

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-001824-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM CALLOWAY CIRCUIT COURT  
HONORABLE DENNIS R. FOUST, JUDGE  
ACTION NO. 03-CR-00064

JAMES T. NANCE, JR.

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: GUIDUGLI, TACKETT, AND VANMETER, JUDGES.

GUIDUGLI, JUDGE: The Commonwealth of Kentucky has taken an interlocutory appeal pursuant to KRS 22A.020(4) from the Calloway Circuit Court's August 13, 2004, order suppressing evidence against James T. Nance seized in a search of his vehicle on March 26, 2003, during a traffic stop. After reviewing the record and considering the parties' briefs and relevant case law, we reverse and remand.

On April 23, 2003, the Calloway County Grand Jury indicted Nance on the offense of manufacturing methamphetamine

while in possession of a firearm. Nance entered a plea of not guilty on May 12, 2003, and eight days later on May 20, 2003, Nance moved to suppress the evidence found after an officer searched his vehicle during a traffic stop on March 26, 2003.

A hearing on the motion to suppress evidence was held on July 14, 2003, at which time Officer Shane Mize of the Murray Police Department testified to the events of the search of March 26, 2003. Mize testified that dispatch informed him of a call received by a woman who reported that Nance had threatened her despite an outstanding domestic violence order (DVO) against him, that Nance had a gun, and identified the vehicle he was driving. Mize also learned of an outstanding arrest warrant issued for Nance on a prior charge for assault.

When they spotted Nance, Mize and another officer pulled Nance over. Nance exited the car and stood next to the driver's door. The officers instructed him to put his hands up, but Nance kept asking the officers why he had to comply and what he had done. The officers walked Nance to the back of his vehicle and placed his hands on the trunk. Mize informed Nance of the reason for the stop, including the phone complaint and arrest warrant. Mize checked Nance's identification, and when the information was validated, Nance was arrested.

While standing at the rear of Nance's vehicle, Mize handcuffed Nance and asked Nance if he had any weapons in the

vehicle. Nance stated that he had a gun in the vehicle, but that it was brand new and in a bag. Mize then went to the car and looked in the bags he found on the back seat until he found the gun. Mize then took the gun from the vehicle, and he escorted Nance to the back seat of the police cruiser.

After securing Nance in the cruiser, Mize went back to the vehicle to look for any ammunition or additional weapons. Mize testified that while looking for the gun, he was also aware of the contents of the other bags, which, at this point, he seized. The bags contained items consistent with the manufacture of methamphetamines.

Relying on Clark v. Commonwealth, Ky.App., 868 S.W.2d 101 (1993), the Calloway Circuit Court granted Nance's motion to suppress. The court found Clark stands for the premise that when a person is "handcuffed and placed in a police car, the scope of a search incident to arrest is somewhat limited."<sup>1</sup> The court also revisited the plain view exception, and found that the search was not done properly with respect to this exception to the warrant requirement.

The issue on appeal is whether the Calloway Circuit Court erred in granting the motion to suppress. The Commonwealth argues that according to established state and federal law, the evidence was seized during a search incident to

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<sup>1</sup> Page 3 of the August 8, 2003 order suppressing the evidence.

arrest. In the alternative, the Commonwealth posits that the warrantless search was valid under the automobile exception to the Fourth Amendment warrant requirement or that the search constituted a lawful "pat-down" pursuant to Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Nance argues that not only is the search not valid under any exception to the warrant requirement or Terry, but the search did not pass the test for a reasonable continuation search, and the court acted properly in granting the motion to suppress. Because Nance was lawfully arrested prior to the search, the court erred in finding the search valid as a search incident to arrest.

In reviewing the decision of a circuit court on a motion to suppress following a hearing, this Court must first examine the circuit court's factual findings for clear error. The findings of facts are conclusive if they are supported by substantial evidence.<sup>2</sup> Having reviewed the record, we have determined that the findings of the circuit court are supported by substantial, uncontradicted evidence, and therefore are conclusive. This Court must then perform a de novo review of the factual findings to determine whether the court's decision is correct as a matter of law.<sup>3</sup> Based upon our de novo review, the relevant findings of fact establish that Nance was lawfully

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<sup>2</sup> RCr 9.78; Adcock v. Commonwealth, Ky., 967 S.W.2d 6, 8 (1998).

<sup>3</sup> Stewart v. Commonwealth, Ky., 44 S.W.3d 376, 380 (2000).

arrested, and therefore, the officers were justified in searching Nance's vehicle incident to arrest.

The law of search and seizure under the Fourth Amendment of the United States Constitution establishes that "all searches without a valid search warrant are unreasonable unless shown to be within one of the exceptions to the rule that a search must rest upon a valid warrant. The burden is on the prosecution to show the search comes within an exception."<sup>4</sup> The exception relevant to the instant appeal, search incident to arrest, establishes that, in relation to automobiles where there is probable cause to make an arrest, the probable cause carries over to justify a search of the entire passenger compartment of the automobile.<sup>5</sup>

The trial court stated that it was unaware of where the practice of searching vehicles after an arrest originated. The rule originated in the Supreme Court and is well-established. In a recent decision, the Court reiterated this rule. The Court stated in Thornton v. U.S., \_\_\_ U.S. \_\_\_, 124 S.Ct. 2127, 2131, 158 L.Ed.2d 768 (2004), that police officers are allowed to search the passenger compartment of a vehicle after making a lawful custodial arrest of a recent occupant of that vehicle. The Court created this standard in order to have

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<sup>4</sup> Gallman v. Commonwealth, Ky., 578 S.W.2d 47, 48 (1979), accord. Katz v. United States, 389 U.S. 347, 356-58.

