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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court Of Appeals

NO. 2002-CA-001515-MR

GAYLON LEE BETAR

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
INDICTMENT NO. 02-CR-00050

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

REVERSING AND REMANDING

** ** * * *

BEFORE: EMBERTON, Chief Judge; McANULTY, Judge; and HUDDLESTON, Senior Judge.¹

HUDDLESTON, Judge: Gaylon Lee Betar appeals from a judgment sentencing him to ten years' imprisonment following his conditional plea of guilty to the charges of facilitation to

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Ky. Rev. Stat. (KRS) 21.580.

manufacture methamphetamine, being a persistent felony offender in the second degree and possession of drug paraphernalia. At issue on appeal is the legality of the search of the automobile Betar had been operating prior to his arrest for driving on a suspended operator's license, an arrest which Betar has not challenged. Rather, Betar argues that the search of the vehicle exceeded what is permissible under the automobile or incident to arrest exceptions to the warrant requirement of the Fourth Amendment to the Constitution of the United States and Section 10 of the Kentucky Constitution. Betar also challenges the constitutionality of Kentucky Revised Statutes (KRS) 218A.1432.

On February 26, 2002, Betar was shopping at a Wal-Mart store in Greenville. A Wal-Mart employee contacted the Greenville Police Department to report that a customer (Betar) had purchased some aquarium tubing and had either looked at or purchased some batteries,² and had inquired about how to get to a Radio Shack store.

Officers Scott Bivens and Tommy Nantz responded to the call, finding a Ford station wagon with a license plate matching the description from the Wal-Mart employee parked in front of

² Whether the police were told that Betar purchased batteries, or merely looked at batteries, is unclear from the record. There was conflicting testimony presented below, and the parties contest the issue on appeal. Ultimately, it makes no difference to our resolution of the case.

the Radio Shack. When Betar exited the Radio Shack, officer Nantz approached him and asked to see his driver's license. Betar presented a state identification card, admitting that he did not have a driver's license. Betar was then arrested for driving without a license. Following Betar's refusal to consent to a search the automobile, the police searched it anyway ostensibly incident to Betar's arrest. Inside Betar's car were Rubbermaid containers, a cooler and a thermos, which contained "various items allegedly used in manufacturing methamphetamine."³

Betar moved to suppress the evidence seized from the automobile, arguing that the search exceeded constitutional limitations. The circuit court denied the motion, finding that the search was proper under both the automobile exception and the incident to arrest exception to the warrant requirements of the Fourth Amendment and Section 10.⁴ Betar then entered a

³ We have borrowed the quoted language from Betar's brief because the record does not recount in detail the contents of the containers, nor is such detail relevant for our purposes.

⁴ On appeal, the Commonwealth also argues that because the vehicle was impounded, the items inside it would have inevitably been discovered as part of a police inventory search. However, the circuit court never ruled on inevitability. Indeed, this would be a difficult question given the uncertain status of the law regarding the legality of warrantlessly impounding a vehicle. See Wagner v. Commonwealth, Ky., 581 S.W.2d 352 (1979). Wagner, however, was overruled in Estep v. Commonwealth, Ky., 663 S.W.2d 213 (1984), to the extent it conflicted with Estep's holding. See also Holbrook v. Knopf, Ky., 847 S.W.2d 52 (1993), which is described in Clark v. Commonwealth, Ky. App., 868 S.W.2d 101 (1993), as holding that

conditional guilty plea, reserving the right to appeal the court's denial of his motion to suppress.

In his motion to suppress, Betar did not challenge his arrest for driving on a suspended license. This was an unwise decision, for the police clearly lacked the articulable suspicion required by Terry v. Ohio⁵ in order to perform the investigative stop wherein they requested his driver's license. Betar had committed no visible traffic offense, there was nothing illegal or unsafe about his vehicle and, as will be explained in greater detail below, the police were not given sufficient information by the Wal-Mart employee to formulate a

Estep overruled Wagner without qualification, despite the explicit language in Holbrook and Estep limiting Estep's holding. Furthermore, Estep was concerned only with automobile searches founded on probable cause, which, as will be explained, is lacking in Betar's case, as it was in Wagner. Estep says nothing about when a motor vehicle may lawfully be impounded following an arrest for a traffic violation, thereby likely leaving Wagner controlling for that proposition. Under Wagner, the impounding of Betar's vehicle was impermissible. See Wagner, 581 S.W.2d at 356. However, whether Wagner remains controlling is an open question.

We need not resolve the difficult question regarding the impounding of Betar's vehicle because the Commonwealth failed to present an explicit policy of the Greenville Police Department regarding inventory searches of impounded vehicles which sufficiently limits the discretion of the officers conducting such searches. Florida v. Wells, 495 U.S. 1, 110 S. Ct. 1632, 109 L. Ed. 2d 1 (1990); see also Clark v. Commonwealth, *supra*, at 108 (Emberton, J., concurring). Accordingly, we may not hold that the evidence would inevitably have been discovered pursuant to a police inventory search of an impounded vehicle.

