IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: OCTOBER 20, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2004-SC-0653-MR

RONNIE FITTS — APPELLANT

V.

APPEAL FROM FULTON CIRCUIT COURT
HONORABLE WILLIAM LEWIS SHADOAN, JUDGE
02-CR-68

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

On August 20, 2002, Appellant, Ronnie Fitts, was convicted of two counts of drug trafficking relating to two separate sales of crack cocaine to a confidential police informant, a Class C felony under KRS 218A.1412. Because he was previously convicted of cocaine trafficking under former KRS 218A.140(1), each count was enhanced to a Class B felony, KRS 218A.1412(2)(b), and Appellant was sentenced to serve two consecutive fifteen-year prison terms.

On October 23, 2003, this Court affirmed Appellant's convictions but reversed his sentences because the instructions required the jury to find him guilty of trafficking in a controlled substance in the first degree, second offense, without first requiring the jury to find that Appellant was a subsequent offender within the meaning of KRS 218A.1412(2)(b). Fitts v. Commonwealth, No. 2002-SC-1072-MR, slip op. at 6 (Ky. Oct.

23, 2003). His case was remanded to the Fulton Circuit Court for a new sentencing hearing. Id.

On remand, a new jury, properly instructed, found that Appellant was a second offender and sentenced him to serve two consecutive twenty-year sentences – the maximum allowed for two Class B felony convictions under KRS 532.020(1)(c) and KRS 532.110(1)(c). Appellant appeals his new sentence as a matter of right, Ky. Const. § 110(2)(b), asserting that the trial court: (1) was vindictive in sentencing him to a higher penalty on resentencing, thus violating his Fourteenth Amendment Due Process rights; and (2) erred in instructing the jury on second-offense enhancement because, in order to enhance his sentence under KRS 218A.1412(2)(b), the Commonwealth first had to prove that the conduct giving rise to his prior drug trafficking conviction (under former KRS 218A.140(1)) would support a conviction under current KRS 218A.1412. Finding no error, we affirm.

I. INCREASED PENALTY ON RESENTENCING.

"Due process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." North Carolina v. Pearce, 395 U.S. 711, 725, 89 S.Ct. 2072, 2080 (1969). Pearce held that a rebuttable presumption of vindictiveness arises when, after a conviction is reversed, the trial judge imposes a more severe sentence after retrial without an affirmative explanation for the increase. 395 U.S. at 725-26, 89 S.Ct. at 2080-81. The United States Supreme Court subsequently limited this presumption to instances where there is a "reasonable likelihood" that the increase resulted from an improper animus by the sentencing agent. Alabama v. Smith, 490 U.S. 794, 799-800, 109 S.Ct. 2201, 2205, 104 L.Ed.2d. 865 (1989).

Appellant asserts that Pearce's presumption of vindictiveness applies to his resentencing because the trial judge did not set forth a statement justifying the increased sentence as required by Pearce. However, the Pearce presumption is inapplicable here because it dealt with an increased sentence imposed by a sentencing judge after a defendant successfully obtained reversal of a conviction. Pearce, 395 U.S. at 725, 93 S.Ct. at 2080. An increased sentence handed down by a new jury panel is expressly excluded from the Pearce presumption.

> [T]he jury, unlike the judge who has been reversed, will have no personal stake in the prior conviction and no motivation to engage in self-vindication. Similarly, the jury is unlikely to be sensitive to the institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals.

Chaffin v. Stynchcombe, 412 U.S. 17, 27, 93 S.Ct. 1977, 1983, 36 L.Ed.2d. 714 (1973). Our predecessor court stated further:

> The rationale of [Pearce] was that the due process clause of the Fourteenth Amendment . . . could be violated if (1) a judge imposed both sentences, and (2) the more severe sentence after a retrial indicated a punitive and vindictive policy which had a deterrent effect upon the defendant's exercise of his right to appeal. The Pearce decision was quite limited in scope. Before the threat of violating the defendant's due process right of appeal arises, there must be a correlating control of both sentences by the same agency.

Bruce v. Commonwealth, 465 S.W.2d 60, 61 (Ky. 1971) (emphasis added). In Kentucky, a judge can decrease a sentence fixed by a jury if the judge deems the sentence unduly harsh, KRS 532.070(1), but cannot increase a sentence fixed by a jury. RCr 9.84(1); Dotson v. Commonwealth, 740 S.W.2d 930, 931 (Ky. 1987).

Because Appellant's increased sentence on retrial was fixed by a new panel of jurors, the presumption in Pearce is inapplicable. There was no "correlating control of both sentences by the same agency" under Bruce. 465 S.W.2d at 61; see also Texas v. McCullough, 475 U.S. 134, 140, 106 S.Ct. 976, 979, 89 L.Ed.2d. 104 (1986) (The

Pearce presumption is inapplicable when "different sentencers assess[] the varying sentences . . . received. In such circumstances, a sentence 'increase' cannot truly be said to have taken place."); Luttrell v. Commonwealth, 952 S.W.2d 216, 219 (Ky. 1997) ("The trial judge was not required to justify imposing a more severe sentence after [defendant's] retrial because the trial judge simply imposed the sentence that had been fixed by the jury in both trials.").

