IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
MAY SESSION, 1995

FILED

December 28, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 02C01-9412-CC-00298
Appellee	)	
	)	HENRY COUNTY
vs.	)	
	)	Hon. **Julian P. Guinn**, Judge
RAY ANTHONY BRIDGES,	)	
	)	(Possession of cocaine with intent to
Appellant	)	sell)

For the Appellant:

Larry E. Fitzgerald
22 N. Second St., Suite 410
Memphis, TN 38103

For the Appellee:

Charles W. Burson
Attorney General and Reporter

Michelle L. Lehmann
Assistant Attorney General
Criminal Justice Division
450 James Robertson Parkway
Nashville, TN 37243-0493

G. Robert "Gus" Radford
District Attorney General
Post Office Box 686
Huntingdon, TN 38344

OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Ray Anthony Bridges, appeals from a judgment of conviction entered in the Circuit Court of Henry County. The appellant pled guilty to one count of possession of cocaine with intent to sell. Pursuant to Tenn. R. Crim. P. 37 (b)(2), the plea expressly reserved the appellant's right to challenge whether the arresting officer should have obtained a warrant before conducting a search of the appellant.[1]

After reviewing the facts of this case, we affirm the appellant's conviction.

I. Factual Background

On August 18, 1994, pursuant to the appellant's motion to suppress, the trial court conducted a hearing to determine whether the police violated the

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[1]The case dispositive question certified by the trial court's order actually contained three questions:

1. Should Officer Blackwell have obtained a search warrant before conducting a search of the Defendant on December 23, 1993 at approximately 3:21 p.m. at the "Preachers" club located in Henry County, Tennessee.

2. Was Officer Blackwell's search of the Defendant without a warrant an illegal search in violation of the Defendant's Fourth Amendment rights under the U.S. Constitution, andalso in violation of Article 1, Section 7 of the Tennessee Constitution?

3. Should all evidence obtained as a result of the aforementioned search without a warrant be excluded?

We are compelled to note that the certified questions as framed are exceedingly broad in scope, i.e. was the search legal, was a warrant necessary, and should the evidence be excluded? Our supreme court, in State v. Preston, 759 S.W.2d 647, 650 (Tenn. 1988), held that questions of law certified pursuant to Tenn. R. Crim. P. 37(b)(2) "must be stated so as to clearly identify the scope and the limits of the legal issue reserved." The certified questions presented in this case minimally satisfy the requirements of Preston.

appellant's Fourth Amendment rights by conducting a warrantless search of his person and seizing from him a quantity of crack cocaine. At the suppression hearing, Officer O.W. Blackwell testified that on December 23, 1993, he received a phone call from the dispatcher, advising him that an informant had information concerning a person selling crack cocaine. Officer Blackwell then called the informant, who told Blackwell "that Anthony Bridges was at 'Preacher's Place' in the 'Bottom' dealing crack cocaine right then." The informant also advised Blackwell that Bridges "had cash money and drugs on him at that time." Blackwell added that he received the information at 2:47 p.m. and arrived at Preacher's Place at approximately 3:21 p.m..

According to Officer Blackwell, the informant had provided him with information eight years ago which had led to an arrest and a conviction. Additionally, Blackwell testified that this informant "had always been very straightforward and very honest and very reliable with me and has given information in the past."

Officer Blackwell added that he "had been getting a lot of information on [Bridges] at that particular area as far as relating to drug dealings." Blackwell testified that he had received "approximately a half a dozen or so" anonymous tips to that effect.

In addition to the officer's testimony, defense counsel introduced a copy of the arrest warrant and accompanying affidavit of complaint. The affidavit of complaint stated that the affiant, Blackwell, "knew Bridges was a convicted felon and convicted drug offender." Blackwell also was aware that Bridges "had been arrested on weapons charges recently in Paris and at that time he had run from

the police."[2]

