RENDERED: JULY 1, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

ORDERED PUBLISHED: SEPTEMBER 16, 2011; 10:00 A.M.

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000015-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JAMES M. SHAKE, JUDGE
ACTION NO. 09-CR-000618

STEVE GERALD — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, STUMBO, AND THOMPSON, JUDGES.

STUMBO, JUDGE: This is an appeal by the Commonwealth from an opinion and order of the Jefferson Circuit Court granting a motion to suppress evidence. The Commonwealth argues that although the trial court's findings of fact were accurate and supported by substantial evidence, its application of the law to those facts was incorrect. We agree, reverse, and remand this case for further proceedings.

On November 14, 2008, Detective Richard Wilkerson of the Jefferson County Sheriff's Department, along with other officers, was attempting to serve an arrest warrant on a man named Gregory Roberts. In an effort to secure the area in front of the house, Detective Wilkerson approached a vehicle parked in front of the residence. From outside the vehicle, Detective Wilkerson observed Steve Gerald rolling a marijuana cigarette. Detective Wilkerson then removed Gerald from the vehicle, handcuffed him, and charged him with possession of marijuana. Detective Wilkerson then searched the passenger compartment of the car where he found marijuana and cocaine. Detective Wilkerson then searched the trunk where he found a 9 millimeter handgun and more cocaine.

A Jefferson County Grand Jury indicted Gerald for first-degree illegal possession of cocaine while in possession of a firearm, illegal possession of marijuana while in possession of a firearm, and illegal possession of drug paraphernalia while in possession of a firearm. Gerald eventually filed a motion to suppress the evidence found during the search of the car. A hearing was held on the matter and the trial court ultimately ruled in Gerald's favor. This appeal followed.

In its opinion and order, the trial court relied on the recent case of *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). In that case, the United States Supreme Court rejected the long-standing rule that when an officer arrests an occupant of a vehicle, he may search the vehicle as a contemporaneous incident of that arrest. The *Gant* Court held that a search of the

vehicle incident to an arrest is only authorized when the arrestee is "unsecured and within reaching distance of the passenger compartment at the time of the search." *Id.* at 1719. The Court also stated

> that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence. But in others . . . the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein.

Id. (citations omitted).

In *Gant*, Gant was arrested for driving with a suspended license, handcuffed, and placed in a patrol car. His vehicle was then searched. The search revealed a gun and cocaine. The Supreme Court found that because Gant was secured in the patrol car and the officers could not reasonably believe they would find more evidence of driving with a suspended license in the car, his car was illegally searched and any evidence found had to be suppressed.

A trial court's findings of fact regarding the admissibility of evidence seized during a search are conclusive if supported by substantial evidence. *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002). An appellate court must then conduct a *de novo* review of the trial court's application of the law to those facts. *Id.* The Commonwealth concedes that the trial court's findings of fact

were supported by substantial evidence; however, it argues that the trial court erred in its application of the law.

The Commonwealth claims that the trial court only relied on the first issue of the *Gant* court regarding unsecured occupants and did not consider the alternate evidentiary basis for the search. We agree with the Commonwealth. In the case at hand, Gerald was arrested for possession of marijuana when he was observed rolling a marijuana cigarette while in his vehicle. We find it was reasonable to believe more evidence of drug possession might be found in the car.

The Commonwealth brings our attention to the case of *Owens v. Commonwealth*, 291 S.W.3d 704 (Ky. 2009). In that case, a man named Thornton was stopped by the police because he was driving with a suspended driver's license. When he was arrested and his person searched, a suspected crack pipe was found. The Kentucky Supreme Court found that once the pipe was found, this "gave rise to another reason for Thornton to be arrested. It was then reasonable for the arresting officer to believe that the vehicle Thornton was driving contained evidence of the offense of the de facto second offense giving rise to the arrest (*i.e.,* possession or trafficking in drugs)." *Id*. at 708. Here, Gerald was found in his car and in possession of marijuana. Under the rationale of *Owens*, it was reasonable for Detective Wilkerson to believe more evidence of Gerald's crime might be found in the car. Under the holding in *Gant*, this made the search of the vehicle's passenger compartment valid.

