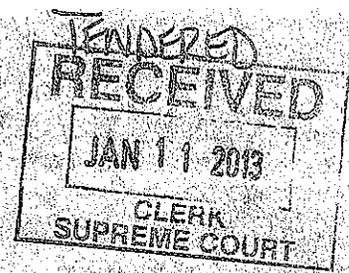


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY



CASE NO. 2012--00111-D
(2010-CA-001909)

FAYETTE CIRCUIT COURT
10-XX-0025

ERICK VEGA

MOVANT

VS.

COMMONWEALTH OF KENTUCKY

RESPONDENT

BRIEF FOR MOVANT ERICK VEGA

I hereby certify that a true and accurate copy of this Brief was mailed, by first class US mail, on January 9th, 2013, to the following:

Hon. Pamela Goodwine
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120 N. Limestone
Lexington KY 40507

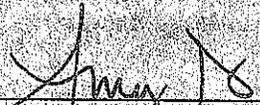
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INTRODUCTION

Movant, Erick Vega, who was arrested and charged with one headlight, rear license not illuminated, carrying a concealed deadly weapon, and possession of controlled substance second degree (2 counts, amended), appeals from a denial of his motion to suppress in Fayette District Court, which was affirmed in Fayette Circuit Court and at the Court of Appeals. Movant sought to suppress any evidence obtained as a result of his arrest for carrying a concealed deadly weapon, as Movant maintains that the weapon was not concealed.

STATEMENT CONCERNING ORAL ARGUMENT

Movant, Erick Vega, requests oral argument before the Court. Movant believes oral argument would be helpful in the event the Court has any questions or desires any further information Movant may provide.

STATEMENT OF POINTS AND AUTHORITIES

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NOTE: The Fayette District Court could only provide a recording of the entire docket on March 8, 2010. Movant’s hearing begins on the 8th increment of the CD and is the next 7 increments. Therefore, Movant has cited the increments as increments eight through fourteen and the specific time within that increment.

STATEMENT OF THE CASE

On January 9, 2010, Movant's vehicle was stopped by Officer Thomas Perkins of the Lexington Police Department for operating with only one headlight and for having the rear license plate not illuminated. Movant, still seated in the driver's seat, was discussing these violations with Officer Perkins when a second officer, Officer Bowles, approached the passenger side of his vehicle and "immediately" alerted the first officer that Movant's car had a gun in it (police report). Although this gun was clearly visible through the closed passenger side window, Movant was placed under arrest for carrying a concealed deadly weapon. Search incident to arrest revealed a Lorcet pill in Movant's pocket. At the jail, Movant advised the officer of another Lorcet pill and one half of a Lortab in his shoe. Movant was charged with one headlight, rear license not illuminated, carrying a concealed deadly weapon, and possession of controlled substance second degree (2 counts, amended).

Movant maintains that he should not have been arrested for carrying a concealed deadly weapon, as the weapon was clearly visible, and therefore any evidence obtained as a result of his arrest should be suppressed.

At the suppression hearing on March 8, 2010, Officer Perkins confirmed the following statement in his written report: "When Officer Bowles looked into the front passenger window, he immediately alerted me there was a firearm on the front passenger seat." (emphasis added) Officer Bowles himself testified that it was not necessary to open the passenger door to see the gun (CD increment

12, at 1:50). He testified that he saw the “barrel and the front side of the pistol” through the passenger window (CD increment 11, at 0:01).

Officer Perkins, standing at driver's window, testified he did not see the weapon. However, he also testified:

- a. It was dark, since it was approximately 10:30 p.m. in January;
- b. He could not say whether or not he shone his flashlight in the passenger seat;
- c. His focus was on the driver and the area immediately around the driver, per his training. (CD increment 10)

Despite this testimony of both officers, Judge Maria Ransdell of the Fayette District Court denied Movant's motion to suppress. Movant entered a conditional guilty plea and appealed to the Fayette Circuit Court, where Judge Pamela Goodwine affirmed the District Court's ruling. The Court of Appeals affirmed the Circuit Court and denied Movant's Petition for Rehearing.

ARGUMENT

The issues Movant argues below are properly preserved by his filing of a motion to suppress in Fayette District Court.

The legal question involved herein is whether probable cause to arrest exists on the charge of carrying a concealed deadly weapon when the weapon is visible, as under the facts of this case.

