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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2009-CA-001309-MR
AND
NO. 2009-CA-002417-MR

CORNELIUS WOODY — APPELLANT

v.

APPEAL FROM FULTON CIRCUIT COURT
HONORABLE TIMOTHY A. LANGFORD, JUDGE
ACTION NOS. 08-CR-00067 AND NO. 09-CR-00007

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING JUDGMENT IN NO. 08-CR-00067,
AND REVERSING AND REMANDING
JUDGMENT IN NO. 09-CR-00007

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; LAMBERT, JUDGE; ISAAC,[1] SENIOR JUDGE.

LAMBERT, JUDGE: Cornelius[2] Woody (Appellant) directly appeals from two criminal convictions related to the December 2007 robbery of a Save-A-Lot store in Fulton County, Kentucky. Following a jury trial, the Fulton Circuit Court

[1] Senior Judge Sheila R. Isaac 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.

[2] Appellant's first name is inconsistently spelled in the record as "Cornelius," "Cornilious," and "Cornilous." Although the correct spelling appears to be "Cornilous," we have opted to use the spelling contained in the notice of appeal.

convicted Appellant on one count each of facilitation to first-degree robbery (No. 08-CR-00067) and of theft by unlawful taking over $300.00 (No. 09-CR-00007). Appellant received two four-year sentences to be served consecutively for a total of eight years in prison. Appellant now contends that the conviction for theft by unlawful taking should be vacated on double jeopardy grounds. We agree. Hence, we affirm Appellant's conviction for facilitation to first-degree robbery, but reverse his conviction for theft by unlawful taking and remand for dismissal of that charge.

During the evening hours of December 19, 2007, three individuals, one armed with a handgun, entered a Save-A-Lot store and stole approximately $1300.00 in cash. One person subdued store clerk Michelle Fields, while the other two went into the manager's office and ordered night manager Dionne Patrick to give them the money from the safe. The robbery ended when stock clerk David Shehorn appeared from the back of the store. The three individuals, along with a fourth person, the driver, proceeded to Hickman where they split the stolen money.

Several months later, five people were indicted on charges related to the robbery. Appellant herein was indicted on charges of first-degree robbery,[3] of engaging in organized crime,[4] and for being a second-degree persistent felony offender.[5] Appellant was later indicted on the charge of theft by unlawful taking

[3] KRS 515.020.

[4] KRS 506.120.

[5] KRS 532.080(2).

over $300.00[6] after he argued that robbery was not a predicate offense under the criminal syndicate statute. Also indicted were Matera Pate, who subdued Fields; Tanya Brown, who was armed with a handgun and stole money from the manager's office; Johana (Jody) Spears, who acted as the lookout and getaway driver; and Fields, the store clerk who acted as the inside person. Brown, Spears, and Fields entered guilty pleas to reduced charges conditioned on their truthful testimony at the trial of Appellant and Pate.

Appellant and Pate were tried jointly before a jury in April 2009. Prior to the start of the trial, the circuit court granted the Commonwealth's motion to amend the charge against Appellant from first-degree robbery to complicity to first-degree robbery. At the conclusion of the trial, the jury found Appellant guilty of the lesser-included charge of facilitation to first-degree robbery and of the theft charge, but found him not guilty of the organized crime charge.[7] Following the penalty phase, the circuit court sentenced Appellant to two consecutive four-year prison sentences in accordance with the jury's recommendation. The circuit court also ordered Appellant to pay restitution to Save-A-Lot. The PFO II charges were dismissed.

Prior to the entry of the judgment, Appellant filed a motion to dismiss the theft charge on double jeopardy grounds as the theft charge arose from the robbery. The Commonwealth responded, noting that Appellant was not convicted of

[6] KRS 514.030.

[7] The jury found Pate guilty of complicity to first-degree robbery and theft by unlawful taking, and likewise found her not guilty on the organized crime charge.

robbery, but of facilitation to robbery, which includes a knowing assistance element not included in robbery or theft charges. The circuit court denied the motion initially on July 9, 2009, and entered a more detailed order on August 3, 2009:

