People v. Ray, R.

COLORADO COURT OF APPEALS

Court of Appeals No.: 06CA2269
Arapahoe County District Court No. 04CR2316
Honorable Michael J. Spear, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Robert K. Ray,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division II
Opinion by: JUDGE ROTHENBERG
Carparelli and Román, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced: May 8, 2008

John W. Suthers, Attorney General, Elizabeth Rohrbough, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Springer and Steinberg, P.C., Harvey A. Steinberg, Michael P. Zwiebel, Denver, Colorado, for Defendant-Appellant

Defendant, Robert K. Ray, appeals his judgment of conviction for possessing a weapon as a previous offender and carrying a concealed weapon. We affirm.

I. Background

On July 13, 2004, defendant was driving north on Potomac Street in Aurora and playing loud music. He was in the left turn lane, and several police officers who were standing outside their police cruisers saw defendant continue northbound instead of turning left. The officers followed and observed him exceeding the speed limit and driving recklessly. The officers activated their overhead lights, and defendant came to a stop, but when the officers approached his car and ordered him to get out, he did not comply. He remained in the car and appeared to drop his arm as if reaching for something. The officers pulled defendant out of the car, placed him under arrest, handcuffed him, and put him in the back of a patrol car.

One of the officers then searched defendant's car around the driver's seat and discovered a BB gun underneath it. Another officer approached the car and noticed that the door panel on the

driver's side was loose. He pulled the bottom of the door panel a few inches, and a semi-automatic handgun fell out.

II. Motion to Suppress

Defendant contends the trial court erred in denying his motion to suppress the evidence found in his car, particularly the handgun found in the door panel. He does not challenge the trial court's finding that the officers had probable cause to arrest him. He argues that (1) because he was arrested, handcuffed, and placed in a patrol car, the search of his car was not a protective search or a search incident to arrest; and (2) the search exceeded the permissible scope of a search incident to a lawful arrest because the officers had to dismantle the door panel to locate the gun. We are not persuaded.

A. Standard of Review

When reviewing a motion to suppress, we defer to the trial court's findings of fact if those findings are supported by competent evidence in the record, but we review the trial court's legal conclusions de novo. *People v. Heilman*, 52 P.3d 224, 227 (Colo. 2002). Under the Fourth Amendment, warrantless searches and seizures are presumptively unreasonable, subject only to a few

specifically established exceptions. *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993).

B. Exception for Search Incident to Lawful Arrest

The United States Supreme Court has held that when a police officer has made a lawful custodial arrest of an occupant of an automobile, the Fourth Amendment allows the officer to search the entire passenger compartment of that vehicle as an incident of the arrest. *New York v. Belton*, 453 U.S. 454, 460 (1981).

In *People v. Graham*, 53 P.3d 658, 661-63 (Colo. App. 2001), a division of this court, relying on *New York v. Belton*, upheld a search that began as the police started to drive the handcuffed arrestee away from the scene of his arrest.

Recently, in *People v. Malloy*, 178 P.3d 1283, 1286 (Colo. App. 2008), another division of this court discussed at length the propriety of *Belton* searches that are conducted "even after [the police] have eliminated any fear related to officer safety or destruction of evidence." The *Malloy* division observed that such searches have been upheld in numerous jurisdictions, including our own. *People v. Daverin*, 967 P.2d 629, 632 (Colo. 1998) (*Belton* exception applied where, at the time of the search, a passenger in

the vehicle had been arrested on an outstanding warrant and was handcuffed and seated in a patrol car at the scene); *People v. H.J.*, 931 P.2d 1177, 1183 (Colo. 1997) (*Belton* exception applied where a passenger in a vehicle was arrested pursuant to an outstanding arrest warrant and was in custody at the scene when the officer searched the vehicle); *see United States v. Hrasky*, 453 F.3d 1099, 1102 (8th Cir. 2006) (applicability of *Belton* rule "does not depend on the presence of one of the specific reasons supporting a search incident to arrest"); *United States v. McLaughlin*, 170 F.3d 889, 891 (9th Cir. 1999) (*Belton* exception "may be invoked regardless of whether the arresting officer has an actual concern for safety or evidence" and it "does not depend upon a defendant's ability to grab items in a car"); *United States v. Doward*, 41 F.3d 789, 794 (1st Cir. 1994) ("*Belton* unmistakably forecloses all such *post facto* inquiries on actual 'reachability.'"); *see also Thornton v. United States*, 541 U.S. 615, 623 (2004) (the Fourth Amendment allows an officer to search vehicle's passenger compartment as a contemporaneous incident of the arrest, even when officer does not make contact until the person arrested has already left the vehicle).

We agree with the reasoning of the divisions in *Malloy* and *Graham* and reject defendant's contention that the search here was invalid because he had already been arrested, handcuffed, and placed in the police cruiser. We conclude the search was a lawful search incident to defendant's arrest.

Contrary to defendant's contention, we are not precluded from upholding the search on this basis even though the trial court relied on another legal basis for reaching its decision. *See People v. Quintana*, 882 P.2d 1366, 1371-72 (Colo. 1994)(appellate court may uphold the trial court's decision on any ground raised in the trial court, even if that ground was not relied upon).

C. Scope of a Valid Search

Defendant also contends that the manner in which the search was conducted exceeded the scope of a valid search because the officers dismantled the car door. We disagree.

Defendant refers us to numerous authorities holding that the removal of a door panel or other parts of a vehicle is beyond the scope of a valid search. However, the authorities he relies on are factually distinguishable.

At the hearing on defendant's motion to suppress, one of the officers testified that he had often found weapons hidden in door panels, and that he did not have to pry open the door panel in this case. The officer explained that he had only used his hands and pulled at the door panel a few inches when the handgun fell out. Thus, there is record support for the trial court's finding that the search in this case did not involve dismantling the car door or prying it open with tools.

