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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000647-MR

JEFFREY SCOTT BELL — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 05-CR-01480

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND NICKELL, JUDGES; KNOPF,[1] SENIOR JUDGE.

NICKELL, JUDGE: Jeffrey Scott Bell (hereinafter "Bell") appeals the final judgment of the Fayette Circuit Court entered on March 7, 2006, sentencing him to serve one year of imprisonment for possession of a controlled substance in the first degree[2] and twelve

[1] Senior Judge William L. Knopf 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.

[2] Kentucky Revised Statutes (KRS) 218A.1415, a Class D felony.

months for possession of drug paraphernalia.[3] Imposition of sentence was suspended and Bell was placed on probation for a period of three years. The conviction resulted from entry of a conditional guilty plea[4] in which Bell reserved the right to appeal the trial court's denial of a motion to suppress items seized during a search of his vehicle following a traffic stop for speeding and his subsequent arrest for operating a vehicle while having a suspended license. Having concluded the trial court properly denied Bell's motion to suppress, we affirm the conviction.

On October 18, 2005, Officer Brad Riley (hereinafter "Officer Riley") of the Lexington Metro Police Department was using a speed tracking device to check the speed of inbound traffic on Versailles Road when he observed a box truck traveling at seventy-two miles per hour in a fifty-five mile per hour zone. Officer Riley motioned for the driver to pull over, which he did, and the officer parked his motorcycle about ten to fifteen feet behind the truck. Officer Riley approached the driver's side of the truck and asked to see the driver's license, proof of insurance and vehicle registration. Bell, the driver and sole occupant of the truck, said his license was at home but he did provide proof of vehicle insurance and registration. Based upon identifying information Bell provided orally, Officer Riley learned Bell's license had been suspended, a fact of which Bell said he was unaware. Another Lexington Metro Police Officer, Matt Hutti (hereinafter "Officer Hutti"), stopped and offered assistance. Bell exited the truck and Officer Riley arrested him for operating a vehicle on a suspended license. After

[3] KRS 218A.500, a Class A misdemeanor.

[4] Kentucky Rules of Criminal Procedure (RCr) 8.09.

searching Bell and advising him of his rights, Officer Riley escorted Bell to the officer's motorcycle and he asked Officer Hutti to search the truck cab.

Behind the truck's passenger seat, beneath a jacket and blanket, Officer Hutti found a leather pouch containing a marijuana pipe and three pill bottles filled with an unknown substance. A straw and a syringe were also found under a blanket in the truck. There was also a pen that smelled as if it had contained marijuana. Bell initially denied all knowledge of the items seized from the truck, but after being transported to the Fayette County Jail he admitted the pill bottles contained liquid methadone.

On November 16, 2005, Bell was indicted by a Fayette County grand jury for possession of a controlled substance in the first degree, possession of drug paraphernalia, operating a motor vehicle on a suspended operator's license,[5] license to be in possession,[6] speeding,[7] and failure to wear a seat belt.[8] At arraignment on November 20, 2005, he entered a plea of not guilty. On January 13, 2006, he moved to suppress all the evidence seized during the search of his truck.

A brief suppression hearing was held on January 17, 2006, at which Officer Riley was the sole witness. Following argument by both sides, the trial court denied Bell's motion to suppress evidence. The court found: the stop was based on articulable

[5] KRS 186.620.

[6] KRS 186.510.

[7] KRS 189.390.

[8] KRS 189.125.

and reasonable suspicion of criminal activity because Officer Riley observed the truck speeding; Bell was arrested for a serious offense, operating on a suspended license; he was not arrested for a minor traffic offense; the arrest was not a pretext to search Bell's truck; and, the search was consistent with *New York v. Belton,* 453 U.S. 454, 101 S.Ct. 2860, 69 L.E.2d 768, 775 (1981).

On January 27, 2006, Bell entered a conditional guilty plea to possession of a controlled substance in the first degree and possession of drug paraphernalia. Four other counts against Bell were dismissed and he reserved the right to appeal the denial of his suppression motion. Final judgment was entered on March 7, 2006. This appeal followed.

Relying upon cases[9] decided prior to rendition of *Belton* in 1981, Bell claims the warrantless search of his truck violated both the Fourth Amendment[10] to the United States Constitution and Section 10[11] of the Kentucky Constitution. He does not contest the validity of either the stop or the arrest, only that the trial court wrongly denied his suppression motion because at the time of the search he was under the control of a

[9] Bell cites *McHone v. Commonwealth,* 576 S.W.2d 242 (Ky. 1978) and *Commonwealth v. Hagan,* 464 S.W.2d 261 (Ky. 1971). Both were decided before *Belton, supra,* was announced by the United States Supreme Court in 1981 and both stand for the proposition that an arrest for a minor traffic violation does not justify a complete vehicle search.

