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**COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
File No. 2013-SC-000141
On Discretionary Review from
Court of Appeals No. 2011-CA-001658**

COMMONWEALTH OF KENTUCKY

APPELLANT

V.

Appeal from Johnson Circuit Court
Hon. John David Preston, Judge
Indictment No. 10-CR-00145

GARY GAMBLE, SR.

APPELLEE

BRIEF FOR APPELLEE, GARY GAMBLE, SR.

Submitted by:

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Certificate required by CR 76.12(b)

The undersigned certifies that this brief was served by U.S. mail, postage prepaid, on the Hon. John David Preston, Judge, Johnson Circuit Court, Judicial Center, Suite 217, 908 3rd Street, Paintsville, Kentucky 41240; the Hon. Anna D. Melvin, Commonwealth's Attorney, P.O. Box 596, Paintsville, Kentucky 41240-0596; the Hon. Steven M. Goble, Assistant Public Advocate, P.O. Box 1423, Paintsville, Kentucky 41240-1423; and the Hon. Jack Conway, Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601-8204 on July 14, 2014.

At 2 n

STEVEN J. BUCK

INTRODUCTION

Appellee, Gary Gamble, entered a conditional guilty plea to one count of second-degree trafficking in a controlled substance and one count of being a second-degree persistent felony offender. He was sentenced to five years (to be suspended after serving one year with the remainder of the sentence to be placed on supervised probation). Gamble appealed the trial court's order denying his motion to dismiss the persistent felony offender charge. The Court of Appeals reversed the judgment and sentence when it found that the sentence for second-degree trafficking in a controlled substance could not be enhanced beyond three years. This Court accepted the Commonwealth's motion for discretionary review.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant welcomes oral argument if this Court believes it would assist it in rendering a fair and just opinion in this case.

DESIGNATION OF RECORD

There is one volume of trial record, and citations to it will be made in "TR [page number]" form. There are nine videos in the record, and citations to them will be made in "VR [date], [time]" form.

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STATEMENT OF FACTS

A grand jury returned an indictment charging Gary Gamble with one count of second-degree trafficking in a controlled substance and one count of being a first-degree persistent felony offender after he allegedly sold three hydrocodone pills to an informant. TR 1-2, 71-72.

Gamble filed a notice of unqualified consent to be sentenced under KRS 218A.1413, as amended by House Bill 463, pursuant to KRS 466.110. TR 64-65. Under the previous version of KRS 218A.1413, anyone who committed second-degree trafficking in a controlled substance was, for the first offense, guilty of a Class D felony. Under the new version of the statute, anyone who commits second-degree trafficking in a controlled substance in the manner Gamble did here (trafficking in less than twenty dosage units of a controlled substance classified in Schedule III, first offense)¹ is guilty of “[a] Class D felony for the first offense, except that KRS Chapter 532 to the contrary notwithstanding, the maximum sentence to be imposed shall be no greater than three (3) years[.]” KRS 218A.1413(2)(b)(1). The trial court ordered that Gamble was entitled to the benefit of the amended statute. TR 80-84.

Gamble also filed a motion to dismiss the persistent felony offender charge. TR 85-88. He contended that KRS 218A.1413, as amended by

¹ The arguments in this brief address acts of second-degree trafficking in a controlled substance that place defendants under the provisions of KRS 218A.1413(2)(b)(1). The statute provides scenarios under which a defendant shall be sentenced as a Class C or one-to-five year Class D felon, but this case only concerns acts that expose defendants to the one-to-three year Class D felony sentencing range.

House Bill 463, precludes imposing a sentence greater than three years for the offense of second-degree trafficking in a controlled substance. TR 85-87. The trial court denied the motion in a written order after holding a hearing. TR 97-101; VR 7/1/11, 10:17:00.

Gamble entered a conditional guilty plea to one count of second-degree trafficking in a controlled substance and one count of being a second-degree persistent felony offender. He was sentenced to five years. TR 107-111.

Gamble appealed the trial court's order denying his motion to dismiss the persistent felony offender charge to the Court of Appeals. In an unpublished opinion, the Court of Appeals reversed the trial court's order when it found that "those portions of KRS 532 which would enhance Gamble's sentence beyond three years are contrary to the provisions of KRS 218A.1413(2)(b) and are therefore inapplicable to that statute, as the General Assembly has expressly forbidden such an application. Therefore, the maximum sentence Gamble can receive for second-degree [trafficking in a controlled substance] is three years." Gamble v. Commonwealth, Slip Op. No. 2011-CA-001658, pp. 10-11 (Ky.App. Feb. 1, 2013).

This Court granted the Commonwealth's motion for discretionary review.

