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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000136-MR

MICHAEL REYNOLDS — APPELLANT

v.

APPEAL FROM BARREN CIRCUIT COURT
HONORABLE PHIL PATTON, JUDGE
ACTION NO. 09-CR-00332

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, CLAYTON, AND VANMETER, JUDGES.

CAPERTON, JUDGE: Michael Reynolds appeals from the denial of his motion to suppress and the corresponding conditional guilty plea for first-degree possession of a controlled substance (methamphetamine), second offense. On appeal, Reynolds argues that the trial court erred when it ruled that Reynolds's prior misdemeanor conviction for possession of a controlled substance, second degree,

could be used to enhance his pending charge to a second or subsequent offense. Additionally, Reynolds argues that the court erred in imposing court costs and fines, as he is an indigent defendant. After a thorough review of the parties' arguments, the record, and the applicable law, we affirm in part, vacate in part, and remand this matter to the trial court for further proceedings.

The facts of this appeal are not in dispute. A police officer noticed Melissa Reynolds, Reynolds's wife, acting suspiciously inside a vehicle as Reynolds entered the vehicle. The officer asked the Reynoldses to step out of the car. Melissa admitted to the officer that she had smoked as well as snorted some methamphetamine. The officer searched Reynolds and found a coffee filter containing a white substance in his left front pocket, which tested positive for methamphetamine. The Glasgow Police Department dispatch informed the officer that Reynolds had a prior conviction for possession of controlled substance, first degree. Reynolds was arrested and charged with one count of first-degree possession of a controlled substance, second offense.

At the time Reynolds appeared before the trial court, KRS 218A.1415 mandated that first-degree possession of a controlled substance, second offense, was a Class C felony. Reynolds sought to suppress his prior conviction which arose from a guilty plea to possession of a controlled substance, second degree, a misdemeanor offense. In his motion to suppress, Reynolds argued that the Kentucky Legislature did not intend to allow a misdemeanor possession conviction

to enhance a felony possession charge to a second or subsequent offense, as this would produce illogical and unfair results.

The trial court agreed with the Commonwealth that *Jackson v. Commonwealth,* 319 S.W.3d 347 (Ky. 2010), and *Commonwealth v. Churchwell*, 938 S.W.2d 586 (Ky.App. 1996), were controlling. The trial court noted that *Jackson* and *Churchwell* held that a prior misdemeanor conviction was properly used to enhance a felony trafficking conviction as a second or subsequent offense. The trial court then denied Reynolds's motion to suppress. Reynolds entered a conditional guilty plea to one count of first-degree possession of a controlled substance, second offense, and was sentenced to eight years of imprisonment and was ordered to pay $1,000 in court costs and fines. It is from this that Reynolds now appeals.

Reynolds presents two arguments on appeal, namely: (1) that the trial court erred when it ruled that Reynolds's prior misdemeanor conviction for possession of a controlled substance, second degree, could be used to enhance his pending charge to a second or subsequent offense (i.e., the trial court misinterpreted KRS 218A.1415 and 218A.010); and (2) that the court erred in imposing court costs and fines because he is an indigent defendant. With these arguments in mind we now turn to our applicable standard of review.

In review of the trial court's decision on a motion to suppress, this Court must first determine whether the trial court's findings of fact are clearly erroneous. Under this standard, if the findings of fact are supported by substantial

evidence, then they are conclusive. RCr 9.78; *Lynn v. Commonwealth*, 257 S.W.3d 596, 598 (Ky.App. 2008). "Based on those findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law." *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky.App. 2002) (citing *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998); *Commonwealth v. Opell*, 3 S.W.3d 747, 751 (Ky.App. 1999)). This Court has held that we will review *de novo* the issue of whether the court's decision is correct as a matter of law. *Stewart v. Commonwealth*, 44 S.W.3d 376, 380 (Ky.App. 2000).

Since the proper interpretation of KRS 218A.1415 and 218A.010 is purely a legal issue, our review is *de novo*. *Commonwealth v. Long*, 118 S.W.3d 178, 181 (Ky.App. 2003). As noted in *Long*:

> On review, it is our duty to construe the statute so as to effectuate the plain meaning and unambiguous intent expressed in the law. Moreover, we understand that the judiciary is not at liberty to add or subtract from the legislative enactment ... or to attempt to cure any omissions.

Id. at 181 (internal quotations and citations omitted).

We now turn to Reynolds's first argument, that the trial court erred when it ruled that Reynolds's prior misdemeanor conviction for possession of a controlled substance, second degree, could be used to enhance his pending charge to a second or subsequent offense, i.e., the trial court misinterpreted KRS 218A.1415[1] and 218A.010. KRS 218A.010(41) states:

[1] KRS 218A.1415 now mandates:

> "Second or subsequent offense" means that for the purposes of this chapter an offense is considered as a second or subsequent offense, if, prior to his or her conviction of the offense, the offender has at any time been convicted under this chapter, or under any statute of the United States, or of any state relating to substances classified as controlled substances or counterfeit substances, except that a prior conviction for a nontrafficking offense shall be treated as a prior offense only when the subsequent offense is a nontrafficking offense. For the purposes of this section, a conviction voided under KRS 218A.275 or 218A.276 shall not constitute a conviction under this chapter[.]

