopardy violation.

For these reasons, we affirm the August 15, 2000, judgment of the Fayette Circuit Court.

ALL CONCUR.

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[13](...continued)
robbery and assault convictions).

[14] KRS 501.020 and KRS 508.010.

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