RENDERED: December 12, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002032-MR

JOHN RANDALL DUNN — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE MARY C. NOBLE, JUDGE
ACTION NO. 02-CR-00632

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: EMBERTON, CHIEF JUDGE; JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: John Randall Dunn has appealed from a final judgment and sentence entered by the Fayette Circuit Court on October 2, 2002, following his conditional guilty plea. Having concluded that the trial court did not err by denying Dunn's motion to suppress evidence of a prior conviction from Ohio, we affirm.

On June 10, 2002, Dunn was indicted by a Fayette County grand jury on one count of operating a motor vehicle

under the influence (DUI), fourth offense,[1] one count of operating a motor vehicle on a suspended license for DUI,[2] and one count of speeding.[3] Dunn's indictment stemmed from his arrest on February 8, 2002. The grand jury charged Dunn with DUI, fourth offense, based on three prior DUI convictions within a five-year period.[4] According to Dunn's indictment, he had previously been convicted of DUI charges in Butler County, Ohio (May 1997),[5] in Fayette County, Kentucky (September 1999), and in Rockcastle County, Kentucky (November 2000).[6]

On July 2, 2002, Dunn filed a motion to suppress evidence of his May 1997, DUI conviction from Ohio. The basis for Dunn's motion was that prior to pleading guilty to that charge, he had not been advised of his constitutional rights as mandated by Boykin v. Alabama.[7] In response, the Commonwealth argued that Dunn was barred from challenging the validity of

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[1] Kentucky Revised Statutes (KRS) 189A.010. Operating a motor vehicle under the influence, fourth offense, is a Class D felony.

[2] KRS 189A.090. For a first offense, operating a motor vehicle on a suspended license for driving under the influence is a Class B misdemeanor.

[3] KRS 189.390.

[4] Pursuant to KRS 189A.010(10), the five-year period "shall be measured from the dates on which the offenses occurred for which the judgments of conviction were entered."

[5] See Ohio Revised Code (ORC) 4511.19.

[6] In addition, the record shows that Dunn was convicted on another DUI charge in Butler County, Ohio, in March 1997. This conviction was not used as a basis for charging Dunn with DUI, fourth offense.

[7] 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

that Ohio conviction since his two prior DUI convictions from Ohio had already been used to convict him of DUI, third offense, in Kentucky.[8] The Commonwealth argued that Dunn had waived his opportunity to attack the validity of his Ohio convictions when he pled guilty to DUI, third offense, in Kentucky without challenging those Ohio convictions. The trial court agreed with the Commonwealth and denied Dunn's motion to suppress evidence on August 16, 2002.

On August 30, 2002, Dunn entered conditional pleas of guilty to DUI, fourth offense, and operating a motor vehicle on a suspended license for DUI, while preserving his right to appeal the trial court's denial of his motion to suppress evidence.[9] On October 2, 2002, following a pre-sentence investigation, the trial court sentenced Dunn to one year in prison on the DUI, fourth offense, conviction, and seven days in jail on the operating on a suspended license conviction. The sentences were run concurrently and probated for five years, with 120 days to serve. This appeal followed.

Dunn's sole claim of error on appeal is that the trial court erred by denying his motion to suppress the evidence of his May 1997, DUI conviction from Ohio. Specifically, Dunn

[8] Dunn pleaded guilty to a DUI, third offense, charge in September 1999, in Fayette Circuit Court.

[9] Kentucky Rules of Criminal Procedure 8.09.

argues that Commonwealth v. Hodges,[10] the case relied upon by the trial court in denying Dunn's motion to suppress, "is no longer valid." In Hodges, our Supreme Court held that a defendant who, without challenging the validity of his underlying DUI convictions, pleaded guilty to charges of DUI, fourth offense, waived his right to challenge those underlying convictions at a later date.[11] Dunn argues that since KRS 189A.310 was amended in 2000 after the decision in Hodges was rendered and since the 2000 version of KRS 189A.310 makes no mention of the "waiver" language found in Hodges, the General Assembly implicitly disapproved of the result reached in Hodges.[12] We disagree.

The version of KRS 189A.310 that was in effect when Hodges was decided stated in pertinent part as follows:

> (1) A court may, upon application of the Defendant, and with notice to the Transportation Cabinet, which shall be a party and if the facts of the case so indicate, order that a prior conviction cannot be used to enhance penalties or

[10] Ky., 984 S.W.2d 100 (1998).

