

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-001999-MR

MICHAEL DAVID ELLIS

APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT  
HONORABLE JERRY WINCHESTER, JUDGE  
INDICTMENT NO. 96-CR-00041

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DYCHE, GUIDUGLI, AND MILLER, JUDGES.

DYCHE, JUDGE: On December 2, 1995, Michael David Ellis seriously injured Billie Jean Watson when he drove his vehicle into hers. Ellis was under the influence of drugs at the time of the accident. Two weeks later he entered a plea of guilty to Driving Under the Influence, First Offense, in Whitley District Court.

The following July, Ellis was indicted for Assault in the First Degree for the same incident. He moved to dismiss the indictment on the grounds that double jeopardy protections would bar further prosecution. The Whitley Circuit Court denied Ellis's motion on July 29, 1997. Ellis entered a guilty plea to the amended charge of Assault in the Second Degree on July 6,

1998, reserving the double jeopardy issue for appeal. He was sentenced to seven years' imprisonment.

Ellis argues that Kentucky did not return to the Blockburger v. United States, 284 U.S. 299 (1932), "same course of conduct" analysis regarding double jeopardy issues until after the date of his indictment. See Commonwealth v. Burge, Ky., 947 S.W.2d 805 (1996), cert. denied, 522 U.S. 971 (1997). Therefore, Ellis urges, the trial court should have granted his motion to dismiss under the "single offense" analysis of Grady v. Corbin, 495 U.S. 508 (1990), adopted by our Supreme Court in Walden v. Commonwealth, Ky., 805 S.W.2d 102 (1991).

Unfortunately for Ellis, our Supreme Court has granted Burge retrospective application. See Justice v. Commonwealth, Ky., 987 S.W.2d 306 (1998); and Farmer v. Commonwealth, Ky. App., 6 S.W.3d 144 (1999). Moreover, Grady was specifically overruled in United States v. Dixon, 509 U.S. 688 (1993), well before Ellis was involved in his car accident. The trial court properly denied appellant's motion to dismiss the indictment.

The judgment of the Whitley Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert E. Cato  
London, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III  
Attorney General

John E. Zak  
Assistant Attorney General  
Frankfort, Kentucky