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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001914-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 04-CR-001232

KEVIN EVANS — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: GUIDUGLI, JOHNSON, AND McANULTY, JUDGES.

GUIDUGLI, JUDGE: The Commonwealth of Kentucky has taken an interlocutory appeal pursuant to KRS 22A.020(4) from the Jefferson Circuit Court's August 11, 2004, order suppressing evidence against Kevin Evans seized in a search of his vehicle on October 8, 2003, during a traffic stop. After reviewing the record and considering the parties' briefs and relevant case law, we reverse and remand.

On April 22, 2004, the Jefferson County Grand Jury indicted Evans on the offenses of trafficking in a controlled

substance in the first degree (KRS 218A.1415), operation of a motor vehicle by a person whose operator's license has been revoked, suspended, cancelled or denied (KRS 186.620(2)), no motor vehicle insurance (KRS 304.39-080), and reckless driving (KRS 189.290). Evans entered a plea of not guilty and subsequently moved the court to suppress the evidence found (crack cocaine) after an officer searched his vehicle during a traffic stop on October 8, 2003.

A hearing on the motion to suppress evidence was held on August 2 and 3, 2004, at which time the arresting officers and Evans testified to the events of the search on October 8, 2003. The circuit court made the following findings of fact, which are not disputed by either party on appeal.

FINDINGS OF FACT

> On October 8, 2003, between 9 p.m. and 11 p.m., Officer Amy Tanner observed a vehicle driving erratically on Logan Street in Louisville. According to Officer Tanner, she believed that the vehicle's crossing the center line several times indicated an intoxicated driver, and she called for backup at that time. When she stopped the vehicle, Mr. Evans exited from the driver's side and protested being pulled over. Officer Tanner ordered him back into his automobile and obtained his operator's license; he was not able to show proof of insurance. She returned to her vehicle to process the information. Sometime during this period an unidentified individual left the automobile and fled the scene. Mr. Jackson remained in the automobile's right passenger seat. Officer Tanner discovered

> that Mr. Evans was operating on a suspended license for driving while intoxicated and had no insurance. Around this time, Officer Joe Davis, the backup officer, arrived. Officer Tanner then ordered both occupants out of the automobile and placed them between Mr. Evans' car and the front of the police car. She testified that at this time, she was planning to arrest Mr. Evans. While she did a pat down search, Officer, Davis, incidental to the arrest, searched the interior of the car and located suspected crack cocaine in the glove compartment. The defendants were then charged with Trafficking in a Controlled Substance, and Mr. Evans was cited for Reckless Driving, Operating on a Suspended License and No Proof of Insurance.
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> According to the (sic) Officer Tanner, during the search of the vehicles Mr. Evans was under arrest for the traffic violations, while Mr. Jackson was detained for safety purposes and was not free to go. According to Officer Davis, Mr. Evans was under arrest, but Mr. Jackson was free to go. Mr. Evans testified that he was advised by Officer Tanner prior to the search that he was free to go after he had been given a citation for the traffic offenses and that only after the drugs were found was he placed under arrest. He also identified the individual who had left his automobile, stating that the person had gone to his cousin's home which was close to where the arrest took place.

Based upon these facts, the circuit court entered the following conclusions of law to support its determination that the evidence seized should be suppressed. In relevant part, the circuit court held as follows:

> While Mr. Evans believed he was free to go, the testimony of both officers indicated

that he was under arrest when he was placed in front of the police vehicle. The arrest of Mr. Evans was appropriate. The question raised by the Defendant Evans is whether or not the police could search the interior of the automobile after they had removed him from it. Officer Davis testified that, "Usually when I place, when someone's under arrest, no, I usually do not ask for consent to search their vehicle. I have the right to do so by state and federal law." Somewhere in Officer Davis' training, they forgot to tell him that there has to be probable cause or reason to believe that criminal activity is occurring before he searches the interior of motor vehicles.

...

The automobile exception allows an officer to search a legitimately stopped automobile where probable cause exists that contraband or evidence of a crime is in the vehicle. United States v. Ross, 456 U.S. 798, 800-01. "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 object of the search." Clark v. Commonwealth, Ky.App., 868 S.W.2d 101, 106 (1993). 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. California v. Carney, 471 U.S. 386, 390-93.

The Commonwealth relies on New York v. Belton, 453 U.S. 454 (1981), and its progeny which generally stand for the proposition that after a police officer has made a "lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.

It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach." New York v. Belton 453 U.S. 454, 460 (Footnote omitted).

