RENDERED: SEPTEMBER 9, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court Of Appeals

NO. 2004-CA-002065-MR

MAURICE WEST — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
INDICTMENT NO. 03-CR-003228

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KNOPF AND TACKETT, JUDGES; ROSENBLUM, SENIOR JUDGE.[1]

KNOPF, JUDGE: Maurice West appeals from a judgment of conviction by the Jefferson Circuit Court. He argues that the trial court erred by failing to suppress evidence seized and statements he made following a warrantless search of his car, and by failing to properly instruct the jury on the charges of possession of a handgun by a convicted felon and being a

[1] Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

persistent felony offender in the first degree. We conclude that the trial court's suppression ruling was not clearly erroneous, and that the jury instructions were substantially correct. Hence, we affirm.

On December 8, 2003, a Jefferson County grand jury indicted West on one count each of possession of a handgun by a convicted felon,[2] receiving stolen property (firearm),[3] possession of an open alcohol container in a motor vehicle,[4] and being a persistent felony offender in the first degree (PFO I).[5] At the close of the Commonwealth's case, the trial court dismissed the receiving stolen-property charge. The remaining charges were submitted to the jury, which found West guilty on all counts. The jury fixed West's sentence at seven years on the handgun-possession charge, enhanced to thirteen years by virtue of West's PFO I status.[6] West now appeals.

West first argues that the trial court erred in denying his motion to suppress evidence seized during a

[2] KRS 527.040, a class C felony.

[3] KRS 514.110, a class D felony.

[4] KRS 189.530(2), a violation.

[5] KRS 532.080.

[6] The trial court and the parties neglected to conduct a separate penalty phase for the open-container violation. Upon discovering the oversight, that charge was dismissed with the consent of the Commonwealth.

warrantless search of his automobile and statements he made to police before and after his arrest. RCr 9.78 sets out the procedure for conducting suppression hearings and establishes the standard of appellate review of the determination of the trial court. Our standard of review of a circuit court's decision on a suppression motion following a hearing is twofold: First, the factual findings of the court are conclusive if they are supported by substantial evidence; and second, this Court conducts a *de novo* review to determine whether the trial court's decision is correct as a matter of law.[7]

Officers Cabe Crain and Joel Phillips of the Louisville Metro Police Department testified at the suppression hearing regarding the circumstances surrounding the search and West's statements. Officer Crain testified that he was on a routine patrol in the 1700 block of Patton Court about 2:30 a.m. on October 25, 2003. He noted that Patton Court is part of the Park Hill public housing complex and is known for high crime and drug activity. Officer Crain noticed a vehicle parked in a no-parking zone and near a sign prohibiting trespassing and loitering.

After parking his cruiser and approaching the car, Officer Crain found West sitting in the driver's seat. West

[7] Adcock v. Commonwealth, 967 S.W.2d 6, 8 (Ky. 1998).

explained that he was waiting for a friend. Using his flashlight to illuminate the interior of the vehicle, Officer Crain observed an open beer bottle and a cigar in the center console. Officer Crain testified that the cigar had a shiny and wrinkled appearance which, in his experience, indicated that it had been dipped in liquid codeine. According to Officer Crain, when asked about the cigar West's level of nervousness "shot up".

At that point, Officer Crain asked West for permission to search the vehicle. West refused, stating that the car belonged to his wife. Officer Crain then asked West to get out of the car. Officer Crain conducted a pat-down search of West, which produced no incriminating evidence. Thereupon, Officer Crain entered the car to retrieve the beer bottle and the cigar. Also in the console were two loose pills and a small medicine-cup of orange or purple liquid.[8] Upon reaching under the driver's seat, Officer Crain found a loaded, 9 millimeter Beretta.[9]

---

[8] Officer Crain testified that the loose pills appeared to be Xanax, a controlled substance, and the syrup in the cup appeared to be liquid codeine. However, no laboratory tests were introduced identifying these substances, and West was not charged with criminally possessing them.

[9] Ultimately, the gun was determined to be stolen, leading to the receiving-stolen-property charge. However, the trial court dismissed this charge at the close of the Commonwealth's case.

