

RENDERED: JULY 1, 2016; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2015-CA-000779-MR

CAROL LYNN MANER

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HON. JAMES D. ISHMAEL, JR., JUDGE  
INDICTMENT NO. 14-CR-00455

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, COMBS AND STUMBO, JUDGES.

STUMBO, JUDGE: Carol Lynn Maner has appealed from the Fayette Circuit Court's order entered March 4, 2015, denying her motion to suppress evidence discovered during a search pursuant to arrest. This Court affirms the circuit court's denial of the motion.

## **I. Background**

On October 31, 2013, at 4:50 pm, Officer James McCullough of the Lexington Police Department was dispatched in relation to a purported theft at the Kroger grocery store on Bryan Station Road in Lexington, Kentucky. Officer McCullough met with loss prevention officer Eddie Murphy and the appellant, Carol Lynn Maner, at Mr. Murphy's office. Through video monitoring, the loss prevention officer had witnessed Maner pay for a portion of her items at a self-checkout lane, then put the paid items back into her cart on top of items that were not paid for. Mr. Murphy told Officer McCullough that he stopped Maner in the vestibule of the store as she began to leave. Maner then told Mr. Murphy that the items in her cart were left there by accident, at which time Mr. Murphy detained Maner to await the arrival of Officer McCullough.

Officer McCullough listened to Maner's version of events and watched the video surveillance footage, which in his opinion clearly showed Maner using her paid for items to try and cover up the unpaid items in her cart. Officer McCullough also believed that he had discretion as to whether to arrest or cite misdemeanor shoplifters, and his own personal rule was that he would usually arrest those shoplifting more than \$50 worth of merchandise. As Maner was apprehended attempting to steal over \$89 worth of merchandise, Officer McCullough placed her under arrest. While conducting a search incident to arrest, the officer discovered a metal tube on Maner's keychain that contained 27 oxycodone pills.

At a suppression hearing held on March 2, 2015, in Fayette Circuit Court, Officer McCullough testified that he was trained in and familiar with the application of Kentucky Revised Statutes (KRS) 431.015, the statute that requires citations rather than arrests for most misdemeanors committed in an officer's presence. He also testified that he was familiar with applying KRS 433.236, relating to the detention and arrest of shoplifting suspects based upon probable cause. Officer McCullough's testimony indicated that he arrested Maner based upon probable cause as a shoplifter pursuant to KRS 433.236. The Fayette Circuit Court denied the suppression motion in an order dated March 4, 2015. Maner subsequently entered a conditional guilty plea to Possession of a Controlled Substance in the First Degree and Theft by Unlawful Taking – Less than \$500, and was given a probated sentence totaling one year. This appeal followed.

## **II. Analysis**

The sole issue on appeal is a question of law, concerning the interaction between KRS 433.236, a statute on the detention and arrest of shoplifters (last amended in 1978), and KRS 431.015. The Legislature amended this latter statute in 2011<sup>1</sup> to require a police officer to issue citations rather than make arrests for misdemeanors committed in the officer's presence, with a few specific exceptions. KRS 514.030, "Theft by Unlawful Taking – Less than \$500," is not one of the listed exceptions. Since at the time of her arrest there was merely probable cause to suspect her of shoplifting pursuant to KRS 514.030, Maner's

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<sup>1</sup> 2011 Ky. Acts, ch. 2, § 46, eff. 6-8-11.

position is that the officer did not properly follow KRS 431.015 and she should have been cited rather than arrested for the misdemeanor. Maner contends that because the arrest was improper, the search incident to arrest was also improper and should have been suppressed by the circuit court. The Commonwealth takes the position that KRS 433.236(3) is a specific statute on shoplifting that gives the officer discretion to make an arrest: “Any peace officer may arrest without warrant any person he has probable cause for believing has committed larceny in retail or wholesale establishments.”

There is certainly tension between the two statutes under these facts, as there are two rules of statutory construction working against each other, summed up as follows: “Generally, when a later-enacted and more specific statute conflicts with an earlier-enacted and more general statute, the subsequent and specific statute will control.” *Stogner v. Commonwealth*, 35 S.W.3d 831, 835 (Ky. App. 2000) (footnote and citation omitted). In *Stogner*, though, the later statute was also the more specific statute. This case offers a more difficult question than that of *Stogner*, however, since here it is the *earlier* statute that is more specific. Maner believes that KRS 431.015 should control as it is the more recent statute over KRS 433.236, which was last amended in 1978. The Commonwealth argues that KRS 433.236 should control for greater specificity, since that statute applies to a very particular set of circumstances, that of “larceny in retail or wholesale establishments.” *Id.* In contrast, KRS 431.015 applies to a more general category

of misdemeanors that happen to be committed in an officer's presence, with some listed exceptions.

Considering the above factors in combination with other guidelines regarding statutory construction, we believe the circuit court properly denied the motion to suppress. "The Legislature is presumed to be aware of the existing law at the time of enactment of a later statute." *Stogner* at 835 (footnote and citations omitted). "We presume that the General Assembly intended for the statute to be construed as a whole, for all of its parts to have meaning, and for it to harmonize with related statutes." *Shawnee Telecom Res., Inc. v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011) (citations omitted). Lastly, while it is possible that conflict between old and new statutes *can* result in the implied repeal of the earlier one, this is not a preferred outcome:

Although repeal by implication is recognized, there is also a presumption that if the Legislature intended a subsequent act to repeal a former one, it will express itself to that end so as to leave no doubt about its purpose. In short, courts must use repeal by implication as a last resort when the repugnancy of the conflict can admit no other reasonable construction.

*Osborne v. Commonwealth*, 185 S.W.3d 645, 649 (Ky. 2006) (internal citation omitted).

Instead of ruling that KRS 431.015 provided for the implicit repeal of the earlier statute, harmonizing the two statutes would be a better solution. This also seems appropriate since, as alluded to by the circuit court, KRS 431.015(1)(a) mandates that an officer give a citation instead of making an arrest "for a

misdemeanor committed *in his or her presence.*” (Emphasis added). Strictly speaking, that does not apply here, nor would it apply under most situations implicating KRS 433.236, as the officer typically only arrives at the scene after the alleged shoplifting offense has occurred. The point is well made, and serves as another indication that KRS 431.015 should not apply in this sort of situation. We hold that KRS 431.015 should stand as a statute of general applicability, allowing KRS 433.236 to control under its specific set of circumstances.

**III. Conclusion**

For the foregoing reasons, we affirm the Fayette Circuit Court Order entered March 4, 2015, denying Appellant’s motion to suppress.

ALL CONCUR.

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