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Kentucky Law Survey: Criminal Law

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Criminal Law

By Linda K. West*

Introduction

Criminal law continues to be one of the most dynamic areas of the law. The Kentucky appellate courts published opinions during the survey period[1] explicating various offenses including bribing a witness, burglary, and criminal attempt. The courts also elaborated on defenses and sentencing options contained within the Kentucky Penal Code. Finally, the interpretation of Kentucky Revised Statute (KRS) section 532.080,[2] Kentucky's persistent felony offender (PFO) provision, remained a focal point of decisional law.[3] This Survey discusses and analyzes a number of these cases, which were selected for their importance to the practicing criminal lawyer.

I. Offenses

A. *Bribing a Witness*

In *Penn v. Commonwealth*,[4] the Kentucky Supreme Court held that proof of a pending "official proceeding" is not required to sustain a conviction of bribing a witness under KRS section 524.020.[5]

A person is guilty of bribing a witness when he "offers, confers, or agrees to confer any pecuniary benefit upon a witness

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The analysis and conclusions contained in this Article are solely those of the author and do not necessarily represent any position of the Kentucky Office of Public Advocacy.

[1] The survey period ran from July, 1984 to July, 1985.

[2] Ky. Rev. Stat. Ann. § 532.080 (Bobbs-Merrill 1985) [hereinafter cited as KRS].

[3] *See* Read, *Kentucky Law Survey-Criminal Law*, 72 Ky. L.J. 365 (1983-84).

[4] 687 S.W.2d 135 (Ky. 1985).

[5] KRS § 524.020 (Bobbs-Merrill 1985).

or a person he believes may be called as a witness in any official proceeding with intent to . . . influence the testimony of that person . . . ."[6] The defendant in *Penn* argued that he could not be convicted of bribing a witness under the statute because, when Penn offered his neighbor $10,000 not to tell anyone about the marijuana patch on his property, no "official proceeding" was underway.[7]

The Court based its rejection of Penn's argument on the statute's language, which prohibits bribes offered by a defendant to a witness "or a person he believes may be called as a witness . . . ."[8] The Court held that "[t]he inclusion in this statute of the above . . . language broadens the scope of the statute to include the bribe offered under the facts of this case."[9] After *Penn*, a defendant violates the statute by offering a bribe with intent to influence the testimony of a *potential* witness at any *potential* official proceeding.

The Court's holding may support eccentric applications of the statute, some of which were noted by Justice Leibson in his dissenting opinion.[10] KRS section 524.010(4) broadly defines "official proceeding" as "a proceeding heard before any legislative, judicial, administrative or other governmental agency or official authorized to hear evidence under oath . . . ."[11] This definition clearly encompasses civil proceedings.[12] Consequently, following *Penn* an individual could be charged with the criminal offense of bribing a witness if he offered a benefit to someone in

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[6] *Id.*

[7] 687 S.W.2d at 136.

[8] *Id.* at 137.

[9] *Id.*

[10] Justice Liebson maintained that, as a result of the *Penn* holding, this penal statute could be applied in several "innocuous" situations from which liability could later arise: "business secrets that could wind up in a contract action, corporate secrets that could wind up in a shareholder's action, or even a personal matter that could wind up before an administrative agency." *Id.* at 138 (Liebson, J., dissenting).

He also argued that the Court must strictly construe the statute and that its extensive interpretation of the statutory language violated the intent of the legislature. *Id.* at 137. He pointed out that the only prior Kentucky case on bribery, Commonwealth v. Bailey, 82 S.W. 299 (Ky. 1904), required that the bribed party actually be a witness in an "ongoing proceeding." *Id.* at 138.

[11] KRS § 524.010(4) (1985).

[12] *Id.*

exchange for not divulging a matter that would subject him to civil liability. The Court's construction of the statute also precludes a consistent interpretation of the same language contained in KRS section 524.030, which prohibits "bribe receiving by a witness."[13] Like KRS section 524.020, KRS section 524.030 extends to "a person believing he may be called as a witness in any official proceeding."[14] The language in both statutes is substantially identical.[15] Nevertheless, an interpretation of the language in KRS section 524.030 that is consistent with the Court's interpretation of the same language in KRS section 524.020 would lead to an anomalous result: a *potential* witness in a *potential* criminal or civil proceeding who accepts a bribe not to divulge information may be convicted of bribe receiving even though he was never legally required to divulge the information. It is unclear whether the *Penn* Court would equate the above situations to the defendant's conduct in *Penn*, which the Court characterized as "corrupt interference with the judicial process and the proper administration of justice."[16]

B. *Second Degree Burglary and Criminal Trespass*

The Court also delineated during the survey period those circumstances in which an instruction on criminal trespass must be given. In *Commonwealth v. Sanders*,[17] the defendant was seen fleeing from a burglarized home from which items of property were found missing.[18] The defendant asserted an alibi de-

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[13] KRS § 524.030 (1985) provides:

(1) A witness or a person believing he may be called as a witness in any official proceeding is guilty of bribe receiving by a witness when he solicits, accepts or agrees to accept any pecuniary benefit upon an agreement or understanding that:

(a) His testimony will thereby be influenced; or

(b) He will attempt to avoid legal process summoning him to testify; or

(c) He will attempt to absent himself from an official proceeding to which he has been legally summoned.

(2) Bribe receiving by a witness is a Class D felony.

[14] KRS § 524.030 (1985).

[15] *Compare* note 6 *supra* and accompanying text *with* note 13 *supra*.

[16] 687 S.W.2d at 137.

[17] 685 S.W.2d 557 (Ky. 1985).

