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DISCRETIONARY REVIEW GRANTED BY SUPREME COURT:
AUGUST 19, 2009
(FILE NO. 2009-SC-000129-D)

**Commonwealth of Kentucky
Court of Appeals**

NO. 2008-CA-000314-MR

SCOTT CROUCH

APPELLANT

APPEAL FROM JESSAMINE CIRCUIT COURT
v. HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 07-CR-00189

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

*** * * *

BEFORE: COMBS, CHIEF JUDGE; WINE, JUDGE; BUCKINGHAM,¹ SENIOR JUDGE.

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.

BUCKINGHAM, SENIOR JUDGE: Scott Crouch was stopped and arrested for speeding, and he gave a false name and Social Security number to the officer. He was charged and convicted of identity theft, and, because he was a first-degree persistent felony offender (PFO), his sentence was enhanced to 15 years in prison. Complaining that his sentence was disproportionately greater than the facts warranted, Crouch appealed, contending that he should have been convicted of no offense greater than giving a false name to a peace officer. We affirm.

On June 30, 2007, a Nicholasville police officer performed a traffic stop on Crouch's vehicle after it was clocked exceeding 90 miles per hour. As he was being arrested, Crouch gave his name as "John Kiger" and provided a Social Security number to the officer. Crouch claimed not to have any identification with him. The officer ran a record check, and the Social Security number came back with the name "John Kiger, Jr." Following the arrest, the officer searched the vehicle and found a burnt marijuana cigarette on the passenger seat.

The officer testified he had no reason to suspect he had been given a false name and Social Security number, and Crouch was taken to the local jail. As they were entering, a guard addressed Crouch as "Scott." The officer indicated his prisoner's name was not "Scott" but rather was "John Kiger."

The guard knew Crouch and retrieved a jail record with Crouch's picture, the name "Scott Crouch," and a Social Security number different from the one Crouch had initially provided to the officer. Crouch then admitted he used the

name “John Kiger” as an alias. A record check showed Crouch’s true Social Security number and that his driver’s license was suspended.

A grand jury indicted Crouch on charges of theft of identity, possession of marijuana, reckless driving, and being a first-degree PFO.² A jury found Crouch not guilty of possession of marijuana but guilty on the remaining charges. Crouch was sentenced to five years on the theft of identity charge, enhanced to 15 years due to his first-degree PFO status. This appeal followed.

Crouch first argues that the trial court improperly denied his oral pre-trial motion to have the indictment amended from the felony charge of identity theft to the misdemeanor charge of giving a false name to a peace officer.

(1) A person is guilty of the theft of the identity of another when he or she knowingly possesses or uses any current or former identifying information of the other person or family member or ancestor of the other person, such as that person’s or family member’s or ancestor’s name, address, telephone number, electronic mail address, Social Security number, driver’s license number, birth date, personal identification number or code, and any other information which could be used to identify the person, including unique biometric data, with the intent to represent that he or she is the other person for the purpose of:

. . .

(d) Avoiding detection[.]

KRS 514.160(1)(d). Theft of identity is a Class D felony. KRS 514.160(2).

A person is guilty of giving a peace officer a false name or address when he gives a false name or address to a

² Crouch was not charged by the officer or indicted by the grand jury for driving on a suspended license.

peace officer who has asked for the same in the lawful discharge of his official duties with the intent to mislead the officer as to his identity. The provisions of this section shall not apply unless the peace officer has first warned the person whose identification he is seeking that giving a false name or address is a criminal offense.

KRS 523.110(1). Giving a false name or address to a peace officer is a Class B misdemeanor. KRS 523.110(2).

