IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

SEPTEMBER 1995 SESSION

STATE OF TENNESSEE,	)	
	)	NO. 02C01-9503-CC-00060
	)	
Appellee	)	CARROLL CIRCUIT
	)	
v.	)	Hon. C. Creed McGinley, Judge
	)	
ERIC SHERROD SANDERS,	)	(unlawful possession of a firearm
	)	with intent to go armed; possession
	)	of a controlled substance with intent
Appellant	)	to sell; driving with a suspended
	)	license)

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OPINION FILED _____

REVERSED AND REMANDED

John K. Byers
Senior Judge

O P I N I O N

The defendant was convicted of possession of a schedule II controlled substance with intent to sell and sentenced to serve 10 years; driving on a suspended license and sentenced to serve 6 months; and possession of a weapon with intent to go armed and sentenced to serve 30 days.

The defendant raises the following issues:

I. Was the Defendant unreasonably detained and searched such that evidence used to obtain the convictions against him was illegally obtained?.

II. Did the court err in failing to grant a Bill of Particulars requested as to the indictments' second count relative to the possession with intent to deliver an unidentified amount of cocaine?

III. Is the language of the second count of the indictment sufficient to charge and support a conviction of a Class B felony?

IV. Did the court err in allowing the State to introduce proof as to the weight of all the presumed controlled substances seized from the defendant when the forensic expert tested only three samples instead of testing all the substance seized?

V. Did the court err in sentencing the defendant to a term of confinement consecutive to a prior conviction in Kentucky when the Kentucky judgment required that the Kentucky sentence is to run concurrently with the instant Tennessee sentence?

We find error on issues I, II, and III. We find no error on issues IV and V. The judgment is reversed and the case is remanded.

Prior to 1:15 a.m. on May 4, 1993, police officers saw the defendant parked at a car wash in the town of Atwood. The car wash was open 24 hours a day and was self-operated. The car wash was privately owned. Two officers, on patrol, saw the defendant's vehicle and approached it. The defendant told the officer his vehicle was causing some problems, but he needed no help. The officer asked for

identification. The defendant showed the officer a valid Texas driver's license. The officer communicated with the police dispatcher to check the license. The dispatcher said she could find no record of the Texas driver's license. The dispatcher told the officer that at one time the defendant had a Tennessee driver's license which had been revoked. The defendant did not exhibit a Tennessee driver's license. The officer continued to detain the defendant while he checked with the Milan Police Department for any warrants etc. on the defendant. The officer also ran a "wants and warrants check" on the defendant through N.C.I.C. None of these showed any warrants or holds were outstanding against the defendant. The officer did not formally arrest the defendant until 20 minutes after he initially approached him.

The officer testified there was no reason to suspect there would be any warrants outstanding against the defendant. The record shows the vehicle was properly registered to the defendant, and there were no indications the defendant had violated any law at the time of the initial approach to the defendant nor was there any suspicion on the part of the officer that the defendant might be involved in illegal activity until 20 minutes after he had been detained by the officer.

In this case, the officer had no suspicion of any wrongdoing by the defendant at the time he approached the vehicle . After considerable investigation, the officer arrested the defendant for driving on a suspended license. The officer then asked to search the vehicle and permission to do so was granted.

The officer found a .25 automatic pistol, money under the seat and in a bag behind the floor board of the front seat, and two containers that contained a substance which was later found to be cocaine.

The State insists the search was proper because the police may approach a car parked in a public place and request the driver's identification whether or not there is any reasonable suspicion of illegal activity, *State v. Pully*, 863 S.W.2d 29 (Tenn. 1993), and assert that if a citizen gives consent to search a vehicle a search

warrant is not needed. *Houston v. State*, 593 S.W.2d 267 (Tenn. 1980). We have no concern with the initial approach of the officer in this case. The conduct of the officer after the initial approach is the area of trouble in this matter. Nor do we question the right of officers to conduct a search of a vehicle when voluntary consent is given or under the circumstances present in *Houston* (police had reasonable basis to believe Houston had just committed a robbery and murder and that evidence of crime was in the vehicle).

We believe the search of the vehicle in this case must be found improper for the reasons stated in *Williams v. State Department of Safety*, 854 S.W.2d 102 (Tenn. App. 1992) and in *State v. Morelock*, 851 S.W.2d 838 (Tenn. Crim. App. 1992).

In *Williams*, the court said:

> In the present case, there was no complaint of the owner of the parking lot as to the presence of petitioner and his vehicle. The police were not seeking the perpetrator of a particular crime with information of the description of a vehicle connected with that crime. The officers had no legitimate reason to approach a vehicle legally parked on private property and rap on its window to cause the occupant to open the door, nor to demand his driver's license. The fact that drugs have previously been discovered in other vehicles in the same parking lot is not probable cause for the actions of those officers.

Williams, 854 S.W.2d at 105-06.

One might argue the *Williams* case is not applicable in this matter. In such event, the reasoning of the court in *Morelock* is applicable. In that case, the court said:

> [W]hat we have here is a routine traffic stop prolonged and extended to the point that the detention, reasonable in the beginning, became unreasonable toward the end.

Morelock, 851 S.W.2d at 840.

We find the consent to search given by the defendant was not voluntary because of the coercive nature of the unlawful detention of the defendant.

For the reason stated, we find the evidence preponderates against the ruling of the trial judge upon the motion to suppress. We reverse the holding that the search was proper and find the search was unlawful and the evidence seized therein should have been suppressed.

We find the trial judge should have granted the bill of particulars and the failure to do so was error.

We find the indictment is insufficient to allege a Class B felony because the possession of cocaine may be a Class B or Class C felony depending on the amount possessed. When an indictment fails to specify the weight required to charge the higher felony, only the lesser felony may be prosecuted.

We have examined the other issues raised on this appeal and find there was no error in the action of the trial court as alleged by the defendant.

The judgment of the trial court is reversed and the case is remanded to the trial court for further proceedings.

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John K. Byers, Senior Judge

CONCUR:

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Joseph B. Jones, Judge

Joseph M. Tipton, Judge