STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 7, 2012
v	No. 302685 Washtenaw Circuit Court
GEORGE HENRY DOUGLAS, Defendant-Appellant.	LC No. 09-000969-FH

Before: M.J. KELLY, P.J., and WILDER and SHAPIRO, JJ.

PER CURIAM.

Defendant pleaded guilty to possession of a controlled substance (heroin), 50 to less than 450 grams, MCL 333.7403(2)(a)(iii). This Court granted defendant leave to appeal the issue of whether the trial court erred when it denied his motion to suppress. *People v Douglas*, unpublished order of the Court of Appeals, entered March 31, 2011 (Docket No. 302685). We reverse and remand.

On March 26, 2009, Michigan State Police Trooper Boike made a traffic stop of defendant. This stop was made for speeding, though LAWNET (Livingston and Washtenaw Narcotics Enforcement Team) was conducting surveillance on defendant and may have requested the stop. Defendant had an outstanding felony warrant for delivery of heroin for deliveries that allegedly occurred on July 18, 2008, and August 26, 2008. Defendant was arrested on the felony warrant, and after his arrest, defendant's person was searched. $5,397 was found in his front pant pocket, consisting of forty-eight $100 bills, one $50 bill, twenty-five $20 bills, six $5 bills, and seventeen $1 bills.

The van defendant had been driving was subsequently searched at the scene. There were three cellular telephones on the front passenger seat. A substance that tested to be heroin and drug paraphernalia were located inside a VCR compartment in the front of the vehicle.

Defendant moved to suppress the evidence found in the vehicle as being the result of an illegal search. After conducting a hearing on the motion, during which arguments were made but no evidence was presented, the trial court denied the motion on the basis that the search was legal under the recent United States Supreme Court decision, *Arizona v Gant*, 556 US 332; 129 S Ct 1710, 1723; 173 L Ed 2d 485 (2009). The trial court concluded:

> Given the outstanding warrant for delivery of drugs in this case, it was reasonable for the police to search the compartment areas near the driver's seat for evidence related to possession and delivery of drugs. Here, the police had a legitimate interest in preserving any evidence relating to the arresting offense, i.e. delivery of drugs, especially in light of the money found on the defendant's person and the observation of three cell phones on the seat of the car.

This Court reviews a trial court's findings of fact at a suppression hearing for clear error and the trial court's ultimate decision on a motion to suppress de novo. *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009).

"[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." *Katz v United States*, 389 US 347, 357; 88 S Ct 507; 19 L Ed 2d 576 (1967) (footnotes omitted). There are two primary relevant exceptions to the warrant requirement at issue in this case: (1) the search of defendant's vehicle incident to defendant's arrest and (2) the search of defendant's vehicle based on probable cause to believe that the vehicle contained contraband or evidence of a crime.

Generally, the rule for searches of vehicles incident to arrest was established in *New York v Belton*, 453 US 454, 459-460; 101 S Ct 2860; 69 L Ed 2d 768 (1981), where the Supreme Court stated "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" and containers in the passenger compartment. *Belton*, 453 US at 459-460 (footnotes omitted). *Belton* was largely understood to authorize "a substantially contemporaneous search of the automobile's passenger compartment" even "after the arrestee had stepped out of the vehicle and had been subdued by police." *Davis v United States*, ___ US ___; 131 S Ct 2419, 2424, 2426; 180 L Ed 2d 285 (2011) (footnote omitted).

This understanding of *Belton* was altered and narrowed in 2009 by *Gant*, which announced that "[p]olice 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." *Gant*, 556 US at 351. While *Gant* applies retroactively, *Griffith v Kentucky*, 479 US 314, 328; 107 S Ct 708; 93 L Ed 2d 649 (1987), "[e]vidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule," *Davis*, 131 S Ct at 2429. At the time of the search at issue, the binding precedent was *Belton*. Because officers could reasonably rely on *Belton*, and *Belton* provides a broader basis for a reasonable search, we decline to address whether the search in this case was reasonable under *Gant* and instead only consider whether the search was reasonable under *Belton*.

The search of the passenger compartment of the vehicle occupied by defendant at the time of his arrest was permitted by *Belton*, and the three cellular telephones on the front passenger seat were properly seized by the officers during their search. *Belton*, 453 US at 460. However, there is no prior precedent offering specific guidance as to whether the search of the VCR installed in the passenger compartment of the vehicle was proper as the search of a "container." Under *Belton*, an officer is authorized to examine the contents of any containers in

the passenger compartment as a search incident to arrest. *Id.* "Container" means "any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment . . . ." *Id.* at 460 n 4. Even if the container could not hold a weapon or evidence of the criminal conduct, the container could still be searched. *Id.* at 461. In the instant case, the trial court denied the motion to suppress without addressing whether the VCR was a "container." Because the record is lacking on this question, we are hesitant to address it in the first instance. Therefore, we remand for an evidentiary hearing on this issue.

Under the other warrantless exception potentially implicated in this case, the "automobile exception," a police officer may search an automobile without first obtaining a warrant if the officer has probable cause to believe that the vehicle contains contraband or evidence of a crime. *Chambers v Maroney*, 399 US 42, 47-48; 90 S Ct 1975; 26 L Ed 2d 419 (1970); *People v Kazmierczak*, 461 Mich 411, 418-419; 605 NW2d 667 (2000). The scope of such a search is only limited "by the objects of the search and the places in which there is probable cause to believe they may be found." *People v Bullock*, 440 Mich 15, 25; 485 NW2d 93 (1992). Thus, if probable cause justifies the search, "it justifies the search of *every part of the vehicle* and its contents that may conceal the object of the search." *People v Carter*, 194 Mich App 58, 61; 486 NW2d 93 (1992) (quotations omitted, emphasis added). Therefore, regardless of whether the VCR is categorized as a "container," the search would have been justified if the searching officer had probable cause to believe that the vehicle contained the contraband. The test for probable cause is whether the facts and circumstances known to the officers would warrant a person of reasonable prudence to believe that evidence of a crime or contraband sought is in a stated place. *People v Martinez*, 187 Mich App 160, 170; 466 NW2d 380 (1991). Once again, for purposes of appellate review, the record is not sufficiently clear as to the identity of the searching officers,[1] or what facts the officers were aware of at the time they conducted the search of defendant's VCR. Accordingly, these questions must also be answered in the first instance through an evidentiary hearing.

Plaintiff argues that even if the search was illegal, the evidence would have been inevitably discovered in an inventory search. However, the Michigan State Police Procedures provide that when vehicles are inventoried, "[a]ll areas of the vehicle that may contain property, including any containers, shall be checked." Again, it is not clear whether the VCR compartment was a container or if the VCR would have been properly considered to be an area of the vehicle that may contain property. This issue also may be addressed on remand.

Reversed and remanded for an evidentiary hearing. At the hearing, the trial court is to determine (1) whether the search was legal as a search incident to arrest as a result of the VCR being a "container" under *Belton*; (2) whether the search was legal under the automobile exception on the basis that the searching officer(s) had probable cause to believe that the vehicle

[1] The trial court's opinion mentions only Trooper Boike as searching defendant's vehicle, but other reports in the lower court file indicate that Trooper Berden and a K-9 unit were involved as well.

contained contraband; and (3) if the search did not qualify under either of the previous two exceptions, whether the evidence would inevitably have been discovered pursuant to an inventory search. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Kurtis T. Wilder
/s/ Douglas B. Shapiro