

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000410-MR

JAVIER TORREZ

APPELLANT

v. APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE ROBERT G. JOHNSON, JUDGE
ACTION NO. 08-CR-00135

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CAPERTON, MOORE, AND VANMETER, JUDGES.

VANMETER, JUDGE: Javier Torrez appeals from a judgment and sentence entered by the Scott Circuit Court on February 5, 2009 following his conditional guilty plea to the charges of trafficking in marijuana over five pounds, operating a motor vehicle under the influence, and operating a motor vehicle without an operator's license. Torrez's conditional guilty plea preserved his right to appeal the trial court's denial of his motion to suppress. For the following reasons, we

affirm the judgment and sentence entered against Torrez on February 5, 2009, as well as the February 5, 2009, order denying his motion to suppress.

On May 28, 2008, Kentucky State Trooper Darren Boyles initiated a traffic stop of a vehicle operated by Torrez.¹ Torrez indicated that he did not speak English and did not have a license. He was arrested for speeding, operating a motor vehicle without an operator's license, operating a motor vehicle under the influence, and failure to wear a seatbelt. Trooper Boyles placed Torrez in the police cruiser and then searched the passenger compartment of Torrez's vehicle in an attempt to locate identification for Torrez. No such identification was found; however, Trooper Boyles did discover a bag containing packages of marijuana.

During the criminal proceeding following his arrest, Torrez moved to suppress the fruits of the vehicle search on the ground that such a warrantless search was unconstitutional. Relying on *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), the trial court concluded that the search of Torrez's vehicle was lawful under the search incident to an arrest exception to the Fourth Amendment's warrant requirement. Under *Belton*, the trial court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* at 460, 101 S.Ct. at 2864 (footnotes omitted). The trial court denied Torrez's motion to suppress; thereafter, Torrez entered a conditional guilty plea and was sentenced. This appeal followed.

¹ Torrez does not challenge the stop of his vehicle or his subsequent arrest.

The record contains a stipulation of facts by the parties concerning Torrez's motion to suppress including: Trooper Boyles' reasonable suspicion for the traffic stop and probable cause for the subsequent arrest of Torrez are not presently being challenged, the purpose of Trooper Boyles' search of Torrez's vehicle was an attempt to locate identification, and Torrez was restrained in the police cruiser during the search of his vehicle. Moreover, it appears from the record that Torrez indicated to Trooper Boyles that he did not speak English and Torrez received the assistance of a Spanish interpreter throughout the criminal proceedings. Since the relevant facts are not in dispute, only questions of law remain for our determination. *See Commonwealth v. Pride*, 302 S.W.3d 43 (Ky. 2010) (when factual findings of trial court are supported by substantial evidence, we then review the ruling on the motion to suppress *de novo* to see whether the decision was correct as a matter of law).

As an initial matter, all warrantless searches are *per se* unreasonable under the Fourth Amendment, unless the search falls within an exception to the warrant requirement. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Among the recognized exceptions to the warrant requirement is a search incident to an arrest. *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969); *Rainey v. Commonwealth*, 197 S.W.3d 89 (Ky. 2006). At the time the trial court denied Torrez's motion to suppress, the issue at bar was pending before the United States Supreme Court in the case of *Arizona v. Gant*, --- U.S. ---, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). Since the Supreme Court

rendered an opinion in *Gant* during the pendency of this appeal, reevaluation of Torrez'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.").

Torrez argues the search of his vehicle was unlawful as a search incident to an arrest, in light of the recent decision in *Gant*. In *Gant*, the Supreme Court held:

Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

Id. at 1723-24.

Here, the record reflects that Torrez was arrested for operating a motor vehicle without an operator's license when he failed to produce identification. Further, at the time of his arrest, Torrez indicated to Trooper Boyles that he did not speak English. Under *Gant*, Trooper Boyles had reason to believe the vehicle contained evidence of the offense of arrest, *i.e.*, identification for Torrez, and properly searched the passenger compartment of Torrez's vehicle for such identification. *See Belton*, 453 U.S. 454, 101 S.Ct. 2860 (an officer may search the entire passenger compartment, as well as all open or closed containers,

as a contemporary incident of any lawful arrest); *Brown v. Commonwealth*, 890 S.W.2d 286 (Ky. 1994) (search of entire passenger compartment proper as a contemporaneous incident of arrest); *Commonwealth v. Ramsey*, 744 S.W.2d 418 (Ky. 1987) (probable cause to arrest defendant for DUI and not having a valid operator's license justified search of automobile's passenger compartment after arrest); *Commonwealth v. Wood*, 14 S.W.3d 557 (Ky.App. 1999) (warrantless search of vehicle's glove compartment following arrest of driver for driving with a suspended license was a valid search incident to arrest).

Accordingly, the judgment and sentence entered against Torrez on February 5, 2009, as well as the February 5, 2009, order denying his motion to suppress, are affirmed.

CAPERTON, JUDGE, CONCURS.

MOORE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

MOORE, JUDGE, DISSENTING: Respectfully, I dissent from the majority's opinion. Whether or not the Court agrees with the decision in *Arizona v. Gant*, ___ U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), we are compelled to follow it when engaging in a Fourth Amendment analysis. While the officer may well have acted within bounds that were accepted prior to *Gant*, *Gant* nonetheless is now controlling authority on this point. Pursuant to *Gant*, the search in this matter was unconstitutional. The Commonwealth, with proper and admirable candor to the Court, all but concedes this point and argues instead that the good faith exception under *United States v. Leon*, 468 U.S. 897, 104 S.Ct.

3405, 82 L.Ed.2d 677 (1984) applies to this case. The Commonwealth puts forth a good argument, but it is one which is not in accord with the majority opinion in *Gant*. Accordingly, I would reverse.

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