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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000561-MR

THOMAS C. FRAZIER — APPELLANT

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE ANTHONY W. FROHLICH, JUDGE
ACTION NO. 08-CR-00349

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING
IN PART, AND REMANDING

** ** ** ** **

BEFORE: DIXON AND VANMETER, JUDGES; LAMBERT,[1] SENIOR JUDGE.

VANMETER, JUDGE: Thomas C. Frazier appeals from the February 25, 2009, final judgment and sentence of imprisonment of the Boone Circuit Court whereby he was adjudged guilty of various offenses.

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

On June 7, 2008, Boone County Sheriff's Deputies Mike Moore and Nate Boggs witnessed a passenger in a silver Ford toss litter from the vehicle. After following the vehicle, Officers Moore and Boggs witnessed the vehicle make a left turn without the use of a turn signal and subsequently initiated a traffic stop on the vehicle. After approaching the driver's side of the vehicle, Officer Moore requested an operator's license and proof of insurance from Frazier, the operator of the vehicle. Officer Moore later testified that Frazier seemed nervous, had shaking hands, failed to look Officer Moore in the eye when speaking to him, and refused to identify the other passengers of the vehicle or their destination. Officer Moore also testified that these factors produced red flags that resulted in Officer Moore asking Frazier to step outside of the vehicle.

Once Frazier was outside of the vehicle, Officer Boggs observed that Frazier appeared very nervous and was verbally belligerent, suggesting the need to perform an over-the-clothes weapons frisk. Officer Boggs requested permission from Frazier to perform the search and permission was refused. Nevertheless, Officer Boggs performed the search and perceived a long coarse object in Frazier's front pocket. After Officer Boggs inquired three times as to the identity of the object, and Frazier refused to answer, Officer Boggs opened Frazier's pocket and saw that the object was a bag of marijuana. Officer Boggs removed the marijuana from Frazier's pocket, arrested him, and placed him in the back of a police cruiser.

Officer Boggs next searched the vehicle where he discovered a short wooden bat, otherwise known as a "tire thumper," located under the driver's seat. During this time, an observing neighbor alerted the officers that Frazier appeared to be eating something while in the back of the cruiser. Officers Moore and Boggs returned to the cruiser where they found that Frazier was chewing on something and had marijuana on his mouth, lap, and shirt. Frazier was ordered to spit out the contents of his mouth, but he swallowed it. Officer Moore later testified that the odor of marijuana was strong and that a plastic bag with marijuana residue was discovered. Frazier was then taken to jail where two marijuana pipe screens were discovered in his wallet.

The Boone Circuit Court Grand Jury indicted Frazier on June 17, 2008. The indictment charged Frazier with tampering with physical evidence, illegal possession of drug paraphernalia, promoting contraband, possession of marijuana, carrying a concealed deadly weapon, and criminal littering. Frazier received a jury trial and proceeded *pro se*. He was found guilty on all charges, except the charge of promoting contraband, and was sentenced to an aggregate of five years and fined a total of $500. The trial judge ordered that he serve 150 days of his sentence, with the remainder probated. This appeal followed.

Frazier's first three arguments on appeal pertain to the search and seizure conducted during the stop that took place on June 7, 2008. Frazier argues

that the trial court erred when it failed to suppress evidence of the search of his person and vehicle, the resulting seizure from those searches, and the fruits of the search and seizures. When reviewing a trial court's ruling on a suppression motion, we apply a *de novo* standard of review to conclusions of law and review factual findings for clear error. *See, e.g. Jackson v. Commonwealth*, 187 S.W.3d 300 (Ky. 2006).

Frazier's first argument regarding the search and seizure is that the seizure of his person and vehicle, i.e., the initial traffic stop, was unlawful and therefore should have been suppressed. As is well-known, "[a] 'seizure' occurs when the police detain an individual under circumstances where a reasonable person would feel that he or she is not at liberty to leave." *Baltimore v. Commonwealth*, 119 S.W.3d 532, 537 (Ky.App. 2003) (citing *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). The parties agree that the traffic stop of Frazier and his vehicle constituted a seizure.

