

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2006-CA-002255-MR

LARRY LAMONT WHITE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE ROGER L. CRITTENDEN, JUDGE  
ACTION NO. 05-CR-002470

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: KELLER, TAYLOR, AND VANMETER, JUDGES.

KELLER, JUDGE: Larry Lamont White has directly appealed from the judgment of the Jefferson Circuit Court convicting him of Possession of a Firearm by a Convicted Felon pursuant to KRS 527.040 and for being a Persistent Felony Offender in the first degree pursuant to KRS 532.080(3). White was sentenced to an enhanced term of fifteen years. On appeal, White challenges the Commonwealth's use of the same prior felony to prove the possession charge and again to establish the PFO I charge. We affirm.

The facts underlying this conviction are relatively straightforward. During the early morning hours of May 21, 2005, Officer (now Detective) Aaron Crowell was on

patrol at the intersection of 26<sup>th</sup> Street and Jefferson Street in Louisville when a pedestrian flagged him down. The pedestrian reported that a car was stopped at a green light at the intersection of 26<sup>th</sup> Street and Market Street and had been stopped for several cycles of green lights. Officer Crowell approached the car in his patrol vehicle and saw a person (White) slumped over in the driver's seat with his foot on the brake while the car was in drive. Officer Crowell attempted to verbally and then physically wake White. As he leaned into the open driver's side window to put the car in park, Officer Crowell noticed a gun protruding from underneath White's left upper thigh. At that time, Officer Crowell's beat partner, Officer (now Detective) Michael Woodard arrived on the scene. Officer Woodard watched as Officer Crowell reached inside to secure the gun and then turned off the car. Officer Crowell removed White from the car. When White stated that he was a convicted felon, Officer Crowell took White into custody.

On August 17, 2005, the Jefferson County grand jury issued a multiple count indictment against White, charging him with receiving stolen property, possession of a firearm by a convicted felon, trafficking in marijuana, operating a motor vehicle on a suspended license, and for being a persistent felony offender (PFO I). The PFO I charge was based upon a 1989 conviction for two counts of murder and one count of first-degree burglary, for which he received a twenty-eight-year sentence,<sup>1</sup> as well as upon a 1982 conviction for first-degree sexual abuse, for which he received a three-year sentence.<sup>2</sup> The circuit court later dismissed the receiving stolen property charge on the Commonwealth's motion and bifurcated the charges to sever the possession of a

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<sup>1</sup> Jefferson Circuit Court Action No. 83-CR-001113. The indictment for the present action actually lists the charges on which he was indicted in 1983, which were two counts of murder, first-degree robbery, first-degree burglary, and first-degree unlawful imprisonment. He was convicted on the murder and burglary charges pursuant to a guilty plea.

<sup>2</sup> Jefferson Circuit Court Action No. 81-CR-000669.

firearm charge from the remaining ones. The possession of a firearm charge was tried first and is the subject of this appeal.

The matter proceeded to a jury trial on July 25, 2006. One of the elements the Commonwealth had to prove in the guilt phase was that White had been convicted of a felony. In order to do so, the Commonwealth introduced testimony from a records custodian from the circuit clerk's office, Tamitha Laird. Laird testified that White had been convicted of a crime under indictment No. 83-CR-001113, and the circuit court took judicial notice that the conviction was for a felony. The jury was not apprised of the number or type of crimes for which White was convicted under the 1983 indictment so that White would not be prejudiced. Following the presentation of proof, the circuit court instructed the jury on the applicable law, and specifically instructed the jury that it had to believe beyond a reasonable doubt that White "had been previously convicted of a felony offense by judgment of the Jefferson Circuit Court entered on May 17, 1989." The jury found White guilty of the possession charge and determined that the firearm was in fact a handgun.

The matter proceeded to the penalty phase the following day. White objected to the proposed jury instructions. He argued that it was improper to allow the Commonwealth to rely upon the conviction for the 1983 felony to prove the PFO I charge when it had already used that conviction to prove an element of the offense for which he was convicted during the guilt phase. White also pointed out that the Commonwealth failed to put on the record what conviction was used to prove the guilt phase element. The circuit court ultimately permitted the Commonwealth to use the two remaining convictions under the 1983 indictment as one prior felony conviction and the felony conviction from the 1981 indictment for the other. In order to prevent further confusion, the circuit court opted to list one murder conviction from the 1983 indictment

as well as the sexual abuse conviction in the jury instructions as the basis for the PFO I charge. The jury returned a verdict sentencing White to ten years' imprisonment on the possession charge, enhanced to fifteen years based upon the PFO I conviction. This appeal followed.