Upon his arrival at Preacher's, Officer Blackwell found the appellant sitting at a table. Based on his knowledge of the appellant's recent arrest on weapons charges, Blackwell believed that the appellant might be armed. Therefore, he conducted a "frisk" of the appellant for weapons. The record is somewhat unclear with respect to the order of events once Blackwell commenced his frisk of the appellant. The affidavit of complaint, attached to the arrest warrant, contains the clearest description of events. In the affidavit, Blackwell stated that, while frisking the appellant, he touched the appellant's right jacket pocket and "immediately recognized a pill bottle ... that is used by the majority of crack dealers to hold their crack cocaine." The frisk also uncovered a knife in the appellant's back pocket. Officer Blackwell then arrested the appellant.[3] After the arrest, Blackwell apparently conducted a further search of the appellant and found a small bag of crack cocaine in his right jacket pocket. At the suppression hearing, Blackwell also testified that a search of the appellant at the Henry County Jail uncovered two hundred and forty-eight dollars hidden in the appellant's underwear.

At the conclusion of the testimony, the trial court denied the appellant's motion to suppress. The trial court ruled as follows:

> All right, the Court finds that the arresting officer had information from a reliable confidential informant, that a felony and perhaps felonies, more than one, had been committed, that is the sale of a schedule two controlled substance, that another felony was in the progress or was actually in effect at that time, that is that he possessed a

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[2]Although the warrant was issued after the appellant's arrest, pursuant to Tenn. R. Crim. P. 4, the affidavit indicates, and Blackwell testified, that he possessed this information prior to the arrest.

[3]It would appear that the basis for the arrest was the discovery of the pill bottle containing cocaine, rather than the discovery of the knife. At the suppression hearing, the appellant suggested that the knife had been returned to him. Moreover, the record does not indicate that any prohibited weapons offense was charged.

schedule two controlled substance, and that acting upon that he had articulable facts that justified the action that he took in making an arrest and frisk.

II. Warrantless Search of Appellant

Ordinarily, the search of a person and the seizure of any items on the person require a warrant. United States v. Place, 462 U.S. 696, 701, 103 S.Ct. 2637, 2641 (1983). However, the Supreme Court of the United States has continually carved out exceptions to this rule based on the level of intrusiveness involved in the search, the expectation of privacy of the individual, and the circumstances surrounding the search. The Tennessee Supreme Court has largely followed the United States Supreme Court's lead in this area.

The appellant contends that the police, in this case, should have procured a search warrant before searching him, as none of the exceptions to the warrant requirement are applicable. The state argues that the brief detention of the appellant and the ensuing search fall within the ambit of the "stop and frisk" exception to the warrant requirement, as established in Terry v. Ohio, 392 U.S. 1, 20-22, 30, 88 S.Ct. 1868, 1879-1880, 1884-1885 (1968).

A search conducted without a warrant is presumptively unreasonable. See State v. McClanahan, 806 S.W.2d 219, 220 (Tenn. Crim. App. 1991). The state, at a suppression hearing, has the burden of showing that the search was conducted within a recognized exception to the warrant requirement. Id. The findings of a trial court at the conclusion of a suppression hearing are afforded the weight of a jury verdict. State v. Dick, 872 S.W.2d 938, 943 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1993); State v. Killebrew, 760 S.W.2d 228, 233 (Tenn. Crim. App. 1988). This court will not set aside the judgment of the trial court unless the evidence contained in the record preponderates against

its findings. Id.

A. Terry "Stop and Frisk"

In Terry, the Supreme Court held that where a police officer has *reasonable suspicion* to conclude that criminal activity may be afoot and that the persons with whom the officer is dealing may be armed and dangerous, the officer is "entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." Terry, 392 U.S. at 30, 88 S.Ct. at 1884-85. The holding in Terry has been explained and expanded in several subsequent Supreme Court decisions. We review these cases and relevant Tennessee case law to determine whether the police officer had reasonable suspicion to believe that the appellant was involved in criminal activity and was armed; and if so, whether the seizure of the pill bottle from the appellant's jacket exceeded the permissible scope of a Terry search.

