

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002697-MR

ROBERT FITZGERALD DAWSON

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 01-CR-00882

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, McANULTY, AND SCHRODER, JUDGES.

McANULTY, JUDGE. Appellant Robert Fitzgerald Dawson appeals his conviction in the Fayette Circuit Court following a jury trial for possession of a handgun by a convicted felon and carrying a concealed deadly weapon. Appellant argues that the trial court erred in failing to grant his motion for directed verdict because the evidence was not sufficient to establish that he exercised dominion and control over the weapon in this case. We affirm.

Police stopped the vehicle of Derron Jones for violation of the noise ordinance. Appellant was seated in the passenger side of the vehicle and was not wearing a seat belt. Officer Hankison of the Lexington Police Department informed appellant that he would cite him for a violation for not wearing his seat belt. He walked to the rear of the vehicle to fill out the citation. While he was writing it, he continued to observe appellant. He saw him lean forward and move his hands below the edge of the car seat. Officer Hankison thought this looked suspicious, so he moved to look through the side window of the car. He observed that appellant had taken off his shoe and had his hand in his sock. Officer Hankison asked appellant to step out of the car, and frisked him for contraband. None was found on appellant. The officer then performed a limited search of the passenger area of the car. He found a handgun under the passenger portion of the seat, not visible from outside of the car. Both Jones and appellant were arrested.

Officer Hankison testified at trial that when he arrested appellant, appellant denied any knowledge of the gun in the car. He stated that before placing Jones and appellant in the police wagon he asked them a second time who the gun belonged to. He testified that Jones said nothing, but appellant stated that the gun was his.

Appellant argues this evidence was not sufficient to support a conviction on the weapons charges because there was no evidence to establish that he had knowledge and possession of the gun under the seat. On appellate review, the test of a directed verdict is, if under the evidence as a whole it would be clearly unreasonable for a jury to find guilt, only then is the defendant entitled to a directed verdict of acquittal. Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). Under KRS 527.040(1), in pertinent part, a person is guilty of possession of a firearm by a convicted felon when he possesses, manufactures, or transports a firearm when he has been convicted of a felony in any state or federal court. The jury instructions defined possession as: "to have actual physical possession or otherwise to exercise actual dominion or control over a tangible object." Appellant contends that Paul v. Commonwealth, Ky. App., 765 S.W.2d 24 (1988), established that mere presence in an automobile in which contraband is found is not sufficient to support a charge of possession against a passenger, and the person who owns or exercises control over the automobile is deemed to possess any contraband found within it.

We disagree. In Burnett v. Commonwealth, Ky., 31 S.W.3d 878, 881 (2000), the Kentucky Supreme Court distinguished Paul and held that ownership and control of the vehicle was only one consideration in determining dominion and control of

contraband found within the vehicle. The Court held that proof that someone other than the passenger had control of the vehicle did not preclude a finding that the passenger had control of contraband contained within. Id. at 880-81. A determination as to possession requires, therefore, an examination of all of the facts surrounding the contraband and the occupants of the vehicle.

In this case, we do not think it was unreasonable for the jury to have found that appellant had constructive possession of the firearm in the car. Unlike the contraband in Paul, the gun was within reach of appellant directly beneath his seat. Thus, the gun was in an area within appellant's immediate control. Moreover, although appellant initially disavowed knowledge of the weapon, he later stated that the gun was his. Therefore, we find that the jury could reasonably find that appellant, as opposed to the driver of the vehicle, had knowledge of and constructive possession of the gun. The trial court correctly denied the motion for directed verdict.

For the foregoing reasons, we affirm appellant's conviction in the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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