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Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001518-MR

KYLE SHEETS

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE MARTIN J. SHEEHAN, JUDGE
ACTION NO. 13-CR-00187

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION AFFIRMING

** ** * * * * *

BEFORE: J. LAMBERT, MAZE, AND NICKELL, JUDGES.

LAMBERT, J., JUDGE: Kyle Sheets appeals from the Kenton Circuit Court judgment of conviction and sentence of six years' imprisonment for Possession of a Firearm by a Convicted Felon. Kentucky Revised Statute (KRS) 527.040. We affirm.

Sheets was arrested after a search warrant (pursuant to another matter) was executed at his home in Elsmere, Kentucky. In the closet of the master

bedroom, Detective Dennis McCarty confiscated a High Point .45 caliber semi-automatic pistol. The firearm's magazine contained nine rounds, and the slide was pulled forward. Sheets, who was living at the house sporadically, acknowledged ownership of the handgun but claimed he was unaware that it remained on the premises. When McCarty ran a criminal records check on Sheets it revealed that Sheets was a convicted felon. McCarty charged Sheets with Possession of a Firearm by a Convicted Felon.

A jury trial was held on September 10, 2013. It was Sheets's defense that, although he readily admitted ownership of the gun, he was not in actual possession of it. Sheets claimed that, subsequent to his prior conviction (a factor which he also does not contest), he moved the gun to his father's house in Covington.¹ Both Sheets and his wife (Rhonda, who testified in his defense at the trial) denied knowledge that the gun was in their bedroom closet.

The circuit court instructed the jury on actual and constructive possession of the handgun. Sheets was convicted as charged and sentenced accordingly. He appeals.

The sole issue for our consideration concerns the instructions to the jury. Sheets argues that, by giving the instruction on constructive possession, the circuit court negated the defense. We disagree.

¹ Sheets did not testify, but Detective McCarthy testified about statements made by Sheets after the search warrant was executed.

KRS 527.040 describes, in pertinent part, the Commonwealth's

burden in proving its case against Sheets:

(1) A person is guilty of possession of a firearm by a convicted felon when he possesses, manufactures, or transports a firearm when he has been convicted of a felony, as defined by the laws of the jurisdiction in which he was convicted, in any state or federal court and has not:

(a) Been granted a full pardon by the Governor or by the President of the United States;

(b) Been granted relief by the United States Secretary of the Treasury pursuant to the Federal Gun Control Act of 1968, as amended.

(2) Possession of a firearm by a convicted felon is a Class D felony unless the firearm possessed is a handgun in which case it is a Class C felony.

Possession is defined in KRS 500.080(14): “‘Possession’ means to have actual physical possession **or otherwise to exercise actual dominion or control over a tangible object[.]**” (Emphasis added.)

In order to convict Appellant of the crime, “the Commonwealth had the burden of proving (1) that he had previously been convicted of a felony, and (2) that he possessed a firearm.” *Johnson v. Commonwealth*, 90 S.W.3d 39, 42 (Ky. 2003), *overruled on other grounds by McClanahan v. Commonwealth*, 308 S.W.3d 694 (Ky. 2010). “**Possession may be proven through either actual possession or constructive possession.**” *Johnson*, 90 S.W.3d at 42 (citing *United States v. Kitchen*, 57 F.3d 516, 520 (7th Cir.1995)).

Meyers v. Com., 381 S.W.3d 280, 284–85 (Ky. 2012) (emphasis added).

In the case before us, Sheets insisted that he did not possess the gun because he lacked knowledge of its presence in the closet. Because KRS 527.040 and KRS 500.080(14) do not speak of constructive possession *per se*, Sheets contends that the circuit court’s inclusion of such language in the jury instructions impermissibly expands the definition of possession beyond the legislative intent of the statute.

We cannot agree with this logic. We initially note that *Meyers, supra*, and *Johnson, supra*, Kentucky Supreme Court cases that affirmed convictions with proof of constructive possession, remain good law in this Commonwealth.

The case of *Deboy v. Commonwealth*, 214 S.W.3d 926, 929–30 (Ky. App. 2007) (which also quotes from *Johnson, supra*), affirmed a conviction where three handguns were found (one under the driver’s seat, one under the passenger seat, and one under a blanket in the back seat) in a vehicle operated by Deboy. Although Deboy claimed that there was “uncontroverted evidence . . . that he did not have . . . knowledge” that the handguns were in the car, the Court of Appeals held otherwise:

“[P]roof that a defendant has possession and control of a vehicle is evidence to support a conviction for constructive possession of contraband found within the vehicle.” *Burnett v. Commonwealth*, 31 S.W.3d 878, 880 (Ky. 2000), citing *Leavell v. Commonwealth*, 737 S.W.2d 695 (Ky. 1987). As noted in *Dixon v. Commonwealth*, 149 S.W.3d 426 (Ky. 2004), this is in accordance with

the general rule that “[t]he contents of an automobile are presumed to be those of one who operates it and is in charge of it, and this applies particularly where the operator is also the owner, as here.” *Id.* at 429, *quoting from Chambers v. State*, 162 Ga.App. 722, 293 S.E.2d 20, 21 (1982).

Here, the evidence was sufficient to support the conviction based on Deboy’s constructive possession of the handgun. Deboy was the owner and operator of the vehicle, and the handgun was found under the seat where he had been sitting. The trial court properly denied Deboy’s motion for a directed verdict.

Deboy at 930. Just as Deboy was presumed to know the contents of his automobile (or at least under his own seat), it was not improper for the circuit court in this appeal to instruct the jury that guilt of possession could be found if the Commonwealth proved that Sheets was aware of the gun’s presence in the home. The loaded gun was found in a closet that contained numerous other items belonging to Sheets, including but not limited to his clothing and his wallet containing a driver’s license that had only recently expired.

We also note that, even though Sheets and his wife disavowed awareness of the gun’s presence and testified that it was last known to be situated in another county, the jury was not required to believe that testimony. Sheets was not prevented from presenting his defense.

The judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

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