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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001629-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JOSEPH W. CASTLEN, III, JUDGE
ACTION NO. 78-CR-00128-001

DENNIS VOWELS

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * * *

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

JONES, JUDGE: The Commonwealth brings this appeal challenging the Daviess Circuit Court's order granting Dennis Vowels's application to vacate and expunge his felony convictions. On appeal, the Commonwealth contends that the 1978 convictions at issue are not eligible for expungement because they did not arise from a single incident. Following review, we vacate and remand.

I. BACKGROUND

In August of 1978, a grand jury returned an indictment charging Dennis Vowels with two counts of burglary and three counts of theft by unlawful taking. The events giving rise to these charges had occurred over a period of five days, during which time Vowels and two accomplices stole three automobiles—each of which belonged to a different owner—and burglarized an auto supply shop and a gas station. Vowels pleaded guilty to all counts on October 13, 1978, and was sentenced to two years on each charge, to run concurrently for a total of two years. Vowels was granted shock probation in December of 1978, and his civil rights were restored in 1986.

On August 19, 2016, Vowels filed an application to vacate and expunge his felony convictions pursuant to KRS¹ 431.073, which allows for the expungement of multiple felony convictions if those convictions “aris[e] from a single incident.” The circuit court held a hearing on the expungement application on September 22, 2016. At the hearing, the Commonwealth argued that, while other circuit courts had interpreted “single incident” as synonymous with a single course of conduct, this was an incorrect interpretation of the law. The Commonwealth noted that the offenses leading to Vowels’s felony charges had occurred against five different victims, on five different days. Accordingly, the Commonwealth argued, each felony charge constituted a distinct incident. Vowels argued that his felonies were eligible to be expunged under the statute as they had

¹ Kentucky Revised Statutes.

all been charged in a single indictment. The trial court noted that KRS 431.073 could be read in accordance with the Commonwealth's interpretation; however, the court construed the statute more liberally, to ensure its intended effect. Therefore, the trial court granted Vowels's application.

This appeal followed.

II. ANALYSIS

In 2016, the Kentucky General Assembly created KRS 431.073, which deals with the eligibility and process for expungement of certain felony convictions. The sole issue in this appeal is the proper interpretation of that statute, specifically subsection (1). In pertinent part, KRS 431.073(1) reads as follows:

Any person who has been convicted of a Class D felony violation of [a list of sixty-one offenses], or ***a series of Class D felony violations of one (1) or more statutes enumerated in this section arising from a single incident***, or who has been granted a full pardon, may file with the court in which he or she was convicted an application to have the judgment vacated.

(Emphasis added). The Commonwealth acknowledges that all of Vowels's convictions fall within the list set forth in KRS 431.073(1). Therefore, standing alone, each would be eligible for expungement under the statute. Vowels, however, was convicted on multiple felony charges. The Commonwealth contends that, because each of Vowels's violations was against a different, distinct victim and occurred on different days, Vowels's convictions cannot be said to have arisen from a single incident—they arise out of five separate incidents. Naturally,

Vowels contends that his felony convictions all arise out of a single incident.

Therefore, whether those convictions can be expunged turns on what it means to “aris[e] from a single incident” as the phrase is found in KRS 431.073(1).

“When interpreting statutes, our utmost duty is to ‘effectuate the intent of the legislature.’” *Brewer v. Commonwealth*, 478 S.W.3d 363, 371 (Ky. 2015) (quoting *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002)). “That intent is perhaps no better expressed than through the actual text of the statute[.]” *Id.* “A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.” *Hall v. Hospitality Res., Inc.*, 276 S.W.3d 775, 784 (Ky. 2008) (quoting *United States v. Plavcak*, 411 F.3d 655, 660 (6th Cir. 2005)). “And ‘[w]e read the statute as a whole and in context with other parts of the law.’” *Wade v. Poma Glass & Specialty Windows, Inc.*, 394 S.W.3d 886, 888 (Ky. 2012) (quoting *Petitioner F v. Brown*, 306 S.W.3d 80, 85-86 (Ky. 2010)). If a statute is “ambiguous or otherwise frustrates a plain reading,” however, we may resort to extrinsic resources to interpret its meaning. *Id.* “A statute is ambiguous ‘[w]hen the undefined words or terms in a statute give rise to two mutually exclusive, yet reasonable constructions’” *Id.* (quoting *MPM Fin. Group, Inc. v. Morton*, 289 S.W.3d 193, 198 (Ky. 2009)).

