

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-000894-MR

ALBERT HOWARD McCRAY

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE REBECCA OVERSTREET, JUDGE  
ACTION NO. 98-CR-0002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: KNOPF, KNOX, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal of a sentence enhanced by a PFO conviction based on a guilty plea conditioned on the outcome of an appeal on a prior felony. The prior conviction has since become final. The facts of the two appeals are interwoven and will be described as briefly as possible.

Albert Howard McCray, the appellant, had two previous convictions (within five years) for DUI (KRS 189A.010) when he was arrested on December 2, 1994, and again on December 29, 1994, both for DUI. He entered a plea to DUI - second offense on January 9, 1996, for the December 2, 1994 incident. He entered a plea to DUI - fourth offense on March 5, 1996, for the

December 29, 1994 incident, a felony. Sentencing was April 10, 1996.

On January 5, 1998, the appellant was indicted for: third offense operating a motor vehicle on November 27, 1997, on a suspended or revoked license, suspended as a result of a DUI (KRS 189A.090), a class D felony; persistent felony offender (PFO), second degree (KRS 532.080), which enhances the class D felony to a class C felony because of a prior felony - DUI fourth offense; and DUI, first offense. On February 18, 1998, appellant filed a CR 60.02 motion to set aside the conviction for DUI - fourth offense on the grounds that by the time the appellant pled guilty to DUI - fourth offense, it was actually only a DUI - third offense, which was a misdemeanor and not a felony. The trial court denied said motion on March 9, 1998, and appellant appealed said decision to this Court in Albert McCray v. Commonwealth of Kentucky, No. 1998-CA-000684-MR.

On March 13, 1998, while his appeal was still pending, appellant entered a conditional plea to all three charges in the indictment, reserving for appeal the validity of the prior felony (DUI - fourth offense) which was the basis of the PFO. Appellant again contended the prior DUI offense was really a DUI third, a misdemeanor. The trial court conditionally sentenced the appellant on April 7, 1998 to one year on count one, enhanced to five years as a PFO, and thirty days concurrent on the DUI first offense.

Appellant filed the appeal herein which was abated pending a final determination of the previous appeal. Another

panel of this Court rendered an opinion on April 9, 1999, affirming the prior conviction of DUI - fourth offense. That opinion has since become final. In order to follow appellant's argument, the following chronological summary is provided:

<u>Date</u>	<u>Incident</u>	<u>Conviction Date</u>
4/8/89	Arrested DUI	8/14/89
8/6/90	Arrested DUI	8/22/90
9/2/93	Arrested DUI	9/9/93 (as third)
12/2/94	Arrested DUI	1/9/96 (as second)
12/29/94	Arrested DUI	3/5/96 (as fourth)
5/30/95	- Indicted for DUI - Fourth for 12/29/94 incident	
1/9/96	- Conviction for 12/2/94 incident as a DUI - Second	
3/5/96	- Conviction for 12/29/94 incident as a DUI - Fourth	
4/10/96	- Sentenced on DUI - Fourth	
11/27/97	- Arrested for suspended license and DUI	
1/5/98	- Indicted for suspended license as a result of DUI - Third Offense; PFO 2nd; DUI - First for 11/27/97 incident	
2//18/98	- Filed CR 60.02 motion to set aside conviction of 3/5/96 of DUI - Fourth	
3/9/98	- Denial of CR 60.02 motion - later appealed	
3/13/98	- Conditional plea on 1/5/98 indictment	
4/7/98	- Sentencing on suspended license as a result of DUI - Third; PFO 2nd; and DUI - First	
4/9/98	- Appeal of PFO 2nd conviction	
4/9/99	- Opinion affirming denial of CR 60.02 motion.	

In the appeal before this panel, appellant contends that despite the guilty plea to DUI - fourth offense, it could only be a third offense, because, at the time of arrest (December 29, 1994), he only had two convictions, as the December 2, 1994 incident was still pending. We disagree. Not only did the prior appeal (No. 1998-CA-000894-MR) decide this issue, but the case of Commonwealth v. Ramsey, Ky., 920 S.W.2d 526 (1996) makes it clear that there is only one DUI, and at the time of sentencing, the court looks to prior convictions within the past five years of the occurrence charged and sentences accordingly. Even though DUI - fourth offense is a felony, it

still takes an indictment on three prior convictions before conviction, not before being charged. See Royalty v. Commonwealth, Ky. App., 749 S.W.2d 700 (1988) and Estis v. Commonwealth, Ky. App., 864 S.W.2d 317 (1993).

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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