

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-000121-DG

KARIN BRANDENBURG

APPELLANT

ON MOTION FOR DISCRETIONARY REVIEW  
FROM HARDIN CIRCUIT COURT  
v. HONORABLE T. STEVEN BLAND, JUDGE  
ACTION NO. 98-XX-00008

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: BARBER, COMBS, AND McANULTY, JUDGES, JUDGES.

BARBER, JUDGE: On October 1, 1997, the Appellant, Karin Brandenburg ("Brandenburg") was charged with 56 counts of second-degree cruelty to animals (KRS 525.130); 66 counts of failure to license dogs in her possession or control (KRS 258.135); 66 counts of failure to vaccinate dogs against rabies (KRS 258.015); and 264 counts of failure to obtain a business license (Radcliff City Ordinance, Chapter 10, §§. 35 and 55). The cases were tried in Hardin District Court on March 26 and March 27, 1999. The jury convicted Brandenburg of all charges, and returned the following penalties:

1. On the 56 cruelty to animal counts, "1.5 months per count for a total of 84 months and a fine of \$200.00 per count for a total of \$11,200.00."

2. On the 66 failure to license counts, "a fine of \$50.00 per count for a total of \$3,300.00"

3. On the 66 failure to vaccinate counts, "a fine of \$100.00 per count for a total of \$6,600.00"

4. On the 264 failure to obtain a business license counts, "a fine of \$20.00 per count with 264 counts for a total of \$5,280.00."

Post-trial, Brandenburg filed a motion requesting that the court amend her 84-month jail sentence to twelve months to conform with the one year cap on aggregate misdemeanor sentences under KRS 532.110(b). Brandenburg also moved that her 56 1.5 month sentences be run concurrently under Stoker v. Commonwealth, Ky., 828 S.W.2d 619 (1992).

By order entered April 10, 1998, the district court denied Brandenburg's motion to run her jail sentences concurrently under Stoker, supra, and granted the motion to cap her sentence at twelve months under KRS 532.110(b).

On April 13, 1999, the district court amended its April 10 order making it final and appealable. Brandenburg appealed to Hardin Circuit Court.

On appeal, Brandenburg argued: (1) that the multiple 1.5 month jail sentences should be run concurrently under Stoker supra, (2) that the \$26,380 in total fines violated KRS

534.040(2)(a) (which provides for a maximum \$500.00 fine for a single Class A misdemeanor conviction) and the Kentucky and United States Constitutional prohibitions against excessive fines. By order entered December 15, 1999, the Hardin Circuit Court affirmed the lower court's judgment. We granted Brandenburg's motion for discretionary review.

KRS 532.110(2) provides that "[i]f the court does not specify the manner in which a sentence imposed by it is to run, the sentence shall run concurrently with any other sentence which the defendant must serve." Brandenburg contends that the district court pronounced sentence on the cruelty to animals charge of "1.5 months for 84 months total of 56 counts", following the conclusion of the March 27, 1999 trial. Brandenburg relies upon the district court's March 27, 1999 bench calendar entries. Brandenburg submits that sentences must be run concurrently, because the calendar entries do not specify the terms "consecutive" and/or "concurrent."

The subject calendar entry actually states "jury finding Sentence 1.5 months for 84 months total of 56 counts Cruelty 2d." (Emphasis added.) As we construe the entry, it simply notes the sentence the jury imposed, not that the court had actually imposed sentence on March 27, 1999. Brandenburg concedes that the trial court "orally reserved jurisdiction to 'review the sentence' on post-trial motions regarding consecutive versus concurrent sentencing." The trial court did not fail to specify whether Brandenburg's sentences were to run concurrently

or consecutively; rather, the trial court merely reserved its ruling on the issue. The April 10, 1999 order clearly indicates the sentences were to run consecutively up to the 12-month aggregate limit imposed by KRS 532.110(1)(b), satisfying any KRS 532.110(2) concerns in this case.

Brandenburg also contends that the trial court failed to include a jury instruction regarding whether any of the multiple sentences were to run concurrently or consecutively. She seeks to persuade us that her 56 1.5 month sentences must be run concurrently under Stoker v. Commonwealth, supra. The issue was not preserved. Brandenburg fails to cite to the record showing any objection to the jury instruction. In fact, Brandenburg concedes that trial counsel did not object to the instructions and did not tender alternative instructions. Nevertheless, we will address Brandenburg's argument under the "palpable error" rule expressed in RCr 10.26.

