

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-000438-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. ON REMAND FROM SUPREME COURT OF KENTUCKY  
NO. 1999-SC-000804-DG

APPEAL FROM BARREN CIRCUIT COURT  
HONORABLE BENJAMIN L. DICKINSON, JUDGE  
ACTION NO. 96-CR-00204

JONATHAN DECKARD

APPELLEE

OPINION  
AFFIRMING  
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BEFORE: COMBS, DYCHE AND JOHNSON, JUDGES.

JOHNSON, JUDGE: The Commonwealth of Kentucky has appealed from an order of the Barren Circuit Court entered on February 11, 1997, which remanded the action against Jonathan Deckard to the Juvenile Division of the Barren District Court. Having concluded that the circuit court's ruling was correct, we affirm.

This case comes before us on remand from the Supreme Court of Kentucky. The somewhat lengthy procedural history of the case is as follows: On December 18, 1996, Jonathan Deckard was indicted by the Barren County grand jury and charged with (1)

unlawful possession of a weapon on school property,<sup>1</sup> and (2) receiving stolen property,<sup>2</sup> both of which are Class D felonies, and (3) possession of a handgun by a minor,<sup>3</sup> a Class A misdemeanor. The weapon involved in the crimes for which Deckard was charged was a .38 caliber pistol. Deckard was 15 years of age at the time these crimes were allegedly committed on November 7, 1996. Pursuant to KRS 635.020(4),<sup>4</sup> Deckard's case was transferred from district court to circuit court. On January 7, 1997, following his arraignment, Deckard filed a motion to dismiss for lack of jurisdiction, claiming that his case had been improperly transferred to circuit court, and that it should therefore be remanded to district court. According to Deckard, KRS 635.020(4), which allows for the transfer of cases involving "a child charged with a felony in which a firearm was used in the commission of the offense," was inapplicable to the facts of his case since he was charged with mere "possession of" and "receiving" the firearm, and it was not argued that he had "used" the firearm to commit an offense. The Barren Circuit Court

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<sup>1</sup>Kentucky Revised Statutes (KRS) 527.070(1).

<sup>2</sup>KRS 514.110(3).

<sup>3</sup>KRS 527.100.

<sup>4</sup>At the time, the statute read as follows:

Any other provision of KRS Chapters 610 to 645 to the contrary notwithstanding, if a child charged with a felony in which a firearm was used in the commission of the offense had attained the age of fourteen (14) years at the time of the commission of the alleged offense, he shall be tried in the Circuit Court as an adult offender. . . .

agreed and on February 11, 1997, entered an order remanding Deckard's case back to the Barren District Court.

The Commonwealth of Kentucky appealed the order of the Barren Circuit Court to this Court. In an Opinion rendered on February 26, 1999, this Court affirmed the order of the Barren Circuit Court, holding that mere possession was not enough to trigger the transfer provision under KRS 635.020(4).<sup>5</sup> Just one week later however, on March 5, 1999, in Darden v. Commonwealth,<sup>6</sup> a different three-judge panel of this Court took a contrary position, holding that possession alone was sufficient to warrant a transfer. On August 13, 1999, the conflicting opinions were withdrawn and this Court, sitting en banc, rendered new opinions in both Darden and the case at bar. In the second Darden opinion, a majority of this Court sitting en banc adhered to the position taken by the previous panel in that case, and held that possession of the firearm alone could trigger the transfer provision. In the instant case, this Court's same en banc majority reversed the Barren Circuit Court, holding again that possession of the firearm alone could warrant a transfer.

The Supreme Court of Kentucky then granted discretionary review in both Darden and the case sub judice. On August 17, 2000, the Supreme Court entered an order holding the case before us in abeyance, pending a final ruling in Darden. On October 17, 2001, the Supreme Court granted review of the instant case. This Court's previous en banc opinion was vacated,

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<sup>5</sup>Case No. 1997-CA-000438-MR.

<sup>6</sup>Case No. 1997-CA-000196-MR.

and the case was remanded to this Court for reconsideration in light of the Supreme Court's final opinion in Darden v. Commonwealth.<sup>7</sup> Having found Darden to be controlling in the case at bar, we now affirm the order of the Barren Circuit Court entered on February 11, 1997.

The Commonwealth's principal argument in this appeal is that the facts of Darden are sufficiently distinguishable to warrant a different result. Specifically, the Commonwealth argues:

[Deckard] did not constructively possess the firearm in a car or truck parked on school property. Rather, the record indicates that he was seen on school property with a stolen "Smith & Wesson .38 gun," and had previously sent a threatening letter to one Ashley Foster. . . . While this evidence was not fully developed due to the circuit court's decision to remand the matter to district court, what is unquestionable is that this case does not involve the kind of constructive possession which concerned the majority [of the Supreme Court] in Darden, and to which that opinion and its legal analysis were addressed. Consequently, the holding in the recent case of Darden v. Commonwealth should not be regarded as dispositive of the transfer issue here. . . .

We find the Commonwealth's attempt to distinguish the case at bar from Darden on grounds of actual versus constructive possession to be unpersuasive. A reading of the Supreme Court's final opinion in Darden reveals two primary rationales which mandate the same result in the case sub judice.

