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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-002045-MR

JESSE RICE — APPELLANT

v.

APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE PAUL F. ISAACS, JUDGE
ACTION NO. 12-CR-00101

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, MAZE, AND TAYLOR, JUDGES.

MAZE, JUDGE: Jesse Rice appeals following his plea of guilty to felony DUI-related charges. After a careful review of the facts in this case, as well as relevant precedent and statutory authority, we conclude that Rice was ineligible for home incarceration. Thus, we affirm and remand.

Background

On October 9, 2012, twenty-three year-old Rice was arraigned for Operating a Motor Vehicle While Under the Influence (DUI), fourth offense. In addition, Rice answered to charges of operating a motor vehicle on a license suspended after his previous DUI conviction - his second such offense - and possession of an open alcoholic beverage container in his vehicle. Rice's blood alcohol concentration was .212 at the time of his arrest.

Rice ultimately pled guilty to aggravated DUI and suspended license charges, both felonies. At the sentencing hearing on November 12, 2013, the trial court accepted Rice's plea. The trial court signed and entered the docket sheet from the hearing which contained handwritten orders sentencing Rice to "3 yrs probated 5 yrs" subject to several conditions. The trial court further sentenced Rice to 240 days to serve due to the aggravating circumstance of his heightened blood alcohol concentration. However, the trial court immediately stayed that portion of its order pending a decision on appeal as to whether Rice could serve the 240 days under home incarceration.[1] The trial court preliminarily ruled that Rice was ineligible to do so under KRS 532.210.

Rice tendered his notice of appeal on November 26, 2013. Apparently in response to concerns that the November 12 handwritten order was not final and appealable, the trial court entered a Judgment and Sentence on Plea of Guilty on December 10, which formalized the three-year, probated sentence first

[1] Specifically, the trial court wrote on the docket sheet, "240 day jail sentence portion of judgment stayed until decision of the Court of Appeals[.]"

noted in the handwritten order. However, the December 10 Judgment did not allude to the statutory minimum sentence of 240 days or the question of home incarceration. Nevertheless, this appeal follows from the November 12 Order.

Analysis

On appeal, Rice challenges the trial court's reading of KRS 532.210. The Commonwealth contends that Rice's appeal was premature in relation to the trial court's December 10 Judgment; or in the alternative, that Rice's November 26 notice of appeal rendered the December 10 Judgment a nullity. We address this jurisdictional issue first.

I. Trial Court's November 12 and December 10 Orders

Generally, "the filing of a notice of appeal divests the trial court of jurisdiction to rule on any issues while the appeal is pending." *Johnson v. Commonwealth*, 17 S.W.3d 109, 113 (Ky. 2000) (citing to *Hoy v. Newburg Homes, Inc.*, 325 S.W.2d 301 (1959)). A trial judge in a criminal case may rule on motions raised during an appeal only if those motions raise new issues that could not have been raised on direct appeal. *Johnson* at 113 (citing to RCr 10.06(2); RCr 11.42(1); *Wilson v. Commonwealth*, 761 S.W.2d 182 (Ky. App. 1988)).

On appeal, the Commonwealth first contends that Rice's appeal is premature, and that this Court does not have jurisdiction over the matter. The Commonwealth bases its contention on the fact that Rice filed his Notice of Appeal prior to the December 10 Judgment. The Commonwealth is correct in its

observation of the procedural history in this case. However, we disagree that this rendered Rice's appeal premature and that we are without jurisdiction to hear it.

Rather, we agree with the Commonwealth's alternative contention that Rice filed a timely notice of appeal from the November 12 Order, divesting the trial court of its jurisdiction pending the appeal, and rendering the December 10 Judgment a nullity. The record clearly reflects that Rice filed his notice of appeal after the trial court's November 12 order and prior to the more formal December 10 Judgment. Rice's notice of appeal named the trial court's "Order Granting Probation and Denying Home Incarceration entered on November 21, 2013" as the order from which he was appealing[2] properly divested the trial court of its jurisdiction over the case prior to December 10, and we have jurisdiction over the appeal of the trial court's November 12 order.

