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CRIMINAL LAW

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INTRODUCTION

As of January 1, 1980, the Kentucky Penal Code had been in effect for five years,[1] during which time it was examined in a moderate number of cases and suffered a modest number of legislative changes. Although this article emphasizes those changes made during the 1979-80 period, the recent revisions are examined against the background of all post-enactment legislative modifications.

If one of the major purposes of the code's enactment was to eliminate the plethora of specific statutes that had come to dominate Kentucky law,[2] the code has been only a partial success because it has been subjected to "hit and miss" amending.[3] Various chapters have undergone revision,[4] with significant legislative changes occurring in the burglary chapter[5] during its two journeys through the amendment process.[6] This Survey will discuss these amendments to the burglary chapter and will analyze cases that have construed the statutes

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[1] Enacted during the 1974 legislative session, the Kentucky Penal Code became effective January 1, 1975.

[2] OFFICE OF CONTINUING LEGAL EDUCATION, UNIVERSITY OF KENTUCKY COLLEGE OF LAW, REPORT OF SEMINAR ON KENTUCKY PENAL CODE 215 (1974).

[3] The possibility that potential "defects" in the code would surface and necessitate remedial legislative action was recognized prior to the effective date of the legislation. *Id.* at 3.

[4] Important legislative changes have occurred in the persistent felony offender statute, KY. REV. STAT. chapter 532 [hereinafter cited as KRS], which was first amended in 1978 (1978 Ky. Acts ch. 78, § 6) and again in 1980 (1980 Ky. Acts ch. 309, § 5).

Additionally, the murder statute, KRS § 532.025 (Cum. Supp. 1980), has been amended to comply with recent constitutional decisions regarding the death penalty. See BRICKEY, KENTUCKY CRIMINAL LAW § 28.04 (Supp. 1978) for a discussion of constitutional requirements and limitations, and their application to KRS § 532.025 subsequent to that provision's amendment.

[5] KRS ch. 511 (Cum. Supp. 1980).

[6] KRS ch. 511 was first amended in 1978 (1978 Ky. Acts ch. 125) and again in 1980 (1980 Ky. Acts ch. 376).

therein.

The meaning of Kentucky Revised Statutes (KRS) Chapter 514 (Theft and Related Offenses) has been considered repeatedly by the appellate courts during this Survey year. This need for construction is due to the difficulty involved in reconciling the penal code theft provisions with pre-1975 traditional larceny concepts.[7] With the exception of the addition of welfare fraud legislation supplanting prosecution of welfare fraud under theft by deception,[8] the chapter, however, has avoided alteration since enactment, despite suggestions that changes are in order.[9] The cases construing the theft chapter will be analyzed in this article. Finally, this Survey will discuss the constitutionality of Kentucky's harassment and harassing communications statutes.

I. BURGLARY

Prior to enactment of the penal code in 1975, the statutory definition contained in the governing burglary provision[10] was so narrowly construed by the courts[11] that the legislature found it necessary to promulgate many "gap filling" statutes[12] in order to address conduct outside the scope of the burglary provision. The penal code consolidated these diverse statutes

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[7] For a discussion of pre-code treatment of larceny and the proposed consolidation of the numerous provisions by current KRS ch. 514, see OFFICE OF CONTINUING LEGAL EDUCATION, UNIVERSITY OF KENTUCKY COLLEGE OF LAW, REPORT OF SEMINAR ON KENTUCKY PENAL CODE, 215-22 (1974).

[8] See text accompanying notes 76-77 *infra* for a detailed discussion of this legislation.

[9] *See* Brickey, *An Introduction to the Kentucky Penal Code: A Critique of Pure Reason?* 61 KY. L.J. 624, 634-35 (1972-73).

[10] KRS § 433.120 (1948) (amended 1975).

