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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002578-MR

TROY ZANDALE DANSBY — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 02-CR-01057

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE, GUIDUGLI, AND McANULTY, JUDGES.

GUIDUGLI, JUDGE: Troy Zandale Dansby appeals his conviction for possession of cocaine, possession of marijuana and of being a persistent felony offender, second degree. Dansby contends that the drugs recovered from his vehicle following his arrest should have been suppressed. We disagree and affirm the final judgment and sentence of imprisonment entered by the Fayette Circuit Court on November 5, 2003.

Officer Jeff Jacobs of the Fayette Urban County Police Department testified that he pulled over Dansby's vehicle on

August 16, 2002, after the officer observed Dansby fail to stop at a stop sign. The officer obtained Dansby's driver's license and ran a routine check for outstanding warrants. Information was obtained that Dansby had an outstanding warrant for an alcohol intoxication charge. Based on the warrant Dansby was arrested and placed in the back seat of the police cruiser.

Officer Jacobs then searched Dansby's car and found crack cocaine in the glove box and marijuana in the center console. When questioned, Dansby admitted the marijuana was his but denied any knowledge of the cocaine. Dansby was subsequently indicted by the Fayette County Grand Jury. He filed a motion to suppress the evidence seized and a hearing was held on May 27, 2003. Dansby admits that at the suppression hearing he argued that Officer Jacobs had no reason to stop the vehicle and that the unlawful stop was the basis for the suppression motion. On appeal, he contends that the traffic violation was a sufficient basis to stop his car and now argues that the search incident to the arrest was unlawful. Dansby contends that this Court should review his appeal under the palpable error rule.[1] RCr 10.26 provides:

> A palpable error which affects the substantial rights of a party may be considered . . . by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief

[1] RCr 10.26.

> may be granted upon a determination that manifest injustice has resulted from the error.

We agree that Dansby's substantial rights would be affected if the contraband was improperly seized and we will address the merits of his appeal.

In reviewing the decision of a circuit court on a motion to suppress following a hearing, this Court must first examine the trial court's factual findings for clear error. The findings of fact are conclusive.[2] Although presented with an argument relating to the stop of the vehicle as opposed to the search incident to the arrest, the findings of fact made by the trial judge 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.[3] Based upon our de novo review, the relevant findings of fact establish that Dansby was arrested on an outstanding warrant, and therefore, Officer Jacobs was justified in searching Dansby's vehicle incident to his 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

[2] RCr 9.78. Adcock v. Commonwealth, Ky., 967 S.W.2d 6, 8 (1998).
[3] Stewart v. Commonwealth, Ky., 44 S.W.3d 376, 380 (2000).

a search must rest upon a valid warrant. The burden is on the prosecution to show the search comes within an exception."[4] The exception relevant to the instant appeal, search incident to arrest, establishes that, in relation to automobiles if 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.[5]

Dansby relies on Preston v. United States, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964), and several other federal and state cases that follow Preston. In Preston, the Supreme Court of the United States determined that a search of a vehicle was not reasonable and the fruits of the search were suppressed. However, the facts in Preston can be easily distinguished from this case and numerous others where a search incident to the arrest has been upheld. The facts in Preston are that the occupants of a car were arrested for vagrancy and taken to the police station. After the occupants had been "booked" at the station, the car which had not been searched at the time of the arrest was driven by an officer to the station and then towed to a garage. Thereafter, the arresting officers went to the garage to search the car and found two loaded revolvers in the glove compartment. They were unable to open

[4] Gallman v. Commonwealth, Ky., 578 S.W.2d 47, 48 (1979), accord Katz v. United States, 389 U.S. 347, 356-58.
[5] Commonwealth v. Ramsey, Ky., 744 S.W.2d 418, 419 (1987).

the trunk and returned to the station only to be told to go back and try again to get into the trunk. The officers did so and this time entered the trunk through the back seat of the car where they found incriminating evidence of conspiracy to commit robbery. The facts herein are easily distinguishable from those of Preston.

