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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000873-DG

COMMONWEALTH OF KENTUCKY APPELLANT

v.

ON DISCRETIONARY REVIEW FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 08-XX-00006

CARL BREWER APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND VANMETER, JUDGES; LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: This Court granted discretionary review of this misdemeanor criminal case in which the Commonwealth seeks to overturn an Opinion and Order of the Christian Circuit Court. Pursuant to *Commonwealth v.*

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice ursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Beard, 275 S.W.3d 205 (Ky. App. 2008), the circuit court vacated Appellee Carl Brewer's conditional guilty plea to a charge of driving under the influence, second offense (DUI 2nd), because Appellee had not been convicted of a pending DUI charge at the time of his arrest for the second DUI offense. The Commonwealth contends on appeal that the facts of this case are distinguishable from those in *Beard* and suggests, in the alternative, that *Beard* be rejected as precedent. However, for reasons that will follow, we are compelled to affirm the decision of the Christian Circuit Court.

Facts and Procedural History

On August 27, 2008, Appellee was arrested and charged with DUI, first offense (DUI 1st). Just over three weeks later, on September 18, 2008, Appellee was again arrested and charged with DUI 1st. At the time of his second arrest, Appellee had not been convicted on the August DUI 1st charge. Appellee pled guilty to the August DUI 1st charge on October 2, 2008 in the Christian District Court.

The September DUI 1st charge was then amended to a charge of DUI 2nd in light of Appellee's guilty plea to the August DUI. Appellee subsequently entered a conditional guilty plea to the September DUI 2nd charge, but he reserved the right to appeal the issue of whether he was subject to a DUI 2nd conviction because he had not yet been convicted of the August DUI at the time of his arrest for the September DUI. The classification of a DUI offense as 1st or 2nd is highly

significant due to the enhanced penalties associated with the latter. *See, e.g.*, KRS 189A.010(5)(b) & (8).

On appeal, the Christian Circuit Court entered an Opinion and Order remanding the case to the district court and ordering that court to vacate Appellee's conditional plea and to treat his September DUI offense as a DUI 1st. In reaching this decision, the circuit court relied upon our decision in *Commonwealth v. Beard*, *supra*, for the proposition that for purposes of DUI penalty enhancement under KRS 189A.010(5)(e), a second DUI offense must occur after conviction for a first offense, *i.e.*, in a "conviction-to-offense" sequence. Thus, the court below concluded that as Appellee had not been convicted of DUI 1st at the time he committed the second offense, he could not be convicted of DUI 2nd for the second offense.

Analysis

On appeal, the Commonwealth contends that because Appellee was convicted of the August DUI charge prior to being convicted of the September DUI, the latter conviction can be properly categorized as a DUI 2nd. The Commonwealth asserts that this is true despite the fact that Appellee had not been convicted of the August offense at the time he was arrested for the September offense. In response, Appellee argues that pursuant to *Commonwealth v. Beard*, *supra*, and KRS 189A.010(5)(e) he could not be convicted of DUI 2nd because at the time of arrest he had not been convicted of a qualified prior DUI. We agree

with Appellee that *Beard* and KRS 189A.010(5)(e) are dispositive of this case and require that we affirm the decision of the circuit court.

In *Beard*, we interpreted KRS 189A.010(5)(e) as expressing the General Assembly's intent to require a "conviction-to-offense sequence" for subsequent DUI offense enhancement, *i.e.*, the second offense must occur after conviction of the first offense. *Beard*, 275 S.W.3d at 208; *see also Fulcher v. Commonwealth*, 149 S.W.3d 363, 380 n.3 (Ky. 2004). KRS 189A.010(5)(e) defines "prior offenses" as including:

> … **all convictions** in this state, and any other state or jurisdiction, for operating or being in control of a motor vehicle while under the influence of alcohol or other substances that impair one's driving ability, or any combination of alcohol and such substances, or while having an unlawful alcohol concentration, or driving while intoxicated, but shall not include convictions for violating subsection (1)(e) of this section. A court shall receive as proof of a prior conviction a copy of that conviction, certified by the court ordering the conviction.

(Emphasis added). Based on this language, the Court concluded that "[t]here seems to be no escaping the import of that language that Kentucky has indeed embraced the conviction-to-offense prerequisite for penalty enhancement purposes in DUI cases." *Beard*, 275 S.W.3d at 208.

