

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000723-MR

JAMES LEE MICKEY

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 11-CR-01246

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: LAMBERT, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: James Lee Mickey brings this appeal from a March 30, 2012, judgment of the Fayette Circuit Court sentencing him upon a conditional guilty plea to a one-year sentence of imprisonment probated for a period of three years. Kentucky Rules of Criminal Procedure (RCr) 8.09. We reverse and remand.

The relevant facts are undisputed. On August 29, 2011, Kentucky State Police Trooper James Collins observed a 2007 Dodge Charger with an

expired vehicle registration tag. After Trooper Collins confirmed the registration was expired, he executed a traffic stop. Upon approaching the vehicle, Trooper Collins informed the driver, Mickey, that he had been stopped due to the expired license plate registration on his motor vehicle. Trooper Collins requested to see Mickey's driver's license, and Mickey responded that his license had been suspended. Thereupon, Trooper Collins decided to place Mickey under arrest for driving on a suspended license and ordered Mickey to exit the vehicle.¹ As Mickey exited the vehicle and Trooper Collins was preparing to handcuff him, Collins detected a faint odor of marijuana. Based upon the odor of marijuana, Trooper Collins believed he possessed probable cause to search the vehicle. Upon securing Mickey in his police cruiser, Trooper Collins discovered two outstanding warrants for Mickey's arrest. Trooper Collins then searched the vehicle and discovered cocaine, drugs and drug paraphernalia.

Mickey subsequently filed a motion pursuant to RCr 9.78 to suppress evidence obtained from the warrantless search of the vehicle. A suppression hearing was held, and the only witness to testify was Trooper Collins. The circuit court ultimately denied Mickey's motion to suppress the evidence. Mickey subsequently entered a conditional guilty plea preserving his right to appeal the denial of his motion to suppress. RCr 8.09. In conformity with the plea

¹ Kentucky Revised Statutes 431.015 was amended effective June 8, 2011, to provide that driving on a suspended license is not an offense for which an arrest is proper, unless the arresting officer believed that the perpetrator constituted a flight risk. In this case, the evidence is undisputed that the officer made a mistake in arresting James Lee Mickey.

agreement, Mickey was sentenced to a one-year term of imprisonment probated for a period of three years. This appeal follows.

Upon review of a circuit court's denial of a motion to suppress, we must initially determine whether the court's findings of fact are supported by substantial evidence. *Com. v. Neal*, 84 S.W.3d 920 (Ky. App. 2002). If the findings are supported by substantial evidence, we must then undertake a *de novo* review of the trial court's application of law to the facts. *Id.* As the facts in this case are materially undisputed, our focus is upon whether the circuit court properly applied the law. *See Adcock v. Com.*, 967 S.W.2d 6 (Ky. 1998).

Mickey contends that the circuit court erred by denying his motion to suppress evidence. Specifically, Mickey argues that Trooper Collins improperly conducted a warrantless search of the vehicle. For the reasons hereinafter stated, we think the circuit court misapplied the law and that Mickey's motion to suppress should have been granted.

Under the Fourth Amendment to the United States Constitution, a warrantless search and seizure is presumed unreasonable and unlawful unless the government can show by a preponderance of the evidence that the search and seizure falls within an exception to the warrant requirement. *Cook v. Com.*, 826 S.W.2d 329 (Ky. 1992). In this case, two exceptions to the warrant requirement are relevant – the automobile exception and the search incident to arrest exception. Considering the unique facts of this case, we are of the opinion that neither exception is applicable and a warrant was necessary for the search; thus, the circuit

court erred by denying Mickey's motion to suppress the evidence. We address each exception *seriatim*.

Automobile Exception

It is well-established that the automobile exception to the warrant requirement is applicable where the automobile is readily mobile and there is probable cause to believe the automobile contains evidence of criminal activity. *Chavies v. Com.*, 354 S.W.3d 103 (Ky. 2011).

In the case *sub judice*, Trooper Collins arrested Mickey for driving on a suspended license pursuant to Kentucky Revised Statutes (KRS) 431.015. However, unbeknownst to Trooper Collins, KRS 431.015 was amended effective June 8, 2011, to require that a mere citation be issued for such violation. Consequently, it is undisputed that Trooper Collins unlawfully arrested Mickey for driving on a suspended license. It is equally clear that Trooper Collins only smelled marijuana after he ordered Mickey to exit the vehicle in order to effectuate the improper arrest. At the evidentiary hearing, Trooper Collins stated he was unsure whether the marijuana smell emanated from Mickey's person or from the vehicle. But, the evidence plainly established that Trooper Collins only detected the odor of marijuana after Mickey exited the vehicle per Trooper Collins' command to effectuate the unlawful arrest. As the arrest for driving on a suspended license was impermissible, the odor detected as a result of Mickey's arrest cannot constitute grounds to form probable cause for a search of the vehicle. *See Wilson*, 37 S.W.3d 745.

