

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NOT TO BE PUBLISHED

NO. 94-CA-2272-MR

CLAY ROARK

APPELLANT

v.

APPEAL FROM KNOX CIRCUIT COURT
HONORABLE LEWIS HOPPER, JUDGE
ACTION NO. 93-CR-097

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

* * * * *

BEFORE: DYCHE, JOHNSON and KNOPF, Judges.

KNOPF, JUDGE: This is an appeal from a judgment of conviction in Knox 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 reverse, and remand for a new trial.

The appellant, Clay Roark, was indicted on the charges of driving under the influence (DUI), fourth offense, and being a persistent felony offender (PFO) in the second degree. Prior to trial, the appellant filed a motion in limine to exclude any reference to his prior DUI convictions during the Commonwealth's case-in-chief. The trial court denied the motion. He also moved

during voir dire to be allowed to question the potential jurors whether they could consider the full range of punishment from one (1) to ten (10) years. The trial court permitted his counsel to ask whether the jurors could consider the entire range of punishment, but held that they could not be advised of the specific range of punishments until the penalty phase. Following a jury trial, the jury returned a verdict of guilty on the DUI charge. The appellant accepted the Commonwealth's offer on sentencing in exchange for a dismissal of the PFO charge. This appeal followed.

The appellant first argues that the trial court erred in allowing evidence of his prior DUI convictions to be admitted during the guilt phase of the trial. 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, 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 do not believe that either KRS 532.055 or Ramsey requires trial courts to trifurcate the proceedings into a guilt phase, a penalty phase and a PFO phase.

Lastly, the appellant's acceptance of the Commonwealth's offer on sentencing would have rendered moot his claim regarding voir dire for the penalty phase. Nevertheless, as we are reversing and remanding for a new trial, we will briefly address the issue. In order to be qualified to sit as a juror in a criminal case, a member of the venire must be able to consider any possible punishment. If he or she cannot, then the juror may be challenged for cause. Shields v. Commonwealth, Ky., 812 S.W.2d 152, 153 (1991). Since there is no provision for voir dire immediately prior to the penalty phase, such questioning must take place when the jury is selected. Information about the specific range of penalties directly relates to the potential jurors' ability to consider the entire range in the case before them. If a defendant must leave out the term of years available as penalties, then the question becomes merely abstract. So long

as the information provided to the jury about the specific range of penalties is accurate and not misleading, then a defendant should be permitted to question the venire on the matter.

Accordingly, we reverse the judgment of conviction and remand for a new trial.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kathleen Kallaher
Pike & Schmidt Law Office
Sheperdsville, Ky.

BRIEF FOR APPELLEE:

Chris Gorman
Attorney General

Vickie L. Wise
Assistant Attorney General
Frankfort, Ky.