

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001822-MR

ROBERT E. THOMAS

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 00-CR-00031

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING
** ** * * * * *

BEFORE: EMBERTON, GUIDUGLI AND McANULTY, JUDGES.

GUIDUGLI, JUDGE. Appellant was convicted in the Muhlenberg Circuit Court of possession of a firearm by a convicted felon. KRS 527.040. We affirm.

On December 13, 1999, appellant pled guilty in the Daviess Circuit Court to possession of a controlled substance in the first degree. KRS 218A.1415. After the entry of his plea at that proceeding, appellant asked the court to allow him to enter the Drug Court Diversion Program. Before the Daviess Court could rule on that request, appellant was arrested on December 24, 1999, in Muhlenberg County. He was charged with possession of a firearm by a convicted felon pursuant to KRS 527.040, based on

his previous drug charge in Daviess County. Subsequently, on January 28, 2000, the Daviess Court approved appellant's request to participate in the Drug Court Program. On February 22, 2000, a Muhlenberg County grand jury indicted appellant on the firearm possession charge.

Appellant moved to have the firearm charge dismissed at trial. He claimed he was not a convicted felon based on his previous drug charge because at the time of his arrest he was under consideration for enrollment in the Drug Court Diversion Program. The Muhlenberg Court denied the motion, and appellant was later convicted on the charge. This appeal followed.

Appellant presents two claims on appeal. First, he alleges the Muhlenberg Court erred in holding that he was a convicted felon based on the Daviess County drug charge. Next, he alleges the court erred in failing to conduct an evidentiary hearing and issue findings of fact in regards to his motion to suppress evidence at trial. We shall address each issue as presented by appellant.

Appellant claimed at trial that he was wrongly held to be a convicted felon. In denying appellant's motion, the trial court relied on a case from this Court, Grace v. Commonwealth, Ky. App., 915 S.W.2d 754 (1996), to conclude that appellant was a convicted felon by virtue of the Daviess drug charge. In Grace, we compared KRS 527.040 to the Federal Gun Control Act of 1968 and its definition of a "convicted" felon, specifically examining 18 U.S.C. §922(h)(1) which outlaws possession of firearms by felons. Regarding the federal law, this Court held, "if guilt is

established via a guilty plea or a verdict, and nothing remains except for imposing a sentence, the particular defendant is deemed 'convicted' for purposes of 18 U.S.C. §922." Grace, supra, at 756. In Grace, the defendant pled guilty to a felony offense but had not yet been sentenced when charged with possession of a handgun by a convicted felon in violation of KRS 427.040. This case is controlled by the holding in Grace which stated, "We conclude that once the appellant's plea of guilty was accepted by the court, and he was found by the court to be guilty; he became a "convicted felon" for purposes of KRS 527.040." Id. at 756. Though his status as a "convicted felon" may change at sometime in the future depending on other circumstances or actions, on the date of the underlying offense he was a convicted felon.

The Drug Court diversion order entered by the Daviess Circuit Court re-enforces this conclusion. Numerical paragraph five specifically states that "The Defendant [Thomas] has freely, knowingly, and intelligently entered a plea for the offense of Possession of a Controlled Substance in the First Degree." Paragraph number eight informed appellant of the consequences of not completing the program as follows, "In the event (Thomas) fails to successfully complete the terms and conditions of the Daviess County, Kentucky, Drug Court Diversion Program and the Court voids this Agreement, (Thomas) understands that a sentence of three (3) year(s) in the penitentiary may be imposed upon him." Upon completion of the Drug Diversion Program, appellant's conviction would not be automatically vacated or dismissed.

Appellant acknowledged this in his motion to dismiss the possession of a firearm by a convicted felon filed on May 18, 2000. In that motion, appellant argued that "[Thomas] at the time the guilty plea was entered, requested the Court to allow him to enter into the Drug Court Program wherein the sentence imposed upon a plea of guilty would be deferred until the completion of drug court." (Emphasis added).

As to appellant's second contention that the trial court failed to hold an evidentiary hearing on his motion to suppress, we believe it lacking in merit. Appellant (at page 5 of his brief) argues that the trial court did not conduct a "full" evidentiary hearing. We believe the record indicates otherwise. The record indicates that the trial court conducted an evidentiary hearing in its chambers and heard evidence from witnesses, and considered all the evidence offered by the parties. After reviewing the evidence, the court properly denied appellant's suppression motion. After reviewing the record, we believe the trial court did not abuse its discretion in this matter. See Partin v. Commonwealth, Ky., 918 S.W.2d 219 (1996).

For the foregoing reasons, the judgment entered by the Muhlenberg Circuit Court is affirmed.

EMBERTON, JUDGE, CONCURS.

McANULTY, JUDGE DISSENTS.

BRIEF FOR APPELLANT:

Bruce A. Brightwell
Louisville, KY

BRIEF FOR APPELLEE:

A. B. Chandler, III
Attorney General

Anitria M. Franklin
Assistant Attorney General
Frankfort, KY

