

RENDERED: FEBRUARY 1, 2019; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky  
Court of Appeals**

NO. 2017-CA-001598-MR

TYRON LAMONT LEWIS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE JAMES D. ISHMAEL, JR., JUDGE  
ACTION NO. 17-CR-00580

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

CLAYTON, CHIEF JUDGE: Tyron Lamont Lewis appeals from the Fayette Circuit Court's judgment and sentence of conviction entered September 25, 2017. Lewis entered a conditional guilty plea following the circuit court's denial of his motion to suppress evidence. We affirm.

At approximately 11:30 a.m. on April 17, 2017, Officer Jesse Mascoe of the Lexington Police Department was on patrol when he observed a black Dodge Charger drive through the stop sign-controlled intersection of Jefferson

Street and Fifth Street without coming to a complete stop. Officer Mascoe could not immediately initiate a traffic stop, however, due to the presence of another vehicle between his cruiser and the Charger. While waiting for the interposed vehicle to clear the intersection, the officer watched as the Charger turned on to Sixth Street and accelerated away at a high rate of speed. Officer Mascoe followed the Charger, occasionally losing sight of the vehicle as it made various turns through neighborhood roads; nonetheless, the officer successfully tracked the vehicle's location by following the distinctive sound of its loud muffler exhaust.

Officer Mascoe caught up to the Charger and initiated a traffic stop at the intersection of Broadway and Loudon Avenue. The only individuals in the Charger were Lewis, who was driving, and a female passenger. As he walked toward the Charger, Officer Mascoe immediately noticed a plain smell of marijuana coming from the vehicle. The officer also noticed that Lewis appeared to be nervous; his voice was jittery, his hands were shaking, and he was sweating profusely. Lewis informed the officer he did not have a driver's license and gave him his personal information. Officer Mascoe walked back to his cruiser, where he requested assistance from dispatch and ran Lewis's information through his computer. He subsequently learned Lewis had a suspended or revoked driver's license, as well as an outstanding warrant for his arrest based on a probation violation.

When an officer arrived to assist, Officer Mascoe removed Lewis and his passenger from the vehicle and placed Lewis under arrest, pursuant to the warrant. Officer Mascoe explained he was going to search the vehicle because of the marijuana smell. Lewis told Officer Mascoe the vehicle did not belong to him, but to a friend, and he did not want police to search it. Upon searching the vehicle, Officer Mascoe discovered torn ends of plastic bags, which he associated with drug trafficking activities, as well as a 9mm Luger pistol in the center console. When asked, Lewis told Officer Mascoe he had no knowledge of the gun, but admitted he was a convicted felon. The officers did not discover any contraband upon Lewis's person, but his female passenger possessed a marijuana cigarette.

The Fayette County grand jury indicted Lewis for being a convicted felon in possession of a handgun,<sup>1</sup> operating on a suspended or revoked operator's license,<sup>2</sup> disregarding a stop sign,<sup>3</sup> and being a second-degree persistent felony offender.<sup>4</sup> After his indictment, Lewis moved the Fayette Circuit Court to suppress evidence found during the vehicle search. The circuit court denied the motion after

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<sup>1</sup> Kentucky Revised Statute (KRS) 527.040(2)(a) states as follows: "Possession of a firearm by a convicted felon is a Class D felony unless the firearm possessed is a handgun in which case it is a Class C felony."

<sup>2</sup> KRS 186.620(2), a Class B misdemeanor.

<sup>3</sup> KRS 189.330(4), a traffic violation.

<sup>4</sup> KRS 532.080(2).

conducting a suppression hearing on September 13, 2017. Lewis subsequently entered a conditional guilty plea to the amended charge of being a felon in possession of a firearm. As part of the plea agreement, the Commonwealth agreed to dismiss the remaining charges, and Lewis reserved his right to appeal the denial of his suppression motion. The circuit court entered its final judgment on September 25, 2017, sentencing Lewis to a term of one year's imprisonment with the Department of Corrections. This appeal followed.

Lewis's sole issue stems from the circuit court's denial of his motion to suppress the evidence discovered in the warrantless search of his vehicle, alleging a violation of his rights under the Fourth Amendment to the United States Constitution and Section Ten of the Kentucky Constitution. "When reviewing a trial court's denial of a motion to suppress, we utilize a clear error standard of review for factual findings and a *de novo* standard of review for conclusions of law." *Jackson v. Commonwealth*, 187 S.W.3d 300, 305 (Ky. 2006) (citing *Welch v. Commonwealth*, 149 S.W.3d 407, 409 (Ky. 2004)).

