

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002335-MR

DAVID TOWERY

APPELLANT

v.

APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 05-CR-00299

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND WINE, JUDGES; BUCKINGHAM, SENIOR JUDGE.¹

BUCKINGHAM, SENIOR JUDGE: David Towery appeals from a judgment of the Graves Circuit Court convicting him of possession of a firearm by a convicted felon. We affirm.

On May 25, 2005, Towery was driving his girlfriend home in her vehicle when he was stopped by police for failing to properly use a turn signal. He was arrested at the scene for driving on a suspended license and for driving under the influence. A search of the vehicle revealed methamphetamine, marijuana, drug paraphernalia, and a

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

loaded 9mm handgun. Towery admitted the weapon was his but denied knowledge of any of the drugs or related items.

A Graves County grand jury indicted Towery for a number of crimes, including possession of a handgun by a convicted felon. That charge was severed from the other charges and scheduled for trial. Towery's motion to suppress the evidence was denied following a hearing, and he then entered a conditional guilty plea pursuant to Kentucky Rules of Criminal Procedure (RCr) 8.09 to an amended charge of possession of a firearm by a convicted felon.² He was sentenced to two years in prison with that sentence being probated for five years.

Towery now appeals the four issues preserved by his conditional plea. He first argues that there was no evidence presented that he had received *Miranda* warnings. See *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). He then suggests that he was not a convicted felon at the date of his arrest and was entitled to be in possession of a handgun or firearm. He next argues that there was no evidence presented to the grand jury suggesting he was a felon in possession of a handgun or firearm. Finally, he asks for a reversal based on the argument that he was never informed he would lose his right to carry a firearm when he earlier had entered a plea of guilty to a felony charge in another court. We disagree with each of Towery's arguments.

Towery first sought to have his statement to the police suppressed because he claims there was no evidence he was ever read his *Miranda* rights. The police officer who testified at the suppression hearing admitted he did not talk much to Towery at the scene and that he could not remember exactly what was discussed. He speculated that it was a general traffic stop conversation. He could not recall if he ever

² Possession of a handgun by a convicted felon is a Class C felony, while possession of a firearm by a convicted felon is a Class D felony. KRS 527.040(2).

advised Towery of his *Miranda* rights. The officer acknowledged that another officer interviewed Towery, and he added that if he did not conduct the interview, he typically did not read a defendant his rights. The trial court ultimately denied the suppression motion based on the finding that a citation entered in the record stated another officer provided Towery's rights pursuant to *Miranda*.³

The question before us is whether the Commonwealth was required to put forward affirmative proof the *Miranda* rights had been read or whether the notation on the citation was sufficient. Our review is limited to a determination of whether the trial court's decision was based on "substantial evidence." See *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky.App. 2002).

In *Commonwealth v. Priddy*, 184 S.W.3d 501 (Ky. 2005), the Kentucky Supreme Court stated that the trial court "could have properly considered comments directly from the citation." *Id.* at 507. Importantly in that case, the review was from a suppression hearing. The court in *Priddy* notes that in that setting, the "judge can bring to bear on those questions evidence that might not be admissible at trial[.]" *Id.* The trial court's reliance on the statement in the citation that Towery had been given his *Miranda* rights and the court's determination in that regard was not error.

Towery's second argument is that he was not a convicted felon at the time of the alleged offense. On April 13, 2005, several weeks before Towery was arrested for the charge herein, he appeared before the McCracken Circuit Court and entered a plea of guilty to a felony crime. The court accepted the guilty plea and set sentencing for October 7, 2005. On May 24, 2005, before that sentencing hearing occurred, Towery was arrested on the charges involved in the current appeal. At the October 7,

³ At the suppression hearing, once the Commonwealth learned that Towery was challenging the admissibility of his statement that the handgun was his, it asked the court to continue the hearing and allow it the opportunity to call the other officer as a witness. The court did not rule on the request.

2005, hearing the McCracken Circuit Court declared Towery guilty and sentenced him. The crux of Towery's argument now is that until the McCracken Circuit Court declared him guilty and sentenced him on October 7, 2005, he was not a convicted felon and thus was legally entitled to possess the handgun.

