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Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000611-MR
AND
NO. 2005-CA-000631-MR

KAREEM ALI HENRY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 04-CR-000658
AND
ACTION NO. 04-CR-000884

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY, JOHNSON, AND SCHRODER, JUDGES.

HENRY, JUDGE: Following his arrest, the Jefferson County Grand Jury returned two separate indictments against the appellant, Kareem Ali Henry, charging him with first-degree burglary, second-degree assault, two counts of possession of a firearm by a felon, possession of cocaine, tampering with evidence, and possession of drug paraphernalia. In each case, Henry moved to suppress certain statements he made, and certain evidence seized from his automobile, at the time of his arrest. After the trial

court denied his suppression motions, Henry reached a comprehensive plea agreement with the Commonwealth. The trial court accepted the plea agreement as well as Henry's guilty pleas and accordingly sentenced him to 10 years in prison conditioned on this appeal of the adverse suppression rulings. See RCr[1] 8.09 (providing for a conditional plea of guilty). On appeal, we have consolidated both of Henry's cases because each turns on identical suppression rulings. Because we affirm the trial court's suppression ruling, we also affirm Henry's convictions and sentence.

The parties do not dispute the material facts and circumstances surrounding Henry's arrest. On January 15, 2004, two Louisville Metro Police Officers drove to Henry's last known address, which was at an Economy Inn near the intersection of Bardstown Road and Goldsmith Lane in Louisville, to question him regarding an assault that had occurred the day before. When they arrived, the officers saw Henry's unoccupied automobile in the parking lot and went to the motel office to ascertain which room Henry was staying in. While in the motel office, a security guard entered and told the officers that he had just chased Henry off the premises and that, before Henry had driven away, he had tossed a handgun over the privacy fence between the

[1] Kentucky Rules of Criminal Procedure.

motel and the neighboring Thornton's gas station and convenience market.

The officers immediately set out after Henry in their own vehicle and soon spotted him in the parking lot of the neighboring Thornton's. Henry had already exited his automobile and was walking towards the back of the Thornton's lot near the privacy fence where the security officer had seen Henry toss a gun. The officers quickly apprehended Henry, handcuffed him, and placed him the rear seat of their cruiser. Then, without advising Henry of his Miranda[2] rights, one of the officers immediately questioned him about the gun. Henry told the officer that he owned two guns, a .22 and a .45, but denied that he had thrown a gun over the privacy fence. The officers then searched Henry's automobile and seized bullets matching the gun in question, which was later found in the field behind Thornton's, where the security guard had reported seeing Henry throw it.

At the suppression hearings below, Henry contended: 1) that his statement about owning two guns should be suppressed because he had not been advised of his Miranda rights before being questioned by the police; and 2) that the search of his automobile was unlawful because the police had no search warrant. The trial court, however, rejected Henry's contentions

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

based on New York v. Quarles, 467 U.S. 649, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984), and Thornton v. United States, 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004). We review the trial court's suppression ruling de novo, save that we review the trial court's findings of fact only for clear error. See RCr 9.78; Commonwealth v. Whitmore, 92 S.W.3d 76, 79 (Ky. 2002) (relying on Ornelas v. United States, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996)).

In Quarles, the United States Supreme Court held that a public-safety exception to the requirement of Miranda warnings applies when the police question a suspect about a handgun reasonably believed to have been recently abandoned by the suspect in a public place. In New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), the Supreme Court held that "when a police officer has made a lawful custodial arrest of an occupant of an automobile, the Fourth Amendment allows the officer to search the passenger compartment of that vehicle as a contemporaneous incident of arrest." Thornton, 517 U.S at 617, 124 S.Ct. at 2129. And, in Thornton, the Court extended the Belton rule by authorizing a warrantless vehicle search that is incident to arrest even when the suspect has exited his vehicle on his own accord before the police arrive on the scene to arrest him. Here, both Quarles and Thornton are controlling because the police arrested Henry and searched his automobile

only after he had exited his automobile and because when the police questioned Henry about his firearm before advising him of his Miranda rights, they reasonably believed that he had abandoned the gun in a location known to be frequented by homeless men. Consequently, we find that the trial court correctly denied Henry's suppression motions.

We reject Henry's invitation to circumvent Quarles and Thornton by construing Section 10 of the Kentucky Constitution as providing greater protection from searches and seizures and custodial interrogations than that provided by the Fourth Amendment, as the Supreme Court of Kentucky has repeatedly held that Section 10 is co-extensive to the Fourth Amendment jurisprudence. See e.g., Lafollette v. Commonwealth, 915 S.W.2d 747, 748 (Ky. 1996) ("[S]ection 10 of the Kentucky Constitution provides no greater protection than does the Federal Fourth Amendment"); Rainey v. Commonwealth, Slip Op., 2005-SC-185 (pet. reh. pending) (Ky. 2006). Therefore, we adhere to Thacker v. Commonwealth, 80 S.W.3d 451, 455 n. 9 (Ky.App. 2002), in which we held that any broadening of the construction of Section 10 must originate with the Supreme Court of Kentucky.

We also reject Henry's reliance on Clark v. Commonwealth, 868 S.W.2d 101 (Ky.App. 1993), as unpersuasive. Clark is clearly factually distinguishable from this case because it involved an automobile search, which was predicated

upon an arrest, which was later determined to be arbitrary and capricious. Id. at 107. The arrest here was valid and was not a pretext for conducting a search incident to arrest. Davis v. Commonwealth, 120 S.W.3d 185, 190 (Ky.App. 2003).

Finally, we note that Henry briefly asserts that his initial detention by the police was unlawful. We decline to reach the merits of this theory, however, because it is presented for the first time on appeal. Indeed, the law is settled that an appellant may not change the theory of his claims on appeal. See Kennedy v. Commonwealth, 544 S.W.2d 219, 222 (Ky. 1976) ("The appellant[] will not be permitted to feed one can of worms to the trial judge and another to the appellate court."). Moreover, Henry did not contend that his initial detention had been unlawful, but instead argued only that the police interrogation and vehicle search had been improper. Consequently, the merits of Henry's new theory are not properly before us.

Also for the first time on appeal, Henry seeks to have one of his firearm-possession convictions voided under the Double Jeopardy Clause. He admits that this claim was not preserved in his conditional guilty plea, but contends that we should nevertheless reach its merits under Sherley v. Commonwealth, 558 S.W.2d 615 (1977), and its progeny. In Sherley, the Kentucky Supreme Court considered the defendant's

double-jeopardy claim even though it was not raised or considered in the trial court. Id. at 618.

But, unlike the present case, neither Sherley nor its progeny involved a plea agreement in which the defendant voluntarily pled guilty to the two charges allegedly violating double-jeopardy principles. Indeed, here, by pleading guilty to the two firearm-possession charges as part of a broader, favorable plea-agreement, Henry guaranteed that he would serve a maximum of 10 years in prison rather than a possible 50 years, which he would have faced had he stood trial. Thus, here, we follow Commonwealth v. Griffin, 942 S.W.2d 289, 292 (Ky. 1997), which held that a defendant is estopped from appealing even an unlawful sentence when he affirmatively bargains for the sentence as part of a plea agreement. Thus, we do not reach the merits of Henry's double-jeopardy claim.

The orders of the Jefferson Circuit Court denying suppression of the evidence are affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

Bruce P. Hackett
Louisville, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Gregory C. Fuchs
Frankfort, Kentucky

ORAL ARGUMENT FOR APPELLEE:

Gregory C. Fuchs
Frankfort, Kentucky