

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000395-MR

PAMELA BROWN

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 99-CR-00100

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BUCKINGHAM, GUIDUGLI AND MILLER, JUDGES.

GUIDUGLI, JUDGE. Pamela Brown (Brown) appeals from the judgment of conviction entered by the Laurel Circuit Court on January 27, 2000, for operating a motor vehicle under the influence (DUI), third offense, with an alcohol concentration of 0.18 or above (KRS 189A.010(4)(c)), and driving on a suspended license (KRS 189A.090(2)(c), third offense. Brown entered a conditional plea of guilty pursuant to RCr 8.09 in which she claimed that KRS 189A.010(4)(c) is unconstitutional and that one of her prior DUI convictions should be excluded because it was constitutionally defective. We believe the trial court was correct in denying both motions, hence, we affirm.

On August 31, 1999, Brown was indicted by the Laurel County Grand Jury on the above-stated charges. The indictment alleged that her operator's license was suspended for a prior DUI, that she had two prior DUI convictions in Laurel County; one on March 17, 1997 (97-T-00917) and the other one on October 20, 1998 (98-T-03332); and that her blood alcohol level was greater than 0.18 (the police report indicated 0.196). Subsequently Brown filed motions to dismiss the charges arguing KRS 189A.010(4)(c) was unconstitutional and seeking to exclude conviction 97-T-00917 because she was unrepresented at the time and her plea was thus constitutionally flawed. The trial court denied both motions. On December 10, 1999, the Laurel Circuit Court entered a written seven page order denying Brown's attack on the constitutionality of KRS 189A.010(4)(c). On the day of her conditional guilty plea, the trial court orally denied her motion as to the prior plea without explanation. After a lengthy discussion between Brown and the trial court relative to her legal representation in this matter, the facts of this case and the pending legal consequences, Brown entered her conditional plea of guilty. This appeal followed.

Brown's first contention dealing with the constitutionality of KRS 189A.010(4)(c) has been dealt with recently by this Court. The cases of Cornelison v. Commonwealth, Appeal No. 1999-CA-001825-MR, rendered July 7, 2000 (motion for discretionary review pending) and Barker v. Commonwealth, Appeal No. 1999-CA-000500-MR, rendered September 29, 2000, rejected a similar constitutional challenge aimed at KRS 189A.010(4)(c).

Both Cornelison and Barker discussed the claims raised herein that the DUI statute was violative of the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution and Sections 2, 11, and 17 of the Kentucky Constitution, in that it is arbitrary, capricious and unreasonable legislation. We believe both Cornelison and Barker are dispositive on this issue and that Brown has failed to maintain her burden of establishing that KRS 189A.010(4)(c) is unconstitutional. See Commonwealth v. Howard, Ky., 969 S.W.2d 700 (1998).

Brown's second argument is that the trial court should have excluded one of her prior DUI convictions. She alleges that when she pled guilty to DUI on March 17, 1997, she was not represented by counsel and her plea was not entered knowingly and voluntarily. Brown claims under Commonwealth v. Crawford, Ky., 789 S.W.2d 780 (1990), that the trial court "is required to read a defendant her rights unless, 1) she has signed a waiver, 2) has acknowledged her signature on the waiver, and 3) has further acknowledged that she understands those rights." (emphasis in appellant's brief). Brown concedes that she signed the waiver but claims no further inquiry was made to determine if she understood the contents of the waiver. Thus, she contends the 1997 DUI conviction, which was used to enhance this case, should have been excluded. We disagree.

First, it should be noted that neither the trial court nor this Court has been supplied with the video or audio tape recording of the plea exchange. In her motion before the trial court, Brown included a two-page transcript of the guilty plea

transcribed by an administrative specialist with the department of public advocacy. The transcription shows that Brown was asked if she understood the charges and her rights. She apparently did not reply to that question, but when asked how she wished to plea, she stated guilty. Also included in her motion was her signed acknowledgment and waiver of rights. Therein she acknowledged she understood her rights, the possible penalties, and that she was not under the influence of alcohol, drug or narcotics. Brown then stated she was guilty of DUI third and acknowledged that this conviction could be used to increase any penalties for additional DUI convictions within the next five years.

In Lynch v. Commonwealth, Ky. App., 610 S.W.2d 902, 904, 905 (1980), this Court held:

Boykin (v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)) requires that the trial court must establish that a defendant's guilty plea is being entered knowingly, intelligently, and voluntarily before accepting same.

....

In assessing whether the constitutional rights of the defendant were breached, pertinent factors are the totality of the circumstances including the background, experience, and conduct of the accused. (Citations omitted)

....

In considering the totality of the circumstances, as previously noted, it is permissible to take notice of appellant's background and experience. He is no newcomer to our system of criminal justice but rather has established such a continuous relationship with it that he is subject to penalty as an habitual criminal. Indeed, his

experience with this present case alone by necessity establishes certain familiarity(.) (Brown was charged with DUI 3rd offense when she pled guilty to 97-T-00917).

....

This Court is not to act de novo in determining the question of voluntariness. Rather is it to review the record before it to ascertain whether the court below acted erroneously in denying that appellant's pleas were made involuntarily.

Lynch, 610 S.W.2d at 904, 905.

Although there was no specific hearing or arguments presented to the trial court on this motion, the trial court did have the motion and attachments along with Brown's prior criminal history which was included in the trial record. Based upon this information, the trial court denied Brown's motion to exclude her prior DUI conviction in case No. 97-T-00917. A review of the trial court's record reveals that Brown had significant contacts with the criminal court system prior to her entering her guilty plea in 1997. She signed an acknowledgment and waiver of rights form and did not indicate on the record any questions as to her legal rights, but voluntarily and freely entered a guilty plea to the criminal charge. She later pled guilty to another DUI in 1998 (98-T-0332) and never raised the issue that the 1997 plea was invalid or unconstitutionally flawed. Based upon our review of this issue, we believe the trial court had ample information and a sound legal basis for denying her motion.

For the foregoing reasons, we affirm the judgment and sentence entered by the Laurel Circuit Court in this matter.

ALL CONCUR.

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