

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JULY SESSION, 1996

<p>FILED</p> <p>January 31, 1997</p> <p>Cecil W. Crowson Appellate Court Clerk</p>

STATE OF TENNESSEE,)

Appellee,)

VS.)

FREDDIE HERRIMAN, and)
LORI SWAH)
Appellant.)

C.C.A. NO. 01C01-9511-CC-00373)

WARREN COUNTY)

HON. CHARLES D. HASTON)
JUDGE)

(Certified Question of Law)

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OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

Appellants Freddie Herriman and Lori Swah entered pleas of guilty in the Warren County Circuit Court to offenses arising from the same set of facts and have consolidated their cases for the purpose of appeal. Herriman pled guilty to carrying a weapon for the purpose of going armed, possession of a Schedule II controlled substance with intent to sell or deliver, and possession of drug paraphernalia. As a Range I standard offender, he received an effective sentence of five years in the Tennessee Department of Correction. The trial court ordered him to serve twelve months of the sentence in the county jail with the balance served on probation. Swah pled guilty to simple possession of a Schedule II controlled substance and possession of drug paraphernalia. She received an effective sentence of eleven months and twenty-nine days in the county jail. The trial court ordered her to serve thirty days of the sentence in the county jail with the balance served on probation. Pursuant to Rule 37(b)(2)(i) of the Tennessee Rules of Criminal Procedure, Appellants Herriman and Swah reserved the following certified question of law: whether the trial court erred in failing to grant a motion to suppress evidence seized during the search of their vehicles.

After a review of the record, we affirm the judgment of the trial court.

I. FACTUAL BACKGROUND

The proof shows that, during the early morning hours of September 4, 1994, Officers Robert Spangler and Robert Hutchins of the McMinnville Police

Department observed a truck driven by Herriman traveling at a high rate of speed on Sparta Highway. Both officers, each in his own police cruiser, followed Herriman until he pulled into the entrance of a mall. Herriman parked his truck parallel to a GMC Jimmy driven by Swah, his girlfriend. The two vehicles were positioned in such a way that the driver-side windows were only separated by a few feet.

Upon his arrival at the scene, Officer Spangler recognized Herriman and recalled that there was an outstanding warrant for his arrest for failure to pay child support. Officer Spangler informed Officer Hutchins, who confirmed the existence of the warrant by contacting the Warren County jail dispatcher.

When asked, Herriman explained that he was traveling at an excessive rate of speed in order to catch up to Swah, with whom he had argued. Officer Hutchins recognized the odor of alcohol and observed an open beer can in the cab of Herriman's truck. Herriman admitted that he had consumed a couple of beers. However, based on field sobriety tests, the officers determined that Herriman had not been driving under the influence of an intoxicant.

Having confirmed the existence of an outstanding warrant and having informed Herriman that he would be transported to jail, Officer Spangler proceeded to search the passenger compartment of Herriman's truck. At some time after Officer Spangler had begun his search, Officer Hutchins escorted Herriman to his police cruiser and placed him under arrest. During the search, Officer Spangler found and seized an overnight bag containing two loaded

handguns, Mannitol, approximately one hundred gram-bags, a digital scale, and a pure form of Methamphetamine.

Following the search, Swah claimed ownership of one of the handguns. Officer Spangler escorted Swah to his police cruiser in order to question her further. He then read Swah her rights but did not place her under arrest. Swah claimed no knowledge of the drugs found in Herriman's truck and stated that there were no drugs or weapons in her vehicle.

Given Herriman's initial access to Swah's vehicle, Officer Spangler asked for and received consent to search her vehicle. Officer Spangler and Officer Rusty Woodlee, another officer on the scene, then conducted a search of her vehicle. During the search, the officers found and seized two bags of cash and a small, purse-type pack containing a razor blade, straws, roach clips, pills, and a one-gram bag of a pure form of Methamphetamine. Officer Spangler subsequently placed Swah under arrest.

