

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2002-CA-002112-MR

ARNOLD AMBURGY

APPELLANT

v. APPEAL FROM ESTILL CIRCUIT COURT  
HONORABLE WILLIAM W. TRUDE, JR., JUDGE  
INDICTMENT NO. 01-CR-00041

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
VACATING AND REMANDING

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BEFORE: EMBERTON, CHIEF JUDGE, JOHNSON AND KNOFF, JUDGES.

JOHNSON, JUDGE: Arnold Amburgy has appealed from a final judgment entered by the Estill Circuit Court on September 27, 2002, convicting him of theft by unlawful taking<sup>1</sup> and sentencing him to four years in prison. Having concluded that the trial court erred in permitting the Commonwealth to introduce uncertified evidence of Amburgy's prior criminal history, a 1980

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<sup>1</sup> Kentucky Revised Statutes (KRS) 514.030.

judgment for receiving stolen property,<sup>2</sup> we vacate and remand for a new sentencing hearing.<sup>3</sup>

On July 20, 2001, an Estill County grand jury indicted Amburgy on one count of theft by unlawful taking. This indictment stemmed from an allegation that Amburgy removed a riding lawnmower, valued at more than \$300.00, belonging to Patricia Oldaker from Oldaker's yard.

This matter proceeded to trial by jury on August 26, 2002. At trial, Oldaker testified that she lived in Estill County next to residences inhabited by Roger and Dorita Marcum and Amburgy and his girlfriend. Oldaker stated that, prior to leaving for a scheduled vacation in April 2001, she had purchased a riding lawnmower from Sears for \$1,250.00. The lawnmower had been parked in Oldaker's yard, but the mower was not visible from the highway because Oldaker parked her car in front of it. Upon her return from vacation, the lawnmower had been removed from her property.

Dorita Marcum testified that on April 26, 2001, she saw Amburgy push Oldaker's lawnmower behind his mobile home. After watching Amburgy move the lawnmower, Dorita saw Amburgy's car leave his residence with the lawnmower secured to an attached hauler. Dorita identified Amburgy as the operator of

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<sup>2</sup> KRS 514.110.

<sup>3</sup> Boone v. Commonwealth, Ky., 821 S.W.2d 813 (1992).

this vehicle. Dorita informed her husband, Roger, of these events. Roger immediately called the police. Roger confirmed calling the police after his wife informed him that Amburgy had taken the lawnmower off of Oldaker's property. Roger further testified that he saw Amburgy drive his vehicle away from his residence with a riding lawnmower attached to a hauler.

Amburgy testified in his own defense. During his testimony, Amburgy denied taking the lawnmower from Oldaker's yard on April 26, 2001. Amburgy asserted that he was not in Estill County at the time the lawnmower was stolen. Amburgy testified that he left his Estill County residence around 6:15 a.m. and drove to his mother's residence in Garrard County so that he could meet his employer, Donald Smitty. Smitty and Amburgy were meeting in Garrard County so they could ride together to Lexington to work at a construction site. Amburgy testified that he worked that day in Lexington with Smitty until 7:15 p.m. After completing their work in Lexington, Amburgy returned to his mother's Garrard County home. Amburgy claimed that he stayed at his mother's house until the next afternoon.

Amburgy's mother, Holly Lear, also claimed that Amburgy met Smitty at her house on April 26, 2001. Lear further claimed that Amburgy returned to her house that evening and remained there during the night. For reasons not clear from the

record, Smitty was not subpoenaed or called to testify on Amburgy's behalf.

After deliberating for approximately 15 minutes, the jury convicted Amburgy of theft by unlawful taking. In the penalty phase of the trial, the Commonwealth wished to introduce evidence of Amburgy's prior criminal history, which included a 1980 judgment from the Madison Circuit Court for receiving stolen property and a 1992 conviction for being a felon in possession of a handgun.<sup>4</sup> The Madison Circuit Court had not certified the 1980 conviction as being true or accurate. Despite Amburgy's objections, the trial court permitted probation and parole officer David Rupard to testify concerning the uncertified conviction. After receiving this information, the jury recommended a sentence of four years' imprisonment. The trial court followed the jury's recommendation when sentencing Amburgy on September 27, 2002. This appeal followed.

Amburgy claims that the trial court erred by permitting the Commonwealth to introduce a copy of his 1980 judgment of conviction from the Madison Circuit Court when that conviction had not been certified. In support of his argument, Amburgy asserts that the Kentucky Rules of Evidence (KRE) allow the Commonwealth to introduce only certified copies of a

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<sup>4</sup> KRS 527.040.

defendant's conviction during the sentencing phase of a criminal trial.

