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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001658-MR

GARY GAMBLE, SR. APPELLANT

v.

APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 10-CR-00145

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DIXON, MAZE AND NICKELL, JUDGES.

MAZE, JUDGE: Appellant, Gary Gamble, Sr. appeals his sentence following his conditional plea of guilty to the amended charges of second-degree trafficking in a controlled substance ("TICS") and being a persistent felony offender ("PFO") in the second degree. We find that the statute regarding TICS, as amended by the General Assembly in 2011, prohibits enhancement of Gamble's sentence from

three to five years. Accordingly, we reverse the trial court's judgment and remand this case for further sentencing.

Background

On April 1, 2010, Gamble sold three pills which authorities later tested and determined to be hydrocodone. He was charged with second-degree trafficking in a controlled substance and with being a PFO in the second degree. On June 8, 2011, the Kentucky General Assembly, through House Bill ("HB") 463, passed revisions to the TICS statute and KRS 532, which addresses enhanced sentencing for certain crimes due to PFO status. On June 9, 2011, Gamble consented to being sentenced under the revised TICS statute but moved the trial court to dismiss the PFO charge, which would enhance his sentence for the underlying charge. Gamble argued that HB 463 amended the criminal code to specifically preclude enhancement of the punishment under the TICS statute beyond three years' incarceration. The trial court denied the motion, stating that while the recent changes prohibited enhancement of some drug charges, other changes to KRS 532 indicated the General Assembly's intent that offenders of the statute be PFO eligible.

Upon the trial court's denial of Gamble's motion to dismiss the PFO charge, it sentenced Gamble to five years' incarceration, suspended after one year with supervised placement for the remainder of the sentence. Gamble now appeals that sentence.

Standard of Review

It is uncontroverted that this case revolves exclusively around the interpretation of the TICS and PFO statutes as amended by HB 463. "The construction and application of statutes is a matter of law and may be reviewed *de novo*." *Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth of Ky., Transp. Cabinet*, 983 S.W.2d 488, 490 (Ky. 1998). Kentucky requires that, "[a]ll statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature . . . ." KRS 446.080(1). Therefore, a reviewing court must "ascertain and give effect to the intent of the General Assembly . . . [and] is not at liberty to add or subtract from the legislative enactment . . . [or] discover meaning not reasonably ascertainable from the language used." *Beckham v. Bd. of Educ. of Jefferson County*, 873 S.W.2d 575, 577 (Ky. 1994). In sum, a reviewing court may not "breathe into the statute that which the Legislature has not put there." *Commonwealth v. Gaitherwright*, 70 S.W.3d 411, 413 (Ky. 2002).

Analysis

KRS 218A.1413(2), Kentucky's second-degree TICS statute, as amended by HB 463 in 2011, reads as follows:

> (1) A person is guilty of trafficking in a controlled substance in the second degree when:
>
> (a) He or she knowingly and unlawfully traffics in . . .
>
> (c) Any quantity of a controlled substance specified in paragraph (a) of this subsection in an amount less than the amounts specified in that paragraph.
>
> (2) (a) Except as provided in paragraph (b) of this subsection, any person who violates [this statute] shall be

guilty of a Class D felony for the first offense and a Class C felony for a second or subsequent offense.

(b) Any person who violates the provisions of subsection (1)(c) of this section shall be guilty of:

1. A Class D felony for the first offense, except that KRS Chapter 532 to the contrary notwithstanding, the maximum sentence to be imposed shall be no greater than three (3) years; and

2. A Class D felony for a second offense or subsequent offense.

KRS 218A.1413.

The controversy in this case surrounds the meaning of the phrase in subsection (2)(b), ". . . except that KRS Chapter 532 to the contrary notwithstanding . . . ," and its effect upon the statute as a whole. In its order, the trial court correctly conceded that HB 463 reduced the maximum penalty for TICS to three years from five for a first offense. But this is not the crux of the issue at hand. The more pressing issue is whether the language of KRS 218A.1413(2)(b), as amended, categorically prohibits the enhancement of that maximum punishment under the persistent felony offender provisions of KRS 532.080. To assist with this question and to help discern the intent of the General Assembly, we look to the exact changes made to the various drug-related statutes by HB 463. The following is the relevant "red line" copy of HB 463, as it pertains to second-degree TICS:

(1) A person is guilty of trafficking in a controlled substance in the second degree when:
(a) He **or she** knowingly and unlawfully traffics in**:**

> . . . **(c) Any quantity of a controlled substance specified in paragraph (a) of this subsection in an amount less than the amounts specified in that paragraph**.
> (2) **(a) Except as provided in paragraph (b) of this subsection,** any person who violates the provisions of subsection (1) of this section shall **be guilty of a Class D felony for the first offense and a Class C felony for a second or subsequent offense.**
> **(b) Any person who violates the provisions of subsection (1)(c) of this section shall be guilty of:**
> **1. A Class D felony for the first offense, except that KRS Chapter 532 to the contrary notwithstanding, the maximum sentence to be imposed shall be no greater than three (3) years; and**
> **2. A Class D felony for a second offense or subsequent offense:**
> ~~(a) For the first offense be guilty of a Class D felony~~;
> ~~(b) For a second or subsequent offense be guilty of a Class C felony~~.

