

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002242-MR

JOE T. HUBER

APPELLANT

v. APPEAL FROM JACKSON CIRCUIT COURT
HONORABLE OSCAR G. HOUSE, JUDGE
ACTION NO. 09-CR-00002

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON AND NICKELL, JUDGES; ISAAC,¹ SENIOR JUDGE.

NICKELL, JUDGE: Joe T. Huber entered a guilty plea to charges of burglary in the third degree² and theft by unlawful taking over \$300.00³ in the Jackson Circuit

Court. Huber was sentenced by a jury to consecutive terms of imprisonment of

¹ Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

² KRS 511.040, a class D felony.

³ KRS 514.030, a class D felony.

five years for the burglary and three years for the theft, for a total sentence of eight years' imprisonment. He now appeals his conviction as a matter of right and we affirm.

Huber was indicted along with a co-defendant, William Parrett, for burglary in the third degree and theft by unlawful taking over \$300.00 for burglarizing a building owned by Roland Huckabee, and also for burglary in the third degree and theft by unlawful taking under \$300.00⁴ for burglarizing a building owned by Curt Angel. A trial on all charges was scheduled for October 12, 2009. Because Mr. Angel was unable to be present that day, the trial court severed the offenses and proceeded to select a jury to hear the charges related to the Huckabee burglary. Before the trial began, Huber entered a guilty plea to the Huckabee charges but opted for the jury to determine his punishment.

The jury heard testimony from Huckabee that his wife awakened him in the early morning hours of November 1, 2008, saying she saw a strange vehicle near their cabin. Huckabee, a retired state trooper, armed himself and went outside. He found Huber inside a metal storage building carrying out some of Huckabee's belongings. Huckabee stated he heard someone running away from the area immediately upon making his initial contact with Huber. Huckabee detained Huber and held him until daybreak when the pair left the cabin and travelled to an area where Huckabee had service for his cellular telephone to call the police.

⁴ KRS 514.030, a class A misdemeanor.

Kentucky State Trooper Rob Morris testified he met Huckabee and Huber a short distance from Huckabee's cabin. Before Trooper Morris could initiate a conversation with him, Huber admitted to entering Huckabee's building and taking some jumper cables and "a couple of lanterns." Huckabee informed Trooper Morris of other items which had been taken from his building and estimated the total value of those items to be \$350.00. Trooper Morris arrested Huber and took him to jail where he obtained a recorded confession. During the confession, Huber was asked about another burglary—that of a building owned by Angel—but he did not confess to that crime. The unredacted confession was played for the jury over Huber's objection. Trooper Morris stated all of the missing property was recovered.

A probation and parole officer testified regarding the penalty range and parole eligibility relating to the crimes charged. She also testified to Huber's prior criminal record which included convictions for possession of a prescription drug in an improper container, alcohol intoxication, marijuana cultivation, possession of marijuana, contempt and misdemeanor theft. Over Huber's objection, the probation officer was permitted to testify that Huber had been indicted by the grand jury but had only been convicted of a misdemeanor.

The jury also heard from Huber's mother who testified Huber had lived with her and taken care of her for several years because of her failing health. She stated Huber also took care of her three disabled siblings who also lived in her

home. She stated Huber worked wherever he could find work. She had no knowledge about the facts of the criminal charges for which Huber stood charged.

After a short deliberation, the jury recommended a sentence of five years' imprisonment for the burglary and three years' imprisonment for the theft to run consecutively for a total sentence of eight years. The trial court entered a final judgment conforming to the jury's recommendation and this appeal followed.

Before this Court, Huber raises three allegations of error. First, he contends it was error to sentence him to a felony in light of the General Assembly's amendment of the theft statute increasing the threshold value from \$300.00 to \$500.00 after he was charged but before he was convicted of taking \$350.00 worth of property. Next, he contends the trial court erred in permitting the probation and parole officer to give more than a general description of his prior misdemeanor convictions. Finally, Huber argues it was reversible error to permit the Commonwealth to play his entire, unredacted confession for the jury. After a careful review of the record, the law and the briefs, we affirm.

First, Huber alleges he was improperly sentenced for a felony offense as the General Assembly had amended the threshold amount for a felony theft to \$500.00 and he was accused of taking only \$350.00 in property. He admits this issue is unpreserved but states that the trial court was without subject matter jurisdiction thus permitting him to raise the issue for the first time on appeal. In

the alternative, he requests palpable error review under RCr⁵ 10.26. We discern no error.

Approximately eight months after Huber's arrest, on June 25, 2009, the General Assembly's amendment of KRS 514.030 increasing the threshold value for felony theft from \$300.00 to \$500.00 became effective. Huber's trial occurred about four months after the effective date of the amendment. The undisputed value of the property taken was \$350.00. Thus, Huber contends that pursuant to KRS 446.110, the mitigated punishment under the amended statute should have been applied to his case making him eligible only for a misdemeanor conviction and the trial court was without jurisdiction to punish him for a felony. We disagree.

KRS 446.110 discusses the application of new or amended laws to offenses committed under former laws. It states:

No new law shall be construed to repeal a former law as to any offense committed against a former law, nor as to any act done, or penalty, forfeiture or punishment incurred, or any right accrued or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued or claim arising 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.

