

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002060-MR

JAMES CARTER

APPELLANT

v. APPEAL FROM SIMPSON CIRCUIT COURT
HONORABLE WILLIAM R. HARRIS, JUDGE
INDICTMENT NO. 97-CR-00091

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * **

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

JOHNSON, JUDGE: James Carter appeals from a final judgment of the Simpson Circuit Court entered on August 3, 1998, sentencing him to prison for ten years following conviction by a jury for trafficking in a controlled substance (cocaine) and being a persistent felony offender in the second degree (PFO II). Having concluded that Carter's previously probated felony conviction qualifies under KRS¹ 532.080(2) for PFO II enhancement purposes, we affirm.

¹Kentucky Revised Statutes.

After receiving numerous complaints about illegal drug activity in the spring of 1997, the Kentucky State Police targeted the area of the Simpco Terrace View Apartments as part of an undercover drug operation. Sergeant Jere Hopson worked with and monitored undercover drug buys by a volunteer, who acted as a confidential informant. During a drug buy monitored by Sgt. Hopson on the night of March 12, 1997, the confidential informant went to the Simpco Terrace View Apartments and purchased 1.6 grams of cocaine from an individual he identified as Carter. The drug transaction was recorded on a hidden audiotape recorder.

Following a trial on June 24, 1998, at which Carter testified, the jury found him guilty of trafficking in a controlled substance (cocaine) in the first degree in violation of KRS 218A.1412. During the penalty phase of the trial, the Commonwealth presented evidence that Carter had been convicted previously of the felony offense of receiving stolen property and two misdemeanor offenses. When Carter committed the receiving stolen property felony offense in July 1994, he was eighteen years old. In March 1996, Carter had been sentenced to one year on the receiving stolen property conviction, but the circuit court placed him on probation for a period of five years rather than ordering him to serve the one-year prison sentence. Carter testified that he was on probation at the time he committed the trafficking offense on March 12, 1997. At the end of the penalty phase, the jury found Carter guilty of being a persistent felony offender in the second degree and recommended a prison sentence of ten years on trafficking in a controlled substance (cocaine)

enhanced to the minimum prison sentence of ten years on the PFO II conviction.

On June 29, 1998, Carter filed a motion for a new trial. He raised several issues including his claim that it was error to convict him as a persistent felony offender because he had never been imprisoned on a felony. On July 20, 1998, the trial court conducted a hearing on the motion for a new trial and on sentencing. Relying on the Commentary to KRS 532.080,² defense counsel argued that if a defendant's prison sentence for a prior felony conviction had been probated, the probated sentence could not be used for enhancement purposes for a persistent felony offender conviction. The trial court denied the motion for a new trial and sentenced Carter to serve ten years in prison. This appeal followed.

On appeal, Carter raises the single issue of whether he was properly convicted of the status offense of being a PFO II when he had received a probated sentence on the underlying felony conviction. As he did in his argument before the circuit court, Carter relies on the Commentary to the persistent felony offender statute for his position that before he could be convicted as a PFO II he must have been imprisoned on the underlying felony conviction.

The current version of KRS 532.080 provides in relevant part:

(2) A persistent felony offender in the second degree is a person who is more than

²The trial court noted that defense counsel had raised this issue during the trial.

twenty-one (21) years of age and who stands convicted of a felony after having been convicted of one (1) previous felony. As used in this provision, a previous felony conviction is a conviction of a felony in this state or conviction of a crime in any other jurisdiction provided:

. . . .

(c) That the offender:

1. Completed service of the sentence imposed on the previous felony conviction within five (5) years prior to the date of commission of the felony for which he now stands convicted; or

2. Was on probation, parole, conditional discharge, conditional release, furlough, appeal bond, or any other form of legal release from any of the previous felony convictions at the time of commission of the felony for which he now stands convicted; or

3. Was discharged from probation, parole, conditional discharge, conditional release, or any other form of legal release on any of the previous felony convictions within five (5) years prior to the date of commission of the felony for which he now stands convicted[.]

The Commentary accompanying KRS 532.080 states in relevant part:

Subsection (2) sets forth a definition of a previous felony conviction. . . . Subsection (c) requires that the defendant must have been imprisoned for the prior offense before it can be treated as a previous felony conviction under this section. The purpose of this requirement is to restrict application of the habitual offender statute to persons who have been previously exposed to an institutional rehabilitative effort.

As the trial court stated, the above-cited portion of the Commentary appears to be in direct conflict with the express

language of the statute. The Commentary was promulgated in 1974 to accompany the new Penal Code enacted that year to provide some assistance in construing the statutes in light of legislative history. It embodies revisions of the notes that previously accompanied the final draft of the Penal Code in 1971.³ The original 1974 version of KRS 532.080(2)(c) required a previous felony conviction and "that the defendant was imprisoned under sentence for such conviction prior to commission of the present felony."⁴ In 1976, KRS 532.080(2)(c) was amended to include within the definition of previous felonies, convictions for which the defendant received a probated sentence, which now appear in Subsections 2 and 3.⁵ As the Court in Commonwealth v. Hinton⁶ stated with reference to the viability of the Commentary to the revised version of KRS 532.080(2):

While the Commentary is a source of interpretation for the original Act, once there is an amendment the portion of the Commentary on that subject loses its validity. The Commentary cited supra was cast in relation to a statute that required actual imprisonment and is now repealed, hence is no longer applicable.⁷

Consequently, Carter's reliance on the Commentary is misplaced. The post-1976 version of KRS 532.080(2) clearly authorizes the use of a prior felony conviction for which a

³ See Kennedy v. Commonwealth, Ky., 544 S.W.2d 219 (1976).

⁴1974 Ky. Acts 406, § 280.

⁵1976 Ky. Acts (Extra Session) 14, § 474.

⁶Ky., 678 S.W.2d 388 (1984).

⁷Id. at 390.

defendant received a probated sentence as a predicate felony conviction for PFO II status purposes. Actual imprisonment is no longer required.⁸ Since Carter was on probation for a felony conviction for receiving stolen property at the time he committed the trafficking offense, he was properly convicted of PFO II. The trial court did not err in denying the motion for a new trial. The judgment of the Simpson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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⁸See also Commonwealth v. Richardson, Ky., 674 S.W.2d 515, 518 (1984) (affirming persistent felony conviction involving prior conviction with probated sentence); Pedigo v. Commonwealth, Ky. App., 644 S.W.2d 355, 358 (1982) (affirming persistent felony conviction involving prior conviction with conditionally discharged sentence which the Court equated with a probated sentence).