

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-000195-MR  
and  
NO. 1999-CA-000693-MR

WILLIAM NEAL

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE REBECCA OVERSTREET, JUDGE  
ACTION NO. 97-CR-01378

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: GUDGEL, Chief Judge; EMBERTON and TACKETT, JUDGES.

EMBERTON, JUDGE: These consolidated appeals stem from the denial of appellant's motion for relief pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 and from the denial of a subsequent Kentucky Rules of Civil Procedure (CR) 59.05 motion to vacate the denial of the previous motion for post-conviction relief. Appellant alleged in his RCr 11.42 motion that he had been denied effective assistance of counsel in that he was permitted to enter an unconditional guilty plea to charges of operating a motor vehicle on a suspended license, third offense,

and of being a persistent felony offender in the second degree, under circumstances which subjected him to an improper double enhancement of the charges against him. Because we are convinced that there was no improper double enhancement, we affirm the denial of both the RCr 11.42 and the CR 50.05 motions.

On October 20, 1995, appellant pled guilty to one count of operating a motor vehicle under the influence of alcohol, fourth offense, and one count of operating a motor vehicle on a suspended license, third offense, for which he was sentenced to one year of imprisonment on each count to be served consecutively. Imposition of the sentences was withheld and appellant was placed on probation for a period of three years. Approximately two and one-half years later, on February 18, 1998, appellant pled guilty to one count of operating a motor vehicle on a suspended license, third offense, and to one count of being a second-degree persistent felony offender. The Commonwealth used the 1995 conviction for operating a motor vehicle on a license suspended for DUI to enhance the 1998 operating a vehicle on a suspended license to a third offense, and the prior DUI fourth conviction served as the basis for the charge of PFO II.

On June 17, 1998, appellant filed the instant RCr 11.42 motion alleging, among other things, that he had received ineffective assistance of counsel as a result of the failure of his counsel to object to the improper splitting of his 1995 convictions to enhance the 1998 convictions. After the denial of that motion, appellant, relying primarily upon a recent decision

of the Kentucky Supreme Court in Gray v. Commonwealth,<sup>1</sup> attempted in a CR 59.05 motion to convince the trial court that its previous ruling was erroneous. That motion was also denied by the trial court.

Appellant again argues in this forum that because his counsel did not object to the double enhancement of the charges against him, he was wrongly convicted of a PFO charge to which he had an absolute defense, demonstrating the requisite prejudice suffered as a result of his counsel's deficient performance. We disagree. Neither the opinion in Gray, supra, nor the law in effect at the time of appellant's 1998 guilty plea, prohibit the kind of double enhancement to which appellant was subjected.

Prior to distinguishing the result in Gray from the situation in appellant's case, we focus our discussion upon the decision of this court in Corman v. Commonwealth,<sup>2</sup> a case factually comparable to appellant's. Corman alleged impermissible double enhancement after he was indicted on a charge of DUI, fourth offense, and for being a persistent felony offender in the second degree. The latter indictment stated that it was based on appellant's prior felony conviction for operating a motor vehicle while his license was suspended for a third offense of DUI. Corman maintained that because his prior DUI convictions had been used to support the charge of DUI, fourth offense, and had also been used to prove the felony of third offense of operating a motor vehicle while his license was

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<sup>1</sup> Ky., 979 S.W.2d 454 (1998).

<sup>2</sup> Ky. App., 908 S.W.2d 122 (1995).

suspended for DUI, use of the OMV conviction to support the PFO II charge constituted double enhancement. In rejecting Corman's contention, the court offered the following explanation of the manner in which prior felonies may be used for enhancement purposes:

The rule is now established that when a single prior felony is utilized to create an offense or enhance a punishment at the trial of the second crime, that same prior felony cannot be used at that trial to prosecute the defendant as a persistent felony offender. [Citations omitted]. If, however, the prior felony used to underlie PFO conviction is a separate prior felony from the one used to create the offense or enhance its punishment, the offense can be further enhanced under the PFO statute. . . .

. . . .

While prosecution for a violation of KRS 189A.090 does require that the defendant have his license revoked or suspended for a violation of KRS 189A.010 (DUI), KRS 189A.090 is a completely separate offense from KRS 189A.010. Violations of KRS 189A.010 do not alone give rise to a charge under KRS 189A.090. The defendant must also have his license revoked (KRS 189A.070) for such violation, and then the defendant must be found to have been operating a motor vehicle while said license was revoked (and must be so convicted three times in order for the offense to be a felony under 189A.090(2)(c)). As the prior DUI convictions are separate convictions from the OMV on a revoked license charge, the case is distinguishable from Heady, supra, and under Eary, supra, it was not double enhancement for the court to allow the OMV for revoked license charge to enhance the DUI 4<sup>th</sup> charge for PFO purposes. (Emphasis added).<sup>3</sup>

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<sup>3</sup> 908 S.W.2d at 123-124.

The import of Gray, supra, to the Corman rationale, and to PFO cases in general, is its explanation of the concept of merger contained in KRS 532.080(4):

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. (Emphasis added).

Although appellant in this case argues that is exactly his situation because his 1993 convictions resulted in a sentence of uninterrupted consecutive sentences, the fallacy in his argument lies in the fact that he was not charged with PFO I and thus his prior offenses did not merge for PFO purposes.

The court in Gray reaffirmed the Corman holding that a single prior conviction cannot form the basis for enhancement under both the DUI statute and the PFO statute, and also explained how the merger concept fits into the equation. Citing Howard v. Commonwealth, Ky., 777 S.W.2d 888 (1989), the court outlined the principle at work as follows:

In Howard, the defendant was convicted of drug trafficking as a subsequent drug offender and of being a PFO in the first degree. Id. at 888. The defendant also had been convicted of two prior felonies and a prior misdemeanor in 1983, the sentences of which were to be served concurrently. The two 1983 felonies, merged under KRS 532.080(4) for PFO purposes, formed part of the basis for the PFO I conviction, and the 1983 misdemeanor formed the basis for the subsequent offender enhancement under the drug statute. Id. at 889. The defendant argued that because the three prior sentences ran concurrently, all of the 1983 convictions

merged for PFO purpose and could not then be split to obtain both PFO I and subsequent offender convictions. The Court held that although the sentences for the 1983 crimes had merged, the underlying convictions, except the two prior felonies for PFO purposes, had not. In upholding defendant's double enhancement, the Court asserted that the "1983 drug misdemeanor conviction, on the other hand, never merged with the 1983 convictions for any purpose, always stood alone, and was independently used to obtain the subsequent offender conviction."<sup>4</sup> (Emphasis added).

Similarly in appellant's case, there was no merger for PFO purposes because he was only charged with PFO II. Because only one prior conviction was required to support the PFO II charge, the 1995 OMV conviction remained independent as the merger statute had no application. It is only when determining whether a person has two or more previous convictions that KRS 532.080(4) comes into play. Thus, there was no impermissible double enhancement by using appellant's 1995 OMV conviction to elevate his current OMV charge to the third offense and using his 1995 DUI 4<sup>th</sup> conviction to support the charge of PFO II. A careful examination of Corman, Howard, and Gray clearly demonstrates that there is no conflict in those opinions.

Therefore, because there was no improper double enhancement, counsel could not be ineffective for failing to object to the indictments. Accordingly, the denial of appellant's RCr 11.42 motion is affirmed.

ALL CONCUR.

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<sup>4</sup> 979 S.W.2d at 456.

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