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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000147-MR

REYES VALESQUEZ — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE PAMELA R. GOODWINE, JUDGE
ACTION NO. 08-CR-01241

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: LAMBERT AND THOMPSON, JUDGES; KNOPF,[1] SENIOR JUDGE.

LAMBERT, JUDGE: Reyes Valesquez appeals from a conditional guilty plea entered by the Fayette Circuit Court on December 5, 2008. Valesquez entered a plea of guilty to first-degree trafficking in a controlled substance, possession of drug paraphernalia, and operating on a suspended or revoked license. This plea

[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.

was conditioned on the preservation for appeal of Valesquez's motion to suppress the contraband discovered in Valesquez's vehicle. Valesquez argues that the holding set forth in *Arizona v. Gant,* __ U.S. __, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), is controlling in this matter and compels a reversal of the trial court's denial of Valesquez's motion to suppress. Agreeing that the trial court's ruling is erroneous under the new authority developed in *Gant*, we hereby vacate the final judgment and sentence entered against Valesquez on January 22, 2009, as well as the November 18, 2008, order denying Valesquez's motion to suppress. This matter shall be remanded to allow Valesquez to withdraw his guilty plea pursuant to Kentucky Rules of Criminal Procedure (RCr) 8.09 and for further proceedings consistent with this opinion.

On August 17, 2008, Officer Brian Jared conducted a traffic stop of Valesquez's vehicle for failing to use his blinker when he turned left in a left-turn-only lane.[2] Upon checking Valesquez's license, it was discovered that Valesquez was driving on a suspended license. Officer Jared placed Valesquez under arrest for this offense.

About the time that Valesquez was being removed from his vehicle, two additional police officers arrived at the scene. While Officer Jared placed Valesquez into the cruiser, the two other officers began a search of Valesquez's

[2] When asked why he stopped Valesquez for such a trivial traffic violation, Officer Jared responded that this is often done to investigate whether people are driving under the influence, have outstanding warrants, or are operating their vehicles with a suspended license.

vehicle. The parties agree that Valesquez was secured in the back of Officer Jared's vehicle during the vehicle search.

The search revealed three bags of cocaine and a set of digital scales found underneath the backseat. Officer Jared testified that no incriminating evidence was in plain view. Rather, during the search, the backseat was discovered to be "loose and ajar" when one of the officers leaned on the seat to look under it. Leaning on the seat caused it to move. The officers then touched the seat and it easily lifted. Upon having his *Miranda* rights read to him at the scene, Valesquez agreed to talk to the officers and eventually admitted that he was about to engage in a drug deal.

During the criminal proceedings that inevitably followed, Valesquez moved to suppress the fruits of the vehicle search on grounds that such a warrantless search was in violation of both the U.S. and Kentucky Constitutions. Relying on *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), and *Commonwealth v. Wood*, 14 S.W.3d 557 (Ky. App. 1999), the trial court concluded that police have long been permitted to search the entire passenger compartment of a vehicle that was occupied or recently occupied by an arrested person under the "search-incident-to-arrest" exception to the warrant requirement. *See also Thornton v. United States*, 541 U.S. 615, 617, 124 S.Ct. 2127, 2129, 158 L.Ed.2d 905 (2004) (*Belton* also applies to vehicles of recent occupants). Valesquez thereafter entered a conditional guilty plea and appealed to this Court.

During the pendency of this appeal, the U.S. Supreme Court rendered *Gant*, which altered the long-standing rule set forth above. Acknowledging that the Court's holding in *Belton* "has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search[,]" the *Gant* Court held that this reading of *Belton* shall now be rejected. 129 S.Ct. at 1718. Instead, the Court directed that the new reading of *Belton* shall allow police to "search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." 129 S.Ct. at 1719. The *Gant* Court further held that searches of an arrestee's vehicle may also be conducted without a warrant when "it is reasonable to believe [that] evidence relevant to the crime of arrest might be found in the vehicle." *Id.* (internal citation and quotation omitted). In light of these new standards, reevaluation of Valesquez's motion to suppress is necessary. *See Griffith v. Kentucky*, 479 U.S. 314, 322, 107 S.Ct. 708, 713, 93 L.Ed.2d 649 (1987) ("failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication.").

