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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000063-MR

JOSHUA TURNER — APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 09-CR-00139

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, STUMBO, AND WINE, JUDGES.

COMBS, JUDGE: Joshua Turner appeals from his conviction in the Laurel Circuit Court. Following our review of the record and the law, we affirm.

On April 5, 2009, the London Police Department received an emergency call from Thomas Goodin, Jr., an employee of Walgreens pharmacy in London. Goodin reported that several men who were riding in the same car took turns

purchasing cold medicine containing pseudoephedrine, an essential ingredient for the manufacture of methamphetamine.

Officers Bryon Lawson and Jeremy Shell responded to the call. One car in the parking lot of Walgreens matched the description that Goodin had provided. Officer Lawson approached the driver's side of the vehicle and asked the driver, Mark Turner, to step out of the car. He conducted a pat down of Mark to search for weapons but instead found a silver pill bottle containing white residue. At that point, Officer Lawson arrested Mark and asked the other occupants of the car to step outside.

Joshua Turner and Bobby Lakes were the passengers in the car. Lakes was in the front passenger seat, and Turner was in the back. Officer Shell searched the car and found a small bag of methamphetamine under the floor mat of the driver's seat and two boxes of pseudoephedrine in the back seat. One of them had been opened and was missing a pill. Officers Shell and Lawson then arrested both Turner and Lakes.

On November 12, 2009, a jury convicted Turner of one count of unlawful possession of methamphetamine precursors and of being a persistent felony offender in the second degree. Turner was sentenced to ten years in prison. He now appeals.

Turner argues that the trial court erred when it denied his motion to suppress the evidence that was obtained during the search of the car. We disagree.

The standard of review for a motion to suppress evidence is two-fold. First, Kentucky Rule of Criminal Procedure (RCr) 9.78 provides: "If supported by substantial evidence[,] the factual findings of the trial court shall be conclusive." However, the trial court's application of the law to the facts is reviewed *de novo*, with no deference to be accorded to the trial court. *Lynn v. Commonwealth*, 257 S.W.3d 596, 598 (Ky. App. 2008).

Turner argues that the arrest of Mark and the subsequent search of the car were illegal.

However, Joshua Turner does not have standing to appeal the search of Mark Turner. In order to challenge a warrantless search and subsequent seizure of evidence, the challenger must possess a reasonable expectation of privacy in whatever property was searched. *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421 (1978). The Sixth Circuit has explained the holding of *Rakas*: "when a defendant is aggrieved by an allegedly illegal search of a third party's person or property, the Fourth Amendment rights of *that* defendant have not been infringed." *U.S. v. Meyers*, 102 F.3d 227, 231 (6th Cir. 1996). (Emphasis original.) Thus, it would be appropriate for Mark Turner to challenge his own pat-down search, but Joshua Turner may not assert it as his own defense.

Turner also contends that the search of Mark's car was improper. The Supreme Court of the United States held that defendants have the right to challenge the propriety of the search of a car in which they were a passenger. *Brendlin v. California*, 551 U.S. 249, 127 S.Ct. 2400 (2007). However, Turner challenged the

search in his motion to suppress based on the holding of *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710 (2009). Under *Gant*, if police officers have secured the suspects in handcuffs, a warrant must be obtained in order to search the car.

The trial court based its ruling on *Gant.* It relied on the exception in *Gant* which allows officers to proceed with a search without a warrant if they have reason to believe that further evidence of the crime is in the car. The trial court found that because Mark was arrested for possession of methamphetamine, the search for more methamphetamine or for methamphetamine precursors in the car was wholly proper. The initial report to the police had concerned methamphetamine precursors. Thus, it was appropriate for officers to search for those substances in the car.

On appeal, Turner has abandoned his reliance upon *Gant* and now argues that the trial court should not have relied on *Gant*. He contends that the search of the car was the fruit of the illegal pat-down search of Mark. We disagree.

Again, Turner has no legal standing to challenge the search of Mark's person. Additionally, we may not address the argument that Turner presents in this appeal because it directly contradicts the argument that he made to the trial court. Although Turner asked the trial court to rely on *Gant,* he now contends that *Gant* was irrelevant. A party may not present one argument to the trial court and another to the appellate court. *Henson v. Commonwealth*, 20 S.W.3d 466 (Ky. 1999).

Turner has also requested that we review any improperly preserved portion of his argument for palpable error pursuant to RCr 10.26, which permits us to

review an unpreserved error when a party's substantial rights have been affected. However, our Supreme Court has directly ruled that a *new argument* presented to an appellate court exceeds the scope of RCr 10.26. *Henson*, 20 S.W.3d at 470-71. Turner's theory on appeal is precisely the sort of new argument encompassed by the holding in *Henson*. Therefore, we may not consider Turner's new theory of defense.

We affirm the order of the Laurel Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Shelly R. Fears
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

M. Brandon Roberts
Assistant Attorney General
Frankfort, Kentucky