1. Reasonable Suspicion

In State v. Watkins, 827 S.W.2d 293 (Tenn. 1992), the Supreme Court of Tennessee held that "a police officer may make an investigatory stop when the officer has a reasonable suspicion, supported by specific and articulable facts, that a criminal offense has been or is about to be committed." Id. at 294. When a stop is based solely on an informant's tip, the Aguilar-Spinelli test is helpful in determining whether the police had reasonable suspicion. State v. Pulley, 863 S.W.2d 29, 31 (Tenn. 1993); State v. Coleman, 791 S.W.2d 504, 505 (Tenn. Crim. App. 1989).

Usually, the Aguilar-Spinelli test is applied to determine whether or not

information supplied by an informant established probable cause to issue a search warrant or to make an arrest. Coleman, 791 S.W.2d at 505. Under the Aguilar-Spinelli test, when an officer relies on an informant's tip, and not on his own observations, the officer must show (1) the basis for the informant's knowledge and (2) the informant's credibility. State v. Jacumin, 778 S.W.2d 430, 432, 436 (Tenn. 1989). The Tennessee Supreme Court rejected the "totality of circumstances test" adopted in Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317 (1983), in favor of this two-pronged standard, originally set forth in Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509 (1964), and Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584 (1969). Jacumin, 778 S.W.2d at 436.

When applying the Aguilar-Spinelli test, the courts will look to the affidavit used to obtain the search warrant to determine whether its contents support a finding of probable cause. However, when the test is applied to a warrantless search conducted pursuant to Terry, there is no affidavit to examine. Instead, the courts must examine the testimony of law enforcement officers concerning the information supplied by the informant. Thus, we must review the testimony of Officer Blackwell to determine whether the information supplied to him by the informant established reasonable suspicion. Moreover, because we are applying the Aguilar-Spinelli test in a reasonable suspicion analysis, we remain cognizant of the fact that:

> reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.

Pulley, 863 S.W.2d at 32 (quoting Alabama v. White, 496 U.S. 325, 330, 110 S.Ct. 2412, 2416 (1990)).

With respect to the credibility prong of the Aguilar-Spinelli test, Officer

Blackwell testified that, although the informant had not been used by him in eight years, he was confident that the informant was reliable. Moreover, the informant's tip was corroborated by "approximately a half a dozen or so" anonymous tips that the appellant had been selling crack cocaine in that area. We conclude that this additional information established the reliability of the informant's information and thereby satisfied the credibility prong. See State v. Ballard, 836 S.W.2d 560, 561 (Tenn. 1992).

As to the basis of knowledge prong of the Aguilar-Spinelli test, the testimony of Officer Blackwell failed to explicitly reveal *how the informant knew* that the appellant was selling cocaine. In the context of a probable cause analysis, the Supreme Court in Spinelli held that:

> [i]n the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.

393 U.S. at 416, 89 S.Ct. at 589. Relevant Tennessee case law also makes it clear that, in order to establish probable cause, the informant must describe the manner in which he gathered the information, or the informant must describe the criminal activity of the suspects with great detail. See e.g., Earls v. State, 496 S.W.2d 464 (Tenn. 1973); State v. Smith, 477 S.W.2d 6 (Tenn. 1972); State v. Vela, 645 S.W.2d 765 (Tenn. Crim. App. 1982).

However, under a reasonable suspicion analysis, "[w]hen an informant reports an incident at or near the time of its occurrence, a court can often assume that the report is first hand, and hence reliable." Pulley, 863 S.W.2d at 32; see also State v. Green, No. 02C01-9209-CC-00201 (Tenn. Crim. App. at Jackson, Oct. 27, 1993). The informant in the present case told Officer

Blackwell that the appellant was at "Preacher's" selling "crack cocaine right then".

Moreover, we may look to the corroboration of several of the details of the report, such as the identity of the accused and the general location of the incident. Pulley, 863 S.W.2d at 32. The informant identified the appellant by name, "Anthony Bridges". Also, soon after he received the tip, Officer Blackwell located the appellant at Preacher's Place, the exact location that the informant provided. Thus, in the context of a reasonable suspicion analysis, the information available to Blackwell is constitutionally sufficient to establish the remaining prong of the Aguilar-Spinelli test.