⁵ Kentucky Rules of Criminal Procedure.

There is no question that the amendment to KRS 514.030 constituted a mitigation of punishment. However, contrary to KRS 446.110, Huber failed to consent to the application of the new provisions of the theft statute.

In *Lawson v. Commonwealth*, 53 S.W.3d 534 (Ky. 2001), our Supreme Court discussed a similar issue in relation to the amendment of sentencing ranges in felony cases. The *Lawson* Court stated:

At common law, when the legislature modified or repealed a statute, the courts no longer had the authority to enter any judgment relying upon the prior law. KRS 446.110 modifies this common law rule so that, unless the General Assembly specifically designates otherwise, “offenses committed against the statute before its repeal, may thereafter be prosecuted, *and the penalties incurred may be enforced.*” Unquestionably, therefore, the trial court had jurisdiction to sentence Lawson under the pre-amendment provisions of KRS Chapter 532.

This Court and its predecessor have consistently interpreted KRS 446.110 to require courts to sentence a defendant in accordance with the law which existed at the time of the commission of the offense unless the defendant specifically consents to the application of a new law which is “certainly” or “definitely” mitigating. As Lawson did not raise any issue in the trial court concerning the new provisions of KRS Chapter 532, he certainly did not consent to the application of the modified provisions. Without reaching the issue of whether those statutory modifications definitely mitigate the existing penalty ranges, we hold that, under the law at the time of the commission of these offenses, the trial court did not err either in the manner in which it instructed the jury regarding the penalty range or in its final judgment imposing sentence.

Id. at 550-51 (emphasis in original) (footnotes omitted). Here, as in *Lawson*, Huber did not specifically consent to the application of the mitigating punishment to his case. It is clear from our review of the record that Huber was aware of the change in the law as his counsel acknowledged during the trial that the value of the goods taken was \$50.00 over “what was the felony amount at that time in Kentucky.” Nevertheless, Huber never requested application of the amended statute to his case and he therefore cannot now be heard to complain. The precedents Huber cites in support of his position are inapposite because in each of those cases the defendant requested application of mitigating statutory amendments. The trial court properly acted within its jurisdiction and no error occurred.

Next, Huber contends the trial court erred in permitting the jury to hear that he had been indicted by the grand jury when his conviction under that indictment was ultimately only for misdemeanor theft. He argues that this information exceeded the permissible “general description” of his prior misdemeanor convictions. Our review of the record reveals no error.

Probation officer Alice Harmon testified about general parole eligibility and Huber’s criminal history. In response to a question from the Commonwealth of whether Huber had been indicted by a Jackson County grand jury in 1998, Harmon responded “Yes.” Huber’s counsel immediately objected and a short bench conference ensued. The trial court permitted the Commonwealth to continue its questioning of Harmon. Huber did not request an admonition or other relief.

Harmon informed the jury that Huber had entered a guilty plea and been convicted of the misdemeanor offense of theft by unlawful taking under \$300.00 and of the penalty he received as a result of that conviction. Contrary to Huber's contention, the jury was never informed that he had been indicted for a felony offense which was amended down to a misdemeanor. We are unable to conclude that a brief reference to an indictment by the grand jury in any way prejudiced the jury against Huber or that the reference gave the jury more than a general description of his criminal history.

Finally, Huber contends the trial court erred in allowing the Commonwealth to play his unredacted confession to the jury as it contained a discussion of other crimes for which he was not on trial. He alleges that these references were irrelevant to the issues to be decided by the jury and were unduly prejudicial. We disagree.

In his recorded confession, Huber indicated he was in the area only to scout deer, he thought the outbuilding belonged to Harry Nicholson, one of Huckabee's neighbors, and he took two lanterns and a set of jumper cables to "keep them from rusting down." He was asked about numerous other items of personal property found in his vehicle on the day of his arrest. These included items belonging to Huckabee and Angel. Some of Angel's property was located inside containers belonging to Huckabee. Huber denied taking those items, instead placing blame on his co-defendant, and claimed to have no knowledge of the items belonging to Angel or of how they came to be in his vehicle. Huber contends these statements

implicate him in a burglary and theft for which he was not on trial and unfairly prejudiced the jury against him.

The Commonwealth contends the statements about Angel's property were inextricably intertwined with the other comments regarding the Huckabee burglary that redaction would be nearly impossible and would render the confession nearly meaningless without the proper context. The Commonwealth also alleges that the complete statement was necessary for the jury to make an informed decision regarding credibility and to properly set Huber's punishment.

We have reviewed the record and must agree with the decision of the trial judge to permit the taped confession to be played in its entirety. Redaction would have resulted in a complete lack of context to the admissible evidence. The dialogue about the Angel property was so inextricably intertwined with the other evidence that separation of the two could not be accomplished without serious adverse effect to the Commonwealth. *See* KRE 404(b)(2). We conclude that the unredacted confession did not deprive Huber of a fundamentally fair trial, and there is no reasonable possibility, much less a probability, that excluding the challenged references from Huber's statement would have altered the result. *Caudill v. Commonwealth*, 120 S.W.3d 635 (Ky. 2003).

Therefore, for the foregoing reasons, the judgment of the Jackson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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