

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003129-MR
and
NO. 1997-CA-003130-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEALS FROM RUSSELL CIRCUIT COURT
HONORABLE EDDIE LOVELACE, JUDGE
INDICTMENT NO. 97-CR-000110

JAMES H. MCCLISTER

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BUCKINGHAM, DYCHE, AND GARDNER, JUDGES.

DYCHE, JUDGE. These are interlocutory appeals by the Commonwealth of Kentucky (Commonwealth) from orders of the Russell Circuit Court granting the motion of appellee, James McClister, to suppress certain prior convictions for purposes of enhancing the charges or penalties against him. We affirm.

On July 8, 1997, McClister was indicted for, among other things, operating a motor vehicle while his license was suspended or revoked (OSL), third offense, a Class D Felony. KRS 189A.090. The incident leading to this indictment occurred on April 8, 1997. Prior to this, appellant had the following

relevant convictions:¹ (1) March 1993 - Driving Under the Influence (DUI); (2) May 1994 - OSL; (3) August 1994 - OSL; (4) December 1996 - OSL. McClister, citing Boykin v. Alabama, 395 S.W.2d 238, 89 S. Ct. 1709, 23 L. Ed. 274 (1969), moved the trial court to suppress the prior convictions for purposes of enhancing any penalties under this indictment. Following hearings on the matter, the trial court granted the motion and struck the previous OSL convictions. These appeals followed.

The Commonwealth first argues that the trial court abused its discretion by basing its ruling on an unpublished decision of this Court. On June 14, 1996, this Court rendered an opinion, to be published, in Eaken v. Commonwealth, No. 95-CA-000511-MR. In August 1997, the Supreme Court ordered the Eaken decision de-published. The de-publication of Eaken occurred three months prior to the trial court's decision in this case. Opinions that are not to be published shall not be cited or used as authority in any other case in any court of this state. CR 76.28(4)(c). Regency Pheasant Run Ltd. v. Karem, Ky., 860 S.W.2d 755, 758 (1993). It was inappropriate for the trial court to base a ruling on an unpublished case. However, this alone does not compel a reversal. An appellate court is "bound to affirm if the trial court reached the correct result but, in doing so, applied the wrong reasoning." Friend v. Rees, Ky. App., 696 S.W.2d 325, 326 (1985). Accordingly, we will examine the issue on the merits.

¹ The dates refer to the dates of the violations.

Each of McClister's prior OSL offenses was charged under KRS 189A.090(2)(a) - OSL first offense. OSL first offense is a Class B misdemeanor. A sentence of imprisonment is possible for a Class B misdemeanor, but may not exceed ninety days. KRS 532.090(2). The district court documents for the prior convictions filed into the record indicate that McClister pled guilty and was fined \$50.00 for each of his first two convictions. The documents relating to his third conviction indicate a \$50.00 fine and "10 days suspended 1 yr." The trial court did not make findings relating to any actual imprisonment relating to these convictions; however, there is no contention that McClister was actually imprisoned as a result of his prior OSL convictions. On appeal, there is also no contention by the Commonwealth that McClister was actually represented by counsel in the course of any of the three prior convictions.²

Where no sentence of imprisonment is imposed, a defendant charged with a misdemeanor has no Sixth Amendment right to counsel. Scott v. Illinois, 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979). "[A]n uncounseled conviction valid under Scott may be relied upon to enhance the sentence for a subsequent offense, even though that sentence entails imprisonment." Nichols v. U.S., 511 U.S. 738, 746-747, 114 S. Ct. 1921, 1927, 128 L. Ed. 2d. 745, 754 (1994). Thus, from a federal constitutional perspective, though McClister was without counsel when he pled guilty to his first three OSL charges, he in fact

²The Commonwealth did, however, raise this challenge in the suppression hearings.

had no Sixth Amendment right to counsel in those cases, and those prior convictions, valid under Scott, may be relied upon to enhance the current OSL charge to a felony. Nichols, supra.³

Kentucky authority, however, mandates a broader right to counsel than the U.S. Constitution. The Sixth Amendment requires appointment of counsel only in those cases where the defendant is actually incarcerated, Scott v. Illinois, supra, whereas Kentucky Rules of Criminal Procedure (RCr) 3.05(2) entitles a defendant to counsel if the crime he is charged with is punishable by confinement. First offense OSL, a Class B misdemeanor, is punishable by up to ninety days' imprisonment. KRS 532.090(2). McClister was therefore entitled to trial counsel in each of his prior OSL proceedings. This right may be intelligently, competently, understandingly, and voluntarily waived by the accused. Blevins v. Tartar, Ky., 306 S.W.2d 297, 299 (1957). However, the record does not show that McClister waived his right to counsel.

Nichols recognized that States may prescribe broader rights to counsel, noting, "many, if not a majority, of States guarantee the right to counsel whenever imprisonment is

³McClister argues that Nichols is distinguishable because "in [Nichols] the previous conviction was merely used in sentencing the defendant." To the contrary, a defendant's guilt is determined under 189A.090(1) by proof that he operated a motor vehicle while his license was revoked or suspended for a prior OSL. The penalties are then delineated in 189A.090(2), the severity of punishment increasing with the number of violations of subsection one. Consequently, subsection two "is nothing more than a sentencing statute, with provision for enhancing the penalty for subsequent offenders." See Commonwealth v. Ramsey, Ky., 920 S.W.2d 526, 528 (1996) (citation omitted) (explaining that subsection four of KRS 189A.010 is "nothing more than a sentencing statute" for subsequent DUI offenders).

authorized by statute, rather than actually imposed.” Nichols v. U.S., 511 U.S. at 748, 114 S. Ct. at 1928, 128 L. Ed. 2d at 755, n. 12. Pursuant to the framework of Nichols, if a defendant was entitled to counsel in a prior misdemeanor conviction, and did not have counsel or intelligently waive his right to counsel, then the conviction may not be used to enhance a subsequent offense. Applying this principle to this case, McClister was entitled to trial counsel in each of his three prior OSL cases, RCr 3.05(2), but did not have counsel and did not waive his right to counsel, and hence the prior convictions may not be used to enhance his current OSL charge.

The order of the Russell Circuit Court is affirmed.

ALL CONCUR.

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