

RENDERED: NOVEMBER 6, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000247-MR

TERRY BURTON

APPELLANT

ON REMAND FROM SUPREME COURT
2009-SC-000264-DG

v. FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 07-CR-00205

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; ACREE, JUDGE; BUCKINGHAM,¹
SENIOR JUDGE.

COMBS, CHIEF JUDGE: This matter is before us on remand from the Supreme
Court of Kentucky by order entered August 19, 2009. In its order, the Supreme
Court directed us to reconsider our opinion rendered April 3, 2009, in light of

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.

Arizona v. Gant, -- U.S. -- , 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). Having duly considered the Court's analysis in *Gant* and re-examined the nature of Burton's appeal, we affirm.

On February 13, 2007, a Fayette County grand jury indicted Terry Burton for possession of marijuana, trafficking in marijuana, giving a false name, and of being a persistent felony offender in the second degree. Several days later, Burton appeared by video in Fayette Circuit Court and entered a plea of "not guilty" to the charges against him.

Burton was a passenger in a vehicle that had been stopped by police. He argued that he had standing to challenge searches of the vehicle conducted by law enforcement officers. In March 2007, Burton made a motion to suppress the evidence that had been obtained against him. Substantively, he argued: (1) that the officers lacked the reasonable suspicion necessary to justify their request for his identification; and (2) that their warrantless search of the entire vehicle exceeded the proper scope of a search conducted incident to an arrest as authorized by the United States Supreme Court in *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981).

Our review of the record revealed the following facts, which are not in dispute: On the evening of December 28, 2006, Vehicle Enforcement Officer Chad Mayes was patrolling the Versailles Road area of Lexington when he observed a Ford Explorer travelling inbound with high beams illuminated. Officer Mayes recognized this activity not only as a traffic violation but also as a generally

accepted indicator of possible driver impairment. Officer Mayes activated his emergency lights, and the driver of the Ford Explorer pulled over immediately. Officer Mayes approached the driver and asked for his operator's license. While the driver was retrieving his license, Officer Mayes talked with him about his use of the vehicle's high beams. In response, the driver turned down his head lamps and presented his license to Officer Mayes. Since there is no shoulder on this portion of Versailles Road, the Ford Explorer and Officer Mayes's cruiser were obstructing one lane of traffic during this exchange. In the interest of safety, Officer Mayes suggested that the driver pull to a nearby side street that intersected Versailles Road.

After the vehicles were moved, Officer Mayes again approached the Ford Explorer. He returned the license to the driver and turned his attention to the passengers. Officer Mayes indicated that it was his custom to ask for identification from any and all passengers during a traffic stop.

Officer Mayes asked both the front-seat passenger and the rear-seat passenger for their names and some identification. Burton told Officer Mayes that his name was "Terry Robinson, Jr.," and he claimed that he was not carrying any form of identification. Officer Mayes told Burton that he could confirm his identification with a Social Security number. Burton then gave Officer Mayes a false Social Security number. Officer Mayes relayed the information to dispatch, but no match was found. Officer Mayes returned to talk with Burton, who gave him a revised Social Security number. Again, dispatch could not make a match.

At about this time, Kentucky State Police Trooper Jason Palmer arrived at the scene.

Burton was warned that he could be arrested for giving a false name to the officers, but he insisted that he had given them accurate information. Trooper Palmer relayed the information provided by Burton to the Kentucky State Police dispatch, but no match was found there either. Eventually, Officer Mayes discovered Burton's true identity. When confronted, Burton admitted that he had given the law enforcement officers a false name because he was wanted on outstanding warrants.

The officers searched the area where Burton had been sitting and found a small bag of marijuana. Burton was promptly arrested for giving a false name to an officer and for possession of marijuana. He was placed into the police cruiser, and the officers then conducted a search of the entire vehicle and discovered a bag containing nearly six pounds of marijuana. Cash totaling \$1400.00 was found on Burton's person.

After considering the testimony and the memoranda submitted by the parties, the trial court denied Burton's motion to suppress. Burton was tried by a jury in November 2007, and he was convicted of all the charges against him. On January 22, 2008, the trial court sentenced him to seven-years' imprisonment.