II. Rice's Eligibility for Home Incarceration

In appealing from the trial court's ruling that he did not qualify for home incarceration under Kentucky Revised Statutes 532.210, Rice contends that the language of that statute, as well as others, permits him to serve his sentence within the confines of his home and under the supervision of the Bourbon County Jailer. This presents a question of law which we review *de novo* and without deference to the trial court's interpretation reading of the law. *Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth Trans. Cabinet*, 983 S.W.2d 488, 490 (Ky.

[2] While the Commonwealth is correct that Rice's notice of appeal lists the date of the Order incorrectly, we are able to glean from Rice's description that he is referring to the trial court's November 12 Order.

1998). Rice's appeal further presents a challenging legal question given the evolution of pertinent authority over the past two decades.

A. Development of Statutory and Precedential Authority

KRS 189A.010 prohibits, and states the penalties for, DUI in Kentucky. It states, in relevant part,

> (d) For a fourth or subsequent offense within a five (5) year period, [a person shall] be guilty of a Class D felony. If any of the aggravating circumstances listed in subsection (11) of this section are present, the mandatory minimum term of imprisonment shall be two hundred forty (240) days, which term shall not be suspended, probated, conditionally discharged, or subject to any other form of release[.]

KRS 189A.010(5)(d). The "aggravating circumstances" referenced in the statute include "[o]perating a motor vehicle while the alcohol concentration in the operator's blood or breath is 0.15 or more …." KRS 189A.010(11)(d).

In 1994, the Attorney General concluded that "a person convicted of a fourth or subsequent violation of KRS 189A.010 is not eligible for home incarceration…." OAG 94-49 (July 11, 1994). This Court came to the same conclusion in *Rhodes v. Commonwealth*, 920 S.W.2d 531, 533 (Ky. App. 1996).[3] However, in 1998, the General Assembly amended KRS 532.210(1) to include

[3] These opinions were largely based upon KRS 532.210(1), which previously read,

> (1) Any misdemeanant may petition the sentencing court for an order directing that all or a portion of a sentence of imprisonment in the county jail be served under conditions of home incarceration. Such petitions may be considered and ruled upon by the sentencing court prior to and throughout the term of the misdemeanant's sentence.

non-violent felony offenders among those who may be eligible for home incarceration. The statute now reads,

> (1) Any misdemeanant or a felon who has not been convicted of, pled guilty to, or entered an Alford plea to a violent felony offense may petition the sentencing court for an order directing that all or a portion of a sentence of imprisonment in the county jail be served under conditions of home incarceration. Such petitions may be considered and ruled upon by the sentencing court prior to and throughout the term of the defendant's sentence.

The addition of non-violent felony offenders to the first sentence of KRS 532.010(1) rendered our 1996 opinion in *Rhodes* and the 1994 Attorney General's Opinion obsolete; and it is the cornerstone of Rice's argument that he is eligible to serve his sentence under home incarceration. Hence, we must look anew at the eligibility of those convicted of a fourth DUI for home incarceration; and we must do so through the lens of the amended statute and other pertinent authority.

B. Language of KRS 189A.010 and KRS 532.210

We begin by restating the well-established rule of statutory interpretation that the "plain meaning" of the statutes in question must control our analysis. *See, e.g., Commonwealth v. McBride*, 281 S.W.3d 799, 803 (Ky. 2009) (citation omitted). Our ultimate goal is "to ascertain and give effect to the intent of General Assembly." *Commonwealth v. Gaitherwright*, 70 S.W.3d 411, 413 (Ky. 2002) (quoting *Beckham v. Board of Education*, 873 S.W.2d 575, 577 (Ky. 1994). In service to that goal, "we are not at liberty to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language

used." *Gaitherwright* (quoting *Commonwealth v. Frodge*, 962 S.W.2d 864, 866 (Ky. 1998). Rather, we ascertain the General Assembly's intent "from the words employed in enacting the statute…. Resort must be had first to the words, which are decisive if they are clear." *Gaitherwright* at 414 (quoting *Gateway Construction Co. v. Wallbaum*, 356 S.W.2d 247 (Ky. 962)).