[11] "The basic offense is common law burglary which has a statutory penalty provision (KRS § 433.120) but is defined by case law." KY. PENAL CODE §§ 1200-07, Comment (Final Draft, 1971). It should be noted that the commentary to the 1971 Final Draft is the official "commentary accompanying the Code" for purposes of statutory construction. Kennedy v. Commonwealth, 544 S.W.2d 219, 220 (Ky. 1976).

[12] Examples include burglary of a bank (KRS § 433.130 (repealed 1975)); armed burglary (KRS § 433.140 (repealed 1975)); housebreaking (KRS § 433.180 (repealed 1975)); storehousebreaking (KRS § 433.190 (repealed 1975)); railroad station breaking (KRS § 433.200 (repealed 1975)). KY. PENAL CODE § 1207, Comment (Final Draft, 1971).

into KRS Chapter 511,[13] which set forth three basic classes of burglary: first, second and third degree. Burglary third degree[14] encompassed any unauthorized entry into any building with intent to commit a crime and carried a penalty of one to five years.[15] Burglary second degree[16] was defined as any unauthorized entry, with aggravating factors,[17] into a non-dwelling building and carried a penalty of five to ten years.[18] Burglary first degree required entry into a dwelling, concurrent with the presence of certain aggravating factors, such as armed entry, causing injury, or entering at night.[19] Burglary first degree carried a penalty range of from ten to twenty years.[20]

Although these three statutes comprehensively replaced the common law scheme, the 1978 term of the General Assembly altered the laws to provide enhanced penalties for certain kinds of burglary.[21] Unauthorized entry into any dwelling at any time, even absent aggravating factors, became burglary first degree.[22] The amendment was evidently an attempt to deter residential burglaries but ironically may have failed to achieve this purpose by creating a penalty that, in the authors' opinions, was often too severe for juries to impose for simple, non-aggravated residential burglary.

In conjunction with the modification of the burglary first degree provision, burglary second degree was redefined: "A person is guilty of burglary in the second degree when, with

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[13] KRS ch. 511 is entitled "Burglary and Related Offenses" and includes within the scope of its provisions the crimes of criminal trespass (KRS §§ 511.060-.080) and possession of burglar's tools (KRS § 511.050). KRS ch. 511 (Cum. Supp. 1980).

[14] KRS § 511.040 (1975) (amended 1978).

[15] KRS § 511.040(2) (1975) (amended 1978); KRS § 532.060(2)(d) (1975) (amended 1978).

[16] KRS § 511.030 (1975) (amended 1978).

[17] Aggravating factors cited in the statute were (1) possession of weapons by burglar, (2) causing physical injury to any person not a participant, and (3) using or threatening to use a dangerous instrument against any person not a participant. *Id.*

[18] KRS § 511.030(2) (1975) (amended 1978); KRS § 532.060(2)(c) (1975) (amended 1978).

[19] KRS § 511.020 (1975) (amended 1978).

[20] KRS § 511.020(2)(b) (1975) (amended 1978).

[21] 1978 Ky. Acts ch. 125. *See also* J. PALMORE, KENTUCKY INSTRUCTIONS TO JURIES § 3.01 (Supp. 1979).

[22] 1978 Ky. Acts ch. 125.

the intent to commit a crime, he knowingly enters or remains unlawfully in an inhabited building."[23] This provision seems simply to increase the penalty in circumstances where another person is present in the building, for what would otherwise be burglary third degree. Nevertheless, "inhabited" suggested to some that it might also include dwellings that were unoccupied.[24] The question was resolved in *Litton v. Commonwealth*,[25] wherein the Kentucky Supreme Court held that the term "inhabited building" encompasses only those buildings in which someone other than the burglar is present.[26]

In response to problems encountered in the application of the 1978 changes, the 1980 session of the General Assembly enacted new burglary provisions.[27] Burglary first degree is now burglary of a building 1) when armed, 2) when use of a dangerous instrument is threatened, or 3) when a non-participant sustains injury.[28] Burglary second degree now covers all non-aggravated residential burglaries,[29] and burglary third degree remains unchanged.

