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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001531-MR

THOMAS NICELEY — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 09-CR-00072

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND WINE, JUDGES; LAMBERT,[1] SENIOR JUDGE.

LAMBERT, SENIOR JUDGE: Thomas Niceley appeals from the Franklin Circuit Court judgment convicting him of possession of a controlled substance in the first

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

degree,[2] no operator's license in possession,[3] and being a persistent felony offender in the second degree (PFO II).[4] For the following reasons, we affirm.

At approximately 4:30 a.m. on February 15, 2009, Frankfort Police Officer Michael Schneble effected a traffic stop of a white 2009 Dodge Durango operated by Niceley. The vehicle matched the description of that given in a radio call regarding a burglary in progress a short time earlier in the same area as reported by a 911 caller. Upon making contact with Niceley and determining that his drivers' license was suspended, Officer Schneble placed Niceley under arrest. A search of Niceley's vehicle initiated incident to his arrest revealed a white powdery substance on the seats, floor and under the driver's seat, which was later confirmed to be cocaine. Although unclear from the record, at some time following Niceley's arrest Officer Schneble learned that there had not, in fact, been a burglary or attempted burglary.[5]

During the pendency of the action below, the United States Supreme Court rendered its decision in *Arizona v. Gant*, 556 U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), which limited warrantless searches incident to lawful arrests. Based on *Gant*, Niceley moved to suppress the drug evidence seized following his

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[2] KRS 218A.1415, a Class D felony.

[3] KRS 186.510, a Class B misdemeanor.

[4] KRS 532.080.

[5] Although Niceley had been at the residence allegedly burglarized, officers investigating the burglary determined, upon questioning the residents of the house, that no such crime actually occurred.

arrest. He argued that *Gant* limited vehicle searches incident to arrest to situations where a suspect is unrestrained and within reaching distance of the passenger compartment at the time of the search or when there is probable cause to believe evidence of the crime of arrest might be located in the vehicle. He alleged that his arrest for driving on a suspended license could not give rise to probable cause to search for evidence of the offense of arrest and that Officer Schneble conducted the search of his vehicle only after placing him under arrest, handcuffing him, and placing him in the rear of a police cruiser. Thus, he argued *Gant* required suppression of the drug evidence.

The trial court denied Niceley's motion following an evidentiary hearing. In its order, the court found: 1) cocaine was in plain view and observable from the exterior of the vehicle; 2) the search was based on probable cause to believe evidence of the burglary might be located in the vehicle; 3) the vehicle matched the description of the vehicle in the burglary report; and 4) Officer Schneble testified truthfully that he observed cocaine in plain view.[6] Following the denial, Niceley entered a guilty plea pursuant *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), and conditioned upon his reservation of the right to appeal the trial court's denial of his suppression motion under RCr[7]

[6] Niceley asserts Officer Schneble failed to mention the "plain view" theory in the arrest report or in his grand jury testimony as justification to search the vehicle. He contends such failure precludes the Commonwealth from arguing that theory on appeal. We note that the Commonwealth does not make such an argument in its brief to this Court. Thus, no further discussion of the matter is warranted.

[7] Kentucky Rules of Criminal Procedure.

8.09. The trial court accepted the plea and sentenced Niceley to five years' imprisonment. This appeal followed.

RCr 9.78, in setting forth the standard of review of a trial court's decision on a suppression motion, states that "[i]f supported by substantial evidence the factual findings of the trial court shall be conclusive." We then must determine "whether the rule of law as applied to the established facts is or is not violated." *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998) (citations omitted).

It is well-settled that warrantless searches are "*per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Searches incident to a lawful arrest, including an arrestee's person and the area within his immediate control for weapons and concealed evidence, constitute one exception to the rule. *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969) (abrogated by *Davis v. United States*, ___ U.S. ___, 131 S.Ct. 2419 (2011)).

Gant limited the scope of searches incident to arrest in the context of automobile searches. Consistent with Niceley's contention, the United States Supreme Court held that officers may search a vehicle incident to the lawful arrest of a recent occupant "only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Gant*, 129 S.Ct. at 1723. There

is no dispute in the case at bar that Niceley was not within reach of the passenger compartment of the vehicle at the time of the search nor that there was a reasonable possibility that the vehicle contained evidence relevant to his arrest for a traffic violation. Thus, it would appear that *Gant* would mandate a finding that the search was unconstitutional and require reversal.

However, the United States Supreme Court recently rendered its opinion in *Davis*. There, the Court held that searches which are conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule. *Davis*, 131 S.Ct. at 2429. The exclusionary rule was judicially created as a deterrent sanction which prohibits the prosecution from introducing evidence obtained in violation of a person's rights under the Fourth Amendment. Since its creation, the United States Supreme Court has applied a "good-faith" exception across a variety of cases.

> [W]hen the police act with an objectively "reasonable good-faith belief" that their conduct is lawful, [*United States v.*] *Leon,*[468 U.S. 897, 909, 104 S.Ct. 3405, 82 L.Ed2d 677 (1984)] (internal quotation marks omitted), or when their conduct involves only simple, 'isolated' negligence, *Herring* [*v. United States*, 555 U.S. 135, 137, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009)], the "'deterrence rationale loses much of its force,'" and exclusion cannot "pay its way." See *Leon*, [468 U.S.] at 919, 908, n. 6, 104 S.Ct. 3405 (quoting *United States v. Peltier,* 422 U.S. 531, 539, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975)).

Id. at 2427-28. The *Davis* Court held that since the arresting officers had complied with binding appellate precedent at the time of the search, even though such

precedent was subsequently overturned, the exclusionary rule did not apply and suppression of evidence found in Davis's vehicle was unwarranted. *Id*. at 2428-29.

At the time of the search in this case, *Chimel* and *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), constituted controlling law on the subject of searches incident to arrest. *Gant* would not be decided until two months *after* Officer Schneble completed his search of Niceley's vehicle. The record does not reveal any indication that Officer Schneble's conduct in searching the vehicle was in any way culpable. Thus, although the search may have been unconstitutional under *Gant*, application of the exclusionary rule would not serve its intended purpose of deterring culpable and deliberately unconstitutional police practices. The trial court was correct to deny Niceley's motion to suppress.

For the foregoing reasons, the Judgment of the Franklin Circuit Court is AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mark A. Bubenzer
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Heather M. Fryman
Assistant Attorney General
Frankfort, Kentucky