

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky

2000-SC-0992-TG

FINAL

DATE 3-13-03 *DIAGRAM*

DEMETRIUS GRAY

APPELLANT

V.

APPEAL FROM FAYETTE CIRCUIT COURT
HON. REBECCA M. OVERSTREET, JUDGE
NO. 2000-CR-0636

COMMONWEALTH OF KENTUCKY

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Demetrius Gray, was convicted of Second Degree Escape and First Degree Fleeing or Evading the Police by the Fayette Circuit Court. The jury recommended a sentence of five years on each count to be run consecutively and each was enhanced to fifteen years due to Appellant's persistent felony offender status. The charges arose from Appellant's arrest for Receiving Stolen Property Over \$300 and his subsequent flight from police while being transported to the Fayette County Detention Center. Appellant was ultimately acquitted of the underlying felony of Receiving Stolen Property Over \$300 but now appeals his convictions on the Escape and Fleeing charges as a matter of right. Ky. Const. § 110(2)(b).

USE OF PEREMPTORY STRIKES BY THE COMMONWEALTH

Appellant alleges reversible error occurred when the Commonwealth was permitted to use its peremptory challenges to remove the only three black jurors from the jury pool. The Equal Protection Clause prohibits the Commonwealth from removing members of the venire panel solely on the basis of race. Batson v. Kentucky, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719, 90 L. Ed. 2d 69, 83 (1986). In Batson, the United States Supreme Court articulated a three-step process for determining whether a prosecutor has impermissibly struck jurors on account of their race. First, the defendant must show a prima facie case of purposeful discrimination on the part of the prosecutor. Id. at 96. A defendant can establish a prima facie case merely by showing that the prosecutor exercised a peremptory challenge to remove a member of the defendant's cognizable racial group. Id. Next, the burden shifts to the government to articulate a neutral reason for exercising the peremptory challenge in that manner. Id. at 97. The explanation, however, does not have to rise to the level of that needed to justify a challenge for cause. Id. "The trial court may accept at face value the explanation given by the prosecutor depending upon the demeanor and credibility of the prosecutor." Commonwealth v. Snodgrass, Ky., 831 S.W.2d 176, 179 (1992). Finally, it is up to the trial judge to determine whether the defendant has proven a case of purposeful discrimination. Batson, supra at 98. Accordingly, this Court gives great deference to the trial court's finding. Snodgrass, supra at 179.

In the case at bar, when defense counsel objected to the prosecution's peremptory challenges of three black jurors, the prosecution responded with race-neutral explanations for each of the three jurors stricken. The explanations offered were that: one juror had not completed high school; another had not completed grade school;

and the third was unemployed and did not raise her hand when the prosecutor asked if all agreed that one should be held responsible for their actions. While it would have been helpful for this Court to know if non-black jurors in similar situations were also peremptorily challenged by the prosecution, the juror qualification forms were not part of the record before us. Therefore, we must defer to the judgment of the trial court that found the prosecution presented plausible race-neutral explanations for exercising its peremptory challenges so as to strike the only three black jurors from the venire panel.

FAILURE TO GRANT A CONTINUANCE

Appellant also alleges that the trial court's failure to grant defense counsel a continuance the day before trial constituted reversible error. The decision whether to grant a continuance is within the sound discretion of the trial judge. Snodgrass v. Commonwealth, Ky., 814 S.W.2d 579, 581 (1991). The trial court is required to consider several factors including: length of delay; previous continuances; inconvenience to the parties involved; whether the accused caused the delay; the complexity of the case; and the identifiable prejudice to the accused if a continuance is not granted. Id. Appellant's defense counsel stated to the trial court that he did not feel he was ready to proceed to trial because he had not yet obtained a fingerprint expert. Appellant also points to several other reasons why defense counsel was not prepared for trial. We find no merit in Appellant's claims particularly because the jury ultimately acquitted him of the underlying charge of Receiving Stolen Property Over \$300. Therefore, Appellant was not identifiably prejudiced by the fact that his defense counsel did not locate a fingerprint expert or have adequate time to review his file. Appellant's contention that the jury gave him a harsher sentence on the Escape and Fleeing

charges, since the jury was not able to convict him of the underlying charge, is unavailing. Accordingly, we do not find that the trial court erred in refusing to grant Appellant's continuance.

SENTENCING ERROR

Appellant contends, and the Commonwealth conceded, that Appellant's sentence violates KRS 532.110(1)(c) which states that "[t]he aggregate of consecutive indeterminate terms shall not exceed in maximum length the longest extended term which would be authorized by KRS 532.080 for the highest class of crime for which any of the sentences is imposed." While KRS 532.080(6)(b) would cap Appellant's sentence for the two convictions (both Class D felonies) at no more than twenty years, here KRS 532.110(4) requires that these sentences run consecutively. See Gaither v. Commonwealth, Ky., 963 S.W.2d 621 (1997). Thus, the trial court did not err in sentencing Appellant to thirty years in prison.

DOUBLE JEOPARDY

Appellant maintains that charging him with both Escape and Fleeing or Evading the Police was error based on the doctrine of *in pari materia* which means "[u]pon the same matter or subject." Black's Law Dictionary 711 (5th ed. 1979). "'Statutes in *in pari materia*' are those relating to the same person or thing or having a common purpose." Id. *In pari materia* is merely a rule of judicial construction that advocates construing statutes having a common purpose together. Commonwealth v. Kash, Ky. App., 967 S.W.2d 37, 44 (1998). Here, we think the more appropriate analysis is whether Appellant's double jeopardy rights were violated by being convicted of two separate charges that constitute the same offense. In order to determine whether two charges

arising out of the same course of conduct constitute the same offense, we are required to use the Blockburger “same elements” test. Commonwealth v. Burge, Ky., 947 S.W.2d 805, 809 (1996). “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.” Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306, 309 (1932).

KRS 520.030, Escape in the second degree reads:

- (1) A person is guilty of escape in the second degree when he escapes from a detention facility or, being charged with or convicted of a felony, he escapes from custody.
- (2) Escape in the second degree is a Class D felony.

KRS 520.095, Fleeing or evading police in the first degree reads in pertinent part:

- (1) A person is guilty of fleeing or evading police in the first degree:
 -
 - (b) When, as a pedestrian, and with intent to elude or flee, the person knowingly or wantonly disobeys an order to stop, given by a person recognized to be a peace officer, and
 -
 - 2. By fleeing or eluding, the person is the cause of, or creates a substantial risk of, serious physical injury or death to any person or property.

Clearly, each charge contains an element that requires proof of facts that the other does not. The Escape charge requires that the accused be charged with or convicted of a felony, while the Fleeing or Evading charge does not. Likewise, the Fleeing or Evading charge requires proof that the accused caused, or created a substantial risk of, serious physical injury or death. This element is not required to find

someone guilty of escape. Therefore, Appellant was neither charged with, nor ultimately convicted of, two separate crimes that constituted the same offense in violation of the Double Jeopardy Clause.

For the reasons set forth above, we hereby affirm Appellant's conviction.

All concur.

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