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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001487-MR

MICHAEL J. HIGGS APPELLANT

v. APPEAL FROM LYON CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NO. 15-CR-00088

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: ACREE, JONES AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: Michael J. Higgs appeals from those portions of a judgment of the Lyon Circuit Court convicting him of two counts of possession of a firearm by a convicted felon and one count of use of a weapon of mass destruction in the third degree. We affirm in part, reverse in part, and remand the judgment of the Lyon Circuit Court for additional proceedings.

I. FACTUAL AND PROCEDURAL HISTORY

Until 2015, Higgs and his "spiritual wife"[1] lived a transient existence in the forests and mountains of the state of Oregon. In the summer of that year, the couple borrowed a vehicle and set out toward Alabama where they hoped to locate a relative of Higgs and acquire a seafaring vessel aboard which they would leave the United States forever. On August 6, 2015, while driving through Kentucky, Higgs made eye contact with Trooper T. J. Williams of the Kentucky State Police as they passed in traffic. According to Trooper Williams's testimony, Higgs had a noticeable emotional reaction upon making eye contact with him, which prompted Williams to conduct a records check on the license plate on Higgs's vehicle. Upon discovering that there was no insurance coverage on the vehicle, Williams initiated a traffic stop.

Williams testified that because Higgs's vehicle had a camper top which obstructed the trooper's view, he requested that Higgs exit his vehicle and stand between his vehicle and the police cruiser. After speaking with Higgs, Williams approached Higgs's vehicle to speak with the passenger. As he neared the open window, Williams noticed a glass pipe of the kind commonly used to smoke illicit substances, in plain view near the gearshift. When asked, the

[1] Higgs referred to this woman as his wife throughout the proceedings but confirmed during his trial testimony that he and the woman were not legally married.

passenger admitted to having "dab" (concentrated marijuana wax) in her purse. A search of the purse led to the discovery of live ammunition. The passenger thereafter admitted there was a rifle buried under the couple's belongings somewhere in the car's back seat.

Other troopers arrived on the scene and assisted Williams in searching the vehicle. The search of the passenger compartment yielded more ammunition (of two different types), the rifle referenced by Higgs's companion, and a handgun hidden in the center console. A search of the trunk revealed an improvised explosive device, which a bomb technician later described as a shrapnel bomb capable of inflicting serious physical injury to anyone within fifty feet of the blast.

Upon discovery of the device, the vehicle search was halted until the KSP Hazardous Material Unit arrived to disable it. Higgs was arrested and subsequently indicted by the grand jury on the following charges: being a convicted felon in possession of a firearm; being a convicted felon in possession of a handgun; use of a weapon of mass destruction in the third degree; possession of marijuana; possession of drug paraphernalia; driving without an operator's license; and driving without insurance.

Higgs filed a pretrial motion to suppress the evidence obtained as a result of the traffic stop, which the trial court denied after a hearing. At trial, Higgs's testimony in his own defense commenced with a refusal, apparently on

religious grounds, to swear to the truth of his forthcoming testimony. After some discussion with the trial judge, Higgs ultimately affirmed that he would tell the truth. Higgs's subsequent testimony included statements that the car had been given to him by someone else to facilitate his journey and that because other people had loaded the vehicle for him, he was unaware of the presence of the explosive device. Higgs also testified that the firearms belonged to his companion and insisted that all the law enforcement witnesses had been lying during their testimony.

Although the Commonwealth agreed to Higgs's pretrial stipulation to a felony conviction and agreed that the nature of his prior convictions would not be made known to the jury, the trial court allowed the Commonwealth to specifically reserve the right to use the evidence for impeachment and rebuttal purposes if necessary. Higgs stipulated during the Commonwealth's case-in-chief that he had felony convictions from Oregon, although the nature of these convictions was not revealed at that time. During cross-examination, Higgs stated his belief that the plain language of the Second Amendment and the Supremacy Clause of the United States Constitution precluded state legislatures from restricting gun ownership in any way.

