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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001215-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE MARY M. SHAW, JUDGE
ACTION NO. 09-CR-001470

ROBERT MASON PARKER — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: COMBS AND LAMBERT, JUDGES; SHAKE,[1] SENIOR JUDGE.

SHAKE, SENIOR JUDGE: The Commonwealth of Kentucky appeals from the March 19, 2010, and May 27, 2010, orders of the Jefferson Circuit Court. Those orders granted defendant Appellee Robert Mason Parker's motion to suppress certain evidence and denied the Commonwealth's motion to reconsider, respectively. For the following reasons, we reverse.

[1] Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On January 12, 2009, Parker was stopped by Officer Brian Reccius after Officer Reccius witnessed Parker's vehicle cross the center line after leaving a bar. Parker was arrested for driving on a suspended license. His vehicle was then searched by Officer Reccius, who discovered a loaded gun and some marijuana.

Parker was indicted by the Jefferson County Grand Jury for possession of a handgun by a convicted felon; illegal possession of a controlled substance, schedule I hallucinogen, marijuana; and operating a motor vehicle while license is revoked or suspended for driving under the influence, first offense, for activities occurring on January 12, 2009. Parker filed a motion to suppress the evidence recovered from his vehicle during Officer Reccius' search. The motion was granted by the trial court. In a handwritten note on the suppression order, the Judge wrote "[t]he Defendant's vehicle was searched solely on the basis of a search incident to arrest for driving on a suspended license and as such, is invalid under *Arizona v. Gant*, 129 S.Ct. 1710 (2009) as no broad good faith exception to the exclusionary rule applies in this case."

The Commonwealth filed a motion, pursuant to Kentucky Rules of Civil Procedure (CR) 59.05, to alter, amend, or vacate the order suppressing, or in the alternative, to enter findings of fact and conclusions of law. In an opinion and order entered on May 27, 2010, the trial court made findings of fact and conclusions of law and denied the motion to reconsider. This appeal followed.

First before the Court is the issue of whether the Commonwealth's appeal was timely filed. The Commonwealth's notice of appeal was filed on May 27, 2010. Parker argues that the Commonwealth had until April 18, 2010, to file its appeal, because the March 19, 2010, order was not appropriate for CR 59.05 review, because it was not a "final" judgment as envisioned by the statute. Therefore, Parker argues, the CR 59.05 motion, and resulting judgment thereupon, failed to toll the time for a timely filed appeal, making the Commonwealth's appeal untimely. We do not agree.

If we were to follow Parker's reasoning regarding the March 19, 2010, order, then the order would not be appealable at all, because it would not be considered a "final judgment." However, the Commonwealth has a statutory right of appeal of the March 19, 2010, order under KRS 22A.020. Further, "[a]ny order that is appealable has the status of a judgment under CR 54.01, and CR 59.05 limits to 10 days the period in which it can be reached by motion unless the grounds therefor[e] bring the motion within CR 60.02." *Mahon v. Buechel Sewer Const. Dist. # 1*, 355 S.W.2d 683, 684 (Ky. 1962). Thus, the running of the time to file an appeal of any judgment is tolled by a timely filed CR 59.05 motion. CR 73.02.

Parker also cites to the case of *Commonwealth v. Cobb*, 728 S.W.2d 540 (Ky. App. 1987) as supportive of his argument that this appeal is untimely. This reliance, however, is misplaced. The case upon which *Cobb* rests its holding, *Commonwealth, ex rel. Mason v. Hughes*, 725 S.W.2d 865 (Ky. App. 1987), was

overruled by *Bates v. Connelly*, 892 S.W.2d 586 (Ky. 1995). The Kentucky Supreme Court in *Bates* held that "a judgment subject to a CR 59 motion cannot be final until the motion has been ruled on." *Bates*, 892 S.W.2d at 588. Although the facts of *Bates* pertain to a timely filed motion for discretionary review, the holding is still applicable to the facts at hand. It is not possible for this Court to obtain jurisdiction over a judgment which is still pending further review in a lower court. Accordingly, we hold that the Commonwealth's notice of appeal was timely filed.

On appeal, the Commonwealth concedes that the search conducted by Officer Reccius was unconstitutional under *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). The United States Supreme Court, in *Gant*, held that a vehicle search, incident to arrest, is only authorized "when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" or "when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Gant,* 129 S.Ct. at 1719 (citation omitted). The Court specified that "[i]n many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence." *Id.*

The Commonwealth also concedes that *Gant* applies retroactively per the U.S. Supreme Court's holding in *Griffith v. Kentucky*, which stated:

> a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past.