None of the words contained in the phrase at issue are defined in the statute. Nonetheless, we do not find that it is ambiguous. The plain meaning of the words used in KRS 431.073(1) do not lend themselves to inconsistent

interpretations. The common definition of “series” is “a number of things or events of the same class coming one after another in spatial or temporal succession.” MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/series>. BLACK’S LAW DICTIONARY (10th ed. 2014) defines “arise” as “1. [t]o originate; to stem (from) 2. To result (from)” “Incident” is defined as “a discrete occurrence or happening; an event, esp. one that is unusual, important, or violent.” *Id.*

Vowels argues that to accurately ascertain the meaning of KRS 431.073, we must further define the words contained in the definition of “incident.” Specifically, Vowels directs our attention to the definition of “occurrence,” which can mean the “action or process of happening” then notes that “process” can be defined as “a series of actions or operations conducing to an end.” Appellee’s Br. 7 (citing MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/occurrence>; *id.*, <http://www.merriam-webster.com/dictionary/process>).² Therefore, Vowels contends that “a series of Class D violations . . . arising from a single incident . . .” should be interpreted as “felony violations that originate from a single series of actions conducing to an end.”

² The definition for occurrence given above is the one that Vowels cited in his brief to support his interpretation of KRS 431.073. However, our own look at Merriam-Webster online reveals that the main definition for “occurrence” is as follows: “1. Something that occurs . . . 2. The action or fact of happening or occurring.” Vowels’s proffered definition is found under a heading titled “Occurrence Defined for Kids.”

We agree with Vowels in part—a person can commit multiple acts during one occurrence, event, or incident. Nonetheless, we do not interpret KRS 431.073(1) as taking as broad a meaning as Vowels alludes to in his brief. While we do not limit “incident” so narrowly as to mean a single movement of a defendant, the plain language of KRS 431.073(1) modifies “occurrence” with “single,” indicating that the series of felony convictions should arise from *one* event rather than multiple events grouped closely together. In other words, to be eligible for expungement under the statute, the felony convictions can arise from a series of acts, but all those acts must have been committed in the same event—not, as Vowels contends, from multiple acts stretching across a series of events.

An example given by the Commonwealth at the hearing on Vowels’s application for expungement is illustrative of what could constitute series of convictions arising out of a single incident. The Commonwealth’s hypothetical involved a defendant fleeing from the police in a vehicle. When apprehended by the police, that defendant is found to be driving a stolen vehicle and in possession of controlled substances. He or she is subsequently convicted on charges for each of those three crimes. In that hypothetical, all charges arise out of one incident—the defendant fleeing from the police, while in a stolen vehicle and in possession of controlled substances. Separate crimes were committed against separate victims, but there was one central event that gave rise to all charges.

To accept the above example, however, we must reject the Commonwealth’s argument at the hearing that a “single incident” is not

tantamount to a “single course of conduct” as used in Kentucky’s double jeopardy statute, KRS 505.020. Examples of a single course of conduct given in the commentary to KRS 505.020 include a defendant who unlawfully enters a dwelling house at night and commits an act of theft upon entering or a deliberate act that results in multiple homicides. These are likewise examples of single events—or incidents—which would give rise to multiple convictions. In contrast, Kentucky courts have “consistently held that ‘a series of acts *that are readily distinguishable* is not a [single] course of conduct’” *Spicer v. Commonwealth*, 442 S.W.3d 26, 32-33 (Ky. 2014) (quoting *Hill v. Commonwealth*, No. 2008-SC-00100-MR, 2009 WL 2706960 (Ky. Aug. 27, 2009)). Acts are readily distinguishable when each act is “preceded by a sufficient period of time in which the defendant could reflect on his conduct and formulate an intent to commit another act[.]” *Id.* at 31. The same is true of convictions arising out of a single incident. Acts cannot be separated by significant spans of time and still be considered to have occurred in the same incident.³

Having ascertained the meaning of KRS 431.073(1), we must determine if Vowels’s felony convictions fall into such definition. Vowels contends that, because his felony convictions were joined in a single indictment

³ Our result is in accord with *Commonwealth v. Adams*, No. 2016-CA-001739 --S.W.3d--, (Ky. App. Oct. 13, 2017). The *Adams* opinion was designated to be published, and therefore, would ordinarily be binding on this panel. However, the Kentucky Supreme Court granted discretionary review in *Adams*. As such, it is not final. As such, we did not treat *Adams* as dispositive. Nevertheless, we do note that our outcome is in accord with *Adams*.