The Commonwealth then asked several questions concerning Higgs's knowledge that it was illegal for a convicted felon to possess a firearm. The

Commonwealth specifically asked Higgs whether he knew he could not possess a firearm and Higgs responded in the negative. When the Commonwealth asked follow-up questions to clarify, Higgs ignored multiple admonitions from the trial court to answer the questions posed to him, instead offering his own interpretation of the Second Amendment. Eventually, when asked a final time whether he believed the law prohibited felons from possessing firearms, Higgs responded, "No, I do not." After a bench conference, the trial court agreed with the Commonwealth that Higgs had opened the door to impeachment evidence and allowed the Commonwealth to ask him whether any of his prior Oregon felony convictions were for being a felon in possession of firearms. Although Higgs initially protested that he could not be asked that question, he eventually conceded the Commonwealth's assertion was true. Higgs also admitted that, at the time of the traffic stop, the guns had been in close proximity to him in the vehicle, but insisted they belonged to his companion for self-protection.

At the close of evidence, the trial court denied Higgs's motions for a directed verdict on the lesser felon-in-possession of a firearm charge and the weapon of mass destruction charge. Thereafter, the jury voted to convict Higgs on all charges and recommended concurrent ten-year prison sentences for the handgun possession and weapon of mass destruction charges, and one year on the firearm

possession charge also to be served concurrently.[2] The trial court sentenced him accordingly.

This appeal followed as a matter of right.

II. ANALYSIS

A. THE TRIAL COURT ERRED IN DENYING HIGGS'S MOTION FOR DIRECTED VERDICT CONCERNING THE POSSESSION OF A FIREARM CHARGE

Higgs was charged with and convicted of possession of a handgun by a convicted felon and possession of a firearm by a convicted felon even though the handgun and the rifle were discovered during a single traffic stop. He argues that his convictions violate the double jeopardy clause.

Under federal and state constitutional law, the same course of conduct cannot be punished as two separate offenses unless those two offenses pass the "same elements test" set forth in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The test is "whether each offense contains an element not contained in the other; if not, they are the 'same offence' [sic] and double jeopardy bars additional punishment and successive prosecution." *Clark v. Commonwealth*, 267 S.W.3d 668, 675 (Ky. 2008) (quoting *United States v. Dixon*, 509 U.S. 688, 696, 113 S.Ct. 2849, 2856, 125 L.Ed.2d 556 (1993)). Double

[2] The jury did not deliberate on the penalties for the misdemeanor charges.

jeopardy prohibits the Commonwealth from carving multiple offenses out of one criminal episode. *Id.* at 678.

In *Hinchey v. Commonwealth*, 432 S.W.3d 710, 711-12 (Ky.App. 2014), our Court held that double jeopardy and Kentucky Revised Statutes (KRS) 505.020(1)(c) "prohibit [a defendant's] conviction for multiple counts of possession of a handgun by a convicted felon which arise from a single course of conduct." Later, we reaffirmed that reasoning in *Wadlington v. Commonwealth*, 2013-CA-001522-MR, 2015 WL 3533266, 3 (Ky.App. 2015) (unpublished).[3] Although *Hinchey* involved two weapons of different classes, one handgun and rifle, cases since *Hinchey* hold that such a distinction does not matter for double jeopardy purposes.

In *Thornton v. Commonwealth*, 2013-CA-002131-MR, 2015 WL 865448, 5 (Ky.App. 2015) (unpublished), this Court held that the defendant could not be convicted of three counts of being a felon in possession of a handgun and one count of being a felon in possession of a firearm, where the firearms were seized during a single search. We held that for purposes of a double jeopardy analysis, possession of a firearm is no different than possession of a handgun. As noted, possession a firearm by a convicted felon is complete "when a convicted felon possesses a firearm." *Id*. We explained: "[A]ll handguns are firearms, but

[3] We cite to unpublished cases pursuant to Kentucky Rules of Civil Procedure 76.28(4)(c).

not all firearms are handguns. Because a handgun can be a firearm, both statutes do not require proof of an additional fact which the other does not; therefore, double jeopardy is violated." *Id.* The distinction of a handgun from other firearms is only an element for purposes of enhancement of the punishment, not the crime. *Id*.

More recently, in *Miracle v. Commonwealth*, 2016-CA-001620-MR, 2018 WL 3202821 (Ky.App. 2018) (unpublished), the defendant was convicted of possession of a handgun by a convicted felon and possession of a firearm by a convicted felon after the defendant was found with two rifles and a handgun inside a duffle bag in his possession. The Commonwealth argued *Hinchey* was wrongly decided. This Court declined to proceed *en banc* and overrule *Hinchey* stating that *Hinchey* "was correctly decided and that [the defendant] should only have been convicted of one possession charge rather than both." *Id*. at 6.

