

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-000743-MR

CHARLES L. SIMPSON

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT  
HONORABLE ROGER L. CRITTENDEN, JUDGE  
INDICTMENT NO. 96-CR-00051

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION

### AFFIRMING

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BEFORE: BARBER, BUCKINGHAM and HUDDLESTON, Judges.

HUDDLESTON, Judge: Charles Simpson appeals from a Franklin Circuit Court order denying his motion for post-conviction relief pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. Simpson contends that he received ineffective assistance of appellate counsel because his Department of Public Advocacy attorneys did not file a motion for discretionary review with the Kentucky Supreme Court after this Court, on direct appeal, affirmed his convictions for first-degree stalking and carrying a concealed deadly weapon.

During the early morning hours of January 14, 1996, Simpson began making calls to his ex-girlfriend, Tasha Miller.

According to trial testimony, Simpson made references to O. J. Simpson and threatened to cut Miller's throat. Later that night, Simpson went to Miller's apartment. In response to Miller's call, the police had arrived ahead of Simpson. In the course of arresting Simpson at the scene, police discovered a ten-inch butcher knife concealed in his coat sleeve and a short paring knife in his pants pocket.

On March 26, 1996, Simpson was indicted for, among other things, first-degree stalking<sup>1</sup> and carrying a concealed deadly weapon<sup>2</sup>. As the predicate aggravating factor under the stalking statute, the indictment stated that Simpson had "previously been served with a protective order."<sup>3</sup> The Commonwealth later discovered that the protective order had expired at a time prior to January 14, 1996, and on November 21, 1996, the prosecutors filed a motion to amend the indictment to state as the aggravating factor that the acts "were committed while Simpson had a deadly weapon on or about his person."<sup>4</sup> On November 27, 1996, the trial court entered an order denying the motion to amend. The trial court held that a protective order need not have been in effect at the time of the alleged stalking, but need only have been issued at sometime in the past.

Following a jury trial, Simpson was found guilty of stalking and carrying a concealed weapon. On February 14, 1997,

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<sup>1</sup> Ky. Rev. Stat. (KRS) 508.140.

<sup>2</sup> KRS 527.020.

<sup>3</sup> See KRS 508.140(1)(b)(1).

<sup>4</sup> See KRS 508.140(1)(b)(4).

final judgment was entered sentencing Simpson to 12 months in jail on the concealed weapon charge and one and one-half years in prison on the stalking charge, with the sentences to be served concurrently. Following his conviction, Simpson filed a pro se motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 to vacate his sentence, which was subsequently denied. Simpson appealed his conviction and the denial of his RCr 11.42 motion to this Court.

On June 30, 2000, this Court rendered an unpublished opinion affirming Simpson's conviction and the denial of his RCr 11.42 motion.<sup>5</sup> We held that the trial court erred when it found that the stalking statute requires only that a protective order have been issued sometime in the past, but that the error was harmless because the uncontradicted evidence that Simpson was carrying a deadly weapon at the time of the incident was sufficient to sustain the conviction pursuant to KRS 508.140(1)(b)(4).

According to Simpson, after this Court's opinion was rendered, the Department of Public Advocacy attorneys appointed to represent him in his direct appeal sent him a letter stating that they would not be filing a motion for discretionary review with the Supreme Court. Simpson claims the letter was dated July 17 and received on July 20, and notified him that he had 30 days from the rendition of this Court's opinion to file a motion for discretionary review; in fact, under the version of CR 76.20(2)(b) in effect at the time, Simpson would have had only 20 days to file

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<sup>5</sup> See Case No. 1997-CA-000689-MR and Case No. 1997-CA-000690-MR.

his motion. Simpson alleges that because the 20-day deadline had already elapsed when he received the letter, he was unable to pursue an appeal to the Supreme Court.

On January 16, 2001, Simpson filed a motion to set aside his conviction pursuant to CR 60.02(e) and (f). Citing appellate counsels' failure to file a motion for discretionary review and their belated notification of their intentions, the motion alleged that Simpson had received ineffective assistance of counsel. On March 6, 2001, the trial court entered an order denying Simpson's motion. This appeal followed.

Simpson contends that he received ineffective assistance of counsel on the basis that appellate counsel failed to file a motion for discretionary review with the Supreme Court after this Court affirmed his conviction on direct appeal. Simpson alleges that an appeal to the Supreme Court would have been successful on the basis that this Court's holding that his possession of a weapon could serve as the aggravating predicate for the stalking charge subjected him to double jeopardy because the fact of his possession of the weapon was also an element of his conviction for carrying a concealed deadly weapon.

The relief Simpson seeks is not available under CR 60.02. CR 60.02 was enacted as a substitute for the common-law writ of coram nobis, and while the remedies formerly available in criminal cases by writ of coram nobis have been preserved, the remedies have not been extended, but, rather have been limited by the language of

the rule.<sup>6</sup> Inexperience, incompetency and inefficiency of counsel are not grounds for granting coram nobis.<sup>7</sup> Moreover, a defendant who claims to have lost the right of appeal for reason of the lack of effective assistance of counsel to prosecute the appeal must seek relief by requesting reinstatement of the appeal from the appellate court which has jurisdiction to hear the appeal, not by post-conviction motion.<sup>8</sup>

Further, on the merits, this Court's opinion of June 30, 2000, did not subject Simpson to double jeopardy. In Commonwealth v. Burge,<sup>9</sup> the Supreme Court announced a return to the "same elements" test set forth in Blockburger v. United States,<sup>10</sup> which is codified at Kentucky Revised Statutes (KRS) 505.020, determining when a single course of conduct may establish more than one offense. Under this test, double 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."<sup>11</sup>

Here, even though Simpson's stalking and concealed weapons convictions both required proof that he carried a deadly

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<sup>6</sup> Gross v. Commonwealth, Ky., 648 S.W.2d 853, 856 (1983).

<sup>7</sup> Meredith v. Commonwealth, Ky., 312 S.W.2d 460, 462 (1958).

<sup>8</sup> See Commonwealth v. Wine, Ky., 694 S.W.2d 689 (1985).

<sup>9</sup> Ky., 947 S.W.2d 805 (1996).

<sup>10</sup> 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

<sup>11</sup> Burge, 947 S.W.2d at 809; Blockburger 284 U.S. at 304, 52 S. Ct. at 182, 76 L. Ed. at 309; Farmer v. Commonwealth, Ky. App., 6 S.W.3d 144, 146 (1999).

weapon, each offense also contained a unique element not required for conviction of the other offense. The offense of first-degree stalking requires proof of stalking and threats,<sup>12</sup> but the offense of carrying a concealed deadly weapon does not.<sup>13</sup> Similarly, the offense of carrying a concealed deadly weapon requires proof that the weapon was concealed,<sup>14</sup> but the offense of first-degree stalking does not require proof of concealment.<sup>15</sup> Consequently, as Simpson's stalking and weapons convictions each required proof of a fact that the other did not, this Court's opinion of June 30, 2000, did not subject Simpson to a double-jeopardy violation.

For the foregoing reasons, the order from which this appeal is prosecuted is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Elizabeth Shaw  
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BRIEF FOR APPELLEE:

Albert B. Chandler III  
Attorney General of Kentucky

Matthew D. Nelson  
Assistant Attorney General  
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<sup>12</sup> See KRS 508.140(1)(a)(1) and (1)(a)(2).

<sup>13</sup> See KRS 527.020(1).

<sup>14</sup> See KRS 527.020(1).

<sup>15</sup> See KRS 508.140(1)(b)(4).