RENDERED: SEPTEMBER 21, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000584-MR

MICHAEL FAIN — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY PAYNE, JUDGE
ACTION NO. 05-CR-01070

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MOORE AND TAYLOR, JUDGES.

MOORE, JUDGE: This is an appeal by Michael Fain from his conditional guilty plea to four counts of Criminal Possession of a Forged Instrument, Second Degree. Fain appeals his five-year probation sentence, insisting the Fayette Circuit Court erred in overruling his motion to suppress evidence seized from his automobile. After a careful review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On July 13, 2005, at 9:00 a.m., Fain was parked in his white Chevrolet pickup truck parallel to the front door of the Shell gas station at 2300 Versailles Road, Lexington, Kentucky. Officer Eddie Pearson of the Lexington Division of Police pulled into the Shell station and noticed Fain's car parked outside the front door. Officer Pearson testified that he immediately became suspicious of the vehicle's location due to the recent number of convenient store robberies throughout Fayette County.

Officer Pearson proceeded to run Fain's license plate number through his cruiser's computer and ultimately located a warrant for Fain's arrest for the nonpayment of fines. Officer Pearson proceeded to call for a backup officer to respond to the location.

Officer Seabolt arrived on the scene by the time the warrant had been verified, and Officer Pearson then placed Fain under arrest. Fain denied there was anything in his vehicle that might harm the officers, and he was then placed in the back of Officer Seabolt's cruiser. A search of the vehicle incident to Fain's arrest revealed a driver's license with his photograph that listed a name other than Fain's.

At this point, Officer Pearson instructed Officer Seabolt, who had since left to transport Fain to jail, to return Fain to the scene. He was subsequently read his rights pursuant to *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and asked whether he wanted to talk about the fraudulent driver's license, to which he stated that he did not. Fain was asked no additional questions.

A further search of the vehicle revealed three more fraudulent driver's licenses as well as forged checks. Overall, Fain was charged with nine counts of Criminal Possession of a Forged Instrument, Second Degree.

Following Fain's arraignment, he filed a motion to suppress arguing the evidence seized from his vehicle was the result of an illegal search and seizure under the Fourth Amendment of the United States Constitution and Section 10 of the Kentucky Constitution. The trial court overruled the motion to suppress, and Fain accepted the Commonwealth's plea offer to dismiss five of the nine charges. He entered a conditional guilty plea, reserving the right to challenge on appeal the trial court's decision to overrule the motion to suppress. Fain was sentenced to five years in prison, but the trial court reduced the sentence to five years' probation, conditional upon Fain's following provisions set forth in the trial court's final judgment.

II. STANDARD OF REVIEW

If the trial court's findings of fact are supported by substantial evidence, then they are conclusive. See *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002). If the facts are conclusive, we conduct *de novo* review of the trial court's application of the law to the facts. *Id*.

III. ANALYSIS

On appeal, Fain argues there was no justification for Officer Pearson to search his vehicle after he was arrested pursuant to a warrant for the nonpayment of fines. He contends the arrest was not for an offense justifying a search of his automobile.

The Fourth Amendment of the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides all United States citizens the right to be secure against warrantless search and seizures. However, one well-recognized exception to the warrant requirement is a search incident to an arrest, which the trial court relied upon when overruling Fain's motion to suppress.

In 1969, the United States Supreme Court held a police officer making an arrest may search for and seize any evidence on the arrestee's person or in areas within the arrestee's immediate control. *Chimel v. California*, 395 U.S. 752, 763, 89 S.Ct. 2034, 2040, 23 L.Ed.2d 685 (1969). The Supreme Court later extended this rule to arrests of automobile occupants, holding police officers may, as a contemporaneous incident of the arrest, search for and seize evidence in the passenger compartment of the automobile. *New York v. Belton*, 453 U.S. 454, 460, 101 S.Ct. 2860, 2864, 69 L.Ed.2d 768 (1981).

More importantly, the Court in *Belton* established a "bright-line" rule permitting the search of an automobile incident to the arrest of an occupant for the purpose of establishing clear guidelines for police officers to follow in the performance of their duties. This rule was adopted by the Kentucky Supreme Court and remains the law applied to searches of automobiles incident to an occupant's arrest. *Commonwealth v. Ramsey*, 744 S.W.2d 418, 419 (Ky. 1988).

Fain relies upon *Clark v. Commonwealth*, 868 S.W.2d 101 (Ky. App. 1994), which held an arrest for a minor traffic violation that normally would not result in an arrest does not justify a complete search of the vehicle. In addition, Fain cites *Knowles v. Iowa*, 525 U.S. 113, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998), which also held a mere citation for a traffic violation does not justify a full search of a vehicle when a police officer could have legally arrested the offender but only issued a citation.

Fain asks this Court to equate minor traffic offenses to a warrant for the nonpayment of fines. He contends searches of automobiles under the *Belton* holding were conducted after an arrest for a criminal offense, and Officer Pearson did not arrest him for a criminal offense. Appellant maintains that he did not receive any complaints from the gas station as to how he had parked, and he did not commit any traffic offenses.

However, unlike a minor traffic offense where a police officer will normally issue the driver a citation without making an arrest, Officer Pearson had a duty to arrest Appellant once he determined the warrant was valid. It was not up to his personal discretion whether to arrest Fain.

Although no case specifically addresses the issue before this Court, we firmly believe an arrest of an automobile occupant pursuant to a valid warrant authorizes the same authority to search the automobile as does an arrest of an occupant made in connection to a criminal offense. Thus, as held in *Belton*, both situations permit a police officer to search the arrestee's vehicle incident to the arrest.

Fain further contends that even if Officer Pearson had the authority to search his vehicle, the scope of the search was excessive when analyzed under *Belton*. As support, Fain cites *Commonwealth v. Wood*, 14 S.W.3d 557, 558-559 (Ky. App. 1999), which states the *Belton* rule authorizes a search of an automobile incident to an arrest if "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 the preservation of evidence."

Fain argues that once he was placed in Officer Seabolt's police cruiser, he no longer was a threat to the safety of the officers or the public. He also claims he had no way of destroying any evidence that remained in his vehicle.

Yet, as the Commonwealth correctly noted in its brief, as long as the arrestee had the item within his immediate control near the time of the arrest, the right to search the item is not affected when the arrestee no longer has access to the item. *Rainey v. Commonwealth*, 197 S.W.3d 89 (Ky. 2006). Therefore, the fact that Fain no longer had access to his pickup truck does not render the search excessive.

We find no merit in Fain's argument that the search was not contemporaneous because it was not conducted until he was being transported to jail. Even though Fain was no longer on the scene, the record does not indicate Officer Pearson delayed in conducting the search. Furthermore, Fain's contention that his mother, who arrived on the scene during the arrest, could have easily driven his vehicle home is without merit.

The Supreme Court's holding in *Belton*, adopted by the Kentucky Supreme Court in *Ramsey,* clearly authorizes an officer to search an automobile incident to the arrest of one of its occupants. Officer Pearson, acting in good faith, placed Fain under arrest and subsequently conducted a search of his automobile incident to the arrest. Accordingly, we affirm the Fayette Circuit Court's decision overruling Fain's motion to suppress the evidence seized from his pickup truck.

ALL CONCUR.

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