In support of her position, Brandenburg relies principally upon Stoker, supra, a multiple felony case. There, the jury was only given the choice of recommending that either all or none of the multiple felony sentences be run consecutively. The jury ultimately recommended that all the sentences be run consecutively. The Supreme Court held that, in felony cases involving multiple convictions, instructions must provide the jury with the option of running all, none, or any combination of multiple sentences consecutively. The Supreme

Court directed that all of Stoker's sentences should be run concurrently, to remedy the error.

Here, the only conviction resulting in a sentence of incarceration was the second-degree cruelty to animal charge. The Completed "Form Verdict No. 1" stated as follows:

We, the jury, find the Defendant **guilty** of 56 counts of Second-Degree Cruelty to Animals under Instruction No. 1 and fix her punishment at 1.5 months per count for a total of 84 months and a fine of \$200.00 per count for total of \$11,200.<sup>1</sup>

Brandenburg is not entitled to relief under the palpable error standard as set forth in RCr 10.26. Under this rule, an error is reversible only if a manifest injustice has resulted from the error. If, upon consideration of the whole case, there is not a substantial possibility the result would have been different, the error will be deemed nonprejudicial. Jackson v. Commonwealth, Ky. App., 717 S.W.2d 511 (1986); Graves v. Commonwealth, Ky., 17 S.W.3d 858, 864 (2000).

The jury fixed Brandenburg's punishment at "1.5 months for a total of 84 months." Brandenburg states in her brief, "[f]rom the verdict form, it is clear that the jury intended to sentence the Appellant to eighty-four months in the county jail[.]" We agree. Moreover, the trial court capped Brandenburg's sentence at 12 months in accordance with KRS

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<sup>1</sup>On the jury verdict form, "guilty" was circled and the underlined portions were handwritten.

532.110(1)(b). Thus, Brandenburg was not prejudiced by the trial court's failure to give a Stoker instruction. Had such an instruction been given, Brandenburg would have inevitably received a 12-month sentence.

Brandenburg also contends that the circuit court erred in affirming the district court's imposition of \$26,380.00 in fines. Brandenburg argues that the fines are excessive and violate KRS 534.040, Amendment VIII of the United States Constitution, and § 17 of the Kentucky Constitution.

First, we consider whether the fines violate KRS 534.040.

(1) Fines and imprisonment for misdemeanors shall not be mutually exclusive. In any case where imprisonment is authorized, a fine may be levied in addition to the imprisonment, or a fine may be levied as an alternative to imprisonment. Similarly, a fine may be levied in lieu of imprisonment. Whether the fine is to be levied as the sole penalty or as an additional or alternative penalty shall be in the discretion of the judge or jury as the case may be. If the trial is by jury, the jury shall have the discretion. This rule shall apply in all cases where a fine is not the exclusive penalty authorized by law.

(2) Except as otherwise provided for an offense defined outside this code, a person who has been convicted of any offense other than a felony shall be sentenced, in addition to any other punishment imposed upon him, to pay a fine in an amount not to exceed:

- (a) For a Class A misdemeanor, five hundred dollars (\$500); or
- (b) For a Class B misdemeanor, two hundred fifty dollars (\$250); or
- (c) For a violation, two hundred fifty dollars (\$250).

KRS 534.040 does not, on its face, impose a cap on the aggregation of misdemeanor fines. This is in stark contrast to the provision in the immediately preceding statute, KRS 534.030(3), which provides:

[w]hen a defendant is convicted of two (2) or more felonies committed through a single act and is sentenced to fines pursuant to subsection (1), the aggregate amount of the fines shall not exceed ten thousand dollars (\$10,000) or double the amount of the defendant's gain from commission of the offenses, whichever is the greater.