KRS 527.020 states that “a person is guilty of carrying a concealed deadly weapon when he or she carries concealed a firearm or other deadly weapon on

or about his or her person.” Delk v. Commonwealth, 344 S.W.2d 832, 833 (1961) states that “[M]erely being out of the range of some particular person’s or persons’ vision does not necessarily mean that the gun was concealed.”

In this case, Officer Perkins would have had to look past Movant in the driver’s seat to see into the passenger seat, something he admittedly did not do. Officer Perkins would also have had to shine his flashlight in the passenger seat, since darkness would have made it impossible to see the gun, and again, Officer Perkins could not say whether he shone his flashlight in the passenger seat or not. When questioned about what he did see when looking in Movant’s vehicle, Officer Perkins said “[n]othing. Nothing out of the ordinary.” (CD increment 8 at 1:45) Officer Perkins could not even say he saw a toolbox. It is clear that Officer Perkins simply did not look in the passenger seat. When the second officer approached the passenger side of the vehicle, he “immediately” saw the gun. These facts are not in dispute. It is obvious from the officers’ report and testimony that the gun was readily visible.

Reid v. Commonwealth, 184 S.W.2d 101 (1944), is directly on point. In Reid, the Defendant had a gun in his belt, which could be seen by anyone observing him from the front. Defendant was arrested for carrying a concealed deadly weapon by an officer who approached him from behind. The evidence in Reid was that the gun was approximately 12 inches long and that “at least four inches” of the gun was “sticking out” of Defendant’s belt. (Id. at 102) Despite the fact that one witness testified he did not see the gun, even though that witness was within “five or six feet of the defendant,” and despite the fact that only 1/3 of

the gun was “sticking out,” the Court found not “even a scintilla of evidence tending to show Reid’s guilt.” Id. at 102.

The present case is analogous to this set of facts in that the weapon only appeared “concealed” to the officer who approached Movant from his left side and who admittedly was not even looking at the passenger seat. The gun was clearly visible to Officer Bowles who approached Movant on the right side.

The only person who claims this gun was concealed is Officer Perkins who testified that, per his training, his focus was on the driver and that he could not say whether he even shined his flashlight in the passenger seat. Officer Perkins’ claim that this weapon was concealed was disproven by his colleague, Officer Bowles, who saw the gun and “immediately” alerted Officer Perkins.

In its pleadings filed with both the Fayette Circuit Court and the Court of Appeals, Respondent has seriously mischaracterized the testimony of the officers at the suppression hearing. The officers never used the word the “tip” of the gun. They never said the gun was “almost entirely concealed” or that “only a very small portion of the gun” was visible. Never did the officers allege that any “close inspection” or “special investigation” was necessary to see the gun.

Respondent relied on Avery v. Commonwealth, 3 S.W. 2d 624 (1928) to support its position by quoting the following:

“Concealed” does not mean that it must be so hidden that it can only be discovered by a person making a special investigation to ascertain whether the person has such a weapon.’

Avery specifically addresses the carrying of a weapon on a person's body. The Avery court says "[w]e are not called upon to decide in this case whether it would be a violation of the statute for a man to have concealed a deadly weapon in his automobile in close proximity to his person and we must decline to pass on that question." (Id. at 626, 627) Regardless, Avery holds that if the gun "may be seen without inspection or examination...and from ordinary observation...then the pistol is not concealed within the meaning of the statute." (Id. at 626) Officer Bowles' testimony is clear that he needed only to walk up to the vehicle and look in the closed passenger window to see the gun.

Prince v. Commonwealth, 277 S.W. 2d 470, 472 (1955) states that "the weapon must be open to ordinary observation to those who may come in contact in the usual and ordinary associations with one carrying the weapon." "Ordinary observation" under Prince must mean that a person has to "observe", i.e. look, in the area where the weapon is located. Officer Perkins cannot say he even looked in the passenger seat. The Avery and Prince cases support Movant's position that Officer Bowles, who "immediately" notified Officer Perkins of the gun, could readily and easily see the weapon on the passenger seat.

