

COMMONWEALTH OF KENTUCKY
SUPREME COURT
2008-SC-0567-DG
on review from the
Kentucky Court Of Appeals
2007-CA-000869-MR

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BRANDON LEON WATKINS

APPELLANT

v.

APPEAL FROM THE TODD CIRCUIT COURT

ACTION NO. 06-CR-00103
Honorable Tyler L. Gill

COMMONWEALTH OF KENTUCKY

APPELLEE

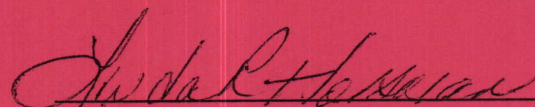
BRIEF FOR APPELLANT

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that copies of this brief were served upon the following named individuals by first-class postage prepaid on April 9, 2009: Honorable Tyler L. Gill, Chief Circuit Judge, PO Box 667, 200 West Fourth Street, Russellville, KY 42276-0667; Hon. Gail Guiling, Commonwealth's Attorney, 210 Bethel Street, P.O. Box 1133, Russellville, KY 42276; Hon. Leilani K. M. Krashin, 1100 S. Main Street, Suite 22, Hopkinsville, KY 42240; and by state messenger mail to Hon. Heather Fryman, Assistant Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601. The undersigned does also certify that the record on appeal has been returned to the Clerk of the Kentucky Supreme Court on or before this date.



LINDA ROBERTS HORSMAN

INTRODUCTION

Brandon Leon Watkins was indicted on charges of Speeding in excess of 26 miles per hour over the speed limit, Failure to Comply with Instructional Permit, two counts of Fleeing or Evading the Police in the First Degree, Possession of Marijuana under 8 ounces, Trafficking in Marijuana under 8 ounces, Possession of a Controlled Substance in the First-degree, cocaine, and Trafficking in a Controlled Substance in the First-degree, cocaine, and being a Persistent Felony Offender in the First-degree. (TR, 15-17). After moving to suppress evidence and being denied, he entered into a conditional guilty plea, reserving his right to appeal the trial court's ruling on his suppression motion. (TR, 83-84). The Court of Appeals affirmed his conviction and this Court granted his Motion for Discretionary Review.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant desires oral argument as this case presents a question concerning constitutional rights.

STATEMENT CONCERNING CITATION TO THE RECORD

The record contains two videotapes. The first videotape, referred to herein as VR 1, contains proceedings from many different days. The suppression hearing, which is the heart of this appeal, took place in chambers. On the judge's desk, on the right side, was a stack of white papers. Unfortunately, that stack of white papers is right where the time/date stamp appears and the presence of the white papers makes it impossible to discern the second count for purposes of citation to the tape. Counsel therefore will refer only to hour and minute counts for these citations, substituting "XX" for the second counts.

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STATEMENT THE CASE

On November 18, 2006, at approximately 1:30 in the afternoon, Officer Brian Atkinson of the Elkton Police Department observed a vehicle speeding down Hwy. 68 at approximately 30 miles over the speed limit. (TR 1). Officer Atkinson chased down the car and the driver, a young black man, pulled into the median between the lanes and ran from the car. (VR 2, 11/18/06, 1:28:35). Atkinson pursued the suspect on foot. Id.

Officer Atkinson asked the dispatcher to contact other officers to assist him in locating the suspect. (VR 2, 11/18/06, 1:29:45). Officer Rodney Moberly of the Elkton Police Department and Chief Bruce Marklin both received the call for assistance by the dispatcher while at their homes. (VR 1, 2/27/07, 9:11:XX; 9:34:XX). Chief Marklin secured the abandoned police vehicle by turning off the lights. (VR 1, 2/27/07, 9:35:XX; VR 2, 11/18/06, 1:35:40) Officer Moberly proceeded to a wooded area behind an auto salvage lot where it was believed the suspect was located. (VR 1, 2/27/07, 9:11:XX).