Once the search of the passenger compartment revealed more drugs, this gave Detective Wilkerson probable cause to search the trunk of the car. In *Gant*, the Court stated:

> *Other* established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand. For instance, *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), permits an officer to search a vehicle's passenger compartment when he has *reasonable suspicion* that an individual, whether or not the arrestee, is "dangerous" and might access the vehicle to "gain immediate control of weapons." *Id*., at 1049, 103 S.Ct. 3469 (citing *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). If there is *probable cause* to believe a vehicle contains evidence of criminal activity, *United States v. Ross*, 456 U.S. 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.

Gant at 1721 (emphasis supplied).

Ross allows, as an exception to the search warrant requirement, a warrantless search when supported by probable cause as to any part of the vehicle, inclusive of the trunk. In the matter at bar, an officer observed Gerald rolling a marijuana cigarette while sitting in his vehicle, which led to a reasonable belief that evidence of criminal behavior might be found in the passenger compartment. Pursuant to *Gant*, a search of the passenger compartment yielded both marijuana and cocaine. Based upon such facts, probable cause then existed for the issuance of a search warrant for the vehicle and, therefore, pursuant to *Ross* a warrantless search of the vehicle's trunk was constitutional. *Ross*, 456 U.S. at 809 ("a search is

not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained."). The search of the trunk was also proper.

Based on the above, we find that the motion to suppress should have been denied. We therefore reverse and remand this case for further proceedings consistent with this opinion.

THOMPSON, JUDGE, CONCURS.

CAPERTON, JUDGE, CONCURS AND FILES SEPARATE OPINION.

CAPERTON, JUDGE, CONCURRING: I concur with the majority but write separately to emphasize the constitutionality of the search of the trunk of the vehicle. Proper emphasis requires the consideration of several cases, namely *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), *New York v. Belton,* 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), and *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982).

Katz establishes that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment–subject only to a few specifically established and well-delineated exceptions." *Katz* at 357. Thus, any warrantless search by law enforcement must fit within an exception when the Fourth Amendment applies.

Subsequently, the U.S Supreme Court decided *Chimel*, which allowed warrantless searches by officers for purposes of removing weapons and seizing evidence from an arrestee or from an area where the arrestee might procure a weapon or access evidence. Later *Belton* was decided and applied the reasoning in *Chimel* to vehicles and stated:

> Accordingly, we hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the *passenger compartment* of that automobile. . . . It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach.

Belton at 460 (emphasis supplied and internal footnotes omitted).

Thus, under *Belton* the passenger compartment and containers are subject to a warrantless search.

In 2009, the U.S. Supreme Court decided *Gant.* In *Gant*, the U.S. Supreme Court considered when and under what circumstances the passenger compartment of a vehicle may be searched. The Court explained, as is relevant to our discussion, that allowing a warrantless search was a means to "ensure that officers may search a vehicle when genuine safety or evidentiary concerns encountered during the arrest of a vehicle's recent occupant justify a search." *Gant* at 1721. As applied *sub judice*, the safety of the officers was not an issue. However, the seizure of evidence in the passenger compartment and the trunk of the vehicle are in issue and bear further discussion.

Under *Gant*, the warrantless search for evidence in the passenger compartment of the vehicle must be justified by a reasonable belief that evidence supporting the crime for which Gerald was arrested, i.e. drugs, may be found there. The Court clarified the search incident to arrest under *Belton* (which would have appeared to allow such a search without a reasonable belief) in stating:

> Construing *Belton* broadly to allow vehicle searches incident to any arrest would serve no purpose except to provide a police entitlement, and it is anathema to the Fourth Amendment[1] to permit a warrantless search on that basis. For these reasons, we are unpersuaded by the State's arguments that a broad reading of *Belton* would meaningfully further law enforcement interests and justify a substantial intrusion on individuals' privacy.