It is significant that the changes in KRS Chapter 511 have occurred principally in the penalties for various kinds of burglary. The 1978 amendments had resulted in a disruption of the penal code's comprehensive scheme of equity in punishment.[30] For example, under these initial changes, a daytime burglary of an unoccupied residence carried the same penalty as assault first degree[31] or robbery first degree.[32] The response

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[23] KRS § 511.030 (1978) (amended 1980).

[24] J. PALMORE, KENTUCKY INSTRUCTIONS TO JURIES § 3.02 (Supp. 1979).

[25] 597 S.W.2d 616 (Ky. 1980).

[26] The Court explained:

> In order to give effect to this statutory scheme, we conclude that the drafters of the 1978 amendment meant to base the second degree/third degree distinction on the presence or absence of persons in the building at the time of the burglary, because the potential for physical injury is made greater by the presence of other persons who may be encountered in the process of the burglary.

Id. at 618.

[27] 1980 Ky. Acts ch. 376.

[28] *Id.*

[29] *Id.*

[30] *See* Brickey, *supra* note 9, at 631.

[31] KRS § 508.010 (1978).

[32] KRS § 515.020 (1978).

to criticisms of such alterations[33] embodied in the 1980 amendments indicates legislative recognition of the need for an internally consistent penalty scheme.

In addition to legislative consideration of the burglary statutes, the Kentucky Supreme Court's attention was drawn to those laws during the Survey year. In recent cases, the Court construed the term "dwelling," which appears in the second degree burglary statute,[34] to include the home of a recently deceased person[35] and the home of a family in the process of moving, where the family was sleeping in the new home at the time the previous home was burglarized.[36] These decisions indicate that the Court will broadly construe "dwelling" to uphold convictions for burglary even when the building is unoccupied and when the inherent dangers traditionally considered to justify the severity of the penalty are not present.[37]

In *Stamps v. Commonwealth*,[38] the Supreme Court reversed the court of appeals and held that entry into the air pockets of concrete blocks comprising the wall of a building is insufficient to constitute burglary and instead should be classified as attempted burglary.[39] Therefore, the question in determining whether entry was accomplished within the meaning of the burglary chapter is not whether the intruder's entry went beyond the "outer skin" of the building but is whether the entry penetrated the "inner skin."

II. THEFT

The appellate courts rendered several significant deci-

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[33] This kind of alteration was explicitly cautioned against prior to the code's enactment. *See* Brickey, *supra* note 9, at 631.

[34] KRS § 511.030(1) states, "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." *Id.* KRS § 511.010(2) (Cum. Supp. 1980) defines "dwelling" as "a building which is usually occupied by a person lodging therein." *Id.*

[35] Simpson v. Commonwealth, 592 S.W.2d 465 (Ky. 1980) (*per curiam*).

[36] Starnes v. Commonwealth, 597 S.W.2d 614 (Ky. 1980).

[37] "[B]urglary is designed to encompass all unlawful intrusions which are accompanied by alarm and danger to occupants." KY. PENAL CODE § 1207, Comment (Final Draft, 1971).

[38] 602 S.W.2d 172 (Ky. 1980).

[39] *Id.*

sions interpreting the theft statutes during 1979-80. The theft chapter,[40] which purports to be a comprehensive treatment of theft,[41] is frequently obscure when an attempt is made to determine the statutory provision applicable to a *particular* crime. For example, it is questionable whether rental of a motor vehicle through deception is a theft of services[42] or is instead a theft by deception.[43] The KRS definition of services specifically includes the use of vehicles;[44] the commentary to the theft by deception statute,[45] however, states that theft by deception encompasses fraudulent renting of motor vehicles.[46] Adding to this confusion is the "theft by failure to make required disposition" provision,[47] which apparently attempts to regulate a broad spectrum of conduct.

