

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001079-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 05-CR-001177

BRYAN T. LAMBERSON

APPELLEE

OPINION
VACATING AND REMANDING

** ** * ** * **

BEFORE: ACREE, KELLER AND LAMBERT, JUDGES.

ACREE, JUDGE: The Commonwealth of Kentucky appeals from an order of the Jefferson Circuit Court suppressing Bryan Lamberson's conviction for driving under the influence (DUI) first offense. Lamberson filed a suppression motion to prevent the Commonwealth from using his first conviction to enhance his current offense from a Class A misdemeanor to a Class D felony (DUI fourth offense). He argued that his first conviction could not be used for enhancement purposes because he pled guilty *in absentia* through his attorney. *Tipton v. Commonwealth*, 770 S.W.2d 239 (Ky.App.

1989). We vacate and remand for consideration of whether Lamberson's plea complied with Kentucky Rule of Criminal Procedure (RCr) 8.28(4).

Lamberson was convicted of DUI in 2000, 2001, and 2002, before being arrested and charged with DUI fourth offense in 2004. Prior to his scheduled trial date, he filed a motion requesting that the trial court suppress his first DUI conviction on the ground that he was in a residential treatment facility in Missouri on the date when his guilty plea was entered pursuant to RCr 8.28(4). In 2000, Lamberson's attorney had tendered a signed Boykin Order, enumerating his client's constitutional rights, as well as a signed DUI Guilty Plea Form which explained both his client's rights and the consequences of future DUI offenses. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

At the hearing, Lamberson acknowledged that these forms had been presented to the trial court accepting his guilty plea *in absentia*. However, he contended that the Bullitt District Court's failure to verify that his guilty plea was knowing and voluntary precluded the use of this plea to enhance subsequent DUI convictions pursuant to our decision in *Tipton*. The Commonwealth argued that *Tipton* did not apply because Lamberson knew his *Boykin* rights and, further, that Lamberson waived the right to contest the use of his first DUI to enhance subsequent offenses when he failed to raise the issue at the time of his second and third DUI convictions. The trial court disagreed and granted the motion to suppress. This appeal followed.

The trial court's order relied on the following language from our opinion in

Tipton:

This panel of the Court is of the opinion that a plea of guilty taken from someone other than the defendant does not comply with *Boykin, supra*. This is so, even in the light of RCr 8.28(4) permitting pleas in absentia. RCr 8.28(4) is discretionary, and we consider it an abuse of discretion to accept a plea of guilty in absentia for any offense, such as driving under the influence, for which an enhanced penalty may be imposed for subsequent convictions. The mandates of *Boykin* overshadow the procedural latitude that misdemeanors are granted in RCr 8.28(4).

Tipton, 770 S.W.2d at 242 (Ky.App. 1989). Due to the similarity between the facts in *Tipton* and Lamberson's situation, the trial court determined that our prior decision mandated suppression of the first DUI for enhancement purposes.

In 1989, when *Tipton* was rendered, the version of RCr 8.48(4) that was currently in force read, "In prosecutions for misdemeanors the court may permit arraignment, plea, trial and imposition of sentence in the defendant's absence." Thus, it was this language that our decision in *Tipton* sought to interpret. Subsequently, the Kentucky Supreme Court amended RCr 8.28(4) to add the following language:

However, no plea of guilty to a violation of KRS 189A or KRS 218A may be entered in the defendant's absence, unless the defendant first executes a written waiver of his or her right to be present.

Rule Change Order 94-1. Consequently, in so far as *Tipton* holds that it is always an abuse of discretion to accept a guilty plea to a misdemeanor DUI *in absentia*, we recognize that it is abrogated by the version of RCr 8.28(4) currently in force.

We note that Lamberson's first DUI conviction occurred after the amendment of RCr 8.28(4). Therefore, in the case at hand, the trial court was tasked with the duty to ascertain whether or not Lamberson had executed a written waiver of his right to be present when he entered his guilty plea *in absentia* to DUI first offense. The trial court's order does not contain any such finding, nor does the trial court address the effect of the rule's provision specifically permitting pleas *in absentia* to offenses under KRS 189A. Consequently, we must vacate the trial court's order and remand this case for further findings on the issue of whether Lamberson executed a written waiver of his right to be present when his guilty plea to DUI first offense was taken in 2000.

For the foregoing reason, the order of the Jefferson Circuit Court is vacated and this case is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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