IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JUNE 1995 SESSION

STATE OF TENNESSEE,	*	C.C.A. #01C01-9502-CC-00037
APPELLANT,	*	MARSHALL COUNTY
VS.	*	Hon. Charles Lee, Judge
JAMES E. SANDERS,	*	(State Appeal)
APPELLEE.	*	

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OPINION FILED:_____

AFFIRMED

William M. Barker, Judge

OPINION

The State of Tennessee appeals from the Marshall County Criminal Court's order suppressing marijuana seized from the defendant's vehicle on June 28, 1994. The State argues that the trial court erroneously concluded that law enforcement officers' stop of the defendant was unlawful. We affirm the ruling of the trial court.

Approximately one month before the defendant's arrest, Captain Norman Dalton of the Marshall County Sheriff's Department met with an informant who "wanted to help...out on some drug traffic." The informant said that the defendant would deliver "several pounds" of marijuana from Nashville to Marshall County. He described the defendant as "an elderly white male, probably in his fifties," who lived and operated a business in Nashville. Dalton and Sheriff Les Helton met with the informant two weeks later. The informant related "basically" the same information, and added that he had purchased "quite a bit" of marijuana from the defendant in the past, though not in Marshall County.

The informant was a Marshall County inmate on work release at the time he first called to volunteer information. He previously had been incarcerated for narcotics offenses in Bedford County and in federal prison. Dalton and Helton did not record their meetings with the informant, nor did they try to independently corroborate the information they received about the defendant. After the second meeting, Dalton contacted the Drug Enforcement Administration about the informant. He learned that the informant "had helped" in the past, but was "just like any other informant." Dalton obtained no information about prior arrests, convictions, or drug seizures that had resulted from information provided by this informant.[1]

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[1] Dalton conceded that at the preliminary hearing he had testified he called the DEA "several years back." He claimed that following the preliminary hearing, he was "reminded" by the prosecutor that he had also contacted the DEA during the

Pursuant to the officers' instructions, the informant tried to call the defendant from a cellular phone during the second meeting but was unsuccessful.[2] Dalton and Helton then instructed the informant to contact the defendant and to arrange a purchase of five pounds of marijuana. The transaction was to be made at a prearranged location near Unionville Road in Marshall County. The informant would be equipped with a wire transmitter, and officers would monitor the transaction.

On June 28, 1994, the informant called Sheriff Helton around lunch time and then again at approximately 3:00 p.m. He said that the defendant "was on his way" and would arrive at 4:45 to 5:00 p.m. in a white Pontiac or pickup truck. Helton contacted Dalton and members of the 17th Judicial District Drug Task Force. Dalton and Officer Robert Phelan went to the prearranged location to meet with the informant at approximately 4:00 p.m. The informant told Dalton that the defendant would arrive at 4:30 p.m. in either a white Pontiac or pickup truck. The information was radioed to other officers who surrounded the area in marked and unmarked cars. Dalton placed a transmitter in the rear of the informant's truck, and then began to set up video equipment to record the transaction. As he and Phelan were doing so, the informant said: "There he goes. He's here. He's going on by. He's in a different vehicle and he's got another male with him. I don't know who he is." The informant also said that "he" was in a brown car.

Sheriff Helton was monitoring the informant while waiting near the area with Chief Deputy Sheriff Billy Lamb. Around 4:00 p.m., which was "much sooner than expected," Helton heard the informant state, "Here they come; he's in a different car."

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investigation of the defendant.

[2] Dalton and Helton did not try to verify that the number called by the informant related in any way to the defendant.

He also said, "That's him." A cream colored Ford driven by a "male white" passed Helton's car going the opposite direction on a moderately traveled county road. The driver was "close" to the description provided by the informant. Helton radioed for Chris White, Director of the Drug Task Force, to follow the car and to "run the tag" number to check the owner and make of the vehicle. White responded that the "tag number does not match James Sanders." Helton did not recall whether White also said that the tag number was registered to a Chevrolet, and not a Ford. When the car turned as if to head toward Nashville, Helton ordered White to stop the car. Both Dalton and Helton conceded that the car was a different make and color than the informant had indicated.

