[J-56-2007]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 22 EAP 2005
	:	
Appellee	:	Appeal from the judgment of the Superior
	:	Court entered August 12, 2004 at 907
	:	EDA 2003 affirming the Judgment of
v.	:	Sentence entered on February 20, 2003 in
	:	the Court of Common Pleas of
	:	Philadelphia County, Criminal Division at
HENRY MCCREE,	:	0211-1121 2/2.
	:	
Appellant	:	857 A.2d 188 (Pa. Super. 2004)
	:	
	:	RESUBMITTED: April 13, 2007
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	:	

CONCURRING OPINION

MR. CHIEF JUSTICE CAPPY **DECIDED: May 31, 2007**

I concur in the result reached in the lead opinion to affirm the denial of Appellant Henry McCree's suppression motion. Furthermore, I join in the opinion's clarification that the test regarding the plain view exception to the warrant requirement as expressed by the United States Supreme Court in Horton v. California, 496 U.S. 128 (1990), is the law in Pennsylvania. I write separately, however, as I reach the result by a different legal construct than the lead opinion with respect to the final prong of this test.

In sum, the plain view exception to the warrant requirement allows for warrantless *seizures* under limited circumstances. As articulated in Horton, prior to the finding of a valid warrantless seizure of an item pursuant to the plain view exception: (1) the police must not

violate the Fourth Amendment in arriving at the location from which the item could be viewed; (2) the item must be in plain view; (3) the incriminating character of the item must be immediately apparent; and (4) the police must have a lawful right of access to the item itself.[1] Horton, U.S. 496 at 136-137. Like many aspects of Fourth Amendment jurisprudence, inquiries regarding satisfaction of the plain view exception to the warrant requirement are highly fact intensive.

In this matter, the record offers that Philadelphia police officer Stacey Wallace had made an initial purchase of Xanax from an individual named Boyer. Officer Wallace asked Boyer if he could obtain more drugs to which he indicated that he could. Boyer walked to a blue Pontiac, entered and sat in the front passenger seat of the automobile, and joined McCree, who was sitting in the driver seat of the automobile. Officer Wallace relayed this information to her back-up, Officers Cujdik and Kovacs, and instructed them to stop a male inside the Pontiac. Trial Court Opinion at 2-3; N.T. February 6, 2003 at 9-12.

The officers approached the Pontiac, Officer Kovacs on the passenger side of the vehicle and Officer Cujdik on the driver side. As the officers identified themselves to the two men in the vehicle, Officer Cujdik saw McCree place an orange/amber pill bottle underneath the seat cushion on which he was sitting. Officer Cujdik opened the driver-side door and asked McCree to step outside the vehicle. As Officer Cujdik was removing McCree from the vehicle, he also recovered the pill bottle from under the seat cushion. Trial Court Opinion at 3; N.T. February 6, 2003 at 15-17. When he recovered the pill bottle,

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[1] The United States Supreme Court officially adopted the plain view exception to the warrant requirement in its seminal decision in Coolidge v. New Hampshire, 403 U.S. 443 (1971)(plurality). The Coolidge Court permitted the warrantless seizure of an item when: (1) there was a prior justified intrusion by the police; (2) the item was found in plain view; (3) it was immediately apparent that the object is in some fashion incriminating; and (4) the discovery of the item was inadvertent. Nineteen years later in Horton, the federal High Court refined the requirements of the doctrine by eliminating the inadvertency prong.

Officer Cujdik could see inside the bottle and saw that the bottle contained Xanax. Trial Court Opinion at 3; N.T. February 6, 2003 at 19.[2]

As to the first prong of the Horton, test, there is no violation of the Fourth Amendment in arriving at the viewing location. Officer Cujdik observed the orange/amber pill bottle from a non-constitutionally protected area, i.e., a public street. Thus, the first prong is satisfied.

As to the second prong, I agree with the lead opinion that the pill bottle was in plain view when observed by Officer Cujdik. Furthermore, the incriminating nature of the orange/amber pill bottle was immediately apparent, satisfying the third prong of the Horton test.

The fourth prong of the Horton test concerns the lawful right of access to the evidence. This prong builds upon the concept that even though it is immediately apparent to police officers that they have contraband before them, and they viewed this evidence from a lawful vantage point, they are not authorized to seize the evidence. Rather, the police officer must have some legal justification or lawful right of access to make the seizure.[3]

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[2] After taking McCree to the rear of the automobile, Officer Cujdik returned to the open door, discovered two additional pill jars in the pocket of the door, and recovered the two other pill jars. Trial Court Opinion at 3; N.T. February 6, 2003 at 21-22. Officer Cujdik opened the two bottles and found OxyContin and Percocets. Trial Court Opinion at 3; N.T. February 6, 2003 at 16. Yet, McCree was only charged and convicted of possession with intent to deliver the Xanax which was found in the orange/amber pill bottle that McCree had secreted under his seat cushion. Trial Court Opinion at 6-7; N.T. February 6, 2003 at 39-40, 42. Thus, the propriety of the seizure of the pill jars from the driver side door pocket is not at issue in this appeal. That being the case, I believe that a discussion of the seizure of the pill jars should wait until that issue is squarely before our Court.