ARGUMENT

- I. **The Court of Appeals correctly ruled that Gary Gamble's maximum punishment for the offense of second-degree trafficking in a controlled substance was three years and that it was not subject to persistent felony offender enhancement.**

Whether a criminal defendant can have his sentence enhanced as a persistent felony offender when his underlying felony is second-degree trafficking in a controlled substance is a question of statutory construction. A reviewing court must "ascertain and give effect to the intent of the General Assembly." Beckham v. Board of Educ. Of Jefferson County, 873 S.W.2d 575, 577 (Ky. 1994). A court is "not at liberty to add or subtract from the legislative enactment" or to "discover meaning not reasonably ascertainable from the language used." Id. A court may not "breathe into the statute that which the Legislature has not put there." Commonwealth v. Gaitherwright, 70 S.W.3d 411, 413 (Ky. 2002).

The starting point for determining what the legislature intended is the text of the statute in question; if the words are unambiguous, then they are decisive. Osborne v. Commonwealth, 185 S.W.3d 645, 648 (Ky. 2006). Any "doubt in the construction of a penal statute will be resolved in favor of lenity...." Commonwealth v. Colonia Stores, Inc., 350 S.W.2d 465, 467 (Ky. 1961). The rule of lenity directs this Court to interpret an ambiguous penal statute "in favor of the accused." Gilbert v. Commonwealth, 838 S.W.2d 376, 382 (Ky. 1991).

By statute, any person who commits second-degree trafficking in a controlled substance shall be guilty of “[a] Class D felony for the first offense, except that KRS Chapter 532 to the contrary notwithstanding, the maximum sentence to be imposed shall be no greater than three (3) years[.]” KRS 218A.1413(2)(b)(1).

The persistent felony offender statute states, “If the offense for which he presently stands convicted is a Class C or Class D felony, a persistent felony offender in the first degree shall be sentenced to an indeterminate term of imprisonment, the maximum of which shall not be less than ten (10) years nor more than twenty (20) years.” KRS 532.080(6)(b). This is the appropriate sentencing range if, in fact, second-degree trafficking in a controlled substance is a Class D felony eligible for enhancement.

Until House Bill 463 went into effect, all Class D felonies in Kentucky had penalty ranges of one to five years. Under the new bill, three Class D felonies were specifically designated for penalty ranges of one to three years: second-degree trafficking in a controlled substance; third-degree trafficking in a controlled substance, second or subsequent offense (KRS 218A.1414); and first-degree possession of a controlled substance (KRS 218A.1415).

The statutes for both second-degree trafficking in a controlled substance and third-degree trafficking in a controlled substance, second or subsequent offense, state “except that KRS Chapter 532 to the

contrary notwithstanding, the maximum sentence to be imposed shall be no greater than three (3) years.” KRS 218A.1413(2)(b)(1), KRS 218A.1414(2)(b)(2). The statute for first-degree possession of a controlled substance states that “[t]he maximum term of incarceration shall be no greater than three (3) years, notwithstanding KRS Chapter 532.” KRS 218A.1415(2)(a).

KRS 532.080(8)(b) specifically addresses first-degree possession of a controlled substance:

A conviction, plea of guilty, or Alford plea under KRS 218A.1415 shall not trigger the application of this section, regardless of the number or type of prior felony convictions that may have been entered against the defendant. A conviction, plea of guilty, or Alford plea under KRS 218A.1415 may be used as a prior felony offense allowing this section to be applied if he or she is subsequently convicted of a different felony offense.

KRS 532.080(10)(a) indirectly addresses third-degree trafficking in a controlled substance, second or subsequent offense:

Except as provided in paragraph (b) of this subsection, this section shall not apply to a person convicted of a criminal offense if the penalty for that offense was increased from a misdemeanor to a felony or from a lower felony classification to a higher felony classification, because the conviction constituted a second or subsequent violation of that offense.

Second-degree trafficking, first offense, is a Class A misdemeanor per KRS 218A.1414(2)(b), so it falls within the purview of the subsection exempting it from enhancement.²

² Third-degree trafficking is not among the second or subsequent felony offenses listed in KRS 532.080(10)(b) as being eligible for enhancement.

KRS 532.080 provides no such guidance for second-degree trafficking in a controlled substance.

The new subgroup of Class D felonies explicitly caps punishment at three years within the individual statutes (“the maximum sentence to be imposed shall be no greater than three (3) years”). Statutes for five-year Class D felonies, which may be enhanced by the persistent felony offender statute, do not contain language that limits corresponding sentences to a maximum term of years. For example, KRS 511.040(2) simply states, “Burglary in the third degree is a Class D felony.” Most statutes follow a similar pattern of stating that the crime in question “is a Class D felony.” That is the extent of the guidance provided by the statutes for sentencing purposes.

Before House Bill 463 amended it, the statute for second-degree trafficking in a controlled substance used similar language:

Any person who violates the provisions of subsection (1) of this section shall:

- (a) For the first offense be guilty of a Class D felony.
- (b) For a second or subsequent offense be guilty of a Class C felony.

