IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MARCH SESSION 1995

STATE OF TENNESSEE,	)	
	)	
APPELLEE,	)	
	)	No. 03-C-01-9409-CR-00355
	)	
	)	Johnson County
v.	)	
	)	Lynn W. Brown, Judge
	)	
	)	(DUI, Child Endangerment, and
	)	Violation of Habitual Motor Offender
	)	Order)
DALE E. MORRELL,	)	
	)	
APPELLANT.	)	

FOR THE APPELLANT:

Randall E. Reagan
Attorney at Law
602 Gay Street, Suite 905
Knoxville, TN 37902
(Appeal Only)

Robert Y. Oaks
Assistant Public Defender
801 Elk Ave., Main Courthouse
Elizabethton, TN 37643
(At Trial and On Appeal)

OF COUNSEL:

David F. Bautista
District Public Defender
142 Market Street, East
Johnson, City TN 37605

FOR THE APPELLEE:

Charles W. Burson
Attorney General & Reporter
450 James Robertson Parkway
Nashville, TN 37243-0493

Michael J. Fahey, II
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

David E. Crockett
District Attorney General
Route 19, Box 99
Johnson City, TN 37601

Kent W. Garland
Assistant District Attorney General
Route 19, Box 99
Johnson City, TN 37601

OPINION FILED: _____

REVERSED AND DISMISSED

Joe B. Jones, Judge

O P I N I O N

The appellant, Dale E. Morrell, was convicted of driving while under the influence, fourth offense, a Class A misdemeanor, child endangerment, a Class A misdemeanor, and violating an habitual motor offender order, a Class E felony, pursuant to a plea bargain agreement. The trial court imposed the following sentences:

a) A fine of $1,000 and confinement for eleven months and twenty-nine days in the Johnson County Jail for DUI, fourth offense. The trial court suspended all but 180 days of the sentence and ordered that 100% of the remaining sentence be served.

b) A fine of $1,000 and confinement for eleven months and twenty-nine days in the Johnson County Jail for child endangerment. The trial court suspended all but 30 days of the sentence and ordered that 100% of the remaining sentence be served.

c) Confinement for one year and six months in the Department of Correction.

The trial court ordered that the three sentences be served consecutively. The effective sentence imposed was fines totaling $2,000 and 210 days confinement in the Johnson County Jail.

The appellant reserved the following questions for appellate review pursuant to Tenn. R. App. P. 3(b)(2) and Tenn. R. Crim. P. 37(b)(iv). The questions preserved are: "[W]hether the stop and subsequent arrest of the defendant was based upon a reasonable and articulable suspicion under the Tennessee and United States Constitutions and whether the roadblock from which the officer made his initial observations resulting in the eventual arrest of the defendant was valid under the Tennessee and United States Constitutions."

The judgment of the trial court is reversed and the prosecution against the appellant is dismissed. The stop made by the law enforcement officer was not supported by a reasonable suspicion based upon specific and articulable facts, as required by the Tennessee and United States Constitutions. The remaining issue, the validity of the roadblock, is therefore moot.

On June 6, 1993, Trooper Don Wilson and two Johnson County deputy sheriffs, Mark Hutchinson and Rick Courtner, established a roadblock on Highway 91 in Johnson

County. The stated purpose of the roadblock was to check the driver's license and vehicle registration of each driver travelling on Highway 91. The roadblock was established to curtail motorcycles racing between the roadblock and a nearby state park.[1]

The appellant and a companion were travelling westbound on Highway 91. Deputy Hutchinson watched the appellant's vehicle approach the roadblock. The appellant turned into a driveway before reaching the roadblock. The driveway was 316 feet from the roadblock. When the appellant made the turn, Hutchinson pursued the appellant's vehicle. He stated that the sole purpose of the pursuit was to check the appellant's driver's license and vehicle registration. According to Hutchinson:

> It is -- it's a routine practice for us as officers that when anyone turns off prior to coming to a roadblock that we go check that person for driver's license to check to see if they are valid.