We previously examined a similar argument in *Grace v. Commonwealth*, 915 S.W.2d 754 (Ky.App. 1996). In that case, Grace entered a plea of guilty to a felony on June 30, 1993, and the trial court accepted that plea and found him guilty. Sentencing was delayed until April 24, 1994. During the interim, Grace was charged with possession of a handgun by a convicted felon. In affirming Grace's conviction for possession of a handgun by a convicted felon, this court held that once Grace's "plea of guilty was accepted by the court, and he was found by the court to be guilty, he became a 'convicted felon' for purposes of KRS 527.040." *Id.* at 756. Towery relies on the portion of the above quote that states that "and he was found by the court to be guilty" to support his argument. He asserts that the McCracken Circuit Court did not find him guilty until it sentenced him on October 7, 2005, several months after his arrest on the charge herein.

The Kentucky Supreme Court reviewed an analogous situation in *Thomas v. Commonwealth*, 95 S.W.3d 828 (Ky. 2003). Thomas entered a plea of guilty to a felony charge and asked to be referred to the felony diversion program in lieu of sentencing. Before the trial court could rule on the request, he was arrested on another charge and was in possession of a firearm. The court held that when Thomas entered a guilty plea to the earlier felony charge, "he acknowledged the fact of having committed a crime and accepted legal responsibility for a criminal act." *Id.* at 829. His "status as a 'convicted felon' was established, and all that remained was the imposition of a sentence." *Id.*

Any doubt concerning the issue was removed when the Kentucky Supreme Court held that a conviction “includes a plea of guilty accepted by the trial court or a jury’s or judge’s verdict of guilty. To the extent that *Thompson* reaches a contrary holding, it is overruled.” *St. Clair v. Commonwealth*, 140 S.W.3d 510, 570 (Ky. 2004). The use of the word “or” in the *St. Clair* case is a clear indication that a plea of guilty, once accepted by the trial court, is sufficient to cause a person to be classified as a convicted felon for purposes of being in violation of KRS 527.040. Towery’s possession of a handgun after entry of a guilty plea to a felony charge was, therefore, a crime pursuant to Kentucky Revised Statute (KRS) 527.040(1).

Towery’s third argument was that there was insufficient evidence for the grand jury to determine he should be indicted for the charge of possession of a handgun or firearm by a convicted felon. Indictments are not properly challenged on the grounds they are not supported by adequate evidence. *Costello v. United States*, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956). Indictments cannot be attacked because of insufficient evidence. *Russell v. Commonwealth*, 405 S.W.2d 683, 684. (Ky. 1966). See *also* Kentucky Rule of Criminal Procedure (RCr) 5.10 (“no indictment shall be quashed or judgment of conviction reversed on the ground that there was not sufficient evidence before the grand jury to support the indictment”). The trial court here was without authority to dismiss the indictment for what Towery termed lack of sufficient evidence. There was no error.

Towery’s final issue is his claim that the charge of possession of a firearm by a convicted felon should have been dismissed because when he entered a plea of guilty to the original felony in the McCracken Circuit Court, he was never informed he would not be allowed to possess a firearm. A guilty plea must be made voluntarily, it

must be reliable, and it must be made intelligently. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

Boykin does require a knowing, voluntary and intelligent waiver of all important constitutional rights. However, a knowing, voluntary and intelligent waiver does not necessarily include a requirement that the defendant be informed of every possible consequence and aspect of the guilty plea. A guilty plea that is brought about by a person's own free will is not less valid because he did not know all possible consequences of the plea and all possible alternative courses of action. To require such would lead to the absurd result that a person pleading guilty would need a course in criminal law and penology.

Turner v. Commonwealth, 647 S.W.2d 500, 500-501 (Ky.App. 1982).

We are not inclined to extend the *Boykin* requirements beyond the constitutional mandates already determined. We conclude that the fact that Towery's guilty plea in the McCracken Circuit Court had the consequence of making him a convicted felon who could not possess a firearm was a collateral consequence for which Towery need not have been informed in order to comply with the *Boykin* requirements.

See Turner, supra.

The judgment of the Graves Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Samuel N. Potter
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky
Frankfort, Kentucky

Bryan D. Morrow
Assistant Attorney General
Frankfort, Kentucky