In February 2008, Terry Burton Jr., filed his notice of appeal from the judgment of conviction and sentence of the Fayette Circuit Court. Burton argued on appeal that the trial court erred by failing to grant his motion to suppress the

evidence. He contended that law enforcement officers lacked the authority to question him about his identity because his identity was not reasonably related to the circumstances that justified the traffic stop and that the officers had no reasonable, articulable suspicion that he was engaged in any criminal activity that would justify an inquiry. He also argued that the questioning by the police unlawfully prolonged the traffic stop and that the drug evidence collected against him should have been excluded as flowing from the illegal detention. Burton did not argue on appeal (as he had before the trial court) that the warrantless search of the entire vehicle exceeded the scope of a search conducted incident to arrest as authorized by *Belton*.

The United States Supreme Court granted *certiorari* in *Gant* less than three weeks after Burton filed his notice of appeal. We shall first discuss our opinion rendered prior to *Gant* before we re-analyze this case in light of *Gant*.

In our previous opinion, we observed that the decision to conduct a routine traffic stop was justified at its inception because it was supported by a reasonable, articulable suspicion. Relying in part on this court's reasoning in *Hardy v. Commonwealth*, 149 S.W.3d 433 (Ky.App. 2004), we concluded "that the existence of the outstanding arrest warrant constituted an 'intervening circumstance' that outweighed any possible misconduct or error on the part of the officers in their investigation of [Burton's] identity." Opinion at 6. Consequently, we concluded that the trial court had not erred by denying Burton's motion to suppress evidence. We affirmed his conviction unanimously.

In October 2008, *Arizona v. Gant* was argued before the United States Supreme Court. The Court's grant of *certiorari* was limited to a single question:

Does the Fourth Amendment require law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicular search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured?

Arizona v. Gant, -- U.S. -- ,128 S.Ct. 1443, 170 L.Ed.2d 274 (2008).

In a 5-4 decision delivered in April 2009, the Supreme Court narrowly construed its decision in *Belton* to hold that police officers may search a vehicle incident to arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or if it is reasonable to believe that the vehicle contains evidence of the offense for which the arrest is made.

Relying on the Court's decision in *Gant*, Burton filed a motion for discretionary review in the Supreme Court of Kentucky in May 2009. In response, the Commonwealth contended that Burton had not appealed the **scope of the searches** undertaken at the time of his arrest but only the lawfulness of the detention that had culminated in his arrest. Burton acknowledged that his appeal had focused on the legality of the detention.

Our opinion of April 3, 2009, summarized Burton's arguments before the trial court. To recapitulate, he argued that he had standing to challenge the searches of the vehicle conducted by law enforcement officers; that the officers had unlawfully prolonged the traffic stop since they lacked the reasonable

suspicion necessary to justify their requests for his identification; and that the warrantless search of the entire Explorer exceeded the scope of a search conducted incident to arrest as authorized by *Belton*.

On appeal, Burton contended that he had been unlawfully detained by the officers because the traffic stop had been prolonged beyond the time reasonably required to address the driver's use of his high beams. He also argued that the officers' insistence that he identify himself to them did not conform to any standard necessary to justify an investigatory stop and that the officers violated his right to privacy and to due process by asking for his Social Security number. Burton focused entirely on the officers' investigation of his identity, characterizing it as a mere "fishing expedition." Burton did not mention the scope of the search undertaken incident to his arrest. Because he failed to discuss this alleged error in his brief, we deemed the issue waived or abandoned. *Hugenberg v. West American Ins. Co.*, 249 S.W.3d 174 (Ky.App. 2006).

As a consequence, our discussion was confined to an analysis of Burton's detention and never addressed the search-incident-to-arrest issue upon which Burton relied as the basis of his motion for discretionary review. Our analysis was limited to a discussion of Officer Mayes's right to initiate a traffic stop under the circumstances. We concluded that Burton's detention -- even if it was tainted -- was not unlawful because the officers discovered an outstanding warrant for his arrest. We were provided with no details surrounding the circumstances of Burton's actual arrest; nor were we asked to consider whether

any safety or evidentiary concerns had arisen during Burton's arrest that would justify a thorough search of the Explorer under the *Gant* criteria. As a result, our resolution of Burton's appeal was not affected by the Supreme Court's analysis of the nature and scope of the vehicular search described in *Gant*.

After reflection in light of *Gant*, our analysis and decision remain unchanged. We affirm the judgment of conviction of the Fayette Circuit Court.

ALL CONCUR.

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