

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2017-CA-000203-MR

JEANNIE KAUFMAN

APPELLANT

v. APPEAL FROM CAMPBELL CIRCUIT COURT  
HONORABLE JULIE REINHARDT WARD, JUDGE  
ACTION NO. 16-CR-00561

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, CHIEF JUDGE; KRAMER AND NICKELL, JUDGES.

KRAMER, JUDGE: At issue in this appeal is whether the circuit court erred in applying the amended version of KRS<sup>1</sup> 189A.010 mandating a ten-year, rather than five-year, “look-back period” to the present case. Pursuant to *Commonwealth v.*

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<sup>1</sup> Kentucky Revised Statute.

*Jackson*, 529 S.W.3d 739 (Ky. 2017), which is directly on point, the circuit court committed no error. Accordingly, we affirm.

Appellant Jeannie Kaufman was indicted on the charge of operating a motor vehicle while under the influence, fourth or subsequent offense within ten years, pursuant to KRS 189A.010. Kaufman previously entered guilty pleas for her prior offenses of operating a motor vehicle while under the influence in 2007, 2008, and 2011. At the time she entered her previous guilty pleas, KRS 189A.010 provided that repeat offenders of the statute would be subject to enhanced penalties for five years. However, approximately one month before Kaufman committed the offense in this case, the amended version of KRS 189A.010 went into effect.<sup>2</sup> It provides that repeat offenders of the statute are subject to enhanced penalties for ten years. *See* KRS 189A.010(5).

Kaufman moved to challenge the application of KRS 189A.010, as amended, to her case. The circuit court denied her motion. Kaufman then moved to enter a guilty plea, conditioned on her right to appeal the denial of her motion challenging the application of the new “look-back period” of ten years to her case. The circuit court accepted her conditional guilty plea and sentenced her

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<sup>2</sup> The amended version of KRS 189A.010 became effective on April 9, 2016. The indictment charges that Kaufman committed the present offense on or about May 30, 2016.

in accord with the plea agreement. Kaufman thereafter filed a timely notice of appeal.<sup>3,4</sup>

Kaufman first contends that application of the amended statute to her new charge violates contract law because her plea agreements on her previous DUI charges were contracts, and those guilty pleas “were entered under the contractual understanding that her convictions could only be used to enhance subsequent offenses occurring over the next five years.”<sup>5</sup> Contrary to Kaufman’s allegation, the Supreme Court in *Jackson*, 529 S.W.3d at 745, held that plea agreement contract law does not bar application of the look-back period of ten years.

Kaufman next alleges that application of the amended statute violates her rights under *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). *Boykin* requires a court to affirm on the record that a guilty plea is voluntary and intelligent before it is entered. Kaufman contends that at the time she entered her guilty pleas regarding her prior DUI offenses, those plea agreements and plea colloquies informed her of the potential consequence of a

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<sup>3</sup> We pause to note that although Kaufman’s guilty plea form in the present case was date-stamped by the circuit court clerk as having been filed into the record on January 11, 2016, this appears to be in error. The back of the guilty plea form states that it was “signed in open court” on January 9, 2017.

<sup>4</sup> This case was held in abeyance, pending the finality of *Jackson*, 529 S.W.3d at 739.

<sup>5</sup> It does not appear Kaufman raised this contract law claim in the circuit court. Therefore, it is not preserved for our review. See *Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976). Regardless, because this claim was examined on the merits in *Jackson*, we will briefly address it.

look-back enhancement for five years. However, the consequences of those pleas now include a look-back enhancement for ten years. Kaufman asserts that this violates *Boykin*.

The *Jackson* Court addressed *Boykin* and its applicability to the amended look-back period of penalty enhancement. The Court specifically held that *Boykin* rights were not violated by the application of the amended version of KRS 189A.010. See *Jackson*, 529 S.W.3d at 747.

Finally, Kaufman asserts that the amended KRS 189A.010 fails to state an intent for retroactive application and such application results in an *ex post facto* violation. She states that at the time she entered her guilty pleas to the prior DUI offenses, she was informed that those convictions “could be used to enhance any further DUI charges she accumulated over the next five years,” not over the next ten years.

However, the *Jackson* Court also addressed these issues and found that they lacked merit. The Court held that:

Because the 2016 amendment [to KRS 189A.010] was in effect when the crimes under review were committed, *ex post facto* principles cannot preclude its application to the crimes under review.

The defendants also argue that the April 2016 amendment should not be applied to them as the amended statute fails to state an intent for retroactive application. KRS 446.080(3) provides that “No statute shall be construed to be retroactive, unless expressly so

declared.” *See also* KRS 446.110 (“No new law shall be construed to repeal a former law as to any offense committed against a former law. . . .”). Again, however, because the crimes under review were allegedly committed *after* the effective date of the 2016 amendment, the defendants are being prosecuted under the statute that was in effect at the time of their alleged crimes. There is no retroactive application of a new law to a situation that occurred before the law became effective.

*Jackson*, 529 S.W.3d at 746.

Consequently, application of the new look-back period to the latest charges against Kaufman was not barred by *ex post facto* principles, and the amended statute was not improperly applied retroactively. *See id.*

Accordingly, the judgment of the Campbell Circuit Court is affirmed.

ALL CONCUR.

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