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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000987-MR

JEFFREY DALE BLAKE

APPELLANT

v.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 09-CR-00106

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; LAMBERT AND THOMPSON, JUDGES.

TAYLOR, CHIEF JUDGE: Jeffrey Dale Blake brings this appeal from an April 20, 2010, judgment of the Graves Circuit Court upon a conditional plea of guilty to sundry offenses (including receiving stolen property over \$300) and a sentence of three-years' imprisonment which was probated for a term of five years. We reverse and remand.

Appellant was indicted by the Graves County Grand Jury upon the offenses of receiving stolen property over \$300 (Kentucky Revised Statutes (KRS) 514.110), operating a motor vehicle under the influence (KRS 189A.010), and with being a second-degree persistent felony offender (KRS 532.080). The indictment stemmed from appellant's possession and operation of a stolen lawnmower on March 19, 2009. Count I of the indictment recited that the offense of receiving stolen property over \$300 constituted a Class D felony pursuant to KRS 514.110. At the preliminary hearing, a police officer testified that the lawn mower was worth approximately \$300.

At the time of the commission of the offense on March 19, 2009, KRS 514.110 provided that receiving stolen property over \$300 constituted a Class D felony. Subsequently, KRS 514.110 was amended effective June 25, 2009. The amended version of KRS 514.110 increased the value of property from \$300 to \$500 to constitute a Class D felony; property valued under \$500 constitutes a Class A misdemeanor.

On January 6, 2010, appellant filed a Motion to Remand to District Court or in the Alternative to Amend the Indictment. Appellant argued that the amended version of KRS 514.110 controlled, and thereunder, he could only be indicted for receiving stolen property under \$500 which was a Class A misdemeanor. The circuit court denied the motion and determined that the amendment to KRS 514.110 could not be retroactively applied per KRS 446.110.

Subsequently, appellant and the Commonwealth reached a plea agreement. Thereunder, appellant entered a conditional plea of guilty reserving the right to appeal the circuit court's decision as to the retroactivity of KRS 514.110. Kentucky Rules of Criminal Procedure 8.09. By judgment entered April 20, 2010, appellant was sentenced to a total of three-years' imprisonment which was probated for a five-year term. This appeal follows.

The sole issue before this Court on appeal is whether KRS 514.110, as amended effective June 25, 2009, should be retroactively applied under the facts of this case. For the reasons hereinafter stated, we conclude that it should be retroactively applied.

The Kentucky Supreme Court recently set forth the law as to retroactive application of an amended criminal statute:

[O]ur savings statute, [KRS 446.110](#), one of the oldest statutes carried forward into the current Kentucky Revised Statutes, provides in pertinent part that[:]

[n]o new law shall be construed to repeal a former law as to any offense committed against a former law, ... or in any way whatever to affect any such offense or act so committed or done, ... before the new law takes effect, except that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings. If any penalty, forfeiture or punishment is mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect.

This statute marks a departure from the common law, under which the repeal of a statute describing a criminal offense precluded prosecution for outstanding violations of the statute which had occurred prior to repeal. [Commonwealth v. Louisville & N.R. Co., 186 Ky. 1, 215 S.W. 938 \(1919\).](#) Under [KRS 446.110](#), unless the General Assembly unmistakably intends otherwise, substantive changes to criminal statutes will not be retroactively applied and “offenses committed against the statute before its repeal, may thereafter be prosecuted, and the penalties incurred may be enforced.” [Lawson v. Commonwealth, 53 S.W.3d 534, 550 \(Ky.2001\)](#) (citation and internal quotation marks omitted). Substantive amendments are those “which change and redefine the out-of-court rights, obligations and duties of persons in their transactions with others.” [Commonwealth of Kentucky Department of Agriculture v. Vinson, 30 S.W.3d 162, 168 \(Ky.2000\).](#) By contrast, procedural amendments—“[t]hose amendments which apply to the in-court procedures and remedies which are used in handling pending litigation” [id. at 168–69](#)—are to be retroactively applied (assuming no separation-of-powers concerns) so that the proceedings “shall conform, so far as practicable, to the laws in force at the time of such proceedings.” Finally, amendments to penalty provisions—provisions pertaining to punishment, such as those creating terms of imprisonment, periods of probation or parole, fines, or forfeitures—may be retroactively applied if the defendant “specifically consents to the application of the new law which is ‘certainly’ or ‘definitely’ mitigating.” [Lawson, supra, 53 S.W.3d at 550; Commonwealth v. Phon, 17 S.W.3d 106 \(Ky.2000\).](#)

Rodgers v. Com., 285 S.W.3d 740, 750-751 (Ky. 2009)(footnotes and citations omitted). Thus, relevant to this appeal, the Supreme Court held that KRS 446.110 permits retroactive application of an amended “penalty provision” of a criminal statute if the amendment “certainly” mitigates punishment and if defendant consents to application of the amendment. *Id.*

In this case, it is beyond dispute that appellant consented to retroactive application of KRS 514.110 as he filed a motion in circuit court requesting same. Consequently, our inquiry focuses upon whether the amendment to KRS 514.110 constitutes an amendment that operates to certainly mitigate punishment.

The amendment to KRS 514.110 increased the value of stolen property from \$300 to \$500 to constitute a Class D felony and concomitantly increased the threshold amount from under \$300 to under \$500 to constitute a Class A misdemeanor. Thus, under the amended version of KRS 514.110, appellant would have been guilty of a Class A misdemeanor; whereas, under the pre-amended version of KRS 514.110, appellant was guilty of a Class D felony. And, if convicted of a Class A misdemeanor, appellant's punishment could be only twelve-months' confinement or less; by contrast, a convicted Class D felon faces punishment from one- to five-years' imprisonment. KRS 532.020; KRS 532.090. Appellant actually received a three-year term of imprisonment. Therefore, appellant's possible sentence of imprisonment would certainly be reduced in length by application of KRS 514.110 as amended. Moreover, a defendant convicted of a felony offense forfeits certain rights as a citizen; yet, a defendant convicted of a misdemeanor generally does not.¹ Accordingly, we conclude KRS 514.110 as amended represents a quintessential example of an amendment to a penalty

¹ An individual convicted of a felony may not vote (Kentucky Constitution Section 145), possess a firearm (KRS 527.040), hold public office (Kentucky Constitution Section 150), or serve on a jury (KRS 29A.080(21)).

provision of a statute that “certainly mitigates” punishment within the meaning of KRS 446.110.

In sum, we hold that KRS 514.110 as amended June 25, 2009, retroactively applies in this case and that the circuit court erred by failing to so conclude.

For the foregoing reasons, the judgment of the Graves Circuit Court is reversed and this cause is remanded for proceedings consistent with this opinion.

ALL CONCUR.

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