The sentencing authority has "wide discretion in the sources and types of evidence used to assist [it] in determining the kind and extent of punishment to be imposed within limits fixed by law." Williams v. New York, 337 U.S. 241, 246, 69 S.Ct. 1079, 1082, 93 L.Ed. 1337 (1949). Absent Pearce's presumption, Appellant must affirmatively prove actual vindictiveness on behalf of the sentencing authority in order to challenge the increased sentence under the Due Process Clause. Wasman v. United States, 468 U.S. 559, 569 104 S.Ct. 3217, 3223, 82 L.Ed.2d 424 (1984). Appellant has offered no evidence of actual vindictiveness.[1]

"The first prerequisite for the imposition of a retaliatory penalty is knowledge of the prior sentence." Chaffin, 412 U.S. at 26, 93 S.Ct. at 1982. Nothing in the record suggests that the jury had any knowledge of the previous sentence. Without evidence that the jury had knowledge of the previous sentence, there can be no actual vindictiveness. For these reasons, Appellant fails to establish a violation of his due process rights.

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[1] Appellant alleges that the trial judge responded to objections to the increased sentence with the statement: "He asked for a jury trial." Appellant's Reply Brief, at 1. A review of the video transcript reveals only a similar statement made by the prosecutor, not the trial judge. Even if this allegation were true, such a statement is not sufficient to establish vindictiveness when the judge merely accepts the jury's recommended sentence.

III. SENTENCE ENHANCEMENT.

Appellant argues that his 1992 trafficking conviction under former KRS 218A.140(1) does not qualify as a prior conviction under KRS 218A.010(25) and thus cannot support a sentence enhancement under KRS 218A.1412(2)(b).[2] Specifically, he argues that without proof that his violation of former KRS 218A.140(1) arose from conduct that would violate current KRS 218A.1412(1), his former trafficking conviction is not a prior conviction under KRS 218A.010(25), and his recent conviction does not qualify as a "subsequent offense" that sustains an enhancement under that subsection.

The 1991 version of KRS 218A.140(1) provided: "No person shall traffic in any controlled substance except as authorized in this chapter."

KRS 218A.1412 provides:

> (1) A person is guilty of trafficking in a controlled substance in the first degree when he knowingly and unlawfully traffics in: a controlled substance . . . classified in Schedules I or II which is a narcotic drug; . . . .
> (2) Any person who violates the provisions of subsection (1) of this section shall:
>
> . . . .
>
> (b) For a second or subsequent offense be guilty of a Class B felony.

"Subsequent offense" is defined in KRS 218A.010(25):

> [A]n offense is considered as a second or subsequent offense, if, prior to his conviction of the offense, the offender has at any time been convicted under this chapter, or under any statute of the United States or of any state relating to substances classified as controlled substances, except

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[2] The Commonwealth does not assert that consideration of this issue is barred by the "law of the case" doctrine, Thomas v. Commonwealth, 931 S.W.2d 446, 450 (Ky. 1996), perhaps because Appellant did not raise this issue on his first appeal and we did not address it sua sponte. However, "[t]he doctrine as defined by the decisions, is that one adjudication settles all errors relied upon for a reversal, whether mentioned in the opinion of the court or not, and all errors lurking in the record on the first appeal which might have been, but were not expressly, relied upon as error." Commonwealth v. Schaefer, 639 S.W.2d 776, 777 (Ky. 1982) (quoting Sowders v. Coleman, 223 Ky. 633, 4 S.W.2d 731, 731 (1928)). We will address the issue on this appeal solely to avoid the necessity of revisiting it in the context of a potential RCr 11.42 motion.

> that a prior conviction for a nontrafficking offense shall be treated as a prior offense only when the subsequent offense is a nontrafficking offense.

(Emphasis added.) The definition of "second or subsequent offense" is broad: any "conviction at any prior time in any jurisdiction" qualifies as a subsequent offense so long as the remaining conditions in KRS 218A.010(25) are satisfied. Morrow v. Commonwealth, 77 S.W.3d 558, 560 (Ky. 2002).

The faulty premise of Appellant's argument is that the conduct previously adjudged criminal, rather than the resulting conviction, disposes of the enhancement question. Contrary to Appellant's assertion, a previous conviction is the sine qua non for a second conviction to constitute a "subsequent offense;" the prior conduct which led to the conviction is not. Fulcher v. Commonwealth, 149 S.W.3d 363, 380 (Ky. 2004) ("[E]nhancement is not premised upon an offense-to-offense sequence but upon a conviction-to-conviction sequence."). So long as the prior trafficking conviction "relat[es] to substances classified as controlled substances," KRS 218A.010(25), it will sustain enhancement under KRS 218A.1412(2)(b). Clearly Appellant's prior conviction for trafficking in cocaine sufficiently "relates to substances classified as controlled substances" that it makes his recent conviction for trafficking in cocaine a subsequent offense.

Canons of statutory interpretation also compel this outcome. Appellant's proposition is in direct contradiction with the statute's language. His construction would render meaningless the phrases "under any statute" and "at any time [convicted]" in KRS 218A.010(25). "Our main objective is to construe the statute in accordance with its plain language and in order to effectuate the legislative intent." Cabinet for Families & Children v. Cummings, 163 S.W.3d 425, 430 (Ky. 2005). Appellant's construction is in direct contradiction with the plain language of the statute.

Appellant seems to argue that the conduct constituting the offense of which he was previously convicted must be reevaluated under a new statute to see if it would constitute the same offense under present law.[3] That argument makes no more sense than would an argument by the Commonwealth that a defendant's conduct, which led to a misdemeanor conviction years ago, should be reevaluated to see if it would constitute a felony under present law and, if so, that it could be used for second-offense enhancement of a present felony conviction. The proposition is untenable under either scenario.

Accordingly, the sentences imposed by the Fulton Circuit Court are affirmed.

All concur.

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[3] To entertain this argument, one must assume arguendo that the legal standards for trafficking have changed. In fact, the legal standards for a trafficking conviction under former KRS 218A.140(1) and current KRS 218A.1412 are the same. We find no authority suggesting that more evidence is needed to obtain a conviction under the new statute than under the old.

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