White had arrived at the scene with Officer Tony Collins in an unmarked car at approximately 4:05 or 4:10 p.m. He had been briefed about the informant's tip, and he was monitoring the informant's transmitter. At approximately 4:30 p.m., White heard the informant say, "That's the car driving by." Ten or fifteen seconds later a tan or brown Ford LTD drove by White's location. Sheriff Helton instructed White to follow the car and to check the vehicle tag number. White learned from the Marshall County dispatcher that the tag was registered to a 1980 four door Chevrolet and under the name of Naomi Johnson.[3] Sheriff Helton instructed him to stop the car, which he did by flashing his lights and gesturing for the driver to pull over.

White ordered the defendant to step from the vehicle and to walk to the rear of the car. White was in possession of a weapon but it was not drawn. Officer Collins, however, had drawn his weapon to "cover" the passenger in the defendant's car. White asked the defendant for identification, and the defendant produced his

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[3] As noted, Helton did not recall being given the exact information with regard to the name of Naomi Johnson or the make of the vehicle. Moreover, White conceded that he did not relate the name of Naomi Johnson or the make of the car at the preliminary hearing, which was only two weeks after the arrest. Instead, he refreshed his memory before the suppression hearing by examining the dispatcher's log.

driver's license. White told the defendant that he had "probable cause" to believe he was in possession of marijuana, but he did not tell the defendant that he had been stopped for the improper vehicle registration. According to White, the defendant consented orally to a search of the car, and then signed a written consent when other officers arrived. Marijuana was found in a cardboard box in the trunk of the car, when the defendant said, "What you are looking for is in that box."

White maintained during the suppression hearing that he believed there was probable cause for the stop based on the information provided by the informant and the statements made at the scene by the informant. White conceded that the information about the make and color of the defendant's car, as well as the defendant's time of arrival, had been inaccurate. He considered the registration violation to be "somewhat significant," although not "in and of itself" the reason he stopped the defendant. Moreover, he conceded that he does not normally stop vehicles for traffic violations as director of the drug task force, and that he would not have done so in this case but for the information about the suspected drug activity.

Officer Tony Collins testified that the license tag was checked before the stop was made, though he did not recall whether he or White ran the check. He recalled that the "car did not fit the tags," and he believed that it was registered under a female name. According to Collins, the defendant was stopped "because we had information that he was transporting narcotics." He conceded that the car was not the same color or make as the information that had been provided. After the defendant's car was stopped, Collins approached with his weapon drawn and pointed it at the passenger.

Collins made notes of the incident two days after the arrest. The notes

indicated that "as the car was going by, [the] Sheriff... informed us by radio that 'that was the man' and to effect a stop." Collins acknowledged that a line had been drawn through the words "effect a stop," and replaced with "and get a tag number." Collins also acknowledged that the notes did not reflect the result of the license tag check. He explained that the notes were revised after he reviewed them with White.

I

The State argues that the officers had a reasonable suspicion that the defendant was involved in a drug transaction, which justified an investigative stop of the vehicle. The State also claims that the trial court applied the wrong standard by requiring a probable cause showing for the stop. We agree that the trial court appeared to have applied the incorrect legal standard; however, the record fully supports the trial court's factual findings and, in our opinion, the same result.[4]

A police officer may make an investigatory stop of a motor vehicle 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. State v. Watkins, 827 S.W.2d 293, 294 (Tenn. 1992); see Terry v. Ohio, 392 U.S. 1, 21 (1968). In determining whether this standard was met, the court must consider the totality of the circumstances, including the officer's "objective observations, information obtained from other police officers or agencies, information obtained from citizens, and the pattern of operation of certain offenders." State v. Watkins, 827 S.W.2d at 294 (citing, United States v. Cortez, 449 U.S. 411, 418 (1981)).

