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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002114-MR

CECIL CARL CLEM — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
INDICTMENT NO. 03-CR-00944

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

HUDDLESTON, SENIOR JUDGE: In the early morning hours of July 4, 2003, Officer Jerad Curtsinger of the Lexington Police Department was on patrol when he noticed that the automobile in front of him had veered twice towards the centerline. Cecil Carl Clem was the driver of that automobile. Officer Curtsinger followed Clem's vehicle for approximately a mile, but, before he

[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 KRS 21.580.

could stop the automobile, Clem halted along Dayton Avenue and got out. As Clem walked down the sidewalk, Officer Curtsinger noticed that Clem was staggering. When Officer Curtsinger confronted Clem, he was approximately fifteen or twenty feet away from his vehicle. The officer noticed that Clem had slurred speech and the odor of alcohol about his person. Clem also admitted that he had been drinking earlier. Curtsinger had Clem perform three field sobriety tests, which Clem failed. While Curtsinger was administering the field sobriety tests, Officer James Moore arrived at the scene. Officer Moore searched the scene with a flashlight and found a small bag containing cocaine which Clem admitted was his. Curtsinger then placed Clem under arrest. Shortly thereafter, Officer Michael Carroll arrived and searched Clem's car finding two sets of scales and another bag of cocaine. Clem admitted that these items were his.

Clem was charged in an indictment with trafficking in a controlled substance in the first degree, tampering with physical evidence, operating a motor vehicle under the influence of alcohol, possession of drug paraphernalia, and with being a persistent felony offender in the second degree. Clem moved to suppress the evidence found in his automobile, but after two evidentiary hearings, the trial court denied his suppression motion. Clem proceeded to trial on July 29, 2004, and was

convicted of possession of a controlled substance in the first degree, a lesser-included offense of trafficking, of possession of drug paraphernalia, and of being a persistent felony offender in the second degree. Following his convictions, Clem was sentenced to a total of eight years in prison.

On appeal, Clem argues that the trial court erred when it denied his suppression motion. Clem acknowledges that the police may, incident to a lawful arrest, conduct a limited search of the arrestee's person and the area within his immediate control from which he might obtain a weapon or destroy evidence.[2] Clem also acknowledges that the holding in New York v. Belton[3] established the rule that police may search an arrestee's vehicle if the search is incident to an arrest.

However, Clem insists that Belton is not applicable; he relies instead on United States v. Strahan.[4] In Strahan, after a confidential informant told police that Strahan had been selling cocaine at a local bar, the police followed him to the bar. When Strahan arrived, he parked behind the bar and quickly got out of his car to enter the bar. When the police finally confronted Strahan, he was about thirty feet from his vehicle. The police performed a pat-down search and found a large quantity of cocaine and a large sum of money. The police

[2] Chimel v. California, 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969).
[3] 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981).
[4] 984 F.2d 155 (1993).

arrested Strahan and searched his vehicle finding a pistol. Strahan moved the United States District Court to suppress the cocaine and the gun, but the court denied Strahan's motion. Strahan entered a conditional guilty plea and appealed to the United States Court of Appeals for the Sixth Circuit. That Court affirmed the district court regarding the cocaine but reversed regarding the pistol.[5] The Court of Appeals held that Belton did not apply in this situation because Strahan was outside of his vehicle when the police confronted him. According to the Court, Belton only applies when police initially confront an arrestee who is still inside a vehicle. And since the compartment of Strahan's car was not within his control at the time of arrest, the search was not valid pursuant to the rule set forth in Chimel.[6]

As in Strahan, Clem insists that Belton does not apply to the instant case because he was fifteen to twenty feet away from his vehicle when Officer Curtsinger confronted him. And, Clem argues, he had been handcuffed and placed in Curtsinger's cruiser by the time Officer Carroll arrived to search his automobile. Since he could not access his vehicle, it was no longer within his immediate control when it was searched. Thus, Clem reasons, the search was illegal given the rule set forth in Chimel.

[5] Id. at 158.
[6] Id. at 159.

