

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000777-MR

JONATHAN PHILLIPS

APPELLANT

v.

APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 15-CR-00218

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, JOHNSON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: On February 5, 2016, Jonathan Phillips entered a conditional guilty plea to various misdemeanor offenses and the possession of a controlled substance, first degree, reserving the right to appeal the Rowan Circuit Court's denial of his motion to suppress evidence obtained from his vehicle. On March 4, 2016, judgment and sentence on Phillips' guilty plea was entered, and he was

sentenced to one year in prison, probated for a period of two years. For the reasons stated, we affirm.

On August 25, 2015, Trooper Stephen Mirus of the Kentucky State Police received a telephone call from a detective at the local sheriff's office inquiring if Mirus knew Phillips. The detective indicated to the trooper that Phillips was believed to be selling drugs at a mobile home park. Mirus entered Phillips' name into an electronic database and learned there was an active warrant for his arrest for driving on a suspended license.

While en route to the mobile home park, Mirus observed Phillips driving in the opposite direction. After following Phillips into a parking lot, Mirus arrested Phillips pursuant to the warrant and placed him in handcuffs between the two vehicles. Admittedly looking for drugs, Mirus squatted and looked through the open driver's side door of Phillips' car but saw no contraband. Mirus then opened the passenger door of Phillips' car and again squatted down to peer under the seat but saw nothing suspicious.

While Phillips was being detained, he asked Mirus to retrieve his cigarettes and allow him to smoke. Mirus then retrieved two cigarette packs from the console of Phillips' vehicle, one of which rattled. Mirus opened that rattling pack and discovered it contained one oxycodone pill. Mirus then searched the vehicle and discovered additional prescription pills.

Phillips was charged with various misdemeanors and possession of a controlled substance. Phillips filed a motion to suppress evidence obtained from

his vehicle, alleging the search was unconstitutional. After conducting an evidentiary hearing where Mirus was the sole witness, the trial court denied the motion, orally concluding Phillips consented to the search because he asked for his cigarettes. Phillips later entered a conditional guilty plea and was sentenced to a total of one year of imprisonment, probated for two years. This appeal follows.

This Court's standard of review of the trial court's denial of a suppression motion is twofold. First, the trial court's findings of fact are conclusive if they are supported by substantial evidence; and second, the trial court's application of the law to the facts are reviewed *de novo*. *Milam v. Commonwealth*, 483 S.W.3d 347, 349 (Ky. 2015). Because the essential facts *sub judice* are undisputed, our review is focused upon the trial court's application of the law to the facts.

Phillips' initial argument is that Mirus' opening the passenger door of Phillips' car to better his vantage point was illegal. Phillips argues that the search was contrary to *Arizona v. Gant*, 556 U.S. 332 (2009). We agree, though that conclusion does not ultimately entitle Phillips to relief.¹

The Kentucky Supreme Court has summarized the application of *Gant* as follows:

Police may search a vehicle incident to a recent occupant's arrest 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

¹ The Commonwealth does not address the propriety of trooper Stephen Mirus' opening Jonathan Phillips' passenger door in its short brief, which contains only about one page of analysis and one citation to precedent.

evidence of the offense of arrest. Otherwise, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

Commonwealth v. Owens, 291 S.W.3d 704, 708 (Ky. 2009) (quoting *Gant*, 556 U.S. at 351) (footnote and quotation marks omitted). Phillips was handcuffed and not within “reaching distance” of the passenger compartment of his vehicle when the trooper opened the passenger door. Moreover, he was arrested for driving on a suspended license, so it was not reasonable to believe his car contained evidence pertaining to the “offense of arrest.” *See Gant*, 556 U.S. at 344 (“*Gant* was arrested for driving with a suspended license – an offense for which police could not expect to find evidence in the passenger compartment of *Gant*'s car.”). Thus, Mirus clearly erred by opening the passenger door to Phillips’ vehicle to better his vantage point without first obtaining a search warrant. However, that search did not yield anything used as the basis for any of the charges against Phillips.

Instead, the crucial question is whether Phillips asking Mirus for “my” cigarettes means Phillips consented to Mirus entering Phillips’ vehicle to get the cigarettes. We agree with the trial court that it did.

Both Phillips and Mirus knew the cigarettes were not on Phillips’ person, despite Phillips’ specious argument to the contrary.² Therefore, the only reasonable place the cigarettes could have been located was inside Phillips’

² Also, Phillips’ unsupported argument that he “[p]erhaps . . . thought Mirus would offer him one [cigarette] of his own” is logically inconsistent with Mirus’ un rebutted testimony that Phillips asked for “my” (i.e., Phillips’ own) cigarettes. Appellant’s Brief at 6.

vehicle. Consequently, Phillips' spontaneous, unprompted request for his own cigarettes is an overwhelming indication that he consented to Mirus retrieving the cigarettes from Phillips' vehicle.