An investigatory stop based on reasonable suspicion requires "a lower

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[4] The Court concluded that: "[T]wo things are required for there to be probable cause. One, which is lacking here, is that the information must be from a reliable source. That was absent in this case."

quantum of proof than probable cause." State v. Pully, 863 S.W.2d 29, 31 (Tenn. 1993)(quoting, United States v. White, 648 F.2d 29, 42 (D.C.Cir. 1981)). In this regard, "[r]easonable 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." Alabama v. White, 496 U.S. 325, 330 (1990).

Nonetheless, when the investigative stop is based on the tip of an informant, "the danger of false reports, through police fabrication or from vindictive or unreliable informants, becomes a concern." State v. Pully, 863 S.W.2d at 31. For this reason, Tennessee courts have required the State to show both the informant's reliability and his or her basis of knowledge to justify the stop. Id.; State v. Coleman, 791 S.W.2d 504 (Tenn. Crim. App. 1989)(investigative stop); see also State v. Jacumin, 778 S.W.2d 430, 436 (Tenn. 1989)(applying two-prong analysis to search warrants); State v. Marshall, 870 S.W.2d 532, 539 (Tenn. Crim. App. 1993)(applied to warrantless arrest).

The State contends that it made a showing under the prevailing standards of the informant's basis of knowledge and reliability. We agree that the informant's basis of knowledge could be marginally inferred from his statement that he had previously purchased marijuana from the defendant, but disagree that this informant was shown to be reliable. The most common way to establish an informant's reliability is by showing that his or her prior information has led to arrests, convictions, or seizures. See McCray v. Illinois, 386 U.S. 300, 304 (1967); State v. Thomas, 818 S.W.2d 350, 353 (Tenn. Crim. App. 1991). Here, Captain Dalton learned that the informant "had helped" federal officials in the past, but he could not state whether the

"help" led to any prior arrests, convictions, or seizures of drugs. Nothing else was offered to show the informant's reliability, or the intrinsic reliability of the information. See, e.g., State v. Ballard, 836 S.W.2d 560, 561 (Tenn. 1992). Thus, the evidence does not preponderate against the trial judge's finding. State v. Woods, 806 S.W.2d 205, 208 (Tenn. Crim. App. 1990).

The State insists that a deficiency with regard to the informant's reliability may be overcome by officers' independent corroboration of the information, and it argues on appeal that corroboration in this case included the description that matched the defendant, the defendant's approximate time of arrival, and the informant's highly agitated state when the defendant arrived due to his "fear for his life." In State v. Marshall, supra, our court discussed the nature of corroborating evidence:

> It is difficult to define with precision the quantity of corroboration necessary to demonstrate the informant's veracity. Certainly, more than the corroboration of a few minor elements of the story is necessary, especially if those elements involve non-suspect behavior. It is equally certain, though, that the police need not corroborate every detail of an informant's report to establish sufficient evidence of his veracity.

870 S.W.2d at 539 (quoting, United States v. Bush, 647 F.2d 357, 363 (3rd Cir. 1981)).

The trial judge addressed the State's contention in this regard and found that corroboration was lacking:

> Now, the State says...we were able to corroborate what the informant said. Well, the information was extremely vague to begin with.....White, male, in his 50s from Nashville. Four things. And that he would be at a certain place at a certain time and he would be alone. And then you start looking at what the informant was wrong on, and in effect this case boils down to whether or not the information supplied by the informant at the scene [was sufficient].

