IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY 1995 SESSION

STATE OF TENNESSEE,	*	C.C.A. # 01C01-9406-CR-00218
APPELLANT,	*	DAVIDSON COUNTY
VS.	*	Hon. Thomas H. Shriver, Judge
HERBERT LEE MASSEY,	*	(State Appeal)
APPELLEE.	*	

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OPINION FILED:_____

AFFIRMED

Gary R. Wade, Judge

OPINION

The defendant, Herbert Lee Massey, was indicted for possession of marijuana and the unlawful possession of a handgun. See Tenn. Code Ann. §§ 39-17-418 and -1307. Upon motion and after an evidentiary hearing, the trial court suppressed items seized pursuant to a search warrant. In this appeal, the state claims that the trial court committed error by prohibiting the admission of evidence acquired in the search.

We affirm the judgment of the trial court.

On October 30, 1993, the Nashville Metropolitan Police conducted a drug sweep of the John Henry Hale housing area. Designed to stop the influx of drug dealers into that community, the sweep included the participation of a walking patrol, a bicycle patrol, and other support units. Many arrests were made during the sweep, including that of the defendant.

Because the testimony presented by the various state witnesses conflicted, a summary of the testimony provided by each witness may place the issue in proper context. Sergeant Mike Vondohlen testified first for the state. While on bicycle patrol, he claimed to have detected a faint odor of marijuana as he approached the defendant and another suspect while they stood at a street corner. Sergeant Vondohlen stated that when the two men saw him, they started to walk away in opposite directions. Sergeant Vondohlen related that

he stopped the defendant while other officers, just arriving at the scene, stopped the other suspect. Based upon "the distinct but faint odor" of the marijuana and the high crime rate in the area, Sergeant Vondohlen claimed to have "patted down" the defendant and found a small caliber gun in his right rear pocket. At that point, other officers assumed responsibility for the investigation.

On cross-examination, Sergeant Vondohlen conceded that he had not seen the defendant smoking marijuana or engaging in any other illegal activity prior to his pat down search:

> Q. [P]rior to your approaching Mr. Massey, ... what reason did you have to believe that he was engaged in any criminal activity?
>
> A. None. I just rode up to see ... who he was and just to say hi and what he was doing. I mean, we were just ... checking people out.
>
> Q. ...[W]hat was your reason for approaching him?
>
> A. Well, it was just a couple of guys standing up on the sidewalk up there, you know, by themselves off to the side. I just was really going up to see--
>
> Q. So you had no reason at all to suspect any criminal activity[?]
>
> A. Not when I first approached them; no, sir.
>
> Q. You were just stopping by to say hello to them?
>
> * * *
>
> A. ...I just asked if they lived in the area, general question.

Officer Brent Carroll testified that he participated in the sweep by riding as a passenger in the car used to transport defendants after an arrest had been made. During the initial portion of his testimony, Officer Carroll claimed that Sergeant Vondohlen had made the initial stop and that Officer Anderson had made the arrest of the defendant. Officer Carroll testified that he then made a full search, finding a small bag of marijuana in the defendant's left rear pocket. On cross-examination, Officer Carroll denied that he had been involved in the initial pat down search and denied ever having previously testified to that effect. The officer specifically denied being the first to confront the defendant and stated that he did not smell any marijuana at the scene.

At that point, defense counsel presented a tape-recording of Officer Carroll's testimony at the preliminary hearing. After listening to the tape, Officer Carroll, who was present during Sergeant Vondohlen's suppression hearing testimony, conceded that the tape-recording contradicted the testimony he had given on direct examination by the state:

> Well, I've made a lot of arrests and [my testimony was] basically, out of confusion, I guess....
>
> [T]hat particular night, like I said, we made three or four arrests. I called it a Terry stop in there[.] I called it a search just a minute ago.... I can't clearly remember.

The officer then described the nature of the sweep:

> We were stopping anybody that was basically outside, just asking them basic questions, just making sure the area was secure, that there wasn't criminal activity going on.

