RENDERED: DECEMBER 21, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000122-MR

JASON SYLVEN BARNEY — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 16-CR-00714

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: SMALLWOOD,[1] TAYLOR AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: On April 9, 2016, certain amendments to Kentucky Revised Statutes (KRS) 189A.010, Kentucky's driving under the influence (DUI) statute, went into effect. Pertinent to this appeal, there was a substantive change to KRS 189A.010(5), which contains substantially enhanced penalties for subsequent

[1] Judge Gene Smallwood concurred in this opinion prior to the expiration of his term of office. Release of the opinion was delayed due to administrative handling.

DUI offenses committed within a specified time frame, commonly referred to as the "look-back" period. KRS 189A.010(5)(d) now provides:

> For a fourth or subsequent offense within a ten (10) year period, 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[.]

On July 18, 2016, Jason Sylven Barney was charged with DUI, fourth offense, with an aggravated circumstance. It is not disputed that Barney entered into plea agreements and pled guilty to three prior DUI offenses within the ten preceding years: the first was in 2008, the second was in 2009 and the third guilty plea was entered in 2015. All three were entered when KRS 189A.010(5) provided for a five-year look-back period.[2]

Barney entered a conditional guilty plea after the Hardin Circuit Court denied his motion *in limine* to exclude introduction of his prior DUI convictions. Barney reserved his right to appeal the issue of whether the ten-year look-back period contained in the current version of KRS 189A.010(5)(d) is applicable to his prior DUI convictions for purposes of enhancing the penalties under the DUI

[2] Barney's 2015 conviction would be within the look-back period under either version of the statute.

statute. Based on *Commonwealth v. Jackson*, 529 S.W.3d 739 (Ky. 2017), we affirm.

Barney argues that his prior guilty pleas were entered in reliance on the look-back provision as being a five-year period as explained to him during plea negotiations and when he pled guilty to each charge.[3] He correctly points out that plea agreements are to be construed as contracts between the defendant and the Commonwealth. *McClanahan v. Commonwealth*, 308 S.W.3d 694, 701 (Ky. 2010). Barney argues that application of the ten-year look-back period to plea agreements that expressly include the five-year look-back period is a unilateral modification of the plea agreements he entered into with Commonwealth.

Section 19 of the Kentucky Constitution states: "No . . . law impairing the obligation of contracts, shall be enacted." As noted in *Elmore v. Commonwealth*, 236 S.W.3d 623, 626 (Ky.App. 2007), "[o]nce a plea agreement is accepted by a defendant, the agreement is binding upon the Commonwealth—subject to approval by the trial court—and the accused is entitled to the benefit of his bargain." Over three decades ago, the Kentucky Supreme Court warned that

[3] Barney does not raise an argument that his rights were violated under *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) or his constitutional right to be free from the application of *ex post facto* laws. We note that both arguments would not succeed under *Jackson*.

the Commonwealth, whether by statute or otherwise, cannot be permitted to break its promises to a criminal defendant. It eloquently stated:

> The standards of the market place do not and should not govern the relationship between the government and a citizen. *People v. Reagan*, 395 Mich. 306, 235 N.W.2d 581, 585 (1975). "Our government is the potent, the omnipresent, teacher. For good or ill, it teaches the whole people by its example." *Olmstead v. United States*, 277 U.S. 438, 485, 48 S.Ct. 564, 575, 72 L.Ed. 944, 960 (1928) (Brandeis, J., dissenting). If the government breaks its word, it breeds contempt for integrity and good faith. It destroys the confidence of citizens in the operation of their government and invites them to disregard their obligations. That way lies anarchy. We deal here with a "pledge of public faith a promise made by state officials and one that should not be lightly disregarded." *State v. Davis*, Fla.App., 188 So.2d 24, 27 (1966).

Workman v. Commonwealth, 580 S.W.2d 206, 207 (Ky. 1979), *overruled on other grounds by Morton v. Com*m*onwealth*, 817 S.W.2d 218 (Ky. 1991). The Court stated the undebatable principle that "our historical ideals of fair play and substantial justice do not permit attorneys for the Commonwealth to disregard promises[.]" *Id*.

Despite this Commonwealth's adherence to the rule that the Commonwealth must not be permitted to welsh on its agreements, in *Jackson*, our Supreme Court was not persuaded that the five-year look-back period contained in plea agreements entered into prior to April 2016 prevents the application of the ten-year look back period to enhance a DUI offense committed after the

amendment of KRS 189A.010(5). In *Jackson*, the circuit court ruled that the defendant's prior plea agreements constituted enforceable contractual provisions assuring that their convictions could not enhance subsequent DUI offenses committed after five years.

Our Supreme Court disagreed. It reasoned:

> [L]anguage in DUI agreements such as that in this case, and similar allusions to the five-year look-back period which may have occurred 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.

Jackson, 529 S.W.3d at 745. In the Court's view, the defendant's theory would produce the absurd result that a DUI defendant who had the same prior offenses on the same prior dates but who went to trial instead of pleading guilty "would have no cognizable claim to the exemption from the 2016 amendment[.]"[4] *Id*.

This case is indistinguishable from *Jackson*. Whether this Court agrees or disagrees, pursuant to Supreme Court Rule 1.030(8)(a), this intermediate appellate court is bound by that decision.

The judgment and sentence of the Hardin Circuit Court is affirmed.

ALL CONCUR.

[4] The Court did not distinguish between the hypothetical defendant who receives a trial and Jackson who waived his constitutional rights under his plea agreement with the Commonwealth and by pleading guilty.

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