

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2010-CA-001902-MR

GARRETT E. HUNTER, JR.

APPELLANT

v. APPEAL FROM CRITTENDEN CIRCUIT COURT  
HONORABLE C. RENÉ WILLIAMS, JUDGE  
ACTION NO. 10-CR-00002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: MOORE, STUMBO AND WINE, JUDGES.

STUMBO, JUDGE: Garrett Edward Hunter, Jr. appeals from a judgment of the Crittenden Circuit Court reflecting a conditional plea of guilty to one count each of driving on a license suspended for DUI, driving under the influence of intoxicants (4<sup>th</sup> offense), and possession of an open alcoholic beverage container. Hunter argues that in calculating the statutory penalty associated with the DUI charge, the trial court improperly applied KRS 189A.010 to include prior DUI offenses which

were outside the five-year statutory period. We conclude that the trial court properly calculated the number of Hunter's prior DUI offenses using the dates of the offenses rather than the dates of the convictions, and accordingly affirm the judgment on appeal.

On February 1, 2010, the Crittenden County grand jury indicted Hunter on one count each of driving on a license suspended for DUI (with aggravator), driving under the influence of intoxicants (4<sup>th</sup> offense with aggravator for refusing an alcohol test), possession of an open alcoholic beverage container, and with being a persistent felony offender in the first degree. Hunter had previously been convicted of four separate DUI offenses.

KRS 189A.010 establishes the penalty associated with a DUI conviction by counting the number of DUI offenses for which the defendant has been convicted in the preceding five years. On September 9, 2010, Hunter, through counsel, filed a motion seeking to amend the indictment. As a basis for the motion, he argued that in calculating the five-year period set out in KRS 189A.010, the indictment improperly used the dates of his prior offenses rather than the dates of his prior convictions. He maintained that if the five-year period were calculated using the dates of convictions rather than the dates of the offenses, he should have been charged with operating a motor vehicle under the influence of intoxicants, 3<sup>rd</sup> offense rather than 4<sup>th</sup> offense.

The trial court overruled the motion to amend the indictment. Hunter then entered a conditional plea of guilty, reserving for appeal the issue of whether the five-year statutory period was properly calculated. This appeal followed.

Hunter now argues that the trial court committed reversible error in denying his motion to amend the indictment. He contends that KRS 189A.010 requires the trial court to calculate the number of DUI events in the preceding five years by looking to the dates of convictions rather than the dates of the offenses. In support of this argument, he directs our attention to *Commonwealth v. Ball*, 691 S.W.2d 207, 210 (Ky. 1985), which states that,

One who has been convicted of engaging in the prohibited conduct of operating a motor vehicle anywhere in this state while under the influence of alcohol in violation of Section (1) of KRS 189A.010, and who has the status at the time of such conviction of having been previously convicted within five years of such conviction of driving under the influence, is a previous offender and is subject to the enhancement provisions of Sections (2)(a), (b), and (c) of KRS 189A.010.

Hunter focuses on the phrase “previously *convicted* within five years” (emphasis added) in support of his argument that the dates of his previous convictions, rather than the dates of the offenses, are determinative when applying KRS 189A.010 to the charge against him. Hunter notes that the motion to amend the indictment in this case was filed on September 9, 2010, and that as of that date more than five years had elapsed since his prior convictions dated April 22, 2005,

and August 5, 2005. Therefore, he contends that those convictions were no longer eligible to enhance the charge in the instant case.

Hunter also points to *Royalty v. Commonwealth*, 749 S.W.2d 700 (Ky. App. 1988), and *Commonwealth v. Beard*, 275 S.W.3d 205 (Ky. App. 2008), in support of his claim that the dates of the convictions rather than the offenses is determinative. The court in *Beard*, for example, noted that “for purposes of penalty enhancement under KRS 189A.010 . . . the date of the conviction—not the date of the arrest—governs.” *Beard*, 275 S.W.3d at 207.

We have closely examined the written arguments, the record and the law, and find no error in the circuit court’s reliance on the dates of Hunter’s prior offenses to calculate the five-year period set out in KRS 189A.010. The statutory language expressly addresses the methodology of calculating the five-year period, stating that, “[I]n determining the five (5) year period under this section, *the period shall be measured from the dates on which the offenses occurred* for which the judgments of convictions were entered.” (Emphasis added). KRS 189A.010(10). This language is clear, unambiguous and lends itself to but one interpretation: the five-year period is determined with reference to the dates of the offenses, not the dates of the convictions.

At first blush, *Royalty* and *Beard* appear to contradict KRS 189A.010(10) by placing emphasis on the dates of conviction rather than the dates of the offenses. These cases, however, addressed fact patterns which are distinguishable from those now at issue. In *Royalty* and *Beard*, the panels of this

Court were addressing scenarios where a third DUI arrest pre-dated the second conviction (*Royalty*), or where two separate DUI offenses were prosecuted on the same day and “virtually simultaneously” (*Beard*). In each case the trial court was presented with a fact pattern which did not easily fit into the statutory scheme. It resolved these issues by holding that a defendant must be convicted of a prior DUI offense before the most recent offense could be statutorily enhanced. Stated differently, the *Royalty* and *Beard* courts merely held that a prior offense must result in a conviction before it can be counted as a prior offense for purposes of KRS 189A.010. Nothing in *Royalty* or *Beard* supplants the unambiguous statutory language that “. . . the period shall be measured from the dates on which the offenses occurred . . . .” KRS 189A.010(10).

Hunter’s first DUI offense occurred on April 19, 2005, and his 5<sup>th</sup> and present offense occurred on January 7, 2010, or within five years. Additionally, the charge of DUI 4<sup>th</sup> does not run afoul of *Royalty* or *Beard* in that each of Hunter’s first four convictions occurred prior to his 5<sup>th</sup> conviction. KRS 189A.010(10) states in no uncertain terms that the period shall be measured from the dates on which the offenses occurred, and the circuit court properly so found. That his indictment was not returned until some nine months after the present offense occurred is not relevant to the calculation of the five-year period. Accordingly, we find no error.

For the foregoing reasons, we affirm the order and judgment of the Crittenden Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Brandon J. Pigg  
Assistant Public Advocate  
Dept. of Public Advocacy  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

Perry T. Ryan  
Assistant Attorney General  
Frankfort, Kentucky