The Commonwealth does not challenge Valesquez's contention that his Fourth Amendment rights were violated under the new constitutional precedent set forth in *Gant*, nor does the Commonwealth offer any alternative grounds for justifying the warrantless search. Officer Jared testified at the suppression hearing that his only reason for stopping Valesquez was the commission of a minor traffic

offense. He further stated that during the arrest there was nothing in plain view which generated a suspicion that Valesquez may have drugs or drug paraphernalia in the vehicle. As the pertinent facts are not in dispute, there are no grounds for remanding this case for further factual findings by the trial court.

Rather, only questions of law remain for this Court's determination. *See Commonwealth v. Pride*, ___ S.W.3d ___, 2010 WL 245591 (Ky. 2010) (warrantless searches are reviewed *de novo*). Upon careful review, we agree with Valesquez that his Fourth Amendment rights were violated as a matter of law when the police officers searched his vehicle without first obtaining a warrant to do so. *See United States v. Lopez*, 567 F.3d 755, 757-58 (6th Cir. 2009) (warrantless search of passenger compartment of vehicle unconstitutional where driver was arrested for reckless driving); *Gant*, 129 S.Ct. at 1714 (warrantless search of passenger compartment of vehicle unconstitutional where driver was arrested for driving on a suspended license). As set forth in *Gant*, the arrest itself, without more, was not sufficient to justify the warrantless search in this case.

The Commonwealth argues on appeal that the equities of these circumstances justify the application of the "good faith" exception to the exclusionary rule established in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), to this case. In other words, even though Valesquez's constitutional rights were violated, he should not be afforded the remedy of having the fruits of this illegal search and seizure suppressed because it

is undisputed that the officers in this case operated in "good faith" and under law that was well-settled at the time of the search.

Whether the "good faith" exception to the exclusionary rule may be utilized, as a matter of law, to preserve the admissibility of evidence discovered from searches conducted pursuant to settled law at the time of the search is an open question. *Compare United States v. McCane*, 573 F.3d 1037, 1044-45 (10th Cir. 2009) ("good faith" exception to exclusionary rule applies in these cases) *with United States v. Gonzalez*, 578 F.3d 1130, 1132 (9th Cir. 2009) ("good faith" exception to exclusionary rule not applicable in light of clear precedent set forth in *Griffith* and *United States v. Johnson*, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982)); *see also United States v. Lopez*, 2009 WL 3112127 (E.D. Ky. Sept. 23, 2009) (applying the good faith exception); *United States v. Peoples*, 2009 WL 3586564 (W.D. Mich. Oct. 29, 2009) (stating that "good faith reliance upon case law cannot excuse suppression under the current formulation and application of the good-faith doctrine."); *United States v. Buford*, 623 F.Supp.2d 923, 927 (M.D. Tenn. 2009) (involving the retroactive application of *Gant* in the context of a motion to suppress and stating that the extension of the good-faith exception would cause "perverse results" in that case).

The Sixth Circuit has yet to articulate a definitive ruling on this question other than to hold that reliance on pre-*Gant* case law to allow a *Belton* search was not plain error in a case in which the defendant failed to preserve the

question for appellate review. *See United States v. Deitz*, 577 F.3d 672, 687-88 (6th Cir. 2009).

The law is currently emerging and unsettled. This important constitutional question is destined to be determined at the highest levels of not only this court system, but the federal court system as well. Until then, we elect to follow the dicta set forth by the Kentucky Supreme Court in *King v. Commonwealth*, ___ S.W.3d ___ , 2010 WL 246060 (Ky. 2010), declaring that "the *Leon* good faith exception is 'clearly limited to warrants invalidated for lack of probable cause' and does not create a broad good faith exception for any illegal search." *Id.* at 7 (quoting *United States v. Whiting*, 781 F.2d 692, 698 (9th Cir. 1986)). A contrary interpretation, we believe, is not reconcilable with the binding authority set forth in *Griffith v. Kentucky*, *supra*, 479 U.S. at 326, 107 S.Ct. at 715 (overruling prior case law that excepted the retroactive application of new constitutional rules that were deemed to have represented a "clear break" from past precedent).

Accordingly, we hereby vacate the final judgment and sentence entered against Valesquez on January 22, 2009, as well as the November 18, 2008, order denying Valesquez's motion to suppress. This matter shall be remanded to allow Valesquez to withdraw his guilty plea pursuant to RCr 8.09 and for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Thomas M. Ransdell
Assistant Public Advocate
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General

Courtney J. Hightower
Assistant Attorney General
Frankfort, Kentucky