Finally, Officer Blackwell stated in his affidavit that he was aware that the appellant "was a convicted felon and convicted drug dealer." Blackwell was also aware of the appellant's recent weapons charge, during which he had run from the police. We conclude that, given the information provided by the informant, numerous anonymous tips, Blackwell's observations, and Blackwell's knowledge of the appellant's prior criminal history, Officer Blackwell had reasonable suspicion that the appellant was armed and involved in criminal activity. Therefore, a Terry "stop and frisk" of the appellant was justified.

2. Seizure of the Pill Bottle

The more difficult question is whether Officer Blackwell could seize the pill bottle, felt during the frisk of the appellant. The rationale underlying the Terry frisk is the protection of the officer. Terry, 392 U.S. at 23, 88 S.Ct. at 1881. Therefore, a Terry frisk "must be limited to that which is necessary for the discovery of weapons. Id. at 26, 1882. However, this does not mean that only weapons may be seized pursuant to a Terry frisk. In Minnesota v. Dickerson, the

Supreme Court held that if, within the confines of a valid Terry frisk, an officer detects contraband through the sense of touch, the officer may seize the contraband. __ U.S. __, 113 S.Ct. 2130, 2137 (1993). This has become known as the Plain Feel Doctrine.

In Dickerson, the Court stated that an officer detects contraband when he "feels an object whose contour or mass makes its identity *immediately apparent*." Id. at 2137 (emphasis added). The phrase "immediately apparent" is somewhat misleading, as the Supreme Court treats "immediately apparent" and "probable cause" as synonymous terms.[4] In other words, "immediately apparent" simply means that the officer has probable cause to believe that the object felt is contraband. Dickerson, 113 S.Ct. at 2136-2137. See also Texas v. Brown, 460 U.S. 739, 741-742, 103 S.Ct. 1535, 1543 (1983). Moreover, the officer must develop probable cause within the context of a Terry search for weapons, or before the justification for the initial intrusion is at an end. See Brown, 460 U.S. at 738-739, 103 S.Ct. at 1541; State v. Jones, 653 A.2d 1040, 1050 (Md. App. 1995)(Moylan, J.), cert. granted, 661 A.2d 733 (Md. 1995). Probable cause developed after the justification ceases will not support a seizure of evidence under the Plain Feel Doctrine. Id. Thus, as one judge has observed,

> The data to be gathered ... must come to light incidentally in the course of a prior intrusion justified for some other purpose ... [Moreover,] [t]he time constraint on the officer's thinking process is that he must have concluded that probable cause exists before presuming to seize evidence under the [Plain Feel Doctrine]. The officer may not seize, or further search, in order to confirm suspicion. The officer may not seize, or further search, otherwise to develop probable cause. The officer may only seize after he already

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[4] We note that an attempt to reconcile the "immediately apparent" and "probable cause" language of Dickerson in our opinion in State v. White, No. 03C01-9408-CR-00277 (Tenn. Crim. App. at Knoxville, June 7, 1995), may have resulted in the application of an overly stringent probable cause standard. In White, an officer conducted a Terry frisk on the basis of information provided by several informants that the defendant was dealing drugs. While conducting the frisk, the officer felt a film canister hidden in the defendant's underwear. He proceeded to seize the canister. We concluded in White that the officer did not have probable cause to believe that the canister contained contraband.

> has probable cause. That is all the phrase "immediately apparent" connotes.

Jones, 653 A.2d at 1050 (Moylan, J.).

Officer Blackwell was engaged in a valid Terry frisk when he felt the pill bottle in the appellant's jacket pocket. Unlike the officer in Dickerson, Blackwell did not squeeze, slide or otherwise manipulate the object in the appellant's pocket. Dickerson, 113 S.Ct. at 2138. Rather, Blackwell immediately recognized the object. Thus, our inquiry must focus on whether the tactile discovery of the pill bottle in this case gave Blackwell, at that moment and without further searching, probable cause to believe that it was contraband. Probable cause has been defined as "'a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that ... the evidence is in the place to be searched.'" State v. Meeks, 876 S.W.2d 121, 124 (Tenn. Crim. App.1993)(citation omitted). Probable cause "does not demand any showing that such a belief be correct or more likely true than false." Brown, 460 U.S. at 742, 103 S.Ct. at 1543.