Our Court has had ample opportunity to consider the Commonwealth's persistent argument that *Blockburger* does not prohibit separate counts in cases where a felon possesses multiple firearms and has rejected that argument. Higgs's possession of the firearms in this case constituted the same offense and a single crime. Our position has been consistent. Under *Hinchey,* Higgs could not be convicted of possession of a handgun by a convicted felon and possession of a firearm by a convicted felon based solely on the single traffic stop.

Nevertheless, with respect to the total sentence Higgs was ordered to serve, the trial court's error was harmless. Kentucky Rules of Criminal Procedure (RCr) 9.24 defines harmless error:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order, or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order unless it appears to the court that the denial of such relief would be inconsistent with substantial justice. **The court at every stage of the proceeding must disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.**

(Emphasis added.)

Here, the trial court imposed a concurrent ten-year prison sentence upon Higgs's conviction of the handgun possession and weapon of mass destruction charges and a one-year sentence on the firearm possession charge, also to be served concurrently. Because Higgs received a total of ten-years' imprisonment for all his crimes, we are persuaded that the error of convicting him of two counts, instead of the proper single count, of possession of a firearm by a convicted felon neither adversely affected his substantial rights nor constituted a miscarriage of justice. However, because we are reversing Higgs's felon-in-possession of a firearm conviction on a different basis, upon remand the trial court will have an opportunity to correct the error.

B. THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTION TO IMPEACH HIGGS DURING CROSS-EXAMINATION

Higgs next asserts that the trial court erred in permitting the Commonwealth to introduce the specifics of his prior convictions as impeachment evidence. Higgs filed a notice pursuant to *Anderson v. Common*wealth, 281 S.W.3d 761 (Ky. 2009), stipulating that he was a convicted felon. The Commonwealth agreed to the stipulation but reserved the right to introduce evidence of Higgs's prior felonies for impeachment purposes. In *Anderson*, our Supreme Court adopted the holding of the Supreme Court of the United States in *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), noting that *Old Chief* had previously been adopted by a majority of the other states considering the effect of a defendant's stipulation to a felony. The Kentucky Supreme Court specifically held that:

> [U]pon request, a criminal defendant charged with being a felon in possession of a firearm may stipulate (with the Commonwealth's agreement) or admit (if the Commonwealth does not agree) that the defendant has been previously convicted of a felony. Such a stipulation or admission would mean that the jury would simply be informed that the defendant was a convicted felon, for purposes of the felon in possession of a firearm charge, **but would not be informed of the specifics of the defendant's previous felony conviction(s).**

Anderson, 281 S.W.3d at 766 (emphasis added). Despite its agreement that it would not introduce the details of Higgs's prior convictions until the penalty phase,

the Commonwealth did just that under the guise of impeachment in cross-examining Higgs.

In response to Higgs's contention, the Commonwealth argues that by denying having knowledge he could not possess a firearm and by rambling unresponsively about the Second Amendment, Higgs "opened the door" to the introduction of evidence of his two prior Oregon convictions for possession of a firearm by a convicted felon. We are not so persuaded.

In response to the Commonwealth's question "you know you can't have a firearm, correct?" Higgs said "no" and thereafter became belligerent and unresponsive. It was at that point that the prosecutor proceeded to ask Higgs about his two prior convictions for being a felon in possession of a firearm. The Commonwealth argues that in light of Higgs's answers to its questions concerning his right to be in possession of a firearm, the trial court properly allowed that line of questioning under the authority of *Commonwealth v. Richardson*, 674 S.W.2d 515, 517-18 (Ky. 1984) (emphasis added):

> In future cases, the rule will be construed essentially as in *Cowan* [*v. Commonwealth*, 407 S.W.2d 695, 698 (Ky. 1966)], so that a witness may be asked if he has been previously convicted of a felony. If his answer is "Yes," that is the end of it and the court shall thereupon admonish the jury that the admission by the witness of his prior conviction of a felony may be considered only as it affects his credibility as a witness, if it does so. **If the witness answers "No" to this question, he may**

> **then be impeached by the Commonwealth by the use of all prior convictions** . . . .

In our view, however, Higgs's testimony falls short of the unequivocal denial of a prior felony envisioned in *Richardson*.

