

IN THE SUPERIOR COURT OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,)	
)	
Plaintiff,)	
)	
v.)	I.D. No. 1301021514
)	
JERRY M. BLAND,)	
)	
Defendant.)	

Submitted: August 2, 2013
Decided: October 1, 2013

Defendant’s Motion to Suppress – DENIED

OPINION

Sarita R. Wright, Esquire, 820 N. French Street, Wilmington, DE 19801. Attorney for Plaintiff State of Delaware.

Thomas A. Foley, Esquire, 1905 Delaware Street, Wilmington, DE 19806. Attorney for Defendant Jerry M. Bland.

CARPENTER, J.

Before this Court is Defendant Jerry M. Bland's ("Bland") Motion to Suppress all evidence gathered from Bland's person and vehicle on January 29, 2013, and all post-arrest and post-detention statements. In Bland's Motion, he argues that: 1) the police did not have reasonable suspicion to detain him or a reasonable basis to frisk him; 2) the police exceeded the scope of a *Terry*¹ frisk when they removed a key from Bland's pocket; 3) the police violated Bland's rights when they pressed the key fob; and 4) the subsequent canine search and seizure of the vehicle and its contents was unlawful.

On July 12, 2013, this Court heard testimony and argument on the Motion. This Court found that the police had reasonable suspicion to stop and a reasonable basis to frisk Bland. The Court reserved decision on whether the seizure of the key from Bland's pocket and pressing of the key fob to identify Bland's vehicle was a search and, if it was a search, whether it violated Bland's rights under the Fourth Amendment's protection against unreasonable searches and seizures.

The Court finds that, under the circumstances of this case, the seizure of the key was proper incident to arrest and the use of the key fob was not a search. Accordingly, Bland's Motion to Suppress is hereby **DENIED**.

¹ *Terry v. Ohio*, 392 U.S. 1 (1968).

BACKGROUND

On January 29, 2013, the Wilmington Police Department received a tip from a past, proven, and reliable informant that Bland was selling crack cocaine on the 300 block of Concord Avenue. The informant advised Lt. William Wells that Bland had a can with a hidden compartment containing crack cocaine and was loitering with several other subjects. The informant described Bland as wearing a black winter hat with a red line, a black hooded sweatshirt, and blue jeans.

Lt. Wells, along with Detectives Alexis Schupp and Vincent Jordan, responded to the 300 Block of Concord Avenue in an unmarked vehicle, dressed in plain clothes but with black raid vests that read "police" in white letters on both the front and the back. When the officers arrived, they observed Bland dressed as the informant had described and exited their vehicle to approach him. When the officers made eye contact with Bland, they observed him throw an object to the ground and walk away quickly. The officers ordered Bland to stop, which he did, and they frisked Bland for weapons. The officers found no weapons or other contraband on him.

The officers looked to where Bland had thrown the object and recovered a brown paper cigarette with a green leafy substance inside. The substance was field tested and tested positive for marijuana. That find, coupled with the smell of marijuana in the area, prompted the officers to place Bland under arrest and take

him into custody. After he was in custody, the officers conducted a second search of Bland and removed a single Cadillac key, with a key fob attached, from his pockets. Bland had told the officers he did not have a vehicle in the area.

After removing the key, Lt. Wells pressed the key fob which caused the lights on a nearby black Cadillac to flash. The officers then sought Bland's consent to search the vehicle, which he refused, stating the car belonged to his mother. The officers radioed their canine officer, Officer Meese, requesting he bring his canine partner to the scene for a canine sniff of the vehicle's perimeter. The canine alerted to the presence of illegal drugs near the front passenger side of the Cadillac.

Bland and the Cadillac were subsequently transported to the Wilmington Police Station. There, the officers learned that Bland was on probation and illegal drugs had previously been found in the Cadillac. The officers used that information to request an administrative search of the Cadillac, which was granted. The officers recovered from the Cadillac a "Gunk Fix a Flat" can with a false bottom, containing marijuana and crack cocaine, near the front passenger seat. Bland was later indicted for Drug Dealing Cocaine, Possession of Marijuana, Possession of Drug Paraphernalia, and Loitering charges.