In Texas v. Brown, an officer stopped the defendant's vehicle at a routine driver's license checkpoint. 460 U.S. at 733-734, 103 S.Ct. at 1539. Standing alongside the driver's window of the defendant's car, the officer asked the defendant for his driver's license. Id. Simultaneously, the officer shined his flashlight into the car. Id. He thereby observed the defendant remove a green opaque party balloon, knotted about one-half inch from the tip, from the defendant's pocket. Id. The defendant then dropped the balloon onto the seat, next to his leg, and proceeded to open the glove compartment. Id. The officer slightly shifted his position in order to obtain a better view of the glove compartment. Id. He observed several small plastic vials, quantities of loose

white powder, and an open bag of party balloons. Id. The officer was aware that narcotics are frequently packaged in balloons similar to those found in the defendant's possession. Id. The officer seized the balloon dropped by the defendant. Id. After concluding that the officer was lawfully in a position to observe both the balloon and the contents of the glove compartment, the Court further determined that, pursuant to the Plain View Doctrine, the officer possessed probable cause to believe that the balloon contained contraband. Brown, 460 U.S. at 742-743, 103 S.Ct. at 1543. The Court observed that "[t]he fact that [the officer] could not see through the opaque fabric of the balloon is all but irrelevant: the distinctive character of the balloon itself spoke volumes as to its contents - particularly to the trained eye of the officer." Id. at 743, 1544.

"The Plain Feel Doctrine is an analogue of or variation on the Plain View Doctrine ... The Plain Feel Doctrine [therefore] shares all of the requirements and all of the characteristics of the Plain View Doctrine, save only for the substitution of fingers for eyes." Jones, 653 A.2d at 1044. See also Dickerson, 113 S.Ct. at 2137. Thus, the District of Columbia Circuit Court of Appeals suggested that police could have seized a "hard," "flat," "angular" object, felt during a consensual search of a suspect, if the officer could have related something "from his experience to correlate objects of this sort with criminal activity." United States v. Gibson, 19 F.3d 1449, 1451 (D.C. Cir. 1994).

In the instant case, Officer Blackwell received information from an informant that the appellant was selling crack cocaine at Preacher's Place and was carrying cocaine on his person. Blackwell was also aware that the appellant had previously been convicted of a drug-related offense. While Blackwell was conducting a lawful frisk of the appellant, he encountered an object which he "immediately recognized" to be a pill bottle. Blackwell testified that, based on his experience, he immediately "knew that it was the kind that a lot of other crack

dealers will use to keep their crack in." We conclude that Blackwell possessed probable cause to believe that the pill bottle contained crack cocaine. Therefore, the seizure of the pill bottle from the appellant's person was valid.

However, the constitutionality of a container seizure does not automatically determine the constitutionality of a container search. Brown, 103 S.W.2d at 1547 (Stevens, J., concurring). In other words, although Officer Blackwell could seize the pill bottle pursuant to the Plain Feel Doctrine, it is not entirely clear that, absent a warrant, he could also open the bottle and examine the contents. Nevertheless, Justice Stevens, concurring in the judgment of Texas v. Brown, suggested that a warrant would not be required if a container possessed a single purpose, and "'by [its] very nature [could not] support any reasonable expectation of privacy because [its] contents [could] be inferred from [its] outward appearance." Id. at 1548. He further suggested that the balloon in Brown was such a container. Id. Again, Officer Blackwell testified that he immediately recognized the pill bottle to be the "kind that a lot of other crack dealers will use to keep their crack in." We conclude that feeling the pill bottle under the circumstances of this case gave the officer a degree of certainty equivalent to the "plain feel" of the crack cocaine itself. Id. Therefore, the officer, having seized the bottle, could lawfully open the bottle and look inside. Thus, the subsequent arrest and the search incident to the arrest, resulting in the discovery of the small bag of crack cocaine, were valid.

III. Conclusion

Having determined that the seizure of the cocaine was valid, the judgment of conviction is affirmed.

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David G. Hayes, Judge

CONCUR:

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John H. Peay, Judge

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William M. Barker, Judge