Here, the facts of the case are largely undisputed, and the issue in this case turns on a question of law. Lewis contends the circuit court erroneously denied his motion to suppress, citing *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009); accord *Rose v. Commonwealth*, 322 S.W.3d 76 (Ky. 2010). "The [United States] Supreme Court previously afforded officers

virtual carte blanche to search an automobile incident to the arrest of a recent occupant of a vehicle[.]” *Owens v. Commonwealth*, 291 S.W.3d 704, 708 (Ky. 2009). In *Gant*, however, the United States Supreme Court held, “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 evidence of the offense of arrest.” *Frazier v. Commonwealth*, 406 S.W.3d 448, 458 (Ky. 2013) (quoting *Gant*, 556 U.S. at 351, 129 S. Ct. at 1710).

Because police typically remove the occupants of a vehicle before searching it, the first exception in *Gant*, requiring an occupant to be within reach of the passenger compartment, rarely applies to justify the warrantless search of a vehicle. The second exception, regarding whether the vehicle may contain evidence relevant to the arrest, is far more significant in practice. *Gant* itself was a case concerning this second exception. The facts in *Gant* involved a driver arrested for operating on a suspended license; a subsequent vehicle search incident to the arrest revealed the presence of narcotics and a firearm. *Gant*, 556 U.S. at 336, 129 S. Ct. 1710. In *Gant*, the Supreme Court concluded when the offense of arrest is a traffic violation, there is no reason to believe evidence relevant to the arrest will be found in the vehicle. *Id.*, 556 U.S. at 344, 129 S. Ct. 1710. The Supreme Court disallowed such searches, deeming them to be unreasonable,

“unless police obtain a warrant or show that another exception to the warrant requirement applies.” *Id.*, 556 U.S. at 351, 129 S. Ct. at 1710.

Lewis argues this second exception in *Gant* should apply to his case. Officer Mascoe arrested Lewis based on an outstanding warrant, and there was no reason to believe evidence relating to the warrant would be found in the vehicle. As a result, Lewis contends the officer lacked a reasonable basis to search the vehicle and thus the fruits of the unlawful search should be suppressed. In denying Lewis’s motion to suppress on this issue, the circuit court ultimately found *Gant* inapposite, because the officer’s justification for the search was based on the plain smell of marijuana, not on a search incident to arrest.

We agree with the circuit court’s reasoning. *Gant* disallows searches of a vehicle *incident to arrest* which do not fall under either of its two exceptions, but explicitly provides “a warrant or . . . *another exception* to the warrant requirement” could nonetheless justify the search. *Gant*, 556 U.S. at 351, S. Ct. at 1710 (emphasis added). Here, Officer Mascoe testified he immediately smelled marijuana upon approaching the vehicle. Lewis acknowledged the existence of the odor during the suppression hearing when he testified, “the weed smell, I understand.” The plain smell of marijuana qualifies as “another exception to the warrant requirement” under *Gant*.

Once the officer smelled marijuana coming from the Charger, he had probable cause to search the vehicle, its occupants, and all of its contents. *Dunn v. Commonwealth*, 199 S.W.3d 775, 776 (Ky. App. 2006). *Dunn* is not grounded in the search-incident-to-arrest exception to the warrant requirement, but in the “automobile exception,” which “permits an officer to search a legitimately stopped automobile [without a warrant] where probable cause exists that contraband or evidence of a crime may be in the vehicle.” *Commonwealth v. Elliott*, 322 S.W.3d 106, 110-11 (Ky. App. 2010) (quoting *Morton v. Commonwealth*, 232 S.W.3d 566, 569 (Ky. App. 2007)). A search incident to arrest, pursuant to *Gant*, is distinguishable and independent from a search based on the automobile exception; *see id.* at 111 (“[The officer’s] search of [appellant’s] vehicle was lawful under both the revised ‘search-incident-to-arrest’ exception set forth in *Gant* and the ‘automobile’ exception.”). The circuit court did not err in its denial of the motion to suppress evidence in this case.

For the foregoing reasons, we affirm the judgment of the Fayette Circuit Court.

ALL CONCUR.

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