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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-001643-MR

TONY DALE ABNEY — APPELLANT

v.

APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE WILLIAM MAINS, JUDGE
ACTION NO. 99-CR-00021

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING

** ** ** ** **

BEFORE: DYCHE, KNOPF, AND McANULTY, JUDGES.

McANULTY, JUDGE: Tony Dale Abney appeals from a judgment of the Montgomery Circuit Court convicting him of operating a motor vehicle on a suspended license, third offense, and sentencing him to three years in prison, enhanced to five years for being a persistent felony offender in the second degree. We affirm.

On April 17, 1998, while on patrol just after midnight, Deputy David Adams of the Montgomery County Sheriff's Department (formerly of the Mt. Sterling Police Department)

noticed a vehicle driven by Appellant when it hit the curb exiting a parking lot. Deputy Adams then observed the car weaving in the road, crossing the yellow line two or three times, at which point he pulled Appellant over. Deputy Adams asked Appellant for his license, and Appellant responded he did not have a license. Deputy Adams ran Appellant's name through dispatch and confirmed that Appellant's license was suspended until August of 2000 for a 1995 conviction for driving under the influence.

On July 2, 2001, a jury found Appellant guilty of operating a motor vehicle while his license was revoked or suspended for driving under the influence. Then, during the second phase of the trial, the trial court permitted the Commonwealth to introduce Appellant's two prior convictions for operating a motor vehicle while his license was suspended for driving under the influence, one from 1991 and the other from 1993. Subsequently, the jury found Appellant to be a third offender. Appellant and the Commonwealth reached an agreement as to sentencing, and the trial court sentenced Appellant to three years for the underlying offense, enhanced to five years by his persistent felony offender status.

The only argument Appellant presents on appeal is that the trial court erred in not allowing Appellant to benefit from the 2000 amendment to KRS 189A.090 which imposes a time limit of

five years for considering prior offenses to enhance the penalty. In support of this argument, Appellant cites KRS 446.110, which states in part, "[i]f any penalty, forfeiture or punishment is mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect."

The trial court applied the 1991 version of KRS 189A.090, and there was no time limit for the consideration of prior offenses under this version. Specifically, under the 1991 version of KRS 189A.090, in pertinent part, the statute was as follows:

> (1) No person shall operate a motor vehicle while his license is revoked or suspended for violation of KRS 189A.010, nor shall any person who has no motor vehicle or motorcycle operator's license operate a motor vehicle while his privilege to operate a motor vehicle has been revoked or suspended for a violation of KRS 189A.010.
> (2) Any person who violates subsection (1) of this section shall:
> ...
> c. For a third or subsequent offense, be guilty of a Class D felony.

In 2000, the legislature amended the statute as follows:

> (1) No person shall operate or be in physical control of a motor vehicle while his license is revoked or suspended under KRS 189A.010(6), 189A.070, 189A.107, 189A.200, or 189A.220, or operate or be in physical control of a motor vehicle without a

> functioning ignition interlock device in violation of KRS 189A.345(1).
>
> (2) In addition to any other penalty imposed by the court, any person who violates subsection (1) of this section shall:
>
> ...
>
> (c) For a third or subsequent offense within a five (5) year period, be guilty of a Class D felony and have his license revoked by the court for two (2) years, unless at the time of the offense the person was also operating or in physical control of a motor vehicle in violation of KRS 189A.010(1)(a), (b), (c), or (d), in which event he shall be guilty of a Class D felony and have his license revoked by the court for a period of five (5) years.

Before we can reach the merits of Appellant's claim, we must find that the issue has been properly preserved for review. At trial, counsel for Appellant objected to the introduction of Appellant's prior convictions on the basis of their "staleness."

The trial court responded as follows to Appellant's objection:

> Okay -- well, the case law -- and, there's a case right on point that says -- I know the -- the legislation has changed effective this year, as to an operating on a suspended, but prior to this year the -- there was no time limit. There's a case right on point, and I can't think of the name of it, but I know it says that three convictions over any period of time -- again, Friday I looked up the laws, because it looked like that was the way this was

> going, and that's -- the case says that staleness is not an issue.

Counsel for Appellant responded, "Well, I just -- note my objection, Your Honor." Considering the objection made by Appellant's counsel and the trial court's response to the objection, we believe Appellant gave a different ground for objection at trial than the one he now raises on appeal. There was no mention of the language in the 2000 amendment to KRS 189A.090 by Appellant's counsel. Even when the trial court made reference to the 2000 amendment, Appellant's trial counsel did not argue that it was applicable in this case. Moreover, Kentucky courts "have consistently interpreted KRS 446.110 to require courts to sentence a defendant in accordance with the law which existed at the time of the commission of the offense unless the defendant specifically consents to the application of a new law which is 'certainly' or 'definitely' mitigating." Lawson v. Commonwealth, Ky., 53 S.W.3d 534, 550 (2001) (quoting Commonwealth v. Phon, Ky., 17 S.W.3d 106, 108 (2000)). As Appellant did not raise any issue in the trial court concerning the 2000 amendments to KRS 189A.090, he certainly did not consent to the application of the modified provisions. See id. at 550-51.

It has long been the rule that failure to raise an argument below results in it not being preserved for review,

even if an objection to the same matter is offered on other grounds. See Kennedy v. Commonwealth, Ky., 544 S.W.2d 219, 222 (1976). "The appellants will not be permitted to feed one can of worms to the trial judge and another to the appellate court." See id. This claim was not properly preserved, so we will not consider it. See Commonwealth v. Duke, Ky., 750 S.W.2d 432 (1988).

For the foregoing reasons, the judgment of the Montgomery Circuit Court is affirmed.

ALL CONCUR.

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