Griffith v. Kentucky, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987). However, the Commonwealth argues that because Officer Reccius reasonably and in good faith relied on the law at the time of the January 12, 2009, arrest, that the purposes of the exclusionary rule are not met by suppressing the evidence recovered by the search. We agree.

In support of its argument, the Commonwealth cites to the recent United States Supreme Court case of *Davis v. United States*, 564 U.S. ___, 131 S. Ct. 2419, 2423, 180 L. Ed. 2d 285 (2011). The facts of *Davis* involve a defendant whose vehicle search, incident to arrest, revealed the presence of a revolver. *See United States v. Davis*, 598 F.3d 1259 (11th Cir. 2010), reh'g denied (Apr. 14, 2010), cert. granted, 131 S.Ct. 502, 178 L.Ed.2d 368 (2010) and aff'd, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011). Davis sought to have the revolver suppressed under the holding of *Gant* and the U.S. Court of Appeals for the Eleventh Circuit held that "the good-faith exception allows the use of evidence obtained in reasonable reliance on well-settled precedent[.]" *Id.* at 1268.

The U.S. Supreme Court affirmed the holding of the Eleventh Circuit. In so doing, it noted that the searching officers had "acted in strict compliance with binding precedent" and that exclusion of the evidence would only serve to deter "conscientious police work." *Davis*, 564 U.S. at ___, 131 S.Ct. at 2428-9. The Court further stated:

> That is not the kind of deterrence the exclusionary rule seeks to foster. We have stated before, and we

> reaffirm today, that the harsh sanction of exclusion should not be applied to deter objectively reasonable law enforcement activity. Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule.

Id. (quotation and citation omitted).

The Court in *Davis* addressed the argument that allowing a good faith exception would be incompatible to the retroactivity precedent of *Griffith*. However, the Court clarified that retroactive application of *Gant* merely serves to raise the question of whether suppression should take place, not determine that it absolutely will. *Davis*, 564 U.S. at ___, 131 S.Ct. at 2431. The Court concluded that suppression would only be appropriate "where its purpose is effectively advanced." *Id.* (citation omitted).

In Kentucky, the exclusionary rule has also been historically utilized in an effort to deter future police misconduct. *See, e.g., Crayton v. Commonwealth*, 846 S.W.2d 684 (Ky. 1992). Suppressing evidence obtained when the police have acted upon a good faith reliance of precedent fails to further this deterrent effect. Therefore, *Davis* is dispositive of the issue before us.

Parker argues that *Davis* is inapplicable in Kentucky because the law of *Gant* has been in place in the Commonwealth since 1993, by means of *Clark v. Commonwealth*, 868 S.W.2d 101 (Ky. App. 1993). However, Parker's argument fails by the simple fact that *Clark* was overruled in 2008 by *Henry v. Commonwealth,* 275 S.W.3d 194 (Ky. 2008). *Henry* held that a search of defendant's vehicle, incident to arrest, was valid notwithstanding that defendant

had been secured in the back of a police cruiser. *Id.* The standard of *Gant* was not officially implemented in the Commonwealth until 2011. *See Rose v. Commonwealth*, 322 S.W.3d 76 (Ky. 2010). Therefore, at the time of Parker's arrest and resulting vehicle search, *Henry* was controlling, making the search appropriate.

For the foregoing reasons, the March 19, 2010, and May 27, 2010, orders of the Jefferson County Circuit Court are reversed.

COMBS, JUDGE, CONCURS AND FILES SEPARATE OPINION.

LAMBERT, JUDGE, CONCURS AND JOINS IN JUDGE COMBS'S OPINION.

COMBS, JUDGE, CONCURRING: The majority opinion correctly applies Davis, but this case serves to highlight the confusing and contradictory legal milieu resulting from the impact of *Davis* upon previous U.S. Supreme Court holdings in *Gant* and *Griffith*. *Davis* provides absolutely no clear or certain guidance to law enforcement, appearing to be more like a "shell game" than a policy directive. Arbitrary and capricious application of traditional 4th Amendment standards is an evitable by-product of the mixed message of the *Davis* case. Police officers will ultimately be called upon to guess and hope for the best in applying the automobile exception to the warrant requirement.

Gant, Griffith and *Davis* desperately need to be harmonized by a more certain statement of the Supreme Court by which they were issued. Our courts

cannot provide needed clarity for the police in the present climate of confusion generated from our nation's highest court.

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