

RENDERED: FEBRUARY 19, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-000071-MR

DAVID EDWARD GRAHAM

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE AUDRA J. ECKERLE, JUDGE  
ACTION NO. 08-CR-000523

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, TAYLOR, AND WINE, JUDGES.

TAYLOR, JUDGE: David Edward Graham brings this appeal from a December 12, 2008, Judgment of the Jefferson Circuit Court upon a jury verdict and subsequent plea agreement resulting in a sentence of eighteen-years' imprisonment. We affirm.

In July 2007, Graham was driving a motor vehicle in Jefferson County when his vehicle was stopped for a routine traffic violation by Louisville Metro

Police Detective Mark Final and Detective Mickey King. After stopping Graham's vehicle, a passenger, Bonita Gritton, admitted to possessing crack cocaine. A subsequent search of the vehicle netted a bag containing six individually wrapped pieces of crack cocaine.

Graham was indicted by the Jefferson County Grand Jury upon the offenses of first-degree trafficking in a controlled substance, possession of drug paraphernalia, disregarding a stop sign, failure to give proper traffic signal, and with being a first-degree persistent felony offender. Thereafter, the Commonwealth, by motion, sought to amend the charge of first-degree trafficking in a controlled substance to the charge of first-degree trafficking in a controlled substance, second or subsequent offense. This amendment also sought to enhance the lesser included offense of possession of a controlled substance to second or subsequent offense. The court granted the motion, and the indictment was so amended. Graham also filed a motion to suppress evidence seized from his vehicle. Following an evidentiary hearing, the circuit court denied the motion.

The matter went to jury trial on December 2, 2008. The jury found Graham guilty of first-degree possession of a controlled substance. After the jury verdict of guilty, Graham entered into a plea agreement with the Commonwealth as to sentencing. Thereunder, Graham entered a conditional guilty plea to being a first-degree persistent felony offender and to possession of a controlled substance (second or subsequent offense). By judgment entered December 12, 2008, Graham was sentenced to a total of eighteen-year's imprisonment. This appeal follows.

Graham initially contends the circuit court erred by granting the Commonwealth's motion to amend the indictment. We disagree.

Under Kentucky Rules of Criminal Procedure (RCr) 6.16, the circuit court may permit an indictment to be amended at any time before verdict and if the defendant's substantial rights are not prejudiced. Graham believes he suffered prejudice by the amendment of the indictment. He maintains that the Commonwealth erroneously utilized a 1973 conviction for "illegal sale of narcotics" as the basis for the amended charge of subsequent offender under the offense of trafficking in a controlled substance or the lesser included offense of possession of a controlled substance. Graham argues that the 1973 conviction is "too remote in time" and provided "no nexus" to the current charge. By using the 1973 convictions, Graham maintains his right to a fair trial and right to due process was violated, thus resulting in prejudice.

A second or subsequent offense is defined in Kentucky Revised Statutes (KRS) 218A.010(35):

"Second or subsequent offense" means that for the purposes of this chapter an offense is considered as a second or subsequent offense, if, prior to his conviction of the offense, the offender has at any time been convicted under this chapter, or under any statute of the United States, or of any state relating to substances classified as controlled substances or counterfeit substances, except that a prior conviction for a nontrafficking offense shall be treated as a prior offense only when the subsequent offense is a nontrafficking offense. For the purposes of this section, a conviction voided under [KRS 218A.275](#) or [218A.276](#) shall not constitute a conviction under this chapter[.]

KRS 218A.010(35) clearly provides that a prior offense may be considered if it was committed “at any time” before the present charged offense. There is plainly no time limit imposed upon prior offenses under KRS 218A.010(35). Moreover, Graham does not challenge the constitutionality of KRS 218A.010(35). Therefore, this Court views KRS 218A.010(35) as dispositive. As such, the circuit court did not err by granting the Commonwealth’s motion to amend the indictment.

Next, Graham contends the circuit court erred by denying his motion to suppress evidence seized from his vehicle. Under RCr 9.78, an appellate court will not disturb a circuit court’s ruling upon a motion to suppress if its factual findings are supported by substantial evidence. *Talbott v. Com.*, 968 S.W.2d 76 (Ky. 1998). If the factual findings are supported by substantial evidence, the appellate court then reviews application of the law *de novo*. *Com. v. Neal*, 84 S.W.3d 920 (Ky. App. 2006).

It is well-established that a police officer may effectuate a stop of a motor vehicle if there exists probable cause to believe a traffic violation has occurred. *Wilson v. Com.*, 37 S.W.3d 745 (Ky. 2001). In this case, the stop of Graham’s vehicle was based upon failure of Graham to fully stop at a stop sign and to turn without giving a proper turn signal. These violations were observed by Detective Final who initiated the traffic stop.

Graham asserts that the trial court’s finding that the police possessed probable cause to stop his motor vehicle was not supported by substantial

evidence. In support thereof, Graham points to his and his passenger's testimonies that Graham completely stopped his motor vehicle at the stop sign and signaled his turn with the motor vehicle's blinker. Also, Graham argues "[t]heir testimony was supported by the jury's decision to acquit Graham of the charges of disregarding a stop sign and failure to give proper turn signal." Graham's Brief at 10.

At the suppression hearing, Detective Final testified that he observed Graham's vehicle fail to stop at a stop sign and fail to signal before turning left. Based upon these traffic violations, Detective Final stated that he effectuated a stop of Graham's motor vehicle.

Detective Final's testimony alone constitutes substantial evidence of a probative value to support the circuit court's denial of Graham's motion to suppress. *See Neal*, 84 S.W.3d 920. Moreover, the jury's decision to acquit Graham of these traffic offenses is inconsequential to our inquiry. We must only determine if substantial evidence supported the circuit court's decision. RCr 9.78. In this case, it did. Additionally, Detective Final's observation of these traffic offenses constitutes probable cause necessary to justify the stop of Graham's motor vehicle. In sum, we conclude the circuit court properly denied Graham's motion to suppress.

For the foregoing reasons, the Judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Steven J. Buck  
Assistant Public Advocate  
Department of Public Advocacy  
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway  
Attorney General of Kentucky

Michael J. Marsch  
Assistant Attorney General  
Frankfort, Kentucky