The Commonwealth's argument in this instance is without merit. There must be a nexus between the seizure of Mr. Evans and the search of his vehicle. In Belton, as in its progeny, there has always been something else that gave the officer probable cause to conduct his or her search. In Belton, there was evidence of marijuana use (a SuperGold envelope in plain view and the smell of marijuana). In Estep [v. Commonwealth, 663 S.W.2d 213 (Ky. 1983)], the officers searched the defendant's car after determining it matched the description of a vehicle involved in a robbery. The Court there stated that "[p]olice who have a legitimate reason to stop an automobile and who have **probable cause** to believe that the objects of the search are concealed somewhere within the vehicle may conduct a warrantless search of the vehicle and all the compartments and containers thereof as well as the contents thereof that are not in plain view. This decision is in harmony with Section 10 of the Kentucky Constitution which protects the people from unreasonable searches because **probable cause** is still a prerequisite to an automobile search." Estep, 663 S.W.2d at 215. (Court's emphasis). The magical words, of course, if we are to uphold the rights of people to be free from "unreasonable searches," is the probable cause prerequisite. As indicated in Clark v. Commonwealth, Ky.App., 868 S.W.2d 101, 106 (1993), "[t]he key to the automobile exception...is whether there was probable cause. Probable cause must exist and be known to the investigating officer at the time he commences the search." *See also*

Sampson v. Commonwealth, Ky., 609 S.W.2d 355, 358 (1980). "It is insufficient to look at the evidence in retrospect and find probable cause." Id.

In the case *sub judice*, Officer Davis did not have probable cause to search the interior of the automobile and thus falls [outside] the automobile exception. His own testimony established his reasoning for the search: it was not because he suspected the defendants were concealing contraband or a weapon, but because he believed he had the absolute right to search the car under state and federal law. Nor does the Court find that the search conducted falls under the search incident to arrest exception. As was stated in Clark v. Commonwealth, *supra* at 108: "[W]e 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 was 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*."

By the time Officer Davis searched the car, Mr. Evans was under arrest, outside of the vehicle, and the glove compartment was not accessible to him. Neither officer was placed in fear for his or her safety. The Defendants had made no furtive gestures to indicate the attempt to conceal contraband, nor had they acted suspicious in any manner. The Defendants were not known to the officers as possible suspects in crimes, the officers had no reason to believe they were armed, nor were the Defendants known as traffickers of controlled substances. There was no testimony indicating this was a "high drug area," and the officers had not

> received any information about these Defendants having committed any criminal acts. The Court finds that the warrantless search conducted in this case did not fall within any exception to the 4th amendment/Section 10 of our state and federal constitutions, and will therefore grant the motion to suppress.

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.[1] 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.[2] Based upon our de novo review, the relevant findings of fact establish that Evans was lawfully arrested, and therefore, the officers were justified in searching Evans'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

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

prosecution to show the search comes within an exception."[3] 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.[4]

The trial court expressed its concern of the police department's practice of searching vehicles after an arrest originated. The rule regarding search incident to an arrest originated in the United States Supreme Court and is well-established. In a recent decision, the Supreme Court reiterated this rule. The Court stated in Thornton v. U.S., 124 S.Ct. 2127, 2131, 158 L.Ed.2d 768 (2004), citing Belton, 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 an enforceable and clear rule for law enforcement officers to follow.[5] 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.[6]

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[3] Gallman v. Commonwealth, 578 S.W.2d 47, 48 (Ky. 1979), accord. Katz v. United States, 389 U.S. 347, 356-58.
[4] Commonwealth v. Ramsey, 744 S.W.2d 418 419 (Ky. 1987).
[5] 124 S.Ct. at 2130.
[6] Id. at 2131.

The Court in Thornton reiterated its findings in Belton. 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 followed the rule established in Belton in United States v. White, 871 F.2d 41 (6th 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.

The Commonwealth adopted the Belton rule in Ramey, supra. 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, 14 S.W.3d 557 (Ky.App. 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 a 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 the officer's 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.

While the decision to reverse the Jefferson Circuit Court is based primarily upon Thornton and Belton, we believe we should also address the circuit court's reliance upon Clark, supra. Recently several cases have come before this Court based upon Clark. In each of those cases, the circuit court has suppressed evidence based upon a search of a vehicle incident to an arrest relying upon Clark. We believe the reasoning set forth in Clark is flawed and has not been followed in any reported case since it was rendered.[7] In contrast, the reasoning

[7] For a more in-depth analysis of this issue, see Dansby v. Commonwealth, case number 2003-CA-002578-MR, a not-to-be-published opinion rendered November 24, 2004.

set forth in Belton and Chimel, and the recent cases of Wood and Thornton (and many other cases) clearly reaffirm the principle that a search of an automobile incident to a lawful arrest is valid.

For the foregoing reasons, the order of the Jefferson Circuit Court granting Evans's motion to suppress is reversed and the matter is remanded for further proceedings.

JOHNSON, JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS IN RESULT ONLY.

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