

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-000137-MR

RICKY W. PACE

APPELLANT

v. APPEAL FROM HARLAN CIRCUIT COURT  
HONORABLE RON JOHNSON, JUDGE  
ACTION NO. 99-CR-00123

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING IN PART, REVERSING IN PART,  
AND REMANDING

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BEFORE: HUDDLESTON, KNOPF, AND MILLER, JUDGES.

MILLER, JUDGE: Ricky W. Pace brings this appeal from a December 22, 1999, judgment of the Harlan Circuit Court. We affirm in part, reverse in part, and remand.

On June 8, 1999, appellant was arrested for DUI while operating his all terrain vehicle (ATV) at Martin Fork Lake in Harlan County, Kentucky. On September 16, 1999, appellant was indicted by the grand jury of Harlan Circuit Court upon the offenses of: (1) driving under the influence (DUI) (Kentucky Revised Statute (KRS) 189A.010), fourth offense in five years; (2) driving on a license suspended for DUI (KRS 189A.090), second

offense; (3) operating an ATV on a highway (KRS 189.515(1)); and (4) operating an ATV with no helmet (KRS 189.515(4)).

On November 3, 1999, appellant was tried before a jury of the Harlan Circuit Court and found guilty on all charges. Judgment was entered against appellant December 22, 1999, and he was sentenced to imprisonment for a total of five years. This appeal follows.<sup>1</sup>

Appellant argues the trial court erred by allowing the prosecutor to cross-examine appellant during the guilt phase of the trial concerning his prior drunk driving convictions. Specifically, appellant claims his prior DUI convictions were inadmissible as "prior bad acts" under Kentucky Rules of Evidence (KRE) 404(b). This issue was not properly preserved by contemporaneous objection at trial. As a result, appellant urges this Court to consider the issue as "palpable error" under Ky. R. Crim. P. (RCr) 10.26, which states:

A palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

It is well established that prior DUI convictions are inadmissible in the guilt phase of a DUI trial. See Commonwealth v. Ramsey, Ky., 920 S.W.2d 526 (1996); O'Bryan v. Commonwealth,

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<sup>1</sup>In his brief, appellant concedes that his convictions of driving on a license suspended for DUI, second offense, operating an ATV on a highway, and operating an ATV with no helmet should be affirmed.

Ky., 920 S.W.2d 529 (1996); Dedic v. Commonwealth, Ky., 920 S.W.2d 878 (1996). KRS 189A.010(4) "merely recognizes that one previously convicted of driving under the influence has the status of a prior offender and can be penalized for having that status." See Ramsey, 920 S.W.2d 526, 528 quoting Commonwealth v. Ball, Ky., 691 S.W.2d 207, 209 (1985). As such, subsection (4) is "nothing more than a sentencing statute with provision for enhancing the penalty for subsequent offenders." See Ramsey, 920 S.W.2d 526, 528, quoting Clay v. Commonwealth, Ky., 818 S.W.2d 264, 265 (1991).

During the guilt phase of the trial, appellant was cross-examined extensively concerning his prior DUI convictions:

- Q. Were you wearing a helmet?  
A. No.  
Q. Were you driving your ATV on the public highway?  
A. Yeah.  
Q. Were you driving while your license was suspended for DUI?  
A. Yeah.  
Q. And had you previously been convicted of driving while your license was suspended for DUI?  
A. Yeah.  
Q. Did you know that it was illegal for you to driving an ATV while...  
A. I just wasn't thinking.  
Q. Okay, let me finish my question. Did you know that it was illegal for you to drive an ATV while your license was suspended for DUI?  
A. Not on dirt roads it ain't, in the mountains. I just wasn't thinking that day when them kids...  
Q. You had a prior conviction for driving your ATV while your license was suspended?  
A. No, ... I, yeah, I, let me tell you how I got that.  
Q. Okay.  
A. My wife got me, I got drunk one night, passed out, and she roused me up and put me on it. I went right below where I live, off

in the creek. Mr. Thompson was the one who arrested me for it.

Q. And what were you charged with that night?

A. DUI.

Q. Anything else?

A. I didn't even know I was in the [inaudible - possibly 'world'?].

Q.(by Court): What did your wife do? Did you say?

A. Put me on a four wheeler and started it and started and turned me loose for me to die drunk.

Q.(By Court). Started it up? How far did you go on that?

