

COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2012-00111-D
COURT OF APPEALS (CASE NO. 2010-CA-001909)
FAYETTE COUNTY CIRCUIT COURT (CASE NO. 10-XX-0025)
FAYETTE COUNTY DISTRICT COURT (CASE NO. 10-F-00092)

ERICK VEGA

APPELLANT

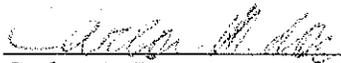
vs.

COMMONWEALTH OF KENTUCKY

APPELLEE

BRIEF FOR APPELLEE

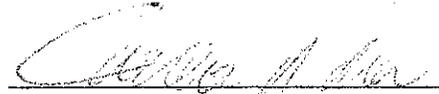
Respectfully submitted,
HON. JACK CONWAY,
ATTORNEY GENERAL

BY: 

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CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing document was executed and served by mailing first class prepaid postage to the following on March 25, 2013: Hon. Jack Conway, Kentucky Attorney General, 700 Capital Ave., Suite 118, Frankfort, KY 40601, Samuel Givens, Clerk of the Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601; Hon. Pamela Goodwine, Fayette Circuit Court, 120 N. Limestone, Lexington, KY 40507; Hon. Kim Wilkie, Fayette District Court, 150 N. Limestone, Lexington, KY 40507, Hon. Ray Larson, Fayette County Commonwealth Attorney, 116 N. Upper Street, Suite 300, Lexington, KY 40507; Hon. Amy Duncliffe, 107 N. Hamilton St, Georgetown, KY 40324. I further certify that the record on appeal was not withdrawn by the Appellee.


Carlos A. Ross
Attorney for Appellee

STATEMENT CONCERNING ORAL ARGUMENT

The Commonwealth does not believe that oral argument is necessary because the facts and circumstances of the case are clear from the record on review.

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COUNTERSTATEMENT OF THE CASE

On January 9, 2010, the Appellant's vehicle was stopped by Officer Thomas Perkins for operating with only one headlight and for having the rear license plate not illuminated. As Officer Perkins approached the driver-side window of the vehicle to conduct the traffic stop, he shined his flash light into the vehicle. Officer Perkins testified that his "flashlight, spotlight, and overhead lights were operational and that his headlights were flashing." (201003308-1019 at 1:32). He also testified that he did not see a gun in the car during his initial contact with the Appellant. Shortly after the stop, Officer Bowles arrived on the scene, assuming the role of backup officer. Officer Bowles testified that as he approached the vehicle and shined his flashlight into the front passenger window he saw the front sight and barrel of a gun protruding from underneath a toolbox in the passenger seat of the vehicle. (1024 at 4:35 -5:01, 1029 at 00.00 – 00:40) Officer Bowles further testified that he only noticed the gun after observing that the toolbox was raised up on the right side and that he "was not able to see anything else on the firearm," aside from its front sight and barrel. (1029 at :08)

Officer Bowles testified that he immediately notified Officer Perkins using hand gestures that a gun was present in the vehicle. (1034 at 00:20) Officer Perkins then asked the Appellant to step out of the car for officer-safety reasons because the firearm would have remained within the Appellant's reach if he had been allowed to stay in the vehicle. Officer Perkins testified that he asked the Appellant why he had failed to alert the officers that he had a gun and the Appellant responded, "[d]id not think I needed to." [1014- 3:14-19] Both Officer Perkins and Bowles testified that the gun was obscured from Officer Perkins' viewpoint from where he stood on the driver's side of the vehicle. Officer

Perkins further testified that the gun was entirely concealed from his view as he approached the car. The Appellant was subsequently arrested for carrying a concealed deadly weapon. In a search incident to the arrest, the officers discovered a Lorcet pill, a schedule-III controlled substance, in the Appellant's pocket. At the jail, the Appellant advised Officer Perkins that he had another Lorcet pill as well as one-half of a Lortab pill, another schedule-III controlled substance, concealed in his shoe. As a result, the Appellant was charged with possession of a controlled substance, second degree, second offense, a felony.

The felony charge was amended to a misdemeanor on the Commonwealth's motion, and the Appellant filed a suppression motion in the Fayette District Court, seeking to exclude evidence obtained from the search incident to his arrest for carrying a concealed deadly weapon. At the Suppression Hearing, which took place on March 8, 2010, District Court Judge Maria Ransdell properly denied the Appellant's motion to suppress, finding that there was probable cause for his arrest. In light of Judge Ransdell's ruling, the Appellant entered a conditional guilty plea, preserving his right to appeal the issue raised in the suppression motion, namely that the police lacked reasonable grounds to arrest him for carrying a concealed deadly weapon. The case was appealed to the Fayette Circuit Court, and the District Court's ruling was affirmed by Hon. Pamela Goodwine, Fayette Circuit Court Judge, Fourth Division, on September 20, 2010. The Kentucky Court of Appeals affirmed the Circuit Court's ruling on September 30, 2011, and this Court subsequently granted discretionary review.