[18] *Id.* at 558.

fense.[19] The court of appeals reversed the defendant's second degree burglary conviction because the trial court failed to instruct the jury on criminal trespass.[20] Criminal trespass differs from second degree burglary only in that second degree burglary has the added element of "with intent to commit a crime."[21]

In reversing the court of appeals, the Kentucky Supreme Court noted that a different court of appeals panel had previously held, in *Polk v. Commonwealth*,[22] on "markedly similar" facts, that the defendant was *not* entitled to a criminal trespass instruction. The Supreme Court concluded that *Polk* was the sounder decision.[23] The Court contrasted *Polk* with its own decision in *Martin v. Commonwealth*,[24] an appeal of a second degree burglary conviction in which the Court held that an instruction on criminal trespass should have been given.[25] In contrast to *Sanders*, the *Martin* defendants admitted entering the dwelling but testified that they were so intoxicated they could not have formed a culpable intent.[26]

The *Sanders* Court observed, "We are not saying that in some circumstances a criminal trespass instruction would not be required even when the defense is alibi."[27] The Court ultimately announced the rule that a showing of unlawful entry "permits the jury to infer intent to commit a crime in the absence of

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[19] *Id.*

[20] KY. L. SUMM. 5, at 3 (Ky. Ct. App. April 6, 1984) [hereinafter cited as KLS].

[21] The offense of second degree burglary is defined in KRS § 511.030 (1985): "(1) A person is guilty of burglary in the second degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a dwelling. (2) Burglary in the second degree is a Class C felony." First degree criminal trespass is defined in KRS § 511.060: "(1) A person is guilty of criminal trespass in the first degree when he knowingly enters or remains unlawfully in a dwelling. (2) Criminal trespass in the first degree is a class A misdemeanor." The 1975 commentary to KRS § 511.060 explains that "[t]he distinguishing factor is the element of 'intent to commit a crime,' which serves to convert trespass into burglary."

[22] 574 S.W.2d 335 (Ky. Ct. App. 1978).

[23] 685 S.W.2d at 559.

[24] 571 S.W.2d 613 (Ky. 1978).

[25] 685 S.W.2d at 559.

[26] 571 S.W.2d at 614.

[27] 685 S.W.2d at 559. *See* Pace v. Commonwealth, 561 S.W.2d 664, 667 (Ky. 1978) ("No matter what technical defense is asserted by an accused at trial, the jury is always free to disbelieve such evidence as relates to this defense and to believe instead any remaining evidence from which an exoneration of the crime might be inferred.").

other facts which would justify the lesser degree instruction."[28]

C. Possession of Stolen Property as Prima Facie Evidence of Burglary

In *Jackson v. Commonwealth*,[29] the Kentucky Supreme Court considered the sufficiency of evidence that resulted in a burglary conviction.[30] Jackson was convicted of burglary based on his possession of property stolen in the burglary.[31] On appeal, Jackson conceded that the evidence established his knowledge that the property was stolen,[32] but argued that the mere possession of stolen property does not create a *prima facie* case of burglary.[33] The Court disagreed and, in support of its opinion, analogized to case law defining *prima facie* evidence of theft:

> The possession of stolen property is prima facie evidence of guilt of theft of the property. Wheeler v. Commonwealth, . . . 173 S.W.2d 817 ([Ky.] 1943); Martin v. Commonwealth, . . . 276 S.W.2d 19 ([Ky.] 1955). Where there is a breaking and entering and property taken from a dwelling and the property is found in possession of the accused, such showing makes a submissible case for the jury on a charge of burglary. Wahl v. Commonwealth, 490 S.W.2d 769 ([Ky.] 1972). Because the evidence is sufficient to support a conviction that appellant stole the property which was taken in a break-in, it follows that the evidence supports a jury finding that said appellant committed the burglary in which the property was stolen.[34]

The Court's holding states a *per se* rule rather than a "totality of the circumstances" rule. The Court cited *Wahl v. Commonwealth*,[35] however, which held that "the case should be submitted to the jury *unless the defendant is able to produce*

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[28] 685 S.W.2d at 559.

[29] 670 S.W.2d 828 (Ky. 1984).

[30] *Id.* at 829.

[31] *Id.*

[32] Jackson told a police officer to whom he sold the property that it was "hot." *Id.* at 830.

[33] Jackson argued that allowing mere possession of stolen goods to create a prima facie burglary case had been declared unconstitutional. *Id.*

[34] *Id.*

[35] 490 S.W.2d 769 (Ky. 1972).

evidence substantiating his innocence so conclusively that he has overcome the presumption of guilt as a matter of law."[36] Other jurisdictions have held, in more precise terms, that the mere possession of stolen goods does not create a submissible case of burglary where the defendant offers a reasonable and unrefuted explanation of the possession.[37]

The *Jackson* holding also fails to weigh other important factors. Although the *Jackson* Court notes in passing that Jackson told police officers that the property in his possession was "hot," the Court accords this direct evidence of guilt no significance in its analysis.[38] The Court similarly recounts, without weighing, evidence that Jackson knew from *where* at least some of the property was stolen.[39] *Jackson* also fails to recognize the recent nature of the burglary as a factor in determining whether a jury issue is presented.[40] It thus appears that the rule announced in *Jackson*, that the possession of property stolen in a burglary is sufficient evidence of guilt, is broader than was necessary to dispose of the sufficiency issue before the Court.

D. *Perjury and False Swearing*

In *Commonwealth v. Thurman*,[41] the Kentucky Supreme Court construed the materiality element in perjury. Reversing a court of appeals decision,[42]the Supreme Court held that Thur-

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[36] *Id.* at 771 (emphasis added).

[37] Wood v. State, 248 S.E.2d 337 (Ga. Ct. App. 1978) (conviction based solely upon circumstantial evidence overturned because evidence did not exclude all other "reasonable inferences"); State v. Bergeron, 371 So. 2d 1309 (La. 1979) (insufficient evidence presented to connect the defendant with breaking into home even though stolen goods found in his possession); McLemore v. State, 638 S.W.2d 211 (Tex. Crim. App. 1982) (appellant's statement that he had "borrowed" the stolen car was adequate defense without rebuttal evidence from state). *See also* People v. Phoenix, 421 N.E.2d 1022 (Ill. App. Ct. 1981). In *Phoenix* the Illinois Court of Appeals went a step beyond a rule allowing for a case-by-case determination by holding that "the exclusive and unexplained possession of recently stolen property, standing alone and without corroborating evidence of guilt, does not prove burglary beyond a reasonable doubt." *Id.* at 1025.

