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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-000921-MR

WESLEY STEVENSON RAY — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE HON. LEWIS G. PAISLEY, JUDGE
ACTION NO. 95-CR-812

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; GARDNER AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Wesley Stevenson Ray (Ray) appeals from a judgment of the Fayette Circuit Court entered on April 8, 1997, that sentenced him to prison for ten years. Finding no error, we affirm.

Ray was indicted on September 19, 1995, for trafficking in a controlled substance (cocaine) in the first degree, subsequent offender, in violation of Kentucky Revised Statutes (KRS) 218A.1412 and being a persistent felony offender in the first degree (PFO I) in violation of KRS 532.080. On November 25, 1995, Ray was tried by a jury and found guilty of trafficking in a controlled substance in the first degree.

Before the penalty phase of the trial began, Ray accepted the sentence offered by the Commonwealth and pled guilty to being a persistent felony offender in the first degree. Ray was sentenced to prison for a period of twenty years through the following sequence of events. The trial court first sentenced Ray to prison for five years on the trafficking conviction. This five-year sentence was enhanced by the trial court to a ten-year prison sentence by virtue of Ray being a subsequent offender. This ten-year sentence was further enhanced by the trial court to a twenty-year prison sentence on Ray's guilty plea to being a persistent felony offender in the first degree.

Ray appealed his twenty-year sentence directly to the Supreme Court of Kentucky as a matter of right. Ray had been convicted in 1993 of three felonies: two convictions were for trafficking in a controlled substance in the first degree and one conviction was for flagrant nonsupport. Ray argued that the twenty-year sentence imposed by the trial court had been impermissibly enhanced by the 1993 convictions.

The Supreme Court, in a not-to-be-published unanimous memorandum opinion rendered on January 30, 1997, in case no. 95-SC-1043, affirmed Ray's conviction for trafficking in a controlled substance in the first degree, but reversed the sentence and remanded the matter for resentencing. In remanding the case, the Supreme Court stated, in pertinent part, as follows:

> By virtue of his guilty plea, Ray admitted the factual allegations of the indictment. He also does not deny that he committed the prior offenses. The issue,

> instead, is how the three 1993 offenses can be used in sentencing and whether Ray can be sentenced as both a subsequent offender and a PFO. . . . [F]or PFO purposes, all three of Ray's 1993 convictions merged into one. This Court has held that one conviction cannot be used to doubly enhance both as a subsequent offender and PFO. See Commonwealth v. Grimes, Ky., 698 S.W.2d 836, 837 (1985); Eary v. Commonwealth, Ky., 659 S.W.2d 198, 199-200 (1983); Jackson v. Commonwealth, Ky., 650 S.W.2d 250, 251 (1983). The question then is whether the Commonwealth can split the convictions, merged for PFO purposes, and use two to enhance as a subsequent offender and one to enhance as a PFO (emphasis original).

The Court then considered the effect of its ruling in a similar case, Howard v. Commonwealth, Ky., 777 S.W.2d 888 (1989), cert. denied, Howard v. Kentucky, 494 U.S. 1068, 110 S.Ct. 1787, 108 L.Ed.2d 789 (1990). The Court pointed out that in Howard the appellant pled guilty to a misdemeanor and two felonies. While the two felony convictions merged for purposes of the PFO statute[1], the misdemeanor conviction did not merge. The misdemeanor drug conviction "stood alone, and was independently used to obtain the subsequent offender conviction". Returning to Ray's appeal, the Supreme Court stated as follows:

> In Ray's case, by contrast, all three 1993 felony convictions merged and must be treated as one for PFO purposes. KRS 532.080(4). Using one of the 1993 convictions to enhance Ray's sentence as a subsequent offender, and then either or both of the other 1993 convictions to enhance for PFO I, is using that one conviction to doubly

[1] KRS 532.080(4) provides as follows: "For the purpose of determining whether a person has two(2) or more previous felony convictions, two (2) or more convictions of crime for which that person served concurrent or uninterrupted consecutive terms of imprisonment shall be deemed to be only one (1) conviction, unless one (1) of the convictions was for an offense committed while that person was imprisoned."

enhance his sentence: for PFO purposes all the 1993 convictions are merged, and whatever component is used to prove subsequent offender status is necessarily part of the merged 1993 convictions used for PFO purposes (emphasis original). Thus, the 1993 convictions are as one for PFO purposes and none of the components can be used also to enhance Ray's sentence via subsequent offender status.

The Commonwealth claims that error, if any, was harmless "because it is unclear which felony convictions were used to enhance the appellant's sentence as a subsequent offender and which were used to enhance his sentence for PFO-I." However, a brief review of the record makes clear that the 1993 convictions had to be the bases for both enhancements. The only prior drug offenses Ray committed were in 1993; thus, one or both of the 1993 trafficking convictions must have been the convictions used to enhance Ray's sentence as a subsequent offender. Regarding PFO status, it is true that under KRS 532.080 (3) PFO I requires proof of only two prior felony convictions, and Ray had two prior felony convictions (1983 and 1977) apart from the 1993 convictions. But, KRS 532.080(3)(c)(1) states that, to be convicted of PFO I status, the offender must have completed service of the sentence imposed on any previous felonies within five years prior to the date of commission of the current felony. The 1993 convictions were the only prior felonies on which Ray completed service within five years of committing the instant felony.

