

RENDERED: October 25, 1996; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 95-CA-2275-MR

ROBERT FOLEY

APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 95-CI-258

FLOYD BRUMMETT
and LONNIE OWENS

APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: COMBS, GUIDUGLI, and KNOPF, Judges.

KNOPF, JUDGE: This is an appeal from an order dismissing a claim for trespass because the lawfulness of the entry had been adjudicated in a prior criminal action. Finding no error, we affirm.

According to his complaint, the appellant, Robert Foley, purchased property in Laurel County, Kentucky for \$2,500.00 and placed the deed in the name of his father, John D. Foley. The deed was recorded in Laurel County on June 22, 1990, in John D. Foley's name. The appellant states that he then

purchased the property back from his father, but that deed was not recorded.

In October 1991, as part of a murder investigation, the Laurel County Sherriff's Department received information that several bodies were on the property. Following a search of the property, four (4) bodies were found and the appellant was arrested. At his criminal trial, he contested the lawfulness of the search. However, the trial court found that the search was proper and the evidence was admissible. Foley was subsequently convicted for the murders.

Foley then brought a civil action against Laurel County Sheriff Floyd Brummett and Deputy Sheriff Lonnie Owens, alleging trespass and violation of his constitutional rights. Brummett and Owens moved to dismiss on the grounds that Foley is precluded from relitigating matters which were decided at his criminal trial. The trial court agreed, and also found that Foley lacked standing to recover for trespass since he is not the owner of record of the property. Foley now brings this appeal.

On the standing question, we agree with Foley that an action for trespass under KRS 381.230 does not require him to show record title. KRS 381.231 defines an owner of real estate as "any person who possesses any interest in real estate or any lawful occupant of real estate". (Emphasis added) Similarly, Foley need not establish ownership of the property searched to contest the legality of the search. See, Rawlings v. Kentucky,

448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980). Nonetheless, the trial court correctly found that Foley is precluded from relitigating the issue of the lawfulness of the search.

The requirements for the offensive use of collateral estoppel are: (1) a final decision on the merits; (2) identity of issues; (3) issues actually litigated and determined; (4) a necessary issue; (5) a prior losing litigant; and (6) a full and fair opportunity to litigate. May v. Oldfield, 698 F. Supp. 124, 126 (E.D. Ky., 1988). The general rule is that a judgment in a former action operates as an estoppel only as to matters which were necessarily involved and determined in the former action, and is not conclusive as to matters which were immaterial or unessential to the determination of the prior action or which were not necessary to uphold the judgment. Sedley v. City of West Buechel, Ky., 461 S.W.2d 556, 558 (1970). The court must inquire whether the judgment was rendered under such conditions that the party against whom res judicata is pleaded had a realistically full and fair opportunity to present his case. Id. at 559.

In this case, Foley had a full and fair opportunity to challenge the lawfulness of the search at his criminal trial. Furthermore, Foley challenged the legality of the search on the same basis which he uses in this action. The gist of both the constitutional torts and the claim for trespass is that the appellees illegally entered onto the property. Since there has

been a prior adjudication that the search was lawful, Foley is now precluded from relitigating it in a subsequent action.

Foley also contends that since the issue of the legality of the search is currently on appeal, the trial court judgment is not final and thus cannot be used to preclude his civil claim. However, a criminal conviction can be used as collateral estoppel in a later civil action regardless of whether an appeal is taken. Roberts v. Wilcox, Ky. App., 805 S.W.2d 152 (1991). The pendency of Foley's original appeal does not render the criminal conviction non-final for purposes of this civil action.

Lastly, Foley contends that the trial judge was biased against him. After reviewing the record, we find no support for this argument. Judge Hopper's comments after the entry of the order of dismissal do not demonstrate a personal animosity toward Foley. At most, Judge Hopper's "off-hand comment" reflected his opinion of the legal merits of Foley's claim. Furthermore, we find no evidence that Foley was prejudiced by his inability to attend the hearing. By his own admission, the matter was scheduled on the court's motion docket, which did not require his attendance. The entire proceeding lasted only a minute and a half, during which Judge Hopper orally ruled on the appellee's written motion to dismiss. Since we found that the motion was properly granted on the merits, there is no indication that the result would have been different had Foley been able to attend.

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

ALL CONCUR.

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