Although cited by the Commonwealth and not Dansby, trial courts have occasionally relied upon Clark v. Commonwealth, Ky.App., 868 S.W.2d 101 (1993) [6], to suppress evidence seized incident to an arrest. The Court in Clark reversed judgments of convictions of Clark and a co-defendant (Nutter) after determining that the search of their vehicle was in violation of their constitutional rights. The facts in Clark are that the defendants were stopped for a speeding violation and the driver (Nutter) did not possess a valid driver's license. After the defendants were out of the car, Nutter was arrested on the traffic charges and the police searched the vehicle and found stolen property. At that time, both Nutter and Clark were arrested. Their motion to suppress was denied and they were subsequently convicted and sentenced based upon the evidence seized during the search of the car. On appeal, this Court reversed finding the warrantless search to be unreasonable. Specifically, the Clark Court held:

[6] Discretionary review denied by Supreme Court February 16, 1994.

> The final exception advanced to support the search is the "search incident to arrest" exception. It provides, in relation to automobiles, that where there is probable cause to support a custodial arrest, that same probable cause justifies a search of the entire automobile passenger compartment. Commonwealth v. Ramsey, Ky., 744 S.W.2d 418, 419 (1987); New York v. Belton, 453 U.S. 454, 460-63, 101 S.Ct. 2860, 2864-66, 69 L.Ed.2d 678, 775-76 (1981). While a superficial analysis (i.e. Nutter was arrested near his car) might suggest the "search incident" or "Belton" exception is applicable, we do not so find. First, both Belton and Ramsey involved arrests for criminal offenses (possession of marijuana and DUI, respectively) as opposed to this appeal, where the arrest was only for traffic violations (speeding and absence of a licensed driver), which normally do not involve custodial arrest.[7] In fact, we note nothing in the record to establish what the decision to arrest Nutter was made on any basis other than the trooper's unfettered (i.e., arbitrary and capricious) discretion. Thus, based upon the nature of the arrest involved in this appeal, we conclude that Belton and Ramsey do not authorize a search of the Tempo. See United States v. Gonzalez, 763 F.2d 1127, 1130 n. 1 (10th Cir.1985), which analyzed a traffic stop under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (investigatory stops justify only a limited detention not including a full search of an automobile), rather than Belton. (Footnote omitted).

[7] We are aware of the Commonwealth's assertion that the Supreme Court in Ramsey indicated the arrest was for both DUI and not having a valid license. Therefore, the Commonwealth argues that there is no real distinction among types of arrest. In other words, any arrest justifies a full search. However, our examination of Ramsey leads us to the opposite conclusion. Notably, the Kentucky Supreme Court framed the issue as follows: The specific question is whether the arresting officer was entitled to search the passenger compartment of a vehicle following an arrest for DUI. Ramsey, 744 S.W.2d at 418. Thus, we conclude that Ramsey did not actually reach the issue presented here; therefore, our analysis is unaffected. (Footnote in original).

Our conclusion is buttressed by McHome v. Commonwealth Ky.App., 576 S.W.2d 242, 243 (1978); and Commonwealth v. Hagan, Ky., 464 S.W.2d 261, 264 (1971), which both hold that an arrest for a minor traffic violation does not justify a complete search of the vehicle. Although both McHome and Hagan predate Belton and Ramsey, they were not overruled in Ramsey. As a result, we must conclude that they are still good law. SCR 1.030(8)(a). Moreover, we do not think precluding full searches after traffic violation-related arrests does violence to the preference in Belton, and presumably Ramsey, for bright lines to guide police officers, since McHome and Hagan also draw bright lines.