Here, when Appellee committed and was arrested for the September DUI he had not been *convicted* of any other DUI offense within the previous five years.[2] Consequently, per *Beard* and KRS 189A.010(5)(e), he could not be

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[2] A person who operates a motor vehicle while under the influence of alcohol for the "second offense within a five (5) year period" is subject to enhanced penalties. KRS 189A.010(5)(b).

convicted of DUI 2nd for that offense even though another DUI charge was pending at the time of the September DUI. However, the Commonwealth contends that a different result should be reached in this case.

The Commonwealth first argues that *Beard* should not be applied here in light of another subsection of KRS 189A.010 – KRS 189A.010(10). That provision states: "In determining the five (5) year period under this section [referring to the period of time following a DUI conviction in which the penalties for a subsequent DUI offense can be enhanced], the period shall be measured from the dates on which the offenses occurred for which the judgments of conviction were entered." The Commonwealth contends that by enacting this provision, the General Assembly intended that the date of the first DUI offense – not the date of the conviction – should be used in deciding if a subsequent offense should be enhanced. The Commonwealth further contends that this section should prevail over KRS 189A.010(5)(e) because of an alleged conflict between the two provisions.

However, we see no conflict here and view KRS 189A.010(10) as only coming into play when a conviction for DUI 1st exists prior to the occurrence of a second DUI offense thereby raising the possibility of enhanced penalties. Any other interpretation would ignore the clear language of KRS 189A.010(5)(e) defining "prior offenses" as including "all convictions." Moreover, this interpretation ignores the conclusions of this Court *and* the Supreme Court of Kentucky that KRS 189A.010 requires a "conviction-to-offense sequence" for

subsequent DUI offense enhancement. *See Fulcher*, 149 S.W.3d at 380 n.3; *Beard*, 275 S.W.3d at 208. Consequently, this argument must be rejected.

The Commonwealth also attempts to draw a distinction between this case and *Beard* because the defendant in *Beard* had only pled guilty to DUI 1st (he had not actually been convicted of the offense) at the time that he pled guilty to DUI 2nd. However, we believe that this is a distinction without a difference given the clear language of KRS 189A.010(5)(e) and our holding in *Beard* that the statute sets forth a "conviction-to-offense sequence" for subsequent DUI offense enhancement. It is the timing of the second DUI *offense* that ultimately controls. Thus, this argument must also be rejected.

The Commonwealth also cites to *Royalty v. Commonwealth*, 749 S.W.2d 700 (Ky. App. 1988) – a case that did not follow the "conviction-to-offense" sequence for purposes of subsequent DUI enhancement – in support of its belief that a different result is compelled. Although we referenced that decision with approval in *Beard* (albeit in a somewhat different context), Appellee correctly points out that the language of KRS 189A.010(5)(e) providing that "prior offenses shall include all convictions in this state, and any other state or jurisdiction" was not added to the statute by the General Assembly until 1991 – three years after *Royalty* was rendered. *See* 1991 Ky. Acts ch. 15, sec. 2.[3] Accordingly, we do not believe that the reasoning and holding of *Royalty* are applicable here in light of the

[3] At the time that it was originally enacted, the language of KRS 189A.010(5)(e) was contained within KRS 189A.010(4)(e). The General Assembly moved the provision to subsection 5(e) in 2000. *See* 2000 Ky. Acts ch. 467, sec. 2.

subsequent legislative enactment. Thus, to the extent that decision conflicts with *Beard* and KRS 189A.010(5)(e), it is overruled.[4]

Conclusion

In reaching this decision, we note that we appreciate the concerns raised by the Commonwealth and the distaste that this result may produce. As we stated in *Beard*:

> Public policy appears to be ill served by the outcome of this case. There is no doubt that the penalty enhancement provisions of KRS 189A.010 were created by the General Assembly in order to deter drunken drivers from becoming habitual offenders. Those penalty provisions are effectively circumvented if a defendant can avoid the extra penalties merely because of the timing of various convictions. However, the legislature has apparently wrestled with the need to balance due process and the policy of enhancing penalties for serial offenses by drunken drivers. It may be that it could achieve that balance by amending the statute to affect the plea process. If and until the statute directs otherwise, we are bound to follow its literal language. The only solution at present is for the Commonwealth to act as swiftly as possible in prosecuting DUI charges seriatim rather than in aggregate.

Beard, 275 S.W.3d at 208. With this in mind and for the reasons provided, we are compelled to affirm the order of the Christian Circuit Court directing the Christian District Court to vacate Appellee's conditional guilty plea to DUI 2nd.

NICKELL, JUDGE, CONCURS.

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[4] We also note that our decision in *Beard* was primarily driven by the language of KRS 189A.010(5)(e) and, to a lesser, more explanatory extent, the decision of the Supreme Court of Kentucky in *Fulcher v. Commonwealth*, *supra*.