[10] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[11] "The people shall be secure in their persons, houses, papers, and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."

motorcycle officer, he was ten to fifteen feet away from his vehicle so he could not reach a weapon or destroy evidence inside the vehicle, and there was no evidence to be found inside the truck that would have proved he was driving on a suspended license. In light of the evidence and controlling case law, we find Bell's argument unpersuasive.

In reviewing a trial court's denial of a motion to suppress evidence following a hearing this Court must first examine the trial court's factual findings for clear error. The trial court's findings of fact will be deemed conclusive if supported by substantial evidence. *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998); RCr 9.78. We must then review the trial court's decision *de novo* to determine whether it is correct as a matter of law. *Stewart v. Commonwealth,* 44 S.W.3d 376, 380 (Ky.App. 2000) (citations omitted). Because the trial court's findings are not clearly erroneous and the court has correctly applied the law, we affirm.

Under the Fourth Amendment, warrantless searches are unreasonable unless they fall within a recognized exception to the warrant requirement.[12] The government must show the search falls within an exception. *Gallman v. Commonwealth*, 578 S.W.2d 47, 48 (Ky. 1979). Here, the Commonwealth convincingly established the warrantless search of Bell's truck was reasonable because it occurred incident to Bell's lawful arrest for a serious offense.

The exception allowing police officers to search a vehicle following a lawful arrest is well-established. In *Belton*, *supra,* a lone police officer stopped a car for

[12] Recognized exceptions include: (1) consent; (2) plain view; (3) search incident to arrest; (4) probable cause; (5) exigent circumstances; and (6) inventory. *Stewart, supra*, at 379 (citations omitted).

speeding. Neither the driver nor any of the three occupants owned the vehicle nor was related to the owner. Additionally, the officer smelled burnt marijuana emanating from the car and he saw a "Supergold" envelope, which he associated with marijuana, on the floorboard. The officer ordered the driver and passengers out of the vehicle and placed each one under arrest for possession of marijuana. He patted down each of the four men, handcuffed them and separated them so they could not physically touch one another. The officer then searched the passenger compartment of the car finding a leather jacket belonging to Belton on the back seat. Upon unzipping a pocket of that jacket, the officer discovered cocaine. Thereafter, the officer collected the "Supergold" envelope, the leather jacket and the four suspects, placed them in his cruiser, and drove to a nearby police station. The United States Supreme Court determined the *Belton* search did not violate the Fourth Amendment because it was incident to a lawful arrest. The Supreme Court of Kentucky followed *Belton* in *Commonwealth v. Ramsey*, 744 S.W.2d 418, 419 (Ky. 1987) wherein it upheld the search of a car's interior because it was contemporaneous with an arrest for driving under the influence and driving without a valid operator's license.

Belton specifically allows the passenger compartment of a vehicle, as well as any containers therein, to be searched incident to a lawful custodial arrest. *Belton*, 453 U.S. At 461. *See also United States v. Ross*, 456 U.S. 798, 825, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). These rules apply whether the arrestee is an occupant of the vehicle or a *recent occupant;* it matters not that the person has been separated from his vehicle

and secured in a police cruiser. *Thornton v. United States*, 541 U.S. 615, 623-4, 124 S.Ct. 2127, 158 L.E.2d 905 (2004).

In *United States v. White*, 871 F.2d 41 (6th Cir. 1989), the Sixth Circuit Court of Appeals recognized the *Belton* rule. In *White*, the suspect was already handcuffed and secured in a police cruiser when the search was performed. The Sixth Circuit noted that even where the arrestee is no longer in reach of the vehicle, a search is valid as a search incident to a lawful arrest and police officers may search any area that is or was in the arrestee's immediate control at the time of the arrest.

Bell urges us to reverse the trial court's denial of his suppression motion based on this Court's decision in *Clark v. Commonwealth*, 868 S.W.2d 101 (Ky.App. 1993). Finding *Clark* distinct, we decline to do so. In *Clark*, the driver of a vehicle, Nutter, was stopped and arrested for driving without a valid driver's license. An officer searched the vehicle he was driving, but not until about forty minutes after Nutter had been placed inside a police cruiser. In reversing the trial court's denial of Nutter's suppression motion, this Court found the search exceeded the area within Nutter's immediate control. *Clark* distinguished *Belton* on two grounds. First, Nutter was arrested for only a minor traffic violation (driving on a valid learner's permit without being accompanied by a licensed driver) rather than for a more serious drug offense (possession of marijuana in *Belton*). Second, the search of Nutter's vehicle was not contemporaneous with his removal from the vehicle whereas the search in *Belton* occurred immediately after the driver and passengers exited their vehicle and were

arrested. *Clark* held the vehicle search could not have been incident to Nutter's arrest because he was arrested outside the vehicle and was immediately placed into the police cruiser and thus there was no belief that Nutter could have returned to the vehicle to secure a weapon or to destroy evidence.

