

# Commonwealth of Kentucky

## Court of Appeals

NO. 2006-CA-001152-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE JAMES M. SHAKE, JUDGE  
ACTION NO. 05-CR-001944

KELVIN MCCRAY

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: COMBS, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

ACREE, JUDGE: The Commonwealth of Kentucky appeals from an order of the Jefferson Circuit Court granting a partial judgment notwithstanding the verdict in favor of Kelvin McCray. The Commonwealth argues the trial court improperly found that collateral estoppel barred the jury from considering the question of McCray's guilt on the charge of possession of a firearm by a convicted felon after finding him not guilty of tampering with physical evidence, trafficking in a controlled substance while in possession of a firearm, and possession of a controlled substance while in possession of a

firearm. We have carefully considered the arguments of the parties and have concluded that the trial court's order reached an incorrect result.

On the day of his arrest, McCray came to the attention of officers of a flex unit who were patrolling a Louisville housing project to thwart drug traffickers. Officers noticed McCray standing on a porch and continuously touching the waistband of his pants. Believing he might be armed, they stopped their vehicle and got out to investigate. A detective told McCray to stay where he was, but McCray dashed into a nearby apartment. Through the partially open door, the detective saw McCray place an unidentified object under a couch pillow in a room where a woman and child were sitting. Fearing that McCray was armed, the detective told him to show his hands. McCray turned around and threw a bundle of cocaine down on the floor before raising his hands. The detective retrieved a gun from the couch.

McCray was charged with possession of a firearm by a convicted felon, first-degree trafficking while in possession of a firearm, and tampering with physical evidence. The defense requested and received a bifurcated guilt-phase proceeding, with the jury being asked to consider only the trafficking and tampering charges during the first phase of the trial. McCray was acquitted of tampering and convicted only on the lesser-included charge of possession of a controlled substance. At this point, defense counsel moved for the dismissal of the charge of possession of a firearm by a convicted felon. Since the jury had acquitted McCray of the firearm enhancement on the possession charge, the defense argued the Commonwealth was estopped from presenting evidence that he possessed the gun for purposes of proving the remaining charge. The

trial court denied the motion, and the jury ultimately convicted McCray of possession of a firearm by a convicted felon.

Following the trial, McCray filed a motion for judgment notwithstanding the verdict, again raising the issue of collateral estoppel. The Commonwealth filed a written response. The trial court heard arguments from the parties before issuing an order granting the motion. This appeal followed.

The trial court's order addressed the matter rather summarily, stating that, "under the facts of this particular case and the principles of collateral estoppel," the Commonwealth should have been barred from proceeding on the charge of possession of a firearm by a convicted felon. Kentucky Revised Statute (KRS) 505.040(2) bars prosecution of an offense involving the same conduct as a previously-acquitted offense where the "former prosecution was terminated by a final order or judgment which has not subsequently been set aside and which required a determination inconsistent with any fact necessary to a conviction in the subsequent prosecution. . . ." Further, the Kentucky Supreme Court has previously decided "that the burden is on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was '*actually decided*' in a prior proceeding." *Benton v. Crittenden*, 14 S.W.3d 1, 5 (Ky. 1999)(emphasis in original).

The jury was instructed on first-degree trafficking while in possession of a firearm, the lesser-included offense of first-degree drug possession while in possession of a firearm, and the non-enhanced versions of both offenses — which did not require possession of a firearm. McCray was convicted on the non-enhanced drug possession

charge. The jury also rejected a charge of tampering with physical evidence which could have involved either the drugs thrown down on the floor, or the gun found in the couch. Although the trial court based its finding of collateral estoppel on the enhanced drug charges, McCray made additional arguments in his brief relating to the tampering charge. Thus, we will examine the elements of all three charges as they relate to his possession of a firearm.

The instructions on both enhanced offenses — first-degree trafficking and first-degree possession — contained the following language:

a. That in Jefferson County, Kentucky, on or about the 30<sup>th</sup> day of March, 2005, the Defendant had in his possession a quantity of Cocaine while in possession of a firearm

...

