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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002141-MR

RAY LEWIS TURNER

APPELLANT

v. APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE DAVID H. JERNIGAN, JUDGE
ACTION NO. 09-CR-00122

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: CAPERTON AND DIXON, JUDGES; LAMBERT,¹ SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: A jury found Ray Lewis Turner guilty of trafficking in methamphetamine and determined that he was a persistent felony offender in the first degree. He was sentenced to serve ten years in prison. He

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

brings two issues before us for review, and after our examination of the record, we reverse and remand.

Turner was pulled over by a state police trooper prior to midnight on March 22, 2009, when the police officer observed Turner driving a small pickup truck that made a legal turn without using a proper signal. When asked for his license, Turner told the police officer he did not have it with him but that it was at home. The officer asked if he could search the truck, and Turner explained that he did not believe he had the authority to grant permission since the truck was not his and he had borrowed it from a friend.

Turner testified that the officer stated he would wait for a drug sniffing dog to arrive, but no drug dog was ever brought to the scene. Turner remained in the truck while the officer went back to his cruiser, presumably to run Turner's social security number through a computer check. Turner was nervous. Another officer arrived on the scene and noticed Turner shrugging his shoulders and moving his arms between his legs. That officer approached Turner and told him to keep his hands in plain sight on the steering wheel of the truck.

The officers noticed an open can of beer in the console area which Turner had covered with a hat. Field sobriety tests were conducted but Turner did not appear to be intoxicated. The officer conducted a pat down pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Inside Turner's pants

pocket was cash totaling \$232. Turner was then arrested for failing to have an operator's license in his possession, and he was placed in the rear of a police cruiser. The police officer then searched the passenger compartment of the truck and located a baggie stuffed into the seat where Turner was sitting with six individually wrapped baggies inside, each containing methamphetamine.

Turner moved to have the results of the search of the truck suppressed. After the police officer testified at the hearing, the Commonwealth argued that the search was incident to an arrest and therefore valid. The trial court properly compared the situation to that in *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). Kentucky has adopted the *Gant* analysis to be consistent with federal constitutional requirements. *See Rose v. Commonwealth*, 322 S.W.3d 76 (Ky. 2010).

As in *Gant*, the trial court found that Turner had been secured in a cruiser and was not within reaching distance of the truck. The Commonwealth argued in the trial court that the police had a "reasonable suspicion" that contraband was in the truck. Overruling the motion to suppress, the trial court determined that Turner had attempted to hide the open beer container and that he was nervous and may have attempted to secrete or manipulate some item under the seat. With this basis, pursuant to the holding in *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), the trial court found that the police actions qualified as an exception to the search warrant requirement. The trial court

concluded that the officer had “probable cause to believe that contraband was being transported in the vehicle.”

Upon the trial court’s findings, we accept that Turner was acting nervously (a fact of dubious importance) and making movements that hid his hands and whatever else he was doing from view. However, at the time of the search, he was securely in police custody in the back seat of a cruiser with no opportunity to disturb the interior of the truck. This is the precise circumstance that *Arizona v. Gant* addressed, and as the most recent authority from this nation’s highest court, we are bound to follow it on this point of federal constitutional law.

Warrantless searches are presumed to be in violation of the Fourth Amendment. Of course, there are notable exceptions that authorize warrantless searches, but, as forcefully reiterated in *Arizona v. Gant*, those exceptions have not swallowed up the rule. The duty to grant or deny a search warrant is for the judiciary, and only where there is a demonstrable need to do otherwise should a police bypass of the judiciary be upheld. Absolutely nothing, save personal inconvenience, would have prevented the state police in this case from seeking judicial approval to search the truck. Whether the police could have established probable cause for a search warrant on the meager evidence is not before us because no judicial officer was given an opportunity to judge whether there was a sufficient basis.

Upon the foregoing, we reverse the final judgment of the Muhlenberg Circuit Court and remand with directions to suppress the evidence seized in the vehicle.

CAPERTON, JUDGE, CONCURS.

DIXON, JUDGE, DISSENTS.

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