On appeal, White raises essentially two arguments. His main argument is that the circuit court erred when it permitted a prior felony conviction to be used twice, once to establish an element of an offense and again to prosecute him under the persistent felony offender statute. In conjunction with this argument, White briefly asserts that the indictment was flawed as the Commonwealth did not specify which convictions would apply to create the offense and then to support the PFO I charge. White also asserts that he was prejudiced when the Commonwealth alluded to matters outside of the record during its closing argument. The Commonwealth has responded to each of these arguments.

We shall only briefly address White's second argument concerning an alleged error during the Commonwealth's closing argument. That alleged error relates to the Commonwealth's reference to Officer Crowell's grand jury testimony concerning the location of the gun when the transcript of that proceeding was not introduced during the trial. We cannot identify any error in the Commonwealth's reference to this testimony. The record clearly reflects that White raised the issue of Officer Crowell's testimony before the grand jury both during his cross-examination of Officer Crowell and later during his own closing argument. Therefore, any error would be harmless.

We shall now turn our attention to White's main argument regarding the Commonwealth's use of his prior felony convictions.<sup>3</sup> During the guilt phase of his trial, White was found guilty under KRS 527.040 of possession of a firearm by a convicted

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<sup>3</sup> We agree with the Commonwealth's statements in its brief and at oral argument that White did not preserve his argument concerning the indictment. As we perceive no palpable error, we shall not review that issue.

felon, which was designated as a Class C felony as the firearm was a handgun. An essential element of this offense was the Commonwealth's proof that White had previously been convicted of a felony under the 1983 indictment. KRS 527.040(1). During the penalty phase, White was also found to be a persistent felony offender pursuant to KRS 532.080(3). The statute defines a PFO I as "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, . . . and now stands convicted of any one (1) or more felonies." KRS 532.080(3). In order to determine whether a defendant has two or more previous felony convictions, "two (2) or more convictions of crime for which that person served concurrent or uninterrupted consecutive terms of imprisonment shall be deemed to be only one (1) conviction[.]" KRS 532.080(4). In other words, those convictions merge for purposes of the PFO statute.

With that statutory background in mind, we shall now turn to the applicable case law. The first case we shall address is *Boulder v. Commonwealth*, 610 S.W.2d 615 (Ky. 1980), overruled in part by *Dale v. Commonwealth*, 715 S.W.2d 227 (Ky. 1986). In *Boulder*, the defendant was convicted of first-degree assault and for possession of a handgun by a convicted felon. The possession conviction was based upon his previous conviction for first-degree assault, which also formed the basis for his sentence enhancements on the primary convictions. In reversing the PFO enhancement, the Supreme Court held,

Although a person's status as a felon may be used to punish him, as evidenced by statutes such as KRS 527.040, KRS 527.020(5), and KRS 532.080, it may not be used to punish him again and again, over and over. Specifically, this status may not be used to obtain a primary conviction, [and] then re-used to increase the punishment for that conviction[.]<sup>4</sup>

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<sup>4</sup> In *Dale*, the Supreme Court overruled *Boulder's* holding to the extent that it "ascribed double enhancement to the assault conviction" as well as to the possession of a handgun charge. 715 S.W.2d at 227.

*Boulder*, 610 S.W.2d at 617-18. Three years later, in *Jackson v. Commonwealth*, 650 S.W.2d 250 (Ky. 1983), the Supreme Court certified the law on a related issue. In discussing *Boulder*, the Supreme Court stated:

The holding of *Boulder*, when the surplusage is distilled, is merely that when a single prior felony is utilized to create an offense or enhance a punishment at the trial of the second crime so created or enhanced, it may not be used *at that trial* to prosecute the defendant under KRS 532.080. (Emphasis in original.)

*Jackson*, 650 S.W.2d at 251. Later that same year, the Supreme Court again addressed this issue in *Eary v. Commonwealth*, 659 S.W.2d 198 (Ky. 1983). In *Eary*, the defendant was convicted of possession of a handgun by a convicted felon and on a PFO I charge. The Court noted that:

Eary had been previously convicted of four felonies, viz., first-degree burglary, first-degree bail jumping, storehouse breaking and possession of burglary tools. Only the previous conviction for bail jumping was utilized for the purpose of creating the offense of carrying a handgun by a convicted felon. The other three convictions were utilized subsequently at the persistent felony stage of the trial. We find no error in this procedure.

