

# Commonwealth of Kentucky

## Court of Appeals

NO. 2005-CA-002139-MR

GLEN ALLEN CENTERS

APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT  
HONORABLE JERRY D. WINCHESTER, JUDGE  
ACTION NO. 05-CR-00006

COMMONWEALTH OF KENTUCKY

APPELLEE

### OPINION AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; HENRY,<sup>1</sup> SENIOR JUDGE.

HENRY, SENIOR JUDGE: On January 10, 2005, Glen Centers was indicted by the Whitley County Grand Jury on nine counts, as follows: count one, first-degree possession of a controlled substance while in possession of a handgun; count two, second-degree possession of a controlled substance while in possession of a handgun; count three, third-degree possession of a controlled substance while in possession of a handgun; count four, possession of a handgun by a convicted felon; count five, receiving stolen property valued

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<sup>1</sup> Senior Judge Michael L. Henry, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

under \$300; count six, operating a motor vehicle while under the influence, second offense; count seven, possession of drug paraphernalia; count eight, possession of a controlled substance not in a proper container; and count nine, being a persistent felony offender in the second degree.

A jury found him guilty of count one, first degree possession of a controlled substance; count six, operating a motor vehicle while under the influence, second offense; and count seven, possession of drug paraphernalia. Following the jury verdict, an agreement was reached whereby Centers would retain any and all rights to appeal in exchange for a sentence of fifteen years on count nine, being a second-degree persistent felony offender.

Centers now brings five issues to our attention on appeal: first, whether the evidence seized was found during an illegal search; second, whether the trial court erred by failing to issue findings of fact when denying Centers' motion to suppress the seized evidence; third, whether he was entitled to a mistrial when the Commonwealth introduced testimony that he refused blood or urine tests after consulting with an attorney; fourth, whether the trial court erred when it refused to show the jury a videotape of prior testimony and finally, whether it was error to instruct the jury on possession of a handgun. After a careful review of the entire record, we find no error and affirm the judgment and sentence of conviction.

In a suppression hearing held prior to trial, Centers sought to suppress the evidence seized at his arrest. On the day of his arrest Centers went to meet his employer

to pick up payment for work done. He testified that he entered a truck owned by the construction company and waited for his employer there. Police responded to the scene after receiving a report of a male subject slumped over in a white truck. When the officer arrived on the scene, the only vehicle in the parking area was a white truck and Centers was inside. The officer testified the truck was parked sideways in the lot and the engine was running. Centers was sweating and clutching the steering wheel. The officer initially got no response when he knocked on the window and he opened the door fearing a possible medical emergency. When Centers was unable to rationally respond to several simple questions, the officer checked his driver's license and had Centers perform a number of field sobriety tests. Centers was unable to perform the tests as instructed. The officer testified that he then believed Centers was under the influence of an intoxicant, so he placed Centers under arrest and searched the vehicle.

The officer located a duffel bag behind the passenger seat containing a handgun, syringes and spoons used to ingest drugs and a white powdery substance. He found additional narcotics in the console. He then escorted Centers to the regional medical center and read him the implied consent form. *See* Kentucky Revised Statutes (KRS) 189A.103. Centers contacted an attorney and refused to submit to any blood or urine tests.

Centers' arguments for suppressing the evidence rests on two primary facts. He first claims that the duffel bag and its contents were not in close proximity to him and therefore the search of that area was illegal. In the alternative, he also suggests that

because the written incident report shows the handgun was found at 7:26 p.m., but the arrest is listed at 7:36 p.m., the search was not incident to arrest and was therefore improper. Both arguments are without merit.

“The test [of when an arrest has been effected] is whether, considering the surrounding circumstances, a reasonable person would have believed he or she was free to leave.” *Commonwealth v. Lucas*, 195 S.W.3d 403, 405 (Ky. 2006). The record is clear that once Centers failed the field sobriety tests, the officer placed him under arrest, and that this occurred prior to the search of the vehicle. A police officer is allowed to search the passenger area of a vehicle after a lawful arrest. *Rainey v. Commonwealth*, 197 S.W.3d 89, 93 (Ky. 2006). This includes the back seat area where the duffel bag was located. The officer may also examine any containers such as the duffel bag. *See New York v. Belton*, 453 U.S. 454, 460, 101 S.Ct. 2860, 2864, 69 L.Ed.2d 768 (1981). There was no error. Suppression of the evidence seized was not required.