VANMETER, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

VANMETER, JUDGE, DISSENTING. I respectfully dissent. In my view, a plain reading of KRS 189A.010(5)(e) reveals that it does not require a "conviction-to-offense sequence" for subsequent DUI enhancement. The statute neither refers to "subsequent offense" nor defines it. Instead, KRS 189A.010(5)(e) simply defines "prior offenses" as including "all convictions." In this instance, Brewer was arrested for his first offense on August 27, 2008 and was convicted of that charge on October 2. While the second offense occurred in between those two dates, on September 18, at the time Brewer came to court on October 9 and plead guilty to the second offense, he had a prior conviction for a DUI of which the offense date had occurred with the previous five years, as measured by the offense dates. *See* KRS 189A.010(10).

Commonwealth v. Beard, 275 S.W.3d 205 (Ky.App. 2008), cited by the majority and the circuit court, does not compel a different result. In *Beard*, this court ostensibly addressed the issue of whether the defendant Beard's May 5, 2006, DUI arrest could be used to enhance the penalties for his conviction on a May 26, 2006, DUI charge when he had not been convicted of the first offense **before the second offense occurred** (or before he was charged with the second offense); however, a close reading of that opinion discloses that this court actually held that Beard could not be charged with DUI second offense based on the fact that "Beard had not yet been convicted as such for the arrest of the May 5, 2006,

when he entered his guilty plea for the second offense of May 26, 2006." *Beard*, 275 S.W.3d at 208 (emphasis added). In other words, this court held that since no credible record of conviction for the May 5, offense existed at the time Beard **pled guilty** to the May 26, offense (NOT at the time the second offense occurred), Beard could not be charged with DUI second offense.

Beard is somewhat confusing because this court acknowledges with approval the prior holding in *Royalty v. Commonwealth*, 749 S.W.2d 700 (Ky.App. 1988), that for purposes of penalty enhancement under KRS 189A.010, the date of conviction (not the date of arrest) governs, yet then states that "[t]here seems to be no escaping the import of [KRS 189A.010(5)(e)] language that Kentucky has indeed embraced the conviction-to-offense prerequisite for penalty enhancement purposes in DUI cases." *Beard*, 275 S.W.3d at 208. Nonetheless, I believe *Royalty* is still good precedent with respect to this issue, even in light of the 1991 amendment to KRS 189A.010(5)(e), since, as amended, the statute still does not define "subsequent offense." In *Royalty*, this court correctly stated the law as set forth by the Kentucky Supreme Court in *Commonwealth v. Ball*, 691 S.W.2d 207, 210 (Ky. 1985):

> 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 provision of Sections 2(a), (b), and (c) of KRS 189A.010.

(emphasis added). Thus, *Ball* provides that Kentucky follows a "conviction-to-conviction" sequence for purposes of subsequent DUI offense enhancement; the determining factor as to whether conviction of a second offense is proper is the existence of a credible record showing conviction of a prior offense.

Beard in essence applies the holdings in *Royalty* and *Ball*, concluding that the defendant Beard could not be charged with a second DUI offense since no credible record of a conviction for the first DUI offense existed **at the time of the second offense conviction**. I believe the Court's holding in *Ball* is binding precedent on this court, is consistent with the literal language of KRS 189A.010(5)(e), and serves the public policy of the Commonwealth to deter drunken drivers from becoming habitual offenders.[5]

I would reverse the opinion and order of the Christian Circuit Court and remand this case with directions for the court to enter an order affirming the judgment of the Christian District Court.

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[5] *Fulcher v. Commonwealth*, 149 S.W.3d 363 (Ky. 2004), cited in the majority opinion, involved an interpretation of KRS 218A.010(25) defining "second or subsequent offense" for purposes of KRS Chapter 218A which relates to controlled substances. Any discussion by the court in *Fulcher* concerning KRS 189A.010(5)(e) is *dicta* and thus not binding precedent. *See Cawood v. Hensley*, 247 S.W.2d 27, 29 (Ky. 1952) (stating that "[a] statement in an opinion not necessary to the decision of the case is obiter dictum" and is not authoritative, "though it may be persuasive or entitled to respect"); *Bd. of Claims v. Banks*, 31 S.W.3d 436, 439 n.3 (Ky.App. 2000) (stating that *dicta* need not be treated as precedent). KRS 189A.010(5)(e) nowhere contains the words "obtained prior to the subsequent offense." Accordingly, I do not read *Fulcher* as holding that KRS 189A.010 requires a "conviction-to-offense sequence" for subsequent DUI offense enhancement.

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