

RENDERED: August 2, 1996; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 94-CA-1972-MR

DENNIS WAYNE LISTER

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DANIEL A. SCHNEIDER, JUDGE
ACTION NO. 94-CA-1090

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

* * * * *

BEFORE: DYCHE, JOHNSON and KNOPF, Judges.

KNOPF, JUDGE: This is an appeal from a judgment of conviction in Jefferson Circuit Court for driving under the influence, fourth offense, pursuant to KRS 189A.010. Based on recent decisions by the Supreme Court of Kentucky, we affirm in part, reverse in part, and remand for a new trial.

The appellant, Dennis Wayne Lister, was indicted on the charges of driving under the influence (DUI), fourth offense; operation of a motor vehicle by a person with a revoked, suspended, cancelled or denied operator's license; and operating

a motor vehicle without illuminated head lights. Prior to trial, the appellant moved to exclude any reference to his previous convictions during the Commonwealth's case-in-chief. The trial court overruled the motion. Following a jury trial, the jury returned a verdict of guilty on the charged offenses.

Thereafter, the appellant admitted his prior DUI convictions and entered a conditional guilty plea pursuant to RCr 8.09 reserving the right to appeal the trial court's ruling concerning exclusion of his prior DUI convictions.

The Supreme Court of Kentucky recently addressed this issue in three (3) cases: Commonwealth v. Ramsey, Ky., 920 S.W.2d 526 (1996); O'Bryan v. Commonwealth, Ky., 920 S.W.2d 529 (1996); and Dedic v. Commonwealth, Ky., 920 S.W.2d 878 (1996). The Supreme Court noted that the elements for the offense of driving under the influence are wholly contained in KRS 189A.010(1). On the other hand, the penalties are delineated in subsection (4), with the severity of punishment increasing with the number of prior violations of subsection (1). Ramsey, 920 S.W.2d at 528. The Supreme Court held that evidence of prior convictions is not essential to the Commonwealth's case-in-chief in the prosecution of a DUI charge and introduction of the prior convictions is unduly prejudicial to the defendant. Consequently, the prior DUI convictions shall not be introduced during the guilt phase of a DUI trial, but are only admissible during the penalty phase. Id.

at 529.

As a result of these decisions, the appellant's conviction for DUI, fourth offense, must be reversed and remanded for a new trial. At a subsequent trial of this action, if the jury reaches a guilty verdict, the circuit court has authority to conduct a penalty phase pursuant to KRS 532.055, in which the prior convictions may be introduced and the appropriate sentence determined, following proper instructions to the jury. Id. at 528. However, we find no reason to set aside the conviction for operating a motor vehicle without illuminated head lamps.

Accordingly, we reverse and remand for a new trial, except with regard to the conviction for operating a motor vehicle without illuminated head lamps.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ann T. Eblen
Louisville, Ky.

BRIEF FOR APPELLEE:

Cris Gorman
Attorney General

Vickie L. Wise
Assistant Attorney General
Frankfort, Ky.