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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001817-MR

ERIC G. FULKERSON — APPELLANT

v.

APPEAL FROM McLEAN CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 05-CR-00016

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY AND WINE, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

WINE, JUDGE: Eric G. Fulkerson appeals an order from the McLean Circuit Court denying his motion to suppress evidence seized from a warrantless search of his automobile. For the reasons stated herein, we affirm the trial court's order.

On April 3, 2005, Fulkerson was pulled over by Deputy Sheriff Todd Wilkerson after Deputy Wilkerson observed Fulkerson weaving and crossing the center yellow line. Fulkerson

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

explained to Deputy Wilkerson that he had dropped a slice of pizza he was eating and his attempt to retrieve the pizza caused him to swerve in the roadway. Fulkerson was unable to produce his driver's license to Deputy Wilkerson because he did not have one. As such, Deputy Wilkerson put Fulkerson under arrest and placed him in his police cruiser.

After reading Fulkerson his rights under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and placing him inside the police cruiser, Deputy Wilkerson searched Fulkerson's vehicle and found a baggie of methamphetamine in a backpack that lay in the back of the vehicle. In addition, Deputy Wilkerson found a glass mason jar which contained a residue typically found in methamphetamine labs.

Thereafter, Fulkerson was indicted for one count of possession of a controlled substance (methamphetamine) and being a persistent felony offender in the second degree. Fulkerson filed a motion to suppress the evidence seized from his vehicle by Deputy Wilkerson. After the trial court denied the motion, Fulkerson entered a conditional guilty plea to first-degree possession of a controlled substance and the PFO II enhancement was dismissed.

Fulkerson now appeals the trial court's order denying his suppression motion because the officer's search of his

vehicle does not fall within any recognized exception to the warrantless search rule. Fulkerson cites Clark v. Commonwealth, 868 S.W.2d 101 (Ky.App. 1993), in support of his contention. The Commonwealth contends this Court's rationale in Clark is seriously flawed and should be overruled. However, we need not consider the Commonwealth's argument because we are convinced that the facts of this case distinguish it from the application of the rationale in Clark.

Pursuant to the Fourth Amendment and Section 10 of the Kentucky Constitution, a warrantless search is per se unreasonable unless it falls within one of the recognized exceptions. See Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). The "incident to arrest" exception evolved to address the exigencies of police work, specifically the arresting officer's safety and the preservation of evidence. Clark, supra; United States v. Robinson, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973).

In Clark, the defendant had been searched and placed in the squad car and almost an hour had elapsed from the time of his arrest until the officers searched his car. This Court recognized that the holding in New York v. Belton, 453 U.S. 454, 460, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981), allows a police officer who has made a lawful custodial arrest of the occupant of an automobile to search the passenger compartment of that

automobile as a contemporaneous incident of that arrest. Nevertheless, this Court held that the search of Clark's vehicle did not fall within the Belton exception because the search invalidated an automobile search that followed an arrest for minor traffic violations, and because the search occurred almost an hour after Clark's arrest. These factors convinced the Court in Clark that the safety and evidentiary rationales for the "incident to arrest" exception had become so diluted as to make the exception inapplicable.

The facts of the current case are significantly different from those in Clark. In Clark, the defendant was taken into custody for a minor traffic violation but here Fulkerson was driving without a valid driver's license, hardly a minor violation and one where an arrest is typically made. Further, Fulkerson makes no claim that an inordinate amount of time passed, like the 45 minutes in Clark, from the time he was taken into custody and the time Deputy Wilkerson conducted the search. Thus, those facts remove this case from the rationale in Clark.

Rather, the search in this case falls squarely within the "search incident to arrest" exception set out in Belton. Following a lawful custodial arrest, the police may search any area of the vehicle within the immediate control of the arrestee. Belton further explains that the area of "immediate

control" has been defined as "the area into which an arrestee might reach in order to grab a weapon or evidentiary item." 453 U.S. at 460 (quoting Chimel v. California, 395 U.S. 752, 763, 89 S. Ct. 2034, 2040, 23 L. Ed. 2d 685 (1969)). Further, the Belton Court held that the police may examine the contents of open and closed containers they find in the passenger compartment. Id. The search of Fulkerson's automobile immediately following his arrest led to the discovery of methamphetamines in a backpack that was well within Fulkerson's reach at the time Deputy Wilkerson pulled him over.

Fulkerson also cites Knowles v. Iowa, 525 U.S. 113, 119 S. Ct. 484, 142 L. Ed. 2d 492 (1998), to support his claim that the evidence seized from his vehicle should have been suppressed. However, Knowles is also distinguishable from the facts of this case because Knowles was only given a citation for speeding. Since the officer in Knowles only issued a citation, the Court recognized that there was little concern for the officer's safety and essentially no concern for the preservation of evidence. Id. at 117-19. Conversely, Deputy Wilkerson made a lawful arrest of Fulkerson and the search of his vehicle following that arrest was warranted. See Washington v. Chrisman, 455 U.S. 1, 7, 102 S. Ct. 812, 817, 70 L. Ed. 2d 778 (1982).

Consequently, the trial court did not err in denying Fulkerson's motion to suppress the items seized in the search of his vehicle.

Accordingly, the trial court's order denying Fulkerson's motion to suppress is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John W. Tullis
Owensboro, KY

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Jeffrey A. Cross
Assistant Attorney General
Frankfort, KY