

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LEROY COLEY,)
) No. 11, 2005
 Defendant Below,)
 Appellant,) Court Below: Superior Court
 v.) of the State of Delaware in
) and for Kent County
)
 STATE OF DELAWARE,) Cr. ID. No. 9804018111
)
 Plaintiff Below,)
 Appellee.)

Submitted: September 13, 2005

Decided: October 18, 2005

Before **STEELE**, Chief Justice, **HOLLAND**, and **JACOBS**, Justices.

ORDER

This 18th day of October 2005, it appears to the Court that:

1. In this case we are asked to determine whether a driver of a vehicle can be removed from his vehicle and lawfully searched when a police officer, among other things,¹ smells burnt marijuana emanating from a vehicle. While an argument is made that this latter factor alone justifies a reasonable suspicion that the driver was armed and presently dangerous, the Court need not address that issue. The officer here had authority to arrest the driver for a drug offense

¹ The officer also witnessed the driver of the vehicle, in the early morning hours with two passengers, behaving nervously upon seeing the police car. The driver slowed his vehicle down 25 miles per hour below the speed limit and made two abrupt lane changes. Further, the driver produced no identification when asked.

pursuant to 11 Del. C. § 1904 because a person would have “reason to believe” or “probable cause” that a drug crime was committed. Since the officer had probable cause to arrest the defendant, the search of the defendant immediately before his arrest can be upheld as a valid search incident to arrest.

2. On April 24, 1998, Officer Berna, while driving on Route 13 in Dover, passed a vehicle driven by the defendant, Leroy Coley. Berna noticed Coley and the two other occupants behaving nervously when they saw Berna’s police car. Berna observed Coley slowing his vehicle to 25 miles per hour below the posted speed limit,² and the occupants moving around in the vehicle. After these observations, Berna himself slowed down and pulled behind Coley.

3. While following Coley, Berna observed Coley make two abrupt lane changes without first determining if the lanes were clear. Berna then decided to pull Coley over to issue a citation for improperly changing lanes.

4. Berna, when approaching the vehicle, smelled an odor of burnt marijuana. Berna asked Coley for his driver’s license. Coley was unable to produce a license or any other form of identification. Berna then asked Coley to step out of the vehicle, and performed a pat-down search of Coley. Berna testified that he conducted the pat-down search because he feared that Coley was armed.

² Berna observed the car going approximately 20 miles per hour. The posted speed limit was 45 miles per hour.

During the pat-down search, a piece of crack cocaine fell from Coley's pant leg. Berna then arrested Coley.

5. Before trial, Coley moved to suppress the cocaine, claiming that it was seized during a search unsupported by probable cause to believe Coley was or had recently committed a crime. The Superior Court judge denied the motion. A jury then convicted Coley of possession with intent to deliver a narcotic, maintaining a vehicle for keeping controlled substances, and improperly changing lanes. Coley appealed.

6. A warrantless search, to be valid, must fall within a recognized exception to the warrant requirement of the Fourth Amendment.³ A search incident to an arrest is a recognized exception.⁴ The United States Supreme Court justified the search incident to arrest exception when it stated 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.”⁵ Generally, a search incident to an arrest follows the valid arrest. This Court, however, following the United States

³ See *Ortiz v. State*, 2004 Del. LEXIS 535 (Del. 2004).

⁴ See *Id.* See also *Chimel v. California*, 395 U.S. 752 (1969).

⁵ *United States v. Robinson*, 414 U.S. 218, 235 (1973).

Supreme Court⁶ stated, “where the arrest and search are nearly contemporaneous, the search may precede the arrest, so long as the police do not use the search to establish probable cause for the arrest.”⁷

7. Here, it is undisputed that Berna arrested Coley immediately following the search or pat-down. The contemporaneity requirement, therefore, has been satisfied. Berna believed he was conducting a *Terry* frisk for fear of his safety, but that has no bearing on the whether the search may be upheld as a search incident to arrest. The United States Supreme Court has stated:

[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.⁸

Thus, the only issue remaining is whether, under the circumstances, Berna had probable cause to arrest Coley immediately before the search.⁹

8. Under 11 Del. C. § 1904, a warrantless arrest by a police officer is lawful whenever the officer has reasonable grounds to believe that the person to be

⁶ See *Rawlings v. Kentucky*, 448 U. S. 98, 111 (1980).

⁷ *Ortiz*, 2004 Del. LEXIS 535 at *8 .

⁸ *Scott v. United States*, 436 U.S. 128, 138 (1978).

⁹ Under *11 Del. C. § 1904(a)(1)*, an arrest by a peace officer without a warrant for a misdemeanor is lawful whenever the officer has reasonable ground to believe that the person to be arrested has committed a misdemeanor in the officer's presence. The words “reasonable grounds to believe” have been construed to mean “probable cause.” See *Norwood v. State*, 813 A.2d 1141 (Del. 2003).

arrested has committed a felony or misdemeanor. This Court has held that "reasonable ground to believe" is . . . the legal equivalent of 'probable cause' and should be accorded the same meaning."¹⁰ The requisite analysis in determining the sufficiency of probable cause for a warrantless arrest is determined according to a "totality of the circumstances" test.¹¹ In determining whether probable cause existed under the totality of the circumstances, this Court has stated:

The validity of [a warrantless] arrest depends upon: whether, at the moment the arrest was made, the officers had probable cause to make it -- whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that [the defendant] had committed or was committing an offense.¹²

9. Applying these principles, Berna had probable cause to arrest Coley for a drug offense. Some courts have found probable cause to arrest based on the mere "smell" of burnt marijuana emanating from a suspect's vehicle.¹³ Here, however, the totality of the circumstances involved more than the mere "smell" of burnt marijuana. In addition to smelling burnt marijuana, Berna witnessed Coley

¹⁰ *Thompson v. State*, 539 A.2d 1052, 1055 (Del. 1988).

¹¹ *Id.* (citing *Illinois v. Gates*, 462 U.S. 213, 231 (1983)).

¹² *Id.*

¹³ See *People v. Chestnut*, 351 N.Y.S.2d 26 (N.Y. App. Div. 1974), order aff'd on other grounds, 335 N.E.2d 865 (N.Y. 1975); *Blake v. State*, 772 So. 2d 1200 (Ala. Crim. App. 2000); *Dixon v. State*, 343 So. 2d 1345 (Fla. Dist. Ct. App. 1977); *Sebastian v. State*, 726 N.E.2d 827 (Ind. Ct. App. 2000).

and his passengers' nervous behavior, Coley slowing his vehicle to 20 miles per hour below the posted speed limit, and Coley making two abrupt lane changes. Further, when asked for identification, Coley produced nothing. These factors, taken together, would lead a prudent person to believe that a drug offense was being committed. Therefore, the totality of the circumstances suggest that Berna had probable cause to believe that Coley was committing a crime and the search immediately before Coley's arrest was, therefore, valid as a search incident to an arrest.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/Myron T.Steele
Chief Justice