See former KRS 218A.1413 (House Bill 132 - 1992 C 441, § 13, effective date July 14, 1992).

Is the plain language of the amended KRS 218A.1413(2)(b)(1) controlling? Is the maximum sentence for second-degree trafficking in a controlled substance three years, or can that sentence in fact be

enhanced to up to twenty years pursuant to the persistent felony offender statute? As the Appellant notes, the phrase “except that KRS Chapter 532 to the contrary notwithstanding” appears to be the determining language. Brief for Appellant at 6.

This Court previously interpreted the “to the contrary notwithstanding” language in Commonwealth v. Halsell, 934 S.W.2d 552 (Ky. 1996), when it analyzed KRS 635.020:

Subsection (4) itself, is prefaced by the words, ‘*Any other provision of KRS Chapter 610 to 645 to the contrary notwithstanding*, if a child charged with a felony in which a firearm was used in the commission of the alleged offense, he shall be tried in the circuit court as an adult offender....’ [emphasis added]. Thus KRS 635.020(4) makes it clear that the provisions of KRS 640.010(2) are not applicable if the district court has found there is reasonable cause to believe that the elements of KRS 635.020(4) have been established.

Halsell at 555-556. Applying this finding to the present case, the “KRS Chapter 532 to the contrary notwithstanding” language in KRS 218A.1413(2)(b)(1) means that the provisions of Chapter 532, including the persistent felony offender statute, are not applicable once a defendant has been convicted of second-degree trafficking. The maximum sentence is three years, as stated in the statute.

The Appellant argues that only the provisions of Chapter 532 that are contrary to KRS 218A.1413(2)(b)(1) are to be ignored. Brief for Appellant at 8-10. The Appellant states that KRS 218A.1413(2)(b)(1) is in contradiction with KRS 532.060(2)(d) because the former caps punishment for second-degree trafficking in a controlled substance at

three years while the latter caps punishment for a Class D felony at five years. Brief for Appellant at 9. The Appellant further argues that KRS 218A.1413(2)(b)(1) is not in contradiction to the persistent felony offender statute even though it too sets a higher maximum sentence than the trafficking statute. Id. The Appellant asserts that the statutes are not contrary because they concern separate subject matters. Id. However, KRS 218A.1413(2)(b)(1) specifically alerts the reader to ignore any language in KRS Chapter 532 that is contrary to the three-year maximum sentence. The maximum sentence is the subject matter. Because the persistent felony offender statute allows for a maximum sentence greater than the three years provided by the trafficking statute, it is contrary and needs to be ignored. The Court of Appeals agreed, finding that “those portions of KRS 532 which would enhance Gamble’s sentence beyond three years are contrary to the provisions of KRS 218A.1413(2)(b) and are therefore inapplicable to that statute, as the General Assembly has expressly forbidden such an application.” Gamble v. Commonwealth, Slip Op. No. 2011-CA-001658, pp. 10-11 (Ky.App. Feb. 1, 2013).

A closer examination of the rest of KRS 218A.1413 and the persistent felony offender statute shows that any other reading would be nonsensical. Under KRS 218.A.1413(2)(b)(2), second-degree trafficking in a controlled substance is “[a] Class D felony for a second or subsequent offense,” so the maximum punishment increases to five

years. KRS 532.080(10)(a) prohibits application of the persistent felony offender statute to a defendant “convicted of a criminal offense if the penalty for that offense was increased from...a lower felony classification to a higher felony classification, because the conviction constituted a second or subsequent violation of that offense.” A second violation of the second-degree trafficking in a controlled substance statute increases the penalty from a one-to-three year Class D felony offense to a one-to-five year Class D felony offense. Thus, under the Appellant’s argument, the maximum punishment for second-degree trafficking in a controlled substance, first offense, would be 20 years while the maximum punishment for a second or subsequent offense would be five years. Such a system of declining punishments would lead to absurd results.

The Appellant states that the Court of Appeals should not have relied on post-passage comments by the authors of House Bill 463 when it quoted a story from the Bowling Green Daily News, but such comments express a clear intent to reduce the prison population and its associated costs. Brief for Appellant at 13-16. 20-year sentences for three-year crimes would severely undermine that clear intent. The Appellee has attached to the appendix a statement from the Bill’s sponsors, Senator Tom Jensen and Representative John Tilley, which was published in the June 2011 edition of the Department of Public Advocacy’s The Advocate. Among the goals stated by the Bill’s sponsors was “[m]odernizing drug laws by distinguishing serious drug trafficking

from peddling to support an addiction by establishing a proportionate scale of penalties based on quantity of drugs sold and by providing deferred prosecution, presumptive probation, and reduced prison time for low-risk, non-violent drug offenders who possess drugs and reinvesting related savings in increasing drug treatment for those offenders who need it.” The Advocate, June 2011, page 3.

