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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000759-MR

TONEY HENRY — APPELLANT

v.

APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 05-CR-00132

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MOORE, AND NICKELL, JUDGES.

MOORE, JUDGE: Appellant Toney Henry appeals the Jessamine Circuit Court's order denying his motion to suppress evidence of his prior Driving Under the Influence (DUI) convictions. After the circuit court denied his motion to suppress, Appellant entered a conditional guilty plea[1] to the charges of Operating a Motor Vehicle on a DUI Suspended

[1] It appears that Appellant conditioned his guilty plea by retaining his right to appeal the denial of his motion to suppress.

License, second offense, with aggravators, a violation of KRS 189A.090,[2] and Operating a Motor Vehicle Under the Influence, third offense in five years, a violation of KRS 189A.010. After a careful review of the record, we affirm the Jessamine Circuit Court's order.

I. FACTUAL AND PROCEDURAL BACKGROUND

In July 2005, Appellant was indicted on the aforementioned charges, as well as a charge of being a First-Degree Persistent Felony Offender, a violation of KRS 532.080. He moved to suppress evidence of his prior DUI convictions that were being used to enhance the charges pending against him in this case. Appellant noted that in August 1996, he entered a guilty plea to a charge of Operating on a DUI Suspended License, second offense, as well as a charge of DUI, second offense. However, in his motion to suppress, Appellant argued that those convictions in August 1996 were actually first offenses, rather than second. Unfortunately, for reasons unknown by this Court, the court's record of those convictions was destroyed. Appellant contended that his criminal record showed that he had not been previously convicted of DUI or Operating on a DUI Suspended License prior to that August 1996 conviction.

In his motion to suppress, Appellant also noted that in October 1998, he pled guilty to the charge of DUI, third offense. Appellant contended that that charge should have been listed as a second offense. He further noted that in December 2000, he pled guilty to the charges of DUI, fourth offense, and Driving on a DUI Suspended

[2] We note that KRS 189A.090 provides that it is a crime to, *inter alia*, operate a motor vehicle while one's driver's license is suspended *or* revoked.

License, second offense. In his motion to suppress, Appellant alleged that those charges should have only been a single charge of DUI, third offense, because his license was not suspended at that time, and it was his third DUI offense. In conclusion, in his motion to suppress filed in the present case, Appellant contended that the charges against him in this case should have been DUI, first offense, and Operating on a Suspended License, a violation of KRS Chapter 186, rather than Operating on a DUI Suspended License, a violation of KRS Chapter 189A, with which he was actually charged. Therefore, he asserted that his present charges should be misdemeanors, and the charge of being a First-Degree Persistent Felony Offender should be dismissed.

During the hearing the circuit court held concerning Appellant's motion to suppress, the court noted that Appellant pled guilty in August 1996 to the charges of DUI, Second Offense, and Operating on a DUI Suspended License, Second Offense. The court reasoned that by pleading guilty, Appellant agreed that the offenses were second offenses. Additionally, the court reasoned that when Appellant pled guilty in October 1998 to a charge of DUI, third offense, he implicitly agreed that his 1996 conviction was a second offense. Further, the court found that when Appellant pled guilty to DUI, fourth offense, in December 2000, he implicitly agreed that his 1998 conviction was his third offense and his 1996 conviction was his second offense.

The circuit court noted that a likely explanation for why Appellant's 1996 convictions were listed as second offenses was because Appellant's first convictions may have occurred in another state and computer systems were not as advanced at that time as

they are now. Thus, if the convictions occurred in another state, they probably were not transmitted to Kentucky.

Further, the circuit court reasoned that because one of Appellant's 1996 convictions was for Operating on a DUI Suspended License, second offense, Appellant necessarily had to have previously been convicted of a DUI in order to be convicted of Operating a Motor Vehicle on a DUI Suspended License. Therefore, the court held that Appellant's claim that his 1996 DUI conviction was a first offense lacked merit. The court then denied Appellant's motion to suppress.

Appellant thereafter entered a conditional guilty plea to the charges of Operating a Motor Vehicle on a DUI Suspended License, second offense, and Operating a Motor Vehicle Under the Influence, third offense in five years. His plea was also made pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L. Ed. 2d 162 (1970).[3] The circuit court sentenced Appellant to a total term of four years of imprisonment.