[38] *See* 670 S.W.2d at 830-31.

[39] Jackson told an undercover agent that some of the property came from a house "down the road." *Id.* at 830.

[40] *See id.*

[41] 691 S.W.2d 213 (Ky. 1985).

[42] 31 KLS 6, at 8 (Ky. Ct. App. May 4, 1984).

man could be convicted of perjury rather than false swearing.[43] A conviction of perjury requires that the false statements be "material",[44] while a conviction of false swearing does not.[45]

Thurman testified, at both his preliminary hearing and trial, that the prosecuting witness gave him a stolen ring. Thurman's testimony at the two proceedings was inconsistent, however. At the preliminary hearing Thurman testified that the witness was a prostitute working for him who gave him the ring in payment of a debt. At trial Thurman disavowed this prior testimony and testified instead that the witness gave him the ring for money to buy marijuana.[46]

The perjury charge against Thurman stemmed from the inconsistency between the two statements. The prosecution proceeded under KRS section 523.050(1), which provides: "In such case it shall not be necessary for the prosecution to prove which statement was false but only that one or the other was false and not believed by the defendant to be true."[47]

Thurman acknowledged the inconsistency between his two statements, but contended that since the inconsistency did not reach the issue of whether the ring was given to him or stolen by him it was not material.[48] The Court rejected this argument: "It is not necessary that testimony, to be material, must relate to the principal issue in a case. It is sufficiently material if it has the potential to influence a tribunal or a jury."[49] The Court explained that Thurman's testimony was material in that it sought to discredit the prosecuting witness and thus influence the jury to believe Thurman's testimony and reject hers.[50] The Court's holding clarifies that statements material to the issue of a material witness' credibility are also material for charging perjury.

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[43] 691 S.W.2d at 216.

[44] KRS § 523.020 (1985) provides: "(1) A person is guilty of perjury in the first degree when he makes a material false statement, which he does not believe, in any official proceeding under oath required or authorized by law."

[45] KRS § 523.040 (1985) provides: "(1) A person is guilty of false swearing when he makes a false statement which he does not believe under oath required or authorized by law."

[46] 691 S.W.2d at 215.

[47] KRS § 523.050(1) (1985).

[48] 691 S.W.2d at 215.

[49] *Id.*

[50] *Id.* at 215-16.

E. Criminal Attempt

In *Commonwealth v. Prather*,[51] the Kentucky Supreme Court considered what conduct constitutes a "substantial step" under KRS section 506.010, the criminal attempt statute. The statute provides that:

> (1) A person is guilty of criminal attempt to commit a crime when, acting with the kind of culpability otherwise required for commission of the crime, he:
>
> . . . .
>
> (b) Intentionally does or omits to do anything which, under the circumstances as he believes them to be, is a substantial step in a course of conduct planned to culminate in his commission of the crime.
>
> (2) Conduct shall not be held to constitute a substantial step under subsection (1)(b) unless it is an act or omission which leaves no reasonable doubt as to the defendant's intention to commit the crime which he is charged with attempting.[52]

In January 1983, Prather contacted John Henon, a police informant, about Henon joining him in robbing the Executive Inn in Owensboro, Kentucky. Henon contacted a Louisville police officer who instructed Henon to keep him advised of further plans. Prather had obtained plans of the Executive Inn and learned the times and methods of making the Inn's deposits. After a "dry run" in which Henon and Prather went to Owensboro and followed the Inn's van to the bank, state police officers set up surveillance at the Inn and two officers replaced the Inn's regular couriers.[53]

Prather and Henon returned to Owensboro on the planned day of the robbery. Prather, who carried a shotgun, tried the doors of the company van to make sure they would open. When the "couriers" left the Executive Inn's parking area, Henon and Prather followed in Henon's car. The police closed in on Henon and Prather when the van stopped at a traffic light.[54]

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[51] 690 S.W.2d 396 (Ky. 1985).

[52] KRS § 506.010 (1985).

[53] 690 S.W.2d at 396.

[54] *Id.* at 397.

In determining whether Prather's conduct amounted to a "substantial step" the Court adopted the standard articulated in *State v. Woods*,[55] an Ohio case that held that a substantial step requires overt acts ". . . which convincingly demonstrate a firm purpose to commit a crime . . . ."[56] The Court explained that: "There is no absolute applicable to this statute except to say that the overt acts, the substantial step, must be considered under all of the circumstances of the case to discover whether they manifest a clear intent to commit the crime."[57] Applying this standard to Prather's conduct, the Court held that Prather's arming himself, going to the scene of the proposed robbery, testing the doors of the van, and following the van from the parking lot constituted the required substantial step toward commission of the crime.[58]

II. DEFENSES

A. *Kidnapping Exemption*

In *Damron v. Commonwealth*,[59] the defendant argued that the kidnapping exemption statute[60] barred his kidnapping conviction. On the day after his escape from the Caldwell County Jail, Damron entered a church, tied up a church pianist, took her car keys, and fled in her car.[61] At his trial, the jury was

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[55] 357 N.E.2d 1059 (Ohio 1976) (armed defendant's act of lying in wait for his victim constitutes criminal attempt of robbery), *vacated*, 438 U.S. 910 (1978) (judgment vacated only insofar as it left the death penalty imposed undisturbed).

[56] 690 S.W.2d at 397 (quoting State v. Woods, 357 N.E.2d at 1063). The court also cited with approval State v. Workman, 584 P.2d 382 (Wash. 1978) and State v. Pearson, 680 P.2d 406 (Utah 1984). 690 S.W.2d at 397. The *Workman* court adopted the MODEL PENAL CODE § 5.01(2) definition of "substantial step": conduct "strongly corroborative of the actor's criminal purpose." 584 P.2d at 387. The Model Penal Code standard differs from that contained in KRS § 506.010(2), which requires that a substantial step "leave no reasonable doubt as to the defendant's intention to commit the crime which he is charged with attempting."

