

RENDERED: OCTOBER 26, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001607-MR

LEONARD HUTCHINSON

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JAMES R. SCHRAND, II, JUDGE
ACTION NO. 16-CR-00400

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: D. LAMBERT, NICKELL, AND TAYLOR, JUDGES.

NICKELL, JUDGE: Leonard Hutchinson appeals from a judgment of the Boone Circuit Court entered pursuant to a conditional guilty plea under RCr¹ 8.09, convicting him of driving under the influence (DUI), fourth offense (with an aggravator).² Discerning no error, we affirm.

¹ Kentucky Rules of Criminal Procedure.

² Hutchinson was also convicted of other crimes not pertinent to this appeal.

Hutchinson was charged in Grant County with DUI, First Offense in July 2009. He was charged in Gallatin County with DUI, Second Offense in October 2010, and DUI, Third Offense in November 2011. Hutchinson pled guilty to each offense and signed and entered an AOC Guilty Plea form. By that form, he was informed his guilty plea would make him susceptible to KRS³ 189A.010(5), which enhances penalties for subsequent DUI offenses committed within a specified time frame, referred to as a “look-back” period. At the time Hutchinson pled guilty to those offenses, the look-back period under KRS 189A.010(5) was five years.

On April 9, 2016, Governor Bevin signed Senate Bill (SB) 56 into law. SB 56 amended the look-back period in KRS 189A.010(5) from five years to ten years. Ten days later, Hutchinson was arrested in Boone County and again charged with DUI, Second Offense. On June 7, 2016, a Boone County grand jury indicted Hutchinson on an amended charge of DUI, Fourth Offense, in light of the recent amendment to the look-back period in KRS 189A.010(5). Hutchinson’s counsel thereafter filed a motion to dismiss claiming: (1) the statutory amendment to KRS 189A.010(5) violated *ex post facto* laws; (2) retroactive application of the amendment violated KRS 446.080(3); and (3) the amendment violated *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). By order entered

³ Kentucky Revised Statutes.

September 9, 2016, the trial court denied the motion. On September 28, 2016, Hutchinson entered a conditional guilty plea to DUI, Fourth Offense (with aggravator), reserving the right to appeal the trial court's determination his three prior offenses could be used for enhancement purposes. Hutchinson was sentenced to three years' imprisonment. This appeal followed.

On February 1, 2017, we granted Hutchinson's motion to abate the appeal pending the outcome of two cases⁴ in the Supreme Court of Kentucky addressing identical issues. The opinion of the Supreme Court in *Commonwealth v. Jackson*, 529 S.W.3d 739 (Ky. 2017), was rendered on September 28, 2017, and became final on October 19, 2017. This appeal was returned to the active docket on January 18, 2018.

Hutchinson again alleges the trial court erred in denying his motion to dismiss the DUI, Fourth Offense because the statutory amendment to KRS 189A.010 violated *ex post facto* laws and *Boykin*. While seemingly abandoning his original argument related to KRS 446.080(3), he now improperly raises a completely new argument—the amendment breached the Commonwealth's contract in his prior plea agreements. None of his arguments carry the day.

In *Jackson*, the Supreme Court expressly addressed each of the contentions Hutchinson has raised in arguing SB 56 cannot be applied to his case.

⁴ The two cases were subsequently consolidated and decided in a single opinion.

The Court held any references to the five-year look-back period occurring during the plea bargain process “were not intended to constitute an immunization of DUI defendants from the 2016 changes to the DUI statute, and so may not be relied upon by defendants to avoid the application of the new look-back period.” *Id.* at 745. Further, the Court held application of SB 56 did not violate *ex post facto* principles or KRS 446.080(3), did not breach prior plea agreements, and *Boykin* does not bar application of the amended statute. *Id.* at 746-47.

We agree with the Commonwealth that *Jackson* is wholly dispositive of the arguments presented herein. Accordingly, application of the ten-year look-back period in KRS 189A.010(5) to Hutchinson’s 2016 DUI offense was proper. Hutchinson admits we are bound by Supreme Court precedent but urges this Court to “express its opinion about these issues and urge the Kentucky Supreme Court to review its opinion if it views the law differently.” We decline the invitation.

For the foregoing reasons, the judgment of the Boone Circuit Court is AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

Steven J. Buck
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Mark D. Barry
Assistant Attorney General
Frankfort, Kentucky