The evidence again does not preponderate against the trial court's finding. The informant told officers that a white male approximately fifty years of age would arrive

in Marshall County from Nashville. Officers did nothing in the time leading up to the arrest to check on the defendant or to verify any of the information. Moreover, the extremely vague description they had been provided was coupled with other information that simply proved to be wrong: the defendant was driving a brown Ford, not a white Pontiac or pickup; the defendant arrived with another person, not alone; and the defendant arrived at a different time than expected. When a brown car driven by an "older" white male approached the area, the informant began to indicate, in effect, "That's him." Nothing observed by officers up to that point had corroborated the information they had received from the informant. Moreover, the State's remaining contention-- that the information was corroborated by the informant's agitated state and his fear of the defendant-- is speculative at best. Accordingly, we agree with the trial court's finding that there was insufficient corroboration of any of the information provided by the informant either before the day of the arrest or at the scene. The State failed in its burden to show that officers had reasonable suspicion to justify an investigative stop for drug-related activity.

II

The State argues in the alternative that officers properly stopped the defendant for driving a vehicle with an unlawful license tag, and that the search that ensued was pursuant to the defendant's valid consent. The trial court rejected this claim; it found that the alleged traffic violation had "nothing to do with [the] case" and was merely a pretext to make the stop:

> I believe you are whistling in the dark if you think that I believe that this man was stopped because he had a bad tag on his car. He was stopped because the officers thought he had drugs in his car.
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> They could [have made the stop], but that is not what they do. Under ordinary circumstances, if the Drug Task Force is driving down the road and they see a car come by them

with bad tags on it, they are not going to stop them.

Accordingly, the trial court ruled that the evidence seized pursuant to the stop had to be suppressed.

Tennessee has long condemned pretextual stops and arrests under article 1, section 7 of our state constitution. Robertson v. State, 184 Tenn. 277, 284, 198 S.W.2d 633, 634-35 (1947); Cox v. State, 181Tenn.344, 348, 181 S.W.2d 338, 340 (Tenn. 1944); see also State v. Lorraine Livingston Byrd, No. 03C01-9403-CR-00108 (Tenn. Crim. App., Knoxville, March 15, 1995)("It is well established that pretextual stops are prohibited in Tennessee"); State v. Jack Protzman, No. 02C01-9105-CR-00115 (Tenn. Crim. App., Jackson, June 10, 1992); State v. Sidney Williams, No. 173 (Tenn. Crim. App., Knoxville, Apr. 30, 1991). Likewise, the United States Supreme Court and other federal and state courts have disapproved of the pretextual use of police power under the fourth amendment to the United States Constitution. See, e.g., United States v. Lefkowitz, 285 U.S. 452, 467 (1932)(an arrest may not be used as a pretext to search for evidence); Wayne R. LaFave, Search and Seizure, Vol. 1, §1.4(e)(cases cited therein and accompanying text.).

A pretextual stop occurs "when the police use a legal justification to make the stop in order to search a person or place...for an unrelated serious crime for which they do not have the reasonable suspicion necessary to support a stop." United States v. Guzman, 864 F.2d 1512, 1515 (10th Cir. 1988); United States v. Millan, 36 F.3d 886, 888 (9th Cir. 1994); see also Robertson v. State, 184 Tenn. at 284, 198 S.W.2d at 635-36. The "classic example" of a pretextual stop is when a law enforcement officer stops a driver for a minor traffic violation in order to investigate a suspicion that the driver is engaged in unlawful drug activity. United States v. Guzman, 864 F.2d at 1515; see also LaFave, Search & Seizure, Vol. 1, §1.4(e) at 93.

Determining whether a stop is in fact pretextual has been problematic for the courts. Our court has addressed the issue in the unpublished opinion of State v. Sidney Williams, supra. There, the defendant was stopped for going 68 miles per hour in a 65 miles per hour zone. Prior to making the stop, the officer followed the defendant's vehicle for an extended distance and called for "backup," even though he had no "objectively suspicious circumstances." Statistical evidence showing the practices of highway patrolman in the area revealed the extremely small number of stops that were made in that area under similar circumstances.