When the gun was found, West was standing behind the vehicle speaking to his wife on his cell phone. Officer Phillips, who had arrived on the scene, overheard West say, "Baby, they found your gun". Officer Crain then placed West under arrest, but he did not advise West of his Miranda rights at that time. During a search incident to the arrest, Officer Crain found $430.00 in cash on West. Officer Crain placed West in his patrol car and began to fill out the paperwork associated with the arrest and the seizure of the money. West asked Officer Crain what he was being charged with. In addition, West further stated that neither the car nor the gun belonged to him. This exchange between Officer Crain and West was recorded on the patrol car's video system.

West concedes that Officer Crain's initial stop and approach to his vehicle was valid. Likewise, he agrees that the open alcohol container and the cigar were in plain view. However, he argues that Officer Crain's further search of the car and discovery of the gun beneath the seat was improper. We disagree.

Under the Fourth and Fourteenth Amendments to the United States Constitution and Section 10 of the Kentucky Constitution unreasonable searches and seizures by the police are unlawful and, as a general rule, warrantless searches and

seizures are unreasonable.[10] Several exceptions to this general rule have evolved, however. It is well established that a police officer may search an automobile without a warrant if he has probable cause to believe that the automobile is operable and contains contraband or other evidence of a crime. The key to the automobile exception, as applied to this appeal, is whether there was probable cause. Probable cause must exist and be known to the investigating officer at the time he commences the search.[11] It is insufficient to look at the evidence in retrospect and find probable cause. Probable cause exists when the totality of the circumstances then known to the investigating officer creates a fair probability that contraband or evidence of crime is contained in the automobile.[12]

Since the beer bottle and the apparently codeine-laced cigar were in plain view, Officer Crain had probable cause to believe that there was contraband or evidence of a crime in the automobile. Furthermore, once probable cause is found, the search may be as thorough as a magistrate could authorize via a search warrant, including all compartments of the automobile and

[10] United States v. Ross, 456 U.S. 798, 72 L. Ed. 2d 572, 102 S.Ct. 2157 (1982); Clark v. Commonwealth, 868 S.W.2d 101 (Ky.App. 1993).

[11] Clark v. Commonwealth, *supra* at 106 (Ky.App. 1993).

[12] Id. at 106-107.

all containers in the automobile which might contain the object of the search.[13] Officer Crain's search under the driver's seat did not exceed the reasonable scope of a probable cause search. Therefore, his seizure of the gun was proper.

Furthermore, West's statements following his arrest were clearly voluntary. Miranda v. Arizona,[14] requires the express declaration of a defendant's rights prior to custodial interrogation. A Miranda warning is not required when a suspect is merely taken into custody, but rather when a suspect in custody is subject to interrogation.[15] Although West was not advised of his right to remain silent pursuant to Miranda, none of his statements were made in response to police questioning. Indeed, West made his initial statement, "Baby, they found your gun", while talking on his cell-phone to his wife. As for the statements in the police cruiser, Officer Crain did not ask West any express questions. Officer Crain merely asked West to verify his count of the money found on West's person. Officer Crain's statements were of the type "normally attendant to

[13] Ross, 456 U.S. at 823-24, 102 S.Ct. at 2172-73; Clark, 868 S.W.2d at 106.

[14] 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[15] 384 U.S. at 479, 86 S.Ct. 1602. *See also* Watkins v. Commonwealth, 105 S.W.3d 449 (Ky. 2003).

arrest and custody",[16] and therefore did not amount to functional equivalent to interrogation which would require suppression.

West next argues that the trial court erred by determining that the firearm found in the car was a “handgun” for purposes of KRS 527.040. Under KRS 527.040(2), possession of a firearm by a convicted felon is a class D felony, unless the firearm possessed is a handgun, in which case it is a class C felony. "Handgun" is defined to mean “any pistol or revolver originally designed to be fired by the use of a single hand, or any other firearm originally designed to be fired by the use of a single hand”. KRS 527.010(5). West contends that, since the Beretta’s status as a handgun enhanced the penalty for the crime, this issue should have been submitted to the jury.