When we review suppression issues, we first examine the trial court's findings of fact to ascertain whether they are supported by substantial evidence. If the findings are supported by substantial evidence, they are conclusive. Second, we review *de novo* the trial court's application of the law to the facts.[7]

In the instant case, the relevant facts are not in dispute; therefore, the trial court's findings are conclusive.

Despite Clem's insistence to the contrary, the holding in Belton applies to this case. In Belton, the Supreme Court noted that police officers were having difficulties applying Chimel's rule that a search incident to an arrest is strictly limited to "the area within the immediate control of the arrestee." Thus, the Supreme Court held that

> when a policeman 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.[8]

The Supreme Court revisited the Belton rule in Thornton v. United States[9] because the question has arisen whether the rule is strictly limited to situations where the police have made initial contact with a suspect while he is still inside a vehicle or whether the rule applies to those situations where

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[7] Commonwealth v. Neal, 84 S.W.3d 920, 923 (Ky. App. 2002).
[8] New York v. Belton, supra, note 3, at 460.
[9] 541 U.S. 615, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004).

police have made initial contact with a suspect after the suspect has exited a vehicle.[10] In Thornton, an officer noticed a car driven by Thornton slowed down to avoid driving next to the officer. Finding this behavior suspicious, the officer had Thornton's license plate number checked and it was reported as belonging to a different vehicle. Before the officer could stop the vehicle, Thornton pulled into a parking lot and got out. The officer confronted Thornton in the parking lot and noticed that Thornton seemed extremely nervous. So the officer asked if Thornton had either drugs or weapons on him or in his vehicle. Although Thornton indicated he did not, the officer asked and received permission to conduct a pat-down search. During the pat-down, the officer detected a suspicious bulge that was revealed to be a large quantity of marijuana and cocaine. Thornton was then arrested, handcuffed and placed in the back of the officer's cruiser. Subsequently, the officer searched Thornton's car and found a pistol. Thornton moved to suppress the pistol because he was outside his car when the officer initially confronted him, but, citing Belton, the state trial court denied Thornton's motion.[11] Thornton eventually appealed to the United States Supreme Court. In analyzing and resolving Thornton's claim, the Court wrote:

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[10] Id. at 2129.
[11] Id.

[W]e 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.

. . .

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. A custodial arrest is fluid and "[t]he danger to the police officer flows from *the fact of the arrest,* and its attendant proximity, stress, and uncertainty[.]" . . . 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.

In some circumstances it may be safer and more effective for officers to conceal their presence from a suspect until he has left his vehicle. Certainly that is a judgment officers should be free to make. But under the strictures of petitioner's proposed "contact initiation" rule, officers who do so would be unable to search the car's

passenger compartment in the event of a custodial arrest, potentially compromising their safety and placing incriminating evidence at risk of concealment or destruction. The Fourth Amendment does not require such a gamble.

Petitioner argues, however, that Belton will fail to provide a "bright-line" rule if it applies to more than vehicle "occupants." But Belton allows police to search the passenger compartment of a vehicle incident to a lawful custodial arrest of both "occupants" and "recent occupants." Indeed, the respondent in Belton was not inside the car at the time of the arrest and search; he was standing on the highway. In any event, while an arrestee's status as a "recent occupant" may turn on his temporal or spatial relationship to the car at the time of the arrest and search,[S.Ct. FN 2] it certainly does not turn on whether he was inside or outside the car at the moment that the officer first initiated contact with him.

FN 2. Petitioner argues that if we reject his proposed "contact initiation" rule, we should limit the scope of Belton to "recent occupants" who are within "reaching distance" of the car. We decline to address petitioner's argument, however, as it is outside the question on which we granted certiorari, see this Court's Rule 14.1(a), and was not addressed by the Court of Appeals[.]

. . .

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. 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. 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.[12]

The present case is factually indistinguishable from Thornton since Clem was a "recent occupant" of a vehicle as was the appellant was in Thornton. Inasmuch as Thornton is directly on point with this case, the trial court correctly applied the law when it denied Clem's motion to suppress.

The judgment is affirmed.

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[12] Id. at 2131 (citations omitted).

ALL CONCUR.

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