RENDERED: SEPTEMBER 28, 2012; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001248-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 11-CR-00028

MATTHEW DEAN BALLINGER — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: CLAYTON, KELLER AND MAZE, JUDGES.

KELLER, JUDGE: The Commonwealth appeals from an order of the Warren Circuit Court granting Matthew Dean Ballinger's (Ballinger) motion to amend count one of his indictment from driving under the influence, fourth offense (DUI 4th) to driving under the influence, second offense (DUI 2nd). Kentucky Revised Statute (KRS) 22A.020(4). For the following reasons, we reverse.

FACTS

The underlying facts are not in dispute. On January 14, 2011, a Warren County Grand Jury indicted Ballinger for DUI 4th.[1] Ballinger subsequently filed a motion in the Warren Circuit Court to amend the DUI 4th charge to DUI 2nd arguing that he had only one prior DUI conviction at the time of his arrest on September 14, 2010.[2] Although he had two other DUI charges pending at the time of his arrest, Ballinger did not plead guilty to those charges until December 20, 2010. Therefore, Ballinger argued that he could only be charged with DUI 2nd and not DUI 4th. The circuit court agreed and entered an order granting Ballinger's motion to amend the DUI 4th offense to DUI 2nd and remanded the case to the Warren District Court. It is from this order that the Commonwealth appeals.

ANALYSIS

On appeal, the Commonwealth first argues that the trial court erred when it amended Ballinger's DUI 4th charge to DUI 2nd, because he was ultimately convicted of three prior DUI charges. In support of its argument, the Commonwealth points to *Royalty v. Commonwealth*, 749 S.W.2d 700 (Ky. App. 1988). In *Royalty*, the defendant was first convicted of a DUI on December 28, 1982. He was subsequently arrested for a second DUI on May 11, 1985, and a

[1] Ballinger was also charged with careless driving and failure to wear a seatbelt. Those charges are not relevant to this appeal.

[2] We note that Ballinger was originally charged with DUI 2nd. After he pled guilty to two other DUI charges that were pending at the time of his arrest, the Commonwealth moved to amend the DUI 2nd charge to DUI 4th.

third DUI on February 14, 1986. Royalty's second and third offenses resulted in convictions that failed to reflect their chronological occurrence. The sequence of events is set forth below:

> DUI 1st: convicted on December 28, 1982
>
> DUI 3rd: arrested on May 11, 1985 and convicted on November 10, 1986
>
> DUI 2nd: arrested on February 14, 1986 and convicted on April 21, 1986

Id. at 701.

As can be seen, Royalty's third conviction for DUI was related to his second DUI arrest while his second conviction for DUI was related to his third DUI arrest. Thus, when he was convicted of the second charged DUI, Royalty achieved the status of having a total of three DUI convictions. On appeal, Royalty argued the trial court erred because it did not "match" the degree of the offense with the date of arrest. In other words, Royalty believed that his third conviction should have only been for DUI 2nd because that conviction was for his second offense. *Id*.

In concluding that Royalty should be treated as a three-time offender for purposes of KRS 189A.010 even though the charge of May 11, 1985, was chronologically his second offense, this Court noted that:

> [C]ommon sense dictates that appellant was already a second time offender of KRS 189A.010 when he submitted to trial by jury on November 10, 1986, in Breckinridge County. To hold otherwise would grant the appellant a license to continue to drive intoxicated from his arrest until trial and judgment without the added penalty of KRS 189A.010(2)(b) or (c). We assume the

> Kentucky Legislature did not intend such a ridiculous result.

Id. Based on this holding, the Commonwealth argues that Ballinger had three prior DUI convictions and was properly charged with DUI 4th.

In response, Ballinger argues that, pursuant to KRS 189A.010(5), he could not be charged with DUI 4th because he had only been convicted of one prior DUI at the time of his fourth arrest. Pursuant to KRS 189A.010(5)(d), "a fourth or subsequent offense within a five (5) year period [is] a Class D felony." KRS 189A.010(5)(e) provides:

> For purposes of this subsection, **prior offenses shall include all convictions** in this state, and any other state or jurisdiction, for operating or being in control of a motor vehicle while under the influence of alcohol or other substances that impair one's driving ability, or any combination of alcohol and such substances, or while having an unlawful alcohol concentration, or driving while intoxicated, but shall not include convictions for violating subsection (1)(f) of this section. A court shall receive as proof of a prior conviction a copy of that conviction, certified by the court ordering the conviction.

