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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001909-DG

ERICK VEGA

APPELLANT

ON DISCRETIONARY REVIEW FROM FAYETTE CIRCUIT COURT
v. HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 10-XX-00025

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, KELLER, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Erick Vega appeals from the Fayette Circuit Court's order upholding the Fayette District Court's denial of his motion to suppress evidence obtained as a result of his arrest for carrying a concealed deadly weapon. Vega argues on appeal that the weapon was not concealed. After careful review of the record, we affirm.

On January 9, 2010, Vega's vehicle was stopped by Officer Thomas Perkins for operating with only one headlight and for not having the rear license plate illuminated. As Officer Perkins approached the driver side window of the vehicle to conduct the traffic stop, he shined his flashlight into the driver's side of the vehicle. Officer Perkins testified that his flashlight, spotlight, and overhead lights were operational and that his headlights were flashing at the time he approached Vega's vehicle. He testified that when he made contact with Vega, he did not see a gun in the car.

Shortly after the stop, Officer Bowles arrived on the scene as a backup officer. Officer Bowles testified that as he approached the vehicle and shined his flashlight into the front passenger window, he saw the barrel of a gun sticking out from underneath a toolbox on the passenger side of the vehicle. Officer Bowles testified that he observed that the toolbox was raised up on the right side of the seat, which is how he was able to view the gun sticking out from underneath the side of it. He testified that he immediately notified Officer Perkins of the gun's presence by making hand motions. Officer Bowles testified that he used hand motions to alert Officer Perkins for officer safety reasons so he did not alert Vega that he had noticed the gun.

Officer Perkins asked Vega to step out of the car because the firearm was within Vega's reach. Officer Perkins testified that he asked Vega why he did not alert him that he had a gun, and Vega responded, "did not think I needed to."

Both Officer Perkins and Officer Bowles testified that the gun was obscured from Officer Perkins' viewpoint from where he stood on the driver side of the vehicle.

Vega was arrested for carrying a concealed deadly weapon. In a search incident to arrest, the officers discovered a Lorcet pill in Vega's pocket. At the jail, Vega advised that he had another Lorcet pill and one-half of a Lortab in his shoe. As a result, Vega was also charged with possession of a controlled substance, second degree.

At the suppression hearing on March 8, 2010, the district court denied Vega's motion to suppress the gun and found that there was probable cause for the arrest. In light of this finding, Vega entered a conditional guilty plea to the charges pending against him. This matter was appealed to the Fayette Circuit Court, which affirmed the denial of the suppression motion by order entered on September 20, 2010. This Court granted discretionary review, and this appeal now follows.

Vega's only argument on appeal is that the firearm was not concealed, and as a result, his subsequent arrest for carrying a concealed deadly weapon was in error. Accordingly, because of the improper arrest, Vega argues that the fruits of the arrest, namely the drugs found on his person, should also be suppressed.

Kentucky Revised Statutes (KRS) 527.020 states that a person is guilty of carrying a concealed weapon when he or she carries concealed a firearm or other deadly weapon on or about his or her person. *Delk v. Commonwealth*, 344 S.W.2d 832 (Ky. 1961) states that "[t]he concealment must be such as to prevent persons from seeing the weapon whose vision is not obscured by the carrier's

person or by anything other than the covering used to conceal it.” Further, for the firearm to be concealed, the courts have previously held that the gun need not be so concealed that it requires a special effort or investigation to discover the presence of the weapon; it is sufficient that the gun was concealed to such a degree that it could not be observed by persons making contact with the Appellant in the course of regular daily activities. *See Avery v. Commonwealth*, 3 S.W.2d 624, 626 (Ky. 1928). In *Prince v. Commonwealth*, 277 S.W.2d 470, 472 (Ky. 1955), the court expressly held that the firearm must be open to “ordinary observation” to any individual who comes into contact in the ordinary course of business with the defendant in order to not be concealed.

In the present case, the gun was concealed beneath a toolbox in the passenger seat and was in no way open to inspection by individuals with whom Vega might come into contact in any regular activities. Officer Perkins testified that he did not see the gun even after approaching Vega and making contact with him. Officer Bowles testified that he was only able to see the gun because the toolbox was raised on one side and in fact was sitting unbalanced on top of the firearm itself. Based on that testimony, it is reasonable to conclude that a person Vega encountered in his ordinary daily life would not be able to view the gun unless they were immediately adjacent to the front passenger side window looking into the vehicle. Even then, the site of the barrel, only a very small portion of the gun, would have been visible and viewing the weapon would require special attention and care on the part of the observer to notice the gun’s presence. To be

sure, the firearm would not have been visible to persons whose vision was not obscured by anything other than the covering used to conceal the weapon, as the court's have explicitly required under *Delk, supra*, for a finding of concealment.

Vega argues that simply because Officer Bowles was able to see the gun by shining his flashlight into the vehicle, the firearm was not concealed. We disagree. In fact, a toolbox was sitting on top of the firearm and the only reason Officer Bowles observed it was because the toolbox was not balanced and was angled up on the right hand side. Had the gun simply been sitting on the passenger side seat of the vehicle without the toolbox covering it, we would agree with Vega that it arguably would not have been concealed. Had Vega notified the officers that he had a gun in the vehicle, the circumstances might also have been different.

Vega relies heavily on *Reid v. Commonwealth*, 184 S.W.2d 101 (Ky. 1944), but the facts and circumstances of that case are distinguishable from the present case. In *Reid*, the defendant had placed the gun in his belt, and although it was clearly in view, it was concealed from the specific angle from which the law enforcement officer had approached the defendant. *Id.* at 101-02. Any other individual from virtually any other viewpoint could have clearly seen the weapon possessed by the defendant in that case. *Id.* In contrast, Vega possessed a firearm that would have been visible only from a specific, solitary angle, and even then, only to individuals standing immediately adjacent to the passenger side window and peering carefully into the vehicle to identify such dangerous objects. Finally,

the fact that a weapon is visible from one particular point of view does not necessarily mean that it is not concealed.

Because we agree with the Commonwealth that Vega's firearm was a concealed deadly weapon, his arrest was proper and the fruits of the search incident to the arrest were not tainted. Accordingly, we affirm the Fayette Circuit Court's September 20, 2010, order upholding the Fayette District Court's denial of Vega's motion to suppress.

ALL CONCUR.

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