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Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001590-MR

TYLER RAMSEY BEDSON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSCONE, JUDGE
ACTION NO. 10-CR-00969

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, LAMBERT, AND STUMBO, JUDGES.

LAMBERT, JUDGE: Tyler Ramsey Bedson has appealed from the final judgment and sentence of probation entered by the Fayette Circuit Court on August 4, 2011, pursuant to a conditional guilty plea. Bedson's argument on appeal relates to the application of the deferred prosecution program created by the General Assembly in House Bill (HB) 463. Because we agree with the Commonwealth that Bedson is

not eligible for deferred prosecution pursuant to Kentucky Revised Statutes (KRS) 281A.14151, we affirm his conviction.

In August 2010, the Fayette County grand jury returned a four-count indictment charging eighteen-year-old Bedson with first-degree trafficking in a controlled substance, first offense (benzylpiperazine and/or trifluoromethylphenypiperazine) (KRS 281A.1412); second degree trafficking in a controlled substance, second offense (psilocin/psilocybin and/or methylphenidate and/or hydrocodone) (KRS 218A.1413); trafficking in marijuana less than eight ounces (KRS 218A.1421); and possession of drug paraphernalia, first offense (KRS 218A.500(2)). These charges arose from Bedson's arrest by Lexington Metro Police Department Officer John Steele on June 10, 2010. Officer Steele pulled over Bedson's vehicle after the victim of an altercation identified him driving by. When he approached the vehicle, Officer Steele noted a strong odor of marijuana coming from inside of the vehicle. Officer Steele's search of the vehicle uncovered 7.5 hydrocodone pills, two extended release methylphenidate pills, four Ecstasy pills, 4.1 grams of mushrooms, 9 whole and 22 half yellow methylphenidate pills, marijuana, digital scales, a marijuana pipe, and marijuana papers.

In October 2010, Bedson applied for diversion; the Commonwealth recommended against diversion, stating that he was statutorily ineligible because he had been charged with the Class C Felony. A few months later, Bedson filed a motion to suppress all evidence seized, arguing that there was no justification for

the search of his vehicle or of himself. The court held a suppression hearing in January 2011. In an order entered February 9, 2011, the circuit court denied the motion as to the evidence seized, but granted it as to statements Bedson made to police after he was arrested confessing to selling the drugs.

On June 8, 2011, HB 463 went into effect and provided for deferred prosecution under certain circumstances. Shortly thereafter, Bedson applied for deferred prosecution. However, the Commonwealth objected to his participation in the program, and Bedson requested that the court clarify his eligibility. In his application, Bedson stated that he had been charged with first-degree possession of a controlled substance pursuant to KRS 218A.1415 and attached a copy of an e-mail from the Assistant Commonwealth Attorney stating the plea offer, including amendments to counts one and two from trafficking to possession.

The court heard arguments from the parties on June 24, 2011. The Commonwealth opposed deferred prosecution, stating that Bedson was statutorily ineligible because he was originally charged with trafficking, as opposed to possession. The court denied Bedson's motion by written order entered June 27, 2011.

On June 28, 2011, Bedson moved the court to enter a guilty plea conditioned on his right to appeal both the suppression ruling and the ruling on his eligibility to participate in the deferred prosecution program. The court accepted Bedson's plea and entered a judgment on July 6, 2011, finding him guilty on amended charges of possession of a controlled substances (first-degree and second-

degree) as well as trafficking in marijuana and possession of drug paraphernalia. Following a sentencing hearing, the court entered a final judgment on August 4, 2011, probating Bedson's concurrent three-year sentence for a period of four years, subject to several conditions, and ordering him to serve ten days in the Fayette County Detention Center. This appeal now follows.

