RENDERED: JUNE 17, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000104-MR

HARLIE LEWIS — APPELLANT

ON REMAND FROM SUPREME COURT OF KENTUCKY
NO. 2010-SC-0106-D

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 06-CR-00424

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

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

NICKELL, JUDGE: This matter is before us on remand from the Supreme Court of Kentucky by order entered on September 15, 2010. In its order, the Supreme Court directed us to reconsider our unpublished opinion rendered August 21, 2009, and modified on January 22, 2010, in light of the recent holding in *Wilburn v. Commonwealth*, 312 S.W.3d 321 (Ky. 2010). In *Wilburn*, the Supreme Court re-

examined precedents related to burglaries committed in public places where the burglar had a license to enter, and what events would trigger the revocation of that license. The Supreme Court also expressly overruled *Merritt v. Commonwealth*, 386 S.W.2d 727 (Ky. 1965), holding that the definition of a "deadly weapon" in the context of a robbery adopted in *Merritt* was irreconcilable with the language of the statutes now in effect. One issue in the present case was determined using *Merritt*; thus, we must re-examine that issue in light of *Wilburn*. After reconsidering the record and briefs in light of *Wilburn*, we conclude the holding therein does not change the analysis or the outcome of our earlier opinion. Therefore, as we did previously, we now affirm the trial court.

The facts underlying this case were stated in our original opinion as follows:

> On January 3, 2006, Lewis entered a 24-hour Walgreen Pharmacy in Louisville, Kentucky, and demanded OxyContin[1] and another drug.[2] Lewis was wearing a hooded sweatshirt pulled up around his face. This same store had been robbed a few weeks prior by a man armed with a gun and wearing a hooded sweatshirt.[3] According to the pharmacist on duty, Beth Quisno, Lewis claimed that even though he did not have a prescription, he did have a gun. After hearing Lewis's claim to be armed, and mindful of the previous robbery at this store, Quisno went to retrieve the drugs Lewis demanded. By the time she returned with the drugs, the police had arrived and

[1] OxyContin is the brand name of a formula of the potent painkiller oxycodone which is produced by the pharmaceutical company Purdue Pharma, L.P.

[2] The record indicates Lewis was mumbling and the name of the second drug was unintelligible.

[3] It is not alleged on appeal that Lewis was the perpetrator of the earlier robbery.

> subsequently arrested Lewis. Prior to his arrest, the police stated that Lewis had his hand in his sweater pocket, which was later found to contain a knife with an open blade.
>
> After his arrest, Lewis was indicted on seven criminal charges including robbery in the first degree, burglary in the first degree, assault in the third degree, carrying a concealed deadly weapon, resisting arrest, disorderly conduct, and alcohol intoxication in a public place. Prior to trial, the Commonwealth dismissed all of the charges except the robbery and burglary counts. Following a trial by jury, Lewis was acquitted of robbery but was found guilty of burglary in the first degree for which he was sentenced to thirteen years' imprisonment. This appeal followed.

Lewis v. Commonwealth, slip op. at 2-3 (footnotes omitted).

We concluded the trial court had not erred in denying Lewis's motion for a directed verdict on the burglary charge. Citing *Bowling v. Commonwealth*, 942 S.W.2d 293 (Ky. 1997), we held that although Lewis had lawfully entered the premises, his license or privilege to enter or remain there was terminated when he acted inconsistently with the business purposes of the pharmacy as evidenced by his criminal actions. Thus, we found it would not have been unreasonable for jurors to return a guilty verdict on the burglary charge. In addition, we concluded the trial court's definition of a "deadly weapon" comported with that set out in *Merritt* and was legally sufficient. The remaining issue we decided relating to the jury instructions is not in issue on remand and warrants no further discussion. We now reexamine the two pertinent holdings in light of *Wilburn*.

First, Lewis argues the Supreme Court in *Wilburn* held that a person cannot be found to have "entered or remained unlawfully" when the building in question is open to the public "unless and until that person is personally ordered to leave or to remain out of the building." He alleges he was licensed to enter the public portions of the Walgreen's store and was never ordered to leave the premises. Thus, he contends he was entitled to a directed verdict of acquittal on the burglary charge. We disagree.