[11] Id. at 102 (stating that "[i]n Graham [v. Commonwealth, Ky., 952 S.W.2d 206 (1997)], this Court reaffirmed the waiver logic of Howard v. Commonwealth, Ky., 777 S.W.2d 888 (1989), in which the failure to challenge the validity of a prior conviction upon conviction as a P.F.O. II barred such a challenge in the subsequent P.F.O. I prosecution. The same logic equally applies in this case, in which Hodges with the assistance of counsel pled guilty to the felony of fourth offense D.U.I. in 1994, presenting no challenge to the validity of the three relevant prior D.U.I. convictions. Hodges, who we also note was well aware of D.U.I. law and his constitutional rights prior to the 1992 and 1993 guilty pleas which bear his signature, waived any argument in that regard under all the circumstances of this case").

[12] It is important to note that the Court in Hodges did not discuss the previous version of KRS 189A.310 in reaching its decision.

> license suspensions or revocations, or for other purposes for which such a conviction might be used.
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> (2) Determinations pursuant to this section shall be made in strict conformity to the requirements of Boykin v. Alabama, 395 U.S. 238 (1969), and the requirements of the case shall not be expanded upon unless later applicable case law so dictates.

The current version of KRS 189A.310, as amended in 2000, states in relevant part as follows:

> (1) A court may, upon application of the defendant or attorney for the Commonwealth or upon its own motion, and if the facts of the case so indicate, order that a prior conviction not meeting applicable case law regarding admissibility of a prior conviction cannot be used to enhance criminal penalties including license suspensions or revocations, or for other purposes for which such a conviction might be used.

As indicated above, neither version of KRS 189A.310 provides that a defendant will waive his right to bring a challenge under that provision if he does not do so at the first opportunity. Hence, contrary to Dunn's contention, the absence of any "waiver" language in the amended version of KRS 189A.310 does not constitute the General Assembly's implicit disapproval of Hodges. The current version of KRS 189A.310, which was amended two years after Hodges was rendered, is substantively the same as the previous version with respect to the "waiver"

issue, i.e., neither version discusses the possibility of waiver at all.

We conclude that in both the old and current versions of KRS 189A.310, the General Assembly granted trial courts the discretion[13] to exclude evidence of any prior conviction that might otherwise be used to enhance criminal penalties, if the applicable case law provided a basis for doing so. The possibility that a defendant may waive his right to bring such a challenge is a separate issue. Certainly, the concept of such a waiver pre-dates both the Hodges decision and the original version of KRS 189A.310, which was enacted in 1991.

In Alvey v. Commonwealth,[14] which was rendered in 1983, our Supreme Court held that a defendant who pleaded guilty to a persistent felony offender charge without challenging the validity of his underlying convictions, waived his right to challenge those underlying convictions in a post-conviction proceeding.[15] We conclude that the same principle of waiver from

[13] See Alexander v. S & M Motors, Inc., Ky., 28 S.W.3d 303, 305 (2000)(stating that Kentucky courts have long construed the word "may" as being a permissive, rather than a mandatory word). See also KRS 446.010(20)(stating that unless the context of the statute requires otherwise, the word "[m]ay is permissive").

[14] Ky., 648 S.W.2d 858 (1983).

[15] Id. at 859-60 (stating that "appellant entered guilty pleas in 1976. Although his pleas may have been perfectly voluntary, the record fails to comply with federally imposed standards for determining whether they were voluntary. However, on September 9, 1980, appellant entered a guilty plea to a persistent felony offender charge which was based on the 1976 convictions. At his RCr 11.42 hearing, appellant admitted that at the time he plead guilty to being a persistent felon he did not raise any issue about the validity of

Alvey and Hodges applies to the case sub judice. In September 1999, Dunn pleaded guilty to a DUI, third offense, charge in Fayette County. Dunn's prior DUI convictions from Ohio, including his May 1997, conviction, were used as the basis for convicting him of DUI, third offense, in Kentucky. It is not disputed that Dunn failed to challenge the validity of his two DUI convictions from Ohio when he pleaded guilty to DUI, third offense in Kentucky. Therefore, Dunn has waived any right in the prosecution of the DUI, fourth offense, charge to challenge the validity of his May 1997, conviction from Ohio. The trial court did not err by denying his motion to suppress the Ohio conviction as evidence.

Based on the foregoing, the judgment and sentence of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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his 1976 guilty pleas. By failing to do so he waived his right to contest them in any subsequent post-conviction proceeding").