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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000649-MR

SAMUEL RAY PRATHER, II

APPELLANT

v

APPEAL FROM MASON CIRCUIT COURT
HONORABLE JOHN W. MCNEILL III, JUDGE
ACTION NO. 05-CR-00047

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: THOMPSON AND WINE, JUDGES; KNOPF, ¹ SENIOR JUDGE.

THOMPSON, JUDGE: Samuel Ray Prather, II entered a conditional plea of guilty to the following: (1) possession of a controlled substance; (2) being a convicted felon in possession of a handgun; (3) possession of drug paraphernalia; and (4) driving on a suspended license. He alleges that the circuit court erred when it denied his motion to

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

suppress evidence obtained as the result of a search of the passenger compartment and trunk of his automobile. We find that the search of the passenger compartment was pursuant to a valid arrest and that the officer had probable cause to search the trunk; we, therefore, affirm.

On April 11, 2005, agents with the Buffalo Trace Narcotics Task Force observed Prather operating an automobile. Agent Fegan, who knew that Prather had a history of drug and firearms convictions, suspected that Prather's driver's license had been suspended which he confirmed with radio dispatch. After hearing the dispatch, Officer Hamm of the Maysville Police Department, who also knew Prather and his criminal history, saw Prather driving, pulled him over and asked for his license. Prather produced what appeared to be a driver's license so Officer Hamm again confirmed with dispatch that Prather's license had been suspended. Prather was removed from the automobile and arrested for driving on a suspended license. Officer Fegan and other officers who had arrived at the scene proceeded to conduct a search of the passenger compartment where they found pieces of wood which appeared to be from a "sawed-off" shotgun and several rounds of 40 caliber and 9mm live ammunition. Prather was asked for a key to the trunk but denied that he had it in his possession.

After transporting Prather to the detention center, he was searched and in his possession was a bag of cocaine as well as a key to the trunk of his automobile.² Since Prather's automobile and officers were still at the place of Prather's arrest, the key

² Prather objects to the search at the detention center only to the extent that it followed his illegal arrest and subsequent search of his automobile.

was taken there and the trunk was searched. Inside the trunk, the officers found digital scales with a white residue and a handgun. The lapse of time between the time of the stop and the removal of the automobile to the impoundment lot was approximately twenty minutes.

The circuit court denied Prather's motion to suppress on the basis that the search of the passenger compartment was a search incident to a lawful arrest and that there was probable cause to search the trunk. We agree and affirm.

We review an order denying a motion to suppress on a clearly erroneous standard as to factual finding of the trial court; the ultimate legal question of whether there was a reasonable suspicion to stop or probable cause to search is reviewed de novo. *Commonwealth v. Banks*, 68 S.W.3d 347, 349 (Ky. 2001), citing *Ornelas v. United States*, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed. 2d 911 (1996).

Prather's initial contention is that the stop of his automobile was not a valid investigatory stop pursuant to *Terry v. Ohio*, 392 U.S.1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). A “*Terry* stop” of an automobile is valid if the “police have a reasonable articulable suspicion that the persons in the vehicle are, or are about to become involved in criminal activity.” *Taylor v. Commonwealth*, 987 S.W.2d 302, 305 (Ky. 1998). When determining whether the officer's action were reasonable, the court must weigh the totality of the circumstances. *Id.*

We have no difficulty in concluding that Officer Hamm's knowledge that Prather's license had been suspended was sufficient to satisfy the *Terry* standard and amply supports the circuit court's determination that the stop was justified. This is not, as

Prather suggests, a situation where the officer based his decision to make the stop based solely on his knowledge of Prather's criminal history. If that were the case, Prather's contention would have merit since mere knowledge of a suspect's criminal past will not justify a *Terry* stop. *Collier v. Commonwealth*, 713 S.W.2d 827 (Ky.App. 1986); *McHone v. Commonwealth*, 576 S.W.2d 242, 242-234 (Ky.App. 1978). However, if other articulable factors exist, “a prior record is a legitimate factor to be considered in determining whether there is a sufficient quantum of evidence to justify a *Terry* stop.” *Collier, supra* at 828. Here, the officer not only knew of Prather's past but had received sufficiently reliable information from dispatch that his license was suspended. *Tucker v. Commonwealth*, 199 S.W.3d 754, 758 (Ky.App. 2006).