In *Pearson*, the defendants were stopped by the police immediately following the collection of materials required for a proposed robbery. 680 P.2d at 407. In upholding the criminal attempt convictions, the court endorsed an analysis that "emphasizes what the accused has done, not what remains to be done." *Id.* at 408.

[57] 690 S.W.2d at 397.

[58] *Id.* at 398.

[59] 687 S.W.2d 138 (Ky. 1985).

[60] KRS § 509.050 (1985).

[61] 687 S.W.2d at 139-40.

instructed that it could convict Damron of kidnapping the pianist if the jurors believed that he restrained her to further his theft of the car and his escape.[62]

On appeal Damron argued that if the restraint of the pianist was to further the theft of her car, then KRS section 509.050, the "Kidnapping Exemption" statute, foreclosed his kidnapping conviction. The statute provides:

> A person may not be convicted of . . . kidnapping when his criminal purpose is the commission of an offense defined outside this chapter and his interference with the victim's liberty occurs immediately with and incidental to the commission of that offense, unless the interference exceeds that which is ordinarily incident to commission of the offense which is the objective of his criminal purpose.[63]

The Kentucky Supreme Court held that "Damron's argument that 'she [the pianist] was being restrained merely to allow the theft to go smoothly without interference' does not take this case out of the operation of the statute."[64] Yet the Court gave little guidance as to how it determined that the restraint of the pianist exceeded "that which is ordinarily incident to commission of the offense."[65] The Court also rejected the argument posed by Damron that his restraint of the pianist was not intended to further his escape,[66] since the escape was fully accomplished the day before the encounter with the pianist.[67] The Court again stated its conclusion without discussion: "Without getting into

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[62] *Id.* at 140.

[63] KRS § 509.050 (1985).

[64] 687 S.W.2d at 140. The statute that continued to control the case was KRS § 509.040 (1985), which provides:

> (1) A person is guilty of kidnapping when he unlawfully restrains another person and when his intent is:
>
> . . . .
>
> (b) To accomplish or advance the commission of a felony.

The Court held that the statute controlled the outcome of the issue regardless of Damron's arguments about the degree of restraint used upon the pianist. 687 S.W.2d at 140.

[65] KRS § 509.050 (1985).

[66] 687 S.W.2d at 140. KRS § 509.050 contains an exception to the exemption provision for "a charge of kidnapping that arises from an interference with another's liberty that occurs incidental to the commission of a criminal escape."

[67] 687 S.W.2d at 140.

a hair-splitting thesis on when the escape is completed, we hold that a jury issue of the matter was made out here, and there is evidence to sustain the kidnapping conviction under the facts of this case."[68]

At a minimum *Damron* seems to indicate that the kidnapping exemption statute will not benefit a defendant whose victim is restrained past the time of the defendant's departure from the scene. Justice Liebson dissented.[69]

B. *Claim of "Reckless" Self-Protection Disallowed*

In *Baker v. Commonwealth*,[70] the Kentucky Supreme Court partially overruled *Blake v. Commonwealth*.[71] The Court held in *Blake* that a jury could find that a defendant had acted in self-defense and yet convict him of second degree manslaughter or reckless homicide because the defendant was wanton or reckless in believing that deadly force was necessary.[72] Thus, in a situation presenting a factual issue as to the reasonableness of the defendant's use of force, the defendant would, under *Blake*, be entitled to instructions on homicide offenses having wantonness or recklessness as an element.[73]

In *Baker* the Court found the reasoning of *Blake* to be "erroneous" to the extent that it applied to reckless homicide.[74] The Court observed that KRS section 501.020[75] defines recklessness as "the failure to perceive a substantial and unjustifiable

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[68] *Id.*

[69] Justice Liebson argued that KRS § 509.050 clearly exempted the restraint of the pianist from the kidnapping statute. He stated that the force applied and the extent of the restraint were no more than necessary to steal her car. He also thought that the "escape" had concluded after the first day so that the exception would not apply. *Id.* at 141 (Liebson, J., dissenting).

[70] 677 S.W.2d 876 (Ky. 1984).

[71] 607 S.W.2d 422 (Ky. 1980).

[72] The *Blake* Court based its holding in part on KRS § 503.120(1) (1985), which provides that the defense of self-protection "is unavailable in a prosecution for an offense for which wantonness or recklessness . . . suffices to establish culpability." 607 S.W.2d at 423.

[73] 607 S.W.2d at 424.

[74] 677 S.W.2d at 879.

[75] KRS § 501.020 (1985).

risk that a *particular result* will occur."[76] From this definition the Court concluded that an instruction on reckless homicide is warranted only when "the perpetrator of the homicide is unaware that his conduct entails a substantial and unjustifiable risk of death."[77]

The facts in *Baker* showed that the defendant shot the victim because he believed she was about to shoot him. Since the defendant could not logically contend that he did not perceive the risk of death to the victim, it followed from the Court's reasoning that he was not entitled to an instruction on reckless homicide.[78] Stated otherwise, it was logically impossible for Baker to form a "reckless" belief that he must use force in his own protection. "The general assembly did not provide . . . for the inclusion of an intentional offense within the definition of reckless homicide."[79]

III. PERSISTENT FELONY OFFENDER STATUTE

A. *Inferential Proof of Age Insufficient*

In *Hon v. Commonwealth*,[80] the Kentucky Supreme Court addressed the issue of whether, in a persistent felony offender prosecution, the Commonwealth must affirmatively prove that the defendant was at least eighteen years old when he committed the prior felonies. Under KRS section 532.080(2)(b) the Commonwealth is required to show that the accused was eighteen or older when he *committed* any prior felonies.[81]

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[76] 677 S.W.2d at 879 (quoting KRS § 501.020) (emphasis added). The court distinguished recklessness from the two other mental states for culpability defined in KRS § 501.020—intent and wantonness. *Id.* at 878. The court noted that this statutory definition of recklessness, and not the "ordinary meaning of the word," applied to all criminal statutes. *Id.* at 879.