> THIS MATTER being before the Court on Defendant's motion to dismiss, post-conviction, the count of Theft by Unlawful Taking over $300 on the basis that Defendant cannot be convicted of both Robbery and Theft; and the parties having filed pleadings and the Court having reviewed the pleadings of the parties and the file; and the Court having heard argument of counsel in support of their respective positions; and the Court being otherwise sufficiently advised in the premises;
>
> IT IS HEREBY THE ORDER OF THIS COURT that Defendant's motion, being without legal merit, should be, and is herby, DENIED. The Court specifically finds that because Defendant was convicted of Theft by Unlawful Taking over $300 and *Facilitation* to Robbery [1st]; and because Facilitation of Robbery requires proof of different elements than Robbery [1st] and TBUT over $300; the prohibition against Double Jeopardy is not implicated in this case. The evidence the jury found of Defendant's aid or assistance of his co-defendants in *their* commission of the robbery, is completely different and distinct from the facts required to support the theft conviction and the facts supporting the robbery.
>
> SO ORDERED this the 25th day of June, 2009 and entered *nunc pro tunc* on this the 27th day of July, 2009.

This appeal follows.[8]

[8] Procedurally, Appellant filed a notice of appeal from the judgment on the theft conviction, and this Court granted his motion for belated appeal from the judgment on the facilitation conviction. The Court then consolidated the two appeals and treated the brief filed in the earlier appeal as the brief for the later appeal.

The sole issue raised in this appeal is whether Appellant's conviction on both the facilitation to robbery and the theft charges constituted a violation of double jeopardy, and accordingly, whether the theft conviction should be reversed. Appellant contends that the theft charge was incorporated into the facilitation charge and that the two charges should have been merged. In the alternative, he contends that the convictions required inconsistent findings of fact in violation of KRS 505.020. The Commonwealth disagrees with Appellant's analysis, arguing that each offense required proof of a fact that the other did not.

The United States Supreme Court set forth the federal rule addressing double jeopardy in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932):

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. *Gavieres v. United States*, 220 U. S. 338, 342, 31 S. Ct. 421, 55 L. Ed. 489, and authorities cited. In that case this court quoted from and adopted the language of the Supreme Court of Massachusetts in *Morey v. Commonwealth*, 108 Mass. 433: 'A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.' *Compare Albrecht v. United States*, 273 U. S. 1, 11, 12, 47 S. Ct. 250, 71 L. Ed. 505, and cases there cited.

*Blockburger*, 284 U.S. at 304, 52 S.Ct. at 182.

The Supreme Court of Kentucky's test as set forth in *Commonwealth v. Burge*, 947 S.W.2d 805 (Ky. 1996), parallels the *Blockburger* test:

> The double jeopardy clause of the Fifth Amendment to the United States Constitution provides in pertinent part that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." Kentucky's Constitution includes a virtually identical provision in § 13. . . . 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." KRS 505.020(1)(a) and (2)(a) codify this rule.

*Burge*, 947 S.W.2d at 809 (internal citation omitted). "We are to determine 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. Put differently, is one offense included within another?" *Id*. at 811 (internal citations omitted).

As stated in *Burge*, the General Assembly codified the *Blockburger* test in KRS 505.020, which details a prosecution for multiple offenses:

> (1) When a single course of conduct of a defendant may establish the commission of more than one (1) offense, he may be prosecuted for each such offense. He may not, however, be convicted of more than one (1) offense when:
>
> > (a) One offense is included in the other, as defined in subsection (2); or
> >
> > (b) Inconsistent findings of fact are required to establish the commission of the offenses[.]
>
> (2) A defendant may be convicted of an offense that is included in any offense with which he is formally charged. An offense is so included when:

(a) It is established by proof of the same or less than all the fact required to establish the commission of the offense charged[.]

Turning back to the present case, we note that the circuit court instructed the jury that it could find Appellant guilty of either complicity to first-degree robbery or the lesser-included crime of facilitation to first-degree robbery as well as of theft by unlawful taking:

**Instruction No. 5**

**Complicity to Robbery in the First Degree**

You, the jury, will find the Defendant, Cornilious [sic] Woody, guilty of Complicity to Robbery in the First Degree under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this county on or about the 19th day of December, 2007 and before the finding of the Indictment herein, the Defendant, Cornilious [sic] Woody aided, counseled or attempted to aide Matera Pate, Tanya Brown, Jody Spears and Michelle Fields, in the robbery of the Save-A-Lot by taking $1,358.08 cash monies;

AND

B. That in the course of so doing and with the intent to accomplish the theft, the Defendant, Cornilious [sic] Woody, aided, counseled or attempted to aide Matera Pate, Tanya Brown, Jody Spears or Michelle Fields in the use or threat of the immediate use of physical force upon Dione Patrick and/or David Shehorn;

AND

C. That the Co-Defendants Matera Pate, Tanya Brown, Jody Spears or Michelle Fields was armed with a deadly weapon, namely a gun[.]

