RENDERED: JUNE 13, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

ORDERED NOT PUBLISHED BY SUPREME COURT:
JANUARY 14, 2009
(FILE NO. 2008-SC-0494-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000349-MR

ROBERT F. EBERENZ — APPELLANT

v.

APPEAL FROM MEADE CIRCUIT COURT
HONORABLE SAM H. MONARCH, JUDGE
ACTION NO. 05-CR-00128

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND NICKELL, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

ACREE, JUDGE: Robert F. Eberenz presents two claims for relief from his conviction of First Degree Fleeing or Evading as well as First Degree Wanton

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Endangerment. His first claim is that his conviction of having committed both offenses constitutes a violation of the constitutional prohibition against double jeopardy. The second claim is that the trial court committed a due process violation by failing to grant his motion for directed verdict, by which he claimed the Commonwealth failed to present sufficient evidence to convict him. We see no merit in either of Eberenz's arguments and, therefore, affirm the convictions.

Double Jeopardy Claim

With regard to the first claim, that of double jeopardy, the court agrees with Eberenz that failure to object to double jeopardy at trial does not waive the right to raise the issue on appeal. *Sherley v. Commonwealth*, 558 S.W.2d 615, 618 (Ky. 1977). Furthermore, Eberenz and the Commonwealth agree that the pertinent law regarding double jeopardy is found in *Commonwealth v. Burge*, 947 S.W.2d 805 (Ky. 1996), which uses the "additional fact" analysis from *Blockburger v. United States*, 284 U.S. 299, 304 (1932). *Burge* at 809-11. The determination to be made is "whether the act or transaction complained of constitutes a violation of two distinct statutes and, if it does, if each statute requires proof of a fact the other does not." *Id.* at 811. The parties disagree, however, as to how this rule of law applies to the offenses of First Degree Fleeing or Evading and First Degree Wanton Endangerment.

Eberenz was convicted of Fleeing or Evading under KRS 520.095(1)(a)(4). The pertinent section reads as follows:

> (1) A person is guilty of fleeing or evading police in the first degree:
>
> (a) When, while operating a motor vehicle with intent to elude or flee, the person knowingly or wantonly disobeys a direction to stop his or her motor vehicle, given by a person recognized to be a police officer, and at least one (1) of the following conditions exists . . . .
>
> 4. By fleeing or eluding, the person is the cause, or creates substantial risk, of serious physical injury or death to any person or property . . . .

KRS 520.095(1)(a)(4).

Eberenz was also convicted of Wanton Endangerment in the First Degree under KRS 508.060.

> (1) A person is guilty of wanton endangerment in the first degree when, under circumstances manifesting extreme indifference to the value of human life, he wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person.

KRS 508.060.

The statutes are similar in some ways. It is clear, however, that the offense of Fleeing or Evading contains elements that Wanton Endangerment does not – at a minimum, in this context, it requires operation of a motor vehicle and disobeying a direction to stop given by one recognized to be a police officer.

The major point of contention, then, is whether the offense of Wanton Endangerment contains an element not present in the offense of Fleeing or Evading. The Commonwealth maintains that the phrase "under circumstances manifesting extreme indifference to the value of human life" in KRS 508.060

constitutes an independent element not present in KRS 520.095(1)(a)(4). We agree.

In *Bell v. Commonwealth*, 122 S.W.3d 490 (Ky. 2003), our Supreme Court discussed the origin and parses the language of the Fleeing or Evading statutes in some detail. *Bell* at 495-96. The most significant aspect of *Bell* for our purposes is that it explicitly points out that Kentucky recognizes a state of "aggravated wantonness" when someone acts "under circumstances manifesting extreme indifference to the value of human life," and that this is different from being merely "wanton." *Id.* at 496.

How to practically differentiate between mere wantonness and "aggravated" wantonness is a thornier problem. A "wanton act" is itself defined as "[o]ne done in reckless disregard of the rights of others, *evincing a reckless indifference to consequences to the life, or limb, or health,* or reputation or property rights of another[.]" BLACK'S LAW DICTIONARY 1419 (5th ed. 1979)(emphasis added). How well or accurately one can measure degrees of indifference to human life is a difficult question, but fortunately it is not necessary to determine that here. The question before this court is whether the language of "under circumstances manifesting extreme indifference to the value of human life" constitutes a separate element of First Degree Wanton Endangerment for double jeopardy purposes.