While the police were searching, the dispatcher received a call that there was a black man riding a bicycle through the woods. (VR 1, 2/27/06, 9:12:XX). Believing that the man on the bicycle was their suspect, the officers started looking through the woods, ultimately finding and arresting the Appellant, Brandon Watkins. (VR 1, 2/27/07, 9:13:XX).

Officer Moberly and Officer Atkinson proceeded back to the scene on the highway when they heard over the radio that other officers had found a suspect in the woods matching the driver's description. (VR 1, 2/27/07, 9:13:XX). When they reached the scene, they decided to conduct a search of the suspect's car. (VR 1, 2/27/07, 9:15:XX). The police noted nothing of interest in the passenger compartment, so they decided to search the trunk. (VR 1, 2/27/07, 9:16:XX). In the trunk, which they opened

by using the latch on the inside of the car, the officers found a closed red and white cooler. (VR 1, 2/27/07, 9:18:XX). The officers opened the cooler and found marijuana and crack cocaine. (VR 1, 2/27/07, 9:19:XX). Once Mr. Watkins was arrested, he was never brought back to the vicinity of his vehicle. (VR 1, 2/27/07, 9:14:XX).

Officer Atkinson indicated in his Uniform Offense Reports that he searched the car “while inventorying (sic) the suspects (sic) vehicle, before it was towed” (TR 36) and that “6 bags of crack cocaine were found while inventoring (sic) the car.” (TR 40). He also stated in a statement admitted into the record that “I inventoried the vehicle, (search incident to arrest)...” (TR 43).

Counsel for Mr. Watkins filed a motion to suppress the crack and marijuana because the search was warrantless and did not fall under a recognized exception to the Fourth Amendment. (TR 72-77). In the motion, counsel argued that the search was clearly not ‘incident to arrest’ despite Officer Atkinson’s characterization in his statement, as Mr. Watkins was nowhere near his vehicle at the time the search was conducted. (TR 74). Further, counsel argued, the search could not be properly considered an ‘inventory’ search because clearly the search was done for investigative purposes and not administrative purposes. (TR 74-75).

After a suppression hearing, the trial court overruled the motion, finding that Mr. Watkins did not have standing to contest the search since he had abandoned the car and retained no reasonable expectation of privacy in the vehicle or its contents; and that even if he did have standing, the search was proper under the ‘inventory’ exception. (TR 92-99). In light of the court’s ruling, Mr. Watkins decided to enter into a conditional guilty plea, reserving his right to appeal the trial court’s ruling on his suppression motion. (TR 83-84).

The Court of Appeals affirmed, approving the trial court's holding that Watkins forfeited standing to contest the search when he abandoned the car. (Slip Op. at 5, in appendix at XX). In the Opinion, the Court of Appeals cited no cases decided by this Court and instead cited its own unpublished Opinion in *Blackford v. Commonwealth*, 2006 WL 202339 (Ky. App. 2006).

I. THE COURT OF APPEALS ERRED IN HOLDING THAT MR. WATKINS DID NOT HAVE STANDING TO CONTEST THE LEGALITY OF THE SEARCH OF HIS VEHICLE.

The Fourth Amendment to the United States Constitution protects citizens against unreasonable searches and seizures by police and makes it incumbent upon the police to display probable cause to and obtain a warrant from an impartial magistrate before they may intrude upon the persons, houses, papers, or effects of individuals. One of the exceptions to this general proposition is when the citizen is deemed to have abandoned the property, and thus their rights to privacy in that property and their standing to contest a search of that property or suppress the fruits of that search.