The private driveway was 263 1/2 feet in length -- the distance from the highway to the residence. The appellant had traversed 180 feet before Deputy Hutchinson reached the vehicle. Hutchinson followed the appellant approximately 80 feet. During this time, the front of the police cruiser was only six to eight feet from the rear of the appellant's vehicle. Deputy Hutchinson did not activate the lights on the cruiser, use the siren, or otherwise direct the appellant to stop.

When the appellant reached the end of the driveway, he stopped and exited the vehicle. Deputy Hutchinson stopped behind the appellant's vehicle. The appellant could not produce a driver's license. The appellant also appeared to be under the influence of an intoxicant. He emitted an odor of an alcoholic beverage. The appellant failed the field sobriety tests. Deputy Hutchinson arrested the appellant for driving while under the influence.

Deputy Hutchinson candidly admitted that he knew the place where the appellant turned was a private driveway. He further admitted that he did not know who lived in the residence at the end of the driveway; and, as far as he knew, the appellant could have lived in the residence.

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[1]Deputy Hutchison testified that they conduct roadblocks "frequently" near the state park during the summer months.

The record establishes that the appellant was driving slowly along the driveway. However, the transcript of the suppression hearing is devoid of evidence that (a) the appellant committed a traffic infraction when he turned into the driveway or (b) the appellant was driving erratically while Deputy Hutchinson followed him. Thus, the appellant apparently made a legal turn from the highway into the driveway and exhibited no behavior indicative of criminal activity.

Issues preserved pursuant to Tenn. R. App. P. 3(b)(2) and Tenn. R. Crim. P. 37(b)(iv) are determined in the same manner as issues raised in an appeal as of right. Since the thrust of the appellant's appeal challenges the ruling of the trial court denying his motion to suppress evidence, the time-tested rules applicable to the findings of the trial court apply.[2]

In this jurisdiction, the findings of fact made by a trial court in resolving the merits of a motion to suppress are binding upon this Court if the evidence adduced at the suppression hearing does not preponderate against these findings.[3] However, this Court is not bound by the trial court's conclusions of law or how the trial court applied the law to the facts. Thus, this Court must examine the record to determine if the state has met its burden of showing that the evidence adduced at the suppression hearing preponderates against the findings made by the trial court.

In the landmark case of Terry v. Ohio, the United States Supreme Court held that a law enforcement officer may temporarily seize a citizen if the officer has a reasonable suspicion, based upon specific and articulable facts, that a criminal offense has been, is being, or is about to be committed.[4] Such seizures are commonly called Terry stops or

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[2]State v. Moore, 775 S.W.2d 372, 377-78 (Tenn. Crim. App.), per. app. denied (Tenn. 1989).

[3]Moore, 775 S.W.2d at 374.

[4]392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); see also State v. Watkins, 827 S.W.2d 293, 294 (Tenn. 1992); State v. Scarlett, 880 S.W.2d 707, 709 (Tenn. Crim. App. 1993); State v. Little, 854 S.W.2d 643, 648 (Tenn. Crim. App.), per. app. denied (Tenn. 1992); State v. Brothers, 828 S.W.2d 414, 415 (Tenn. Crim. App.1991), per. app. denied (Tenn. 1992); State v. Oody, 823 S.W.2d 554, 561 (Tenn. Crim. App.), per. app. denied (Tenn. 1991); State v. Coleman, 791 S.W.2d 504, 505 (Tenn. Crim. App. 1989), per. app. denied (Tenn. 1990); State v. Blankenship, 757 S.W.2d 354, 356 (Tenn. Crim. App.), per. app. denied (Tenn. 1988); State v. Denson, 710 S.W.2d 524, 525 (Tenn. Crim. App. 1985); State v. Hellum, 664 S.W.2d 314, 317 (Tenn. Crim. App. 1983), per. app. denied (Tenn. 1984); Johnson v. State, 601 S.W.2d 326, 328 (Tenn. Crim. App.), per. app. denied (Tenn. 1980).

investigatory stops. The Terry doctrine applies to citizens riding in a motor vehicle.[5]

The purpose of a Terry stop is to permit a law enforcement officer to obtain a citizen's identity, question the citizen, and, when appropriate, maintain the status quo momentarily while the officer obtains additional information. However, the scope of the investigation "must be carefully tailored to its underlying justification" -- the officer's reasonable suspicion that a crime has been, is being, or is about to be committed.[6] The detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop; and the investigative methods used by the officers should be the least intrusive means available to either verify or refute the officer's suspicions.[7]