AND

(c/d) That the firearm was connected to or furthered the offense.<sup>1</sup>

The instruction on tampering with physical evidence, of which McCray was also acquitted, read

You will find the Defendant, Kelvin McCray, guilty under this instruction if, and only if, you believe beyond a reasonable doubt all of the following:

That in Jefferson County, Kentucky on or about the 30<sup>th</sup> day of March, 2005, the Defendant concealed OR removed the Cocaine and/or a handgun;

AND

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<sup>1</sup> The language regarding connected to or furthering the offense was subsection (c) in the instruction on possession and subsection (d) in the trafficking instruction which contained an additional element related to intent to sell the cocaine.

(b) That he did so with the knowledge or intent that the Cocaine and/or handgun was about to be produced or used in an official proceeding, with the intent to impair its verity or availability in the official proceeding. . . .

Possession was defined as “actual physical possession or otherwise to exert actual dominion or control over a tangible object.”

In contrast to these three instructions, the instruction on possession of a firearm by a convicted felon merely required the jury to find that McCray knowingly possessed a firearm and that he had been previously convicted of a felony. Clearly, both of the drug-related instructions and the tampering instruction required proof of facts that were not required to prove McCray guilty of possession of a firearm by a convicted felon. The question thus becomes whether or not the jury’s decision to acquit him of the enhanced drug and tampering charges amounted to a decision that McCray did not have a firearm in his possession. We find his argument on that score to be unpersuasive.

The evidence at trial showed that officers believed McCray might be armed as he stood on the porch of an apartment building at Beecher Terrace and that he fled into an apartment when instructed to stop by officers exiting from their vehicle. A detective observed McCray as he apparently stuffed something beneath a couch pillow, and a gun was retrieved from that location. The woman in the room appeared scared and told detectives that the gun did not belong to her.

McCray now argues that the jury, in acquitting him on the tampering with physical evidence charge, determined that he never possessed the gun. He refers specifically to the tampering charge, reasoning that the jury’s verdict indicated disbelief

in the Commonwealth's evidence that McCray placed the gun under the couch pillow. However, this ignores the fact that concealment of an item alone is not sufficient to sustain a conviction for tampering with physical evidence. Otherwise, the same argument could be made regarding his conviction of first-degree possession relating to the cocaine. Since the jury did not convict him of tampering with physical evidence relating to the cocaine which he threw on the floor, should we believe that jurors did not find proof beyond a reasonable doubt that McCray possessed cocaine? Clearly, that would be false since he was convicted of possessing cocaine. Rather, since knowledge that an item is to be produced or used against him in an official proceeding and an intent to hamper that proceeding by making the item unavailable are also required, we might draw the conclusion that jurors felt proof of these elements did rise to the level of overcoming reasonable doubt. Thus, we see no reason to conclude that the jury's failure to convict McCray of tampering required jurors to find that he never possessed the firearm to begin with.

Furthermore, McCray's acquittal on the firearm-enhanced drug offenses does not equate to a jury determination that he did not have a firearm in his possession. Just as the tampering charge required proof of elements unrelated to the charge of possession of a firearm by a convicted felon, the enhanced drug charges required proof of elements not necessary to convict McCray of possession of a firearm by a convicted felon. Specifically, the enhanced drug charges required proof that the firearm was connected to or furthered the offense of trafficking/possessing cocaine. There is nothing inconsistent in the acquittal verdicts on the enhanced drug charges and the tampering

charge and the jury's determination that McCray did, in fact, possess a firearm at the time of his arrest. In order to prevail on his claim of collateral estoppel, McCray was required to demonstrate that the jury's verdict of acquittal represented a factual determination inconsistent with one of the elements required to convict him of the subsequently-prosecuted charge. KRS 505.040(2). While the trial court may have acted with an abundance of caution in order to protect McCray's right to be free from double jeopardy, the facts in this case simply do not meet the burden imposed by KRS 505.040 and the *Benton* decision.

For the foregoing reasons, the partial judgment notwithstanding the verdict entered by the Jefferson Circuit Court is reversed, and the case is remanded for entry of a new judgment in accordance with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gregory D. Stumbo  
Attorney General of Kentucky

Teresa Young  
Special Assistant Attorney General  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Frank W. Heft, Jr.  
Office of the Louisville Metro Public  
Defender  
Louisville, Kentucky