The trial court and the Court of Appeals erred in holding that Mr. Watkins did not have standing to seek suppression of the fruits of the search. The trial court stated after the suppression hearing that he had concerns that Mr. Watkins did not have standing to contest the search because, according to the officers, he had variously claimed and disclaimed ownership of the car. (VR 1, 2/27/07, 10:13:XX). However, in his written order, the trial court relied upon Mr. Watkins act of "abandoning" the vehicle to support his conclusion that Mr. Watkins "abandoned" any expectation of privacy in the vehicle. In support of his ruling, the trial court cited *United States v. Anderson*, 924 F.Supp. 286 (1996). This case is not mandatory authority and is distinguishable. In *Anderson*, the vehicle was abandone—left running in the middle of the street—with a handgun on the

front seat in plain view. In the present case, the car was parked in the median, out of traffic, and the motor was turned off. (VR 2, 11/18/06, *ibid*).

The Court of Appeals affirmed this incorrect ruling, stating:

In our opinion, the trial court did not err in finding that Watkins' vehicle had been abandoned. While being pursued by a police officer, Watkins sought to evade police before coming to a sudden stop in a median between lanes of traffic. He immediately got out of the car and fled to a wooded area. As in *Blackford*, this evidence does not suggest Watkins intended to retain any privacy interest in the car. As such, Watkins could not establish that he retained a reasonable expectation of privacy in the automobile once he fled the scene. (Slip Op. at 5).

This Court first announced that a citizen could forfeit privacy rights in, and thus standing to object to the search of, a vehicle which had been "abandoned" in *Hunt v. Commonwealth*, 488 S.W.2d 692 (Ky. 1972). However, the facts of *Hunt* are quite different than the facts in the present case. *Hunt* and two other men were seen standing in a park next to a vehicle. When police approached, the men ran into the woods. The vehicle was watched by police for four hours and none of the men returned to it. It was later determined that the vehicle had been rented by Mr. Hunt and had been reported stolen by the rental agency. *Id.* at 693-694. This Court held that Mr. Hunt did not have standing to contest the warrantless search of the vehicle: "It seems abundantly clear that Hunt and Bailey abandoned the rented automobile and thus abandoned any reasonable expectation to a continuation of their personal right against having the car searched by the officers." *Id.* at 695. It was noted by the Court that the vehicle was rented and had been reported stolen by the rental agency, two facts which further dilute Hunt's expectation of privacy in the vehicle.

The facts in this case are that Mr. Watkins, after failing to pull over for police, leapt from his vehicle and attempted to elude capture. There were no facts cited by the

Commonwealth to support the contention that he intended to relinquish once and for all any possessory interest in the vehicle. In fact, Mr. Watkins apparently turned off the motor, showing concern for the vehicle. On the video from the dashboard camera of Chief Marlin, it is clear that he checked the car, but did not turn off the ignition, indicating it was already in the off position. (VR No. 2, 11/18/06, 1:35:29).

This fact was cited in *United States v. Anderson*, the case cited by the trial court as supportive of his determination that Mr. Watkins lacked standing to contest the search. 924 F.Supp. 286 (D.D.C. 1996). In *Anderson*, the vehicle was abandoned with the motor running and was in the street. This fact was cited by that Court as supportive of their determination that the defendant lacked standing: "The defendant did not park the vehicle on the side of the road and lock it, but in fact abruptly stopped his vehicle at an angle to the curb and fled, leaving the vehicle in the street with the motor running." *Id.* at 289-290.

Likewise, the United States Court of Appeals for the Fifth Circuit found that abandonment of a vehicle can be found when the vehicle is abandoned during a chase while still running.

Defendant's right to Fourth Amendment protection came to an end when he abandoned his car to the police, on a public highway, with engine running, keys in the ignition, lights on, and fled on foot. At that point defendant could have no reasonable expectation of privacy with respect to his automobile.

U.S. v. Edwards, 441 F.2d 749, 751 (C.A.Ga. 1971).

The Missouri Court of Appeals also found that leaving a vehicle in a manner which displays an intent to relinquish possession can support a finding of abandonment.

In this case it is apparent that when defendant, after being pursued by the patrolmen, left his car in the middle of the street with door open and keys in the ignition he

relinquished any reasonable expectation of privacy in the automobile.