Bland subsequently brought this Motion to Suppress on April 22, 2013. The State responded on June 18, 2013, and a hearing was held on July 12, 2013. This Court reserved judgment on the singular issue of whether Lt. Wells' seizure and

use of the key fob to ascertain the identity of the car was an unreasonable search under the Fourth Amendment.

DISCUSSION

As mentioned above, there are two actions being challenged by Bland as unreasonable searches. First, Bland challenges Lt. Wells' initial seizure of the key, by removing it from his pocket. Alternatively, Bland challenges Lt. Wells' pressing of the key fob, which caused the car to alarm.

I. Seizure of the Key

Bland argues that this issue is controlled by the holding in *Purnell v. State*² and, consistent with that opinion, the Court should find that Lt. Wells was not justified in removing the key from Bland's person. The police, in *Purnell*, had conducted a valid *Terry* frisk, with permission, and found no weapons on the suspect.³ However, after the suspect stated he did not have a vehicle, the police conducted a second nonconsensual frisk to remove keys they had felt during the initial pat-down.⁴ The court found that there was no authority for the second search and that the scope of the search exceeded that allowed in *Terry*.⁵ Thus, the court found that the search and seizure of the keys was unreasonable and a

² 832 A.2d 714 (Del. 2003).

³ *Id.* at 717.

⁴ *Id.*

⁵ *Id.* at 722-23.

motion to suppress brought by the defendant was granted.⁶ Since the initial search and seizure was unreasonable, the Delaware Supreme Court declined to address whether the officer's subsequent use of the key fob to locate the vehicle was permissible.⁷

In *Purnell*, without any additional justification the police performed a subsequent *Terry* pat down search. However, here the police removed the key from Bland's pocket during a search incident to arrest not a *Terry* search. Therefore, not only does *Purnell* not bind this Court's analysis, the facts here are easily distinguishable. Warrantless searches incident to arrest are reasonable under the Fourth Amendment if they are made incidental to and contemporaneous with a lawful arrest and they are made to seize fruits of the crime, means or evidence relating to the crime, or weapons or objects which would aid escape from arrest or custody.⁸ The Delaware Supreme Court has articulated that "[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification ... it is the fact of the lawful arrest which establishes the authority to search."⁹ Further, "[a] peace officer has the right to seize and search any person whom the officer observes breaking the law. The search is justified as

⁶ *Id.* at 723.

⁷ *Id.* at 723-24.

⁸ 11 *Del. C.* 1953, § 2303; *United States v. Robinson*, 414 U.S. 218 (1973); *Gustafson v. Florida*, 414 U.S. 260 (1973); *Chimel v. California*, 395 U.S. 752 (1969); *Rew v. State*, No. 300, 1992 (Del. Feb. 25, 1993); *State v. Culver*, 288 A.2d 279 (Del. 1972); *Jarvis v. State*, 600 A.2d 38 (Del. 1991).

⁹ *Coley v. State*, 886 A.2d 1277 (Del. 2005) (internal quotation marks omitted).

incident to a lawful arrest.”¹⁰ Accordingly, “[f]ollowing an arrest, the officer is permitted to search the individual in order to remove any potentially dangerous instrumentality and to preserve evidence.”¹¹

Here Bland was arrested after the police recovered the drug package they had observed him discard. While the police had previously conducted a pat down search for weapons, the second search is unrelated to the first and it was conducted incident to his arrest on drug charges and not as a *Terry* protective search. As stated above, if the arrest is lawful, the police do not need any additional justification to conduct a search incident thereto and Bland does not challenge the legality of the arrest.¹² Therefore, since the arrest was lawful, there was no additional justification needed for the police to conduct a search incident thereto. The only issue here is whether the key was an object which could properly be seized incident to the arrest.