A Terry stop is never justified when it is based upon the mere hunch or inarticulate suspicion of the law enforcement officer.[8] The touchstone of a Terry stop is the specificity of the information possessed by the law enforcement officer when he stops a citizen.[9] These articulable facts must be reviewed objectively to determine if the suspicion is reasonable. If subjective beliefs alone were the test, "the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police."[10]

In determining whether a law enforcement officer's suspicion was supported by specific and articulable facts, the court must consider the totality of the circumstances --

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[5]Watkins, 827 S.W.2d at 294; Scarlett, 880 S.W.2d at 709; Little, 854 S.W.2d at 648; Brothers, 828 S.W.2d at 414; Oody, 823 S.W.2d at 561; State v. Jones, 802 S.W.2d 221, 223 (Tenn. Crim. App. 1990), per. app. denied (Tenn. 1991); Coleman, 791 S.W.2d at 504-05; Blankenship, 757 S.W.2d at 356; Denson, 710 S.W.2d at 525; Hellum, 664 S.W.2d at 317; State v. Yarbro, 618 S.W.2d at 521, 523 (Tenn. Crim. App.), per. app. denied (Tenn. 1981); Johnson, 601 S.W.2d at 327-28.

[6]Florida v. Royer, 460 U.S. 491, 499-500, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 229, 238 (1983).

[7]Florida v. Royer, 460 U.S. at 500, 103 S.Ct. at 1325-26, 75 L.Ed.2d at 238; United States v. Seelye, 815 F.2d 48, 50 (8th Cir. 1987).

[8]State v. Bryant, 678 S.W.2d 480, 482 (Tenn. Crim. App. 1984), cert. denied, 469 U.S. 1192, 105 S.Ct. 967, 83 L.Ed.2d 971 (1985).

[9]Moore, 775 S.W.2d at 377.

[10]Beck v. Ohio, 379 U.S. 89, 97, 85 S.Ct. 223, 229, 13 L.Ed.2d 142, 148 (1964); see Brown v. Texas, 443 U.S. 47, 51, 99 S.Ct. 2637, 2640, 61 L.Ed.2d 357 (1979); Delaware v. Prouse, 440 U.S. 648, 654-55, 99 S.Ct. 1391, 1396-97, 59 L.Ed.2d 660 (1979).

the entire picture -- the picture perceived by the officer prior to making a Terry stop.[11] The court must consider, among other things, the objective observations of the officer, the information the officer obtained from an informant, the reliability of the informant and the specificity of the informant's information, information received from other law enforcement officers and agencies, and the reasonable inferences which may be drawn from the officer's observations and the information available to the officer.[12] Other factors which may be considered are the character of the area where the stop occurred, any furtive movement made by the suspect, and a suspect's attempt to avoid being stopped by the officer.[13] The state must establish objectively reasonable suspicion by a preponderance of the evidence.[14]

The trial court found that Deputy Hutchinson did not stop the appellant. The court concluded that the appellant voluntarily stopped and exited his vehicle. The court further concluded that Deputy Hutchinson had reasonable suspicion, based on specific and articulable facts, to stop the appellant. The reasonable suspicion was the appellant turning into the driveway over three hundred feet before the roadblock. The evidence contained in the record preponderates against these findings of fact. Some of the salient facts recited by the trial court were unknown to Deputy Hutchinson at the time he pursued and stopped the appellant.

In determining whether an accused has been stopped or "seized" by a law enforcement officer, the courts apply what has been described as the "reasonable person" standard.[15] A law enforcement officer seizes a person when in view of all the circumstances surrounding the incident, a reasonable person believes that he or she is not

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[11]Alabama v. White, 496 U.S. 325, 330-31, 110 S.Ct. 2412, 2416, 110 L. Ed. 2d 301, 309 (1990); Watkins, 827 S.W.2d at 295; Binion, 880 S.W.2d at 709; Little, 854 S.W.2d at 648; Hellum, 664 S.W.2d at 317.