Crouch argues that “subsection (d) should be interpreted to require some form of pecuniary benefit to avoid the constitutional problems the current interpretation carries, or, in the alternative, that it does not cover misrepresentations of identity to police officers, since that is the subject matter of a specific statute.” In this regard, he notes that the crime is described in the statutes as a “theft” offense. Crouch further contends that prosecuting him for identity theft deprives him of due process of law and equal protection under various provisions of the U.S. Constitution and Kentucky Constitution because his sentence is “severely disproportionate to the crime committed, when compared to the misdemeanor penalty which is often given for the same offense.” He further argues that the rule of lenity should be applied due to the ambiguity in the construction of the statute. *See White v. Commonwealth*, 178 S.W.3d 470, 484 (Ky. 2005)(“The rule of lenity requires any ambiguity in a statute be resolved in favor of a criminal defendant”).

We decline to hold that the court should have amended the indictment or that the Commonwealth should have been prohibited from charging Crouch with

identity theft. First, Crouch’s actions fit the plain language of the statute. He admitted that he used Kiger’s name and Social Security number as an alias to “avoid detection.” KRS 514.160(1)(d). Further, despite the fact that the crime is stated to be a “theft” offense, the statute does not require that there be some sort of pecuniary benefit, and we decline to read such a requirement into its language.³ Second, we decline to hold that the punishment is disproportionate to the crime committed. The crime is a Class D felony, which carries a sentence of one to five years in prison. KRS 532.020(1)(a). It was Crouch’s PFO status that enhanced his sentence to 15 years. Finally, we decline to apply the rule of lenity because we perceive no doubt or ambiguity as to the construction of the statute. *See White, supra.*

Once an indictment is brought by a grand jury, the trial court is without “jurisdiction to change it except as authorized by RCr 6.16.” *Coleman v. Commonwealth*, 501 S.W.2d 583, 584 (Ky. 1973). “A trial court has no authority to amend an indictment to charge an additional or different offense[.]” *Id.* The court’s denial of Crouch’s motion was proper and without error.

Crouch next argues that it was error for the trial court to deny his request for a jury instruction that would have allowed the jury to find him guilty of

³ While it is true that the crime for which Crouch was convicted is described as a theft offense and the statute is located in KRS Chapter 514, which contains theft offenses, a “theft” in the classic sense of the word is not an element of the offense. Further, KRS 446.140 provides that “[t]itle heads, chapter heads, section and subsection heads or titles, and explanatory notes and cross references, in the Kentucky Revised Statutes, do not constitute any part of the law, except as provided in KRS 355.1-109.”

giving a false name to a peace officer. Crouch agrees that giving a false name to a peace officer is not a lesser included offense of identity theft. Rather, his argument is based on his assertion that he was entitled to a jury instruction on the lesser uncharged offense because guilt of that offense is a defense to the indicted offense.

An instruction on a separate, uncharged, but “lesser” crime – in other words, an alternative theory of the crime – is required only when a guilty verdict as to the alternative crime would amount to a defense to the charged crime, *i.e.*, when being guilty of both crimes is mutually exclusive.

Hudson v. Commonwealth, 202 S.W.3d 17, 22 (Ky. 2006).

The crimes of identity theft and giving a false name to a peace officer are not mutually exclusive. A person may not be guilty of giving a false name to a peace officer “unless the peace officer has first warned the person whose identification he is seeking that giving a false name or address is a criminal offense.” KRS 523.110(1). There is nothing in the record to indicate that the officer at any time warned Crouch that giving a false name was a crime. Thus, the trial court correctly denied providing an instruction when the evidence did not support it. *See Crane v. Commonwealth*, 833 S.W.2d 813, 817 (Ky. 1992).

The judgment of the Jessamine Circuit Court is affirmed.⁴

WINE, JUDGE, CONCURS.

COMBS, CHIEF JUDGE, DISSENTS AND FILES SEPARATE OPINION.

⁴ Crouch notes in his brief that there was a clerical error in the judgment because it reflected he had been convicted of possession of marijuana when, in fact, he had not. This court has entered an order directing the trial court to correct this error.

COMBS, CHIEF JUDGE, DISSENTING: After much reflection, I am compelled to dissent.