A. Commonwealth v. Day

In *Commonwealth v. Day*,[48] the defendant was found in possession of a stolen vehicle, but there was no proof that he had stolen the property in question. The Kentucky Supreme Court affirmed the defendant's conviction for theft by unlawful taking. That theft statute provides: "(1) A person is guilty of theft by unlawful taking or disposition when he unlawfully: (a) Takes or exercises control over movable property of another with intent to deprive him thereof."[49]

Day was convicted under jury instructions that dealt only with the "exercises control" language of the statute. The court

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[40] KRS ch. 514 (Cum. Supp. 1980).

[41] KY. PENAL CODE § 1500, Introduction (Final Draft, 1971). *See also* Commonwealth v. Day, 599 S.W.2d 166, 167 n.2 (Ky. 1980).

[42] KRS § 514.060 (Cum. Supp. 1980).

[43] KRS § 514.040 (Cum. Supp. 1980).

[44] KRS § 514.010(8) (Cum. Supp. 1980) states: " 'Services' includes labor, professional service, transportation, telephone, electricity, gas, water or other public service, accommodation in hotels, restaurants or elsewhere, admission to exhibitions, *use of vehicles* or other movable property" (emphasis added).

[45] KRS § 514.040 (Cum. Supp. 1980).

[46] KY. PENAL CODE § 1515, Comment (Final Draft, 1971).

[47] KRS § 514.070 (Cum. Supp. 1980). This statute covers situations in which the defendant fails to make a required payment or disposition of property arising out of an agreement or legal obligation.

[48] 599 S.W.2d 166 (Ky. 1980).

[49] KRS § 514.030 (Cum. Supp. 1980).

of appeals reversed, finding "that the 'exercises control' language was intended to be no more than the statutory equivalent of embezzlement."[50] The court concluded that "exercises control" was the equivalent of a "taking" in the embezzlement sense, *i.e.*, the term would not apply where the property was physically taken without permission of the owner but rather would apply where one lawfully came into possession of another's property and subsequently misappropriated it. Thus the court reasoned that the jury instructions were "erroneous because there was no evidence of lawful possession by Day at the outset."[51] The Supreme Court reversed the court of appeals decision, stating that the offense of theft by unlawful taking encompasses *either* taking or exercising control, as long as the act is accompanied by the requisite intent to deprive another of property.[52]

The *Day* opinion illustrates one difference between the Kentucky Penal Code and the Model Penal Code, in that the Kentucky code has eliminated the distinction between larceny and embezzlement[53] found in the Model Code.[54] The Supreme Court, therefore, held that "exercises control" is not to be limited to an embezzlement situation but is to be given its ordinarily-understood meaning.[55] Under this interpretation, Day was within the scope of the theft by unlawful taking statute if he exercised control over the vehicle on the date he was apprehended and had the requisite intent, regardless of whether he was the individual who initially stole the vehicle.

Because the court of appeals position is the more conven-

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[50] 599 S.W.2d at 167.

[51] *Id.*

[52] *Id.* at 168.

[53] "Conduct denominated theft in this chapter constitutes a single offense embracing the separate offenses presently known as *larceny, embezzlement,* false pretenses, extortion, blackmail, fraudulent conversion, receiving stolen property, uttering worthless checks, operating a motor vehicle without the owner's consent and the like." KY. PENAL CODE § 1500, Introduction (Final Draft, 1971) (emphasis added).

[54] MODEL PENAL CODE § 223.2 (Proposed Official Draft, 1962). The Model Penal Code's commentary distinguishes between "takes lawful control" and "exercises unlawful control," saying the former refers to larceny-related offenses while the latter applies to embezzlement-related crimes.

