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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001122-MR

DEBORAH L. AGEE

APPELLANT

ON REMAND FROM THE KENTUCKY SUPREME COURT
APPEAL NO. 2011-SC-000745-DG

V. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE WILLIAM G. CLOUSE, JUDGE
ACTION NO. 10-CR-00001

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE, MAZE AND STUMBO, JUDGES.

MAZE, JUDGE: Deborah L. Agee appeals from her conditional guilty plea in the Madison Circuit Court. This Court previously affirmed the trial court's denial of her motion to suppress evidence seized following a stop by the police. On discretionary review, the Kentucky Supreme Court remanded this matter for

reconsideration in light of recent authority relating to the scope of a search incident to arrest. Upon further consideration, we again conclude that the officers had probable cause to arrest Agee and that they properly searched her backpack incident to that arrest. Hence, we affirm.

In the previous opinion, this Court set out the facts of this case as follows:

On January 6, 2010, a Madison County grand jury indicted Agee on one count each of first-degree possession of a controlled substance, possession of drug paraphernalia, and public intoxication. The charges arose from events occurring on September 25, 2009, when Agee was stopped and searched by a police officer in a restaurant parking lot. After entering a plea of not guilty, Agee moved to suppress the evidence seized in the stop.

At the evidentiary hearing, Officer Jason Spalding, Patrolman Josh Petry, and Corporal Catherine Eaves testified regarding the circumstances surrounding Agee's arrest. Agee also testified at the hearing. At around 11:30 p.m. on September 25, 2009, Officer Spalding of the Richmond Police Department responded to a complaint from the manager of a Waffle House Restaurant about a woman smoking and possibly doing drugs in the bathroom. As Officer Spalding arrived at the Waffle House, he saw Agee leaving the bathroom. He approached Agee and asked if he could speak with her outside.

Patrolman Petry arrived as Officer Spalding and Agee were leaving the restaurant. While he was speaking with Agee, Officer Spalding noticed that Agee was very nervous, she was “fidgety” and “scratchy,” her pupils were constricted, and her speech was slurred. Agee admitted that she was taking Dilantin for seizures, and that she had smoked crack cocaine several days before. Agee testified that she told the officers that she had taken prescription Lortab, Tramadol, Valium, and Dilantin earlier in the day.

After observing Agee's behavior, the officers concluded that she was under the influence. Officer Spalding called his supervisor, Corporal Eaves, to the scene to conduct a pat-down search. Prior to that search, Officer Spalding asked Agee to empty her pockets. She complied with that request, but refused when he asked to search her purse and backpack. Corporal Eaves arrived on the scene about fifteen minutes after the initial stop and conducted the pat-down search. No contraband was found during any of these searches.

Agee testified that Corporal Eaves gave her several field sobriety tests, and she was able to perform all but one. However, Corporal Eaves testified that she recalled giving Agee only a horizontal gaze nystagmus (HGN) test, which Agee failed. After further questioning for about ten minutes, Agee stated that she wanted to leave and indicated that she planned to drive. Officer Spalding replied that he would not allow her to leave since she appeared to be intoxicated. At that point, he placed Agee under arrest for public intoxication. Corporal Eaves advised Agee of her Miranda rights, and Officer Petry searched Agee's purse and backpack. No contraband was found in her purse. But during the search of the backpack, Officer Petry found three individually wrapped bags of heroin, several pieces of currency containing heroin residue and several items of paraphernalia associated with heroin use.

Following the evidentiary hearing, the trial court denied the motion to suppress. The court found that Officer Spalding had a reasonable basis to stop Agee, that the duration of the stop was reasonable based on Agee's behavior and demeanor during the stop, that Officer Spalding had probable cause to arrest Agee for public intoxication, and that the drugs and paraphernalia were seized from Agee's backpack during a valid search incident to the arrest. Thereafter, Agee entered a conditional guilty plea to the three counts set out in the indictment. Pursuant to the terms of the plea agreement, the trial court sentenced Agee to a total sentence of one-year imprisonment, probated for two years.

Agee v. Commonwealth, No. 2010-CA-001122-MR, 2011 WL 5419705 (Ky.

App. 2011).

In the first appeal, Agee challenged the warrantless search of her backpack, arguing it exceeded the scope of a permissible search either under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), or as a search incident to arrest. The prior panel of this Court concluded that the officers had probable cause to arrest Agee and they properly conducted a warrantless search of the backpack incident to her arrest. *Agee*, 2011 WL 5419705 at 3-5.

Thereafter, the Kentucky Supreme Court granted Agee's motion for discretionary review. The Supreme Court did not address the merits of Agee's appeal. Rather, the Court vacated our prior opinion and remanded the matter for further consideration in light of *Frazier v. Commonwealth*, 406 S.W.3d 448 (Ky. 2013). The remanded matter is now submitted to this Court for review.