Limitations on a defendant's eligibility for home incarceration clearly remain a part of KRS 532.210. While the General Assembly's 1998 amendment to the first sentence of KRS 532.210(1) created clear language expanding eligibility, when the entire subsection is read, the equally clear language of the subsection's remaining provisions still limits eligibility for home incarceration to "sentence[s] of imprisonment in the county jail…." Reading this language plainly, KRS 532.210 requires that a misdemeanant's or non-violent felon's sentence be one of imprisonment in the county jail for that sentence to be eligible for service under home incarceration. Accordingly, our inquiry shifts toward the nature of Rice's sentence.

KRS 189A.010(5) dictates that the punishment for a defendant's first, second, and third DUI offense "shall be imprisonment in the county jail…." Likely indicative of the legislature's intent, this trend ceases after a third offense. For a fourth offense, KRS 189A.010(5)(d) mandates that a defendant "be guilty of a Class D felony[]" and is subject to a mandatory minimum sentence of 240 days if aggravating circumstances exist. When incorporated, these sentences operate as an indeterminate sentence of no less than 240 days, but no more than five years'

imprisonment. Such a sentence, by operation of statute, commits the defendant "to the custody of the Department of Corrections for the term of his sentence and until released[.]" KRS 532.100(1).

There is also precedent which supports the proposition that, despite the 1998 amendment to KRS 532.210, the nature of a defendant's sentence can determine his eligibility for home incarceration. In *Aviles v. Commonwealth*, 17 S.W.3d 534, 537-38 (Ky. App. 2000), another panel of this Court held that a defendant convicted and sentenced for three Class D felonies was "not included in the class of prisoners who may petition for home incarceration" because her sentence was one of imprisonment in the state penitentiary, not the county jail. In asserting her new-found eligibility, Aviles specifically referenced the amendment to KRS 532.210 made under the 1998 Omnibus Crime Bill. We found her assertion "unavailing." *Aviles* at 538.

Rice's is not a "sentence of imprisonment in the county jail[,]" but a sentence to be served as a state prisoner under the control of the state Department of Corrections. Rice received a sentence which was, in effect, imprisonment for no less than 240 days, but no more than three years. It follows that, as the recipient of an indeterminate sentence, Rice was a state prisoner under the jurisdiction and control of the Kentucky Department of Corrections, not the Bourbon County Jailer. *See* KRS 532.100(1) and (6),[4] and like Aviles, Rice is "not included in the class of

[4] This is true despite the fact that Rice could serve his sentence "in a county jail in a county in which the fiscal court has agreed to house state prisoners" under KRS 532.100(4)(a). Even if Rice serves his sentence in the Bourbon County jail, he would do so as a state prisoner in the custody and under the control of the Department of Corrections, not the county jailer as required

prisoners why may petition for home incarceration." *Aviles* at 538. No portion of his three-year sentence, including the mandatory minimum period of 240 days, can be served under home confinement.

Conclusion

In sum, we interpret both the language of the statutes mentioned herein, as well as the General Assembly's intent behind those statutes, to establish that the felony of DUI, fourth offense is to be punished more harshly than the misdemeanors that immediately precede it in our criminal statutes. This heightened punishment entails commitment to a state, not a county, correctional authority, and it therefore entails confinement outside of one's home.

To this end, we affirm the trial court's conclusion that Rice was ineligible for home incarceration. Furthermore, we remand the matter to the trial court so that it may lift its stay on the order sentencing Rice to the mandatory minimum period of 240 days to serve.

ALL CONCUR.

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for eligibility for home incarceration. *See* KRS 532.210(5).