During further cross-examination, Officer Carroll concluded that it was he rather than Sergeant Vondohlen that first approached the defendant. He conceded that the defendant was not breaking any law except, if he was unable to show that he lived in the area, "the possibility of criminal trespass." He explained that at the time he confronted the defendant, there were "20, 25 officers" on "both sides of the street." He summarized the reason for the stop of the defendant as "for investigation only."

On re-direct questioning by the state, Officer Carroll confirmed that his testimony as to who made the initial stop and pat down search conflicted with that of Sergeant Vondohlen. He acknowledged that at the time of the preliminary hearing, he obviously believed that he had first approached the defendant. Officer Carroll could not recall whether he or the sergeant had found the gun but related that he remembered "patting [the defendant] down and feeling a hard-like object." Officer Carroll ultimately acknowledged that he was both "the arresting officer and the transporting officer."

The state then called Officer George Anderson in an effort "to clarify the situation." Officer Anderson related that his units had received complaints from area residents about "outsiders." He testified that on the night the defendant was arrested, the police were conducting "field interviews to find out who lived there and who didn't." He testified that he recalled seeing the defendant being

questioned first by Sergeant Vondohlen who later conducted the pat down search and found the gun. He said that thereafter, Officer Carroll conducted the full search, finding the marijuana. On cross-examination, however, Officer Anderson acknowledged that he had not seen the defendant involved in any kind of illegal activity prior to the stop.

At the conclusion of the hearing, the trial court made the following observations:

> ... I doubt seriously that ... being on the street in a public housing project represents a trespass....
>
> The difficulty with this case is ... it sounds like the testimony is being contrived to try to justify [the search]. If I believe Officer Vondohlen and Officer Anderson, then, I've got to reject what Officer Carroll said ... at the Preliminary Hearing and what he wound up saying after he heard the Preliminary Hearing tape....
>
> ... Officer Vondohlen was extremely tentative about everything he said. [I]f it had not been for Officer Carroll's testimony, I probably would have accepted the proposition that he smelled Marijuana and ... suspected that this defendant was involved with it. That might have justified what took place afterwards.
>
> But ... Officer Carroll claims to have been present at the initial encounter. He claimed that at the Preliminary Hearing and he claimed it again today after he heard the ... tape. There was nothing about Marijuana being smelled.
>
> Officer Anderson came up later; so, he can't say.
>
> [T]o do a pat down, Terry type search, there must be a reasonable suspicion that a crime has been or is about to be committed, and there must be articulable circumstances stated by an experienced officer ... to justify that

suspicion.

> All we have here is a housing project, high crime area and a sweep. I don't think that justifies this intrusion under these circumstances.... The question is, does the ... Fourth Amendment prohibit the ... use by the State of [the gun and the marijuana] as evidence.... I think it does.
>
> So I ... very reluctantly grant the Motion to Suppress.

Thereafter, the trial court entered an order of suppression finding that none of the officers had observed the defendant either violate the law or engage in activities suggesting the commission of a crime:

> He was simply standing on the sidewalk. Taken in its most favorable light, there is no creditable proof of probable cause, exigent circumstances, or articulable circumstances which would lead an experienced police officer to reasonably infer that the defendant had committed or was contemplating the commission of a crime.
>
> Public Housing Projects are frequently the venue of drug sales, assaults, shootings and other criminal activity. Police "sweeps" ... however necessary or desirable ... cannot annul the fourth amendment.

Our scope of review is limited. The findings of the trial judge have the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates otherwise. State v. O'Guinn, 709 S.W.2d 561 (Tenn. 1986), cert. denied, 479 U.S. 871 (1986). If there is any material evidence to support the conclusions of the trial court, it must be upheld. State v. Pritchett, 621 S.W.2d 127, 133 (Tenn. 1981). The claim of the state is that the evidence

preponderates against the findings in the trial court. See State v. Dulsworth, 781 S.W.2d 277, 284 (Tenn. Crim. App. 1989).