[12]Watkins 827 S.W.2d at 294; Scarlett, 880 S.W.2d at 709.

[13]See Hawkins v. State, 543 S.W.2d 606, 609-10 (Tenn. Crim. App. 1976).

[14]United States v. Matlock, 415 U.S. 164, 177 n.14, 94 S.Ct. 988, 996 n.14, 39 L.Ed.2d 242 n.14 (1974).

[15]Michigan v. Chesternut, 486 U.S. 567, 574, 108 S.Ct. 1975, 1980, 100 L. Ed. 2d 565, 572 (1988).

free to leave.[16]

In this case, the totality of the circumstances establishes that Deputy Hutchinson seized the appellant within the meaning of the Fourth Amendment to the United States Constitution and Article I, § 7 of the Tennessee Constitution. Deputy Hutchinson followed the appellant's motor vehicle within six to eight feet. Moreover, when a law enforcement officer pulls behind a vehicle and follows it within six to eight feet, a reasonable person would conclude that the officer wanted the operator of the vehicle to pull to the side of the roadway. A reasonable person would have every reason to believe that Deputy Hutchinson wanted him to stop. In addition, Deputy Hutchinson testified that he did not think it was necessary to activate his blue lights. He knew it was a matter of seconds before the appellant would reach the end of the driveway and be forced to stop his vehicle. He also knew that the appellant could not turn around and return to the highway because his police cruiser was blocking the single-lane driveway.

In this case, Deputy Hutchinson did not have a reasonable suspicion, based upon specific and articulable facts, that the appellant had committed a crime, was committing a crime, or was about to commit a crime. To the contrary, he was simply acting upon a "hunch" or "inarticulable facts" when he stopped the appellant.[17] Hutchinson testified that "it's a routine practice for us as officers that when anyone turns off prior to coming to a roadblock that we go check that person for driver's license to check to see if they are valid." In short, Hutchinson would have chased and stopped every motor vehicle that did not reach the roadblock regardless of the existing facts and circumstances.

Besides the turn into a private driveway, Deputy Hutchinson offered no articulable facts to support a reasonable suspicion of criminal activity. When he saw the appellant turn, he knew that the appellant was turning into a private driveway. Hutchinson candidly admitted that he did not know who lived at the end of the driveway. As far as he knew, the appellant was simply going home. Furthermore, Deputy Hutchinson did not observe the appellant commit any offense as he drove the motor vehicle along the highway and

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[16]Chesternut, 486 U.S. at 573, 108 S.Ct. at 1979, 100 L. Ed. 2d at 572; see INS v. Delgado, 466 U.S. 210, 215, 104 S.Ct. 1758, 1762, 80 L. Ed. 2d 247, 255 (1984); United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L. Ed. 2d 497, 509 (1980).

[17]State v. Binion, 900 S.W.2d 702, 706 (Tenn. Crim. App. 1994).

driveway. This Court has previously condemned the practice of stopping a motorist simply to check the operator's license.[18]

In Murphy v. Commonwealth,[19] a motorist made a lawful turn approximately 350 feet from a roadblock. In holding that the officer was not entitled to stop the motorist simply because the motorist had turned, the Virginia Court said:

> "[W]e find that the act of a driver in making a lawful right turn 350 feet before a roadblock does not give rise to a reasonable suspicion of criminal activity unless the driver's turn or action is coupled with other articulable facts. . . .[20]

The decision this Court renders today is limited to the facts contained in the record. As this Court stated in Binion, the circumstances surrounding an effort to avoid a roadblock "may by itself constitute reasonable suspicion that a criminal offense has been or is about to be committed."[21] This Court set forth the factors to be considered in making this determination.[22]

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JOE B. JONES, JUDGE

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[18]State v. Westbrooks, 594 S.W.2d 741, 743 (Tenn. Crim. App. 1979).

[19]384 S.E.2d 125 (Va. Ct. App. 1989).

[20]384 S.E.2d at 128.

[21]Binion, 900 S.W.2d at 705.

[22]Id. at 706.

CONCUR:

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DAVID H. WELLES, JUDGE

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WILLIAM M. BARKER, JUDGE