[55] 599 S.W.2d at 168.

tional one,[56] the Supreme Court's decision in *Day* is a significant interpretation of Kentucky's theft by unlawful taking statute. This decision may resolve the prosecutor's dilemma over whether to indict an individual for theft by unlawful taking or for receiving stolen property when the evidence establishes only possession of the property. Without the *Day* decision, a prosecutor would have been limited (under the court of appeals analysis) to bringing a charge of receiving stolen property in such a case. Now he has the option of bringing either charge, and this option may be an important one. While, under the receiving stolen property statute, a presumption exists that an individual in possession of stolen property is aware of the character of the property,[57] that presumption is not available under the theft by unlawful taking statute. However, under the theft by unlawful taking statute the prosecution's burden of establishing intent-to-deprive is lessened by the fact that intent may be inferred from the circumstances of possession.[58]

B. Commonwealth v. Jeter

Commonwealth v. Jeter[59] reached the court of appeals on certification by the Commonwealth following the trial court's dismissal of a multi-count indictment for theft by failure to make required disposition of property. KRS section 514.070 provides that: "(1) A person is guilty of theft by failure to

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[56] *Id.*

[57] KRS § 514.110(2) (Cum. Supp. 1980).

[58] "The Court based its conclusion on the permissible inference that in the absence of a satisfactory explanation of possession, the possessor of recently stolen property is guilty of the theft." Commonwealth v. Day, 599 S.W.2d at 169 (citing Howe v. Commonwealth, 462 S.W.2d 935 (Ky. 1971)).

The Kentucky Supreme Court's construction of KRS § 514.030 is strikingly similar to the "recent and exclusive possession principle" existing under the New York theft scheme. In New York, if a defendant is found in recent and exclusive possession of stolen property, a rebuttable presumption exists that the possession is criminal, *i.e.*, that the defendant committed the theft. Obviously, absence of an explanation or a false explanation would be inadequate to rebut this presumption, and the prosecution's burden of proof would be satisfied. People v. Giesa, 337 N.Y.S.2d 233 (N.Y. 1972); People v. Adams, 310 N.Y.S.2d 7 (N.Y. 1970); People v. Foley, 121 N.E.2d 516 (N.Y. 1954).

[59] 590 S.W.2d 346 (Ky. Ct. App. 1979).

make required disposition of property received when: (a) He obtains property on agreement or subject to a known legal obligation to make specified payment . . . ."

Phillip Ray Jeter operated a used furniture store in Lexington, Kentucky and, on the four occasions charged in the indictment, received money for appliances under an agreement for subsequent delivery. In one instance there was a complete failure to deliver; in another, the item was received in unsatisfactory condition. The Commonwealth sought an indictment under section 514.070 on the theory that Jeter received money subject to an obligation to deliver property and that his conduct amounted to a failure to fulfill that obligation.

In substance, the number of charges was sufficient to indicate that the failure to deliver involved more than mere negligent non-performance. The trial court, in granting a motion to dismiss the indictment, focused on the commentary to KRS section 514.070, that states in part:

> It is not the purpose of Section 1530 to impose a criminal obligation or sanction to the relationship of debtor and creditor. To constitute an offense there must be a breach of trust, growing out of a contract or confidential relation.[60]

On appeal, the Commonwealth argued that a fiduciary relationship existed between the parties on the basis of the agreement to deliver.[61] Refusing to address the question in this manner, the appellate court held that this situation was not one in which KRS section 514.070 applied but rather was a case where theft by deception[62] was the more appropriate charge.[63]

The opinion imposes an important limitation on the scope of KRS section 514.070. Absent strict construction, the statute is potentially subject to abuse in that, on its face, it purports to govern such a wide variety of circumstances.[64] The

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[60] KY. PENAL CODE § 1530, Comment (Final Draft, 1971).

[61] 590 S.W.2d at 347.

[62] KRS § 514.040 (Cum. Supp. 1980).

[63] 590 S.W.2d at 347.

[64] For example, the statute presumably could cover situations where a leased vehicle is retained after expiration of the lease.

Jeter decision, in finding the conduct within the purview of the theft by deception statute, indicates that a defendant similarly situated is guilty of a theft offense only if he intended not to fulfill the promise to make delivery at the time the money was obtained. As long as this intent did not exist concurrent with receipt of payment, the purchaser is in effect a creditor of the defendant, and KRS section 514.070 is not applicable despite the subsequent intentional non-performance.