In his treatise on jury instructions, Justice Cooper explains that, “[o]rdinarily, whether a firearm is a handgun will be an issue of law for the judge to decide. However, if a jury issue exists, the form verdicts at Sections 8.60A and B should be used to submit this issue to the jury so that the classification of the offense can be determined for

[16] Wells v. Commonwealth, 892 S.W.2d 299, 302 (Ky. 1995), *citing* Rhode Island v. Innis, 446 U.S. 291, 301, 100 S.Ct. 1682, 1689, 64 L.Ed.2d 297 (1980).

penalty phase purposes".[17] But in Apprendi v. New Jersey,[18] the United States Supreme Court held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.[19]

The issue presented in Apprendi concerned the trial court's consideration of aggravating factors which enhanced the penalty for a crime beyond its statutory maximum. Nevertheless, the Supreme Court in Apprendi emphasized that a criminal defendant is entitled "to a jury determination that [he] is guilty of every element of the crime which he is charged, beyond a reasonable doubt".[20] Since possession of a *handgun*, as opposed to merely a firearm, is an element of the enhanced offense, West was entitled to an instruction allowing the jury to decide whether the Beretta was a "handgun" as defined by KRS 527.010(5).

In this case, however, we deem any error to be harmless beyond a reasonable doubt. Officer Crain testified

---

[17] William S. Cooper, 1 Kentucky Instructions to Juries (Criminal), § 8.60B (Comment) (Anderson Publishing, 1999 & 2005 Supp.).

[18] 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

[19] Id. at 490, 120 S.Ct. at 2362-63. *See also* Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

[20] Id. at 477, 120 S.Ct. at 2356. *See also* KRS 500.070.

that he test-fired the Beretta, and it was capable of being fired by one hand. In addition, the Commonwealth introduced the Beretta as an exhibit. There was no evidence to counter Officer Crain's testimony that the Beretta was a handgun within the meaning of the statute. Indeed, West never argued that the Beretta was not a handgun, but only that he did not knowingly possess it. Consequently, there was no evidence to support a jury finding that the Beretta was merely a "firearm" and not a handgun.

Furthermore, the trial court's failure to allow the jury to determine whether the Beretta was a handgun did not affect West's sentence. Although possession of a firearm by a convicted felon is a class D felony and possession of a handgun by a convicted felon is a class C felony, West's sentence was further enhanced by his status as a PFO I. Under KRS 532.080(6), both a class D felony conviction and a class C felony conviction are enhanced the same – ten to twenty years in prison. Since West's sentence was enhanced by less than the maximum statutory sentence, any error in the instructions did not affect his substantial rights.[21]

Finally, West argues that the jury instructions on the PFO I charge were insufficient because they did not direct the

[21] RCr 9.24.

jury to determine whether his previous sentences were served concurrently or consecutively. Under KRS 532.080(4),

> 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.

West asserts that there was evidence that some of his prior sentences were served concurrently, and this question should have been submitted to the jury. But as the Commonwealth points out, West was sentenced to a total of six years following his first felony conviction in 1989. His three subsequent felony convictions, one in 1990 and two in 1995, each involved offenses committed within six years of the first felony conviction. By operation of law, the terms of imprisonment for the three separate indictments would have to run consecutively.[22] Likewise, West's sentence on the fourth felony, based on an offense committed while he was awaiting trial for the third felony, also would have to run consecutively with any other sentence.[23] As a matter of law, the trial court was entitled to conclude that at least two of West's prior felony sentences were

[22] KRS 533.060(2).

[23] KRS 533.060(3).

served consecutively. Therefore, the trial court did not err by declining to submit this issue to the jury.

Accordingly, the judgment of conviction by the Jefferson Circuit Court is affirmed.

TACKETT, JUDGE, CONCURS.

ROSENBLUM, JUDGE, CONCURS IN RESULT.

BRIEF FOR APPELLANT:

Rob Eggert
Louisville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

James C. Shackelford
Assistant Attorney General
Frankfort, Kentucky