

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000884-MR

JEROME BUSSEY

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE KELLY MARK EASTON, JUDGE
ACTION NO. 17-CR-01067

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING IN PART AND REMANDING

** ** * * * **

BEFORE: ACREE, GOODWINE, AND KRAMER, JUDGES.

GOODWINE, JUDGE: Jerome Bussey (“Bussey”) appeals from the Hardin Circuit Court’s final judgment and sentence of imprisonment entered May 25, 2018. At his jury trial, Bussey was convicted of being a felon in possession of a handgun and being a first-degree persistent felony offender (“PFO-1st”). He was thereafter sentenced to thirteen years’ imprisonment. The Commonwealth now concedes error occurred in Bussey’s sentencing. Because the trial court

erroneously convicted Bussey as a PFO-1st based on prior convictions with uninterrupted and consecutive sentences, contrary to the concurrent sentence break rule, we vacate Bussey's PFO-1st conviction and remand for a new sentencing trial.

BACKGROUND

At approximately 2:00 a.m. on November 4, 2017, Officer Wyatt Rossell ("Officer Rossell") was on patrol in northern Radcliff when he observed Bussey driving a Buick sedan with an unilluminated license plate.¹ Officer Rossell initiated a stop of the vehicle based on the violation. During the traffic stop, Officer Rossell smelled marijuana and asked Bussey to step out of the vehicle. The officer asked Bussey whether he had any weapons or contraband. Bussey replied he was carrying a pistol in his jacket pocket and allowed Officer Rossell to retrieve the weapon. Upon further questioning, Bussey admitted he was a convicted felon.

The Hardin County grand jury thereafter indicted Bussey on one count of being a felon in possession of a handgun and one count of being a PFO-1st. At trial, Officer Rossell testified for the Commonwealth and relayed the aforementioned facts. Bussey testified in his own defense and told the jury he

¹ Kentucky Revised Statute (KRS) 186.170(1) requires license plates to be legible and illuminated during nighttime hours. An unilluminated plate is a traffic violation under KRS 186.990.

obtained a pistol to protect himself after one of his neighbors was murdered. After deliberating, the jury returned a guilty verdict on the charge of being a felon in possession of a handgun.

During the trial's penalty phase, the Commonwealth presented testimony from Jacqueline Keene ("Officer Keene"), an officer working for the Kentucky Department of Corrections, Division of Probation and Parole. She testified how Bussey had two criminal felony cases for which he had previously served prison sentences. In Bussey's first criminal case, involving second-degree assault and first-degree wanton endangerment, the offenses occurred on June 15, 2008, and he was convicted on January 27, 2010. In Bussey's second criminal case, involving second-degree burglary, the offense occurred on September 29, 2009, and he was convicted on September 13, 2010. Officer Keene testified how Bussey was sentenced to five years' imprisonment and five years' probation in the first felony case, and five years' imprisonment in the second felony case, to run consecutively to the first felony sentence.

Following the penalty phase testimony, the jury found Bussey guilty of being a PFO-1st and fixed his sentence at seven years' imprisonment for the handgun possession charge, which the jury then enhanced to thirteen years' imprisonment by virtue of the PFO-1st. The trial court entered its final judgment

on May 25, 2018, sentencing Bussey in accordance with the jury's recommendation. This appeal followed.

ANALYSIS

In his sole argument on appeal, Bussey contends the trial court erroneously convicted and sentenced him as a PFO-1st based on two prior felony sentences which ran consecutively to each other. The Commonwealth concedes this sentence was in error. We agree. "A persistent felony offender in the first degree is a person who is more than twenty-one (21) years of age and who stands convicted of a felony after having been convicted of two (2) or more felonies[.]" KRS 532.080(3). An individual with only one prior felony conviction, may typically only qualify as a second-degree persistent felony offender.² KRS 532.080(2). However,

[f]or the purpose of determining whether a person has two (2) or more previous felony convictions, two (2) or more convictions of crime for which that person served concurrent or uninterrupted consecutive terms of imprisonment shall be deemed to be only one (1) conviction, unless one (1) of the convictions was for an offense committed while that person was imprisoned.

KRS 532.080(4).

² The exception to this rule is if the single prior felony offense is a sex crime against a minor, as defined in KRS 17.500. Such individuals may be charged with PFO-1st under KRS 532.080(3).

This principle is frequently labeled the “concurrent sentence break” rule.³ The purpose of the rule is “to strengthen the Commonwealth’s attempts at rehabilitation of convicted persons. Greater penalties are sanctioned for those persons who, after serving a prison term for a conviction, demonstrate the futility of their rehabilitation by committing other crimes after their release.” *Blades v. Commonwealth*, 339 S.W.3d 450, 455 (Ky. 2011) (emphasis omitted) (quoting *Williams v. Commonwealth*, 639 S.W.2d 788, 790 (Ky. App. 1982)). A PFO-1st conviction is appropriate when “the rehabilitative efforts on [the defendant’s] first conviction failed, the rehabilitative efforts on his second conviction failed, and he is, under the statute, a persistent felony offender in the first degree upon receiving his third conviction.” *Williams*, 639 S.W.2d at 790. In keeping with this rehabilitative purpose, “[t]he concurrent sentence break is provided . . . to those who may have committed more than one crime but received their sentences for these crimes prior to serving any time in prison.” *Blades*, 339 S.W.3d at 455 (quoting *Williams*, 639 S.W.2d at 790).

Here, Bussey’s PFO-1st conviction was based on two prior felony cases for which he served “uninterrupted consecutive terms of imprisonment” as outlined in KRS 532.080(4). The Commonwealth accurately described the facts of

³ See, e.g., *Perry v. Commonwealth*, 2013-CA-000076-MR, 2015 WL 2446589 at *4 (Ky. App. May 22, 2015).

this case as follows: “While it is uncontroverted that [Bussey] had two prior sets of felony convictions . . . it is also clearly established on the record that he committed the second set of felony offenses prior to being convicted and sentenced on the first set of felony offenses.” (Commonwealth’s brief at 3.) Therefore, Bussey’s two prior felony cases should have been considered one prior conviction pursuant to KRS 532.080(4), and the trial court erroneously convicted and sentenced Bussey on the charge of PFO-1st.

CONCLUSION

For the foregoing reasons, we vacate the portion of the Hardin Circuit Court’s judgment convicting Bussey of being a first-degree persistent felony offender. We remand for a new sentencing trial to determine whether Bussey is a second-degree persistent felony offender.

ALL CONCUR.

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