Higgs did not deny he was a convicted felon; rather, he asserted his erroneous belief that the state could not enact legislation restricting his gun rights protected by the Second Amendment. We are convinced that the expression of that belief, even if rambling and unresponsive to questioning, did not open the door for the Commonwealth to disclose to the jury the details of his prior felony convictions.

Having concluded that the trial court erred in allowing the Commonwealth to impeach Higgs with evidence of his two prior convictions for being a felon in possession of a firearm, we turn to the harmless error analysis set out in *Anderson*:

> Merely concluding that the trial court erred by refusing Anderson's proposed stipulation does not end our inquiry, however, because "no error or defect in any ruling . . . is ground for granting a new trial or for setting aside a verdict . . . unless it appears to the court that the denial of such relief would be inconsistent with substantial justice."

Anderson, 281 S.W.3d at 766 (quoting RCr 9.24). Unlike the outcome in *Anderson*, we are convinced that permitting the jury to hear evidence that Higgs

had two prior felony convictions *for the same offense with which he was charged* in this case was prejudicial and "inconsistent with substantial justice." RCr 9.24.

Thus, we conclude that there was a reasonable possibility that the jury's knowledge of Higgs's two prior convictions for being a felon in possession of a firearm impacted its deliberations and contributed not only to his conviction for the identical charge in this case, but also in receiving the maximum penalty for that charge. Accordingly, the improper introduction of that evidence requires reversal and remand for a new trial.

C. THE TRIAL COURT ERRED IN DENYING HIGGS'S MOTION FOR DIRECTED VERDICT ON THE CHARGE OF USE OF A WEAPON OF MASS DESTRUCTION IN THE THIRD DEGREE

KRS 527.210(1) provides in pertinent part that "a person is guilty of **use** of a weapon of mass destruction in the third degree when intentionally, without lawful authority, he or she **places** a weapon of mass destruction at any location in the Commonwealth." (Emphasis added.) A "weapon of mass destruction" is defined by KRS 500.080(18) as "[a]ny destructive device as defined in KRS 237.030, but not fireworks as defined in KRS 227.700." The offenses relating to use of a weapon of mass destruction set out in KRS Chapter 527 have been the subject of scant analysis in the jurisprudence of our Commonwealth, with only one reported case, *Biederman v. Commonwealth*, 434 S.W.3d 40 (Ky. 2014), discussing the related offense of use of a weapon of mass destruction in the second

degree proscribed by KRS 527.205. In *Biederman*, the Supreme Court held that for double jeopardy analysis, second degree use of a weapon of mass destruction is a separate offense when combined with an attempted murder charge. Thus, Higgs's argument that he was entitled to a directed verdict of acquittal on the charge of use of a weapon of mass destruction in the third degree appears to be a case of first impression in this Commonwealth.

Higgs's contention that he was entitled to a directed verdict is predicated upon the phrase "*places* a weapon of mass destruction at any location in the Commonwealth." (emphasis added.) Because the word "places" is not defined in the statutory scheme proscribing use of a weapon of mass destruction, Higgs correctly posits that KRS 446.080(4) guides the court in determining legislative intent: "[a]ll words and phrases shall be construed according to the common and approved usage of language . . . ."

In according the word "place" it's plain and ordinary meaning, Higgs relies upon the definition of that term set out in the Merriam-Webster online dictionary: "to put in . . . a particular place or position; Set" or "to put in a particular state" or "to direct to a desired spot."[4] In other words, Higgs maintains that the statute clearly differentiates between merely "possessing" a weapon of

[4] https://www.merriam-webster.com/dictionary/place?src=search-dict-hed

mass destruction and *use* of a weapon of mass destruction by intentionally "placing" it.

In support of this contention, Higgs cites KRS 237.040, criminalizing the possession, transportation, or manufacture of destructive devices, arguing that KRS 237.040 proscribes different behavior than KRS 527.210. If the statutes do not proscribe distinct conduct, one of the two provisions must be construed to be redundant.

In *Shawnee Telecom Res., Inc. v. Brown*, 354 S.W.3d 542 (Ky. 2011), the Supreme Court of Kentucky reiterated the fundamental principle that in construing a statute, the goal of the judiciary is "to give effect to the intent of the General Assembly" and that courts:

> derive that intent, if at all possible, from the language the General Assembly chose, either as defined by the General Assembly or as generally understood in the context of the matter under consideration. We presume that the General Assembly intended for the statute to be construed as a whole, for all of its parts to have meaning, and **for it to harmonize with related statutes**.