KRS 218A.010(41).

While Reynolds argues that *Jackson, supra,* and *Churchwell, supra,* are not controlling in this case as they involve trafficking in a controlled substance, second or subsequent offense, we disagree. The Court in *Jackson v. Commonwealth*, 319 S.W.3d 347, 351 (Ky. 2010), relied upon *Churchwell, supra*, when it held:

> By its terms, KRS 218A.010(35) does not require that the underlying prior drug trafficking offense be a felony conviction in order for it to enhance a future conviction as a "second or subsequent offense." All that section

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(2) Possession of a controlled substance in the first degree is a Class D felony subject to the following provisions:
(a) The maximum term of incarceration shall be no greater than three (3) years, notwithstanding KRS Chapter 532;
(b) For a person's first or second offense under this section, he or she may be subject to a period of:
1. Deferred prosecution pursuant to KRS 218A.14151; or
2. Presumptive probation;
(c) Deferred prosecution under paragraph (b) of this subsection shall be the preferred alternative for a first offense; and
(d) If a person does not enter a deferred prosecution program for his or her first or second offense, he or she shall be subject to a period of presumptive probation, unless a court determines the defendant is not eligible for presumptive probation as defined in KRS 218A.010.

> requires is some conviction under Chapter 218 or any other state or federal law, a requirement Appellant's prior misdemeanor conviction clearly satisfies. Appellant's reasoning would require this Court to add additional language to the statute. This we will not do.

Jackson at 351.

We find no error with the trial court's reliance upon such dispositive cases. By the plain wording of KRS 218A.010(41), the legislature did not distinguish between a prior felony conviction and a prior misdemeanor conviction. We decline to add such additional language to the statute. Accordingly, we affirm on this issue.

Reynolds's second argument is that he should be given the benefit of the legislature's amendments to KRS 218A.141 thereby capping his maximum incarceration period at three years in contrast to the eight years he received pursuant to his conditional guilty plea. We note that Reynolds's case was not final based upon *Griffith*, *infra*, because it was pending on appeal.[2]

In *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), the United States Supreme Court held "that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final[.]" *Id.* The Court explained, "[b]y 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or

[2] KRS 218A.010 was also amended while Reynolds's appeal was pending. However, the definition of "second or subsequent offense" did not substantively change with the addition of "or her" and the renumbering of the statute from KRS 218A.010(35) to KRS 218A.010(41).

a petition for certiorari finally denied." *Id.* at 321 n. 6, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649.

However, KRS 446.110 clearly requires Reynolds to give his consent: "If 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." KRS 446.110. As noted in *Bolen v. Commonwealth*, 31 S.W.3d 907, 909 (Ky. 2000):

> This statute creates an exception to the general rule that "[n]o statute shall be construed to be retroactive, unless expressly so declared." KRS 446.080. The exception of KRS 446.110 only applies if the new penalty is definitely mitigating. *Commonwealth v. Phon*, Ky., 17 S.W.3d 106, 108 (2000), citing *Coleman v. Commonwealth*, 160 Ky. 87, 169 S.W. 595, 597 (1914).

Bolen at 909.

This issue was raised by Reynolds on appeal. The trial court did not have the benefit of the amended statute during the trial of the case. And, in light of *Griffith* and KRS 446.110, we believe that the amendments to KRS 218A.1415 must be applied to this case with the consent of Reynolds. Therefore, we vacate the trial court's application of KRS 218A.1415 before its amendment and remand for the trial court to determine if Reynolds consents to the application of KRS 218A.1415 as amended. If Reynolds does not consent, then the trial court is to reapply its sentence as originally imposed.

Turning now to the third issue raised by Reynolds, that the court erred in imposing court costs and fines because he is an indigent defendant, we note that

the Commonwealth agrees with Reynolds in light of *Travis v. Commonwealth*, 327 S.W.3d 456, 459 (Ky. 2010), wherein the Kentucky Supreme Court held that a trial court clearly erred by imposing a fine and court costs upon defendants who were clearly indigent. We note, however, that the Kentucky Supreme Court has revisited this issue in *Maynes v. Commonwealth*, 361 S.W.3d 922 (Ky. 2012). As the trial court is to reconsider the sentence in light of the amendment to KRS 218A.1415, it should also reconsider the imposition of costs and fines in light of *Maynes*. Accordingly, we must vacate that part of the sentence and remand for further review.

In light of the aforementioned, we affirm in part, vacate in part, and remand this matter for further proceedings.

ALL CONCUR.

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