

# SUPREME COURT OF KENTUCKY

## Ordway v. Commonwealth

352 S.W.3d 584 (Ky. 2011) · No. 2009-SC-000479-MR · Decided September 22, 2011

### SUMMARY

The Supreme Court of Kentucky addressed collateral estoppel following the defendant's acquittal on a possession-of-a-handgun charge, concluding that the acquittal did not bar prosecution for robberies involving a firearm. The court also rejected the defendant's search challenge for lack of standing, but held that identical jury instructions for nine burglary counts constituted palpable error. One theft conviction was additionally vacated because the two stolen ATVs were taken in a single theft, while the judgment was otherwise affirmed.

### CASE DETAILS

|                       |                                                                                                                                                                                                                                                                                                               |
|-----------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of Kentucky                                                                                                                                                                                                                                                                                     |
| WRITING FOR THE COURT | Chief Justice Minton; Justice Noble; Justice Schroder; Justice Venters; Justice Abramson; Justice Cunningham; Justice Scott                                                                                                                                                                                   |
| JURISDICTION          | Kentucky                                                                                                                                                                                                                                                                                                      |
| DECIDED               | September 22, 2011                                                                                                                                                                                                                                                                                            |
| DOCKET                | 2009-SC-000479-MR                                                                                                                                                                                                                                                                                             |
| DISPOSITION           | reversed_and_remanded                                                                                                                                                                                                                                                                                         |
| PROCEDURAL POSTURE    | Ordway appealed as a matter of right from a Christian Circuit Court judgment entered after jury trials resulting in convictions for first-degree robbery, third-degree burglary, theft by unlawful taking over \$300, and receiving stolen property over \$300.                                               |
| STANDARD OF REVIEW    | The court reviewed collateral-estoppel and double-jeopardy issues as legal questions, reviewed the suppression ruling for whether the defendant established a legitimate expectation of privacy, reviewed the jury-instruction error for palpable error, and reviewed authentication for abuse of discretion. |
| PRECEDENTIAL VALUE    | published                                                                                                                                                                                                                                                                                                     |
| PARTIES               | Larry Ordway v. Commonwealth of Kentucky                                                                                                                                                                                                                                                                      |

### TOPICS

criminal procedure

double jeopardy

suppression of evidence

authentication

appellate procedure

## PRACTICE AREAS

criminal law

criminal procedure

appellate practice

evidence

## QUESTIONS PRESENTED

1. Whether Ordway's acquittal of possession of a handgun by a convicted felon collaterally estopped the Commonwealth from presenting evidence that he used or possessed a handgun during the charged robberies.
2. Whether Ordway had standing, through a legitimate expectation of privacy, to challenge the search of Turnley's apartment.
3. Whether identical jury instructions for nine separate third-degree burglary counts deprived Ordway of a unanimous verdict and constituted palpable error.
4. Whether convictions for two thefts based on the simultaneous taking of two ATVs violated double jeopardy.
5. Whether the Commonwealth sufficiently authenticated a letter allegedly written by Ordway.

## HOLDINGS

1. The acquittal established only that Ordway did not constructively possess the particular handgun found in Turnley's apartment during the specified period; it did not establish that he never possessed or used any gun during that period. The acquittal therefore did not bar prosecution for robbery or admission of relevant evidence that Ordway used a gun during the robberies, although the particular issue actually decided could not be relitigated.
2. Ordway could not challenge the search because he failed to establish a legitimate expectation of privacy in Turnley's apartment.
3. The trial court properly denied suppression; in addition to Ordway's failure to establish standing, the record supported the trial court's finding that the search was justified by consent.
4. Identical instructions that failed to distinguish the nine separate storage-unit burglaries were clearly erroneous and constituted palpable error because they potentially deprived Ordway of a unanimous verdict and an adequate appellate remedy. The nine burglary convictions were reversed.
5. Ordway could not be convicted of two thefts for simultaneously taking two ATVs from the same place; one theft conviction had to be vacated.
6. The trial court did not abuse its discretion in finding that the letter was sufficiently authenticated as having been written by Ordway.