> Where a seizure has occurred, "if police have a reasonable suspicion grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony," then they may make a *Terry* stop to investigate that suspicion. Evaluation of the legitimacy of an investigative stop involves a two-part analysis. First, whether there is a proper basis for the stop based on the police officer's awareness of specific and articulable facts giving rise to reasonable suspicion. Second, whether the degree of intrusion was reasonably related in scope to the justification for the stop.

Baltimore, 119 S.W.3d at 537-38 (citations omitted).

Officers Boggs and Moore testified that a passenger in Frazier's vehicle had tossed a bag of trash from the vehicle and also that Frazier had made a left turn without signaling. Frazier does not argue that these actions occurred. Failure to signal while making a turn is a traffic violation.[2] KRS 189.380. Littering is also a crime. KRS 512.070. Given that two infractions had taken place by the occupants of Frazier's vehicle, including his own failure to properly signal, the stop of the vehicle was appropriate.

Frazier next argues that the scope of the traffic stop and the resulting frisking of his person were improper, and therefore the evidence acquired during the frisk should have been suppressed. This argument relates to the second prong of evaluating an investigatory stop: "whether the degree of intrusion was reasonably related in scope to the justification for the stop." *Baltimore*, 119 S.W.3d at 538 (citations omitted). Frazier argues that Officer Moore's inquiries about the identity of the vehicle's other passengers and their destination exceeded the scope of the original stop. Frazier further argues that had he not refused to answer Officer Moore's questions regarding his occupant's identities and their

[2] Frazier raises the argument that he was turning from a left-turn only lane. However, the statute requires that all turns be indicated by use of a signal and does not differentiate between the lane usage.

destination, the officers would not have asked him to exit his vehicle and he would not have been frisked.

The United States Supreme Court has held that an officer requesting a driver to exit his vehicle creates only a *de minimus* intrusion and is therefore reasonable during a routine traffic stop. *Pennsylvania v. Mimms*, 434 U.S. 106, 111, 98 S.Ct. 330, 333 (1977). In the Commonwealth of Kentucky, officers commonly request that drivers step out of their vehicles for their safety and for the safety of the officers. *See, e.g. Johnson v. Commonwealth*, 179 S.W.3d 882 (Ky.App. 2005). Given the totality of the circumstances, specifically Frazier's nervousness and failure to answer Officer Moore's simple, unobtrusive questions, Officer Moore's request that Frazier exit the vehicle was neither unreasonable nor outside the scope of the stop.

Furthermore, officers are permitted to frisk an individual whom they believe may be armed and dangerous, regardless of whether probable cause exists for an arrest. *Adkins v. Commonwealth*, 96 S.W.3d 779, 786-87 (Ky. 2003). An officer, who justifiably believes that an uncooperative individual may be armed, has the authority to determine if a weapon is being carried by that individual. *Baker v. Commonwealth*, 5 S.W.3d 142, 146 (Ky. 1999). Given the totality of the circumstances, Officers Moore and Boggs possessed this authority. The combination of Frazier's nervousness, his failure to cooperate, his failure to look

the officers in the eyes, and his verbal belligerence once outside the vehicle, were sufficient to alert the officers that Frazier may have been a threat. Accordingly, we hold that the trial court did not err in determining that Frazier's being ordered from the vehicle, and his subsequent frisk, were appropriate actions.

Frazier also challenges the search of his vehicle, which produced the wooden bat from under the seat. However, at the time that the officers searched Frazier's vehicle, he had already been arrested for the marijuana in his pocket and placed into the police cruiser.

In *Arizona v. Gant*, ___ U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), the Supreme Court held that "[p]olice 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.**" *Id.* at 1723 (emphasis added). Although Frazier had been arrested and placed in the police cruiser, the fact that he had just been arrested for possession of marijuana was sufficient to establish the reasonable belief that additional evidence of that offense would be found in the vehicle, either more marijuana, additional drugs, or drug paraphernalia. *See Owens v. Commonwealth*, 291 S.W.3d 704 (Ky. 2009) (interpreting *Gant* and holding that the discovery of a suspected crack pipe on the person of the vehicle's driver authorized a subsequent search of the vehicle since it

was then reasonable for the arresting officer to believe that evidence of the offense of arrest might be found in the vehicle).[3] *See also Commonwealth v. Elliott*, 322 S.W.3d 106 (Ky.App. 2010) (holding that a reasonable reading of *Gant*, as set forth by the Kentucky Supreme Court in *Owens*, clearly holds that the search-incident-to-arrest exception is available after the arrestee has been secured in the police cruiser if it is reasonable to believe the arrestee's vehicle contains evidence of the offense of arrest).

