

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: MAY 19, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky FINAL

2003-SC-000517-MR

DATE 10-20-05 E.H.A. GORDIN, D.C.

COMMONWEALTH OF KENTUCKY

APPELLANT

V.

APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE JAMES WEDDLE, JUDGE
02-CR-00036

JOSIAH DANIEL GORDIN

APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

I. INTRODUCTION

Appellee, Josiah Gordin, was convicted of First-Degree Manslaughter and First-Degree Robbery, and sentenced to two concurrent twenty-year sentences. The Commonwealth contends (1) that the trial court erred in its decision to dismiss at the close of the evidence a First-Degree Wanton Endangerment charge as being barred by double jeopardy, and (2) that the trial court erred in rejecting the jury's recommendation of consecutive sentences and instead imposing concurrent sentences. The dismissal was, in effect, an acquittal of Appellee on the wanton endangerment charge, and under Section 115 of the Kentucky Constitution, the Commonwealth cannot appeal from a judgment of acquittal. And a trial court is not required to follow the jury's sentencing recommendation. Accordingly, we reject the Commonwealth's claims of error and affirm the judgment.

II. BACKGROUND

Appellee, Josiah Gordin, robbed Ryan Harris, and a high-speed car chase ensued. During the chase, Appellee fired several shots from Joey Reynolds's vehicle, in which he was riding, at Harris's pursuing vehicle. Eventually, Harris decided to end the chase, but as he was turning around to leave, Appellee exited Reynolds's stopped vehicle, approached Harris's vehicle, and shot him, from approximately 15 feet away while Harris was still in his vehicle. Harris died shortly thereafter from the gunshot wounds.

Police arrested Appellee and he was later indicted for Murder, First-Degree Wanton Endangerment, and First-Degree Robbery.

During the trial, at the close of all of the evidence, the defense made a motion to dismiss the wanton endangerment charge, arguing that the charge merged with the murder and robbery charges. The judge either granted the motion or merged the wanton endangerment charge with the other charges, finding that "the charged is barred because of double jeopardy." The jury convicted Appellee of First-Degree Manslaughter and First-Degree Robbery and recommended two consecutive twenty-year sentences. The judge rejected the jury's recommendation and sentenced Appellee to two concurrent twenty-year sentences.

III. ANALYSIS

The Commonwealth asserts two grounds for reversal. First, the Commonwealth argues that the trial court improperly granted Appellee's motion to dismiss the wanton endangerment charge or to merge it with the other charges. Second, the Commonwealth contends that the trial judge abused his discretion in substituting his own sentence for the jury's recommendation.

The jury had been sworn, thus jeopardy had attached.¹ The judge's decision to grant Appellee's motion for dismissal of the wanton endangerment charge or to merge it with the other charges, whichever, and not instruct separately on it was, in effect, a directed verdict of acquittal.² As such, double jeopardy precludes retrial.³

Section §115 of the Kentucky Constitution provides: "[I]n all cases, civil and criminal, there shall be allowed as a matter of right at least one appeal to another court, except that the Commonwealth may not appeal from a judgment of acquittal in a criminal case, other than for the purpose of certification of law."⁴ If the Commonwealth had sought a certification of law pursuant to CR 76.37(10), then we would have jurisdiction to address this issue. Here, however, the Commonwealth seeks a reversal of the lower court's dismissal of the wanton endangerment charge by way of a matter of right appeal, and we are without jurisdiction to do so.⁵

The Commonwealth also maintains that the trial judge erred in substituting his sentence for the jury's recommendation. This argument, however, is in conflict with our previous interpretation of the jury's sentencing recommendation. In Dotson v.

¹ Commonwealth v. Littrell, 677 S.W.2d 881, 886 (Ky. 1984) ("[O]nce the defendant was again placed on trial by the swearing of a legally impanelled jury and the reception of evidence, he was in jeopardy.").

² Kotila v. Commonwealth, 114 S.W.3d 226, 236 (Ky. 2003) ("The trial judge did not instruct the jury on [Manufacturing Methamphetamine], effectively granting a directed verdict of acquittal on that issue . . .").

³ Id. at 256 n. 2 ("The proscription against double jeopardy precludes retrial of the same offense after a directed verdict of acquittal."); Hourigan v. Commonwealth, 883 S.W.2d 497, 498 (Ky. App. 1994) ("If the trial court's action truly were 'the functional equivalent ... of a verdict of acquittal,' retrial is prohibited.").

⁴ (Emphasis added.)

⁵ Commonwealth v. Bailey, 71 S.W.3d 73, 76 (Ky. 2002) ("[T]he Kentucky Constitution prohibits the Commonwealth from appealing a judgment of acquittal in a criminal case . . .").

Commonwealth,⁶ we held that although “the jury shall ‘recommend’ whether the sentences shall be served concurrently or consecutively[,] [t]here is nothing mandatory or binding upon the judge as to the recommendation.”⁷ “The recommendation remains only a recommendation and has no mandatory effect.”⁸ Here, the jury recommended consecutive sentences. The judge, however, disagreed with the jury’s recommendation and ordered the sentences to be served concurrently; this action was well within his power. A judge’s decision not to sentence a defendant according to the jury’s recommendation on whether the sentences run concurrent or consecutive is not subject to reversal.

IV. CONCLUSION

The trial judge’s decision to grant Appellee’s motion for dismissal of the wanton endangerment charge or to merge it with the other charges was, in effect, a directed verdict of acquittal, which cannot be appealed for the purpose of seeking reversal because of double jeopardy. And, the jury’s recommended sentence has no mandatory effect on the judge’s sentencing determination. Therefore, we affirm the trial court’s judgment.

Lambert, C.J.; Cooper, Graves, Johnstone, Keller and Scott, JJ., concur.

Wintersheimer, J., dissents without opinion.

⁶ 740 S.W.2d 930 (Ky. 1987).

⁷ Id. at 931.

⁸ Id.

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