On appeal, Bedson limits his argument to one issue; namely, his eligibility to participate in the deferred prosecution program created by HB 463 and set forth in KRS 281A.14151.¹ He argues that the circuit court, and the Commonwealth, have misinterpreted the language and application of KRS 218A.14151(b) by inserting the word "originally" before the words "charged with" so that the deferred prosecution program would not apply to individuals whose original offense was amended down to a lesser charge pursuant to a plea bargain. In addition, Bedson states that both the circuit court and the Commonwealth failed to comply with the mandatory requirements of KRS 218A.1415(2) and KRS 218A.14151(2). On the other hand, the Commonwealth contends that the circuit court properly construed the statute in finding that Bedson was ineligible for the program and that neither the Commonwealth nor the court needed to comply with further steps provided in KRS 218A.14151(2) or KRS 218A.1415 if he was not eligible. We agree with the Commonwealth that the circuit court properly held that Bedson was not eligible for the deferred prosecution program.

¹ Bedson has not contested the suppression ruling in his brief.

The sole question before this Court relates to the interpretation of KRS 218A.14151, and the law related to statutory interpretation is well-settled in the Commonwealth:

The interpretation of a statute is a matter of law. *Commonwealth v. Garnett*, 8 S.W.3d 573, 575–6 (Ky. App. 1999). The primary purpose of judicial construction is to carry out the intent of the legislature. In construing a statute, the courts must consider “the intended purpose of the statute-and the mischief intended to be remedied.” “A court may not interpret a statute at variance with its stated language.” *SmithKline Beecham Corp. v. Revenue Cabinet*, 40 S.W.3d 883, 885 (Ky. App. 2001). The first principle of statutory construction is to use the plain meaning of the words used in the statute. *See Revenue Cabinet v. O'Daniel*, 153 S.W.3d 815 (Ky. 2005); KRS 446.080(4). “[S]tatutes must be given a literal interpretation unless they are ambiguous and if the words are not ambiguous, no statutory construction is required.” *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002). We lend words of a statute their normal, ordinary, everyday meaning. *Id.* “We are not at liberty to add or subtract from the legislative enactment or discover meanings not reasonably ascertainable from the language used.” *Commonwealth v. Harrelson*, 14 S.W.3d 541, 546 (Ky. 2000). The courts should reject a construction that is “unreasonable and absurd, in preference for one that is ‘reasonable, rational, sensible and intelligent [.]’” *Commonwealth v. Kerr*, 136 S.W.3d 783, 785 (Ky. App. 2004); *Commonwealth v. Kash*, 967 S.W.2d 37, 43–44 (Ky. App. 1997).

Monumental Life Ins. Co. v. Department of Revenue, 294 S.W.3d 10, 19 (Ky. App. 2008). Issues of law are reviewed *de novo*. *Monumental Life Ins. Co. v. Dept. of Revenue*, 294 S.W.3d 10, 16 (Ky. App. 2008), citing *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky. App. 2005).

We shall begin by acknowledging that HB 463 represents the most concentrated overhaul of Kentucky's penal code in more than thirty years, and it is "designed to curb the cost of incarceration without compromising public safety."² Specifically regarding the deferred prosecution program, the text of the bill states that it creates "a new section of KRS Chapter 218A to allow deferred prosecution for possession cases[.]"³ This statute, KRS 218A.14151, provides in relevant part as follows:

(1) A defendant charged with his or her first or second offense under KRS 218A.1415 may enter a deferred prosecution program subject to the following provisions:

(a) The defendant requests deferred prosecution in writing on an application created under KRS 27A.099, and the prosecutor agrees;

(b) The defendant shall not be required to plead guilty or enter an Alford plea as a condition of applying for participation in the deferred prosecution program;

(c) The defendant agrees to the terms and conditions set forth by the Commonwealth's attorney and approved by the court, which may include any provision authorized for pretrial diversion pursuant to KRS 533.250(1)(h) and (2); and

(d) The maximum length of participation in the program shall be two (2) years.

(2) If a prosecutor denies a defendant's request to enter a deferred prosecution program, the prosecutor shall state on the record the substantial and compelling reasons why

² <http://courts.ky.gov/pressreleases/NR06202011JB2.htm>.

³ <http://www.lrc.ky.gov/record/11rs/hb463.htm>.

the defendant cannot be safely and effectively supervised in the community, is not amenable to community-based treatment, or poses a significant risk to public safety.