State v. Achter, 512 S.W.2d 894, 900 (Mo.App. 1974).

The Fourth Circuit Court of Appeals came to a similar determination in *U.S. v. Kirlew*. Kirlew, after engaging the police in a chase, leapt from his moving car and allowed it to roll on its own.

In this case, the vehicle was found resting on the median of the street, over 100 yards from where Kirlew jumped out. When the detective opened the unlocked driver's side door, he noted the car was still in drive and the engine was still running. Accordingly, we find that Kirlew's actions indicate an absence of any reasonable expectation of privacy in the contents of the vehicle.

U.S. v. Kirlew, 291 Fed.Appx. 536, 538-539, 2008 WL 4107221, 2 (C.A.4 Va., 2008) *unpublished, cited pursuant to CTA4 Rule 32.1*.

Thus, the courts of several states and the federal system have consistently required corroborating evidence before determining that a vehicle has been abandoned. Some indication of an intention to discard and disassociate oneself from the vehicle, a valuable item, must be shown. The Court of Appeals Opinion cited no such corroborating evidence of intent to abandon and its conclusion that Mr. Watkins abandoned the vehicle is incorrect.

II. THE TRIAL COURT ERRED IN OVERRULING THE MOTION TO SUPPRESS AS THE COMMONWEALTH DID NOT ESTABLISH THE SEARCH FELL UNDER AND ACCEPTED EXCEPTION TO THE WARRANT REQUIREMENT.

The Court of Appeals chose not to address this argument once it incorrectly determined that Mr. Watkins relinquished any privacy interests in the vehicle or its contents. However, as the Court's determination was incorrect, this Court must determine whether the search of the vehicle fell under one of the recognized exceptions to the warrant requirement. It did not.

Concerning appellate review of suppression determinations, the ultimate legal question of whether there was reasonable suspicion to stop or probable cause to search is reviewed *de novo*. *Ornelas-Ledesma v. United States*, 517 U.S. 690, 698-700 (1996). See also *United States v. Roark*, 36 F.3d 14 (6th Cir. 1994). *Cf. Clark v. Commonwealth*, 868 S.W.2d 101 (Ky. App. 1993).

Kentucky and American citizens are guaranteed the fundamental right to be free from unreasonable searches and seizures under the Fourth Amendment to the United States Constitution and §10 of the Kentucky Constitution. Therefore, “[a]ll searches without a valid search warrant are unreasonable unless shown to be within one of the exceptions to the rule that a search must rest upon a valid warrant. The burden is on the prosecution to show the search comes within an exception.” *Gallman v. Commonwealth*, 578 S.W.2d 47, 48 (Ky. 1979). The search itself must satisfy all the elements required for that exception. “[I]t cannot be justified by creating an amalgam, which combines elements of different exceptions to support a search not otherwise valid under any of the separate exceptions.” *Clark, supra*, at 105.

In this case, the trial court held that the search satisfied the inventory exception to the warrant requirement. (TR 92-99).

Inventory exception

An inventory search must be conducted for purposes other than investigation and based upon a standardized policy that provides standardized criteria to restrict or eliminate an officer’s discretion as to whether and what to search. *Florida v. Wells*, 495 U.S. 1, 3-4 (1990). If there is no policy of record, as in this case, an “inventory” search is not sufficiently regulated to pass Fourth Amendment muster. *Wells* at 4-6. The Elkton Police Department’s complete lack of a standardized inventory policy with which to reign

in their officers' discretion requires a finding that the inventory search in this case is unconstitutional.

Officer Moberly testified at the suppression hearing that the Elkton Police Department had no written "standardized" criteria for conducting an "inventory" search and that, in fact, no inventory itself was ever created. (VR 1, 2/27/07, 9:26:XX). Chief Marklin disagreed and testified that they sometimes search before turning a vehicle over to the tow agency and other times wait to secure a warrant. (VR 1, 2/27/07, 9:50:XX). Despite this dearth of evidence to support a finding that a known policy was in effect, the trial court found that the Elkton Police Department had a policy that "items found in the car are listed on a wrecker slip to protect both the wrecker company and the police department from liability for allegations of missing property." (TR 97-98). However, the Commonwealth could not provide the wrecker slip with the inventory of items in the car.