Criminal Justice System—Sentencing Guidelines—Violations, 2011 Kentucky Laws Ch. 2 (HB 463). As the red-line copy demonstrates, the revisions to the statute reduced the maximum penalty, taking a first offense from a maximum of five years to three, and a second offense from a maximum of ten years down to five.

Similarly, Section 11 of HB 463 amended KRS 218A.1414 as follows:

> (1) A person is guilty of trafficking in a controlled substance in the third degree when he **or she** knowingly and unlawfully traffics in**:**
> . . . **(b) Any quantity of a controlled substance specified in paragraph (a) of this subsection in an amount less than the amount specified in that paragraph**.
> (2) **(a)** Any person who violates the provisions of subsection (1)**(a)** of this section shall **be guilty of a Class A**

misdemeanor for the first offense and a Class D felony for a second or subsequent offense.
(b) Any person who violates the provisions of subsection (1)(b) of this section shall be guilty of:
1. A Class A misdemeanor for the first offense, subject to the imposition of presumptive probation; and
2. A Class D felony for a second or subsequent offense, except that KRS Chapter 532 to the contrary notwithstanding, the maximum sentence to be imposed shall be no greater than three (3) years:
~~(a) For the first offense be guilty of a Class A misdemeanor~~.
~~(b) For a second or subsequent offense be guilty of a Class D felony~~.

Criminal Justice System—Sentencing Guidelines—Violations, 2011 Kentucky Laws Ch. 2 (HB 463). Using the same language, KRS 218A.1414 reduces the penalty for violating its provisions, adding a presumption of probation for a first offense to a crime which would otherwise require jail time.

The General Assembly used different language to set out penalties for possession of a controlled substance, amending KRS 218A.1415 as follows:

(1) A person is guilty of possession of a controlled substance in the first degree when he **or she** knowingly and unlawfully possesses:
(a) A controlled substance~~ that contains any quantity of methamphetamine, including its salts, isomers, and salts of isomers or,~~ that is classified in Schedules I or II **and** ~~which~~ is a narcotic drug;
. . . (2) Possession of a controlled substance in the first degree is~~:~~
~~(a) For a first offense~~ a Class D felony **subject to the following provisions:**
(a) The maximum term of incarceration shall be no greater than three (3) years, notwithstanding KRS Chapter 532;
(b) For a person's first or second offense under this section, he or she may be subject to a period of:

1. Deferred prosecution pursuant to Section 20 of this Act; or
2. Presumptive probation;
(c) Deferred prosecution under paragraph (b) of this subsection shall be the preferred alternative for a first offense; and
(d) If a person does not enter a deferred prosecution program for his or her first or second offense, he or she shall be subject to a period of presumptive probation, unless a court determines the defendant is not eligible for presumptive probation as defined in Section 5 of this Act.
~~(b) For a second or subsequent offense a Class C felony.~~

Criminal Justice System—Sentencing Guidelines—Violations, 2011 Kentucky Laws Ch. 2 (HB 463).

It is abundantly clear to this Court that the intent behind the General Assembly's changes in HB 463 was to reduce maximum punishments and create a clearly-defined hierarchy, or what the Appellant calls "a new sub-group," of penalties for certain drug-related crimes. This sub-group includes crimes for which the General Assembly has assigned a maximum punishment of three years, though they are classified as Class D felonies typically punishable by up to five years. Within this scheme, maximum sentences are reduced, however sentences remain higher for more serious offenses and for second or subsequent offenses. The second-degree TICS statute fits squarely within this new "sub-group" of drug-related crimes.

In addition to the language of HB 463 itself, we find firm evidence of the General Assembly's intent in the statements of those who helped draft those amendments. The Kentucky Court of Justice has stated that HB 463 was

"designed to curb the cost of incarceration without compromising public safety." *Bedson v. Commonwealth*, 2011-CA-001590-MR, 2012 WL 4839552 (citing http://courts.ky.gov/pressreleases/NR06202011JB2.htm). More recently, the Chief Justice of Kentucky's Supreme Court stated that HB 463's changes were "intended to reduce prison costs by lessening penalties for certain drug possession offenses and steering addicts away from prison and into rehabilitation or other forms of supervised release." Justin Story, *Chief Justice Praises State Reforms to Penal Code*, Bowling Green Daily News, Oct. 25, 2012. Such a clear statement by those who sought and secured HB 463's changes is difficult to refute and provides clear insight when attempting to resolve a question of legislative intent and statutory construction.