Id. at 551 (emphasis added.)

We agree with Higgs that the General Assembly intended to differentiate between the offense of "possession, transportation, and manufacture" of a weapon of mass destruction and the offense of "use" of a weapon of mass destruction. If it were otherwise, KRS 237.040 and KRS 527.210 would

impermissibly criminalize identical behavior and assign different penalties for the same conduct. The requisite differentiation in the intent of the two statutes is found in the language proscribing *placement* of such devices in KRS 527.210, which has no parallel in KRS 237.040. To that end, we accept Higgs's definition of the word "places" contained in KRS 527.210. We emphasize, however, that we do not intend the phrase "to put in . . . a particular place or position" to necessarily connote an immobile location so as to preclude prosecution for the intentional placement of such a device within a vehicle for the purpose of using the vehicle itself as a mobile weapon, such as occurred in the infamous Oklahoma City bombing in 1995.

Having established the definition of "places" as used in KRS 527.210, we turn to an analysis of Higgs's motion for a directed verdict in light of the evidence adduced at trial. In reviewing the denial of a directed verdict motion, we must determine whether "under the evidence taken as a whole, it would be clearly unreasonable" for a jury to find guilt. *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). Even contradicted proof is sufficient to support a conviction if the fact-finder assigns it sufficient weight. *Commonwealth v. Suttles*, 80 S.W.3d 424, 426 (Ky. 2002).

Although Higgs insisted that he had no knowledge of the bomb and had not loaded the car himself, Higgs admitted knowingly and intentionally

crossing into the territorial boundaries of the Commonwealth with the device in his vehicle. However, drawing all inferences permitted by the evidence in favor of the prosecution, we are convinced that the Commonwealth's case fell short of establishing an essential element of the offense charged – *placement.* Law enforcement officers testified that the bomb was found buried under the couple's luggage in the trunk of the vehicle. Importantly, Higgs testified that he was merely passing through Kentucky on the way to Alabama. While Higgs may have possessed or transported the device, there is no specific evidence to support an inference that he *placed* or *used* it within the Commonwealth of Kentucky.

The Commonwealth bears the burden of proving each element of an offense beyond a reasonable doubt. *Quisenberry v. Commonwealth*, 336 S.W.3d 19, 34 (Ky. 2011). Upon a challenge to the denial of a properly preserved directed verdict motion, the standard of review is "whether, viewing the evidence in the light most favorable to the Commonwealth, any rational juror could have found all the elements of the crime." *Id*. at 35. Because we are convinced that there was no evidence on the essential element that Higgs intentionally *placed* the explosive device "anywhere within the Commonwealth," the trial court improperly denied Higgs's motion as to the weapon of mass destruction charge.

In the well written dissent, it is pointed out that when Higgs drove into Kentucky he "placed" the weapon of mass destruction in this Commonwealth.

While the dissent criticizes the majority definition of "place" too narrowly, we cannot define "place" the same as "transport." Doing so would make the same behavior a crime but subject to two different penalties. While KRS 527.210 makes it a Class C felony to take the affirmative step of placing a weapon of mass destruction in the Commonwealth, KRS 237.040 makes it a crime to possess, manufacture, or transport such substance or device with "intent to use" that device or knowledge that some other person intends to use that device. The statute continues and states that "[m]ere possession without substantial evidence of the requisite intent is insufficient to bring action under KRS 237.030 to 237.050." That crime is a Class D felony. KRS 237.990. Given the wide-spread damage these weapons can cause, it would seem prudent to make mere possession a crime, rather than the added element of intent. However, that prudence must be exercised by the legislature and cannot be reached by a strained reading of KRS 527.210.

D. THE TRIAL COURT PROPERLY DENIED HIGGS'S MOTION TO SUPPRESS THE RESULTS OF THE SEARCH OF HIS VEHICLE

Higgs's final argument is that the trial court erred in denying his motion to suppress the fruits of the search of his vehicle during the traffic stop, contending that Williams lacked probable cause to search the vehicle without a warrant.