This interpretation comports with other post-*Gant* decisions by several federal and state courts. *See United States v. Davis*, 569 F.3d 813 (8th Cir. 2009) (holding that smell of marijuana and discovery of marijuana during search of defendant's person authorized search of vehicle under automobile exception to warrant requirement); *United States v. Herman*, 2009 WL 2973123 (E.D. Wash. 2009) (discovery of drug paraphernalia on defendant's person justified search of vehicle as search incident to arrest and under automobile exception). *See also Brown v. State*, 24 So.3d 671 (Fla. Dist. Ct. App. 2009) (holding that the "reasonable belief that evidence might be found" prong of *Gant* can be satisfied solely from the inference that might be drawn from the nature of the offense itself);

[3] In *Gant*, the Court reaffirmed its decision in *Thornton v. United States*, 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004), and specifically identified *Thornton* in stating that "the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein." *Gant*, 129 S.Ct. at 1719. In *Thornton*, similar to the instant case, a vehicle was stopped for a traffic offense, the driver exited the vehicle, appeared nervous, and upon a pat-down search, the officer found a bag of cocaine and a bag of marijuana on the person of the driver.

State v. Cantrell, 233 P.3d 178 (Idaho App. 2010) (arrest for DUI supplied basis for search of vehicle because DUI is an offense for which police could expect to find evidence in the vehicle).

Frazier's next argument is that the trial court erred by failing to inquire into his competency to stand trial. Frazier maintains that the trial court should have ordered a mental inquest, *sua sponte*, after Frazier acted erratic and self-destructive during the penalty phase of his trial. Frazier's brief then goes on to list the behavior which should have signaled to the trial court that Frazier was incompetent to stand trial. This behavior included making numerous off-color jokes about attorneys; referring to himself as "Deacon;" making constant remarks and distributing materials promoting the decriminalization of marijuana; talking aloud to himself during the questioning of witnesses; and lashing out at the jury.

KRS 504.090 provides that "[n]o defendant who is incompetent to stand trial shall be tried, convicted or sentenced so long as the incompetency continues." If reasonable grounds exist, which call the capacity of a party to stand trial into question, then all proceedings shall be postponed until the issue of competency is resolved. RCr[4] 8.06. Capacity to stand trial exists when a defendant exhibits the "capacity to appreciate the nature and consequences of the proceedings against him or her, or to participate rationally in his or her defense[.]"

[4] Kentucky Rules of Criminal Procedure.

Id. See also Commonwealth v. Strickland, 375 S.W.2d 701 (Ky. 1964). In Kentucky, a presumption exists that the defendant is competent to stand trial and the defendant bears the burden to show otherwise, by a preponderance of the evidence. *Alley v. Commonwealth*, 160 S.W.3d 736, 739 (Ky. 2005).

In the case before us, the trial court referred Frazier to the Kentucky Correctional Psychiatric Center (KCPC) for a competency evaluation. A hearing was thereafter held regarding Frazier's competency, during which Dr. Steven J. Simon, the Director of Psychology at KCPC, testified. Dr. Simon testified that Frazier scored perfectly on several memory tests; that he was above average intelligence; had above average literary skills; and that he possessed the intellectual capacity, literary skills, and working knowledge of basic justice system terminology and courtroom procedure. Dr. Simon concluded by opining that while Frazier might present as dramatic or grandiose, he was competent to stand trial.

The trial court conducted another hearing during which it questioned Frazier as to his ability to represent himself. Frazier stated to the court that he had not been threatened or coerced into representing himself and agreed with Dr. Simon's conclusions that he was rational, articulate, personable, able to express himself, and had a reality-based speech and thought process. Frazier further articulated to the court that he had an understanding of the legal system and that he had previously represented himself in another criminal proceeding.

