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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-001319-MR

ROBERT K. DELABAR

APPELLANT

v. APPEAL FROM MASON CIRCUIT COURT
HONORABLE JOHN W. McNEILL, III, JUDGE
ACTION NO. 03-CR-00091

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * * * * *

BEFORE: COMBS, CHIEF JUDGE; HENRY, JUDGE; POTTER,¹ SENIOR JUDGE.

POTTER, SENIOR JUDGE: Robert K. Delabar appeals from a conditional guilty plea pursuant to Kentucky Rules of Criminal Procedure (RCr) 8.09. Reserved for our review is the trial court's determination that Delabar is subject to persistent felony offender (PFO) sentencing enhancement pursuant to Kentucky Revised Statutes (KRS) 532.080. Delabar committed his

¹ Senior Judge John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

present felony on the fifth anniversary of his release from prison on a prior felony. Because we conclude that Delabar's release did not occur within the period called for in the statute, we reverse.

BACKGROUND

The facts are not in dispute. On September 1, 1998, at approximately 9:30 a.m., Delabar was released from incarceration on a prior felony charge. On September 1, 2003, at approximately 9:59 p.m., Delabar was arrested at a Mason County Wal-Mart Store for an earlier attempt to shoplift, at approximately 8:45 p.m., two computer ink cartridges valued at less than \$300.00. Of significance to this case, however, at the time of his arrest Delabar possessed a forged Ohio driver's license, a felony. See Kentucky Revised Statutes (KRS) 516.060.

On October 10, 2003, Delabar was indicted for second-degree possession of a forged instrument, KRS 516.060; theft by unlawful taking under \$300.00, KRS 514.030; and first-degree persistent felony offender, KRS 532.080.

On March 22, 2004, Delabar filed a "Motion to Prohibit Improper PFO Enhancement." In the motion, Delabar argued that he had been released from custody more than five years before he committed the present felony, and, accordingly, his prior felony could not be used to enhance his present felony.

On April 14, 2004, the trial court entered an order overruling Delabar's motion. The trial court determined that the five-year period contemplated in KRS 532.080(3)(c)(1) began to run on September 2, 1998, the first full day following Delabar's release from incarceration, and ran through the entire length of the day of September 1, 2003.

After the trial court's ruling on the PFO issue, Delabar entered a conditional guilty plea pursuant to RCr 8.09, reserving his right to appeal the trial court's determination that his present offense could be enhanced.

KRS 532.080(3) provides, in relevant part, as follows:

A persistent felony offender in the first degree is a person who is more than twenty-one (21) years of age and who stands convicted of a felony after having been convicted of two (2) or more felonies. As used in this provision, a previous felony conviction is a conviction of a felony in this state or conviction of a crime in any other jurisdiction provided:

. . . .

(c) That the offender:

. . . .

1. Completed service of the sentence imposed on any of the previous felony convictions within five (5) years prior to the date of the commission of the felony for which he now stands convicted;

The Commonwealth argues, and the trial court agreed, that the counting of the five-year time period referred to in

the statute began to run on the first full day following Delabar's release and, accordingly, the five-year period ran from September 2, 1998, through September 1, 2003. Delabar, on the other hand, argues that the day of his release should count as the first day, and that the five-year period ran from September 1, 1998, through August 31, 2003.

THE ARGUMENT THAT THE STATUTE DOES APPLY

KRS 446.030, which in all significant respects took its present form in 1970, reads as follows:

(1) (a) In computing any period of time prescribed or allowed by order of court, or by any applicable statute or regulation, the day of the act, event or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, a Sunday, a legal holiday, or a day on which the public office in which a document is required to be filed is actually and legally closed, in which event the period runs until the end of the next day which is not one (1) of the days just mentioned. . . .

(b) When a statute, regulation, or order of court requires an act to be done either a certain time before an event or a certain time before the day on which an event occurs, the day of the event shall be excluded in computing the time. If the day thereby computed on which or by which the act is required to be done falls on a Saturday, Sunday, legal holiday, or a day on which the public office in which the act is required to be completed is actually and legally closed, the act may be done on the next day which is none of the days just mentioned.

Under Section 1(a) the statute looks into the future and deals with an act to be done after an event. In computing the applicable period the statute excludes the day on which the event occurs. For example, the one-year statute of limitation for an accident occurring on January 1 expires on January 1 of the next year and a complaint filed on that date is timely. Derossett v. Burgher, 555 S.W.2d 579 (Ky. 1977). Therefore, looking forward from the day Delabar was released, the day of his release would be excluded and the five year period beginning on September 1, 1998 would include September 1, 2003.

Under Section 2(b) the statute looks into the past. Under that provision, the day of the present event, i.e., the day of the present crime, is excluded, and the five-year period before September 1, 2003 would include September 1, 1998.

While the statute does make allowances for Saturdays, Sundays and legal holidays, those exceptions are limited to situations in which the act contemplated to be done is the filing of a document in a legally closed office. Therefore those provisions have no application here. If anything, by limiting the exceptions to situations where something must be done in an office that is closed, the statute recognizes that it has application to situations where there are no documents to be filed.

Therefore we could easily hold that the trial court correctly held that Delabar was subject to being prosecuted under the PFO statute.

THE ARGUMENT THAT THE PFO STATUTE DOES NOT APPLY

Delabar contends that in order to avoid an absurd or unreasonable result, the five-year period referred to in KRS 532.080(3)(c)(1) must be calculated by counting the day of a defendant's release from incarceration. This interpretation is supported by the legislature's palpable intent that a defendant be subject to PFO enhancement from the moment of his release from incarceration, including the remaining hours of the day of release. This interpretation of legislative intent is buttressed by the holding in Garrett v. Commonwealth, 675 S.W.2d 1 (Ky. 1984), which determined that for purposes of application of the PFO statute, a defendant was "over the age of 18" from first moment of day on which his eighteenth birthday fell. However, under the Commonwealth's construction, counting would not commence until the day following release, and an unaccounted for gap between the moment of release and the commencement of the following day would result. This unaccounted for gap in the Commonwealth's proposed interpretation produces an unreasonable and absurd result.

