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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-000335-MR

MICHAEL C. KNIGHT

APPELLANT

v. APPEAL FROM CRITTENDEN CIRCUIT COURT
HONORABLE C. RENE' WILLIAMS, JUDGE
ACTION NO. 16-CR-00071

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** * * * *

BEFORE: LAMBERT AND L. THOMPSON, JUDGES; AND HENRY,
SPECIAL JUDGE.¹

HENRY, SPECIAL JUDGE: Michael C. Knight appeals from a conditional plea
to a fourth offense of driving under the influence of alcohol or drugs (“DUI”)

¹ Special Judge Michael L. Henry sitting by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

within a ten-year period on the basis that KRS² 189A.010, as amended in 2016, was incorrectly applied to his case. After review of the record, we affirm the judgment of the Crittenden Circuit Court.

Knight was arrested for DUI, aggravated, fourth offense in October 2016. His prior DUI convictions occurred in 2007 and 2009, with two occurring in 2009. KRS 189A.010(5) states:

Any person who violates the provisions [prohibiting driving under the influence] shall . . . [f]or 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[.]

The enhanced penalties for subsequent DUI offenses committed within a specified time frame are commonly referred to as the “look-back period.” Prior to April 2016, the lookback period for prior DUI offenses was five years, which would have eliminated Knight’s prior convictions for enhancement purposes for the 2016 DUI offense.

Knight filed a motion challenging application of the amended version of KRS 189A.010 to his case, which was denied. He then entered a conditional guilty plea, reserving his right to appeal on this issue. This appeal followed.

² Kentucky Revised Statutes.

Knight alleges three grounds for his appeal. First, Knight argues that application of KRS 189A.010 to his case violates contract law. Second, Knight claims that application of KRS 189A.010 violates his rights under *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). Finally, he claims that application of KRS 189A.010 to his case violates the constitutional prohibition on *ex post facto* law. In *Commonwealth v. Jackson*, 529 S.W.3d 739 (Ky. 2017), the Kentucky Supreme Court considered and rejected each of these arguments.

First, Knight argues that the amended version of KRS 189A.010 violates both the Kentucky Constitution³ and the United States Constitution⁴ because plea agreements are considered contracts and that the Commonwealth is bound by their terms. Under the terms of his prior agreements, Knight argues that his DUI convictions could only be used to enhance subsequent offenses during the next five years. In *Jackson*, 529 S.W.3d at 745, the Kentucky Supreme Court rejected this argument as follows:

[W]e conclude that language 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

³ “No *ex post facto* law, nor any law impairing the obligation of contracts, shall be enacted.” KY. CONST. § 19(1).

⁴ “No State shall . . . pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts[.]” U.S. CONST. art. I, § 10.

defendants to avoid the application of the new look-back period.

Second, Knight claims that application of the amended version of KRS 189A.010 violates the requirement that guilty pleas must be voluntary and intelligent pursuant to *Boykin*. He explains that, when he entered his prior pleas, Knight was advised only of the consequences of the five-year look-back period, not the ten-year period. The Kentucky Supreme Court rejected this argument by stating the following:

The fact that subsequent legislative measures may unforeseeably alter the consequences and effects of the criminal conviction does not take the plea retrospectively outside the scope of the *Boykin* requirements. A plea entered without knowledge of unanticipated and unforeseeable consequences that may not become manifest for many years does not have the constitutional significance of a plea entered without knowledge of its immediate foreseeable consequences, or in ignorance of the fundamental rights to remain silent, to a jury trial, and to confront witnesses.

Jackson, 529 S.W.3d at 747.

Finally, Knight contends that Article I, section 10 of the United States Constitution and section 19 of the Kentucky Constitution bar *ex post facto* laws from being enacted and that application of the amended version of KRS 189A.010 violates this prohibition. The Kentucky Supreme Court addressed this argument as follows:

The defendants' 2016 DUI offenses were committed *after* the effective date of the 2016 amendment of KRS

189A.010 extending the DUI prior offense look-back period from five years to ten years. They are not charged with a crime that was legal when committed but was rendered illegal by the 2016 amendment. Because their current crime was committed after the 2016 amendment, it cannot be said that the amendment aggravated or increased the punishment beyond the applicable punishment when the crime was committed. The 2016 amendment did not alter the rules of evidence to require less proof or different proof to convict than what was necessary when the crime was committed. Because the 2016 amendment was in effect when the crimes under review were committed, *ex post facto* principles cannot preclude its application to the crimes under review.

Jackson, 529 S.W.3d at 746 (emphasis in original).

Knight acknowledges the Kentucky Supreme Court’s rejection of identical arguments in *Jackson* but urges this Court to review the Supreme Court’s opinion if we have a different view of the law. We decline to do so. “[This Court] is bound by and shall follow applicable precedents established in the opinions of the Supreme Court[.]” SCR⁵ 1.030(8)(a). “The Court of Appeals cannot overrule the established precedent set by the Supreme Court or its predecessor court.”

Smith v. Vilvarajah, 57 S.W.3d 839, 841 (Ky. App. 2000) (citation omitted).

Therefore, pursuant to *Jackson*, we reject Knight’s arguments on the same basis.

For the foregoing reasons, we affirm the judgment of the Crittenden Circuit Court.

⁵ Rules of the Supreme Court.

ALL CONCUR.

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