KRS 218A.1415 codifies the crime of possession of a controlled substance in the first degree, which is a Class D Felony.

In the present case, Bedson was charged by the grand jury with first-degree trafficking in a controlled substance pursuant to KRS 218A.1412 (a Class C Felony), among other lesser trafficking charges. For this reason, the Commonwealth argues that he was precluded from application of KRS 218A.14151. Bedson, on the other hand, argues that because the charge was amended to first-degree possession of a controlled substance under KRS 218A.1415 through plea negotiations, he is eligible to participate in the program.

Based upon our reading of this specific statutory language, in conjunction with the reasoning behind HB 463, we hold that Bedson is not eligible to participate in the deferred prosecution program as set forth in KRS 218A.14151. The plain language of the statute provides that it is only available to “[a] defendant [who is] charged with his or her first or second offense under KRS 218A.1415[.]” KRS 218A.14151(1). Here, Bedson was not charged with a possession offense under KRS 218A.1415. Rather, Bedson was charged with trafficking, a much more serious crime than mere possession. Through the plea bargaining process, Bedson and the Commonwealth were able to negotiate lesser offenses to which he pled guilty, including amending the primary trafficking charge to first-degree possession of a controlled substance. Accordingly, Bedson was never actually

charged with a possession offense under KRS 218A.1415, the only statute under which a defendant may be eligible to apply for the deferred prosecution program. Therefore, we must hold that Bedson is not eligible to enter the deferred prosecution program.

Based upon this holding, we need not address the Commonwealth's waiver argument. Furthermore, we need not address Bedson's argument that the Commonwealth failed to follow the procedural requirements regarding deferred prosecution as set forth in KRS 218A.1415(2) and that the circuit court did not comply with its statutory obligation pursuant to KRS 218A.1415(2)(b), except to note that the decision whether to allow a defendant to enter the deferred prosecution program is within the sole discretion of the Commonwealth. *See Flynt v. Commonwealth*, 105 S.W.3d 415, 426 (Ky. 2003) ("KRS 533.250(2) gives a circuit court the discretion to approve or disapprove an application for pretrial diversion only when the Commonwealth has recommended that the court approve the application. Thus, . . . where the Commonwealth objects to pretrial diversion, circuit courts cannot unilaterally approve a defendant's diversion application.").

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

STUMBO, JUDGE, CONCURS.

CLAYTON, JUDGE, DISSENTS AND FILES SEPARATE

OPINION.

CLAYTON, JUDGE, DISSENTING. I respectfully dissent. As set forth in the majority opinion, Bedson was originally charged with first-degree trafficking in a controlled substance under KRS 218A.1412 along with other offenses. In its offer of a plea agreement, the Commonwealth agreed to amend his charges to first-degree possession of a controlled substance. KRS 218A.1415(2)(d) provides that a defendant charged with possession of a controlled substance may enter a “deferred prosecution program.” The majority believes that the legislature intended this to mean that someone originally charged in an indictment may receive the benefits of this, but not someone whose charge was amended from trafficking to possession. I disagree with the majority’s conclusion.

As the majority has set forth above, “[i]n construing a statute, the courts must consider ‘the intended purpose of the statute-and the mischief intended to be remedied.’ ‘A court may not interpret a statute at variance with its stated language.’” *Monumental Life Ins. Co.*, 294 S.W.3d at 19 (citations omitted). “[T]he authority to dismiss a criminal complaint before trial may only be exercised by the Commonwealth, and the trial court may only dismiss via a directed verdict following a trial.” *Commonwealth v. Isham*, 98 S.W.3d 59, 62 (Ky. 2003); Kentucky Rules of Criminal Procedure (RCr) 9.64. The Commonwealth, not the trial court, amended Bedson’s charge with the guilty plea offer. Once the charge was amended, Bedson’s charge would be first-degree possession, not trafficking, for which he would be eligible to be considered for the deferred prosecution program. There is no requirement in the statute that it be the original charges

against the defendant nor that the charges stem from the Grand Jury rather than an amendment by the Commonwealth. Therefore, I respectfully dissent.

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