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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000836-MR

MARK SHEPARD

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JAMES R. SCHRAND, II, JUDGE
ACTION NO. 16-CR-00848

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JONES, J. LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: On April 9, 2016, certain amendments to Kentucky Revised Statutes (KRS) 189A.010, Kentucky’s 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 DUI offenses committed within a specified time frame, commonly referred to as the “look-back”

period. In April 2016, that subsection was amended to increase the look-back period from five years to ten years. 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 November 3, 2016, Mark Shepard was indicted for DUI, fourth-offense and operating on a DUI-suspended license, aggravator. To calculate his prior offenses, the Commonwealth included a 2009 DUI conviction entered pursuant to Shepard's guilty plea, a 2015 DUI conviction and an earlier 2016 DUI conviction. He entered a conditional guilty plea reserving his right to appeal the issue of whether the ten-year look-back period in KRS 189A.010(5) applied to include his 2009 conviction.¹

Shepard argues the use of the 2009 DUI conviction violates his rights under contract law, under *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), and under his constitutional right to be free from the application of *ex post facto* laws. After reviewing the record in conjunction with

¹ The 2015 conviction and earlier 2016 conviction fall within the look-back period of either version of KRS 189A.010(5).

the opinion of our Kentucky Supreme Court’s opinion in *Commonwealth v. Jackson*, 529 S.W.3d 739 (Ky. 2017), we affirm.

Shepard argues his prior 2009 guilty plea was entered in reliance on the look-back provision being a five-year period as explained to him during plea negotiations and when he entered his guilty plea. 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).

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 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. Commonwealth*, 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.* While those same principles would seem applicable to Shepard’s 2009 plea agreement and preclude the application of the amendment to KRS 189A.010(5), our Supreme Court has held otherwise.

In *Jackson*, the circuit court ruled that the defendants’ 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 reasoning that:

[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 defendants’ 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[.]” *Id.* at 739.²

Because *Jackson* holds that contract principles do not preclude application of the amended statute to Shepard’s current offense, the circuit court’s inclusion of the 2009 DUI conviction for purposes of enhancement did not breach or violate his previous plea agreement.

Jackson also precludes Shepard’s requested relief based on a violation of his *Boykin* rights. *Boykin* requires that at the time a guilty plea is entered, the record must affirmatively show the defendant was informed of and waived his privilege against self-incrimination; his right to a jury trial; and his right to confront his accusers. *Boykin*, 395 U.S. at 243, 89 S.Ct. at 1712. It may not be inferred from a silent record that a defendant waived these constitutional rights. *Id.*

In *Jackson*, our Supreme Court disagreed that the application of the ten-year look-back period to include DUI convictions entered prior to April 2016 implicated *Boykin*. The Court explained that “[t]he fact that subsequent legislative measures may unforeseeably alter the consequences and effects of the criminal

² The Court did not distinguish between the hypothetical defendant who was tried and the defendants in *Jackson* who entered guilty pleas and waived constitutional rights pursuant to their plea agreements.

conviction does not take the plea retrospectively outside the scope of the *Boykin* requirements.” *Jackson*, 529 S.W.3d at 747. Under *Jackson*, Shepard’s *Boykin* challenge cannot succeed.

Finally, Shepard contends that to allow the Commonwealth to apply the ten-year look-back period to include his 2009 conviction violates *ex post facto* principles under both the United States Constitution and the Kentucky Constitution. U.S. Const. art. I § 10; Kentucky Constitution § 19(1). A statute violates *ex post facto* principles, when it imposes a punishment for an act that was not punishable at the time it was committed or imposes additional punishment to an already prescribed punishment. *Pate v. Dep’t of Corr.*, 466 S.W.3d 480, 486-87 (Ky. 2015).

Again, *Jackson* is determinative and forecloses Shepard’s argument. The Court held there is no *ex post facto* violation when the ten-year look-back period is applied to DUI convictions entered pursuant to guilty pleas entered prior to the effective date of the amendment to KRS 189A.010(5). It reasoned:

Under essentially these identical circumstances, we previously held that any new DUI penalty provisions as contained in the amended statute may be applied to the new DUI charges. In *Commonwealth v. Ball*, 691 S.W.2d 207 (Ky. 1985), the defendant had a prior DUI conviction obtained before the enactment of the statute enhancing the penalties for subsequent DUI offenses, KRS 189A.010. When the same defendant was charged with another DUI after the enactment of KRS 189A.010, we held that *ex post facto* principles posed no barrier to

using the first conviction to enhance the penalties for the latter conviction. We said that the new statute did not create a new offense, but merely imposed different penalties on the same criminal act depending on the status of the offender. The same principle is applicable here.

Jackson, 529 S.W.3d at 746. Shepard was charged with DUI after the effective date of the amendment to the look-back provision and, therefore, *ex post facto* principles do not bar application of the new period.

Shepard's 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 Boone Circuit Court is affirmed.

LAMBERT, J., JUDGE, CONCURS.

JONES, JUDGE, CONCURS IN RESULT ONLY.

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