ARGUMENT

At the outset, it is important to identify the appropriate standard of review to be applied on this appeal of the District Court's ruling. As this Court stated in Welch v. Commonwealth, 149 S.W. 3d 407 (Ky.2004):

Appellate review of a motion to suppress is governed by the standard expressed by the Supreme Court of the United States in Ornelas v. United States [517 U.S. 690, 116 S. Ct. 1657, 134 L.Ed.2d 911 (1966)] and adopted by this Court in Adcock v. Commonwealth [Ky., 967 S.W. 2d 6 (1998)]. The approach established by the Supreme Court of the United States is a two-step process that first reviews the factual findings of the trial court under a clearly erroneous standard. [Ornelas, 517 U.S. at 699, 116 S.Ct. at 1663.] The second step reviews *de novo* the applicability of the law to the facts found.

Welch, 149 S.W.3d at 409 (internal citation footnotes omitted and contents included within brackets in block quote). Under this standard of review, if the trial court's findings of facts are supported by substantial evidence, they are conclusive. RCr. 9.78. Moreover, those factual findings are entitled to some degree of deference : "At a suppression hearing, the ability to assess the credibility of witnesses and to draw reasonable inferences from the testimony is vested in the discretion of the trial court." Pitcock v. Commonwealth, 295 S.W.3d 130, 132 (Ky.App 2009) (citing Commonwealth v. Whitmore, 92 S.W.3d 76, 79 (Ky.2002)). Under this standard, the Commonwealth maintains that the District Court properly denied the Appellant's suppression motion because the court's holding that the gun was concealed and that officers therefore had reasonable grounds to arrest the Appellant was not clearly erroneous.

I. OFFICERS HAD A REASONABLE BASIS TO BELIEVE THE FIREARM WAS CONCEALED PURSUANT TO KRS 527.020.

Under KRS 527.020, "[a] person is guilty of carrying a concealed weapon when he or she carries concealed a firearm or other deadly weapon on or about his or her

person.” For the firearm to be “concealed,” the courts have previously held that the gun need be not so concealed that it requires a special effort or investigation to discover the presence of the weapon; it is sufficient that the gun was concealed to such a degree that it could not be observed by persons making contact with the Appellant in the course of his regular daily activities. Avery v. Commonwealth, 3 S.W.2d 624, 626 (Ky. 1928).

Furthermore, in Prince v. Commonwealth, the court expressly held that the firearm must be open to “ordinary observation” to any individual who comes into contact in the ordinary course of business with the defendant. Prince v. Commonwealth, 277 S.W.2d 470, 472 (Ky. 1955).

In the present case, the gun was concealed beneath a toolbox on the passenger seat of the Appellant’s vehicle and was in no way open to inspection by individuals with whom he might have come into contact with in any regular activities. Officer Perkins, the arresting officer, testified that he did not see the gun, even after approaching and making contact with the Appellant. Officer Bowles testified that he noticed the gun after shining his flashlight into the passenger-side area of the front seat as the Appellant reached into the glove box. Only then was he able to see front sight and barrel of a gun protruding from beneath the toolbox stowed in the passenger seat. (1024 at 4:49) Based on that testimony, it is reasonable to conclude that a person who encountered the Appellant in his ordinary daily life would be unable to view the gun unless they were immediately adjacent to the front, passenger-side window looking into the vehicle. Even then, only the front sight and barrel, a very small portion of the gun, would have been visible and recognizing the weapon would require special attention and care on the part of the

observer. Clearly, the circumstances of the present case qualify as “concealment” as previously defined by Kentucky’s courts.

According to the testimony of Officer Bowles, the toolbox was the only thing concealing the firearm from his view and not any other type of obstruction. See Delk v. Commonwealth, 344 S.W. 2d 832, 833 (Ky.1961), (“The concealment must be such as to prevent persons from seeing the weapon whose vision is not observed by the carrier’s person or by anything other than the covering used to conceal it.”). At no time was the firearm ever visible to Officer Perkins. From the testimony of Officers Bowles, it is clear that only the front sight of the barrel of the gun would have been visible to someone standing immediately adjacent to the passenger-side window peering into the vehicle with a flashlight. From any other angle, or for any individual not standing immediately adjacent to the vehicle who was able to closely inspect its interior, the gun would have been concealed by the toolbox resting on top of it. Contrary to the claims of the Appellant, the officers clearly had a reasonable basis to believe that the firearm was concealed for purposes of KRS 527.020. As noted above, this Court’s predecessor has held that a weapon need not be entirely concealed from view from any angle whatsoever to be “concealed” for the purposes of KRS 527.020. Avery at 626. Given the circumstances, and absent the type of special effort or investigation contemplated in Avery and Prince, there can be little doubt that the gun would have remained concealed underneath the Appellant’s toolbox and would not have been subject to the “ordinary observation” of anyone who might come into contact with the defendant.

