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Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002070-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

ON REMAND FROM KENTUCKY SUPREME COURT
2004-SC-212-D

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE DENISE CLAYTON, JUDGE
ACTION NO. 02-CR-000912

WILLIAM RAINEY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: MINTON, SCHRODER, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: This matter is before us on remand from the Kentucky Supreme Court by Opinion and Order entered December 8, 2004. The Supreme Court vacated our Opinion rendered February 13, 2004, and ordered us to reconsider it in light of Thornton v. United States, 541 U.S. 615, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004). Having considered Thornton, we issue the following opinion.

The Commonwealth of Kentucky brings this interlocutory appeal from a September 5, 2002, order of the Jefferson Circuit Court. Kentucky Revised Statutes (KRS) 22A.020. We reverse and remand.

The facts are not in dispute. Officer Stephen Glauber and Officer Kenneth Wilkins were on foot patrol in a Louisville neighborhood when they spotted William Rainey driving at a high rate of speed. Glauber and Wilkins observed Rainey parking his vehicle, exiting his vehicle, and shouting loudly at nearby residents. By the time the officers reached Rainey, he was approximately fifty feet from his vehicle. Glauber and Wilkins recognized that Rainey was "unsteady on his feet, smelled strongly of alcoholic beverages, and was slurring his speech." Rainey told the officers that he had been thrown out of a bar and had been drinking. Rainey refused a field sobriety test; however, Glauber and Wilkins deduced that Rainey was intoxicated. Rainey was arrested and charged with operating a motor vehicle under the influence of intoxicants (DUI) (KRS 189A.010) and reckless driving (KRS 189.290).

Following the arrest, Glauber and Wilkins searched Rainey's vehicle and found a handgun concealed beneath the driver's seat. Rainey was charged with the additional crimes of possession of a firearm by a convicted felon (KRS 527.040) and

with being a persistent felony offender in the first degree (KRS 532.080).

Rainey filed a motion to suppress the handgun seized from his vehicle. The circuit court granted the motion and suppressed the introduction of the handgun into evidence. This interlocutory appeal follows.

The Commonwealth contends the search of Rainey's vehicle was proper as a search made incident to an arrest. We agree.

A search incident to an arrest provides an exception to the general rule that searches and seizures must be accompanied by a warrant. The exception stands for the proposition:

> [w]hen an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. . . . [and] to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.

Chimel v. California, 395 U.S. 752, 762-63, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). The incident to arrest exception has been extended to a warrentless search of an automobile made contemporaneously to the lawful arrest of its occupant. New York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768

(1981), *cited with approval in* Commonwealth v. Ramsey, 744 S.W.2d 418 (Ky. 1987).

In Thornton, the United States Supreme Court has now held that a police officer may search a vehicle's passenger compartment incident to the lawful arrest of a "recent occupant" of the vehicle. The Supreme Court clearly rejected the contention that a police officer must first initiate contact with the suspect while he is still an occupant of the vehicle. Under the facts of our case, it is clear that Rainey was a recent occupant of the vehicle, and thus, the police properly searched the passenger compartment of his vehicle under the search incident to arrest exception. See Thornton, 541 U.S. 615. Accordingly, we conclude the circuit court erred by suppressing the introduction of the handgun into evidence.

For the foregoing reasons, the order of the Jefferson Circuit Court is reversed and this cause is remanded for proceedings not inconsistent with this opinion.

ALL CONCUR.

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