The assault statutes, KRS 508.010 and 508.020, offer a similar "wantonness" language distinction. First Degree Assault, KRS 508.010(1)(b), may

be charged when, *"[u]nder circumstances manifesting extreme indifference to the value of human life* [the accused] wantonly engages in conduct which creates a grave risk of death to another and thereby causes serious physical injury to another person." (Emphasis added). By comparison, one provision of second degree assault, KRS 508.020(1)(c), provides that the accused is guilty when "[h]e *wantonly* causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument." (Emphasis added). The degree of wantonness is not the only difference between the cited provisions, but it seems clear that the legislature does intend a difference by the enhancement in the wantonness language. The courts are bound to give meaning to every part of a statute, in particular where legislative intent seems clear. And so, we must do so here.

To our knowledge, there are no published cases dealing explicitly with this question. The Court of Appeals, however, has rendered several unpublished decisions addressing the issue. Pursuant to Kentucky Rules of Civil Procedure (CR) 76.28, we are now permitted to cite such cases for consideration if there are no published opinions that address the same issue.

In *Pinkston v. Commonwealth*, 2004 WL 595647 (Ky.App. Mar. 26, 2004)(No. 2001-CA-002552-MR), *review denied* (Ky. Sep. 16, 2004), this Court initially held that simultaneous convictions for First Degree Fleeing or Evading, Second Offense DUI, and First Degree Wanton Endangerment did constitute double jeopardy. *Pinkston v. Commonwealth*, 2003 WL 2003813 (Ky.App. May 02, 2003)(No. 2001-CA-002552-MR), *review granted* (Feb. 11, 2004). However,

the Supreme Court vacated that decision, remanding it for reconsideration in light of *Bell*. On remand, we stated that, "[f]rom our reading of *Bell*, we see that the first-degree wanton endangerment conviction should not have been reversed and thus order that said conviction be reinstated."

In *Gray v. Commonwealth*, 2004 WL 2315193 (Ky.App. Oct. 15, 2004) (No. 2003-CA-000648-MR), review denied (Sep. 14, 2005), we reached the same conclusion reached in *Pinkston*.

> To prove wanton endangerment, the Commonwealth must prove that the accused manifested an extreme indifference to the value of human life. Fleeing or evading does not contain this element. As can be seen, fleeing or evading requires proof of three additional elements that wanton endangerment does not. Wanton endangerment requires proof of one additional element that fleeing or evading does not. Therefore, double jeopardy did not prohibit the Commonwealth from prosecuting Gray for both charges.

Finally, we recently decided *Butcher v. Commonwealth*, 2007 WL 2894213 (Ky.App. Oct. 5, 2007)(No. 2006-CA-000989-MR), in which we held that First Degree Wanton Endangerment contained a separate element, namely that it "requires proof that the defendant manifested an extreme indifference to the value of human life by wantonly engaging in conduct that creates a substantial risk of death or injury to another person."

The frequency with which this issue repeatedly arises in our courts should have called for the publication of authority on this issue prior to now. Previous publication may have eliminated doubt in the minds of appellants who

subsequently challenged their convictions based on this issue. But because these unpublished opinions are only the fringe and not part of the warp and woof of our jurisprudence, Eberenz was perfectly justified in bringing us this very same issue for at least the fourth time.

We therefore hold again that convictions on both First Degree Fleeing or Evading and First Degree Wanton Endangerment will not trigger double jeopardy, as each offense contains at least one element not present in the other.

Insufficient Evidence Claim

Eberenz appeals on a second ground, stating that it was reversible error to deny his motion for directed verdict. We cannot agree. Our standard of review on appeal of the denial of a motion for directed verdict of acquittal is whether, upon consideration of the evidence as a whole, it would be clearly unreasonable for the jury to find the defendant guilty of the indicated offense. *Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky. 1983). Eberenz posits that there is no substantial evidence in this case to support his conviction, provided of course that we completely ignore the testimony of the police officer involved, Officer Cox. But we cannot ignore such testimony where the officer's credibility was assessed by the jury and appropriately found to be worthy of consideration. *Commonwealth v. Jones*, 880 S.W.2d 544, 545 (Ky. 1994), *citing Commonwealth v. Bivins*, 740 S.W.2d 954, 956 (Ky. 1987). In this case, the jury believed Officer Cox, and that evidence is substantial enough to convict Eberenz.

For the foregoing reasons, we affirm.

ALL CONCUR.

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