Appellate review of a trial court's denial of a motion to suppress involves a two-step analysis. First, we examine the trial court's findings of fact for

clear error, followed by a *de novo* review of the trial court's application of the law to those facts. *Davis v. Commonwealth*, 484 S.W.3d 288, 290 (Ky. 2016). Because the trial court's factual findings are not in dispute, our review focuses on its application of the law to the facts. Accordingly, we review that application *de novo*.

"As long as an officer 'has probable cause to believe a civil traffic violation has occurred, [he] may stop [the] vehicle regardless of his or her subjective motivation in doing so.'" *Commonwealth v. Bucalo*, 422 S.W.3d 253, 258 (Ky. 2013) (quoting *Wilson v. Commonwealth*, 37 S.W.3d 745,749 (Ky. 2001)). However, the officer may not detain the vehicle and its occupants for longer than it takes to effectuate the purpose of the initial stop, unless something occurs during the stop which gives rise to a reasonable and articulable suspicion that other criminal activity is ongoing. *Davis*, 484 S.W.3d at 292.

The testimony at the suppression hearing indicated that the initial traffic stop was precipitated by Trooper Williams having conducted a records check on Higgs's license plate on the basis of Higgs's reaction to making eye contact with him. The records check disclosed that the vehicle was uninsured. After speaking with Higgs about the insurance issue, Williams approached the car to speak with the passenger. As he neared the vehicle, Trooper Williams smelled a faint odor of marijuana and observed a glass pipe in plain view, which Higgs

admitted was of the same kind typically used to smoke marijuana. Trooper Williams then asked the passenger whether there was any marijuana in the car. When the passenger answered that she had "dab" in her purse, Williams's search of her purse led to the discovery of handgun ammunition. When Williams asked the passenger if there were any guns in the car, she stated that there was a rifle in the back seat, allowing Williams to reasonably infer that there could be another weapon concealed somewhere in the vehicle. The discovery of the firearm led to a further search of the vehicle for weapons and, ultimately, the discovery of the explosive device.

In arguing that the stop was illegal, Higgs contends that Williams unlawfully extended the stop in approaching the vehicle to speak with the passenger instead of immediately issuing a citation and allowing the couple to be on their way. Higgs insists that Williams had no need to speak with the passenger at all after confirming from Higgs that the vehicle was, in fact, uninsured.

We are persuaded, however, that Higgs's position ignores the larger context of the situation: 1) Trooper Williams observed Higgs to appear to have an unusual reaction to seeing a law enforcement officer; 2) upon a records check of the vehicle's license plate number, Trooper Williams discovered that it was uninsured; and 3) upon talking to Higgs, Trooper Williams learned that this vehicle was being driven by someone other than its registered owner and was thousands of

miles from its state of registration. Because the context of these facts could give rise to any number of reasonable and articulable suspicions of criminal behavior beyond the traffic violation, we cannot conclude the trial court erred in finding a lawful search and denying Higgs's motion to suppress the evidence obtained in that search.

III. CONCLUSION

We reverse the judgment convicting Higgs of two counts of being a felon in possession of a firearm and remand for a new trial on one count of felon in possession of a firearm. We also reverse the judgment of conviction for violation of KRS 527.210 and remand with directions to enter a judgment of acquittal as to that charge. The denial of the motion to suppress is affirmed.

JONES, JUDGE, CONCURS.

ACREE, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

ACREE, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur with the majority in its analysis and result in sections II.A and II.D. Respectfully, however, I dissent from the analysis and result reached in sections II.B. and II.C.

Regarding the former section, Higgs testified to his state of mind at the time he is alleged to have committed the crime of being a felon in possession of

a firearm. He said he was unaware it was a crime, *i.e.*, unaware he was breaking the law. This certainly opened the door to allow impeachment evidence that he previously committed this very crime. If he was unaware it was a crime then, he surely knew it was a crime the second time he committed it. Perhaps the law fooled him once and so shame on it; but fooled him a second time? Shame on him.

As for the latter section from which I dissent, the majority defines "place" too narrowly. When Higgs drove into this jurisdiction, he "placed" himself, his companion, his vehicle and all its contents, including the weapon of mass destruction, in the Commonwealth of Kentucky. Would it have been better if the legislature had defined the word "places," or clearer if it had used the word "transport"? Of course, but it also would have been better if the three statutes relating to WMDs had not been pigeon-holed in the subsection of Chapter 527 labeled "Minors and Juveniles" as though adults could not be tried for the crimes.

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