Contrary to Lewis's argument, in *Wilburn*, the Supreme Court distinguished *Bowling* and *Fugate v. Commonwealth*, 993 S.W.2d 931 (Ky. 1999), on factual bases but did not overrule them nor question their logic. The Supreme Court stated:

> [n]or is the significant principle stated in the two cases relevant to the present case. *Bowling* states the principle as follows: "[i]mplicit in [KRS 511.090(2)] is the concept that license or privilege expires once the person commits an act inconsistent with the purposes of the business. Bowling terminated his license to be on the premises when he committed the criminal acts." *Id.* at 307. Similarly, the *Fugate* opinion states, "the privilege granted to one doing business ceases when the licensee commits acts, such as crimes, inconsistent with the business." *Id.* at 940.
>
> The principle stated in the cases is sound; however, the Commonwealth's application of it to the facts of this case is not. For the principle to apply, the defendant must first perpetrate a crime (or other act) thereby bringing about, by obvious implication, the revocation of his license to remain in the dwelling or building. He must thereafter remain on the premises with the intention to commit a crime, which may be the completion of the robbery or

> any other crime. Only then are the elements of burglary satisfied under the principle.

The *Wilburn* Court also did not, contrary to Lewis's assertion, "suppl[y] the further clarification that this Court solicited" in our original opinion in this matter. The dichotomy of opinion we discussed regarding when revocation of a defendant's license or privilege to enter or remain on the premises occurs was not mentioned in or pertinent to the *Wilburn* case. In fact, the *Wilburn* Court found the manager's firing of a gun at Wilburn was "the functional equivalent" of a lawful order not to remain on the premises. It further held that a defendant's perpetration of a crime or other act would constitute "by obvious implication, the revocation of his license to remain in the dwelling or building." Thus, the Supreme Court did not clarify the apparent conflict of precedents we discussed in our original Opinion in this case, nor did it provide the final word on the matter as Lewis contends. Therefore, we are unable to conclude we erred in affirming the trial court's disposition of Lewis's directed verdict motion.

Next, Lewis contends the overruling of *Merritt* by the *Wilburn* Court entitles him to a reversal. He argues the jury instruction given by the trial court in this case was based on the definition of a "deadly weapon" set forth in *Merritt* and we relied on that decision in finding the trial court's instruction was legally sufficient and did not amount to reversible error. Although we believe Lewis is correct in his assessment of the *Wilburn* decision and our earlier opinion, we cannot agree that he is entitled to a reversal.

The trial court's instruction defining a "deadly weapon" mirrored the language of *Merritt*. We affirmed the trial court's use of this language as it comported with the law in effect at the time the case was presented to the jury and the time of the appeal. Several months after we rendered our opinion, *Wilburn* overruled *Merritt* and its progeny insofar as they set forth the rule underlying the trial court's instruction herein that "any object intended by its user to convince the victim that it is a pistol or other deadly weapon, and does so convince him, is one." However, a careful review of the Supreme Court's opinion reveals nothing to indicate the holding was to be applied retroactively.

Generally, absent a clearly expressed intent to the contrary, our courts invoke the rule against retroactive application of a statute or decision, because retroactivity is not favored in the law. *See* KRS 446.080(3) ("no statute shall be construed to be retroactive, unless expressly so declared"); *see also Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152, 166-67 (Ky. 2009) (retroactive application of statutes improper unless legislative intent to do so is clearly manifested); *BellSouth Telecommunications, Inc. v. Southeast Telephone, Inc.*, 462 F.2d 650 (6th Circ. (Ky.) 2006) (same). It is abundantly clear that "in cases involving new judicial precedent, a court is to apply the law in effect at the time it renders its decision." *Carpenter-Moore v. Carpenter*, 323 S.W.3d 11, 16 (Ky. 2010) (internal quotation marks and citation omitted); *see also Landgraf v. USI Film Prods.*, 511 U.S. 244, 264, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994).

In the case *sub judice*, as was proper for it to do, the trial court used *Merritt*, the law in effect at the time, as a guide to crafting its instructions. That law remained in effect until only recently. *Merritt* represented the law in this Commonwealth at the time of Lewis's trial and at the time of our review of those proceedings. We held the trial court properly instructed the jury based on the law in existence at the time. Based on our reading of *Wilburn*, we discern no reason to now retroactively apply the Supreme Court's reasoning to this case to find the trial court erred in doing as it was charged to do. There was no error in the trial court's instructions.

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

ALL CONCUR.

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