

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ODELL BRIAN HUNTER,

Defendant-Appellant.

UNPUBLISHED

June 8, 2010

No. 272873

Wayne Circuit Court

LC No. 06-005688-01

ON REMAND

Before: KELLY, P.J., and MURPHY, C.J., and OWENS, J.

PER CURIAM.

Our Supreme Court has vacated this Court's decision in *People v Hunter*, unpublished per curiam opinion of the Court of Appeals, issued April 3, 2008 (Docket No. 272873), reversing the trial court's order granting defendant's motion to suppress evidence and dismiss the case, and has remanded this case for reconsideration in light of *Arizona v Gant*, 556 US ____; 129 S Ct 1710; 173 L Ed 2d 485 (2009). On remand, we again reverse the trial court's order granting defendant's motion to suppress evidence and dismissing the case.

I. UNDERLYING FACTS AND PROCEEDINGS

During the early morning hours on May 1, 2006, Romulus Police Officer Hays was conducting surveillance at a motel in a location in which narcotics activity was known to occur. Hays observed a van pull into the parking lot, saw a female exit the van and enter a motel room, and then saw the same female exit the room after only a few minutes. She returned to the van, and the van left the parking lot.

Hays followed the vehicle, and observed that it was missing a license plate lamp. Hays effectuated a traffic stop of the vehicle, which was driven by defendant and carried Mia Davis and Kevin Davis as passengers. Hays obtained identification from the vehicle's occupants, and ran LEIN checks on all the occupants. Hays discovered that Mia Davis had several outstanding warrants for her arrest. Hays ordered Mia Davis out of the vehicle, and placed her under arrest. A female officer arrived on the scene in response to Hays' call for assistance, conducted a patdown search of Mia Davis, and discovered cocaine in Mia Davis's clothing. Mia Davis was secured in a patrol car.

Hays then ordered defendant and Kevin Davis to exit the vehicle so that he (Hays) could search the vehicle incident to the arrest of Mia Davis. Kevin Davis was the first to exit the vehicle. As Kevin Davis exited the vehicle, he dropped a package of cigarettes, and what appeared to be a crack pipe fell out of the package. Hays arrested Kevin Davis and secured him.

Defendant then exited the vehicle. Hays conducted a patdown search of defendant for safety, and discovered cocaine in defendant's pocket. In response to Hays's inquiry about other contraband, defendant responded that he had a gun in the vehicle. Hays placed defendant under arrest, secured him, and then searched the vehicle and recovered the gun.

Defendant was charged with possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v), carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant moved to suppress the evidence and dismiss the case. The trial court granted the motion, concluding that after defendant produced a valid driver's license and ownership documentation for the vehicle, the officer's request for identification from the passengers was an unwarranted intrusion. The trial court further held that the appearance of the crack pipe from a cigarette package carried by Kevin Davis might have justified the search of Kevin Davis, but it did not justify the search of defendant's vehicle.

II. APPELLATE PROCEEDINGS

In *Hunter*, this Court held that the Fourth Amendment, US Const, Am IV, did not preclude the officer from asking the occupants of defendant's vehicle for identification, and that the trial court erred in holding to the contrary. *Hunter*, slip op at 2. The *Hunter* Court also held, citing *People v Mungo*, 277 Mich App 577; 747 NW2d 875 (2008)¹, that the trial court erred in holding that the officer could not search defendant's vehicle pursuant to the arrest of Mia Davis. *Hunter*, slip op at 2. The *Hunter* Court reversed the trial court's order suppressing the evidence and remanded the case to the trial court for further proceedings. *Id.*

In an order entered on September 9, 2008, our Supreme Court held defendant's application in abeyance pending a decision by the United States Supreme Court in *Gant*.

In *Gant*, two persons were arrested outside a residence at which narcotics allegedly were sold. These persons were secured in separate police cars. Defendant Gant, who had been at the residence earlier, arrived in his vehicle and was arrested for driving with a suspended license after he had exited the vehicle and walked some 10 to 12 feet. An additional patrol car arrived, and Gant was secured in the back of that car. Thereafter, two officers searched Gant's car and found a gun and a bag of cocaine. Ultimately, the Arizona Supreme Court held that the search of Gant's car was unreasonable under the Fourth Amendment to the United States Constitution, US Const, Am IV.

¹ This case was vacated and remanded by our Supreme Court for reconsideration in light of *Gant*, and subsequently a panel of this Court affirmed the trial court's order suppressing the evidence and quashing the information in *People v Mungo*, ___Mich App___; ___NW2d___ (2010) (*Mungo II*).

The *Gant* Court revisited the issue of what circumstances permit a police officer to search the passenger compartment of a vehicle incident to a recent occupant's arrest. The *Gant* Court began its analysis by noting that the basic rule that a warrantless search is per se unreasonable under the Fourth Amendment is subject to a few specific exceptions, including a search incident to a lawful arrest. That exception "derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Gant*, 129 S Ct at 1716. A search incident to arrest may include only the person of the arrestee and the area within the immediate control of the arrestee, i.e., the area in which the arrestee might gain a weapon or evidence that could be destroyed. *Chimel v California*, 395 US 752, 763; 89 S Ct 2034; 23 L Ed 2d 685 (1969). The *Belton* Court considered the application of the *Chimel* rule in the context of a vehicle search. The *Belton* Court held that if an officer lawfully arrests "the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile" and any containers within the passenger compartment. *Belton*, 453 US at 460.