[77] *Id.*

[78] *Id.*

[79] *Id.* The Court explained that "[w]e cannot escape the fact that an act claimed to be done in self-defense is an intentional act. It is not a 'reckless' act as the term is defined in the statute." *Id.*

[80] 670 S.W.2d 851 (Ky. 1984).

[81] KRS § 532.080(2)(b) (Bobbs-Merrill 1985) states:

> (2) A persistent felony offender in the second-degree is a person who is more than twenty-one (21) years of age and who stands convicted of a felony after having been convicted of one (1) previous felony. As used in

The Commonwealth argued that the date of *conviction* of the prior felony supported an inference that the defendant was eighteen at the time of its commission since it was "unlikely" that any court would have waited four years to try him.[82] The Commonwealth cited as authority *Kendricks v. Commonwealth*,[83] where similar evidence was held sufficient to infer that the defendant was the requisite age.[84] The Kentucky Supreme Court rejected this argument. "Because the persistent felony offender statute is so clear in its requirements, and so strictly *penal* in nature, we believe that it is improper for proof of an inferential nature to be used to obtain and sentence a conviction under its terms."[85] Thus, Hon's conviction was reversed on grounds of insufficient evidence because the Commonwealth introduced no direct proof of the age at which he committed the prior felony.[86]

The *Hon* Court's decision overruled *Kendricks*,[87] and was consistent with the Court's holdings and reasoning in previous cases: the PFO statute is penal in nature,[88] the charge is easily proven,[89] and a defendant to a first degree PFO charge is not

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> this provision, a previous felony conviction is a conviction of a felony in this state or conviction of a crime in any other jurisdiction provided:
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> . . . .
>
> (b) That the offender was over the age of eighteen (18) years at the time the offense was committed . . . .

[82] 670 S.W.2d at 852.

[83] 557 S.W.2d 417 (Ky. 1977).

[84] 670 S.W.2d at 852. In *Kendricks*, no direct evidence of defendant's age was offered. Nevertheless, the Court specifically held that since the defendant was twenty-four years old at the time of his conviction for his first felony, it was reasonable to infer that he was at least eighteen at the time of the commission of the felony. 557 S.W.2d at 420. The Court thought "it is unlikely that any court would wait six years to try a person charged with a criminal offense." *Id.*

[85] 670 S.W.2d at 853 (emphasis in original).

[86] *Id.*

[87] *Id.*

[88] Hardin v. Commonwealth, 573 S.W.2d 657, 661 (Ky. 1978). "KRS 532.080 does not create or define a criminal offense. It recognizes a status and, in a proceeding separate and apart from the initial trial, fixes a penalty which is to be imposed rather than the one fixed by the jury on the initial trial." *Id.*

[89] Pace v. Commonwealth, 636 S.W.2d 887, 890 (Ky. 1982) ("In order to establish a persistent felony offender status, the Commonwealth merely needs to establish a simple check list of technical statutory requirements."). It should be noted that proof of PFO status is, in virtually every case, readily available from public records.

automatically entitled to a jury instruction on the lesser offense of second degree PFO.[90]

B. Two or More Previous Felony Convictions

KRS section 532.080(4) provides that:

> For the purpose of determining whether a person has two (2) or more previous felony convictions, two (2) or more convictions of crime for which that person served concurrent or uninterrupted consecutive terms of imprisonment shall be deemed to be only one conviction, unless one (1) of the convictions was for an offense committed while that person was imprisoned.[91]

In *Zachery v. Commonwealth*,[92] the Kentucky Supreme Court construed this portion of the PFO statute as indicating that a probated sentence merges into a later sentence of imprisonment to form one conviction. Nevertheless, the Court overruled *Zachery* in *Commonwealth v. Hinton*.[93]

The holding of *Zachery* was based on the commentary to KRS section 532.080(4), which states: "When an individual has been convicted two times before serving any time in prison, his convictions shall be considered a single conviction for purposes of this section."[94] In 1976, however, the statute was amended to include within the definition of a prior felony those convictions resulting in probation, parole, or conditional release.[95] The Supreme Court held in *Hinton* that this amendment effectively nullified the portion of the commentary on which the decision in *Zachery* was based.[96] "While the Commentary is a source of

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[90] Payne v. Commonwealth, 656 S.W.2d 719, 721 (Ky. 1983) ("The fact that two convictions must be proven does not justify breaking down the charge into two parts so as to give the jury the opportunity to pass on each prior conviction in the absence of some evidence bringing one or both prior convictions into dispute.").

[91] KRS § 532.080(4) (1985).

[92] 580 S.W.2d 220 (Ky. 1979).

[93] 678 S.W.2d 388 (Ky. 1984).

[94] KRS § 532.080 commentary (1974).

[95] KRS § 532.080(2), (3). The statute now includes situations where the defendant is "on probation, parole, conditional discharge, conditional release, furlough, appeal bond, or any other form of legal release from any of the previous felony convictions at the time of commission of the felony for which he now stands convicted." *Id.*

[96] 678 S.W.2d at 390.

interpretation for the original Act, once there is an amendment the portion of the Commentary on that subject loses its validity."[97]

The Court's construction of KRS section 532.080(4) harmonizes that subsection with the amendments to subsections (2) and (3) by consistently treating a probated sentence as a term of imprisonment.[98] Thus, in the absence of a provision in the PFO statute specifically merging a conviction for which a probated sentence is imposed with another conviction, such a conviction will be treated as though it resulted in a sentence of imprisonment.

C. *Definition of "Over the Age of Eighteen"*

The Court held in *Garrett v. Commonwealth*[99] that, for purposes of KRS section 532.080(3)(b),[100] a person is "over the age of eighteen from the first moment of the day on which his eighteenth birthday falls . . . ."[101] The Court found unpersuasive the argument that "over the age of eighteen" means at least nineteen.[102]

The Court did not share its reasoning,[103] even though the phrase "over the age of eighteen" is arguably ambiguous when compared with age requirements in other statutory enactments. The legislature has, in other contexts, employed such language as "being eighteen years old or more,"[104] "eighteen years of age or over,"[105] and "age of eighteen years."[106] Additionally, at least one court has reached an opposite conclusion. In *Wilson v. Mid-*

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[97] *Id.*

[98] *See* note 95 *supra.*

[99] 675 S.W.2d 1 (Ky. 1984).