In its oral findings of fact and conclusions of law, the circuit court relied upon *Dunn v. Com.*, 199 S.W.3d 775 (Ky. App. 2006). In *Dunn*, the police approached a parked motor vehicle with two passengers to investigate suspicious activity connected to the prior theft of an automobile. *Id.* The police then approached the driver's side of the motor vehicle, and appellant rolled down the window. At that moment, police smelled a strong odor of marijuana. By contrast, in our case, Trooper Collins did not smell marijuana when Mickey rolled down his automobile window; rather, Trooper Collins smelled marijuana only after he commanded Mickey to exit the automobile in order to effectuate the improper arrest. The distinction is pivotal.

In *Dunn*, the officer lawfully approached the vehicle to conduct an investigatory stop and immediately recognized the odor of marijuana when the window was rolled down. *Id.* Conversely, in our case, Trooper Collins only smelled the marijuana because he effectuated an impermissible arrest of Mickey. In *Dunn*, the officer smelled marijuana due to constitutionally permissible conduct, whereas, in our case, Trooper Collins only smelled the marijuana due to his constitutionally impermissible conduct. *See id.*

Accordingly, we hold that probable cause to search the vehicle could not be based upon Trooper Collins' detection of the odor of marijuana.

Search of a Vehicle Incident to Arrest

A search of a vehicle's passenger compartment incident to the arrest of a recent occupant is an authorized exception to the warrant requirement only if

the arrestee is unsecured and within reaching distance of the vehicle's passenger compartment. *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (Ky. 2009). After an arrestee is secured in a police officer's patrol car, a search of the vehicle's passenger compartment is not authorized under the search incident to arrest exception because the arrestee is secured and not within reaching distance of the passenger compartment. *Id.*

In this case, Trooper Collins discovered two outstanding arrest warrants after arresting Mickey for driving on a suspended license. The Commonwealth believes that the search may be justified under the search incident to arrest exception because of the outstanding arrest warrants. Even if we accept the Commonwealth's argument that the outstanding warrants provided a valid basis for Mickey's arrest, the search was still improper. Mickey was handcuffed and placed in the cruiser before the search of the vehicle was conducted. Trooper Collins searched the vehicle only after Mickey had been secured in his cruiser. As Mickey was clearly handcuffed and placed in the back of the police cruiser, Trooper Collins could not validly search the passenger compartment of the vehicle per the search incident to arrest exception. Thus, the warrantless search of Mickey's vehicle cannot be justified under this exception. *See id.*

In sum, we conclude that the warrantless search of Mickey's vehicle was impermissible as no exception to the warrant requirement is applicable. Therefore, we reverse the order of the Fayette Circuit Court denying Mickey's motion to suppress and remand for appropriate proceedings.

For the foregoing reasons, the judgment of the Fayette Circuit Court is reversed and remanded for proceedings consistent with this Opinion.

LAMBERT, JUDGE, CONCURS.

VANMETER, JUDGE, CONCURS, AND FILES SEPARATE
OPINION.

VANMETER, JUDGE: I concur, but write separately to elaborate. The trial court correctly held that the officer's arrest of Mickey for operating on a suspended license was unlawful. The trial court also correctly held that the officer had the right to arrest Mickey based on the outstanding warrants. The issue, then, is whether the officer would have had the right to search the vehicle, had he arrested Mickey for the outstanding warrants instead of for operating on a suspended license. Hypothetically, the scenario would have likely unfolded as follows: officer approaches the vehicle, is informed by Mickey that he is driving on a suspended license, officer orders Mickey to remain in his vehicle, officer returns to his cruiser to run Mickey's name, officer discovers Mickey has outstanding warrants, officer returns to the vehicle and orders Mickey to step out of the vehicle so he can effectuate the arrest. One could posit that when Mickey stepped out of the vehicle at that time, the officer would have smelled the odor of marijuana on him, or coming from the vehicle. But of that we cannot be sure.

A number of factors could have influenced whether the officer would have smelled the odor of marijuana at that time. The record is unclear as to how much time passed from when the officer initially approached the vehicle to when

the officer discovered Mickey's outstanding warrants. During that unknown period of time, a number of things could have occurred. For example, Mickey and the passenger could have rolled down the windows of the vehicle to air it out, Mickey could have sprayed air freshener or cologne, the wind could have changed direction or died down by the time the officer returned to the vehicle, it could have started raining, or any number of unpredictable, intervening acts that could have affected whether or not the officer would have smelled the odor of marijuana. Moreover, the officer testified that the marijuana was a "faint odor" so the occurrence of any of these factors, or other factors, could have affected whether the officer would have smelled the odor. Thus, no one is able to say with certainty that the officer would have smelled the odor of marijuana when he returned to the vehicle to arrest Mickey for the outstanding warrants. As a result, I am compelled to concur with the majority opinion, which resolves the matter based on the facts as they actually occurred.

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