

RENDERED: MARCH 5, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2008-CA-001294-MR

JASON L. GRAY,  
A/K/A MARCELO GIOVANNI

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE MARY M. SHAW, JUDGE  
ACTION NOS. 07-CR-001958 AND 07-CR-003455

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, KELLER, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Jason L. Gray was convicted by a Jefferson County jury of possession of a handgun by a convicted felon and of being a second-degree persistent felony offender. For these crimes, Gray was sentenced to twelve years' imprisonment. He now appeals to this Court, setting forth several errors which he

claims entitle him to either a dismissal of the charges or a new trial. Finding no reversible error, we affirm the jury's verdict.

The crimes set forth above were discovered during a May 21, 2007, stop and seizure of Gray. The trial court set forth the following facts surrounding this stop and seizure:

On May 21, 2007, [Officer Sean Jones] rode up in his marked police car to the Circle K on Greenwood Road to get a cup of coffee around 2:00 a.m. He was approached by a cashier running out and saying that a black man with a red shirt and long shorts had just stolen a case of beer and took off in the direction of some apartments the officer knew had a high rate of drug activity. Officer Jones testified that he called Officer [Brian] Wyatt to follow. He further testified that upon reaching the apartments he saw Gray and the black man with the red shirt and long shorts; told them to stop; and shined his light on them. The alleged beer thief stood there, but Gray did not. According to Officer Jones' testimony, Gray quickly walked away when hit with the light. Based upon his experience as a police officer, he thought that the two may have been in a drug transaction given that they were close together, in a high crime area, at approximately 2:15 a.m., and Gray quickly walked away as if to elude police.

On cross examination, Officer Jones stated that the two individuals were talking face-to-face in the parking lot, out in the open and not hidden, when he turned his light on them. He testified that Gray's hands actually went up in the air before Gray turned and quickly walked away. Officer Jones agreed that he did not see Gray with any beer, drugs or weapons at that time. It was the officer's testimony that he initially followed Gray for about 100 yards in the marked car while yelling to stop and then exited the vehicle and chased after Gray on foot.

Gray approached an entryway of an apartment; a guy came out; and when Gray attempted to walk around him, the guy stated that he did not know Gray. Officer

Jones testified that at that time, Gray looked over his shoulder and his hand went to his waistband. The officer stated that he pulled his weapon on Gray and told Gray to drop the gun and lay down. It was his testimony that Gray eventually raised his hands up to his shoulder level and lay [sic] on the ground, at which time Officer Wyatt handcuffed Gray and asked Gray where the gun was – to which Gray replied, “It’s in my waistband.”

According to the officers, a gun was thereafter seized from Gray’s waistband. At trial, Gray stipulated to a prior felony conviction at the time the gun was seized.

In his first and primary argument on appeal, Gray argues that both of his convictions must be dismissed because Kentucky Revised Statutes (KRS) 527.040, the statute under which he was convicted, is unconstitutional. KRS 527.040 prohibits convicted felons from possessing, manufacturing, or transporting handguns. The Commonwealth argues that Gray’s constitutional challenge is not reviewable on appeal since Gray failed to notify the attorney general of his claim. *See Brashars v. Commonwealth*, 25 S.W.3d 58, 65 (Ky. 2000). Gray counters that since KRS 527.040 is *void ab initio*, any applicable “procedural” rules are without effect. He further claims that any rules barring consideration of Gray’s constitutional challenge are unenforceable and unconstitutional.

We need not address any of the above arguments because KRS 527.040 has been held constitutional by our Supreme Court on two occasions. *Eary v. Commonwealth*, 659 S.W.2d 198, 200 (Ky. 1983); *Posey v. Commonwealth*, 185 S.W.3d 170, 175 (Ky. 2006). This Court has no authority to overrule opinions of a higher court. *Smith v. Vilvarajah*, 57 S.W.3d 839, 841 (Ky.

App. 2000) (“The Court of Appeals cannot overrule the established precedent set by the Supreme Court or its predecessor court.”). Accordingly, we affirm the trial court’s refusal to dismiss the indictments against Gray on grounds that KRS 527.040 is unconstitutional.

Gray next argues the trial court submitted an erroneous instruction to the jury for possession of a firearm by a convicted felon. Both parties agree that the instruction was in conformity with Cooper’s form book. It directed as follows:

You will find the defendant, Marcelo Giovanni also known as Jason Leigh Gray, not guilty of Possession of a Handgun by a Convicted Felon under this Instruction unless you believe from the evidence beyond a reasonable doubt all of the following:

A. That in Jefferson County on or about May 21, 2007, he knowingly had in his possession a handgun;

AND

B. That he had been previously convicted of a felony.

Gray claims that KRS 503.055 and KRS 503.085 required the inclusion of the following additional element in the instruction: “that Gray did not possess the firearm for purposes of self-defense.” He contends that the above statutes have essentially repealed KRS 527.040 to the extent that convicted felons are now entitled to possess firearms for the purpose of self-defense. This argument is without merit.