In interpreting statutes, this Court must "ascertain and give effect to the intention of the Legislature . . . ." Moore v. Alsmiller, 289 Ky. 682, 686-687; 160 S.W.2d 10, 12 (1942). The intention "must be determined from the language of the statute itself if possible." Id. Where legislation includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that the legislature acted intentionally and purposefully in the disparate inclusion or exclusion. Keene Corp. v. United States, 508 U.S. 200, 113 S.Ct. 2035, 124 L.Ed.2d 118 (1993); Russello v. United States, 464 U.S. 16, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983). KRS 534.040 does not provide for an aggregate limit upon multiple misdemeanor fines for misdemeanor convictions committed through a single act, unlike KRS 534.030(3), dealing with felonies. The commentary to KRS 534.040 states, that the misdemeanor fine scheme differs from the felony fine scheme because "fines for misdemeanors are generally more useful and

appropriate for purposes of deterrence than are fines for felonies." We conclude that the legislature did not intend to place a cap in the case of multiple misdemeanor fines.

Brandenburg also argues that the fines are excessive, in violation of § 17 of the Kentucky Constitution and Amendment VIII to the United States Constitution. Section 17 of the Kentucky Constitution provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishment inflicted." The VIII Amendment of the United States Constitution contains essentially identical language.

Workman v. Commonwealth, Ky., 429 S.W.2d 374, 378 (1968), applies a test to determine whether fines are excessive - - whether the punishment shocks the general conscience of society today and is intolerable to fundamental fairness.

Commonwealth v. Fint, Ky., 940 S.W.2d 896, 898 (1997), adopts the three-prong analysis from Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983): (1) the gravity of the offense and harshness of the penalty; (2) the sentences imposed upon other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions. In other cases, Kentucky courts have noted that § 17 of the Constitution of Kentucky is a constitutional limitation on the Legislature, in fixing punishment by statute, that is not applicable to punishment set by a jury so long as it does not exceed the statutory limits. Bradley v. Commonwealth, 288 Ky. 416, 156 S.W.2d 469 (1941); McElwain v. Commonwealth, 289 Ky.



446, 159 S.W.2d 11 (1942); Weber v. Commonwealth, 303 Ky. 56, 196 S.W.2d 465 (1946); Monson v. Commonwealth, Ky., 294 S.W.2d 78, 80 (1956). However, the courts do have the power to declare a penalty unconstitutional, if it clearly and manifestly appears to be so. Weber, supra.

Brandenburg was convicted of 452 counts involving the violation of four distinct statutes and ordinances. Obviously, in considering whether there is any violation of the excessive fines clause, the matter must be considered in this context, and not as a \$26,380.00 fine for a single act.

Second-degree cruelty to animals in violation of KRS 525.130, is a Class A misdemeanor, which carries a maximum fine of \$500.00. KRS 534.040(2)(a). There is no statutory requirement that multiple misdemeanor fines be capped. Brandenburg received a \$200.00 fine for each of the 56 convictions, totaling \$11,200.00. We cannot agree with Brandenburg that the fines were excessive. The fine imposed per cruelty conviction was only 40 percent of the maximum allowed by statute. Considering the conditions in which Brandenburg kept the animals, the fines were not fundamentally unfair, nor do they shock the conscience.

Brandenburg was also convicted of 66 counts of failure to license a dog, a violation of KRS 258.135. The penalty for violation of the statute is \$5.00 to \$100.00 per violation and imprisonment from 5 to 60 days, or both. Brandenburg was fined \$50.00 per count, for a total of \$3,300.00 in fines. The fines

were well within the amount permitted by statute, and in no way shock the conscience, or violate state and federal prohibitions against excessive fines.

Brandenburg was convicted of 66 counts of failure to vaccinate a dog for rabies, a violation of KRS 258.015. KRS 258.990 specifically provides that each day of violation shall constitute a separate offense and that the fine per conviction shall be not less than \$10.00 per day nor more than \$100.00 per day. Although KRS 258.990 provides that each day constitutes a separate violation, Brandenburg was charged with only one day of violation per dog. Under the circumstances, the \$6,600.00 in fines for failure to vaccinate was not excessive.

Finally, Brandenburg was convicted and fined \$20.00 per violation for 264 violations of Radcliff's business license ordinance. A \$20.00 per day fine for failure to properly obtain a business license is not constitutionally excessive.

The judgment of the Hardin Circuit Court is affirmed.

ALL CONCUR.

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