[100] KRS § 532.080(3) (1985) provides in material part: "As used in this provision, a previous felony conviction is a conviction of a felony in this state or conviction of a crime in any other jurisdiction provided: . . . (b) That the offender was over the age of eighteen (18) years at the time the offense was committed . . . ."

[101] 675 S.W.2d at 1.

[102] *Id.*

[103] *See id.*

[104] KRS § 510.050(1) (1985) (second degree rape statute).

[105] KRS § 530.050(4) (1985) (nonsupport and flagrant nonsupport statute).

[106] KRS § 2.015 (1980) (age of majority in Kentucky).

Continental Life Insurance Co.,[107] the Oklahoma Supreme Court, interpreting an insurance policy, held that "over the age of 65 years" is "universally understood" to mean that a person is not over sixty-five years of age until he or she reaches the sixty-sixth year.[108]

The *Garrett* Court's holding also raises questions about the meaning of the PFO statute's second age requirement—that an individual adjudicated a PFO be "more than twenty-one (21) years of age."[109] In *Hayes v. Commonwealth*,[110] the Court held that an individual can be convicted as a PFO so long as he is twenty-one when he is convicted of a second felony, even though he was not twenty-one at the time he committed the second felony. The *Hayes* Court assumed that "more than twenty-one" simply means twenty-one.[111] The precise issue of the meaning of "more than twenty-one" was not before the Court, however, and was not considered by it. In view of the *Garrett* Court's interpretation of "over the age of eighteen," the legislature's choice of different phraseology, in the same statute, regarding the element "more than twenty-one" possibly signifies that "more than twenty-one" means twenty-two.

D. Escape from Jail is an Offense Committed While "Imprisoned"

In *Damron v. Commonwealth*,[112] the Kentucky Supreme Court again construed "imprisonment" as used in KRS section 532.080(4). The statute provides:

> For the purpose of determining whether a person has two (2) or more previous felony convictions, two (2) or more convictions of crime for which that person served concurrent or

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[107] 14 P.2d 945 (Okla. 1932). Nevertheless, the court noted the typical treatment of ambiguity in insurance contracts by saying, "If the policy of insurance is susceptible of two constructions, that one is adopted which is most favorable to the insured." *Id.* at 947.

[108] *Id.* at 946.

[109] KRS § 532.080(3) (1985).

[110] 660 S.W.2d 5 (Ky. 1983).

[111] *See id.* at 6.

[112] 687 S.W.2d 138 (Ky. 1985). For a discussion of other aspects of *Damron*, see *supra* notes 59-69 and accompanying text.

> uninterrupted consecutive terms of imprisonment shall be deemed to be only one conviction, *unless one (1) of the convictions was for an offense committed while that person was imprisoned.*[113]

Damron contended that a jail escape committed while awaiting trial was not an offense committed while "imprisoned." He urged the Court to interpret "imprisonment" as limited to custody by the Department of Corrections since only such custody would expose him to a rehabilitative effort.[114] The Court rejected Damron's argument, holding that "escape from jail is encompassed in the statute."[115]

In reaching its decision the Court repudiated the commentary to KRS section 532.080(4). The commentary states:

> . . . When an individual has been convicted two times before serving any time in prison, his convictions shall be considered a single conviction for purposes of this section. This is another effort to avoid the label of persistent felony offender for persons who might be rehabilitated through an ordinary term of imprisonment for the offense most recently committed.[116]

The Court acknowledged that the PFO statute's commentary emphasized treating as one offense multiple offenses resulting in a single, uninterrupted course of rehabilitation.[117] Nevertheless, the Court itself read legislative intent as indicating that "the legislature intended to deal more harshly with persons who commit crimes while incarcerated."[118] The *Damron* Court's decision does not overrule its earlier opinion in *Combs v.*

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[113] KRS § 532.080(4) (1985) (emphasis added).

[114] 687 S.W.2d at 140. Damron had three prior 1980 judgments of conviction from Crittenden County, all of which ran concurrently, and two 1980 judgments of conviction from Livingston County, both of which ran concurrently with the Crittenden County judgments. All of the convictions related to crimes occurring in a six week period commencing June 15, 1980. *Id.* at 142 (Liebson, J., dissenting).

[115] *Id.* at 140.

[116] *Id.* (quoting KRS § 532.080(4) commentary (1974)).

[117] 687 S.W.2d at 140. The Court disposed of the commentary as follows: "It is plain that the commentary is centered on the defendant being exposed to rehabilitative efforts. We regard the commentary as good advice but not necessarily all inclusive. It is pertinent as far as it goes but does not contemplate the present situation." *Id.*

[118] *Id.*

Commonwealth[119] that "when an individual has been convicted two times before being exposed to the institutional rehabilitation efforts afforded by a term of imprisonment, the two convictions shall count only as one in persistent felony offender proceedings."[120] Nevertheless, *Damron* significantly enlarges the KRS section 532.080(4) exception for offenses committed while imprisoned by construing that exception to include escape from jail while awaiting trial. Justice Liebson dissented.[121]

E. Prior Felony Conviction Must Be Obtained Prior to Commission of Present Felony

The court of appeals held in *Dillingham v. Commonwealth*[122] that "KRS 532.080[[123]] requires that *all* prior felony convictions used as a basis for enhancing a present felony conviction must have been obtained *prior* to the date of the commission of the present felony."[124] Dillingham's conviction as a PFO was based in part on a conviction obtained on February 15, 1980. However, the principal offense was committed prior to that date, on January 1, 1980. The court held that the enhancement use of the felony conviction obtained *after* the date of commission of the underlying offense was impermissible.[125]

On its face, KRS section 532.080 does not confine "previous felony convictions" to convictions obtained prior to commission of the principal offense. Indeed, subsections (2) and (3) provide that:

> (2)A persistent felony offender in the second-degree is a person . . . who stands convicted of a felony *after* having been convicted of one (1) previous felony . . . .