This case is a disturbing example of a legalized injustice. Crouch could have been charged under either of two statutes. KRS 523.110(1) clearly applies to his conduct. He was speeding and had a marijuana cigarette in his car; he lied about his identity. Needless to say, he deceived the arresting officer. However, KRS 523.110(1) classified this kind of behavior as a Class B misdemeanor bearing a maximum sentence of ninety days – specifically making direct reference to a police officer:

A person is guilty of **giving a peace officer** a false name or address when he gives a false name or address **to a peace officer who has asked for the same in the lawful discharge of his official duties** with the intent to mislead the officer as to his identity. (Emphases added.)

KRS 523.110(1). Additionally, KRS 523.110(1) requires that police officer to warn that giving a false name and address is a crime in order for the statute to apply.

By contrast, KRS 514.160(1)(d) covers theft of the identity of another. It is certainly true that Crouch technically fits the elements of giving a false name and a Social Security number to avoid detection. This statute classifies such conduct as a Class D felony bearing a maximum penalty of five years. It contains no warning requirement by an arresting officer.

The caption of KRS Chapter 514 pertains to “theft and related offenses” as the appellant correctly notes in his brief. Theft logically presupposes

a victim. There was no victim in this case. John Kiger did not press charges. Indeed, Crouch has argued that Kiger permitted him to use both his name and Social Security number. Kiger was not charged as an accomplice or an accessory to the deception perpetrated by Crouch “to avoid detection.”

I respectfully submit that Crouch was prosecuted under the wrong statute with the result that a gross disparity in sentencing occurred and that the punishment imposed (fifteen years with PFO enhancement *versus* ninety days) was wholly disproportionate to the gravity of the offense actually committed. Appellant properly contends that in such a case where two statutes arguably might apply, the statutory construct of the rule of lenity dictates that incongruously harsh results should be avoided by utilizing the less severe statute. *Hoskins v. Commonwealth*, 350 S.W.2d 465 (Ky. 1961).

Appellant also argues that another rule of statutory construction is applicable to bolster the propriety of KRS 523.110 in this situation. It is black-letter law that where two statutes pertain to the same subject matter, the more specific is to be preferred over the more general. *Porter v. Commonwealth*, 841 S.W.2d 166 (Ky. 1992). There is no doubt that KRS 523.110 covers this situation with specificity.

Appellant makes a cogent argument as to the legislative intent underlying the two statutes:

Since there is already a statute dealing with giving a false name to police officers, there is no need to use this felony statute to increase the penalty. One could assume **that**

the legislature was aware, when they passed this theft of identity statute, that they already had passed a law against giving a false name to the police, and thus had no intention of upgrading a class B misdemeanor to a class D felony.

(Emphasis added.) Appellant's brief, p. 14. If the legislature intended the kind of contradictory construction of these statutes that occurred in this case, I profoundly hope that it will re-visit this matter and clarify the situation.

Numerous errors afflict this case. First, I believe that the court erred in denying Crouch's pre-trial motion to amend the indictment to proceed under KRS 523.110. Second, I am persuaded that the court erred in refusing to instruct the jury under KRS 523.110(1). Third, the court erred in its judgment by reciting that Crouch had been found guilty of possession of marijuana when in fact the jury found him "not guilty" of that charge. The Commonwealth argues that this erroneous recitation was merely a clerical error that could have been corrected by recourse to Kentucky Rules of Criminal Procedure (RCr) 10.10 by motion of appellant to the trial court to correct the record. On the contrary, this clerical error is part and parcel of the compounded errors in this case requiring a remand and a reversal of Crouch's conviction.

Most disturbing of all is the glaring violation of the Fourteenth Amendment to the U.S. Constitution underlying the manner of prosecuting Crouch in this case. Another defendant similarly situated easily could have been charged under the misdemeanor statute in lieu of the felony statute. One cannot help but surmise that because of his previous criminal record, Crouch was most likely

singled out for harsher reprisal than what would have been the prosecutorial course of conduct for a defendant without a record. Principles of equal protection and due process will not tolerate such an ambivalent, arbitrary outcome.

Accordingly, I would vacate the judgment in this case and remand this matter to the trial court for appropriate action.

BRIEF AND ORAL ARGUMENT
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