under RCr⁴ 6.18, the convictions naturally fall into the definition of a series of felony violations occurring from a single incident. We disagree. The requirements that must be met for charges to be brought in a single indictment are not the same as the requirements that must be met for a series of felony convictions to be expunged. Under RCr 6.18, multiple felonies can be charged in the same indictment “if the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan.” Vowels acknowledges that his felony violations could have been charged in the same indictment because they are “of the same or similar character.” He contends, however, that his felonies could also be classified as “transactions connected together or constituting parts of a common scheme or plan.” Vowels argues that his felony convictions fall into this category because all violations were committed by the same actors, acting in concert with each other, and arose out of “the three boys’ joint plan to do some foolish, illegal things together.” Alternatively, Vowels argues that all violations arose from or followed the first car theft, making them eligible for expungement.

There is nothing in the record indicating under which theory Vowels’s offenses were joined in one indictment. Regardless, we disagree with his contention that the requirement for offenses to be joined in an indictment is the same as the threshold that must be met for a series of felony convictions to be expunged. Under RCr 6.18, connected transactions can be charged in the same

⁴ Kentucky Rules of Criminal Procedure.

indictment even though they arose out of separate incidents. *See, e.g., Cohron v. Commonwealth*, 306 S.W.3d 489 (Ky. 2010) (affirming the trial court’s conclusion that separate incidents occurring on separate days could be tried together to explain the defendant’s state of mind). In contrast, KRS 431.073(1) specifically states that the series of convictions must arise from a *single* incident to be eligible for expungement. Convictions “arising from a single incident” and eligible for expungement under KRS 431.073(1) will likely have been suitable to be charged in a single indictment. However, while convictions charged in one indictment under RCr 6.18 *could* be deemed to all arise out of a single incident and therefore meet the standard of KRS 431.073(1), that will not always be the case.

In the instant case, Vowels was indicted for five offenses that occurred over a period of five days. The offenses certainly constitute a “series of Class D felony violations”—the theft and burglary charges are similar in nature and each new offense followed the previous offense over a relatively short span of time. We cannot, however, find that all offenses arose out of a single incident or resulted from a single occurrence. Vowels argues that his first act of theft, which occurred on July 8, 1978, should count as the “single incident” out of which the two subsequent thefts and burglaries arose. Without more, the first offense in a series of offenses cannot qualify as “single incident” out of which spawned the remaining charges. If that were the case, the General Assembly would not have needed to include the “arising from a single incident” language in KRS 431.073. To be part of a series, the violations necessarily must follow each other in

succession. The statute could have simply stated that one who has been convicted of a series of Class D felony violations may apply to have those convictions vacated. Besides indicating that his offenses followed each other over a short period of time, Vowels has made no argument as to why the first car theft should constitute the originating incident.

Vowels does argue that all violations arose from his and his friends' plan to "do some foolish, illegal things together." Perhaps Vowels and his friends did plan to commit a spree of crimes together then went and committed the offenses for which Vowels was convicted. But we cannot find that a plan to partake in a string of illegal activities constitutes a "single incident" under KRS 431.073. As noted above, "incident" is defined as "a discrete occurrence or happening; an event, esp. one that is unusual, important, or violent." Making plans does not fit into this definition. A plan is not an occurrence, happening, or event. Plans may work as proposals for happenings or events, but they do not, in themselves, constitute incidents. Further, if the General Assembly intended for KRS 431.073 to include series of events that arose out of a common plan, it could have parroted the common scheme or plain language used in RCr 6.18. It did not do so.

Vowels's crimes are related inasmuch as they are similar in nature, and they occurred within a relatively brief period. While the crimes might constitute a series, they do not appear to arise from a single incident. The identity of the perpetrators is all that links them together. This is insufficient. To

constitute a single incident, there must be some greater connections that leads from one crime to the next such that there is little or no time for reflection between them. Each crime was discrete, and following each crime, Vowels had ample time to reflect of his past conduct, and to disassociate himself from further criminal activity. Instead, Vowels continued on, and a successive incident occurred when Vowels undertook to and did commit a new crime against a new victim.

III. CONCLUSION

Because we cannot find that all of Vowels's felony convictions arose out of a single incident, we must conclude that Vowels's convictions are not eligible for expungement under KRS 431.073(1). In many ways, this is an unhappy result. Even the Commonwealth acknowledges that Vowels's life choices following his 1978 convictions have been commendable. However, the General Assembly enacted a statute limiting the availability of expungement to particular individuals. Having carefully reviewed the statute, we must hold that Vowels is not currently one of those individuals because his crimes did not arise out of a single incident.

LAMBERT, D., JUDGE CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

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