KRE 1005 provides as follows:

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed with a governmental agency, either federal, state, county, or municipal, in a place where official records or documents are ordinarily filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with KRE 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Thus, a party seeking to introduce a public record must present a certified copy of that record or have a person who has compared the copy with the original testify that the document is, in fact, authentic.<sup>5</sup>

Authentication, or establishing that the document is what it is purported to be, is governed primarily by KRE 902.

KRE 902 states, in pertinent part, as follows:

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

. . .

(4) Official records. An official record or an entry therein, when admissible for any purpose, may be evidenced by an official

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<sup>5</sup> Skimmerhorn v. Commonwealth, Ky.App., 998 S.W.2d 771, 776 (1998).

publication thereof or by a copy attested by an official having the legal custody of the record.

Thus, a certified copy of a criminal conviction is self-authenticated and does not require testimonial declarations of its verity. However, a copy of a criminal conviction that has not been certified fails to satisfy KRE 902(4) and KRE 1005. Without such certification, a person must testify about the conviction at issue from personal knowledge.

In Merriweather v. Commonwealth,<sup>6</sup> the defendant was convicted of being a persistent felony offender based upon the testimony of a probation and parole officer concerning three uncertified documents relating to the defendant's prior convictions in Tennessee. Our Supreme Court held that the introduction of the Tennessee judgments was not in compliance with KRE 902 and KRE 1005 because those documents contained no "certification . . . [n]or did anyone with knowledge of the facts surrounding the documents testify as to their authenticity."<sup>7</sup> In reaching this conclusion, the Supreme Court declared that Kentucky law does "'not embrace any compilation of data by any court or police agency in the absence of exemplification . . . or a witness who can testify that the

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<sup>6</sup> Ky., 99 S.W.3d 448 (2003).

<sup>7</sup> Id. at 453.

record comports with the business record exception to the hearsay rule.'"<sup>8</sup>

In the case sub judice, the Commonwealth presented an uncertified copy of the Madison Circuit Court's 1980 judgment convicting Amburgy for receiving stolen property. Since the record was not certified, a representative from the Madison Circuit Court Clerk's Office or some other person with personal knowledge of the 1980 judgment was required to testify to the verity of the copied documents. Instead, the Commonwealth called upon a probation and parole officer to testify about a conviction even though that witness possessed no personal knowledge of the facts surrounding that conviction. Clearly, the trial court erred in allowing the judgment of the Madison Circuit Court to be admitted into evidence because KRE 902(4), KRE 1005 and Merriweather all require a defendant's prior convictions to be certified and attested to by an officer having legal custody of those public records.

The Commonwealth argues that no violation of the Kentucky Rules of Evidence occurred because the photocopied signature of the presiding Madison Circuit Court judge satisfied KRE 902. KRE 902 requires not just a signature by an official with knowledge of the document, but a signature by an official attesting to the authenticity of the document. In 1980 the

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<sup>8</sup> Id. (quoting Robinson v. Commonwealth, Ky., 926 S.W.2d 853, 854 (1996)).

Madison Circuit Court judge allegedly signed a judgment in his capacity as a judge; however, there was no authentication by a court official that the document relied upon for the witness's testimony was a true and accurate copy of the judgment signed by the judge. Obviously, the judge's signing of the judgment of conviction does not transform this judgment into a self-authenticating document.

We now consider whether this error constitutes reversible error. The test for harmless error is "whether there is any reasonable possibility that absent error, the verdict would have been different."<sup>9</sup> In this case, the jury recommended a sentence of four years' imprisonment, when the maximum sentence was five years. The only evidence introduced during the sentencing phase was the 1980 and 1992 convictions. While the jury is allowed to consider in the penalty phase any and all of the evidence introduced during the guilt or innocence phase of the trial, the evidence heard by the jury concerning the 1980 conviction bore similarities to the charge for which Amburgy was being tried. Because of these similarities, the uncertified conviction from 1980 could have unduly prejudiced Amburgy in the eyes of the jury. Thus, upon review of the entire case, we conclude that if the trial court had excluded the uncertified

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<sup>9</sup> RCr 9.24; Renfro v. Commonwealth, Ky., 893 S.W.2d 795, 797 (1995) (citing Crane v. Commonwealth, Ky., 726 S.W.2d 302, 307 (1987), cert. denied 484 U.S. 834, 108 S.Ct. 111, 98 L.Ed.2d 70 (1987)).

evidence of his 1980 conviction, there is a reasonable possibility that the jury would have recommended that Amburgy's sentence be less than four years.

For the foregoing reasons, the sentence imposed herein by the Estill Circuit Court is vacated and this matter is remanded only for a new sentencing hearing.

ALL CONCUR.

BRIEF FOR APPELLANT:

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