## KEY QUOTATIONS

*"The jury did not—as Appellant contends—determine that he never possessed a gun during that time period."*  
(591)

*“This type of instruction is clearly erroneous.” (593)*

*“One of the theft convictions must be vacated for this reason.” (593)*

## FACTUAL BACKGROUND

Police investigated a series of robberies, burglaries, and thefts in Christian County during the summer of 2007. A search of Dawn Turnley's apartment produced a revolver, Ordway's wallet and identification, dark clothing, ammunition, tools, and other items; Turnley later implicated Ordway in the crimes. After Ordway was acquitted in a separate trial of possessing a handgun by a convicted felon, he was convicted in the subsequent trial of multiple robbery, burglary, theft, and receiving-stolen-property offenses.

## PROCEDURAL HISTORY

Ordway was first tried separately on a charge of possession of a handgun by a convicted felon and was acquitted. He was subsequently tried on the remaining robbery, burglary, theft, and related charges and was convicted of three robberies, ten burglaries, six thefts, and receiving stolen property. The Kentucky Supreme Court affirmed in part, reversed nine burglary convictions, vacated one theft conviction, and remanded.

## DISPOSITION

reversed\_and\_remanded

## REMAND INSTRUCTIONS

Remanded to the Christian Circuit Court for further proceedings consistent with the opinion after reversal of the nine Eagle Mini Storage burglary convictions and vacation of one theft-by-unlawful-taking-over-\$300 conviction.

## CASES CITED

- Ashe v. Swenson, 397 U.S. 436, 443-444 (1970)
- Benton v. Crittenden, 14 S.W.3d 1, 4-5 (Ky. 1999)
- Montana v. United States, 440 U.S. 147, 152 (1979)
- Sealfon v. United States, 332 U.S. 575, 579 (1948)
- Rice v. Marshall, 816 F.2d 1126, 1131-1132 (6th Cir. 1987)
- People v. Cornier, 42 Misc. 2d 963, 249 N.Y.S.2d 521, 527 (N.Y. Sup. Ct. 1964)
- Napier v. Jones By and Through Reynolds, 925 S.W.2d 193, 195-196 (Ky. App. 1996)
- Dowling v. United States, 493 U.S. 342, 348 (1990)
- Hampton v. Commonwealth, 133 S.W.3d 438, 442 (Ky. 2004)
- United States v. Sangineto-Miranda, 859 F.2d 1501, 1510 (6th Cir. 1988)
- Rawlings v. Kentucky, 448 U.S. 98, 104 (1980)
- Sussman v. Commonwealth, 610 S.W.2d 608, 611 (Ky. 1980)
- Combs v. Commonwealth, 341 S.W.2d 774, 775 (Ky. App. 1961)

- Bruner v. Commonwealth, 192 Ky. 386, 233 S.W. 795 (1921)
- Harp v. Commonwealth, 266 S.W.3d 813, 818 (Ky. 2008)
- Miller v. Commonwealth, 283 S.W.3d 690, 696 (Ky. 2009)
- Cardine v. Commonwealth, 283 S.W.3d 641, 652 (Ky. 2009)
- Jackson v. Commonwealth, 670 S.W.2d 828, 832 (Ky. 1984)
- Cooley v. Commonwealth, 821 S.W.2d 90 (Ky. 1991)
- Fair v. Commonwealth, 652 S.W.2d 864, 867 (Ky. 1983)
- Sanders v. Commonwealth, 301 S.W.3d 497, 501 (Ky. 2010)
- Johnson v. Commonwealth, 134 S.W.3d 563, 566-567 (Ky. 2004)
- Bell v. Commonwealth, 245 S.W.3d 738, 744 (Ky. 2008)

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