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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000295-MR

BRANDON SEAN FIGHTMASTER APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 17-CR-00645

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: DIXON, KRAMER, AND J. LAMBERT, JUDGES.

LAMBERT, J., JUDGE: Brandon Fightmaster appeals from the Fayette Circuit Court's judgment following his conditional guilty plea to several offenses, including operating a motor vehicle under the influence of alcohol/drugs (DUI), fourth offense, aggravated. Fightmaster challenges the trial court's denial of his motion to suppress and his request for a suppression hearing. We vacate the

judgment of conviction and remand for further proceedings consistent with this opinion.

On December 1, 2017, Fightmaster entered a conditional guilty plea to DUI, fourth offense, along with other offenses unrelated to this appeal. His three prior DUI offenses occurred within the ten-year lookback period. Kentucky Revised Statutes (KRS) 189A.010(5); *Commonwealth v. Jackson,* 529 S.W.3d 739 (Ky. 2017).

He filed a motion to suppress his first DUI conviction used for enhancement purposes on the basis that his plea in that case was entered without counsel, without discussion of his *Boykin*[1] rights, and after being told he would be released from jail if he pled guilty. He was arrested on that charge on May 8, 2010, and he pled guilty at his arraignment (conducted via video from the jail) three days later. The court heard arguments on Fightmaster's motion, and after orally denying the motion to suppress and the request for a hearing, allowed Fightmaster to present testimony on avowal that he was never informed of his rights and that he was not offered an attorney. The court later entered a written order denying the motion. This appeal followed.

A trial court's findings of fact with respect to a suppression hearing are conclusive if supported by substantial evidence. *Commonwealth v. Lamberson*,

[1] *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) (holding that a waiver of a defendant's constitutional rights must be made on the record).

304 S.W.3d 72, 75-76 (Ky. App. 2010). Whether the trial court properly applied the law to the factual findings is reviewed *de novo*. *Anderson v. Commonwealth*, 352 S.W.3d 577, 583 (Ky. 2011) (citations omitted). No suppression hearing occurred in this case. A trial court's failure to hold a hearing on a motion to suppress evidence—the evidence here being Fightmaster's first DUI conviction—is "harmless error when there is no dispute as to the material or substantial facts involving the evidence for which suppression is sought." *Matlock v. Commonwealth*, 344 S.W.3d 138, 140 (Ky. App. 2011) (citing *Mills v. Commonwealth*, 996 S.W.2d 473, 481 (Ky. 1999)); Kentucky Rules of Criminal Procedure (RCr) 8.27.

"A judgment of conviction is entitled to some presumption of regularity." *Conklin v. Commonwealth*, 799 S.W.2d 582, 584 (Ky. 1990). Consequently, Kentucky courts have consistently held that defendants may not collaterally attack prior convictions being utilized for enhancement purposes under the persistent felony offender (PFO) or DUI statutory framework. *McGuire v. Commonwealth*, 885 S.W.2d 931 (Ky. 1994); *Webb v. Commonwealth*, 904 S.W.2d 226 (Ky. 1995); *Commonwealth v. Lamberson*, 304 S.W.3d 72 (Ky. App. 2010). Typically, defendants make arguments based on their *Boykin* rights. The courts have stated that defendants waive their *Boykin* violation claims by failing to challenge those prior convictions "at the first opportunity—in other words, before

the enhanced conviction is entered[.]" *Lamberson*, 304 S.W.3d at 77 (citing *Howard v. Commonwealth*, 777 S.W.2d 888, 889 (Ky. 1989)); *see also Commonwealth v. Hodges*, 984 S.W.2d 100 (Ky. 1998). Therefore, as the Commonwealth argues here, Fightmaster cannot now challenge the validity of his first DUI conviction because it must be made "before the prior offense is successfully used to enhance a conviction." *Lamberson*, 304 S.W.3d at 78.

However, the United States Supreme Court has carved out an exception to this general rule due to the unique constitutional nature of the right to counsel. *Custis v. United States*, 511 U.S. 485, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994).[2] Pursuant to *Custis*, the admission of a prior criminal conviction that raises a presumption that the defendant was denied his right to counsel "is inherently prejudicial and to permit use of such a tainted prior conviction for sentence enhancement would undermine the principle of *Gideon*."[3] 511 U.S. at 495, 114 S.Ct. at 1738 (citing *Burgett v. Texas*, 389 U.S. 109, 115, 88 S.Ct. 258, 262, 19 L.Ed.2d 319 (1967)). Thus, Kentucky courts are not required to conduct preliminary hearings to assess the constitutionality of convictions utilized for PFO

[2] The Court, quoting *Powell v. Alabama*, 287 U.S. 45, 68-69, 53 S.Ct. 55, 64, 77 L.Ed. 158 (1932), reiterated its long-held view that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." (Internal quotations omitted.)

[3] *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963) (holding that the Sixth Amendment requires that counsel be appointed for indigent defendants or validly waived by the defendant).

enhancement purposes unless a complete denial of counsel in the prior proceeding(s) is claimed. *McGuire*, 885 S.W.2d at 937 (citing *Custis*, 511 U.S. at 489, 114 S.Ct. at 1735). *Commonwealth v. Fugate*, 527 S.W.3d 43, 46 (Ky. 2017), makes applicable that same exception to DUI enhancement cases.

However, in *Fugate*, the Supreme Court determined that although Fugate made the claim of "complete denial of counsel" in his appeal, he failed to make that claim at the trial court. His suppression motion only contained "oblique, unsworn allusions to not having counsel or knowing about that right" to bolster his *Boykin* argument, which does not "equate with claiming squarely a complete denial of counsel." *Id.* at 47. For that reason, the Supreme Court held that Fugate failed to properly preserve his argument that he was completely denied counsel and did not consider the claim. *Id.* at 48.

Here, the trial court ruled as a matter of law that Fightmaster cannot collaterally attack his first DUI conviction after failing to raise any challenge upon his second and third DUI convictions, and thus, Fightmaster was not entitled to a hearing. But Fightmaster explicitly claimed "complete denial of counsel" both in his suppression motion and during argument before the trial court on that motion, although executed unartfully. The trial court erroneously found that "these circumstances do not equate to a complete denial of counsel." The trial court thereby made a factual finding without conducting an evidentiary hearing, making

it impossible for this Court to properly review this matter on appeal. Additionally, the trial court ignored *Fugate*'s actual holding in failing to find that Fightmaster only needs to make a claim of complete denial of counsel to be afforded a suppression hearing. By making an erroneous finding as to whether Fightmaster was completely denied counsel, it is clear to this Court that Fightmaster did, in fact, raise such a claim before the trial court.

Although the merits of Fightmaster's claim are not before this Court for a determination, based on the limited information presented as to what occurred at the arraignment for his first DUI conviction, Fightmaster certainly makes sufficient allegations of a complete denial of counsel to warrant an evidentiary hearing on the matter. Regardless, Fightmaster has made the requisite claim, contrary to the circumstances in *Fugate*, and a complete evidentiary hearing is necessary to determine whether Fightmaster was given the opportunity to seek the assistance of counsel or have counsel appointed for him if indigent. If the facts as Fightmaster asserts them can be proven, then his first conviction could not be used as an enhancement in this case. Therefore, denying Fightmaster's request for a suppression hearing was not harmless error.

For the foregoing reasons, we vacate the Fayette Circuit Court's judgment of conviction entered December 1, 2017, and remand for further proceedings consistent with this opinion.

ALL CONCUR.

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