The decision, however, does not resolve the question of the quantity of proof that will be required under a prosecution for theft by deception in these circumstances. Because a conviction for theft by deception cannot be sustained solely on the basis of non-performance,[65] the question presented is whether the pattern of non-performance is egregious enough to establish the element of deception.

In contrast to *Jeter, Blanton v. Commonwealth*[66] provides an excellent example of conduct falling squarely within the proscription of KRS section 514.070. In *Blanton,* the court of appeals held a contractor who had received payments from the owner of a building and who failed to apply an appropriate portion of the funds to satisfy subcontractor claims[67] guilty of theft by failure to make required disposition.[68]

It is interesting to note that the Kentucky appellate courts have thus far failed to address authoritatively the most confusing element of KRS section 514.070: the definition of "obtain." KRS section 514.070 requires that a defendant "obtain" the property subject to a known obligation. "Obtain" is defined in KRS as: "(a) In relation to property, to bring about a transfer or purported transfer from another person of a legal interest in the property, whether to the obtainer or another; or (b) In relation to labor or services, to secure performance thereof."[69] Therefore, the keynote is that quality of title sufficient to constitute "obtaining."

Consider a situation in which *A* informally allows *B* to

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[65] 590 S.W.2d at 347.

[66] 562 S.W.2d 90 (Ky. Ct. App. 1978).

[67] That obligation arises under KRS § 376.070 (1972).

[68] 562 S.W.2d at 92.

[69] KRS § 514.010(4) (Cum. Supp. 1980).

borrow *A*'s car to travel across town and back. *B* then decides to abscond with the vehicle and proceeds to drive to Florida. Did *B* acquire sufficient title from *A* to be guilty of theft by failure to make required disposition, as opposed to guilt for theft by unlawful taking? Is the answer different if the vehicle was rented to *B*, thereby giving *B* at least a lessee's interest in the property? The Kentucky courts have not answered these questions, which are further complicated by the fact that the Kentucky Penal Code is unclear as to whether traditional common law concepts of title are applicable to its provisions. Until the scope of the term "obtain" is delineated, questions will continue to arise regarding the application of KRS section 514.070 and the various other provisions within the theft chapter.

C. Commonwealth v. McKinney

In 1979 the Kentucky Court of Appeals confronted the question of whether welfare fraud was indictable under KRS section 514.070 (theft by deception). In *Commonwealth v. McKinney*,[70] the defendants were charged under this provision with obtaining public assistance payments in excess of $100 by means of false statements regarding eligibility. At trial, the defendants argued that the specific provisions of KRS Chapter 205 that prohibit the making of false statements to obtain such payments and that carry a misdemeanor penalty,[71] preclude prosecution under the general theft provision. Persuaded by this argument, the Warren Circuit Court dismissed the indictments.

On appeal by the Commonwealth, the court of appeals reversed the trial court's decision.[72] Although the appellate court recognized that when the provisions of a specific and of a general statute conflict, the specific statute governs,[73] it further found that the statutes in question were not irreconcilable. The specific statute proscribed the making of false state-

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[70] 594 S.W.2d 884 (Ky. Ct. App. 1979).
[71] KRS § 205.990 (Cum. Supp. 1980).
[72] 594 S.W.2d at 884.
[73] *Id.* at 886.

ments for the purpose of obtaining public aid *irrespective of receipt* of benefits, whereas KRS section 514.070 addressed the actual *receipt* of public assistance payments obtained by false statements or misrepresentations.[74] Unlike Chapter 205, KRS section 514.070 requires a receipt before a crime under that section can be found. Under this construction, the relevant provisions of KRS Chapter 205 do not directly conflict with the theft statute, and thus the two can be harmonized.