First, the Supreme Court looked to Haymon v. Commonwealth.<sup>8</sup> In Haymon, our Supreme Court previously stated:

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<sup>7</sup>Ky., 52 S.W.3d 574 (2001).

<sup>8</sup>Ky., 657 S.W.2d 239, 240 (1983).

The Commonwealth contends that possession of a weapon involves its use; that the intent of the General Assembly was to deter the involvement or presence of weapons in the commission of crimes. Admittedly, the word "use" is subject to such a construction.

On the other hand, the General Assembly took pains to distinguish between being "armed" with a weapon and the "use of a weapon" in the burglary statute. The offense can be committed by one who is only "armed" with a deadly weapon but when dangerous instruments are involved there must be a showing of their use or threatened use. [Haymon] contends, therefore, that mere possession of a weapon constitutes being "armed" with a weapon but "use" of a weapon contemplates that it be employed in some manner in the commission of an offense. This too is a plausible explanation of the meaning of the word "use."

We conclude that the phrase "use of a weapon" as it is used in K.R.S. 533.060(1) is ambiguous in that it is subject to two entirely different but nevertheless logical interpretations. It is not possible to determine which meaning the General Assembly intended to be given to the phrase "use of a weapon" and for that reason [Haymon] is entitled to the benefit of the ambiguity.

In the instant case, while KRS 635.020(4) is susceptible to an interpretation whereby Deckard's "possession of" or "receiving" the firearm could trigger the transfer provision, an equally plausible construction is that to constitute "use," the firearm must "be employed in some manner in the commission of an offense." As Haymon makes clear, Deckard is "entitled to the benefit of the ambiguity." In Darden, the Supreme Court stated that the terms "possession of a weapon" and "use of a weapon" are "two entirely different concepts."<sup>9</sup>

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<sup>9</sup>Darden, supra at 577.

Therefore, in order for the transfer provision in KRS 635.020(4) to apply, it had to be shown that the firearm was actually used in the commission of the felony. Accordingly, since the Commonwealth cannot show that Deckard "used" the firearm in the commission of an offense and because "possession" or "receiving" do not constitute "use" under Darden, the transfer provision at KRS 635.020(4) is inapplicable to Deckard.

Second, the Supreme Court in Darden saw the possibility of an absurd result arising if possession alone were held to mandate a transfer from district court to circuit court. The Supreme Court stated:

The legislative scheme found in the Juvenile Code illustrates a connection between the seriousness of the offense and the nature of the proceedings faced by a juvenile. For instance, certain offenses do not make a juvenile eligible for transfer to circuit court at all, while some offenses mandate transfer, such as felonies where a firearm was used in the commission of the offense. KRS 635.020. However, even more cases provide for a discretionary waiver into circuit court. These cases include those where the juvenile is older than fourteen (14) and charged with a capital offense or Class A or Class B felony, and those children sixteen (16) or older who have previously been convicted of a felony. Id. See also, KRS 640.010. It is inconceivable that the Legislature would provide that waiver is discretionary if a child murders someone with a knife, but provide that waiver is mandatory for a minor who merely brings his hunting rifle to school in the gun rack of his pickup truck.<sup>10</sup>

This language applies with equal force to the facts of the instant case. Deckard was charged with "possession" and "receiving" only. The record is void of any evidence that

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<sup>10</sup>Darden, supra at 577.

Deckard actively "used" the firearm in any way to commit an offense; his mere possession of the firearm at the school constituted the offense. In Deckard, our Supreme Court recognized that it was unlikely that our Legislature would provide for mandatory transfer for a juvenile who merely possessed a firearm, but allow for discretionary transfer for a juvenile who used a knife to murder someone.

Like our Supreme Court, we too are acutely aware of the dangers inherent in a child possessing a firearm at school, and of the increase in violent acts committed at schools by children armed with guns. However, a court's awareness of such tragic events does not justify or permit the court to enlarge the parameters of the automatic waiver statute, KRS 635.020(4), to include, as the Commonwealth suggests, a juvenile charged with mere possession of a firearm at school. Instead, it is the duty of the courts "to ascertain and give effect to the intent of the General Assembly. We are not at liberty to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language used."<sup>11</sup> Further, "[i]t is presumed that the Legislatures have knowledge of existing laws and the construction placed upon them by courts. . . ."<sup>12</sup> As Justice Vance aptly noted in Haymon, our Legislature is aware of the difference between the terms "possession" and "use." If it had intended for the mere possession of a firearm to result in a

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<sup>11</sup>Beckham v. Board of Education of Jefferson County, Ky., 873 S.W.2d 575, 577 (1994).

<sup>12</sup>Baker v. White, 251 Ky. 691, 695, 65 S.W.2d 1022, 1024 (1933). See also Butler v. Groce, Ky., 880 S.W.2d 547, 550 (1994) (Lambert, J., dissenting).

nondiscretionary transfer of a juvenile to circuit court, it would have so provided.

Accordingly, the judgment of the Barren Circuit Court is affirmed.

ALL CONCUR.

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