Prather attempts to invalidate the search on the assumption that suspects are not typically arrested for the misdemeanor offense of driving on a suspended license. There is no evidence in the record to support this assumption. The offense is classified as a Class B misdemeanor and, as a matter of statutory authority, an officer has the discretion to either issue a citation or make an arrest for a misdemeanor committed in his presence. KRS 186.620; KRS 431.015. Prather's license had been suspended for his failure to appear on a speeding ticket; it was, therefore, reasonable for Officer Hamm to believe that if he issued only a citation, Prather would not appear to answer the charge.

Having determined that both the stop and arrest were justified, our inquiry turns to the validity of the subsequent search of the passenger compartment and trunk. The Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution guarantee the fundamental right to be free from unreasonable searches and

seizures and a search conducted without a warrant is presumptively unreasonable. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). However, to accommodate society's competing need for effective police work, a number of exceptions to the warrant requirement have evolved, including a search “incident to arrest”.³

In *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L.Ed.2d 768 (1981) the Supreme Court held that when an officer makes a lawful custodial arrest of an automobile's occupant, the officer is permitted to search the passenger compartment as a contemporaneous incident of arrest. Subsequently, in *Thornton v. United States*, 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004), the Supreme Court upheld the search of a passenger compartment where the officer's initial contact with the arrestee was outside the automobile and held that the arrestee must only have been a “recent occupant.” In accord with those cases expanding the scope of the search of a passenger compartment, in *Commonwealth v. Wood*, 14 S.W.3d 557 (Ky.App. 1999), the court upheld a search based on a valid arrest even though the arrestee had been removed from the vehicle prior to the search and posed no immediate threat to the officer or others. Evidentiary concerns, the court noted, nonetheless remained. *Id.* at 559. As explained by the court in *Penman v. Commonwealth*, 194 S.W.3d 237 (Ky. 2006), the “rule under *Belton* and *Thornton* is no longer based upon the fact that the arrestee might grab a weapon or evidentiary item from his car.” *Id.* at 251. In relation to automobiles, “where

³ The Commonwealth makes no contention that the search of the automobile was pursuant to a valid inventory search. Such an contention would fail because the testimony at the suppression hearing was that the Maysville Police had no standardized inventory search procedure. *Clark v. Commonwealth*, 868 S.W.2d 101 (Ky.App. 1993).

there is probable cause to arrest, that same probable cause justifies a search of the entire passenger compartment.” *Commonwealth v. Ramsey*, 744 S.W.2d 418, 419 (Ky. 1987).

Despite the precedent cited, Prather relies on *Clark v. Commonwealth*, 868 S.W.2d 101, 107 (Ky.App.1993) which invalidated the search of an automobile on the basis that the arrest was for minor traffic violations (speeding and the absence of a licensed driver) and the search occurred forty minutes after the arrest. As did the court in *Wood, supra*, we find the facts of that case distinguishable. First, Prather was arrested for a class B misdemeanor and the officer had the clear authority to arrest. In addition, the search of the passenger compartment immediately followed the arrest. The search of the passenger compartment of Prather's automobile was lawfully conducted as one incident to arrest .

Prather challenges the circuit court's conclusion of law that the live ammunition and the knowledge of the officers that he was a convicted felon constituted probable cause to search the trunk. The requirements for the warrantless search of an automobile is subject to different exceptions than those applicable to dwellings or other immobile objects. The “automobile exception” to the warrant requirement provides that automobiles may be searched without a warrant if there is probable cause to believe that the car contains articles that the officers are entitled to seize. *Chambers v. Maroney*, 399 U.S. 42, 48, 90 S.Ct. 1975, 1979, 26 L.Ed.2d 419, 426 (1970). The scope of the search includes “all compartments of the automobile and all containers in the automobile which might contain the object of the search.” *Gray v. Commonwealth*, 28 S.W.3d 316, 319 (Ky.App. 2000). At the time the officers searched the trunk, they knew that Prather was a

convicted felon subject to the criminal laws prohibiting his possession of firearms and they had discovered live ammunition and pieces of a “sawed-off” shotgun through a lawful search of the passenger compartment. In addition, cocaine had been found during a custodial search at the detention center. Under the totality of the circumstances, there is ample evidence to support the circuit court's determination that there was probable cause to conduct a warrantless search of the trunk.

The judgment of the Mason Circuit Court is affirmed.

ALL CONCUR.

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