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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000306-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM CLINTON CIRCUIT COURT
HONORABLE ALLAN RAY BERTRAM, SPECIAL JUDGE
ACTION NO. 00-CR-00073

DANIEL E. LAIB — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUIDUGLI, JOHNSON, AND KNOPF, JUDGES.

KNOPF, JUDGE: In 1976, Daniel Laib pled guilty in federal court to one count of misusing his pharmacist privileges and unlawfully distributing diet pills (Tenuate, a schedule-four controlled substance), in violation of 21 U.S.C. ' 841(a)(1). The authorized punishments for this offense were anything from a fine of up to $10,000.00 to incarceration for up to three years.[1] Laib was sentenced to six-months= imprisonment, but after he

[1]21 U.S.C. '841(b)(2).

served thirty days in a Ajail-type institution@ the balance of his sentence was probated.

In November 2000, a Clinton County grand jury indicted Laib for unlawfully registering to vote, in violation of KRS 119.025. That statute prohibits persons ineligible to vote from registering, and the Commonwealth alleged that by virtue of his 1976 conviction, which the Commonwealth characterized as a felony, Laib was ineligible to vote. Section 145 of Kentucky=s Constitution disenfranchises convicted felons whose rights have not been restored.[2] By order entered January 14, 2002, the Clinton Circuit Court dismissed the indictment. It ruled that Laib=s 1976 conviction was not a felony, that Laib was eligible to vote, and thus that an essential element of the alleged crime was missing. It is from that order that the Commonwealth has appealed. It contends that any offense potentially punished as a felony should be deemed for all purposes a felony. We reject such a rule and affirm the order of the circuit court.

The Kentucky Penal Code defines Acrimes@ as either felonies or misdemeanors.[3] The classification of an offense as a felony or a misdemeanor is within the prerogative of the legislature, and in Kentucky the General Assembly has based the distinction on the length and place of punishment. Offenses

[2]*See* Commonwealth v. Kash, Ky. App., 967 S.W.2d 37 (1997).

[3]KRS 500.080(2). Offenses (other than traffic infractions) punishable only by fine are classified as violations. KRS 500.080(17).

punishable by a year or more in the custody of the Department of Corrections are defined to be felonies.[4] And offenses (other than traffic infractions) punishable by no more than Aa sentence to a term of imprisonment of . . . twelve (12) months@ are misdemeanors.[5] By and large the General Assembly has classified serious offenses as either misdemeanors or felonies in the statute defining the offense and has provided for potential punishments accordingly.

It is obviously possible however, for the defining statute not to declare the offense either a misdemeanor or a felony and to authorize penalties straddling the misdemeanor/felony boundary. In effect, such statutes leave classification of each particular offense to the sentencing judge. Such statutes are relatively rare in Kentucky, but apparently in other jurisdictions they are common.[6] In California, where the felony/misdemeanor distinction is based on the place of imprisonment, the courts refer to these statutes and the offenses they define as Awobblers@:

> Offenses that are punishable by imprisonment either in the county jail or in the state prison are called Awobblers.@ . . . In the case of wobblers, the characterization of the crime is dependent upon the actual punishment imposed. . . . When a defendant is sentenced to state prison, the offense is a felony;

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[4]KRS 500.080(5).

[5]KRS 500.080(10).

[6]*E.g.* Arizona v. Shlioinsky, 911 P.2d 637 (Ariz. App., 1996).

> when the defendant is sentenced to county jail, the offense is a misdemeanor.[7]

As noted, the General Assembly has by-and-large eschewed wobblers, but from time to time our courts have been confronted, as in this case, by what we venture to call quasi-wobblers; that is, a conviction from a foreign jurisdiction based on a statute that would be a wobbler in Kentucky. Although the cases addressing such circumstances are not perfectly consistent, the rule that seems to have emerged is along the lines of the California rule just quoted. In Commonwealth v. Lundergan,[8] for example, a case addressing a domestic wobbler, the offense was deemed a misdemeanor following a misdemeanor sentence. In Commonwealth v. Davis,[9] and Ware v. Commonwealth,[10] on the other hand, quasi-wobblers that had given rise to felony sentences were deemed felonies for the purposes of our persistent-felony-offender statute.[11]

We are aware that this court has expressed reservations about the propriety of domestic wobblers,[12] and it may well be

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[7]People v. Terry, 54 Cal. Rptr. 2d 769, 771 (Cal. App. 1996) (citations omitted).

[8]Ky., 847 S.W.2d 729 (1993).

[9]Ky., 728 S.W.2d 532 (1987).

[10]Ky., 47 S.W.3d 333 (2001).

[11]KRS 532.080.

[12]Commonwealth v. McClure, Ky. App., 593 S.W.2d 92 (1979). Apparently in California, wobblers are deemed felonies unless and until a misdemeanor sentence is imposed. The felony statute of limitations therefore applies to them. People v. Sillas, 123 Cal. Rptr. 2d 340 (Cal. App. 2002). In McClure this Court took the opposite tack. It deemed a domestic wobbler a

that under our constitution the General Assembly should avoid them. That issue, of course, is not before us. Regardless of our own distaste for wobblers, however, other jurisdictions are apt sometimes to confront us with quasi-wobblers, and when they do, the rule of treating the foreign offense as a felony if it received what in Kentucky would be a felony sentence and as a misdemeanor otherwise seems to us both reasonable and consistent with Kentucky law.

We thus agree with the trial court that Liab=s 1976 conviction should be deemed a misdemeanor. He was sentenced to only six months= incarceration and served only one month, apparently in a local jail. Under Kentucky law this is a misdemeanor sentence. The trial court correctly deemed Liab=s offense a misdemeanor, therefore, notwithstanding the fact that under the federal statutes creating the offense he might have been sentenced as a felon. Accordingly, we affirm the January 14, 2002, order of the Clinton Circuit Court.

JOHNSON, JUDGE CONCURS.

GUIDUGLI, JUDGE, CONCURS IN RESULT AND FILES SEPARATE OPINION.

GUIDUGLI, JUDGE, CONCURRING. While I concur with the majority in that appellee's prior conviction must be treated as a misdemeanor offense, I write separately because I believe we need

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misdemeanor for statute-of-limitations purposes and suggested that due-process considerations favored that result.

not look to foreign jurisdictions for guidance on this issue or engage in the "wobblers" debate. I believe the Kentucky cases of Ware v. Commonwealth, Ky., 47 S.W.3d 333 (2001), Commonwealth v. Lundergan, Ky., 847 S.W.2d 729 (1993), Commonwealth v. Davis, Ky., 728 S.W.2d 532 (1987), and Commonwealth v. McClure, Ky. App., 593 S.W.2d 92 (1979), adequately address the issue before this Court. In Ware, supra, our Kentucky Supreme Court held it is the length of the actual sentence imposed which determines whether an indeterminate sentence is a misdemeanor or felony offense. In Davis, supra, the sentence was six (6) months to five (5) years and the Court held you look at the maximum sentence imposed. In Lundergan, supra, the Court determined that a Kentucky statute which included pre-penal code language imposing an indeterminate sentencing of six (6) months to two (2) years must follow legislative intent and the rule of lenity and thus be considered a misdemeanor offense. In McClure, supra, the Court found that a penalty section that provides for "a prison sentence of not more than five (5) years" (KRS 45.990(3)) "does not fit the penalties of either the felonies or the misdemeanors enumerated in the Penal Code" and as such, "the court regards the offense as a misdemeanor." McClure, 593 S.W.2d at 95, 96, 97. I am convinced that these cases are determinative of the issue before us and require that the trial court's opinion and order dismissing indictment be affirmed.

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