Frazier v. Commonwealth involved the validity of a *Terry* stop, pat-down, and subsequent search incident to an arrest. In *Frazier*, two police officers witnessed a passenger in the vehicle in front of them at a drive-through throw some trash out of the car window. They decided to follow the vehicle out of the parking lot. When the officers observed the vehicle make a left-hand turn without using a turn signal, they activated their lights and stopped the vehicle.

The officers testified that the driver, Frazier, appeared nervous as he provided his license and proof of insurance. They also testified that Frazier was reluctant to provide information about his passengers or where they were going. The officers then asked Frazier to step out of the car and conducted a pat-down

search of him. One of the officers felt an object in Frazier's front jeans pocket which he described as "long", "coarse", and "suspicious." Frazier refused to identify the object. The officer then pulled open the top of Frazier's pant pocket and observed a plastic bag filled with a leafy, green substance. At that point, the officers arrested Frazier.

The officers then commenced a search of Frazier's vehicle. At some point during the search an onlooker approached and notified the deputies that Frazier appeared to be eating something in the back seat of the cruiser. When the deputies reached Frazier, they observed what appeared to be marijuana crumbs on his mouth, shirt, and lap. An additional bag of marijuana was found on Frazier's person at that time. Although the vehicle search failed to yield more drugs or drug paraphernalia, two marijuana pipe screens were found in Frazier's wallet during his booking search at the jail. *Id.* at 451.

Prior to trial, Frazier moved to suppress the evidence found during the pat-down search and following his arrest. The trial court denied the motion to suppress and Frazier entered a conditional guilty plea. On appeal, this Court affirmed.

On discretionary review, however, the Kentucky Supreme Court reversed the conviction. The Court first found that the officers lacked any specific and articulable facts to justify the pat-down search. The officers' initial reason for the stop, their observation of littering and a traffic violation, provided no basis to believe that Frazier was armed. *Id.* at 454-55. The Court further held that

Frazier's apparent nervousness, his failure to cooperate and his overall disrespectful demeanor were not sufficient to suggest that he was a threat or that he was carrying a weapon. *Id.* at 455.

The Court went on to hold that, even if the pat-down search was justified, the intrusion into his pants pockets exceeded the scope of a *Terry* search. There was no evidence that the officer immediately recognized the item in Frazier's pocket as either a drug or a weapon. Likewise, Frazier's insistence that there was "nothing" in his pocket could not create a reasonable suspicion warranting a further intrusion. *Id.* at 456-57.

Finally, the Supreme Court concluded that, since the officers lacked any basis to lawfully arrest Frazier, the search of his vehicle incident to that arrest was also unconstitutional. The Court also suggested that the search of the vehicle would be otherwise improper because it was outside of Frazier's immediate area of control and the officers had no valid basis to believe that the vehicle contained evidence of the crime for which Frazier was arrested. *Id.* at 457-58. Based upon all these factors, the Supreme Court concluded that the trial court erred by failing to grant Frazier's motion to suppress. *Id.* at 458.

We now apply the same analysis to the facts of Agee's appeal. However, in this case, Agee concedes that the initial stop was valid. Furthermore, she does not challenge the pat-down since that search did not produce any incriminating evidence and was not the basis for the subsequent arrest. Rather, she argues that the length of the detention exceeded the limited scope allowed for a

Terry stop. As a result, she maintains that she was actually detained by the police long before she was formally arrested and therefore the later search of her backpack could not have been “incident” to her arrest. This Court rejected that argument, holding as follows:

In *U.S. v. Sharpe*, 470 U.S. 675, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985), the Supreme Court addressed the difference between a *de facto* arrest and an investigative stop, noting that there is no rigid time limitation on *Terry* stops. *Id.* at 685, 105 S.Ct. at 1575. In determining whether a detention is too long, a court should consider, “whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant,” and that, “[a] court making this assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing.” *Id.* at 686, 105 S.Ct. at 1575.

In this case, Officer Spalding and Patrolman Petry testified that they determined that Agee was under the influence within a short period after the initial stop. Officer Spalding testified that he called Corporal Eaves to the scene because he felt that it would be more appropriate to have a female officer conduct the pat-down search of Agee. As noted above, Corporal Eaves arrived about fifteen minutes after the initial stop. All three officers observed Agee for another ten minutes from that point. Furthermore, Officer Spalding arrested Agee after she indicated that she planned to drive home. Given this sequence of events, we cannot find that the duration of the detention exceeded the scope of a reasonable *Terry* stop. Therefore, the trial court did not clearly err in finding that the search of the backpack was incident to the arrest.

Agee v. Commonwealth, 2011 WL 5419705 at 2-3.

Considering the difference between the facts and issues presented in this case and those presented in *Frazier*, we conclude that the duration of the *Terry* stop is beyond the Supreme Court's order of remand. The first question which remains is whether the officers had probable cause to arrest Agee. Unlike in *Frazier*, the officers' decision to arrest Agee was not based upon any evidence obtained during an illegal search. Rather, they arrested Agee based solely upon their observations of her behavior during the *Terry* stop.