Three of the appellees in *McKinney* argued that passage of Senate Bill 11 by the 1979 Extraordinary Session of the Kentucky General Assembly[75] clearly indicated that the legislature had intended KRS Chapter 205 to be the exclusive statutory provision governing welfare fraud prosecutions.[76] Senate Bill 11 amended KRS Chapter 205 to provide felony status in cases where false statements are made to obtain welfare benefits in excess of $100, and in cases where the welfare fraud is commercial in nature. The court dismissed the appellees' contention, finding no evidence of such legislative intent and noting that the recent legislation was simply part and parcel of the extensive welfare reform.[77]

Senate Bill 11, beyond providing much needed clarity, eliminates the cumbersome process of indictment that existed under KRS section 514.070. In an indictment for theft by deception, each welfare payment constituted a separate count, resulting in lengthy multi-count indictments. While Senate Bill 11 is, in essence, supplemental theft legislation outside the penal code, it provides a more practical mode of welfare fraud prosecution by permitting the aggregate amount of payments received to result in a single felony charge.[78]

III. HARASSING COMMUNICATIONS AND HARASSMENT

A. *Harassing Communications*

In January, 1979 Stanley Green was convicted in the Fay-

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[74] *Id.* at 887.
[75] 1979 Ky. Acts Extra. Session ch. 2.
[76] 594 S.W.2d at 888.
[77] *Id.*
[78] 1979 Ky. Acts Extra. Session ch. 2.

ette District Court on a charge of harassing communications. The proscribed conduct consisted of a series of unwarranted and annoying telephone calls to the complainant, a former girlfriend, and the writing of the word "BEWARE" in the snow on her automobile.[79] KRS section 525.080 provides:

> (1) A person is guilty of harassing communications when with intent to harass, annoy or alarm another person he:
> (a) Communicates with a person, anonymously or otherwise, by telephone, telegraph, mail or any other form of written communication in a manner which causes annoyance or alarm and serves no purpose of legitimate communication; or (b) Makes a telephone call, whether or not conversation ensues, with no purpose of legitimate communication.
> (2) Harassing communications is a Class B Misdemeanor.[80]

The constitutionality of this statute was successfully challenged in the Fayette Circuit Court, in *Green v. Commonwealth*,[81] with the court stating: "KRS 525.080 is clearly overbroad and unconstitutional since it includes within its proscription constitutionally protected speech within the first amendment."[82]

The Kentucky Court of Appeals granted a motion for discretionary review and, in an unpublished opinion, reversed the circuit court.[83] The appellate court stated:

> We find, when considering the Kentucky Harrassment [sic] Communications statute, that there is a clear distinction between speech or messages and conduct communicated in a public form from that type of speech and conduct which involves, contrary to the clear import of the statute, intrusion upon a justifiable privacy interest of a recipient. Where there is involved an area where a person's interests are predominantly private, the degree of protective rights afforded by the 1st Amendment is but lessened.[84]

The court further stated that it is not speech that the Ken-

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[79] Green v. Commonwealth, No. 79X002, at 1 (Fayette Cir. Ct., Aug. 6, 1979).
[80] KRS § 525.080 (Cum. Supp. 1980).
[81] No. 79X002 (Fayette Cir. Ct., Aug. 6, 1979).
[82] *Id.* at 2.
[83] Commonwealth v. Green, No. 79-CA-1405-DG (Ky. Ct. App., June 27, 1980).
[84] *Id.* at 2 (citation deleted).

tucky statute prohibits, but it is instead the use of private communications as a tool for harassment that is forbidden.[85] Where the right of privacy is involved, the court recognized that reasonable regulation not otherwise permitted under the first amendment can exist to protect the privacy right. Moreover, the telephone is a particularly susceptible means for harassment, since individuals can be annoyed through obscene or threatening calls. The ubiquity of the telephone renders nearly every individual vulnerable to such abuse.[86] In addressing the argument that the broad statutory language encompasses protected speech, the court construed the statute to be limited by the requirement that the actor possess specific intent to annoy or alarm.[87]