Our court held that to determine whether an investigative stop is pretextual, "the proper inquiry is whether a reasonable officer would have made the seizure in the absence of illegitimate motivation." Id., slip op. at 6 (quoting, United States v. Smith, 799 F.2d 704, 708 (11th Cir. 1986)(emphasis in original)). The court reconciled the standard with Maryland v. Macon, 472 U.S. 463, 470-71 (1985):

> Whether a Fourth Amendment violation has occurred 'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time' and not on the officer's actual state of mind at the time the challenged action was taken.

(quoting, Scott v. United States, 436 U.S. 128, 136 (1978)). The court concluded that the officer's conduct was not "objectively reasonable," and that the evidence seized following the stop should have been suppressed. Williams, supra, slip op. at 8. Williams has been cited with approval by this court in Byrd and Protzman.[5]

The State concedes that the trial court's ruling that the stop was pretextual was correct under Williams; however, it asks that we depart from this decision to adopt

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[5] The "would" analysis has been followed by three federal circuit courts of appeal. United States v. Cannon, 29 F.3d 472, 476 (9th Cir. 1994); United States v. Guzman, 864 F.2d at 1517; United States v. Smith, 799 F.2d at 708.

a broader approach that validates any stop wherein probable cause was present, regardless of the officer's conduct or motivations in making the stop. The State cites, among other cases, United States v. Ferguson, 8 F.3d 385 (6th Cir. 1993), cert. denied, 115 S.Ct. 97, 130 L.Ed.2d 47 (1994). In Ferguson, the Sixth Circuit, en banc, recognized that a split exists between those federal circuits that ask whether a reasonable officer would have made the stop and those that ask whether an officer could have made the stop. Id. at 388.[6] The Court majority favored a third approach:

> We hold that so long as the officer has probable cause to believe that a traffic violation has occurred or was occurring, the resulting stop is not unlawful and does not violate the Fourth Amendment [citation omitted]. We focus not on whether a reasonable officer 'would' have stopped the suspect (even though he had probable cause to believe that a traffic violation had occurred), or whether any officer 'could' have stopped the suspect (because a traffic violation had in fact occurred), but on whether this particular officer in fact had probable cause to believe that a traffic offense had occurred, regardless of whether this was the only basis or merely one basis for the stop. The stop is reasonable if there was probable cause, and it is irrelevant what else the officer knew or suspected about the traffic violator at the time of the stop....

Id. at 391 (Jones & Keith, JJ, dissenting).[7] The court stressed that the existence of probable cause must be known to the officers prior to making the stop, and that the court would not make the determination based on events that occurred after the stop

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[6] The following circuits use the "could" analysis. United States v. Scopo, 19 F.3d 777 (2d Cir.), cert. denied, 115 S.Ct. 207, 130 L.Ed.2d 136 (1994); United States v. Hawkins, 811 F.2d 210, 213 (3d Cir.), cert. denied, 484 U.S. 833 (1987); United States v. Causey, 834 F.2d 1179, 1184 (5th Cir. 1987); United States v. Trigg, 925 F.2d 1064, 1065 (7th Cir.), cert. denied sub. nom., 502 U.S. 962 (1991); United States v. Maejia, 928 F.2d 810, 815 (8th Cir. 1991).

[7] Ferguson and cases adopting a "could" analysis have been criticized as "poorly reasoned decisions." See LaFave, supra, §1.4(e) at Supp. 28. LaFave notes that the decisions miss the critical point for constitutional analysis, which is whether the seizure was arbitrary. In this regard, the question is not why the officers deviated from their usual practices but whether they did in fact depart from such practices. Id. The risk in the broad based "could" approach is that it gives "the police virtual carte blanche to stop people because of the color of their skin or for any other arbitrary reason." LaFave, supra, §1.4(e) at Supp. 28. See United States v. Ferguson, 8 F.3d at 396-398 (Jones, J., dissenting).

had been made. Id.