In Kentucky, the trial judge has the discretion to accept the testimony of a doctor witness and make a finding regarding competency based on that testimony. *See, e.g., Harston v. Commonwealth*, 638 S.W.2d 700 (Ky. 1982). Here, the trial court entered an order finding that Frazier was capable of participating rationally in all aspects of his defense. Our review of the record indicates that this finding was supported by substantial evidence and was not clearly erroneous. Frazier argues that he was not capable of dealing with the verdict and was therefore mentally unfit to continue representing himself during the sentencing phase. We submit that no party would be content with a guilty verdict. The fact that Frazier managed to belittle the prosecution and the jury, while making a spectacle of himself and the judicial process, is less of a reflection on his competency to stand trial and more of a reflection of his poor decisions in his self-representation. Accordingly, the trial court's decision that Frazier was competent to stand trial and represent himself is affirmed.

Frazier's final argument on appeal is that he was entitled to a directed verdict on the littering charge. Frazier maintains that he could not have been charged with the crime because he was not the occupant that littered, he was merely the operator. Frazier further argues that the charge was incorrectly stated in the jury instructions, which provided an instruction that Frazier should be found guilty if he permitted litter to be placed or thrown from the vehicle.

The Commonwealth concedes that the jury instruction, on the charge of littering, was improper. The jury instruction created third-party liability for Frazier if he allowed an occupant of his vehicle to litter. However, the criminal littering statute only creates third-party liability for someone who "permits to drop on a highway any *destructive or injurious material*[.]" KRS 512.070(1)(a) (emphasis added). No allegations were made that the litter thrown from Frazier's vehicle was destructive or injurious material, and the jury instruction did not include this language. Accordingly, the jury instruction as to that charge was improper and Frazier's conviction and resulting sentence, in regards to the littering charge, is reversed.

For the foregoing reasons, the final judgment and sentence of the Boone Circuit Court is affirmed in part and reversed in part as set forth herein and above and this case is remanded to the Boone Circuit Court for resentencing.

DIXON, JUDGE, CONCURS.

LAMBERT, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

LAMBERT, SENIOR JUDGE, DISSENTING: In my view, the majority reads *Arizona v. Gant*, ___U.S. ___, 129 S.Ct. 1710 (2009), so broadly as to nullify the requirement of a search warrant where a driver or occupant of a motor vehicle has been arrested and removed from reaching distance of the car.

The majority has concluded that discovery of marijuana on the person of an arrestee makes it reasonable to believe that the vehicle contains evidence of the offense of arrest. While the majority quotes from *Arizona v. Gant*, for a full understanding of the opinion, an expanded quotation is appropriate:

> 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. When these justifications are absent, 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.

Arizona v. Gant, 129 S.Ct. at 1723-1724.

At the outset, I am unable to think of any circumstance in which it would be unreasonable to believe that evidence of the criminal conduct of one just arrested might be found in the motor vehicle from which he had just been removed. There would always be an argument that one arrested for murder, robbery or any other crime would have left evidence of the crime in his motor vehicle. If this is a proper interpretation, then *Arizona v. Gant* is of no import, and despite the efforts of the Supreme Court of the United States, *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), would continue to be the prevailing rule. Clearly, the Supreme Court intended no such result.

A proper interpretation of *Arizona v. Gant* is that the reasonable belief pertains directly to the offense of arrest. In a proper case there might be evidence justifying arrest for possession of marijuana without marijuana being found on the person of the arrestee. In that case, if a reasonable belief existed, a warrantless search of the vehicle would be authorized. In this case, however, the marijuana was found on Appellant's person. The search could not have been for "evidence of the offense of arrest." In reality, the search was for evidence of other or additional offenses, and such a search exceeds the scope of the Fourth Amendment and Section 10 of the Constitution of Kentucky.

There is another sound reason that a warrantless search in circumstances such as these should not be upheld. Nothing would have prevented the police officers in this case from applying for a search warrant and obtaining judicial authorization for the search. There were no exigent circumstances. Circumstances such as these encourage police officers to by-pass the judicial process and the protections afforded by the Fourth Amendment and Section 10 to the detriment of citizens' constitutional rights. *See Arizona v. Gant*.

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