We therefore conclude the trial court did not err in denying defendant's motion to suppress evidence based on the scope of the search. *See California v. Acevedo*, 500 U.S. 565, 580 (1991)("The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained."); *United States v. Owens*, 167 F.3d 739, 750 (1st Cir. 1999)("[I]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." (quoting *United States v. Ross*, 456 U.S. 798, 825 (1982))).

III. Motion for New Trial

Defendant next contends the trial court erred in denying his motion for a new trial based on the prosecution's failure to disclose material, exculpatory evidence to him until after the guilty verdict. We disagree.

A prosecuting attorney has an obligation to disclose to the defense any material, exculpatory evidence he or she possesses. Crim. P. 16(I)(a)(2); *Salazar v. People*, 870 P.2d 1215, 1220 (Colo. 1994). However, the failure to disclose information is a violation of a defendant's constitutional right to due process only where the evidence is material to guilt or punishment. *Salazar*, 870 P.2d at 1220.

A. Standard of Review

As a threshold matter, we address the proper standard that the trial court was required to apply in analyzing this issue. The People contend the prosecution's failure to disclose exculpatory evidence is reviewed under the standard applicable to newly discovered evidence, which requires the trial court to find the withheld evidence is likely to have resulted in the defendant's acquittal. Defendant contends the standard is not whether the defendant would more likely than not have received a different

verdict with the withheld evidence, but whether he or she received a fair trial in the absence of such evidence. Both parties are partially correct.

The Colorado Supreme Court stated the appropriate standard in *People v. Lincoln*, 161 P.3d 1274 (Colo. 2007):

> Prosecutors have a constitutional and statutory obligation to disclose to the defense any material, exculpatory evidence that tends to negate the guilt of the accused. A prosecutor has a duty to disclose such evidence regardless of whether the accused requests disclosure; the prosecutor's duty of disclosure also encompasses impeachment evidence. Failure to disclose information helpful to the accused is a due process violation only if the information is material to either guilt or punishment. The evidence is material only if there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."

Id. at 1279-80 (citations and footnote omitted)(quoting *Salazar*, 870 P.2d at 1221). The court in *Lincoln* defined "a reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Id.* at 1280 n.3 (citing *People v. Dist. Court*, 808 P.2d 831, 834 (Colo. 1991)).

B. Application to this Case

The court held a pretrial hearing on the discovery issue in this case, and the following evidence was presented and undisputed.

Defendant's wife was interviewed by detectives on November 22, 2005, regarding an unrelated offense, a shooting that had occurred nine days before defendant was arrested. The prosecutor who tried the present case was present for part of that interview. During the interview, defendant's wife told the police, as relevant here, that after attending a barbeque, she, her sister, and defendant went to the park where the shooting occurred. The wife also stated that a friend, whom she named, had driven defendant's car to the barbeque and the wife had driven it back home after the shooting in the park.

The transcript of defendant's wife's interview was received by the prosecutor on January 12, 2006, but not disclosed to defense counsel until January 20, after the jury trial was over. The prosecutor explained to the court that the reason for the delay was that the interview with defendant's wife was conducted during the investigation of a different case, and that the prosecutor did not recall the wife's statement before or during the trial. Defendant argued that the prosecutor's failure to disclose those statements before trial violated his right to due process of law, and that he was entitled to a new trial. However, the trial court denied his motion,

concluding the evidence was not material because the information was available before trial and was cumulative of other evidence presented at trial. We agree.

At trial, defendant maintained that others had access to the car, that they were able to hide the gun in the door panel, that the gun was not visible when it was in the door panel, and that there was reasonable doubt whether he knew the gun was there. Thus, the key issue at trial was whether defendant knew the gun was in the car.

Also at trial, defendant's mother testified that "several people" drove the car and that it was like the "family car." However, her credibility was impeached by the testimony of a police officer who stated that she had initially told him that only defendant drove the car. During closing argument, the prosecutor emphasized this impeachment evidence and argued that the mother was not credible, that defendant was the sole driver of the car, and that he was the owner of the gun.

Nevertheless, the issue for the trial court in ruling on the defendant's motion for new trial was whether there was a reasonable probability that the result of defendant's trial would

have been different if the transcript of his wife's interview had been disclosed to him earlier. The court found that such disclosure would not have changed the result, and this finding is supported by the record.

According to the statement by defendant's wife, he went to the park with her on the date of the shooting, and someone else drove his car there. Thus, the transcript of the wife's interview indicates that defendant was aware *before* his trial that his wife and at least one other person had driven his car. Furthermore, the trial court found that the information the wife had disclosed to the police was cumulative, because defendant's mother had already testified that several people other than defendant drove the car. The trial court also considered the fact that if the transcript had been disclosed and, based on the information in it, defendant had called his wife to testify, she would have been cross-examined by the prosecution about her statement to the police that defendant had possessed and fired a gun on the day of the shooting and that he often carried a gun. Thus, the trial court found that the wife's statement contained information that would have been very damaging to defendant's case.

In summary, the trial court stated on the record that it had considered the relevant appellate opinions addressing materiality, and had concluded that the evidence of the wife's interview by the police was highly unlikely to have resulted in testimony that would have changed the outcome of the case, had it been revealed to the jury during the course of the trial. We similarly conclude there is no reasonable probability that the result of the trial would have been different had such evidence been admitted.

Thus, while we do not condone the prosecutor's delay in disclosing the wife's statement to defendant's counsel, we conclude the trial court did not err in denying defendant's motion for a new trial.

The judgment is affirmed.

JUDGE CARPARELLI and JUDGE ROMÁN concur.