*Id.* at 199. The Court then articulated its holding as follows:

Where a defendant is convicted at his trial for possession of a handgun by a convicted felon and has been previously convicted of more than one prior felony, those convictions in excess of that for a single felony may be utilized for the purpose of persistent felony offender sentencing pursuant to KRS 532.080.

*Id.* at 200.

The Kentucky Court of Appeals addressed this issue in *Corman v. Commonwealth*, 908 S.W.2d 122, 123 (Ky. App. 1995), defining the rule as:

[W]hen a single prior felony is utilized to create an offense or enhance a punishment at the trial of the second crime, that same prior felony cannot be used at that trial to prosecute the defendant as a persistent felony offender. . . . If, however, the prior felony used to underlie [the] PFO

conviction is a separate prior felony from the one used to create the offense or enhance its punishment, the offense can be further enhanced under the PFO statute.

See also *O'Neil v. Commonwealth*, 114 S.W.3d 860 (Ky. App. 2003).

We have also reviewed *Morrow v. Commonwealth*, 77 S.W.3d 558 (Ky. 2002), in which the Supreme Court addressed “second or subsequent offense” sentence enhancements under KRS Chapter 218A in conjunction with the persistent felony offender statute. Morrow had been previously convicted of two felony trafficking charges that stemmed from the same indictment and one final judgment. He was then found guilty of first-degree trafficking in a controlled substance and entered into a conditional guilty plea, in which he admitted that he was subject to a sentence enhancement as a “second or subsequent” offender under KRS 218A.1412 and as a second-degree persistent felony offender. The Supreme Court held:

. . . [A] defendant with two prior convictions for first degree trafficking in a controlled substance who is again convicted under that section can be sentenced within the penalty range for Class A felonies . . . , regardless of whether the sentences for the prior convictions were ordered to run concurrently within the same judgment. Such an offender is eligible for penalty enhancement as both a KRS Chapter 218A “second or subsequent” offender and as a second degree persistent felony offender.

*Id.* at 560. In so holding, the Supreme Court relied upon its previous opinion of *Howard v. Commonwealth*, 777 S.W.2d 777 (Ky. 1989), in which it “emphasized that the KRS 532.080(4) ‘merger’ occurs only for PFO purposes[.]” *Morrow*, 77 S.W.3d at 563. Although this case arose under KRS Chapter 218A, we nevertheless recognize its guidance in the present case.

Turning back to the present case, we hold that the circuit court properly instructed the jury. During the guilt phase, the circuit court instructed the jury that one of the elements it had to decide was whether White “had been previously convicted of a

*felony offense* by judgment of the Jefferson Circuit Court entered on May 17, 1989.” (Emphasis added.) The Commonwealth only had to establish that White had been convicted of one prior felony in order to prove the offense, which is set out in the instruction. The Commonwealth chose to rely upon one of the three felonies of which he was convicted by the May 17, 1989, judgment. In that judgment, White was convicted on two counts of murder and one count of burglary. The record reflects that the jury was not given any information as to the nature of the crimes for which White was convicted to alleviate any prejudice that might arise from that knowledge.

Following his conviction during the guilt phase, the Commonwealth sought to establish his PFO I status during the penalty phase. In order to establish the requisite prior felony convictions to support the charge, the Commonwealth introduced evidence of White’s 1982 felony conviction for sexual abuse and the remaining two felony convictions from the 1989 judgment, which merged by operation of KRS 532.080(4). The jury instructions ultimately required the jury to find the existence of only two prior convictions; one of the two murder convictions from the 1989 judgment and the 1982 sexual abuse conviction.

We believe that the circuit court’s jury instructions comported with the law of the Commonwealth, in that the same conviction was not used twice to result in a double enhancement. Rather, the Commonwealth used one of the three felony convictions from the 1989 judgment to support the possession charge, and then used the remaining two 1989 felony convictions along with the 1982 felony conviction to support the PFO I charge. Logically, there could not be a double use of any of the felony convictions, as the circuit court instructed the jury on the murder conviction during the penalty phase. White was convicted of two counts of murder in 1989, meaning that at least one of the murder convictions was not used to support the



possession charge in the guilt phase. Hence, at least one murder conviction remained available to support the PFO I charge. The three felony convictions from the 1989 judgment would not have merged until the penalty phase, when the PFO I charge was tried, meaning that each of the three convictions could be separately used for any appropriate purpose during the guilt phase. Therefore, the circuit court did not commit any error in instructing the jury or in permitting the Commonwealth to use a single conviction from the 1989 judgment in the guilt phase and another conviction from the same judgment in the penalty phase to support the PFO I charge.

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

ALL CONCUR.

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