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[119] 652 S.W.2d 859 (Ky. 1983).

[120] *Id.* at 861. In contrast to *Damron*, the Court in *Combs* found support for its decision in the official commentary: "The 1974 commentary to the criminal code makes it plain that the intent of the persistent felony offender statute was to restrict its application to persons who have been previously exposed to an institutional rehabilitative effort . . . ." *Id.*

[121] Justice Liebson cited *Combs* with approval arguing that the legislature clearly did not intend temporary jail terms pending trial to constitute "imprisonment" within KRS § 532.080(4). 687 S.W.2d at 142 (Liebson, J., dissenting).

[122] 684 S.W.2d 307 (Ky. Ct. App. 1985).

[123] KRS § 532.080 (1985).

[124] 684 S.W.2d at 309 (emphasis in original).

[125] *Id.*

. . . .

> (3)A persistent felony offender in the first-degree is a person . . . who stands convicted of a felony *after* having been convicted of two (2) or more felonies.[126]

The statute thus allows the enhancement use of any felony conviction obtained prior to the *conviction* for the present felony. Under Kentucky's former habitual criminal statute, there also was no express requirement that the previous felony convictions have been obtained before commission of the principal offense.[127] The former Kentucky Court of Appeals nevertheless read such a requirement into the statute in *White v. Commonwealth*[128] and *Cobb v. Commonwealth.*[129] The court of appeals in *Dillingham* determined that these decisions were based on reasoning equally applicable to the present PFO statute: "We have compared KRS 431.190 with the present statute, KRS 532.080, and find that the principles enumerated in *White* and *Cobb* are consistent with KRS 532.080."[130]

The court of appeals holding is also consistent with the PFO statute's intent to "restrict application of the habitual offender statute to persons who have been previously exposed to an institutional rehabilitative effort."[131] At the time that the prin-

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[126] KRS § 532.080(2), (3) (emphasis added).

[127] KRS § 431.190 (1962), *repealed by* Acts 1974, ch. 406, § 336 (Jan. 1, 1975), defined and penalized the habitual criminal as follows:

> Any person convicted a second time of felony shall be confined in the penitentiary not less than double the time of the sentence under the first conviction; if convicted a third time of felony, he shall be confined in the penitentiary during his life. Judgment in such cases shall not be given for the increased penalty unless the jury finds, from the record and other competent evidence, the fact of former convictions for felony committed by the prisoner, in or out of the state.

[128] 379 S.W.2d 448, 449 (Ky. 1964). The Court emphasized that the other convictions must precede the principal offense because, as a matter of policy, only the prior convictions will sufficiently warn the defendant to cease his activities. *Id.*

[129] 101 S.W.2d 418, 420 (Ky. 1936). Boyd v. Commonwealth, 521 S.W.2d 84 (Ky. 1975) ("[T]his court in construing the Habitual Criminal Act has consistently held that it is the commission of a second felony after conviction of a first felony and the commission of a third felony after conviction of a second that is required to be established. . . ." *Id.* at 84.). *See* Hardin v. Commonwealth, 428 S.W.2d 224 (Ky. 1968) (burden placed on state to directly prove the succession of the prior convictions).

[130] 684 S.W.2d at 309.

[131] KRS § 532.080 commentary (1974).

cipal offense was committed, Dillingham, not having been convicted of the previous felony, had not been exposed to any attempted rehabilitation.[132] Consequently, Dillingham had not demonstrated the incapacity for rehabilitation ordinarily present in a first degree PFO case.[133]

IV. SENTENCING

A. *Effect of Parole Revocation and Good Time Forfeiture on Minimum Expiration Date*

In *Hobbs v. Commonwealth*,[134] the defendant contended that the circuit court erred in allowing his prior felony conviction to be used for enhancement because his minimum sentence expiration date was more than five years prior to the commission of the principal offense.[135] While this case arises in the context of a PFO conviction, it is significant for its interpretation of various statutes relating to the effect of parole and "good time"[136] on sentence expiration.

Hobbs was convicted of voluntary manslaughter in 1971 and received a sentence of four years with a maximum expiration date of May 14, 1975. Upon his imprisonment on July 21, 1971, the Corrections Cabinet determined that, according to a schedule of good time awarded each prisoner, four years would result in a minimum expiration date of June 1, 1974, if completely served. On June 7, 1973, Hobbs was paroled for the first time. Subsequently, he violated the provisions of his parole, and was returned to prison on October 1, 1974. He was paroled for the second time on December 21, 1974, and received his final dis-

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[132] 684 S.W.2d at 309.

[133] *See* notes 114-16 *supra* and accompanying text.

[134] 690 S.W.2d 771 (Ky. Ct. App. 1985).

[135] *Id.* at 772. KRS § 532.080(2)(c)(3) (1985) requires a finding that the defendant: "Was discharged from probation, parole, conditional discharge, conditional release, or any other form of legal release on any of the previous felony convictions within five (5) years prior to the date of commission of the felony for which he now stands convicted . . . ."