We are not compelled to follow either Ferguson or the unpublished case of Williams. Moreover, it is unnecessary to reach this issue to resolve this case. Instead, we conclude that, even assuming that officers had reason to stop the defendant for the vehicle's improper tag, the trial court's suppression of the evidence was proper. As noted, a traffic stop is a limited seizure and is more like an investigative detention than a custodial arrest. United States v. Walker, 933 F.2d 812, 815 (10th Cir. 1991); see Terry v. Ohio, 392 U.S. at 20. In this regard, the United States Supreme Court has said: "[T]he usual traffic stop is more analogous to a so-called 'Terry stop' ... than a formal arrest." Berkemer v. McCarty, 468 U.S. 420, 439 (1984).

In analyzing an investigative detention under Terry, a court must consider "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." Terry v. Ohio, 392 U.S. at 19-20 (emphasis added); see also Florida v. Royer, 460 U.S. 491, 500 (1983)(plurality opinion)("The scope of the detention must be carefully tailored to its underlying justification."). Thus, where a motor vehicle is stopped for a routine traffic offense, the scope of the resultant detention must be strictly limited to the enforcement of that offense. United States v. Ramos, 42 F.3d 1160, 1163 (8th Cir. 1994); United States v. Walker, 933 F.2d at 815; United States v. Guzman, 864 F.2d at 1519. The scope of the stop and the detention may be expanded only where the officer develops a reasonable, articulable suspicion that other criminal activity is afoot. In other words, the detention must be temporary, last no longer than necessary to effectuate the purpose of the stop, and involve the least intrusive means available to either verify or refute that an offense has been or is being committed. Florida v. Royer, 460 U.S. at 499-500.

As we have already held, the officers in this case did not have a reasonable, articulable suspicion that the defendant was involved in drug-related activity. Assuming that the officers did acquire information relative to a traffic violation,[8] their conduct immediately following the stop went well beyond that necessary to investigate that offense. The defendant was ordered from the car by Director White while Agent Collins drew his weapon and pointed it at a passenger. The defendant was asked to produce identification, and he complied by producing a drivers license in his own name. Additional officers began arriving at the scene. The defendant was not told that he was stopped for the license tag, however, nor was he asked about the car he was driving. Instead, officers directly told him that they had probable cause to believe he was transporting narcotics, and they immediately seized him and asked for his consent to search. See, e.g., United States v. Walker, 933 F.2d at 815.

Under these facts, it is clear that the conduct of the officers was not reasonably related in scope to the circumstances which justified the stop in the first place, i.e, the alleged tag violation. Despite having stopped the defendant for a traffic offense, the officers immediately exceeded the purpose of the stop by investigating the matter of drugs without a reasonable suspicion of such behavior. Accordingly, we view their conduct as improperly intrusive and unreasonable under the fourth amendment to the United States Constitution and article 1, section 7 of the Tennessee Constitution.

Conclusion

For the foregoing reasons we affirm the trial court's ruling suppressing the

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[8] The trial judge's resounding rejection of the tag violation as a basis for the stop was coupled with his finding that Sheriff Helton did not testify that he had the complete information relative to the violation prior to ordering the stop to be made. Also, the obvious conflicts in the testimony of White and Collins, although not resolved specifically by the trial judge, raised questions as to the information the officers had before the stop was made.

evidence in this case. Given our conclusions with regard to the stop and officers' conduct immediately following the stop, we need not decide the issues concerning the validity of the defendant's consent to search. See, e.g., Wong Sun v. United States, 371 U.S. 471, 485 (1963); State v. Coleman, 791 S.W.2d at 507. Moreover, it is clear from the record that any consent obtained from the defendant was tainted by the illegality of officers' conduct. See Brown v. Illinois, 422 U.S. 590, 603-04 (1975).

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William M. Barker, Judge

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Joe B. Jones, Judge

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William B. Acree, Special Judge