Second, we do not think that the search of the Tempo was truly a search incident to arrest. In this case, Nutter was arrested outside the Tempo, at the left rear of the vehicle, and placed immediately into the trooper's cruiser and there is no suggestion that Nutter could have gotten back to the Tempo. As such, the "search incident" was not properly limited to the area within Nutter's immediate control, from which a weapon could be drawn, or evidence destroyed, which is the justification for the search allowed in Belton. 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 685 (1969), which provided the theoretical grounding for Belton. But cf. United States v. Pino, 855 F.2d 357, 363-64 (6th Cir.1988), which upheld a search in similar circumstances as a search incident. Additionally, there is some question in this case whether the search was contemporaneous with the arrest, since it took place some time (apparently, thirty to forty minutes or more after Nutter's arrest). See Vasey, 834 F.2d at 787-88. But cf. United States v. Bates, 398 F.Supp. 731, 733 (S.D.Tex.1975), which held that a one-hour and fifteen-minute delay

> between arrest and search was not objectionable when there was justifiable reason for the delay. In any event, we conclude that the search in this case was not a search incident to arrest, which precludes reliance on that exception to the warrant requirement.[8]

Since Clark was rendered in 1993, there have been cases rendered that distinguished but not specifically overruled it. Recently in Commonwealth of Kentucky v. Woods, Ky.App., 14 S.W.3d 557 (1999)[9], this Court distinguished the facts before it from Clark and upheld a search incident to an arrest valid. Relying upon Chimel, Belton, and Ramsey, the Court, in Woods, held:

> Despite our conclusion that the search was valid under the previously cited cases, we deem it important to distinguish the rationale at work in Clark, which appears to provide support of the circuit court's exclusion of the evidence. The Clark court invalidated an automobile search which followed an arrest for minor traffic violations, a factor which the court utilized to remove the case from the purview of Belton on the basis that such offenses do not ordinarily give rise to a custodial arrest. In explaining its apparent deviation from the holdings of Belton and Ramsey, the court expressed concern that the search was not genuinely incident to the arrest as it occurred some distance from the vehicle and after the elapse of some forty minutes from the time of arrest. These circumstances convinced the Clark court that the safety and evidentiary rationales for the "incident to arrest" exception had

[8] Clark, 868 S.W.2d 107-08.
[9] (Discretionary review denied by Supreme Court April 12, 2000).

> become so attenuated as to make the exception inapplicable.
>
> Thus, in a typical arrest situation such as in the case before us, we must adhere to the Belton rule that a warrantless search of an arrestee and his vehicle is to be upheld provided the arrest is proper and the scope of the search does not exceed that which is necessary to protect society's interest in the safety of police officers (and third persons) and in the preservation of evidence. Unlike the arrest in Clark, there is no question that arrest is typical for the offense of driving on a license suspended for DUI. The search in this case immediately followed the arrest and there was the additional concern of a passenger in the vehicle. Therefore, although Wood, who had been removed from the vehicle prior to the search, posed no immediate threat to the officer or others, evidentiary concerns remained.
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> Accordingly, because we believe that the search of Wood's vehicle falls within the "incident to arrest" exception articulated in Belton and Ramsey, we reverse the order of the Warrant Circuit Court and remand the case for further proceedings consistent with this opinion.[10]

This year the United States Supreme Court again addressed the issue of a search incident to an arrest in Thornton v. United States, 124 S.Ct. 2127 (2004). Thornton was stopped by police when it was discovered that the license plate on his vehicle was registered to another vehicle. When the officer was finally able to stop him, Thornton was already out of his vehicle. After questioning Thornton whether he possessed

[10] Wood, 14 S.W.3d 558-59.

any narcotics or weapons, he admitted to having illegal drugs on his person. At that point Thornton was arrested, handcuffed and placed in the back seat of the patrol car. The officer then search Thornton's car and found a nine-millimeter handgun under the driver's seat. Thornton moved to suppress the evidence seized from the automobile. The United Sates Supreme Court upheld the trial court's denial of Thornton's motion to suppress holding that the search of the vehicle was valid under Belton. After discussing the holdings in Belton, Chimel, and United States v. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973), the Supreme Court held:

> In so holding, we placed no reliance on the fact that the officer in Belton ordered the occupants out of the vehicle, or initiated contact with them while they remained within it. Nor do we find such a factor persuasive in distinguishing the current situation, as it bears no logical relationship to Belton's rationale. There is simply no basis to conclude that the span of the area generally within the arrestee's immediate control is determined by whether the arrestee exited the vehicle at the officer's direction, or whether the officer initiated contact with him while he remained in the car. We recognized as much, albeit in dicta, in Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), where officers observed a speeding car swerve into a ditch. The driver exited and the officers met him at the rear of his car. Although there was no indication that the officers initiated contact with the driver while he was still in the vehicle, we observed that "[i]t is clear...that if the officers had arrested [respondent]...they could have searched the

passenger compartment under New York v. Belton." Id., at 1035, 1036, and n. 1, 103 S.Ct. 3469.

In all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle. An officer may search a suspect's vehicle under Belton only if the suspect is arrested. See Knowles, supra, at 117-118, 119 S.Ct. 484. A custodial arrest is fluid and "[t]he danger to the police officer flows from the fact of the arrest, and is attendant proximity, stress, and uncertainty," Robinson, supra, at 234-235, and n. 5, 94 S.Ct. 467 (emphasis added). See Washington v. Chrisman, 455 U.S. 1, 7, 102 S.Ct. 812, 70 L.Ed.2d 778 (1982) ("Every arrest must be presumed to present a risk of danger to the arresting officer"). The stress is no less merely because the arrestee exited his car before the officer initiated contact, nor is an arrestee less likely to attempt to lunge for a weapon or to destroy evidence if he is outside of, but still in control of, the vehicle. In either case, the officer faces a highly volatile situation. It would make little sense to apply two different rules to what is, at bottom, the same situation.

. . .

To be sure, not all contraband in the passenger compartment is likely to be readily accessible to a "recent occupant." It is unlikely in this case that petitioner could have reached under the driver's seat for his gun once he was outside of his automobile. But the firearm and the passenger compartment in general were no more inaccessible than were the contraband and the passenger compartment in Belton. The need for a clear rule, readily understood by police officers and not depending on differing estimates of what

> items were or were not within reach of an arrestee at any particular moment, justifies the sort of generalization which Belton enunciated. [Footnote omitted]. Once an officer determines that there is probable cause to make an arrest, it is reasonable to allow officers to ensure their safety and to preserve evidence by searching the entire passenger compartment.
>
> Rather than clarifying the constitutional limits of a Belton search, petitioner's "contact initiation" rule would obfuscate them. Under petitioner's proposed rule, an officer approaching a suspect who has just alighted from his vehicle would have to determine whether he actually confronted or signaled confrontation with the suspect while he remained in the car, or whether the suspect exited his vehicle unaware of, and for reasons unrelated to, the officer's presence. This determination would be inherently subjective and highly fact specific, and would require precisely the sort of ad hoc determinations on the part of officers in the field and reviewing courts that Belton sought to avoid. Id. at 459-460, 101 S.Ct. 2860. Experience has shown that such a rule is impracticable, and we refuse to adopt it. So long as an arrestee is the sort of "recent occupant" of a vehicle such as petitioner was here, officers may search that vehicle incident to the arrest. (Emphasis added). [Footnote omitted].[11]

We believe the reasoning set forth in Clark is flawed and has not been followed in any reported case since it was rendered. However, the reasoning set forth in Belton and Chimel has formed the basis for numerous cases that have been routinely followed. The recent cases of Wood and Thornton as set out

[11] Thornton, 124 S.Ct. 2131-32.

above clearly reaffirm the principle that a search of an automobile incident to a lawful arrest is valid.

For the foregoing reasons, the final judgment and sentence of imprisonment entered by the Fayette Circuit Court in this matter is affirmed.

McANULTY, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT ONLY.

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