The trial court's order also relied on the fact that the city of Elkton did not have its own impound lot and relied upon private companies to tow vehicles impounded by the police. The trial court found that "it would not be appropriate for the police to turn over an automobile to a tow truck driver without ensuring that there is no hazardous materials located in the automobile." *Id.* at 98. The trial court also cited the fact that Todd County has a methamphetamine problem and it is likely that a car stopped by police may contain chemicals used in the manufacturing process. (VR 1, 2/27/07, 10:13:15).

Despite the trial court's findings, the Elkton Police Department apparently has a policy not of searching every vehicle for book-keeping and safe-keeping, but rather has an indiscriminate policy that instructs its officers to search regardless of the individual circumstance whenever the decision has been made to "tow" a vehicle. There must also be a distinction made between a "tow," an impound, and a lawful impound pursuant to

Wagner v. Commonwealth, 581 S.W.2d 352 (Ky. 1979) and Section 10 of the Kentucky Constitution.

In *Clark v. Commonwealth*, the Court of Appeals stated that if an inventory policy is not part of the record “then an ‘inventory’ search is not sufficiently regulated to pass Fourth Amendment muster.” 868 S. W. 2d 101 (Ky. App. 1994) [citing, *Florida v. Wells*, 495 U.S. 1, 4 – 6 (1990)]. There was no inventory policy introduced into the record in the instant case.

According to the testimony of Chief Marklin at the suppression hearing, the EPD sometimes decides to tow a vehicle and sometimes does not tow. (VR 1, 2/27/07, 9:50:XX). Chief Marklin testified that when a decision to tow has been made, the officer contacts the tow company to come remove the vehicle, and before they allow the tow company to remove the vehicle the officer searches the vehicle and details the contents on the tow slip. Then the tow truck tows the vehicle to the tow company’s lot. The vehicle remains there until the defendant comes to pay the fees and pick it up. This distinction is important because the vehicle is not towed to a secure police impoundment lot, but rather to a private lot. Therefore, the search in this case cannot fall into the lawfully impounded inventoried search because the vehicles are not “impounded,” nor are the contents “inventoried.”

Further, even if the court considered the tow an impound, it certainly was not a lawful impound as the vehicle in this case did not fit into any of the criteria set forth in the pertinent caselaw. In 1979, this Court addressed the issue of warrantless searches of automobiles in the seminal decision *Wagner v. Commonwealth*, 581 S.W.2d 352 (Ky. 1979). In *Wagner*, the defendant’s vehicle was parked in a convenient food mart parking lot. While inside the food mart, the alleged victim came inside and accused the defendant of raping her. The police were called and the defendant was taken to the police station,

questioned, and arrested for rape. During the questioning the police had the defendant's car towed to the police station, and after the defendant's arrest the police conducted an "inventory search" for the purpose of "looking for evidence." That search was later held to be unconstitutional by this Court and the defendant's conviction was reversed.

The *Wagner* court articulated that a vehicle may be impounded without a warrant only if one of the following conditions exists:

1. The owner or permissive user consents to the impoundment;
 2. The vehicle, if not removed, constitutes a danger to other persons or property or the public safety and the owner or other permissive user cannot reasonably arrange for alternate means of removal;
 3. The police have probable cause to believe both that the vehicle constitutes an instrumentality or fruit of a crime and that absent immediate impoundment the vehicle will be removed by a third party; or
 4. The police have probable cause to believe both that the vehicle contains evidence of a crime and that absent immediate impoundment the evidence will be lost or destroyed.
- Wagner*, 581 S.W. 2d at 356.

