

RENDERED: October 8, 2004; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-001885-MR

TERRY EDWARD SEARIGHT

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE JOHN R. ADAMS, JUDGE  
ACTION NO. 03-CR-00235

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, DYCHE, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Terry Edward Searight (Searight) appeals his conviction for receiving stolen property over \$300; fleeing/evading police, second degree; possession of drug paraphernalia; and persistent felony offender, first degree, on a conditional plea reserving the right to appeal the trial court's denial of a motion in limine. Searight sought to

prevent the introduction of a prior conviction for possession of a controlled substance, a felony, on the basis that it was more than ten years old, and that the prejudicial value outweighed the probative value, requiring exclusion. We opine that the trial court has the discretion to allow an eleven-year-old conviction to impeach a witness and the trial court did not abuse that discretion. Therefore, we affirm.

A pretrial conference/hearing was held on July 29, 2003, wherein Searight's attorney made a motion in limine to prevent the introduction of felonies over ten years old. Searight's contention was that the 1992 felony conviction for possession of a controlled substance was more than ten years old, and under KRE 609(b), was not admissible; and that the introduction of this evidence would be more prejudicial than probative should Searight elect to testify on his own behalf. The trial court heard evidence that the 1992 conviction was the latest of three prior felony convictions. There was also a murder conviction in 1981, and a third-degree burglary conviction in 1979. The trial court also noted Searight was on parole when the latest offense was committed. After discussing the matter, the trial court ruled that if Searight took the stand, the Commonwealth could only ask if he had previously been convicted of a felony - no further questions.

KRE 609 does allow impeachment of witnesses through the use of a prior felony conviction, but not the identity of the crime unless the witness denies a conviction. Section (b) of KRE 609 does impose a time limit:

Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten (10) years has elapsed since the date of the conviction unless the court determines that the probative value of the conviction substantially outweighs its prejudicial effect. (emphasis added.)

Thus the rule itself gives the trial judge the discretion to admit a conviction over ten years old if the probative value substantially outweighs its prejudicial effect. McGinnis v. Commonwealth, Ky., 875 S.W.2d 518, 528 (1994), overruled in part on other grounds by Elliott v. Commonwealth, Ky., 976 S.W.2d 416, 421 (1998), acknowledged that:

KRE 609 does not, by its terms, divest the trial court of a limited discretion to admit a conviction more than ten years old. It is precatory, rather than mandatory, and leaves room for a trial judge to rule such evidence admissible in circumstances where fairness so demands.

Id. And,

KRE 609 does not foreclose the evidence; it simply imposes on the Commonwealth the burden of persuading the court that, in the circumstances in which the evidence is being offered, "the probative value of the conviction substantially outweighs its prejudicial effect." KRE 609, *supra*.

Id.

The balancing of probative value evidence against the danger of undue prejudice is reserved for the sound discretion of the trial judge. Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999). The standard of review is whether the trial court abused its discretion. Abuse of discretion occurs when the trial court's decision was arbitrary, unreasonable, unfair or unsupported by the sound legal principles. Id. We do not believe the trial court abused its discretion. Although the last conviction was around eleven years old, Searight was still on probation at the time the current offenses were committed. In the grand scheme of KRS 609(b), this conviction is not so remote, at least when the defendant is still serving his sentence.

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

ALL CONCUR.

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