The Delaware Supreme Court has explained “that the hazards to police of placing a suspect in custody justify[es] a full-body search.”¹³ The United States Supreme Court has articulated: “When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise,

¹⁰ *Jones v. State*, 745 A.2d 856, 872 (Del. 1999).

¹¹ *O’Neil v. State*, 691 A.2d 50, 54 (Del. 1997) (citing *Chimel v. State of California*, 395 U.S. 752 (1969)).

¹² Pl. Mot. ¶ 5.

¹³ *Stafford v. State*, 59 A.2d 1123, 1131 (Del. 2012) (citing *United States v. Robinson*, 414 U.S. 218, 234-35 (1973)).

the officer's safety might well be endangered, and the arrest itself frustrated.”¹⁴ The hazards and dangers warned of by both the Delaware and United States Supreme Courts are self evident when an arrestee possesses a hard object, such as a key, that could be used as a weapon or to aide escape from custody. Although a key is not a conventional weapon, it is well established that officers may remove items that, while not customarily used as such, could potentially be used as weapons.¹⁵ Therefore, in the interest of safety and effectuating a lawful, orderly arrest, the officer was permitted to seize the key found on Bland’s person incident to the lawful arrest.¹⁶ Accordingly, the seizure of the key was warranted and the only issue this Court must address is whether the subsequent use of the key fob to identify the vehicle was a search and, if so, whether it was reasonable.

II. Use of the Key Fob

A key fob is a wireless device carried on a key chain used for remote keyless entry to a vehicle, either by pressing a button on the fob or via Bluetooth wireless technology. As previously mentioned, the Delaware Supreme Court has yet to address the precise issue of whether the police can use a key fob, lawfully seized from an arrestee, to locate or identify the corresponding vehicle. In answering this

¹⁴ *Chimel v. California*, 395 U.S. 752, 762-63 (1969).

¹⁵ See *supra* note 8.

¹⁶ See e.g., *Commonwealth v. Blevins*, 438 Mass. 604, 608 (Mass. 2003); *Commonwealth v. Santos*, 2006 WL 1646112, at *6 (May 2, 2006).

question, the Court must determine whether the use of the key fob is an unreasonable search under the Fourth Amendment.

The Fourth Amendment to the United States Constitution protects individuals against unreasonable searches and seizures.¹⁷ An individual may challenge a search under the Fourth Amendment if it violates the individual's "reasonable expectation of privacy,"¹⁸ or is an unreasonable intrusion into a constitutionally protected area.¹⁹ Therefore, this Court must determine whether Bland had a reasonable expectation of privacy in the identity of his vehicle or whether the government unreasonably intruded on his property, akin to a trespass.²⁰ This Court finds that both inquires are resolved in the negative and, thus, the use of the key fob was not an unreasonable search.

The Eighth Circuit Court of Appeals considered an officer's use of a key fob to locate the suspect's car in *United States v. Cowan*.²¹ The court began their analysis by citing to United States Supreme Court precedent defining privacy rights in vehicles as "diminished" and easily susceptible to plain view scrutiny.²² The court, in *Cowan*, found that the pressing of the key fob to ascertain the identity of the car was not a search as the defendant did not have a reasonable expectation

¹⁷ U.S. Const. amend. IV; *United States v. Place*, 462 U.S. 696, 700 (1983).

¹⁸ *United States v. Jones*, 132 S. Ct. 945, 950-53 (2012).

¹⁹ *Id.*

²⁰ *Id.*

²¹ 674 F.3d 947 (8th Cir. 2012).