Nevertheless, because this is a matter of first impression, it is our ultimate task to say what KRS 218A.1413(2)(b) means. Therefore, we must clarify our reading of that statute, keeping the stated purpose behind HB 463 in mind. We derive our understanding of this statute from breaking the text into two parts. Without rewriting the statute itself, and remaining faithful to its plain meaning, our first part contracts the beginning and end of the phrase in question, reading, ". . . shall be guilty of [a] Class D felony for the first offense, except that . . . the maximum sentence to be imposed shall be no greater than three (3) years." This reading more definitively illustrates the purpose of the General Assembly's use of "except that," which is to qualify the classification of second-degree TICS as a

Class D felony with a limitation of three years on a sentence that would otherwise be five.

We more plainly read the second part of the statute as "notwithstanding the contrary provisions of KRS 532." With this phrase, the General Assembly clearly acknowledges that parts of KRS 532 conflict with its assignment of a three-year maximum sentence and unequivocally directs that those parts of KRS 532 not be applied to KRS 218A.1413. Read as a whole, we interpret KRS 218A.1413(2)(b)(1) to say that violation of the statute constitutes a Class D felony for the first offense and the maximum sentence to be imposed for a first offense is three years, despite those portions of KRS 532 which would enhance that sentence. This reading of the statute is not only reasonable, but it clearly serves the General Assembly's intent to reduce the cost of incarcerating certain drug offenders. By placing the crime of second-degree TICS in the new "sub-group" of Class D felonies punishable by only three years, and by excluding the same crime from enhancement under the PFO statute, the punishment for second-degree TICS is reduced, as is the cost of incarcerating those who commit that crime. Further, the possibility for sentence enhancement is already built into the statute, as second or subsequent offenses will earn a person progressively higher maximum sentences.

In its Order denying Gamble's Motion to Dismiss the PFO charge, the trial court found that, while the language of HB 463 limited the maximum incarceration of a person guilty of second-degree TICS to three years, the General

Assembly did not intend to expressly prohibit the enhancement of that sentence under the PFO statute. The trial court based its finding on Section 26 of HB 463, which amended KRS 532.080 to read that the punishment for possession of a controlled substance could not be enhanced beyond three years. The trial court asserted that the General Assembly's choice not to impose the same express prohibition upon the TICS statute showed the Legislature's intent for KRS 532 to apply to that crime. We find the trial court's reasoning erroneous, as it proves to be little more than implication which is easily disproven by examining, as we do above, the General Assembly's actions in amending the sentencing guidelines for certain drug-related crimes.

The Commonwealth asserted at oral arguments that because KRS 532 addresses much more than PFO sentencing, it could not have been the General Assembly's intent to prohibit application of KRS 532 in its entirety to the TICS statute. We agree. We find that KRS 218A.1413(2)(b)(1), when it says "KRS Chapter 532 to the contrary notwithstanding," instructs the reader to disregard only those provisions of KRS 532 which contradict it. While the Commonwealth is correct in stating that it was not the General Assembly's intent to prohibit application of KRS 532 in its entirety to the TICS statute, it is incorrect to then infer that all of KRS 532 applies when the language added by HB 463 clearly limits its application. Accordingly we find that those portions of KRS 532 which would enhance Gamble's sentence beyond three years are contrary to the provisions of KRS 218A.1413(2)(b) and are therefore inapplicable to that statute,

as the General Assembly has expressly forbidden such an application. Therefore, the maximum sentence Gamble can receive for second-degree TICS is three years.

As this Court recognized very recently, HB 463 represents the most concentrated overhaul of Kentucky's penal code in more than thirty years. *Bedson v. Commonwealth*, 2011-CA-001590, 2012 WL 4839552 (Ky. App. 2012). While the language of the amended TICS statute may be convoluted and unclear at times, we believe there is one interpretation of the statute which serves the General Assembly's broader intent to lessen the maximum period of incarceration for TICS and other drug-related crimes. Our interpretation gives effect to that intent while not presuming to "breathe into the statute that which the Legislature has not put there." *See Gaitherwright*, *supra*. For this reason, we reverse the trial court's Judgment and Sentence, and we remand this case for further consideration of Gamble's motion to dismiss the PFO charge and for sentencing, both in accordance with this opinion.

ALL CONCUR.

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