Centers next revisits the issues of the time of the arrest and the search of the duffel bag by suggesting the trial judge committed error by failing to issue written findings of fact on those two issues. *See Kentucky Rules of Criminal Procedure (RCr) 9.78*. The trial judge correctly applied the law as it relates to those two issues. “Although we agree that written findings greatly facilitate appellate review . . . we do not believe this is a case where we are 'left in the dark' as to the basis for the trial court's ruling.” *Coleman v. Commonwealth*, 100 S.W.3d 745, 749 (Ky. 2002). Centers did not request further findings from the trial court and did not preserve this issue. It is clear from the

record that the trial court's ruling was supported by adequate facts and law. There was no error.

Centers next claims that the trial court erred by denying his request for a mistrial. We disagree. Prior to trial the prosecutor agreed to limit testimony and not introduce evidence that Centers consulted with an attorney prior to refusing the blood or urine tests. During questioning from the Commonwealth, a police officer blurted out that Centers had consulted with counsel. Centers objected and requested a mistrial. That request was denied by the trial judge. There is nothing in the record to indicate the prosecutor deliberately elicited this testimony and we reject any suggestion of prosecutorial misconduct as it relates to the police officer's testimony. We are further swayed by guidance from *United States v. Tocco*, 200 F.3d 401 (6<sup>th</sup> Cir. 2000). In that case, testimony indicated the defendant requested to see an attorney and consulted with an attorney. *Id.* at 422. The fact that the defendant “sought out or consulted the advice of an attorney generally – simply does not invade the attorney-client relationship[.]” *Id.* That evidence did not impinge on the exercise of the defendant's “constitutional right to consult with an attorney. The mere act of hiring an attorney is simply not probative of [the defendant's] guilt or innocence” under the circumstances described in *Tocco*. *Id.* at 423. Nor, we believe, is Centers' act of consulting with an attorney probative of his guilt or innocence in this case. We agree with the trial judge that a mistrial was not appropriate and find no error.

During jury deliberations, a note was sent out from the jury room asking to be provided a transcript of the testimony. There was no transcript as the entire trial was recorded on videotape and those tapes form the record of the trial. Centers argued to the trial court that the videotape should have been provided to the jury or that the court should have at least inquired into what testimony the jury wished to review. The trial judge sent back a note telling the jury a transcript was not available.

“Any decision to allow the jury to have testimony replayed during its deliberations is within the sound discretion of the trial judge.” *Baze v. Commonwealth*, 965 S.W.2d 817, 825 (1997). Similar to the matter before us, in *Thompson v. Commonwealth*, 147 S.W.3d 22 (Ky. 2004) the Kentucky Supreme Court examined a situation where the jury “made a plain request to the trial judge to rehear Appellant's testimony, and did not elaborate as to the reason for the request.” *Id.* at 35. “The trial court was not presented with any indication that the jury was confused about Appellant's testimony, nor did the jury state or imply that a verdict could not be reached without a transcript or recording of the testimony.” *Id.* This is the situation we face in Centers' appeal. “Moreover, the request was never reiterated. Having no reason to suspect that the jury was confused or unable to continue deliberations, we conclude that the trial court did not abuse its discretion in denying the jury's request to rehear Appellant's testimony.” *Id.* We are bound by the decision of the Kentucky Supreme Court in this regard and therefore find no error in the trial court's response to the jury question.

Centers' final contention is that the jury instructions were improper because they asked the jury to find whether or not he was guilty of the various charges of possessing controlled substances while in possession of a handgun. Count four of the indictment originally charged Centers with possession of a handgun by a convicted felon, but this count was dismissed on the Commonwealth's motion before the jury was instructed. Nevertheless, the instructions on each of the controlled substance possession charges gave the jury the option of finding Centers not guilty, or of finding him guilty of simple possession of a controlled substance, or finding him guilty of possession of a controlled substance while in possession of a handgun. Such instructions are required when the Commonwealth seeks to enhance the penalty for possession of controlled substances when the defendant is also in possession of a firearm, pursuant to KRS 218A.992. While the instructions themselves appear to meet the requirements of the law, *see Johnson v. Commonwealth*, 105 S.W.3d 430 (Ky. 2003), Centers' complaint is that the instructions were irrelevant and prejudicial. This issue was not preserved for appeal and was never brought before the trial court. We note that even though it had the option to do so under the instructions, the jury did not find Centers guilty of being in possession of a handgun on the one count on which it found Centers guilty of possession of a controlled substance. "No party may assign as error the giving . . . [of] an instruction unless the party's position has been fairly and adequately presented to the trial judge . . ." RCr 9.54(2). We are not now inclined to review unpreserved error in this case particularly

when it appears from the record the jury was not improperly influenced by the inclusion of the instructions regarding the handgun. There was no error.

The judgment of the Whitley Circuit Court is affirmed in all respects.

ALL CONCUR.

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