Since *Clark* was rendered in 1993, several cases have distinguished it, but none have overruled it. In *Commonwealth v. Wood*, 14 S.W.3d 557 (Ky.App. 1999), this Court distinguished the facts before it from *Clark* and upheld a search incident to an arrest. Relying upon *Belton*, *supra*; *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969); and *Ramsey*, *supra,* we held:

> Thus, in a typical arrest situation such as in the case before us, we must adhere to the *Belton* rule that a warrantless search of an arrestee and his vehicle is to be upheld provided 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 in the preservation of evidence. Unlike the arrest in *Clark*, there is no question that arrest is typical for the offense of driving on a license suspended for DUI. The search in this case immediately followed the arrest and there was the additional concern of a passenger in the vehicle. Therefore, although Wood, who had been removed from the vehicle prior to the search, posed no immediate threat to the officer or others, evidentiary concerns remained.

Wood, 14 S.W.3d at 558-59. *Clark* is inconsistent with federal case law regarding searches incident to arrest. In *Clark,* a panel of this Court concluded the passenger compartment of a car did not come within Nutter's area of immediate control because he was arrested outside the car. However, as stated in *White, supra* at 44, upon lawful arrest, officers can search the area that is or was in an arrestee's immediate control. In

Clark, the passenger compartment was within Nutter's immediate control when the officer initiated contact. Here, Bell was stopped while driving the vehicle and, according to *White*, the passenger compartment could be searched because it was within Bell's immediate control when he was removed from the vehicle. Also, the search in this case was contemporaneous to the arrest. There was no forty minute delay between arrest and search as in *Clark*.

In 2004, the United States Supreme Court again addressed the issue of a search incident to an arrest in *Thornton, supra.* An undercover officer noticed a vehicle slow down to avoid driving beside an unmarked patrol car. The officer ran the license plate and learned the plate was registered to another vehicle. Before the officer was able to stop the car, Thornton pulled into a parking lot, parked and exited the car. He approached Thornton who was sweating and nervous. Thornton agreed to a pat-down search which revealed marijuana and crack cocaine. At that point Thornton was arrested, handcuffed, and placed in the back seat of a patrol car. The officer then searched Thornton's car and found a nine millimeter handgun under the driver's seat. Thornton moved to suppress evidence seized from the automobile. The United States Supreme Court upheld the trial court's denial of Thornton's motion to suppress because the search of the vehicle was valid under *Belton*. The Supreme Court stated:

> In so holding, we 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. We recognized as much, albeit in dicta, in *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), where officers observed a speeding car swerve into a ditch. The driver exited and the officers met him at the rear of his car. Although there was no indication that the officers initiated contact with the driver while he was still in the vehicle, we observed that "[i]t is clear . . . that if the officers had arrested [respondent] . . . they could have searched the passenger compartment under [*Belton*].

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," *Robinson*, *supra*, at 234-235, and n.5, 94 S.Ct. 467 (emphasis added). *See Washington v. Chrisman*, 455 U.S. 1, 7, 102 S.Ct. 812, 70 L.Ed.2d 778 (1982) ("Every arrest must be presumed to present a risk of danger to the arresting officer"). 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.

. . . .

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 [footnote omitted].

Thornton, 541 U.S. at 620-23.

In applying our standard of review, we conclude first that the trial court's findings are supported by substantial evidence. Officer Riley testified at the suppression hearing that he observed Bell's truck traveling seventeen miles per hour over the speed limit. Upon stopping Bell's vehicle, Officer Riley learned Bell's operator's license had been suspended and placed him under arrest. Since operating a vehicle on a suspended license usually results in an arrest, *Commonwealth v. Wood,* 14 S.W.3d 557 (Ky.App. 1999), we uphold Bell's arrest as being lawful.

Next we conclude the trial court correctly denied the motion to suppress. Bell's arrest was for a serious offense, not a minor traffic violation. As such, under *Belton* and its progeny, Officer Riley was authorized to search Bell's entire vehicle and any containers within it. Contrary to Bell's theory of error, it matters not that he was separated from his vehicle and could not readily reach a weapon or destroy evidence within his truck. The warrantless search was proper under *Thornton, supra,* because the truck was within Bell's immediate control just prior to his arrest. *Penman v. Commonwealth,* 194 S.W.2d 237 (Ky. 2006). *See also White, supra.* Ultimately, since

Bell's arrest was proper, the search of his vehicle, contemporaneous to his lawful arrest, was also proper. *Ramsey, supra.*

Accordingly, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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