The Appellant relies primarily on Reid v. Commonwealth, 184 S.W.2d 101 (Ky.1944), but the facts and circumstances in that case are readily distinguishable from

those presented here. In Reid, the defendant had placed a gun in the front of his belt and, although it was clearly in view, it was concealed from the law enforcement officer who had approached the defendant from behind. Id. In Reid, any other individual, from virtually any other viewpoint, would have seen the defendant's weapon. Id. By contrast, the Appellant possessed a firearm that was only visible from a specific, solitary angle and, even then, was only observed by a police officer standing immediately adjacent to the passenger-side window, peering carefully into the vehicle in an effort to identify such dangerous objects.

Thus, the holding in Reid is inapplicable to the present case because the facts and circumstances on the issue of "concealment" in the two cases drastically differ from one another. Whereas Reid dealt with a firearm that was carried in public view, readily visible to all but the arresting officer or someone approaching the defendant from behind, the present case deals with a firearm that was effectively concealed from view to all but the most careful observers. Although Officer Bowles was able to see the weapon as he peered through the passenger window, the gun was substantially covered by a toolbox so that only the front sight and barrel were visible. It is noted that the Appellant's Brief omits any mention of the key fact that the firearm was found underneath a toolbox. As noted in Avery, the fact that a weapon is visible from a particular point of view does not necessarily mean it is not concealed. This is particularly true when the only individual who testified to having observed the firearm is a police officer who had been trained to identify such dangerous items. The holdings of Avery, Prince, and Delk are controlling in the present case and, as a result, the Commonwealth requests this Court to affirm the

prior rulings of the lower courts that there was a reasonable basis to support the Appellant's arrest for carrying a concealed deadly weapon.

Moreover, the ultimate issue of whether or not the weapon was actually concealed would have been a question of fact to be considered by the jury and required proof beyond a reasonable doubt if the case had proceeded to trial. On the other hand, and as noted above, the factual findings of a trial court deciding a motion to suppress shall be conclusive if supported by substantial evidence. RCr 9.78. The Appellant here has the much greater burden of showing that the trial court's ruling was clearly erroneous. Harper v. Commonwealth, 694 S. W. 2d 665, 668 (Ky. 1985). The District Court rendered its ruling against the Appellant after considering the testimony of Officer Bowles and Officer Perkins regarding the concealment of the firearm and concluding that there was probable cause to support the Appellant's arrest. The Commonwealth met its burden of proof by a preponderance of the evidence. The trial Court had a substantial factual basis for denying the Motion to Suppress.

II. THE EVIDENCE TAKEN FROM THE APPELLANT WAS SEIZED INCIDENT TO A LAWFUL ARREST AND THEREFORE SHOULD NOT BE SUPPRESSED.

According to KRS 431.005(1)(d), a police officer may effectuate an arrest without a warrant when a misdemeanor, as defined in KRS 431.060, has been committed in his or her presence. "The appropriate analysis to determine a lawful misdemeanor arrest is whether a reasonable officer could conclude from all facts that a misdemeanor is being committed in his presence." Commonwealth v. Mobley, 160 S.W. 3d 783, 787 (Ky.2005). In this case—given Officer Bowles' observation of the Appellant's handgun concealed beneath a toolbox on the passenger seat of his vehicle—it was reasonable for

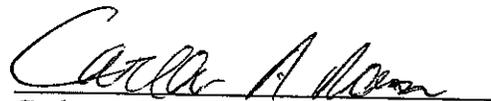
Officer Perkins and Officer Bowles to conclude that the Appellant possessed a concealed weapon as prohibited by KRS 527.020. Therefore, Appellant's arrest was lawful and the items found as a result of the search incident to that arrest should not be suppressed based on his claim that the arrest was somehow unlawful. See, e.g., Robbins v. Commonwealth, 336 S.W. 3d 60, 63 (Ky. 2011), ("One of the exceptions to [the prohibition on warrantless searches] is a search incident to a lawful arrest which permits an officer to search an arrestee's person and the area within his immediate control for weapons or concealed evidence." (citing Chimel v. California, 395 U.S. 752, 763 89 S. Ct. 2034, 23 L.Ed. 2d. 685 (1969).).

CONCLUSION

WHEREFORE, the Fayette District Court properly denied the Appellant's Motion to Suppress because the arresting officer had a reasonable basis to arrest the Appellant for carrying a concealed deadly weapon. As a result, the search incident to arrest was proper. Therefore, the Commonwealth respectfully requests that this Court affirm the prior rulings of both the Fayette Circuit Court and the Kentucky Court of Appeals, upholding the denial of the Appellant's Motion to Suppress.

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