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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: AUGUST 21, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2006-SC-000911-MR

CLIFTON EDWARD RILEY — APPELLANT

V.

ON APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CRAIG Z. CLYMER, JUDGE
NO. 05-CR-00307

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This is a matter of right appeal from a judgment in which Appellant Clifton Edward Riley was convicted of First-Degree Trafficking in a Controlled Substance (cocaine), Use or Possession of Drug Paraphernalia (both second offenses), and for being a First-Degree Persistent Felony Offender. Appellant received a sentence of twenty years, enhanced for the subsequent offenses of Use or Possession of Drug Paraphernalia and First-Degree Trafficking, and further enhanced to thirty-five years for being a First-Degree Persistent Felony Offender. On appeal, Appellant contends that his sentence was enhanced twice using the same prior conviction of First-Degree Trafficking in a Controlled Substance as both a subsequent offense under KRS Chapter 218A, and under the persistent felony offender statute, KRS 532.080, constituting an unlawful double enhancement. We reject the claimed error due to the lack of merit. Hence, we affirm.

On June 15, 2005, Detective William Gilbert with the Paducah Police Department, and Fred White, a confidential informant, arranged a controlled drug buy with Appellant to purchase $100.00 worth of cocaine at America's Best Inn. When Detective Gilbert and Mr. White were in the room, they observed Appellant cut a small piece of cocaine from a large piece, giving the small piece to Detective Gilbert, who subsequently left the buy money with Appellant. At this time, Appellant informed Detective Gilbert and Mr. White that if they wanted more cocaine he would have "some really good stuff" later that night. After Detective Gilbert and Mr. White exited the room, Detectives John Tolliver and Matt Wentworth entered the room and arrested Appellant. After the arrest, Detectives recovered the buy money, the large piece of cocaine, a cell phone Appellant stated he purchased to sell cocaine, and a soda can that Appellant stated he used to smoke cocaine. Appellant later told Detective Gilbert that they had caught him "red-handed." An audiotape of the drug transaction was recorded and played for the jury at Appellant's trial.

Appellant was charged with First-Degree Trafficking in a Controlled Substance (cocaine), Use or Possession of Drug Paraphernalia (both second offenses), and being a First-Degree Persistent Felony Offender (PFO I).

After a jury trial on September 18, 2006, Appellant was found guilty of each charge. During the penalty phase, the jury recommended a one-year sentence for the Use or Possession of Drug Paraphernalia, second offense charge. However, as the jury was retiring to deliberate on the First-Degree Trafficking in a Controlled Substance charge, a juror approached the trial court and stated she "just couldn't do it" because she had just remembered that she had a brother was serving time in Illinois for the same thing. The trial court and counsel questioned the juror, who was then dismissed,

leaving eleven jurors. The remaining jurors were then informed of the problem and were also dismissed.

On September 21, 2006, the trial court held a hearing to determine how to proceed. The Commonwealth requested a trial only on the remaining penalty phase and the Appellant requested a completely new trial. The trial court determined a trial on the remaining penalty phase was all that was needed.

On October 16, 2006, a new jury was impaneled to proceed with the remaining penalty phase. Appellant received an enhanced sentence of twenty years for the subsequent offense of First-Degree Trafficking to run concurrent with the one year sentence for Use or Possession of Drug Paraphernalia, second offense. Appellant was also found guilty of PFO I, for which the jury recommended a total sentence of thirty-five years. Appellant appeared in court on November 27, 2006, and was sentenced to thirty-five years imprisonment.

DOUBLE ENHANCEMENT

Appellant argues the same prior trafficking conviction was used to enhance his First-Degree Trafficking Conviction as a subsequent offense and also to find him guilty of PFO I. Appellant admits that his claim of error is unpreserved for review, but states that it can be raised for the first time on appeal. We agree. This Court in Cummings v. Commonwealth, 226 S.W.3d 62, 66 (Ky. 2007), held that sentencing issues may be raised for the first time on appeal. Further, this Court in Hughes v. Commonwealth, 875 S.W.2d 99, 100 (Ky. 1994), held that every defendant has the right to be sentenced after due consideration of all applicable law. Therefore, this issue is properly before the Court.

At the penalty phase of the trial, the Commonwealth presented evidence of Appellant's prior felony convictions. In 1992, Appellant plead guilty to three counts of Trafficking in a Controlled Substance (cocaine). In 1993, Appellant plead guilty to First-Degree Trafficking in a Controlled Substance. In 2001, Appellant was convicted of three counts of first-degree burglary, one count of second-degree burglary, and for being a second-degree persistent felony offender. After presenting this evidence, the trial court then instructed the jury to enhance Appellant's sentence for First-Degree Trafficking if they believed beyond a reasonable doubt that Appellant had been previously convicted of first-degree trafficking. The jury enhanced Appellant's sentence to twenty years. A similar instruction was given regarding Appellant's status as PFO I, but this time the jury was to consider Appellant's previous convictions for first-degree burglary, second-degree burglary, and first-degree trafficking in a controlled substance. The jury found Appellant guilty of PFO I and recommended a thirty-five year sentence.

This Court in Morrow v. Commonwealth, 77 S.W.3d 558, 560 (Ky. 2002) (overruling Gray v. Commonwealth, 979 S.W.2d 454 (Ky. 1998)), held that an offender is eligible for a sentence enhancement under both the "second or subsequent" offender provisions of KRS Chapter 218A, and under the persistent felony offender statute, KRS 532.080, where there are separate prior unrelated convictions used to support each enhancement. Appellant contends that the jury could only consider the 1993 conviction for first-degree trafficking for the second or subsequent offense because the 1992 convictions were for "trafficking in a schedule II narcotic," and specifically did not include the word "first-degree." Appellant further contends that because that prior conviction was already used, it could not be used again to find Appellant guilty of PFO I.

Appellant had previously been convicted of trafficking in a controlled substance four times, but only the 1993 conviction specifically stated "first-degree trafficking." Further, the trial court instructed the jury for the second or subsequent offense enhancement using "first-degree trafficking." While Appellant argues that this could only include the 1993 conviction because the three 1992 convictions were for "trafficking in a schedule II narcotic," KRS 218A.1412(1) states that "[a] person is guilty of trafficking in a controlled substance in the first degree when he knowingly and unlawfully traffics in: a controlled substance, that is classified in Schedules I or II which is a narcotic drug . . . ." Also, Appellant's 1992 convictions were for trafficking cocaine, which is classified under KRS 218A.070 as a Schedule II narcotic. Moreover, Appellant's 1992 convictions for trafficking in a Schedule II narcotic were under KRS Chapter 218A, which was changed to include "first-degree trafficking." Appellant's claim that only the 1993 conviction for first-degree trafficking could be used is without merit.

Having concluded that any of the four previous trafficking convictions could have been used for enhancement for the second or subsequent offense under the "first-degree trafficking" language, Appellant's contention that any of the remaining three convictions for trafficking could not be used for enhancement for the PFO I charge is without merit. Using one of these prior convictions for enhancement as a second or subsequent offender under KRS Chapter 218A would leave three separate prior qualifying convictions for the jury to consider for enhancement under KRS 532.080. The trial court properly instructed the jury to consider Appellant's previous convictions for first-degree burglary, second-degree burglary, and first-degree trafficking for the PFO I enhancement.

For the foregoing reasons, the judgment of the McCracken Circuit Court is hereby affirmed.

All sitting. All concur, except Venters, J., not sitting.

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