B. *Harassment*

In *Green*, the Fayette Circuit Court cited *United States v. Sturgill*,[88] a Sixth Circuit Court of Appeals case that examined the Kentucky harassment statute[89] as applied to an altercation on federal property under the Federal Assimilative Crimes Act.[90] The Sixth Circuit held the statute unconstitutionally overbroad. KRS section 525.070 provides:

> (1) A person is guilty of harassment when with intent to harass, annoy or alarm another person he:
> (a) Strikes, shoves, kicks or otherwise subjects him to physical contact or attempts or threatens to do the same; or
> (b) In a public place, makes an offensively coarse utterance, gesture or display, or addresses abusive language to any person present; or
> (c) Follows a person in or about a public place or places; or

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[85] *Id.* at 3.

[86] *Id.*

[87] Communications, as here, must, of course, be made in a manner likely to cause annoyance, alarm, or harass and which serve no purpose of legitimate communication, or thusly with an intent to harass, annoy or alarm the other person. As so construed, the statute does not suffer from a constitutional infirmity since we further recognize the serious obligation to construe the statute, if possible, to preserve its constitutionality.

Id. at 4.

[88] 563 F.2d 307 (6th Cir. 1977).

[89] KRS § 525.070 (Cum. Supp. 1980).

[90] 18 U.S.C. § 13 (1970).

> (d) Engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose.[91]

Sturgill was convicted under KRS section 525.070(1) (b) in connection with an "altercation at the United States Naval Ordnance Station in Louisville, Kentucky between defendant Sturgill, a machinist at the station, and Joseph Frank Scott, a security guard at the station."[92] The court stated that while Sturgill's conduct was sufficiently serious to warrant prosecution, the Kentucky harassment statute was constitutionally defective. The court said the statute could "withstand an attack upon its constitutionality only if, as authoritatively construed by the state courts, it is not susceptible of application to speech protected by the First Amendment."[93] In the absence of such a narrowing construction by a Kentucky state court, the Sixth Circuit reversed the conviction for harassment.[94]

C. *The Status of the Constitutionality of the Statutes*

While not binding on the Kentucky state courts,[95] the Sixth Circuit's decision underscores the nebulous status of both KRS section 525.070 and KRS section 525.080. Although neither provision has been deemed unconstitutional in a published Kentucky appellate decision,[96] the constitutionality of both provisions is suspect. This doubt arises from the difficulty involved in limiting the broad language of the provisions so as to avoid infringement upon the first amendment right of free speech.[97]

The appellate court in *Green* presents a sound interpretation of KRS section 525.080, which unfortunately is embodied in an unpublished opinion. The Kentucky appellate courts

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[91] KRS § 525.070 (Cum. Supp. 1980).

[92] 563 F.2d at 308.

[93] *Id.* at 310.

[94] *Id.* at 311.

[95] *See* Younger v. Harris, 401 U.S. 37 (1971).

[96] KY. R. CIV. P. 76.28(4)(c) states: "Opinions that are not published shall not be cited or used as authority in any other case in any court of this state."

[97] BRICKEY, *supra* note 4, § 23.07 at 264-65, § 23.08 at 268.

have to date taken no further action to construe either the harassment or the harassing communications provisions. The unpalatable result is evidenced by the decision in *Sturgill, i.e.,* the harassment conviction would have withstood a constitutional challenge had there existed a sufficiently restrictive construction of the statute by the Kentucky courts.[98]

Whether the appellate courts will resolve the constitutional questions posed by these statutes in a final and authoritative decision remains to be seen. The resolution is rendered more uncertain in that appeals from the state district courts are rarely pursued further than to the circuit court, particularly where, as with the harassment charge, the maximum penalty is a fine of $250.[99]

[98] 563 F.2d at 310.

[99] KRS § 525.070(2) (Cum. Supp. 1980).