Its argument depends, in great measure, upon its contention that when Sergeant Vondohlen first approached the defendant the smell of marijuana provided either articulable suspicion or probable cause to arrest. If Sergeant Vondohlen had probable cause to arrest, the search would have been valid incident to the arrest. If the circumstances warranted an investigative stop and frisk, the presence of the weapon justified the full search and the seizure of the marijuana. See State v. Kyger, 787 S.W.2d 13, 21 (Tenn. Crim. App. 1989).

In Beck v. Ohio, 379 U.S. 89, 91 (1964), the Supreme Court denied probable cause necessary for arrest:

> [W]hether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed ... an offense.

An officer may make a warrantless arrest of a suspect "[o]n a charge made, upon reasonable cause, of the commission of a felony." Tenn. Code Ann. § 40-7-103(a)(4). Our courts make little, if any, distinction between the terms "reasonable cause" and "probable cause" in determining whether there exists a basis for an arrest. See State v. Melson, 638 S.W.2d 342 (Tenn. 1982), cert. denied, 459 U.S. 1137 (1983). If there is "reasonable cause" under the statute or "probable

cause" under either art. I, § 7 of the Tennessee Constitution or the fourth amendment to the United States Constitution, the arrest is lawful and any evidence acquired incident thereto is admissible. Draper v. United States, 358 U.S. 307, 310-11 (1959); State v. Tays, 836 S.W.2d 596, 598-99 (Tenn. Crim. App. 1992).

Articulable suspicion is, of course, a lesser standard than that of probable cause. A police officer may make an investigatory stop when there is a reasonable suspicion, supported by articulable and specific facts, that a criminal offense has been, or is about to be, committed. Terry v. Ohio, 392 U.S. 1, 21-22 (1968); State v. Scarlett, 880 S.W.2d 707, 709 (Tenn. Crim. App. 1993). In determining whether articulable and specific facts support an officer's reasonable suspicion, the court must consider the totality of the circumstances:

> [The totality of the circumstances] includes, but is not limited to, objective observations, information obtained from other police officers or agencies, information obtained from citizens, and the pattern of operation of certain offenders. A court must also consider the rational inferences and deductions that a trained police officer may draw from the facts and circumstances known to him.

State v. Moore, 775 S.W.2d 372, 377 (Tenn. Crim. App. 1989)(citations omitted). Officers must have a particularized and objective basis for their suspicions about criminal activity. United States v. Cortez, 449 U.S. 411, 417-18 (1981).

Implicit in the ruling is that the trial court

rejected Sergeant Vondohlen's testimony that he detected the odor of marijuana and first approached the defendant to further investigate. Findings made in the trial court, when based upon testimony in the record, are practically conclusive on appeal. Here, there were a number of arrests on the night of the "sweep." Many officers were involved. Confusion by the sheer numbers involved may have been a factor. The court described Sergeant Vondohlen's testimony as "tentative about everything." It conflicted in all of the important points with the testimony offered by Officer Carroll. The word "contrived" appears prominently in the findings of fact. Also implicit in the ruling is that Officer Carroll, who had no apparent basis to suspect that the defendant had committed or was about to commit a crime, may have first encountered the defendant. He did not smell marijuana; neither did Officer Anderson, who arrived later. That the defendant might be guilty of criminal trespass for standing on a public street corner does not qualify as an articulable, reasonable suspicion. By his own testimony, Officer Carroll had no basis for the stop and frisk.

The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the evidence are matters entrusted to the trier of fact. Typically, this court may not re-evaluate the testimony nor substitute its inferences for those drawn by the trier of fact from the evidence. The trial court accredited the testimony of Officer Carroll, at least the part that was consistent with the testimony he provided at the preliminary hearing, and

rejected pertinent parts of Sergeant Vondohlen's testimony. There was a basis in the record for such findings. Under those circumstances, we are bound to uphold the order of suppression.

Accordingly, the judgment is affirmed.

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Gary R. Wade, Judge

CONCUR:

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John H. Peay, Judge

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Rex H. Ogle, Special Judge