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DISCRETIONARY REVIEW GRANTED BY SUPREME COURT: AUGUST 15, 2007  
(FILE NO. 2007-SC-0123-D)

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2005-CA-001211-MR

COMMONWEALTH OF KENTUCKY

APPELLANT

v. APPEAL FROM ESTILL CIRCUIT COURT  
HONORABLE WILLIAM W. TRUDE, JR., JUDGE  
ACTION NO. 04-CR-00003

HEATHER ROSE

APPELLEE

OPINION  
REVERSING AND REMANDING

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BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND JOHNSON,<sup>1</sup> JUDGES.

JOHNSON, JUDGE: The Commonwealth of Kentucky has appealed from an order of the Estill Circuit Court entered on May 17, 2005, granting Heather Rose's motion to suppress evidence of an illegal search. Having concluded that the search of the vehicle was a lawful search incident to Rose's arrest, we reverse and remand for further proceedings.

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<sup>1</sup> Judge Rick A. Johnson completed this opinion prior to the expiration of his term of office on December 31, 2006. Release of the opinion was delayed by administrative handling.

On January 26, 2004, Rose was indicted by an Estill County grand jury on four counts of possession of stolen mail matter,<sup>2</sup> and three counts of criminal possession of a forged instrument in the second degree.<sup>3</sup> Rose filed a motion on January 28, 2005, to suppress evidence seized as a result of a search of her purse following a traffic stop. A suppression hearing was held on May 5, 2005.

Deputy Kevin Hardy with the Estill County Sheriff's Department testified at the suppression hearing that on November 19, 2003, he was traveling to Rose's home to serve two bench warrants on her. Dep. Hardy stated that one bench warrant from Estill County was for "an old fine", and the other warrant, from Madison County, was for "bail jumping". Dep. Hardy testified that he noticed Rose was a passenger in a vehicle traveling down the same road, in the opposite direction. Dep. Hardy turned his vehicle around and stopped the suspect vehicle.

Dep. Hardy testified that as he approached the vehicle he did not see Heather Rose in the passenger seat, but only saw the driver, Danny Rose.<sup>4</sup> Dep. Hardy questioned Danny as to Heather Rose's whereabouts, and Danny replied that she was "in

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<sup>2</sup> Kentucky Revised Statutes (KRS) 514.150.

<sup>3</sup> KRS 516.060.

<sup>4</sup> There was some discussion at the hearing as to whether Danny Rose was married to Heather Rose. However, the status of their relationship is not relevant to this appeal.

the trunk".<sup>5</sup> Dep. Hardy removed Rose from the trunk, placed her under arrest pursuant to the bench warrants, and put her in the back seat of his police cruiser.

Dep. Hardy stated that after he arrested Rose he returned to the vehicle and Danny consented to a search of the vehicle. Dep. Hardy further stated that he searched a purse on the passenger-side floor and he found one check that did not belong to Heather Rose. He also searched a small leather bag he found in the center console of the vehicle which contained two stolen checks, and another stolen check was found in a small change purse also located in the center console. Once the search was completed, Dep. Hardy allowed Danny to leave the scene in the vehicle.

When Deputy Hardy arrived at the jail with Rose, he questioned her regarding the checks he had found during the search. Rose gave a written statement admitting that the stolen checks had been in her possession, but claiming the checks had been given to her by another person.

In her motion to suppress this evidence, Rose claimed that she had not consented to the search of her purse, and that Danny could not have given consent to search her purse. The Commonwealth filed its response to the motion on May 12, 2005.

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<sup>5</sup> Dep. Hardy testified that the back of the Rose vehicle had a visible gap between the back seats and the trunk. He testified that he thought Rose had lowered the back seats and climbed into the trunk.

On May 17, 2005, the trial court entered an order granting Rose's motion to suppress evidence and stated as follows:

The issue before the Court appears to be whether or not the consent given by [Danny] would go to the change purse and the purse belonging to Heather Rose. The Commonwealth has argued that the search was incident to arrest, however, that is not what the Deputy testified to.

As the Court finds that the search was pursuant to the consent of [Danny] and that [Danny] gave consent to search the vehicle, however, no consent was given by Heather Rose to search her purse or change purse or leather bag which were located inside the vehicle.

The Court finds that based on United States v. Welch, 4 F.3d 761 (1993), the evidence herein should be suppressed.

There is no evidence in the record that the Deputy believed that [Danny] could give him consent to search the valuables owned by [Rose]. The Court finds that there is no other exception to the Search Warrant requirement to uphold the search of [Rose's] personal items.

This appeal followed.