[3] As noted by Judge Moylan in his article on the plain view exception: "Seeing something in open view does not, of course, dispose, ipso facto, of the problem of crossing constitutionally protected thresholds. Those who thoughtlessly over-apply the plain view doctrine to every situation where there is a visual open view have not yet learned the (continued…)

The lead opinion invokes the automobile exception under both the United States Constitution and the Pennsylvania Constitution to satisfy the lawful right of access requirement. As to the justification under Article I, §8 of the Pennsylvania Constitution, the lead opinion declines the Commonwealth's offer to adopt the federal automobile exception as the law in our Commonwealth, but contends that we have adopted a "limited automobile exception" under Article I, §8. The lead opinion goes on to apply this "limited automobile exception" in addressing the lawful right of access prong, and concludes that because the officer had probable cause to search the automobile, the police officer could lawfully access the interior of the automobile under the automobile exception.

I part from the approach taken in the lead opinion at this juncture for two reasons. First, the automobile exception in Pennsylvania is the subject of continued controversy in our Commonwealth and in its discussion of the "limited automobile exception" under Pennsylvania law, the lead opinion fails to acknowledge or critically discuss the differing viewpoints concerning the existence or parameters of such an exception to the warrant requirement. See Commonwealth v. Perry, 798 A.2d 697 (Pa. 2002) (Cappy, J. Opinion Announcing the Judgment of the Court), (Castille, J., concurring), (Saylor, J., Concurring), (Nigro, J., dissenting); see also Commonwealth Brief at 14 ("[T]he state of this Court's automobile exception jurisprudence has been the subject of internal and external question.").

Second, I believe it unnecessary to delve into the contours of the automobile exception under Article I, §8, as the parameters of that exception to the warrant

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(…continued)
simple lesson long since mastered by old hands at the burlesque houses, 'You can't touch everything you can see.'" Judge Charles E. Moylan, Jr., *The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle*, 26 Mercer L. Rev. 1047, 1096 (1974).

requirement are not directly before us. Rather, I would find that the lawful access prong is satisfied by the search incident to arrest exception to the warrant requirement.

In Pennsylvania, an exception to the constitutional mandate that a search or a seizure must be pursuant to a valid warrant has been recognized to permit a warrantless search incident to an arrest. Our Court has stated that an arrest is "any act that indicates an intention to take the person into custody and subjects him to the actual control and will of the person making the arrest …." Commonwealth v. Rodriguez, 614 A.2d 1378, 1384 (Pa. 1992)(citation omitted). When a police officer makes an arrest, he or she may conduct "a search of an arrestee's person and the area within an arrestee's immediate control as a matter of course because of the ever-present risk in an arrest situation that an arrestee may seek to use a weapon or to conceal or destroy evidence." Commonwealth v. Timko, 417 A.2d 620, 622 (Pa. 1980).

Here, I believe that under the totality of the circumstances, the police officers had probable cause to arrest McCree; they were entitled to remove McCree from the automobile for purposes of effecting this arrest; and in arresting McCree, the police officers were permitted to search McCree's person and the area within his immediate control. Timko. Therefore, as Officer Cujdik was removing McCree from the automobile, he had a lawful right to access the immediate interior of the automobile as part of a search incident to the valid arrest. As such Officer Cujdik properly seized the pill bottle from under the seat cushion pursuant to the plain view exception to the warrant requirement. As the Commonwealth satisfied the Horton test under these circumstances, I believe that McCree's motion to suppress was properly dismissed.[4] [5]

[4] McCree does not contend that his hiding of the pill bottle underneath the seat cushion after it was observed while in plain view should change the legal construct by which we view the police conduct from a plain view analysis to a search analysis. Indeed, it would appear that such action on the part of a defendant does not alter the plain view approach.

For the reasons set forth above, I concur in the result reached by the majority.

Mr. Justice Baer and Madame Justice Baldwin join this concurring opinion.

(…continued)

[5] Not only do the factual findings of the trial court support lawful access to seize the contraband pursuant to the plain view doctrine due to the search incident to an arrest exception, such an approach fits comfortably with the evolution of the plain view doctrine which emerged as an offshoot from the search incident to arrest exception to the warrant requirement. Moylan, at 1050-66.