²² *Id.* at 955 (citing *United States v. Knotts*, 460 U.S. 276, 281 (1983); *Cardell v. Lewis*, 417 U.S. 583, 590 (1974)).

of privacy in the identity of his car, which was parked on a public street.²³ The court further found that “the mere transmission of electric signals [from the fob to the vehicle] alone is not a trespass.”²⁴ Without a reasonable expectation of privacy in the identity of his vehicle and no physical intrusion by the government onto constitutionally protected property, the motion to suppress in *Cowan* was denied.²⁵ *Cowan* was favorably cited by the Court of Appeals of Texas for the proposition that using a key fob, lawfully seized from a suspect, to ascertain the identity of a vehicle parked on a public street does not amount to a Fourth Amendment violation.²⁶ Further, the Superior Court of Pennsylvania has independently reached a similar conclusion.²⁷

Bland points to cases in Massachusetts which he contends should persuade this Court to invalidate the officer’s actions.²⁸ However, the Massachusetts cases both involve more investigation by the officers subsequent to the seizure than that conducted by Lt. Wells here. In *Commonwealth v. Blevines*,²⁹ the Supreme Judicial Court of Massachusetts found that, although the seizure was reasonable incident to arrest, the officer’s decision to walk down the street, insert the seized key into a vehicle’s trunk, and subsequently open the trunk was an unreasonable

²³ *Cowan*, 674 F.3d at 955.

²⁴ *Id.* at 956.

²⁵ *Id.* See also *United States v. Salgado*, 250 F.3d 438, 456 (6th Cir. 2001); *United States v. \$109,179 in U.S. Currency*, 228 F.3d 1080, 1087-88 (9th Cir. 2000); *United States v. Lyons*, 898 F.2d 210, 213 (1st Cir. 1990).

²⁶ *Wiley v. State*, 388 S.W.3d 807 (Tex. App. 2012); *Nunley v. State*, 2012 WL 6035512 (Tex. App. Dec. 5, 2012).

²⁷ *Commonwealth v. Harvard*, 64 A.3d 690 (Pa. Super. Ct. 2013).

²⁸ *Blevins*, 438 Mass. 604; *Murphy*, 822 N.E.2d 320.

²⁹ 438 Mass. 604.

search.³⁰ Similarly, in *Commonwealth v. Murphy*,³¹ the court found that the officer's actions of analyzing a descriptive tag attached to a rental vehicle key, with the vehicle's make, model, and license plate number thereon, and using such to locate the vehicle was an unreasonable search.³²

Here, Lt. Wells did not walk down the street and try to match the key to a vehicle. Further, he did not analyze any written information on the key or keychain about the vehicle's specifications. Lt. Wells merely pressed the key fob. The actions of pressing the fob would only result in any additional discoveries if the vehicle was within close proximity to the point of detention. Just as the *Cowan* court found, the pressing of the key fob merely transmitted electronic signals to the corresponding vehicle and provided officers with the identity of a vehicle parked on a public street, in which Bland has no expectation of privacy. Accordingly, the Massachusetts cases are distinguishable.

Therefore, since the officers lawfully seized the key fob and the car was parked on a public street, the officer's use of the key fob to ascertain the identity of the vehicle was not a search under the Fourth Amendment. Once the officers lawfully determined the identity of the vehicle, and a canine alerted to the presence

³⁰ *Id.* at 496.

³¹ 822 N.E.2d 320.

³² *Id.* at 325-26.

of illegal drugs therein,³³ the police were justified in transporting the vehicle to the police station and conducting an administrative search thereof.³⁴

CONCLUSION

As a result, the Court concludes that the seizure of the key fob was reasonable incident to arrest and the use of the key fob was not a search within the Fourth Amendment. Therefore, Bland's Motion to Suppress is hereby **DENIED**. **IT IS SO ORDERED.**

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

³³ Even though the affidavit does not provide evidence that the drug canine was a properly trained, reliable, drug detection dog, the Court can infer that he was trained to detect narcotics because he was Officer Meese's police dog. *See Arcuri v. State*, 49 A.3d 1177, 1179-80 (Del. 2012).

³⁴ Bland does not challenge the subsequent search for any ground other than that it is tainted as fruit of the prior allegedly unreasonable searches. Therefore, this Court need not address the reasonableness of the administrative search.