Appellant now appeals, raising the following claims: (1) his license was not "DUI suspended" at the time that he committed the present offenses, thus, the circuit court erred when it failed to amend his felony charge of Operating a Motor Vehicle on a DUI Suspended License, second offense, to the misdemeanor charge of Operating on a Suspended License, a KRS Chapter 186 violation; and (2) the circuit court denied Appellant due process of law when it failed to hold a hearing on Appellant's motion to

[3] "A defendant entering an *Alford* plea declines to acknowledge guilt, but admits that the Commonwealth can present strong evidence of guilt." *Toppass v. Commonwealth*, 80 S.W.3d 795, 796 (Ky.App. 2002).

suppress in order to require the Commonwealth to produce testimonial evidence regarding his first claim, mentioned previously. We note that Appellant does not raise any claims on appeal concerning his present conviction for Operating a Motor Vehicle Under the Influence, third offense in five years. Therefore, any challenge he may have raised regarding that conviction is deemed waived on appeal. *See Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 815 (Ky. 2004).

II. STANDARD OF REVIEW

If the trial court's findings of fact are supported by substantial evidence, then they are conclusive. *See Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky.App. 2002). We conduct *de novo* review of the trial court's application of the law to the facts. *Id*. We review findings of fact for clear error, and we "give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Stewart v. Commonwealth*, 44 S.W.3d 376, 380 (Ky.App. 2000) (internal quotation marks and citation omitted).

III. ANALYSIS

A. CLAIM THAT APPELLANT'S LICENSE WAS NOT "DUI SUSPENDED" AT THE TIME THAT HE COMMITTED THE PRESENT OFFENSES

Appellant first alleges that his license was not "DUI suspended" at the time that he committed the present offenses and, thus, the circuit court erred when it failed to amend his felony charge of Operating a Motor Vehicle on a DUI Suspended License, second offense, to the misdemeanor charge of Operating on a Suspended License, a KRS Chapter 186 violation. However, Appellant's argument is misplaced. Before he

committed the offenses forming the subject of this appeal, Appellant pled guilty in December 2000 to, *inter alia*, a charge of DUI, fourth offense. That offense appears to have been committed in July 2000 and, presumably, it was his fourth DUI offense in a five-year period, considering the DUI statutes are written in a manner such that the second, third, and fourth offenses must occur within a five-year period to constitute a second, third, or fourth offense for purposes of determining punishment. Indeed, even though Appellant pled guilty to DUI, fourth offense, in December 2000, his current DUI conviction was merely for DUI, third offense. Therefore, his December 2000 offense necessarily was his fourth DUI offense in a five-year period.

As previously noted, Appellant contends that his driver's license was not "DUI suspended" as a result of the July 2000 offense upon which his December 2000 conviction was based. However, when Appellant pled guilty to that charge of DUI, fourth offense, his license was revoked for sixty months, i.e., five years, from the date of his arrest for that offense, pursuant to KRS 189A.070(1)(d). *See also* KRS 189A.070(2). Therefore, when Appellant committed the present offenses in May 2005, his license was still suspended pursuant to that prior DUI conviction, and his current charge of Operating a Motor Vehicle on a DUI Suspended License, pursuant to KRS 189A.090, is proper.

B. CLAIM THAT THE CIRCUIT COURT FAILED TO HOLD A HEARING ON APPELLANT'S MOTION TO SUPPRESS

Appellant next alleges that the circuit court denied him due process of law by failing to hold a hearing on his motion to suppress in order to require the Commonwealth to produce testimonial evidence regarding his first claim, mentioned

previously. Appellant's argument is misplaced because the circuit court did hold a hearing on his motion to suppress on October 28, 2005. Thus, his due process rights were not violated by the failure to hold a hearing.

Further, the circuit court did not require the Commonwealth to produce testimonial evidence that Appellant's license was "DUI suspended" at the time of his present offenses. However, the court did not need to require the introduction of such evidence because Appellant, by pleading guilty to DUI, fourth offense, in December 2000, necessarily had his license revoked for five years pursuant to KRS 189A.070(1)(d). Therefore, the introduction of testimonial evidence concerning this revocation was unnecessary, and Appellant's present conviction under KRS 189A.090 was proper without the introduction of such evidence.

Accordingly, the order of the Jessamine Circuit Court is affirmed.

ALL CONCUR.

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