

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-003178-MR

DAVID LYNN HARPER

APPELLANT

v. APPEAL FROM MCCRACKEN CIRCUIT COURT  
HONORABLE JAMES DANIELS, JUDGE  
ACTION NO. 97-CR-00205

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION

### REVERSING

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BEFORE: EMBERTON, GARDNER, AND MILLER, JUDGES.

MILLER, JUDGE: David Lynn Harper (Harper) brings this appeal from judgment of the McCracken Circuit Court entered on December 5, 1997. We reverse.

On June 10, 1997, Harper was charged with operating a motor vehicle under the influence (DUI), second offense (Ky. Rev. Stat. (KRS) 189A.010), and operating a motor vehicle while license is suspended for DUI, third offense (KRS 189A.090), a felony.

Subsequent to indictment on the above charges, Harper moved the circuit court to amend the charge of operating a motor vehicle while license is suspended for DUI to driving without a

license (KRS 186.620), a misdemeanor. His position was that the felony charge could not be sustained because his prior related convictions were obtained in foreign jurisdictions. Having no prior convictions from Kentucky, he reasoned that his only offense was that of a misdemeanor under KRS 186.620. The circuit court denied the motion and made the following conclusion of law:

When enacting KRS 189A.090, Operating on a Suspended License for DUI, the Kentucky legislature did not intend to exclude persons whose operators license is revoked for a DUI conviction in another state. [Emphasis added.]

Thereafter, Harper entered a conditional guilty plea pursuant to Ky. R. Crim. P. 8.09. Judgment was entered on December 5, 1997. This appeal followed.

Harper asserts the circuit court erred in interpreting KRS 189A.090 to include persons whose operators' licenses were revoked as a result of foreign DUI convictions. KRS 189A.090 states, in relevant part, as follows:

- (1) No person shall operate a motor vehicle while his license is revoked or suspended for violation of KRS 189A.010, nor shall any person who has no motor vehicle or motorcycle operator's license operate a motor vehicle while his privilege to operate a motor vehicle has been revoked or suspended for a violation of KRS 189A.010. [Emphasis added.]

Harper maintains that to violate KRS 189A.090, one must previously have had his license revoked as a result of a conviction for KRS 189A.010. Harper had never been convicted of violating KRS 189A.010. His license was suspended as a result of

a foreign DUI conviction; thus, he asserts that he could not have violated KRS 189A.090. We agree.

The language of KRS 189A.090 is clear and unambiguous: a violation of that statute occurs only if one's license has been revoked or suspended previously for a DUI conviction in this state. On the other hand, the language of KRS 189A.010 is all-inclusive regarding the use of prior DUI convictions for enhancement purposes. Further, our persistent felony offender statute,<sup>1</sup> specifically states that foreign felony convictions can be used for enhancement purposes. Thus, we are led to the conclusion that if the legislature had intended foreign convictions to serve as the basis for a conviction under KRS 189A.090, it would have specified same. We find particularly cogent the ratiocination of this Court in Suttle v. Commonwealth, Ky. App., 774 S.W.2d 454 (1989), concerning the use of foreign convictions under KRS 189A.010.<sup>2</sup> Upon the whole, we believe the circuit court erred in interpreting KRS 189A.090 and for failing to dismiss or amend the felony charge against Harper. Accordingly, we reverse his conviction.

We deem Harper's remaining argument to be moot.

For the foregoing reasons, the judgment of the McCracken Circuit Court is reversed.

GARDNER, JUDGE, CONCURS.

EMBERTON, JUDGE, DISSENTS WITHOUT OPINION.

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<sup>1</sup>Ky. Rev. Stat. 532.080.

<sup>2</sup>We note that Suttle v. Commonwealth, Ky. App., 774 S.W.2d 454 (1989), was superseded by statute.

BRIEF FOR APPELLANT:

Mark Edwards  
Paducah, KY

BRIEF FOR APPELLEE:

A. B. Chandler III  
Attorney General

Samuel J. Floyd, Jr.  
Assistant Attorney General  
Frankfort, KY