Statutes are construed according to the plain meaning of the language set forth therein. *King Drugs, Inc. v. Commonwealth*, 250 S.W.3d 643, 645 (Ky. 2008). Where two statutes appear to be in conflict, “it is the Court's duty to harmonize the law so as to give effect to both statutes.” *Commonwealth v. Phon*, 17 S.W.3d 106, 108 (Ky. 2000).

KRS 527.040 plainly states that convicted felons are prohibited from possessing, manufacturing, or transporting firearms. There is no language in KRS 503.055 or KRS 503.085 which professes to repeal any portion of KRS 527.040. Moreover, language granting all persons the right to possess firearms for the purpose of self-defense is likewise absent in these statutes.

Rather, the language contained in KRS 503.055 and KRS 503.085 provides that persons in Kentucky may use defensive force, including force that is intended to or likely to cause death or great bodily harm, in certain circumstances where they hold a “reasonable fear of imminent peril of death or great bodily harm to himself or herself or another . . . .” KRS 503.085. Gray argues that this right to use deadly defensive force in certain circumstances “necessarily anticipates that persons will go about armed. How else to protect one’s person from sudden attack?”

Gray’s argument is without merit and spurious. KRS 503.055 and KRS 503.085 do not expressly or impliedly grant convicted felons the right to “go about armed” for the purpose of self-defense. Accordingly, the trial court did not

err in rejecting Gray's proposed instruction to the jury for possession of a firearm by a convicted felon.

In his final argument, Gray argues that the trial court erred when it denied his motion to suppress the gun discovered on his person by the police officers. He claims that the gun was subject to suppression because his constitutional rights were violated during the stop and seizure.

Gray does not challenge any of the factual findings set forth by the trial court above. Rather, he argues that these facts are not sufficient to support the trial court's conclusion that Officer Jones had "reasonable suspicion that criminal activity had occurred, was occurring, or was about to occur, so as to permit a brief forcible stop of Gray and a subsequent frisk for weapons." We disagree.

Gray cites to no authority to support his position. We find the circumstances of this case to be more than sufficient to support a finding of reasonable suspicion. *See Terry v. Ohio*, 392 U.S. 1, 30, 88 S.Ct. 1868, 1885, 20 L.Ed.2d 889 (1968) (police officers may temporarily stop and perform a pat-down search of a suspect if they have reasonable suspicion that criminal activity is afoot).

In pursuit of a suspect, Officer Jones came upon Gray during the early morning hours in a high crime area closely conversing with the suspect Officer Jones was seeking. When Officer Jones approached the pair, Gray immediately threw his hands in the air and quickly walked away. Jones testified that based on his experience, he believed that the men may have been engaging in a drug

transaction. Gray was also of interest as he was seen in close conversation with a theft suspect and upon being approached, he acted nervously and fled. These circumstances were certainly sufficient to justify the temporary stop and pat-down of Gray. *See Illinois v. Wardlow*, 528 U.S. 119, 124-25, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000) (unprovoked flight from officers in heavy crime area was sufficient to justify temporary stop of individual); *Hampton v. Commonwealth*, 231 S.W.3d 740, 743 (Ky. 2007) (reasonable suspicion present where suspects were observed fleeing from a suspected drug house upon arrival of police).

Gray argues in the alternative that even if Officer Jones did have reasonable suspicion to conduct the temporary stop of Gray, these so-called *Terry* stops, while permissible under the United States Constitution, are not permissible under Section 10 of the Kentucky Constitution. He claims that the Kentucky Constitution permits officers to stop and seize individuals, even temporarily, only if there is probable cause to make an arrest.

Gray's argument is unpreserved as he failed to raise it before the trial court. *See Commonwealth v. Maricle*, 15 S.W.3d 376, 379 (Ky. 2000) (court is limited to review of those issues raised and ruled on by trial court); *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky.1989) ("The Court of Appeals is without authority to review issues not raised in or decided by the trial court."). In any event, it is without merit. *See Commonwealth v. Mobley*, 160 S.W.3d 783, 784 (Ky. 2005) (Section 10 of the Kentucky Constitution provides no greater rights than those provided by the Fourth Amendment of the U.S. Constitution); *see also*

*Bays v. Commonwealth*, 486 S.W.2d 706, 709 (Ky. 1972) (adoption of federal *Terry* standard in Kentucky). Accordingly, the trial court did not err in denying Gray's motion to suppress the gun found on his person.

As Gray has presented no reversible error before this Court, we hereby affirm Gray's convictions and sentence recorded by final judgment in Jefferson Circuit Court on May 29, 2008.

ALL CONCUR.

BRIEF FOR APPELLANT:

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