Because the 1993 convictions could have been used to enhance Ray's sentence as either a subsequent offender or PFO I, but not as both, the authorized sentencing range would be not less than ten years nor more than twenty (emphasis added). Thus, the twenty-year sentence Ray received was within the authorized range. However, in sentencing him, the trial court erroneously believed Ray's trafficking conviction could be doubly enhanced by splitting up the 1993 convictions, making twenty years the minimum possible sentence. Thus, we remand this case for resentencing.

At the resentencing hearing, the trial court stated that if it had not erred at the original sentencing hearing, the Commonwealth then would have been allowed to choose which enhancement method to use. Upon this rationale, the trial court accepted the Commonwealth's election to proceed on the PFO I enhancement. On April 8, 1997, the trial court in accordance with the Commonwealth's recommendation sentenced Ray to prison for five years on the trafficking conviction enhanced to ten years based upon the persistent felony conviction. This appeal followed.

Ray makes the following three arguments on appeal: (1) "it was fundamentally unfair for the court to treat the proceeding as sentencing de novo for the prosecution, but not the appellant"; (2) "the court had no power to set aside a final, valid underlying judgment which included an enhanced sentence"; and (3) "appellant was entitled to the rule of lenity at resentencing". Ray's main argument is that his sentence should have been enhanced pursuant to his status as a subsequent offender and not pursuant to his status as a persistent felony offender. The distinction is important because a defendant who receives a ten-year prison sentence, under the subsequent offender statute is eligible for parole after serving two years; while the same defendant under the PFO I statute is not eligible for parole until he has served all ten years.

In the original appeal, the Supreme Court's opinion stated that "the 1993 convictions could have been used to enhance Ray's sentence as either a subsequent offender or PFO I, but not

as both. . . .” We conclude from this statement that Ray could have been properly sentenced on remand through either method of enhancement. Based upon the Supreme Court’s express language, we conclude that the trial court did not err when it accepted the Commonwealth’s election to proceed under the PFO I statute rather than the subsequent offender statute.

Ray contends that by allowing the Commonwealth to make an election as to the type of enhancement to apply to his underlying conviction, “the trial court treated the remand proceeding as a new sentencing proceeding as far as the Commonwealth was concerned.” Ray claims that at resentencing he had “the right to request a jury trial.” This issue is not properly preserved for our review because Ray did not seek a jury trial at the resentencing. The Supreme Court’s decision left the underlying conviction in place and remanded the case for resentencing. If Ray had requested a jury trial as to the resentencing, the Commonwealth would have still been able to elect to proceed with the PFO enhancement. If Ray had been convicted of PFO I, (he has never challenged the evidence in support of this charge), the jury would have then recommended an enhanced sentence of between 10 and 20 years. Since the Commonwealth agreed to the minimum PFO I sentence of 10 years, there was no benefit for Ray to have a jury trial.

Ray’s second argument is that the trial court impermissibly altered the judgment of conviction because “[a]t the resentencing hearing, the trial court stated that the underlying conviction was for trafficking, a subsequent offense”.

Ray alleges that the trial court altered an affirmed judgment of conviction when it allowed enhancement pursuant to the PFO I statute rather than the subsequent offender statute. Ray's contention that the original conviction was for "trafficking, a subsequent offense" is simply inaccurate. Since the trial did not have a guilt phase, the jury did not even hear any proof of prior offenses. The jury verdict read as follows: "We[,] the jury[,] find the Defendant GUILTY of First-Degree Trafficking in a Controlled Substance under Instruction No. 2". Ray's argument that the jury convicted him of being a subsequent offender is totally without merit. Thus, the trial court did not alter the judgment of conviction.

Ray's final argument is that the "rule of lenity" should apply. He states: "Given the facts and the nonspecific nature of the order on remand, the trial court should have accorded appellant benefit of the less harsh result on resentencing." This argument is likewise misplaced. Apparently, but without citation, Ray is referring to the "rule of lenity" as discussed in Woods v. Commonwealth, Ky., 793 S.W.2d 809, 814 (1990); Boulder v. Commonwealth, Ky., 610 S.W.2d 615, 618 (1980)(overruled on other grounds); and Commonwealth v. Colonial Stores, Inc., Ky., 350 S.W.2d 465, 467 (1961). The rule of lenity provides that "[p]enal statutes are not to be extended by construction, but must be limited to cases clearly within the language used (citation omitted). 'Moreover, doubts in the construction of a penal statute will be resolved in favor of lenity and against a construction that would produce extremely

harsh or incongruous results.'" Woods, supra, at 814. If the "rule of lenity" had any applicability in this case, it was when the case was before the Supreme Court. Obviously, the Supreme Court saw no place for the rule of lenity because it expressly stated that either method of enhancement, but not both methods, was appropriate. The real issue is one of prosecutorial discretion. Prosecutors regularly exercise such discretion in deciding which offense to prosecute and which enhancements to seek. The Supreme Court's decision, which is the law of the case, gave the prosecutor that discretion.

For the foregoing reasons, we affirm the judgment of the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Hon. Sally Wasielewski
Lexington, Kentucky

BRIEF FOR APPELLEE:

Hon. A.B. Chandler III
Attorney General

Hon. Perry T. Ryan
Asst. Attorney General
Frankfort, Kentucky