RENDERED: OCTOBER 15, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001149-MR

RONALD LEE BLEDSOE — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 08-CR-00939

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; LAMBERT, JUDGE; HENRY,[1] SENIOR JUDGE.

LAMBERT, JUDGE: Ronald Bledsoe appeals from a conditional guilty plea entered by the Fayette Circuit Court on May 8, 2009. Bledsoe entered a plea of guilty to possession of marijuana, alcohol intoxication in a public place, and possession of a firearm by a convicted felon. This plea was conditioned on the

[1] Senior Judge Michael L. Henry 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.

preservation for appeal of Bledsoe's motion to suppress evidence discovered in his vehicle. Bledsoe argues that *Arizona v. Gant*, --- U.S. ---, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), controls and compels a reversal of the trial court's denial of his motion to suppress. Agreeing that the trial court's ruling is erroneous under the new authority developed in *Gant*, we vacate the final judgment and sentence entered against Bledsoe on June 3, 2009, as well as the January 15, 2009, order denying Bledsoe's motion to suppress. We remand to allow Bledsoe to withdraw his guilty plea pursuant to Kentucky Rules of Criminal Procedure (RCr) 8.09 and for further proceedings consistent with this opinion.

On May 2, 2009, Officer Raymond Terry was patrolling with another officer on bicycles in downtown Lexington. While patrolling, Terry and the other officer observed a van parked in a cul-de-sac in a neighborhood known for narcotics. Based on this contention, the officers approached Bledsoe, who was in the driver's seat of the van. Officer Terry testified that no one else was around the van at this time.

The officers asked Bledsoe why he was sitting in the van, and he answered that he was waiting for his sister, who was in one of the houses on that street. Officer Terry testified later at the suppression hearing that Bledsoe's eyes were watery, that he spoke with slurred speech, and that there was a smell of

alcohol coming from the van. When asked, Bledsoe stated that he had been drinking earlier in the day.

Officer Terry arrested Bledsoe for alcohol intoxication in a public place, and Bledsoe was handcuffed and read his *Miranda* rights. Officer Terry testified that as he was doing paperwork necessary for the arrest, the other officer searched the van in a search incident to Bledsoe's arrest. During that search, the officer found three grams of marijuana and a derringer pistol.

Bledsoe was initially charged with alcohol intoxication in a public place, possession of marijuana, and carrying a concealed deadly weapon. However, because Bledsoe had been previously convicted of a felony, the charge of carrying a concealed deadly weapon was amended to one of possession of a handgun by a convicted felon.

Prior to trial, defense counsel filed a motion to suppress the evidence seized from the van on grounds that the officer's warrantless search was in violation of both the United States and Kentucky Constitutions. The Fayette Circuit Court held a hearing on January 14, 2009. Following the hearing, the trial court denied the motion to suppress. 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). Pursuant to that ruling, Bledsoe entered a conditional guilty plea, reserving his right to appeal the trial court's denial of the motion to suppress the evidence seized from the van. He subsequently appealed to this court.

During the pendency of Bledsoe's case, the United Staes Supreme Court rendered *Gant*, which altered the long-standing rule set forth by the trial court above. The *Gant* court rejected its previous holding in *Belton*, which allowed officers to conduct 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[.]" 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." *Gant,* 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, we must necessarily reevaluate Bledsoe's motion to suppress. *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.").

Bledsoe does not allege error with regard to the trial court's factual findings. Instead, he argues that, given the ruling in *Gant*, his conviction should be vacated, and thus only questions of law remain for this Court's determination. *See Commonwealth v. Pride*, 302 S.W.3d 43 (Ky. 2010) (warrantless searches are reviewed *de novo*).

Upon careful review, we agree with Bledsoe that his Fourth Amendment rights were violated as a matter of law when the police officer 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*, Bledsoe's arrest for public intoxication, 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). In other words, even though Bledsoe'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.

In support of this contention, the Commonwealth points to *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009), wherein the Tenth Circuit applied the *Leon* good faith exception in a case similar to the one at bar. However, 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).

Until this important constitutional question is determined, we elect to follow the dicta set forth by the Kentucky Supreme Court in *King v. Commonwealth*, 302 S.W.3d 649 (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 657. (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 Bledsoe on June 3, 2009, as well as the January 15, 2009, order denying Bledsoe's motion to suppress. This matter shall be remanded to allow

Bledsoe to withdraw his guilty plea pursuant to RCr 8.09 and for further proceedings consistent with this opinion.

TAYLOR, CHIEF JUDGE, CONCURS.

HENRY, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

HENRY, SENIOR JUDGE, DISSENTING: I respectfully dissent. It is not disputed in this case that on the night of his arrest Bledsoe was 1) a convicted felon 2) sitting alone in a vehicle which contained marijuana and a loaded handgun 3) in a high-crime neighborhood 4) drunk. For purposes of our review of his case Bledsoe admitted that on that night he was a convicted felon in possession of a handgun. We are asked to decide whether, despite his guilt, federal constitutional law requires us to instruct the trial court to void his conviction. The majority has "elect[ed] to follow the dicta set forth by the Kentucky Supreme Court in *King v. Commonwealth,* " and, thereby, expand the scope of *Arizona v. Gant*, --- U.S. ---, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) in Kentucky law before the Kentucky Supreme Court has ruled on the issue. I, on the other hand, elect not to follow dicta to void Bledsoe's conviction. I would follow the clear holdings of *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009) and *United States v. Deitz,* 577 F.3d 672 (6th Cir. 2009) until either the Kentucky Supreme Court or the United States Supreme Court clearly require otherwise. I would affirm.

BRIEF FOR APPELLANT:

J. Brandon Pigg
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General

Julie Scott Jernigan
Assistant Attorney General
Frankfort, Kentucky