In reviewing the decision of a circuit court on a motion to suppress evidence following a hearing, this Court must first examine the trial court's factual findings for clear error. The findings of fact are conclusive if they are supported by substantial evidence.<sup>6</sup> This Court must then perform

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<sup>6</sup> Kentucky Rules of Criminal Procedure (RCr) 9.78; Adcock v. Commonwealth, 967 S.W.2d 6, 8 (Ky. 1998).

a de novo review of the factual findings to determine whether the trial court's decision is correct as a matter of law.<sup>7</sup>

The law of search and seizure under the Fourth Amendment to the United States Constitution establishes that "[a]ll searches without a valid search warrant are unreasonable unless shown to be within one of the exceptions to the rule that a search must rest upon a valid warrant. The burden is on the prosecution to show the search comes within an exception."<sup>8</sup>

The rule allowing police officers to search a vehicle following a lawful arrest is well-established. In New York v. Belton,<sup>9</sup> police officers stopped a vehicle for a traffic offense and ordered the driver and passengers out of the vehicle. Each was placed in handcuffs and stood outside of the vehicle while officers searched the passenger compartment. Officers searched a leather jacket located inside the vehicle and found drugs in a pocket. The Court upheld the search as a valid search incident to a lawful arrest which did not violate the Fourth and Fourteenth Amendments to the United States Constitution. The Supreme Court stated that the passenger compartment of the car was within the arrestees' immediate control and further held that not only can police officers search the passenger

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<sup>7</sup> Stewart v. Commonwealth, 44 S.W.3d 376, 380 (Ky.App. 2000).

<sup>8</sup> Gallman v. Commonwealth, 578 S.W.2d 47, 48 (Ky. 1979).

<sup>9</sup> 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 678 (1981).

compartment of a vehicle,<sup>10</sup> but they may also examine the contents of any containers found inside the vehicle. "Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have."<sup>11</sup>

In United States v. White,<sup>12</sup> the Court of Appeals for the Sixth Circuit recognized the Belton rule. In White, the suspect was already handcuffed and secured in a police cruiser when the search was performed. The Court noted that even where the arrestee is no longer in reach of the vehicle, a search is valid as a search incident to arrest. The Court clarified that in a search incident to arrest, police officers can search any area that is or was in the arrestee's immediate control at the time of the arrest.

The trial court's reliance upon United States v. Welch,<sup>13</sup> as support for its decision to grant the motion to suppress is misplaced. Welch was passing counterfeit bills at a casino when she and her co-defendant were detained and

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<sup>10</sup> See Commonwealth v. Ramsey, 744 S.W.2d 418, 419 (Ky. 1987).

<sup>11</sup> Belton, 453 U.S. at 461.

<sup>12</sup> 871 F.2d 41 (6th Cir. 1989).

<sup>13</sup> 4 F.3d 761 (1993).

questioned and then placed in separate rooms. The co-defendant gave officers permission to search a vehicle that he and Welch had traveled in together. Security officers located a purse in the trunk of the vehicle and a subsequent search of the purse revealed counterfeit bills. Welch admitted the purse belonged to her. She was thereafter arrested.

In this case, Rose was arrested prior to the search of the vehicle in which she had been an occupant. It is of no consequence that Danny gave permission to search the vehicle. If an officer has made a lawful arrest of an occupant of a vehicle, the officer can conduct a search of the passenger compartment of that vehicle and any containers therein, even if the suspect is detained in a police cruiser away from the vehicle.

Likewise, Rose has misapplied the decision of Clark v. Commonwealth.<sup>14</sup> In Clark, the driver of the vehicle, Nutter, was stopped and arrested for driving without a valid driver's license. Approximately 40 minutes later, after Nutter had been placed in the police cruiser, the officer conducted a search of his vehicle. In granting the motion to suppress, the trial court found that the search was not limited to the area within Nutter's immediate control. The trial court distinguished Belton because Nutter's arrest was made for a minor traffic violation

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<sup>14</sup> 868 S.W.2d 101 (Ky.App. 1993).

rather than a serious crime as in Belton, and the search in Belton took place immediately after the driver and passengers exited the vehicle and were arrested. Clark noted that the search of the vehicle could not have been incident to Nutter's arrest because he was arrested outside of the vehicle and placed immediately into the police cruiser and there was no belief that Nutter could have gone back to the vehicle.

However, Clark is inconsistent with federal case law regarding searches incident to arrest. The Court concluded that the passenger compartment did not come within Nutter's area of immediate control because he was arrested outside the car. However, as stated in White, upon arrest, officers can search the area that is or was in an arrestee's immediate control. In Clark, the passenger compartment was within Nutter's immediate control when the officer initiated contact. Here, Rose was stopped while riding in the vehicle, and according to White, the passenger compartment could be searched because it was in Rose's immediate control when the vehicle was stopped. Also, the search in this case was contemporaneous to the arrest, unlike the 40-minute lapse of time from the arrest to the search in Clark.

Therefore, we hold that the search of Rose's purse, and other containers located within the vehicle, was valid as a search incident to arrest because Rose was a recent occupant of



the vehicle when the deputy initiated contact and because Rose was lawfully arrested before the search. Even though Danny gave permission for the vehicle to be searched, the search of the containers challenged by Rose was valid incident to Rose's lawful arrest.

Accordingly, the order of the Estill Circuit Court is reversed and this matter is remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

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