

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002418-MR

ALBERT CLAYTON HOBBS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 99-CR-00817

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: HUDDLESTON, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Appellant, Albert Clayton Hobbs, appeals from a judgment of the Fayette Circuit Court convicting him of driving under the influence, fourth offense and first-degree persistent felony offender, and sentencing him to ten years' imprisonment. Having determined that appellant waived his right to contest his 1994 guilty plea and that his DUI, fourth offense conviction was valid, the trial court properly denied appellant's motion to dismiss, hence, we affirm.

Appellant was indicted by the Fayette County Grand Jury on November 16, 1998, indictment no. 98-CR-1184, on one count of operating a motor vehicle under the influence, third offense,

blood alcohol level of .18 or above, and with being a first-degree persistent felony offender (PFO I). The DUI charge resulted from an offense occurring on September 13, 1998. The indictment reflected that appellant had been convicted of DUI twice in 1994, in Jessamine County and in Fayette County, as well as four prior felonies. On December 4, 1998, appellant filed a motion in Fayette Circuit Court to suppress his 1994 Jessamine County DUI conviction as based on a constitutionally defective guilty plea, and dismiss the DUI, third offense charged in indictment no. 98-CR-1184. The trial court denied the motion in an order entered on January 20, 1999.

While the case in indictment no. 98-CR-1184 was pending, appellant committed a fourth DUI offense, on December 23, 1998, for which appellant entered a guilty plea to DUI, third offense in Fayette County on January 5, 1999. As a result, upon motion by the Commonwealth, indictment no. 98-CR-1184 was dismissed, and, on August 2, 1999, appellant was reindicted by the Fayette County Grand Jury (indictment no. 99-CR-817) on one count of operating a motor vehicle under the influence, fourth offense and PFO I, resulting from the September 13, 1998 incident. The Commonwealth used the 1994 Jessamine County conviction, the 1994 Fayette County conviction, and the January 5, 1999 Fayette County conviction as the basis for the DUI, fourth offense charge. On August 16, 1999, appellant filed a motion to dismiss indictment 99-CR-817, on grounds including that "at least one of his prior DUI convictions" was the result of a constitutionally invalid guilty

plea, and that the Commonwealth was improperly using a conviction subsequent to the offense charged in indictment 99-CR-817 as a basis for the charge. Contrary to the Commonwealth's assertions, it appears from the record that the trial court did consider appellant's motion to dismiss, which it denied on August 20, 1999. On August 20, 1999, appellant entered a conditional guilty plea, reserving the right to appeal the trial court's adverse decision on his motion to dismiss. In an order entered on September 14, 1999, appellant was sentenced to one year's imprisonment for the DUI, fourth offense, enhanced to ten years by the PFO I, from which order he appeals.

On appeal, appellant argues that the trial court erred when it failed to suppress his 1994 Jessamine County DUI conviction. Appellant contends the plea was constitutionally defective, as he was not represented by counsel and the court did not properly establish that his plea was knowing, voluntary and intelligent as required by Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). Although appellant challenged the 1994 Jessamine County plea in his motion of December 4, 1998 in regard to indictment no. 98-CR-1184, the record does not indicate, and appellant does not contend, that appellant challenged the plea when he pled guilty to DUI, third offense in Fayette County on January 5, 1999. Having failed to contest the plea in the January 5, 1999 proceedings, per the Kentucky Supreme Court's holding in Commonwealth v. Hodges, Ky., 984 S.W.2d 100 (1998), appellant waived his right to contest the plea in a subsequent proceeding.

Appellant next argues that the trial court erred when it refused to dismiss the superceding indictment of August 2, 1999 which charged DUI, fourth offense in relation to the September 13, 1998 incident. Appellant argues that the Commonwealth should not be allowed to reindict him using a conviction subsequent (here, the January 5, 1999 conviction) to the offense being tried (the September 13, 1998 offense) to establish his status as a felon.

In Royalty v. Commonwealth, Ky. App., 749 S.W.2d 700 (1988), this Court addressed a similar fact pattern. In Royalty, the defendant received his second DUI conviction for his third DUI arrest and received his third DUI conviction for his second DUI arrest. This Court affirmed the DUI, third offense conviction, finding Commonwealth v. Ball, Ky., 691 S.W.2d 207, 210 (1985) dispositive of the issue, in which the Kentucky Supreme Court stated:

One who has been convicted of engaging in the prohibited conduct of operating a motor vehicle anywhere in this state while under the influence of alcohol in violation of Section (1) of KRS 189A.010, and who has the status at the time of such conviction of having been previously convicted within five years of such conviction of driving under the influence, is a previous offender and is subject to the enhancement provisions of Section (2) (a), (b), and (c) of KRS 189A.010.

The enhancement provisions, which were contained in KRS 189A.010 (4) at the time of appellant's convictions in 1999 [KRS 189A.010(5) effective October 1, 2000], provide that for a fourth or subsequent offense within a five-year period, a person shall be guilty of a Class D felony. KRS 189A.010(4) (e) [KRS

189A.010(5)(e) effective October 1, 2000] defines "prior offenses" to include:

. . . all convictions in this state, and any other state, or jurisdiction for operating or being in control of a motor vehicle while under the influence of alcohol or other substances that impair one's driving ability, or any combination of alcohol and such substances, or while having an unlawful alcohol concentration, or driving while intoxicated, but shall not include convictions for violating subsection (1)(e) of this section.

Appellant's DUI conviction record is as follows:

| <u>Violation Date</u> | <u>Convicted</u> |
|-----------------------|------------------|
| 09/05/94 | 09/22/94 DUI 1st |
| 09/11/94 | 10/17/94 DUI 2nd |
| 09/13/98 | 08/20/99 DUI 4th |
| 12/23/98 | 01/05/99 DUI 3rd |

While the case resulting from appellant's September 13, 1998 offense was pending, indictment no. 98-CR-1184, he committed a fourth DUI offense on December 23, 1998, to which he pled guilty as a DUI, third offense on January 5, 1999. As appellant now had three prior DUI convictions, 98-CR-1184 was dismissed, and on August 2, 1999, appellant was properly reindicted for the September 13, 1998 offense as a DUI, fourth offense instead of third, to which he conditionally pled guilty on August 20, 1999. Per the terms of KRS 189A.010, and the holdings of Royalty and Ball, we conclude appellant's DUI, fourth offense conviction is valid.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mark Wettle
Louisville, Kentucky

BRIEF FOR APPELLEE:

A. B. Chandler, III
Attorney General

John E. Zak
Assistant Attorney General
Frankfort, Kentucky