IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

AUGUST SESSION, 1999

FILED

December 28, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	**C.C.A. NO. W1999-01780-CCA-R3-CD**
	)	
Appellee,	)	
	)	**CHESTER COUNTY**
VS.	)	
	)	
RICKY FRAZIER,	)	**HON. FRANKLIN MURCHISON, JUDGE**
	)	
Appellant.	)	
	)	(DUI)

ON APPEAL FROM THE JUDGMENT OF THE
CIRCUIT COURT OF CHESTER COUNTY

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OPINION FILED ________________

REVERSED AND REMANDED

JERRY L. SMITH, JUDGE

OPINION

On November 9, 1997, following a jury trial, Ricky Frazier ("defendant" or "appellant") was convicted of driving under the influence of alcohol. The sole issue on appeal is whether the police had reasonable suspicion to stop the appellant. Because we find that the police lacked sufficient specific and articulable facts to justify harboring a reasonable suspicion that the defendant was engaged in or was about to be engaged in criminal activity, we reverse the judgment of the trial court.

FACTUAL BACKGROUND

Some time after 10:00 p.m. on May 17, 1997, Chester County Sheriff's Deputy Steve Davidson witnessed a vehicle traveling slowly through a parking lot of a used furniture store. Deputy Davidson noticed that the store, located next to a major state highway, was closed for the evening. He then saw the car drive onto the highway and proceed down the road in the opposite direction of his own car. Deputy Davidson turned around, activated his siren and emergency lights, and stopped the vehicle.

He approached the driver of the vehicle, later identified as the defendant, and asked for his driver's license. When the defendant attempted to respond to the Deputy, the Deputy noticed a strong smell of alcohol about the defendant's car and person. Deputy Davidson proceeded to ask the defendant to get out of the car, and the defendant did as he was instructed. The Deputy then administered several field sobriety tests to the defendant; The defendant failed

them all. Deputy Davidson then placed the defendant under arrest and transported him to the police station.

Before the trial, the defendant moved to suppress any and all evidence obtained as a result of the stop. He claimed the stop was an illegal seizure because it was not based on a warrant, probable cause, or reasonable suspicion. At a hearing on the motion to suppress, Deputy Davidson testified that he stopped the defendant because (1) the parking lot was adjacent to a store which had a history of burglaries, (2) the defendant was driving slowly, and (3) the store was closed. The trial judge rejected the defendant's claim, stating

> This is a close case, I will have to admit . . . . The distinguishing thing that I find here in this case is that here we have – this occurred on the premises of a store that was closed – at nighttime, for lack of a better way to put it, this store – no one would have had any business being there; although, it would certainly not be illegal for Mr. Frazier to have been there. However, it is something to raise the suspicion of the officer that he was there. The store had been broken into on previous occasions . . . [and Mr. Frazier was] driving very slowly for some unknown suspicious reason in the area. He wasn't – it is significant that he wasn't driving fast enough. He was driving sort of slow. It would be unlikely that his motive was just merely to go up and turn around and go somewhere else. There was only one store there. It had long since been closed. It was dark. And there is just apparently no reason for the defendant to have been there driving that slow.

The defendant was tried by a jury and convicted the next day.

STANDARD OF REVIEW

This case involves a review of the trial court's findings of fact and law in denying the motion to suppress. "[A] trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." State v. Crutcher, 989 S.W.2d 295, 299 (Tenn. 1999)(quoting State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996)). The application of the law to the facts found by the trial court, however, is a question of law which this Court reviews de novo. State v. Yeargan, 958 S.W.2d 626, 629 (Tenn. 1997); Odom, 928 S.W.2d at 23. In this case, it is the application of the law to the facts which requires reversal.

REASONABLE SUSPICION

There is no question that the stop in this case was a "seizure" within the meaning of both the Federal and State Constitutions. "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." Terry v. Ohio, 392 U.S. 1, 16, 88 S. Ct. 1868, 1877, 20 L. Ed. 2d 889 (1968). The moment Deputy Davidson turned on his emergency equipment and stopped the defendant, he initiated an investigatory stop and thus seized the defendant within the meaning of the Federal and State Constitutions. United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497 (1980); State v. Pulley, 863 S.W.2d 29, 30 (Tenn. 1993). We must now determine whether the stop complied with the constitutional prohibitions against unreasonable seizures.

