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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001491-MR

ALDEAN HENDERSON, JR.

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE CHARLES L. CUNNINGHAM, JR., JUDGE
ACTION NO. 80-CR-000412

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS AND LAMBERT, JUDGES; SHAKE,¹ SENIOR JUDGE.

COMBS, JUDGE: Aldean Henderson, acting *pro se*, appeals from an order of the Jefferson Circuit Court that denied his motion for relief pursuant to Kentucky Rule[s] of Civil Procedure (CR) 60.02. After our review, we affirm.

In 1980, Henderson was convicted of burglary in the first degree, robbery in the first degree, and sexual abuse in the first degree. He was also convicted of being a

¹ Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

persistent felony offender (PFO) in the first degree. Because of the PFO conviction, his sentence of twenty years was enhanced to life.

Henderson's trial was bifurcated. The first part concerned his guilt as to the burglary, robbery, and sexual abuse charges. The second part pertained to the charge of PFO. After the jury returned a guilty verdict for the first part but before proceedings began relating to the PFO, the court allowed the Commonwealth to amend the indictment and to add six more offenses.

Henderson's direct appeal to the Supreme Court of Kentucky was based in part on his contention that this amendment was improper. The Supreme Court disagreed and affirmed the conviction in a published opinion. *Henderson v. Commonwealth*, 636 S.W.2d 648 (Ky. 1982). Henderson now raises the same argument, asserting that a recent decision of the Supreme Court, *Miller v. Commonwealth*, 2009 WL 160583 (Ky. Jan. 22, 2009), has changed the applicable law. We disagree.

Kentucky Rule[s] of Criminal Procedure (RCr) 6.16 directs that:

[t]he court may permit an indictment, information, complaint or citation to be amended any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced. If justice requires, however, the court shall grant the defendant a continuance when such an amendment is permitted.

Henderson argues that, under *Miller*, we must now construe the amendment of his PFO indictment as a violation of RCr 6.16.

We first note that *Miller* is an unpublished opinion and that, therefore, it is not binding authority. CR 76.28(4)(c). Because we find that *Miller* is distinguishable from the case before us, we shall nonetheless consider the merits of Henderson's argument.

In *Miller*, the Supreme Court found error because the jury had already returned a guilty verdict on a charge of first-degree possession of a controlled substance when the court allowed the Commonwealth to amend the indictment to make the possession charge a second or subsequent offense. First-degree possession is a Class D felony under Kentucky Revised Statute[s] (KRS) 218A.1415(2)(a). A charge of a second or subsequent offense is a Class C felony under KRS 218A.1415(2)(b). Therefore, on its face, the amendment violated RCr 6.16 both by being made after the verdict and by charging a different offense.

In the case before us, the amendment to Henderson's indictment related to a status offense; it was made after the verdict was returned on his **substantive** offenses but before the jury returned a verdict on the PFO charge. The jury had not even heard the proof relating to the PFO charge. Furthermore, the amendment did not change the offense charged in any way. It merely added more proof. There was not a facial violation of RCr 6.16, and Henderson has not shown how he was prejudiced by the amendment. As the Supreme Court stated in *Miller*, "RCr 6.16 is a lenient rule." *Id.* at 3. We agree with the trial court that *Miller* does not affect its previous decision regarding the amendment to the indictment.

Accordingly, we affirm the Jefferson Circuit Court.

ALL CONCUR.

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