Gant at 1721 (internal footnotes omitted).

The Court later stated: "If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." *Gant* at 1716.

In considering the search of the vehicle, the Court concluded:

> [T]hat circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is "*reasonable to believe* evidence relevant to the crime of arrest might be found in the vehicle." *Thornton*, 541 U.S. at 632, 124 S.Ct. 2127 (SCALIA, J., concurring in judgment). In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to

[1] This comment echoes Justice O'Connor's concerns in her concurrence in *Thornton* that "lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969)." *Thornton* at S.Ct. 2133.

> believe the vehicle contains relevant evidence. See, *e.g., Atwater v. Lago Vista*, 532 U.S. 318, 324, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001); *Knowles v. Iowa*, 525 U.S. 113, 118, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998).

Gant at 1721. (emphasis supplied).

This limitation placed upon *Belton* by *Gant* appears merely to apply the "reasonable to believe" criteria to warrantless searches for evidence. Thus the warrantless search of the vehicle does not arise from the fact of an arrest, but from the facts observed by the officers which then serve as a basis for the reasonable belief that evidence of crime may be found in the passenger compartment of the vehicle.

In the case *sub judice,* Gerald was arrested for possession of marijuana based on the officers observing Gerald rolling a marijuana cigarette while sitting in his vehicle. Few would opine that such facts do not give rise to a reasonable basis to believe that the passenger compartment of the vehicle might then be searched for evidence in further support of the crime, i.e. drugs. Therefore, under *Gant*, the passenger compartment of the vehicle was properly within the scope of a warrantless search. The question then posed is under what exception, if any, might the trunk of the vehicle be searched?

This question is answered by *Ross* cited with approval by the Court in *Gant* during a short synopsis of the jurisprudence surrounding the search of vehicles. The Court stated:

> Under our view, *Belton* and *Thornton* permit an officer to conduct a vehicle search when an arrestee is within

> reaching distance of the vehicle or it is *reasonable to believe* the vehicle contains evidence of the offense of arrest. *Other* established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand. For instance, *Michigan v. Long*, 43 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), permits an officer to search a vehicle's passenger compartment when he has *reasonable suspicion* that an individual, whether or not the arrestee, is "dangerous" and might access the vehicle to "gain immediate control of weapons." *Id*., at 1049, 103 S.Ct. 3469 (citing *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). If there is *probable cause* to believe a vehicle contains evidence of criminal activity, *United States v. Ross*, 456 U.S. 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.

Gant at 1721 (emphasis supplied).

Ross allows, as an exception to the search warrant requirement, a warrantless search when supported by probable cause as to any part of the vehicle, inclusive of the trunk. Factually the officers had, prior to the search of the trunk, seen Gerald rolling a marijuana cigarette while sitting in his vehicle, which led to a reasonable belief that that evidence of crime might be in the passenger compartment. Pursuant to *Gant*, a search of the passenger compartment yielded both marijuana and cocaine. Again, few would opine that based upon such facts probable cause did not exist for the issuance of a search warrant for the vehicle and, therefore, pursuant to *Ross* a warrantless search of the vehicle's trunk was constitutional.

Therefore, I concur in reversing the circuit court and write separately

only to offer a stepwise analysis based upon our jurisprudence.

BRIEFS FOR APPELLANT:

Jack Conway
Attorney General of Kentucky

Samuel J. Floyd, Jr.
Special Assistant Attorney General
Louisville, Kentucky

BRIEF FOR APPELLEE:

Annie O'Connell
Assistant Public Defender

J. David Niehaus
Deputy Appellate Defender
Louisville Metro Public Defender

Daniel T. Goyette
Louisville Metro Public Defender
of Counsel
Louisville, Kentucky