<sup>5</sup> Commonwealth v. Ramsey, Ky. 744 S.W.2d 418, 419 (1987).

an enforceable and clear rule for law enforcement officers to follow.<sup>6</sup> The Court recognized that the concerns for officer safety and evidence preservation are no less when a suspect is arrested while standing next to the vehicle than when an arrest is made while the suspect is still in the vehicle.<sup>7</sup>

The Court in Thornton reiterated its findings in New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 678 (1981). In Belton, police officers stopped a vehicle and ordered the driver and passengers out of the vehicle. Each was placed in handcuffs and stood outside of the car while officers searched the car. Officers searched a leather jacket belonging to one of the passengers and found drugs in the pocket. The Court upheld the search as a valid search incident to lawful arrest.

The Sixth Circuit stated its appreciation of the Belton rule in United States v. White, 871 F.2d 41 (6<sup>th</sup> Cir. 1989). In this case, the suspect was already handcuffed and secured in a police cruiser when the search was performed. The Court stated that even where the arrestee was no longer in reach of the car, the search was valid as search incident to arrest. In searches incident to arrest, the Court clarified officers can search the area that is or was in the arrestee's immediate control at the time of the arrest.

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<sup>6</sup> 124 S. Ct. at 2130.

<sup>7</sup> Id. at 2131.

The Commonwealth adopted the Belton rule in Ramsey. Since then, the Commonwealth has applied the rule in cases factually similar to the instant appeal, where the search occurs when the occupant has been removed from the vehicle. For example, in Commonwealth v. Wood, Ky.App., 14 S.W.3 557 (1999), this Court applied Belton to uphold a search conducted where the driver was arrested for driving with a DUI suspended license, handcuffed, and placed in the police cruiser.

It is clear from federal and state law that when a police officer makes a lawful arrest of a recent occupant of a vehicle, that officer may conduct a search of the passenger compartment of the vehicle even if the arrest was made outside the vehicle and the suspect is detained in a police cruiser. This rule ensures officer safety and the preservation of evidence, policies which the court recognizes are no less important when the arrestee is no longer in reach of the passenger compartment. Because this rule is well-established, the decision of the circuit court granting the motion to suppress is reversed.

In the instant case, officers initiated contact with Nance while he was an occupant of his vehicle. Nance exited the vehicle, and officers placed him under lawful arrest for the outstanding assault warrant and violation of the domestic violence order against him. Even though Nance was not in reach

of the passenger compartment at any point after the arrest, according to the above-referenced cases, the subsequent search was valid as incident to the lawful arrest.

The lower court misapplied the decision of Clark v. Commonwealth, Ky.App., 868 S.W.2d 101 (1993). In Clark, the appellant was stopped and arrested for driving without a valid driver's license. Forty minutes later, the appellant was driven from the scene, and officers conducted a search of his vehicle. In granting the motion to suppress, the court found that the search was not limited to the area within the defendant's immediate control. The court distinguished Belton because the arrest was for a minor traffic violation rather than a serious crime as in Belton. Also, the appellant waited at the scene for forty minutes and was no longer at the scene when the search took place. In Belton, the search took place just after the driver and passengers were patted down after exiting the car.

Clark strays from established federal law regarding searches incident to arrest where there is probable cause to make an arrest, that same probable cause justifies a vehicle search. The court did not believe that the passenger compartment came within the appellant's area of immediate control because he was arrested outside the car. However, as stated in White, upon arrest, officers can search the area that is or was in an arrestee's immediate control. In Clark, the

passenger compartment was in the appellant's immediate control when the officer initiated contact. Here, Nance was stopped while driving the vehicle, and according to White, the passenger compartment could be searched because it was in Nance's immediate control when he was stopped.

Not only does Clark stray from established federal law, the instant case is clearly distinguishable based on the decision in Clark. Here, Nance was arrested for criminal offenses - DVO violation and assault. This is precisely the distinction that Clark makes between its facts and the facts of Belton. In Clark, the officers did not have reason to believe that they would find evidence of any other crime in the appellant's car since he was arrested for traffic violation. Here, Mize had reason to believe that he would find a gun and perhaps ammunition or other weapons in the car driven by Nance. The officers not only had probable cause based on the dispatch call to search the car, but Nance told the officers that he had a gun in the car.

Also, the search in this case is contemporaneous to the arrest, unlike the forty minute lapse of time from the arrest to the search in Clark. Mize executed the search just after Nance was arrested and while he still stood to the rear of the car. Nance was only taken to the police cruiser when the gun was discovered, but searches incident to arrest are,

according to each of the above-referenced cases, valid even where the arrestee is detained outside of the vehicle.

We hold that the search of Nance's vehicle is valid as incident to arrest because Nance was a recent occupant of the car when the officer's initiated contact and because Nance was lawfully arrested for criminal offenses before the search began. Because the search of Nance's vehicle was valid incident to arrest, it is not necessary to address the other assignments of error. Therefore, the decision of the lower court granting Nance's motion to suppress is reversed and this matter is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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