Establishing that Phillips consented to the retrieval of the cigarettes does not end the matter because we must also address Phillips' fallback argument that the purported "consent" was not voluntarily given. In other words, we must determine whether Phillips' consent to search dissipated the taint of Mirus' prior illegal search.³ See, e.g., *Stevens v. Commonwealth*, 354 S.W.3d 586, 591 (Ky. App. 2011) (citing *Baltimore v. Commonwealth*, 119 S.W.3d 532, 540 (Ky. App. 2003)). "The admissibility of the challenged evidence involves a two-part test: (1) whether the consent was voluntary and (2) whether the consent was an independent act of free will." *Baltimore*, 119 S.W.3d at 540.

Voluntariness "focuses on coercion" while determining whether the consent was an independent act of free will "considers the causal connection between the 'consent' and the prior constitutional violation." *Baltimore*, 119 S.W.3d at 540 (quoting *United States v. Dortch*, 199 F.3d 193, 201 (5th Cir.1999)). Factors to be considered in determining whether the consent is an independent act of free will are "(1) the temporal proximity of the illegal conduct and the consent; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the initial misconduct." *Baltimore*, 119 S.W.3d at 540, n. 34 (citing, e.g., *United*

³ Inexplicably, the Commonwealth remarkably states in its brief that Phillips "does not allege that his consent was given under duress or was otherwise involuntary." Commonwealth's Brief at 3.

States v. Becker, 333 F.3d 858, 861-62 (8th Cir. 2003)). Here, Phillips' unconvincing arguments to the contrary notwithstanding, there is no objective indication from the record that Phillips' unsolicited request for his cigarettes was somehow coerced by Mirus.

Second, the consent was an independent act of free will because there was no direct "causal connection" between the request for cigarettes and the prior, improper search. The oxycodone pill in the cigarette pack was not revealed by Mirus' improper search. Instead, Mirus discovered it only after Phillips spontaneously asked for his cigarettes. Therefore, even though the consent occurred in close temporal proximity to the improper search, we conclude the consent was a voluntary, spontaneous intervening circumstance not unduly tainted by the improper search. In other words, the request for cigarettes was not occasioned by the improper search, especially since Mirus did not physically enter Phillips' vehicle until Phillips asked him to retrieve the cigarettes.

Finally, Phillips contends that since the nature of the pill inside the cigarette pack was not immediately apparent, Mirus erred by opening the rattling pack. Phillips' argument is directly contrary to the Supreme Court's holding in the factually similar case of *United States v. Robinson*, 414 U.S. 218 (1973), as reaffirmed in *Riley v. California*, ___ U.S. ___, 134 S. Ct. 2473 (2014).

Robinson was searched pursuant to his arrest for driving with an expired license. *Robinson*, 414 U.S. at 221. During the pat down incident to arrest, the arresting officer felt an unknown object in Robinson's coat pocket. The

officer pulled the unknown object out and it “turned out to be a crumpled-up cigarette package.” *Id.* at 23. The officer felt the package and knew it did not contain cigarettes but did not know its actual contents. Thus, he opened the pack and found fourteen heroin capsules. *Id.*

The Supreme Court found the officer acted properly, holding in relevant part as follows:

The search of respondent's person conducted by [the arresting officer] in this case and the seizure from him of the heroin, were permissible under established Fourth Amendment law Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [the arresting officer] did not indicate any subjective fear of the respondent or that he did not himself suspect that respondent was armed. Having in the course of a lawful search come upon the crumpled package of cigarettes, he was entitled to inspect it; and when his inspection revealed the heroin capsules, he was entitled to seize them as fruits, instrumentalities, or contraband probative of criminal conduct.

Robinson, 414 U.S. at 236 (footnotes and quotation marks omitted).

In *Riley* the Supreme Court reaffirmed its holding in *Robinson*. The Court acknowledged it was unlikely *Robinson* could have accessed the cigarette pack's contents once it was in the officer's control but nonetheless held that “*unknown physical objects may always pose risks, no matter how slight, during the tense atmosphere of a custodial arrest.*” The officer . . . testified that he could not identify the objects in the cigarette pack but knew they were not cigarettes. Given that, a further search was a reasonable protective measure.” *Riley*, 134 S. Ct. at 2485 (citation omitted) (emphasis added).

Similarly, Mirus heard a rattling within the cigarette pack and knew it contained some unknown object which was not a cigarette. Under *Robinson*, Mirus was permitted to search the cigarette pack. *Robinson*, 414 U.S. 218. Since Mirus lawfully discovered the oxycodone in the cigarette pack taken from the car with permission, his subsequent search of the car was also concomitantly permissible.

For the foregoing reasons, the judgment of the Rowan Circuit Court is affirmed.

ALL CONCUR.

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