ERROR BY LOWER COURTS

The Courts which have considered this matter thus far have erred in the following ways:

A. Error by Trial Court

1. The Trial Court erred when it failed to suppress evidence obtained in violation of an unlawful arrest. Movant was arrested for carrying a concealed deadly weapon, and the evidence presented clearly indicated that the weapon was visible, not concealed.
2. The Trial Court's opinion was clearly erroneous as it disregarded Officer Perkins' testimony that he could not say whether he even looked in the passenger seat. He also testified that per his training his focus was on the driver.
3. The Commonwealth failed to produce substantial evidence that the weapon was concealed. In fact, the uncontradicted testimony presented by Officer Bowles is that the weapon was clearly visible to someone looking at the passenger seat.

B. Error by Fayette Circuit Court

1. The Fayette Circuit Court erred when it affirmed the Trial Court's ruling, saying that it was based on substantial evidence. Neither the Trial Court nor the Circuit Court opinion addresses Officer Perkins' testimony that he could not say whether he even looked in the passenger seat. Under this rationale, a person waving a gun behind the officer could be charged with carrying a concealed deadly weapon, if the officer were not looking at him.
2. The Fayette Circuit Court opinion erroneously sets the standard that because an officer "felt" a gun was concealed means it was concealed. The law provides an objective test on this issue rather than the subjective test which the Fayette Circuit Court

applied. The weapon was either concealed or it was visible. How the officer "felt" is irrelevant.

3. The Fayette Circuit Court opinion also states that "whether Vega intended to conceal the gun was a question of fact for a jury to determine." Intent is not an element of the offense charged.
4. The Fayette Circuit Court opinion says "a police officer may effectuate an arrest without a warrant if the officer has probable cause to believe that the person has committed a felony." Movant was charged with the misdemeanor offense of carrying a concealed deadly weapon.

C. Error by Court of Appeals

1. On page two of its Opinion, the Court of Appeals states that Officer Bowles saw the "barrel" of the gun. Officer Bowles actually testified he saw both the "barrel and front side of the gun." (CD increment 11, at 0:01). Officer Bowles was outside Movant's vehicle when he was able to see the gun on a dark January night.
2. Officer Perkins is the charging officer. The Court of Appeals appears to have not considered Officer Perkins' critical testimony that:
 - i. It was dark, since it was approximately 10:30 p.m. in January;

- ii. He could not say whether or not he shone his flashlight in the passenger seat;
- iii. His focus was on the driver and the area immediately around the driver, per his training. (CD increment 10)

It is incongruous to call a weapon “concealed” in the passenger seat when the officer’s focus was on the driver and it was dark and the officer cannot say he even looked in the passenger seat. Since the other officer saw the gun “immediately,” it is clear that no “special effort or investigation” was necessary to see the gun.

3. On page five of the Court of Appeals Opinion, the Court states that “even then (i.e. even standing adjacent to the front passenger side window), the site of the barrel, only a very small portion of the gun, would have been visible and viewing the weapon would require special attention and care on the part of the observer to notice the gun’s presence.” **This statement directly contradicts both officers’ testimony that Officer Bowles “immediately” saw the gun without even having to open the passenger door.** There is nothing in the record to support the idea that any “special attention and care” was necessary to see the gun.

CONCLUSION

In sum, the only person claiming the gun was concealed is the officer who cannot say he even looked in the passenger seat on a dark night. The officer who did look in the passenger seat saw the gun "immediately," again without even having to open the passenger door.

Reid v. Commonwealth, 298 Ky. 800, 184 S.W.2d 101, 102 (1944) found "not even a scintilla of evidence" that the gun was concealed, even though only 1/3 of it was visible and the officer and a witness claimed not to have seen it. It is clear under case law that Movant's gun was not concealed.

It is imperative that the Commonwealth sustain its burden on each and every element of the offense charged before placing an individual under arrest. As the essential element of concealment in KRS 572.020 was not met, Movant's arrest for this charge was illegal in violation of KRS 431.005 and the Fourth and Fourteenth Amendments. Movant respectfully requests this Court to reverse the ruling of the lower courts and find that Movant was not carrying a concealed weapon. Any evidence obtained as a result of the unlawful arrest should then be suppressed.

Respectfully Submitted,



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APPENDIX

1. Docket sheet from suppression hearing in Fayette District Court.
2. Order from Fayette Circuit Court.
3. Opinion from the Court of Appeals.
4. A copy of Reid v. Commonwealth, 298 Ky. 800, 184 S.W.2d 101 (1944).