[136] *See* KRS § 197.045(1) (1982). "Good time" refers to a credit or reduction in sentence earned by a prisoner for good conduct. The credit may not exceed 10 days for each month served and may be forfeited if the prisoner commits any offense or violates the rules of the institution while imprisoned. *Id.*

charge from parole on October 18, 1976. On March 11, 1980, he committed the principal offense.[137]

Hobbs argued that the original minimum expiration date of his sentence, June 1, 1974, was the appropriate date from which to calculate whether his previous conviction fell within the five year limit of KRS section 532.080(2)(c)(3). His argument was based on counting his parole time as service of the sentence.[138] The court of appeals rejected this contention, citing KRS section 439.344,[139] which states: "The period of time spent on parole shall not count as a part of the prisoner's maximum sentence except in determining parolee's eligibility for a final discharge from parole as set out in KRS 429.354."[140] The court also relied on KRS section 439.340(2),[141] which provides: "[P]arole shall be ordered only for the best interest of society and not as an award of clemency, and it shall not be considered a reduction of sentence or pardon."[142]

As an alternative argument, Hobbs submitted that he was entitled to good time reduction of sentence as a matter of right.[143] The court of appeals rejected this argument on the basis of KRS section 197.045(1),[144] which authorizes the forfeiture of good time: "The [Corrections] cabinet shall have authority to forfeit any good time previously earned by the prisoner, or to deny the prisoner the right to earn good time in any amount, if during the term [not time] of imprisonment a prisoner commits any offense or violates the rules of the institution."[145]

In effect, the court held that offenders can be paroled beyond their minimum expiration date and that parole revocation results

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[137] 690 S.W.2d at 772.

[138] *Id.*

[139] *Id.*

[140] KRS § 439.344 (1985). *See also* Stokes v. Howard, 450 S.W.2d 520 (Ky. 1970) ("The sole question on this appeal being whether a parole violator, who subsequently committed and was convicted of other felonies, is entitled to credit for time spent out on parole toward the completion of his sentences, the answer is that he is not.") *Id.* at 520 (citing KRS § 439.344).

[141] 690 S.W.2d at 772.

[142] KRS § 439.340(2) (1985).

[143] 690 S.W.2d at 772.

[144] *Id.*

[145] KRS § 197.045(1) (1982).

in loss of good time for a person on parole past the minimum expiration date.[146]

B. *"Use" Must Be Personal Under KRS Section 533.060*

KRS section 533.060(1) imposes an additional penalty upon offenders using a firearm:

> (1) When a person has been convicted of an offense or has entered a plea of guilty to an offense classified as a Class A, B, or C felony and the commission of such offense involved the *use of a weapon* from which a shot or projectile may be discharged that is readily capable of producing death or other serious physical injury, such person shall not be eligible for probation, shock probation or conditional discharge.[147]

In *Commonwealth v. Reed*,[148] the court of appeals addressed the issue of whether the "use" required by the statute means *personal* use. Reed and a co-defendant both pled guilty to charges of first degree robbery. The co-defendant displayed a gun during the offense, but Reed was unarmed. Based on these facts the Commonwealth argued that both the co-defendant and Reed should be denied probation pursuant to KRS section 533.060(1).[149] The circuit court disagreed[150] and the Commonwealth appealed.[151]

The court of appeals stated the issue as "whether [the co-defendant's] use of the firearm should be imputed to the appellee and, as a result, trigger the application of KRS section 533.060 to deny the appellee probation."[152] The court held that the term "use" as contained in the statute is ambiguous.[153] In *Haymon*

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[146] *See* 690 S.W.2d at 772.

[147] KRS § 533.060(1) (1985) (emphasis added).

[148] 680 S.W.2d 134 (Ky. Ct. App. 1984).

[149] *Id.* at 135.

[150] The circuit court found that since Reed "was not in actual possession of the firearm used in the robbery even though he acted in complicity with [the co-defendant], KRS § 533.060(1) does not apply through KRS § 502.020." *Id.* at 135-36. KRS 502.020 provides that in certain situations one may be held liable for the acts of another. Apparently, in the circuit court's opinion, none of the situations existed.

[151] 680 S.W.2d at 136.

[152] *Id.*

[153] *Id.*

v. Commonwealth,[154] the Kentucky Supreme Court, recognizing the ambiguity, interpreted "use" to the defendant's benefit by holding that the defendant, who fled the scene of a burglary with a stolen shotgun, had not committed an offense involving the use of a weapon.[155] The court of appeals in *Reed* similarly resolved the interpretive question before it:

> [W]e find that the ambiguity contained in the statute—whether a defendant is guilty of committing an offense involving the use of a weapon if his cocomplicitor, rather than himself, personally used the weapon—is an ambiguity which must be resolved in the appellee's favor. As we construe the statute, we hold that the term "use" means "personal use," not vicarious usage.[156]

The court of appeals additionally reasoned that a distinction can be drawn between a complicity statute, which specifically provides for criminal liability based on the conduct of another, and an enhancement provision of a penalty statute, which does not specifically create vicarious liability.[157] The court of appeals noted that "[o]ther courts have made a similar distinction and have disallowed any attempt to create vicarious liability under enhancement provisions of a penalty statute."[158] The court's decision is consistent with the majority rule in other jurisdictions.[159] The *Reed* holding is also consistent with the mandate of individualized sentencing implicit in the requirement of KRS section 533.010(2) that: "Before imposition of a sentence of imprisonment the court shall consider the possibility of probation . . . [a]fter due consideration of the nature and circumstan-

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[154] 657 S.W.2d 239, 240 (Ky. 1983).

[155] *Id.*

[156] 680 S.W.2d at 137.

[157] *Id.*

[158] *Id.*

[159] *See* People v. Walker, 555 P.2d 306 (Cal. 1976) ("personal" use of gun required in armed felony statutes); Earnest v. State, 351 So. 2d 957 (Fla. 1977) ("knowing and active" aid to one in possession of gun insufficient to activate armed felony statute); State v. Thompson, 614 P.2d 970 (Idaho 1980) (strict construction of penal statutes requires that only the defendant who used the gun be subject to statutory enhancements); State v. Hicks, 589 P.2d 1130 (Or. Ct. App. 1979) (defendant is subject to statute which enhances the penalty for armed felonies only if in actual, physical possession of the firearm).

ces of the crime and the history, character and condition of the defendant . . . ."[160]

CONCLUSION

During the survey period the Kentucky Supreme Court and Kentucky Court of Appeals looked to their own precedents and those of other states, but did not hesitate to overrule existing case law. The courts' interpretations of various provisions of the Penal Code sometimes notably broadened, and sometimes narrowed, prior interpretations of those provisions. Overall, the cases surveyed show both significant changes and continued steady evolution in Kentucky's criminal law.

[160] KRS § 533.010(2) (1985).