Based upon these observations, the trial court found that Officer Spalding had probable cause to arrest Agee. Under Kentucky Rules of Criminal Procedure ("RCr") 9.78, the standard of review of the trial court's decision on a suppression motion following a hearing is twofold. "First, the factual findings of the court are conclusive if they are supported by substantial evidence[;]" and second, this Court conducts "a *de novo* review to determine whether the [trial] court's decision is correct as a matter of law." *Stewart v. Commonwealth*, 44 S.W.3d 376, 380 (Ky. App. 2001), citing *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998). Since the facts of this case are not at issue, we owe no deference to the trial court's ruling on the merits of the suppression issue.

As this Court previously noted, probable cause for arrest occurs when "a reasonable officer could conclude from all the facts [and circumstances] that [an offense] is being committed in his presence." *Commonwealth v. Mobley*, 160 S.W.3d 783, 786 (Ky. 2005). The phrase "probable cause" is incapable of precise definition or quantification into percentages because the standard deals with

probabilities and depends on the totality of the circumstances. “[T]o determine whether an officer had probable cause to arrest, [the Court must examine] the events leading to the arrest and the decision of the officer as to whether these facts, viewed from the standpoint of an objectively reasonable police officer amounts to probable cause.” *Commonwealth v. Fields*, 194 S.W.3d 255, 257 (Ky. 2006), citing *Maryland v. Pringle*, 540 U.S. 366, 372, 124 S. Ct. 795, 800–01, 157 L. Ed. 2d 769 (2003).

In this case, the officers received a credible complaint that a person was smoking and possibly using drugs in the restaurant’s bathroom. Officer Spalding met Agee coming out of the bathroom. Several officers observed Agee’s behavior for several minutes and concluded that it was consistent with intoxication. Corporal Eaves gave Agee an HGN test, which she did not pass. And finally, Agee indicated that she planned to drive home.

Although Agee raises some potentially valid points concerning the circumstances leading up to her arrest, her arguments do not negate the trial court’s conclusion regarding probable cause. Likewise, while the officers could have exercised discretion in deciding whether to arrest Agee, we cannot say that the officers lacked any reasonable, objective basis for concluding that she had committed the offense of public intoxication. Considering the totality of the circumstances, we agree with the trial court that the officers had probable cause to arrest Agee for public intoxication.

The more difficult question presented in this case is whether the officers were entitled to search Agee's backpack incident to that arrest. Agee relies heavily on *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), in which the United States Supreme Court clarified the search incident to arrest exception as it applies to vehicle searches. In *Gant*, the Court held that a search incident to arrest can be justified only if the arrestee was unrestrained, or if it was reasonable for the arresting officers to believe that evidence relevant to the crime of arrest might be accessed or destroyed by the arrestee. *Id.* at 343, 129 S. Ct. at 1719. *See also Davis v. U.S.*, --- U.S. ---, 131 S. Ct. 2419, 2425, 180 L. Ed. 2d 285 (2011).

Agee points out that the backpack was not on her person at the time of her arrest. Rather, it was laying several feet away on the trunk of her car. Since the backpack was outside of her area of immediate control at the time of her arrest, Agee argues that the officers had no justification to search it incident to her arrest.

The rule set out in *Gant* and *Davis* specifically applies to searches of an automobile incident to the arrest of a recent occupant of that automobile. In this case, the officers did not search the vehicle, nor had Agee recently occupied the vehicle. Furthermore, Agee's backpack was not inside the vehicle, but was sitting on the lid of the vehicle's trunk. While the Commonwealth concedes that the analysis of *Gant* may be relevant to any search incident to arrest, such an analysis is difficult considering the distinctive facts of this case.

However, even if the backpack was outside of the area of Agee's immediate control, *Gant* permits a search incident to arrest in cases where the arrestee is secured if it was "reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle." *Gant*, 556 U.S. at 343-44, 128 S. Ct. at 1719. *See also Rose v. Commonwealth*, 322 S.W.3d at 76, 80 (Ky. 2010). In *Gant*, the Supreme Court noted that a person retains a significant privacy interest in personal effects within the passenger compartment of her vehicle. *Id.* at 344-46, 128 S. Ct. at 1720. Since Agee's backpack was not within the vehicle, her expectation of privacy to its contents was somewhat less than if it had been. Indeed, when the officers arrested Agee, the backpack was simply unsecured and out in the open.

Moreover, Agee had been carrying the backpack at the time she emerged from the restroom and was stopped by the officers. She placed the backpack on the lid of her car trunk after leaving the restaurant. Under the circumstances, we conclude that the officers had a reasonable basis to believe that the backpack contained evidence of Agee's public intoxication, and that its search and seizure was necessary to preserve that evidence. Therefore, the trial court properly denied Agee's motion to suppress the evidence found inside the backpack.

Accordingly, the judgment of conviction by the Madison Circuit Court is affirmed.

ALL CONCUR.

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