The Fourth Amendment to the United States Constitution provides, in relevant part: "[t]he right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated." Similarly, Article I, Section 7 of the Tennessee Constitution provides: "that the people shall be secure . . . from unreasonable searches and seizures." The intent, purpose, and scope of the two prohibitions against unreasonable searches and seizures is the same. State v. Simpson, 968 S.W.2d 776, 779-80 (Tenn. 1998). Under both Constitutions, a warrantless search or seizure is presumed unreasonable, and evidence discovered as a result thereof is subject to suppression, unless the state demonstrates that the search or seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement. Coolidge v. New Hampshire, 403 U.S. 443, 455, 91 S. Ct. 2022, 2032, 29 L. Ed. 2d 564 (1971); State v. Bridges, 963 S.W.2d 487, 490 (Tenn. 1997).

The investigative stop is one such exception to the warrant requirement. Terry, 392 U.S. at 20. Although an investigative stop is less intrusive than an

arrest, the Fourth Amendment is still implicated because an investigative stop is a seizure of the person. Id. Seizures of the person that are not arrests are judged by their reasonableness rather than by a showing of probable cause. Id. The reasonableness of the intrusion is "judged by weighing the gravity of the public concern, the degree to which the seizure advances that concern, and the severity of the intrusion into individual privacy." Pulley, 863 S.W.2d at 30 (quoting Brown v. Texas, 443 U.S. 47, 50, 99 S. Ct. 2637, 2640, 61 L. Ed. 2d 357 (1979)). Having conducted that balancing test, the United States Supreme Court found that even a brief detention of an automobile is a violation of the Fourth Amendment, unless there is at least articulable and reasonable suspicion that an occupant is engaged in or is about to be engaged in criminal activity. Delaware v. Prouse, 440 U.S. 648, 653-54, 99 S. Ct. 1391, 1396, 59 L. Ed. 2d 660 (1979). Thus, an investigative stop of an automobile may be based on reasonable suspicion rather than probable cause. Id.; State v. Watkins, 827 S.W.2d 293, 294 (Tenn. 1992).

Reasonable suspicion must be based on specific and articulable facts indicating that a criminal offense has been or is about to be committed. Terry, 392 U.S. at 21; State v. Seaton, 914 S.W.2d 129, 131 (Tenn. Crim. App. 1995). In evaluating whether reasonable suspicion is based on specific and articulable facts, we must consider the totality of the circumstances, including the personal observations of the police officer, information obtained from other officers or agencies, information obtained from citizens, and the pattern of operation of certain offenders. Watkins, 827 S.W.2d at 294 (citing United States v. Cortez, 449 U.S. 411, 417-18, 101 S. Ct. 690, 695, 66 L. Ed. 2d 621 (1981)); State v. Wilhoit, 962 S.W.2d 482, 486-87 (Tenn. Crim. App. 1997). The specific and articulable facts must be judged objectively rather than relying on the subjective beliefs of the officer making the stop. State v. Norword, 938 S.W.2d 23, 25 (Tenn. Crim. App. 1996) (citing Cortez, 449 U.S. at 417-18). We must also consider the rational inferences and deductions that a trained police officer

may draw from the circumstances. Watkins, 827 S.W.2d at 294 (citing Terry, 392 U.S. at 21).

Although Deputy Davidson articulated facts which made him suspicious of the defendant, those facts were not sufficient to reasonably justify his suspicion. Deputy Davidson relied on his knowledge that the store had been burglarized before. However, an individual's presence in a high crime area is not a basis for concluding that the individual himself is engaged in or will engage in criminal conduct. Brown, 443 U.S. at 52; Williams v. State Dept. of Safety, 854 S.W.2d 102, 106 (Tenn. App. 1992). Thus, the defendant's presence in the parking lot

of a business with a history of burglaries is, standing alone, insufficient to warrant a finding of reasonable suspicion.[1]

Similarly, the mere fact that the defendant was driving in a parking lot slowly is insufficient to justify suspicion of criminal activity, despite the trial court's finding that "there would be no reason to be there." Deputy Davidson admitted during the suppression hearing that driving fast may have been suspicious also. Indeed, following the trial court's reasoning, even innocuous behavior such as turning around in one's vehicle, or stopping to check a road map in the unsecured parking lot of a closed business would be sufficient to warrant a stop by police. The parking lot was open to the public, and was located next to a state highway. We are not prepared to subject every person who drives through the open parking lot of a closed business next to a state highway to a police intrusion. Thus, we conclude that the initial stop of the defendant was invalid, and all evidence flowing therefrom should have been suppressed. Accordingly, we reverse the judgment of the trial court and remand to the trial court for further proceedings consistent with this opinion.

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JERRY L. SMITH, JUDGE

[1] When asked whether he considered the area a "high crime area," Deputy Davison replied: "We always check suspicious activity around businesses. We have had a lot of businesses broken into throughout the county."

CONCUR:

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DAVID H. WELLES, JUDGE

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JAMES CURWOOD WITT, JR., JUDGE