## Instruction No. 6

## Facilitation of First-Degree Robbery

If you do not find the Defendant, Cornilious [sic] Woody guilty under Instruction No. 5, you will find the Defendant guilty of Facilitation of First-Degree Robbery under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this County on or about December 19, 2007 and before the finding of the Indictment herein, he engaged in conduct which he knew would provide Tanya Brown, Michelle Fields, Matera Pate, and Jody Spears with the means or opportunity for them to commit a Robbery at Save-A-Lot;

AND

B. That he intended for Tanya Brown, Michelle Fields, Matera Pate, and Jody Spears to rob Save-A-Lot;

AND

C. That he knew that Tanya Brown, Michelle Fields, Matera Pate, and Jody Spears were going to rob Save-A-Lot;

AND

D. That the means or opportunity he provided to Tanya Brown, Michelle Fields, Matera Pate, and Jody Spears in fact aided them in robbing Save-A-Lot.

## Instruction No. 8

## Theft by Unlawful Taking – Value $300.00 or More

You will find Defendant Cornilious [sic] Woody guilty of Theft under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

A. That in this County on or about December 19, 2007 and before the finding of the Indictment herein, he took cash which belonged to Save-A-Lot;

B. That in so doing, he knew the cash was not his own;

C. That in so doing, he intended to deprive Save-A-Lot of the cash;

AND

D. That the cash which he took had a value of $300.00 or more.

The statutes supporting the instructions are KRS 502.020, 506.080(1), 515.020(1), and 514.030(1). KRS 502.020(1) defines complicity as follows:

> A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:
>
> (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or
>
> (b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or
>
> (c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

KRS 506.080(1) defines criminal facilitation:

> A person is guilty of criminal facilitation when, acting with knowledge that another person is committing or intends to commit a crime, he engages in conduct which knowingly provides such person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime.

The LRC Commentary to the KRS 506.080 explains that, "[t]o be guilty of the offense of facilitation, an individual must facilitate the commission of a crime that

is actually committed." The crime in this case was first-degree robbery, which is defined by KRS 515.020(1) :

> 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.

Finally, KRS 514.030(1) defines theft by unlawful taking:

> Except as otherwise provided in KRS 217.181 or 218A.1418, a person is guilty of theft by unlawful taking or disposition when he unlawfully:
>
> (a) Takes or exercises control over movable property of another with the intent to deprive him thereof[.]

The Supreme Court of Kentucky explained the difference between complicity and facilitation as being one of the applicable mental states:

> Under either statute [KRS 502.020(1) (complicity) or KRS 506.080(1) (facilitation)], the defendant acts with knowledge that the principal actor is committing or intends to commit a crime. Under the complicity statute, the defendant must intend that the crime be committed; under the facilitation statute, the defendant acts without such intent. Facilitation only requires provision of the means or opportunity to commit a crime, while complicity requires solicitation, conspiracy, or some form of assistance. *Skinner v. Commonwealth*, Ky., 864 S.W.2d 290, 298 (1993). "Facilitation reflects the mental state of one who is 'wholly indifferent' to the actual completion of the crime." *Perdue v. Commonwealth*,

> Ky., 916 S.W.2d 148, 160 (1995), *cert. denied*, 519 U.S. 855, 117 S.Ct. 151, 136 L.Ed.2d 96 (1996).

*Thompkins v. Commonwealth*, 54 S.W.3d 147, 150-51 (Ky. 2001).

We agree with Appellant that his convictions for both facilitation to first-degree robbery and theft by unlawful taking constituted a violation of the double jeopardy clause. Here, the facilitation instruction was included as a lesser-included offense of the complicity charge, and both required that a crime be committed. In this case, that crime was the robbery of the Save-A-Lot store. An element of the robbery is theft, which in this case is represented by the cash taken from the store. It is the taking of this same money that supports the theft charge. Therefore, the actual theft was incorporated into the facilitation offense, and Appellant's conviction for both offenses constitutes a violation of the double jeopardy clause. Accordingly, the circuit court erred when it denied Appellant's motion to dismiss the theft by unlawful taking charge, as the two charges should have merged.

For the foregoing reasons, the judgment of conviction in No. 08-CR-00067 for facilitation to first-degree robbery is affirmed. The judgment entered in No. 09-CR-00007 convicting Appellant of theft by unlawful taking over $300.00 is reversed, and this matter is remanded for dismissal of that charge.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Brandon Neil Jewell
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky