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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000286-MR
AND
NO. 2008-CA-001309-MR

DERRICK D'KEITH AKINS

APPELLANT

v.

APPEALS FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NOS. 07-CR-00307 AND 07-CR-00302

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING AS TO THE FIRST APPEAL AND
VACATING AND REMANDING AS TO THE SECOND APPEAL

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; THOMPSON, JUDGE; HARRIS,¹ SENIOR JUDGE.

COMBS, CHIEF JUDGE: This case involves two appeals that are being heard

together by motion of the Commonwealth. The outcome of the first dictates the

fate of the second.

¹ Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Derrick D'Keith Akins appeals from the final judgment of the Hardin Circuit Court convicting him of carrying a concealed deadly weapon, possession of marijuana, and possession of a handgun by a convicted felon (Akins I). He was sentenced as a persistent felony offender (PFO). In a second appeal (Akins II), Akins challenges another conviction for possession of a handgun by a convicted felon and a separate PFO conviction. Although the Commonwealth has vigorously defended both appeals, it concedes that an affirmance of the first conviction would preclude Akins's subsequent conviction for possession of a handgun by a felon as a violation of the constitutional guarantee against double jeopardy. After carefully studying the arguments of counsel, we affirm the initial appeal (Akins I); because of the double jeopardy issue, we vacate and remand the conviction in Akins II.

Early on the morning of April 12, 2007, Detective Clinton Turner of the Elizabethtown Police Department was driving in an unmarked vehicle when he observed Akins travelling on foot alongside Valley Creek Road. Akins was dressed in dark pants and was wearing a dark, hooded jacket; he appeared to be hitchhiking. As Turner passed Akins, he noticed Sergeant Danny Kelly approaching from the opposite direction in a marked car. Turner indicated that as soon as Akins saw Kelly's vehicle, Akins left the road side, stepped onto the front lawn of a nearby residence, and picked up the resident's newspaper. Next, Akins climbed onto the front porch, opened the storm door, and began to knock frantically at the inside door. Akins kept his eyes on the police vehicles as he knocked.

Turner and Kelly indicated that their suspicions were aroused by this behavior. They turned into the driveway of the house and began to approach Akins. He jumped off the porch and made an attempt to run. When Kelly told Akins to stop, he did so. Akins immediately raised his arms and told Turner and Kelly: "You got me." As Kelly conducted a protective pat-down, he felt a handgun in the left, front pocket of Akins's jacket. Kelly alerted Turner, who immediately drew his revolver. They placed Akins on the ground on the lawn and handcuffed him. At that point, Turner recognized Akins and realized that he was subject to an outstanding arrest warrant.

Akins was eventually indicted on numerous charges, including carrying a concealed deadly weapon. Prior to trial, he moved the court to suppress evidence of the handgun as the product of an illegal search and seizure. Following a hearing, the trial court denied the motion.

During the first phase of the trial, the jury found Akins guilty of carrying a concealed deadly weapon and possession of marijuana. During the next phase of the proceeding, the jury found him guilty of being a convicted felon in possession of a firearm. During the final phase of the proceeding, the jury recommended that Akins be sentenced to serve more than fifteen-years' imprisonment.

In a separate proceeding, Akins was acquitted of charges of rape and kidnapping but was convicted on another charge of possession of a handgun by a convicted felon. These appeals followed.

In his first appeal (Akins I), Akins presents two arguments. First, he contends that the trial court erred by denying his motion to suppress the evidence against him since police lacked an articulable, reasonable suspicion to stop him. Next, he argues that the trial court erred by failing to order a mistrial based on testimony from Sergeant Kelly that Detective Turner had recognized Akins as being subject to an outstanding arrest warrant. We disagree with both contentions.

In his first argument, Akins complains that Detective Turner and Sergeant Kelly lacked a reasonable suspicion to stop him when they encountered him at Valley Creek Road. He contends that the trial court erred by denying his motion to suppress evidence of the handgun in his possession since it was recovered only as a result of the illegal frisk initiated by Turner and Kelly. The Commonwealth argues that Turner and Kelly had the right to stop Akins because they reasonably believed that he was engaged in criminal activity and that the detective and officer were entitled to frisk Akins since they thought he might be armed.

Akins contends that he was not subject to an ordinary investigatory stop on Valley Creek Road based on his behavior as observed by the police. We do not agree. His conduct on the porch itself under the circumstances furnished an articulable, reasonable suspicion that criminal activity might be afoot. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed2d 889 (1968). His reactions to the police – taking immediate, evasive flight upon seeing Kelly’s vehicle approach and then leaping from the porch as the two vehicles approached – also furnished reasonable,

articulable suspicion for the initial stop. The United States Supreme Court has held that the fact of flight at the mere sight of the police constitutes the reasonable suspicion required to justify a *Terry* stop:

Our cases have also recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion. Headlong flight – wherever it occurs – is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.

Illinois v. Wardlow, 528 U.S. 119, 124; (citations omitted) 120 S.Ct. 673, 676; 145 L.Ed.2d 570 (2000).

In addition, the existence of the warrant for his arrest removed any doubt as to the propriety of the arrest that followed. Since a court of the Commonwealth had ordered that Akins be arrested pursuant to its warrant wherever he was found, he lacks any basis to challenge the efforts of Turner and Kelly to make that arrest. *Birch v. Commonwealth*, 203 S.W.3d 156 (Ky.App. 2006). Akins had no liberty interest at stake and absolutely no reasonable expectation of privacy that would entitle him to be free from search and seizure once the police had been authorized by the courts to make his arrest. *Hardy v. Commonwealth*, 149 S.W.3d 433 (Ky.App. 2004). Turner and Kelly did not violate Akins's constitutional rights when they stopped and frisked him on the morning of April 12, 2007. Consequently, the court did not err by denying Akins's motion to suppress the evidence.

In his second argument, Akins contends that he was deprived of a fair trial when Sergeant Kelly testified before the jury that Detective Turner recognized Akins and advised him (Akins) that he was wanted on warrants. Akins argues that the trial court erred by denying his timely motion for a mistrial following the testimony.

The Commonwealth contends that Akins was not entitled to the extraordinary relief of a mistrial when a curative admonition would have been sufficient. The Commonwealth notes that Akins specifically and emphatically declined the trial court's offer to admonish the jury following Kelly's unsolicited comments.

As alluded to above, a mistrial is an extraordinary remedy. *Sherroan v. Commonwealth*, 142 S.W.3d 7 (Ky.2004). It should be used only when the record reveals a manifest necessity. *Greene v. Commonwealth*, 244 S.W.3d 128 (Ky.App.2008). This standard relies on the presumption that a trial court's admonition will cure a defect in testimony. *Sherroan, supra*. However, that presumption may be overcome where there is an overwhelming probability that the jury would be unable to follow the admonition *and* where there is a strong likelihood that the impermissible evidence would be devastating to the defendant. *Id.* If an admonition is offered by the court in response to a timely objection but is then rejected by the defendant as insufficient, the only question on appeal is whether the admonition would have cured the alleged error. *Graves v. Commonwealth*, 17 S.W.3d 858 (Ky.2000).

Sergeant Kelly's comments before the jury were neither complicated nor expansive. There is no indication that the jury would have been incapable of following a simple admonition by the court not to consider his testimony on this point during its deliberations. In addition in light of the totality of Akins's suspicious behavior giving rise to the investigatory stop, we are not persuaded that allusion to an outstanding warrant for his arrest was "devastating" to his defense. We conclude that the admonition offered by the court would have been sufficient to have cured any alleged error in Kelly's testimony. Therefore, there is no basis for a reversal of the judgment of conviction on this issue. We affirm as to the first appeal (Akins I).

With respect to the second appeal, Akins contends that his second indictment for possession of a handgun violated the bar against double jeopardy as his possession was not a new, separate offense but was rather part and parcel of an ongoing, uninterrupted course of conduct. The Commonwealth is correctly following the recent case of *Henry v. Commonwealth*, 275 S.W.3d 194, (Ky.2008), and it has candidly acknowledged the binding impact of that precedent. In *Henry* at 202, the Supreme Court of Kentucky reiterated and re-affirmed its reasoning in *Fulcher v. Commonwealth*, 149 S.W.3d 363, 376 (Ky.2004), as follows:

...uninterrupted possession of the same contraband over a period of time is but one offense constituting a continuing course of conduct, precluding convictions of multiple offenses for possession of the same contraband on different dates.

Therefore, we vacate the conviction in Akins II and remand to the Hardin Circuit Court with directions that it dismiss the indictment for possession of a handgun by a convicted felon and the PFO II resulting from that charge.

In his second appeal, Akins also challenges his conviction as a violation of his right to a speedy disposition pursuant to Kentucky Revised Statute(s) (KRS) 500.110. We decline to address that issue as it is moot based upon the vacating and remanding dictated by *Henry, supra*.

In summary, we affirm in Akins I and vacate and remand in Akins II for proceedings consistent with this opinion.

ALL CONCUR.

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