The sponsors’ statement contradicts the Appellant’s argument that the bill’s authors only intended to lessen the penalties for drug possession cases. See Brief for Appellant at 15-16. House Bill 463 even amended the first-degree trafficking statute to include lesser penalties for traffickers who deal in small amounts of drugs. See KRS 218A.1412. Gary Gamble is a non-violent drug offender who sold three hydrocodone pills. The legislature does not want him to spend the next two decades in prison at the public’s expense.

Whether it was to reduce state costs, reduce the prison population, emphasize rehabilitation efforts, or deemphasize punitive discipline for drug offenders, the legislature expressed a clear desire to decrease maximum sentences for a variety of drug offenders. Do those interests change when the offender has a criminal record that meets the elements of the persistent felony offender statute? “In these circumstances-where text, structure, and history fail to establish that the Government’s position is unambiguously correct-we apply the rule of lenity and resolve

the ambiguity in [the defendant]'s favor.” United States v. Granderson, 511 U.S. 39, 54 (1994).

A plain reading of the amendment shows that the legislature changed the statute for second-degree trafficking in a controlled substance by inserting language capping the maximum sentence at three years in spite of the persistent felony offender statute. Like the old statute, the amended second-degree trafficking in a controlled substance statute provides its own enhancements for subsequent offenders (“[a] Class D felony for a second offense or subsequent offense”). KRS 218A.1413(2)(b)(2). The minor bump from a maximum of three years to a maximum of five years for a subsequent offense is another indication that the legislature does not want to saddle second-degree traffickers with long prison sentences.

The Appellant also argues that it would be superfluous for the persistent felony offender statute to expressly prohibit enhancement of first-degree possession of a controlled substance if the plain language of the one-to-three year Class D felony statutes already forbade it. Brief for Appellant at 10-13. In fact, the trial court overruled defense counsel’s motion to dismiss the persistent felony offender charge on that basis. As the Court of Appeals stated, the reasoning is “erroneous, as it proves to be little more than implication which is easily disproven by examining [...] the General Assembly’s actions in amending the sentencing guidelines for certain drug-related crimes.” Gamble at 10. The

legislature may have added redundant language to the persistent felony offender statute barring first-degree possession of a controlled substance from being enhanced, but that does not mean that the plain language of the criminal statutes does not already lead to the same result.

The Appellant's final argument is that dismissal of the persistent felony charge would be improper because the indictment named a public offense. Brief for Appellant at 17. The public offense, however, was not one permitted by statute. If a defendant's second-degree trafficking in a controlled substance sentence cannot be enhanced, it follows that the defendant cannot be charged as a persistent felony offender. The trial court has the authority to dismiss an indictment when the indictment is invalid on its face, the conduct alleged in the indictment does not constitute a crime, or the indictment does not include an essential element of the crime. See Cochran v. Commonwealth, 315 S.W.3d 325, 330 (Ky. 2010), and Commonwealth v. Simmons, 753 S.W.2d 872, 874 (Ky.App. 1988). The indictment was invalid because the first-degree persistent felony offender charge was not permitted by law.

The Appellant states that it is important for prosecutors to be able to keep the persistent felony charge in these types of cases, even if the sentence cannot be enhanced, because it affects a defendant's probation and parole eligibility. Brief for Appellant at 18. The decision-makers will still have full access to the defendant's criminal history regardless of whether he is deemed a persistent felony offender. Under KRS

532.050(2), a presentence investigation report is available that shall include “[t]he results of the defendant’s risk and needs assessment” and “[a]n analysis of the defendant’s history of delinquency or criminality, physical and mental condition, family situation and background, economic status, education, occupation, and personal habits.” The report also includes “[a]ny other matters that the court directs to be included.” The harm to the Commonwealth in dismissing a persistent felony offender charge from a case that precludes sentence enhancement is minimal.

The “Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” In re Winship, 397 U.S. 358, 364 (1970). Gamble’s persistent felony offender conviction and enhanced sentence do not appear to be permissible by statute, either under a plain reading of KRS 218A.1413(2)(b)(1) or a broader look at the legislative intent. Any lingering ambiguities trigger the rule of lenity in Gamble’s favor. The trial court’s order denying Gamble’s motion to dismiss the persistent felony offender count was in violation of the plain reading of the statute, the rule of lenity, and Gamble’s due process rights under the Sixth and Fourteenth Amendments to the United States Constitution and Sections Two and Eleven of the Kentucky Constitution. The Court of Appeals correctly reversed the trial court’s order.

CONCLUSION

For the foregoing reasons, Gary Gamble requests that this Court affirm the opinion of the Court of Appeals and find that Gamble's second-degree trafficking sentence cannot be enhanced beyond three years.

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APPENDIX

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