Moreover, since to carry out the legislative intent the first day must be counted, the five-year anniversary date of

the defendant's release (September 1, 2003, in the present case - the first day of the sixth year) cannot be counted. The counting of that day would result in a total covered period of five years and one day, which does not comport with the statute.

Further, Kentucky case law has established the principle that in computing time from a particular day, that day is to be excluded, but, in computing time from an act done, the day on which act occurs is to be included in the computation.² See Randall v. L. L. Morris Transport Co., 380 S.W.2d 221 (Ky. 1964); Coles v. Johns, 377 S.W.2d 587 (Ky. 1964); Fannin v. Lewis, 254 S.W.2d 479 (Ky. 1952); Charles v. Big Jim Coal Co., 314 Ky. 778, 237 S.W.2d 68 (1951); Dehart v. City of Olive Hill, 305 Ky. 864, 205 S.W.2d 351, (1947); Salisbury v. Commonwealth, 254 Ky. 77, 70 S.W.2d 987, (1934). In the situation at bar, it would be reasonable to conclude that the better application of the rule is to view the calculation as a computation from an act done; i.e., the act of the completion of service of the sentence imposed on the previous felony conviction. Under this construction, the day on which the act occurred (release from incarceration on the prior felony) would be included in the computation.

² We are mindful that the cited cases precede the 1970 revisions to KRS 446.030. See pgs. 4-5, supra.

DECISION

Generally a statute is open to construction only if the language that is used is ambiguous and requires interpretation. If the language is clear and unambiguous and if applying the plain meaning of the words would not lead to an absurd result, further interpretation is unwarranted. Overnite Transportation v. Gaddis, 793 S.W.2d 129, 131 (Ky.App. 1990). As the two arguments above indicate, the portion of the PFO statute at issue here is ambiguous.

The fundamental rule in the interpretation and construction of a statute is that the court should "ascertain and give effect to the intention of the Legislature and that intention must be determined from the language of the statute itself if possible." Moore v. Alsmiller, 289 Ky. 682, 686-87, 160 S.W.2d 10, 12 (1942). However, when a statute is ambiguous and its meaning uncertain, the legislative intent should be ascertained by considering the whole statute and the purpose intended to be accomplished. Department of Motor Transportation v. City Bus Co., 252 S.W.2d 46, 47 (Ky. 1952). In construing the statute, the court must consider the policy and the purpose of the statute, the reason and the spirit of the statute, and the mischief intended to be remedied. Barker v. Commonwealth, 32 S.W.3d 515, 516-17 (Ky.App. 2000).

Unfortunately, none of these rules is of assistance here. The limitations period set by the legislature is an arbitrary line. All parties agree that if Delabar had been arrested three hours later he would not be subject to the PFO enhancement.

Fortunately, Kentucky case law does have one principle that is applicable here. It has long been recognized that when there is an ambiguity or conflict in a penal statute, the "rule of lenity" is applicable. Commonwealth v. Lundergan, 847 S.W.2d 729, 731 (Ky. 1993) (*citing* Boulder v. Commonwealth, 610 S.W.2d 615 (Ky. 1980)). "Penal statutes are not to be extended by construction, but must be limited to cases clearly within the language used." Woods v. Commonwealth, 793 S.W.2d 809, 814 (Ky. 1990). "In interpreting an ambiguous penal statute, doubt is to be resolved in favor of the accused." Kirby v. Commonwealth, 132 S.W.3d 233, 236 (Ky.App. 2004). Doubts about the meaning of a penal statute should be resolved in favor of lenity and against a construction that would produce extremely harsh or incongruous results or impose punishment totally disproportionate to the gravity of the offenses. Id. (*citing* Commonwealth v. Colonial Stores, 350 S.W.2d 465, 467 (Ky. 1961)).

The notions of fairness which lie at the heart of the rule of lenity can best be satisfied in this case by construing

the five-year period at issue to include the day of Delabar's release from incarceration, and to have ended on August 31, 2003, the day prior to his subsequent felony offense on September 1, 2003.

In summary, we believe that the trial court erroneously applied KRS 532.080(2)(c)(1) to encompass Delabar's September 1, 2003, felony.

For the foregoing reasons the Judgment of the Mason Circuit Court is reversed, and the cause is remanded for additional proceedings consistent with this opinion.

COMBS, CHIEF JUDGE, CONCURS.

HENRY, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

HENRY, JUDGE, DISSENTING: I must respectfully dissent. I am unable to discern any ambiguity whatever in KRS 532.080(3)(c)(1) or in KRS 446.030(1)(a) as they apply to this situation. The first says that if Delabar completed sentence of one of his felony convictions within five years prior to the date of commission of the felony resulting in the PFO charge, he is a persistent felony offender. The second says that in computing a time period prescribed by a statute (here, five years) the day of the act after which the designated period of time begins to run is to be excluded, and the last day of the period is to be included. In this case, that means that September 1, 1998 is excluded and September 1, 2003 is included,

which clearly and simply means that Delabar stole the ink cartridges one day too soon. There is no ambiguity, only simple arithmetic. That may seem harsh to Delabar but when the General Assembly has imposed a clear rule it is not our province to reach for the "rule of lenity" to extricate him. I would affirm the circuit court.

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