Following the release of *Gant*, our Supreme Court issued an order in this case that reads in pertinent part:

By order of September 9, 2008, the application for leave to appeal the April 3, 2008 judgment of the Court of Appeals was held in abeyance pending the decision of the United States Supreme Court in *Arizona v Gant* (Docket No. 07-542). On order of the Court, the case having been decided on April 21, 2009, *Arizona v Gant*, 556 US ____; 129 S Ct 1710; 173 L Ed 2d 485 (2009), the application is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals and REMAND this case to that court for reconsideration in light of the decision in *Arizona v Gant*.

III. ANALYSIS ON REMAND

On remand, this Court is charged with reconsidering the instant case in light of the decision in *Gant*. Thus, this Court must determine whether, in light of *Gant*, the circuit court correctly granted defendant's motion to suppress the evidence and dismiss the case. We conclude that the circuit court erred in suppressing the evidence and dismissing the case. The search of defendant's vehicle incident to the arrest of Mia Davis and Kevin Davis was legal because there was probable cause to search the van for drugs and a gun given the drugs found on the female passenger, the drug paraphernalia found on the male passenger, the drugs found on defendant, defendant's announcement that there was a gun in the van, and the fact that defendant was pulled over after leaving a motel known for drug activity.

This Court reviews de novo a trial court's decision to dismiss a charge on legal grounds. *People v Owen*, 251 Mich App 76, 78; 649 NW2d 777 (2002). This Court reviews a trial court's findings of fact for clear error. MCR 2.613(C).

While *Gant* and *Mungo II* certainly indicate that the basis for our previous conclusion in this matter, that the trial court erred in holding that the officer could not search defendant's vehicle pursuant to the arrest of Mia Davis, is not correct, the totality of the remaining evidence

and circumstances surrounding defendant's arrest lead us to conclude that the search of defendant's vehicle was proper.

The Court in *Gant* stated:

If there is probable cause to believe a vehicle contains evidence of criminal activity, *United States v Ross*, 456 US 798, 820-821; 102 S Ct 2157; 72 L Ed 2d 572 (1982), authorizes a search of any area of the vehicle in which the evidence might be found. . . . *Ross* allows searches for evidence relevant to offenses other than the offense of arrest, and the scope of the search authorized is broader. [*Gant*, 129 S Ct at 1721.]

We first turn to whether or not the police conducted a valid patdown search of defendant in this case. Officer Hayes testified that he patted down defendant "for safety" and discovered a lump in defendant's pocket. When Hayes inquired about the lump, defendant allegedly admitted that the lump was crack cocaine. A police officer may conduct:

a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. *Terry v Ohio*, 392 US 1, 27; 88 S Ct 1868; 20 L Ed 2d 889.

"[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Id.* An officer may conduct a patdown search of a person if he has reason to believe the person is armed and dangerous, but the scope of the patdown is limited to what could reasonably lead to the discovery of a weapon. *People v Champion*, 452 Mich 92, 99; 549 NW2d 849 (1996).

Here, Officer Hayes testified that he pulled defendant over after defendant left a motel in a location in which narcotics activity was known to occur. Defendant's passenger dropped a crack pipe upon exiting the vehicle. Officer Hayes expressed a concern for his safety. When viewed in the totality of the circumstances as "understood by law enforcement officers," the actions gave rise to a reasonable suspicion that defendant might be armed and dangerous. *People v Nelson*, 443 Mich 626, 632; 505 NW2d 266 (1993). Accordingly, we find that the objective facts that prompted Officer Hayes to determine that his safety might be at risk, were sufficient to warrant the patdown search of defendant and was valid under the Fourth Amendment of the United States Constitution and Const 1963, Art 1, § 11. Therefore, both the gun and the cocaine found in defendant's pocket may properly be considered in determining whether the search of defendant's vehicle was reasonable.

We conclude that since the police had probable cause to arrest defendant on the drug and weapons charges, defendant's arrest was lawful and the police had probable cause to believe that evidence relevant to the drug crime would be found in the vehicle. *See Gant*, 129 US at 1719. This case is unlike *Gant*, where the defendant was arrested for driving with a suspended license,

an offense for which there is “no reasonable basis to believe the vehicle contains relevant evidence.” This case is also distinguishable from *Mungo II*. In *Mungo II*, the defendant’s vehicle was lawfully pulled over. The defendant was driving with one passenger and the passenger was subject to an arrest warrant for outstanding traffic citations, and he was removed from the car and placed in a police cruiser. The police searched the vehicle on the basis that it was a search incident to the arrest of the passenger with no other probable cause and a weapon was found. There were no other incriminating facts, and the panel found the search unconstitutional under *Gant*.

Here, our facts are distinguishable because defendant was properly arrested for possession of cocaine, admitted that there was a gun in the car, was carrying a passenger who was in possession of a crack pipe, and had two passengers with arrest warrants. Thus, defendant’s arrest was proper under *Gant*’s holding that a search is proper where it is reasonable to believe that the vehicle contains evidence of the offense of arrest. Here that offense was drug possession. See *United States v Martinez-Cortes*, 566 F3d 767, 771 n. 3 (8th Cir.2009) (explaining that *Gant* limited officers’ authority to conduct a search of a vehicle incident to arrest, but holding that there was probable cause to believe that contraband or other evidence of drug possession existed based upon the occupants’ furtive actions when the vehicle was stopped and was an independent basis for conducting a warrantless search of the vehicle.)

Furthermore, even assuming arguendo that the officer acted improperly in having defendant exit the vehicle and patting him down, the fact that there were two other people in the van who possessed drugs and drug paraphernalia and that defendant was leaving a motel known for drug activity provided probable cause that there were more drugs in the van.

Reversed and remanded for proceedings consistent with this opinion.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ Donald S. Owens