While, arguably, the facts of this case satisfy the last two conditions, such does not mean that the state has unfettered access to the contents of the vehicle. The *Wagner* court further went on to state that even if a vehicle is impounded legally without a warrant, that does not mean that the police have an unfettered right to search the vehicle.

The more difficult question is the legality of a routine police inventory of a vehicle subsequent to a lawful impoundment. Mere legal custody of an automobile by law enforcement officials does not automatically create a right to rummage about its interior. A routine police inventory of the contents of an impounded vehicle constitutes a substantial invasion of the zone of privacy of its owner or permissive user. It is an invasion additional to the intrusion upon his privacy interests occasioned by the impoundment itself. Consequently, such an inventory is impermissible unless the owner or permissive user consents or substantial necessities grounded upon public safety justify the search." *Wagner*, 581 S.W.2d at 357.

The trial court cited the fact that Todd County has a methamphetamine problem as a justification for the police officer's search of the closed trunk of the car. (TR 98). However, there was never any indication that Mr. Watkins was suspected of methamphetamine involvement and the trial court erred in relying upon irrelevant facts to support his determination. The fact that the Elton Police Department may be small does not excuse them from following the requirements of establishing a formal inventory policy. Establishing a delineated policy concerning the towing of vehicles is not much to ask of a professional department. The Elkton Police Department's utter lack of any policy ensures that this and every other inventory search conducted by it will be constitutionally infirm.

The Search Incident to Arrest Exception Does Not Apply

Although not relied upon by the trial court, the officer noted on a citation that he conducted the search of the car and truck "incident to arrest." (TR 43). The Appellant addresses this issue out of an abundance of caution, lest it be deemed later that this issue was not fully litigated.

The search incident to arrest exception provides that the same probable cause to support a custodial arrest justifies a search of the automobile passenger compartment. *Commonwealth v. Ramsey*, 744 S.W.2d 418, 419 (Ky. 1987); *New York v. Belton*, 453 U.S. 454, 460-463 (1981). "Practically speaking, the 'incident to arrest' exception allows for the warrantless search of an arrestee's person and of the area within his immediate control." *Commonwealth v. Wood*, 14 S.W.3d 557, 558 (Ky. 1999). The area of immediate control is defined as "**the area from within which the [arrestee] might gain possession of a weapon or destructible evidence.**" *Chimel v. California*, 395 U.S. 752 (1969). *Wood, supra.*; emphasis added. "[T]he scope of the search [must] not exceed that

which is necessary to protect society's interest in the safety of police officers (and third persons) and in the preservation of evidence." Id.

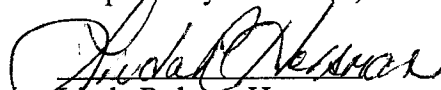
In *Clark, supra*, a KSP officer stopped Nutter for speeding. From that traffic stop grew a search of Nutter's vehicle. The trooper found several packages of stolen merchandise in the back seat and what the trooper presumed was hashish in the glove box. He then arrested both Clark and Nutter. *Clark*, 868 S.W.2d at 104-105. In finding that the search was not incident to arrest, the Kentucky Supreme Court noted that Nutter was arrested at the left rear of his vehicle and immediately placed into the trooper's cruiser. Thus, the search was not limited to the area within his "immediate control." Moreover, the Court questioned whether a search which took place thirty to forty-five minutes after an arrest could be considered "contemporaneous" to it. Id., at 108.

In this case, Mr. Watkins was 1.5 to 2 miles away from the car at the time of his arrest. (VR 1, 2/27/07, 10:11:XX). Clearly, trial court was correct in finding that the search was not incident to arrest. (TR 95).

CONCLUSION

The Court of Appeals' Opinion was erroneous. Mr. Watkins' rights under the Fourth Amendment were violated by the search of the vehicle and this Court must reverse his conviction with instructions to suppress all evidence found during the illegal search of the car.

Respectfully submitted,


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