(Emphasis added). Ballinger argues that the language in KRS 189A.010(5)(e) providing that "prior offenses shall include all convictions" means that, for penalty enhancement purposes in DUI cases, the subsequent offense must occur after the conviction(s) of the prior offense(s). Ballinger further notes that this language was added to the statute by the General Assembly in 1991—three years after *Royalty* was rendered. *See* 1991 Ky. Acts ch. 15, sec. 2. Thus, he argues that, in light of the subsequent legislative enactment, the holding in *Royalty* is inapplicable.

Ballinger contends that *Commonwealth v. Beard*, 275 S.W.3d 205 (Ky. App. 2009), is dispositive. In *Beard*, this Court addressed the issue of whether Beard's May 5, 2006, DUI arrest could be used to enhance the penalties for his conviction on a May 26, 2006, DUI charge when he had not been convicted of the May 5 offense (first offense) before the May 26 offense (second offense) occurred. This Court acknowledged with approval the prior holding in *Royalty*, that, for purposes of penalty enhancement under KRS 189A.010, the date of conviction, not the date of arrest, governs. However, this Court then stated that "[t]here seems to be no escaping the import of [KRS 189A.010(5)(e)'s] language that Kentucky has indeed embraced the conviction-to-offense prerequisite [*i.e.*, the second offense must occur after conviction of the first offense,] for penalty enhancement purposes in DUI cases." *Beard,* 275 S.W.3d at 208.

Ultimately, this Court held that Beard could not be charged with DUI 2nd based on the fact that "Beard had not yet been convicted as such for the arrest of [] May 5, 2006, when he entered his guilty plea for the second offense of May 26, 2006." *Id.* at 208 (emphasis added). In other words, this Court held that, because no credible record of conviction for the May 5 offense existed at the time Beard pled guilty to the May 26 offense, Beard could not be charged with DUI second offense. Thus, consistent with *Royalty*, this Court concluded that Beard could not be charged with a second DUI offense because no credible record of a conviction for the first DUI offense existed at the time of the second offense conviction. *Id.*

In further support of his argument that the subsequent offense must occur after the conviction of a prior offense, Ballinger cites *Fulcher v. Commonwealth*, 149 S.W.3d 363 (Ky. 2004). In a footnote, the Supreme Court of Kentucky stated that "[t]he General Assembly also appears to have adopted the conviction-to-offense sequence for subsequent offense enhancement of operating a motor vehicle while impaired. KRS 189A.010(5)(e) (defining prior offenses as 'all convictions' obtained prior to the subsequent offense)." *Id*. at 380 n.3. We note that *Fulcher* involved a defendant who was charged with multiple methamphetamine-related offenses and faced "subsequent offender" penalty enhancements pursuant to KRS 250.991(2), and the footnote Ballinger relies on is merely dicta. Because, "we need not treat *dicta* as precedent," we do not find Ballinger's reliance on *Fulcher* to be persuasive. *Beard*, 275 S.W.3d at 207.

KRS 446.080(4) requires that we construe the words of all statutes "according to the common and approved usage of language," unless the words "have acquired a peculiar and appropriate meaning in the law . . . ." **A** plain reading of KRS 189A.010(5)(e) reveals that it does not require a "conviction-to-offense sequence" for subsequent DUI enhancement. Subsection (5)(e) neither refers to "subsequent offense" as set forth in KRS 189A.010(5)(d), nor defines it. Instead, it simply defines "prior offenses" as including "all convictions." Thus, consistent with *Royalty*, we believe that, for purposes of penalty enhancement under KRS 189A.010(5)(e), the determining factor as to whether conviction of a subsequent offense is proper is the existence of a credible record showing

conviction of a prior offense. Therefore, it is the timing of the convictions that control, not the timing of the arrests.

In this case, at the time of Ballinger's fourth arrest, he had one prior DUI conviction and two pending DUI charges. Ballinger pled guilty to the two pending DUI charges on December 20, 2010 and was indicted for DUI 4th on January 14, 2011. Thus, Ballinger had a total of three prior DUI convictions. Therefore, we believe the trial court erred in granting Ballinger's motion to amend the DUI 4th offense to DUI 2nd.

We note that the Commonwealth also argues that the trial court did not have authority to amend the indictment. Having already determined that the trial court improperly amended the indictment, this argument is moot. Therefore, we do not address it.

CONCLUSION

For the foregoing reasons, we reverse the order of the Warren Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Jack Conway
Attorney General of Kentucky

Heather M. Fryman
Assistant Attorney General
Frankfort, Kentucky

ORAL ARGUMENT FOR APPELLANT:

J. Hays Lawson
Assistant Attorney General
Frankfort, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE:

Shannon Dupree
Assistant Public Advocate
Frankfort, Kentucky