⁵ 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

reasonable suspicion of criminal activity. Therefore, had Betar not waived his challenge to the initial stop and ensuing arrest for driving on a suspended license, we would likely invalidate every police action from that point forward. However, having waived that challenge, Betar's only remaining avenue for relief from his arrest and guilty plea to this count is under Kentucky Rules of Criminal Procedure (RCr) 11.42, which must await a subsequent proceeding.

Turning to the search of Betar's car, we must determine whether it was permissible under either exception relied upon by the circuit court. As observed in Clark v. Commonwealth,⁶

[t]he automobile exception allows officers to search a legitimately stopped automobile where probable cause exists that contraband or evidence of a crime is in the vehicle.^[7] The search may be as thorough as a magistrate could authorize via a search warrant, including all compartments of the automobile and all containers in the automobile which might contain the

⁶ Supra, n. 4, at 106.

⁷ United States v. Ross, 456 U.S. 798, 800, 102 S. Ct. 2157, 2159, 72 L. Ed. 2d 572, 578 (1982); Estep, supra, n, 4 at 215.

object of the search.^[8] This exception is based upon the exigencies created by an automobile's mobility, and upon the diminished expectation of privacy one has in an automobile, which arises from the pervasive regulatory schemes applicable to automobiles.^[9]

The key to the automobile exception, as applied to this appeal, is whether there was probable cause. Probable cause must exist and be known to the investigating officer at the time he commences the search.^[10] It is insufficient to look at the evidence in retrospect and find probable cause.^[11] Probable cause exists when the totality of the circumstances then known to the investigating officer creates a fair probability that contraband or evidence of a crime is contained in the automobile.^[12]

⁸ Ross, id., 456 U.S. at 823, 72 L. Ed. 2d at 593; Estep, supra, n. 4, at 215.

⁹ California v. Carney, 471 U.S. 386, 390, 105 S. Ct. 2066, 85 L. Ed. 2d 406, 413; Estep, supra, n. 4, at 215.

¹⁰ See Sampson v. Commonwealth, Ky., 609 S.W.2d 355, 358 (1980).

¹¹ Id.

¹² Id.; See also Illinois v. Gates, 462 U.S. 213, 229, 103 S. Ct. 2317, 2327, 76 L. Ed. 2d 527, 543 (1983); Beemer v. Commonwealth, Ky., 665 S.W.2d 912, 913 (1984).

At the time of Betar's arrest, the police knew that he had purchased some aquarium tubing and had coolers, bins and a thermos in his car. Taking the Commonwealth's version, the officers also believed (albeit incorrectly) that he had purchased batteries. While it is true that possession of these items could suggest an involvement with methamphetamine, it just as readily indicates purely legal conduct. There was nothing uniquely suspicious about Betar's conduct: he did not buy inordinate amounts of any item, he was not behaving furtively or erratically, etc. Were we to condone this search as one supported by probable cause, it would result in the needless and unjustified searches of scores of innocent persons and their possessions, precisely the sort of unreasonable interference with individual liberty the Fourth Amendment and section 10 of the Kentucky Constitution were designated to prevent.

Likewise, this was not a search incident to Betar's arrest. As in Clark v. Commonwealth,¹³ Betar was arrested outside his vehicle and immediately placed in police custody, and there was no suggestion that Betar could have re-entered the vehicle. "As such, the 'search incident' was not properly limited to the area within [Betar's] immediate control, from which a weapon could be drawn, or evidence destroyed, which is

¹³ Supra, n. 4, at 108.

the justification for the search allowed in [New York v.] Belton.”¹⁴ There was no risk to the officers that Betar could have retrieved a weapon from inside the vehicle. Likewise, the police did not have reason to suspect that Betar was involved in any criminal conduct other than operating a vehicle on a suspended license,¹⁵ so there was no reason to believe that a search of his vehicle would uncover additional evidence of wrongdoing. Accordingly, the justification for the search incident to arrest exception to the warrant requirement does not apply to Betar’s case, rendering the search of his vehicle improper.

Accordingly, we reverse the judgment entered on Betar’s conditional guilty plea and remand this case to Muhlenberg Circuit Court with directions that Betar be allowed to withdraw his plea and the evidence obtained from the search of his vehicle be suppressed. Because we have decided the case on the above grounds, we need not reach Betar’s argument regarding the constitutionality of KRS 218A.1432.

¹⁴ Clark, supra, n. 4, at 108, citing New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981); United States v. Vasey, 834 F.2d. 782, 787 (9th Cir. 1987). See also Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 1969).

¹⁵ As noted above, the police did not have reason to suspect him of this offense either.

McANULTY, Judge, CONCURS IN RESULT.

EMBERTON, Chief Judge, DISSENTS and files separate opinion.

EMBERTON, Chief Judge, DISSENTING. I respectfully dissent. I agree with the trial court that the circumstances leading to the search of the vehicle clearly placed the search in the category of exceptions to the rule requiring a search warrant. I would affirm.

BRIEF AND ORAL ARGUMENT
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