A. Approximately about a hundred foot, about a hundred-fifty foot over my drive into the creek.

Q.(Comm.) And so that was all your wife's fault, right?

A. Yes. I had given her the keys and told her to put them up and hide them and not let me have them.

Q. And that time you were charged with, weren't you, with driving on a DUI suspended license?

A. (nods affirmatively)

Q. For being on the ATV driving?

A. Yeah. I pleaded guilty to it.

Q. You were also charged with driving without a helmet?

A. The night I was arrested up by the lake, Mr. Thompson arrested me, I had a pair of safety glasses...[balance of appellant's response dealing with belief that law required only safety glasses not transcribed]

Q. Now, you've been injured previously in an all terrain vehicle wreck, is that right?

A. I've been injured two or three times...

Q. On all terrain vehicle wrecks?

A. Yeah.

Q. Did these wrecks occur while you were drunk?

A. Uh Uh (negative)

Q. Did any of these occur when you were drunk?

A. No, most of them were just climbing up hills. (inaudible) it just rolled back on you.

Q. There was one of them in April of this year where you were hospitalized because you had an ATV wreck while you were drunk, wasn't it?

A. This year? Not this year I ain't.  
When I wrecked below the house I had some ribs that got cracked.  
Q. Okay, you were on your ATV that night?  
A. Yeah.  
Q. And you were drunk?  
A. Yeah, when (inaudible) started it for me.  
Q. When was that?  
A. That was back, it seemed like April.  
Q. It was April of this year?  
A. Yeah.  
Q. That's what I just asked, right?  
A. Yeah, but I wasn't hospitalized. I just went to the hospital, he took me from the hospital to the jail.  
Q. You went to the hospital for treatment, though?  
A. Yeah.  
Q. Bit [sic] they didn't keep you overnight?  
A. Right.

(Appellant's brief, pp. 5-7.) The above testimony deals almost exclusively with appellant's past DUI convictions on an ATV. In the case at hand, appellant was charged with DUI on an ATV. The erroneously admitted evidence also concerned appellant's prior DUI convictions on an ATV. It is hard for this court to conceive of any prior bad acts that would have had any greater prejudicial effect on the jury. Under Ramsey, such was clearly inadmissible during the guilt phase of the trial.

Whereas the appellant refused an Intoxilyzer test and allegedly field sobriety tests, there was no *objective evidence* of intoxication. As the jury's verdict hinged upon the perceived credibility and veracity of the witnesses -- namely Trooper Thompson and appellant -- we are of the opinion that appellant's credibility was certainly impinged by the introduction of his prior DUI convictions on an ATV. In the absence of such testimony, we believe there was a substantial possibility the

outcome of the trial would have been different. See Jackson v Commonwealth, Ky. App., 717 S.W.2d 511 (1986).

In sum, we believe admission of appellant's prior DUI convictions on an ATV constitutes palpable error as set out in RCr 10.26.

We affirm his convictions of driving on a license suspended for DUI, second offense, operating an ATV on a highway, and operating an ATV with no helmet and reverse his conviction of DUI, fourth offense.

For the foregoing reasons, the judgment of the Harlan Circuit Court is affirmed in part, reversed in part, and this case is remanded for proceedings consistent with this opinion.

HUDDLESTON, JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

KNOPF, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: Respectfully, I dissent from the portion of the majority opinion which reverses Pace's conviction for driving under the influence (DUI), fourth offense. Prosecution of a defendant on charges of DUI and operating a motor vehicle while licence is suspended for DUI presents a number of difficulties. Although the prior DUI convictions are an element of the latter offense, they are not admissible during the guilt phase of the DUI trial. Commonwealth v. Ramsey, Ky., 920 S.W.2d 526 (1996); O'Bryan v. Commonwealth, Ky., 920 S.W.2d 529 (1996); and Dedic v. Commonwealth, Ky., 920 S.W.2d 878 (1996). Thus, I agree with the majority that it was error to allow the prosecutor to cross-examine Pace during the guilt phase of the trial regarding his

prior DUI convictions. However, Pace failed to raise this objection during the trial. Furthermore, the evidence against Pace, while not overwhelming, was significant. Indeed, Pace admitted that he had been drinking; but merely denied that he was as intoxicated as Trooper Thompson had described. Based upon Newcomb v. Commonwealth, Ky. App., 964 S.W.2d 228 (1998), I do not agree with the majority opinion that the error affected Pace's substantial rights. Accordingly, I would affirm the conviction in all aspects.

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