On December 16, 1994, a Warren County Grand Jury separately indicted Herriman and Swah for carrying a weapon for the purpose of going armed in violation of Tennessee Code Annotated Section 39-17-1307, possession of a Schedule II controlled substance with intent to sell or deliver in violation of Tennessee Code Annotated Section 39-17-417, and possession of drug paraphernalia in violation of Tennessee Code Annotated Section 39-17-425. On May 19, 1995, both Herriman and Swah filed pretrial motions to suppress the evidence seized from the search of each vehicle, alleging that the stop and the searches were unconstitutional. Following an evidentiary hearing on May 24,

1995, the trial court denied the motions. On June 9, 1995, Herriman pled guilty to the offenses as charged in the indictment while Swah pled guilty to simple possession of a controlled substance and possession of drug paraphernalia. Each reserved a certified question of law regarding the legality of the stop and the searches.¹ As stated previously, the two cases were then consolidated for the purpose of appeal.

II. MOTION TO SUPPRESS

The Appellants allege that the trial court erred in failing to grant the motion to suppress evidence seized during the search of their vehicles. The Appellants argue that the evidence seized from their vehicles should have been suppressed because the investigatory stop as well as the search of both vehicles were unconstitutional.

A. INVESTIGATORY STOP

The Appellants argue that the investigatory stop was unconstitutional because there was insufficient evidence that Herriman was violating the speed limit. In support of this argument, the Appellants point out that, when Officer Spangler concluded that Herriman was traveling at an excessive rate of speed, he was under the mistaken impression that the speed limit was thirty-five miles-per-hour rather than forty-five miles-per-hour. The Appellants further point out that neither Officer Spangler nor Officer Hutchins testified that Herriman was traveling in excess of forty-five miles-per-hour.

¹ Both Herriman and Swah have satisfied all prerequisites for consideration of their certified question of law on the merits. See State v. Preston, 759 S.W.2d 647, 650 (Tenn. 1988).

Stopping an automobile and detaining its occupants constitutes a seizure within the meaning of the federal and state constitutions. State v. Binion, 900 S.W.2d 702, 705 (Tenn. Crim. App. 1994). However, a police officer may conduct an investigatory stop of a vehicle when the officer has a reasonable suspicion, supported by specific and articulable facts, that a crime has been or is about to be committed. Terry v. Ohio, 392 U.S. 1, 21 (1968); Griffin v. State, 604 S.W.2d 40, 42 (Tenn. 1980). An investigatory stop based on reasonable suspicion requires a lower quantum of proof than probable cause. State v. Pulley, 863 S.W.2d 29, 31 (Tenn. 1993). In determining whether reasonable suspicion exists, the reviewing court must consider the totality of the circumstances. United States v. Cortez, 449 U.S. 411, 417 (1981). These circumstances include, but are not limited to, objective observations and the rational inferences and deductions of trained police officers. State v. Watkins, 827 S.W.2d 293, 294 (Tenn. 1992).

Officer Spangler testified that he and Officer Hutchins pursued Herriman because he appeared to be traveling in excess of the speed limit. While Officer Spangler mistakenly believed that the speed limit was thirty-five miles-per-hour, there was no evidence presented at the suppression hearing that Officer Hutchins was under the same mistaken belief as to the speed limit. Officer Hutchins testified that Herriman was traveling "very fast," and, for that reason, he made the decision to pursue. When asked by the officers at the scene, Herriman acknowledged his excessive speed by explaining that he was attempting to catch up to his girlfriend.² In light of the foregoing observations,

² It is unclear from the record whether Herriman stopped at the mall entrance in recognition of the police officers or because he had successfully caught up to Swah, who was already parked at the mall entrance. If indeed Herriman pulled into the mall entrance only because he had caught up to

we believe that the officers possessed the requisite reasonable suspicion, supported by specific and articulable facts, to warrant an investigatory stop. Considering the totality of the circumstances, we conclude that the officers made a constitutionally-permissible investigatory stop of Herriman's vehicle.

B. SEARCH INCIDENT TO ARREST

The Appellants argue that the search of Herriman's vehicle was unconstitutional because it occurred prior to his arrest, making the doctrine of search incident to arrest inapplicable, and that the search of Swah's vehicle was unconstitutional because it occurred as a direct consequence of the unconstitutional search of Herriman's vehicle.

The Constitution of the State of Tennessee guarantees that "the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures" Tenn. Const. art. I, § 7. The Fourth Amendment of the United States Constitution provides the same guarantee. Ordinarily, a legal search and seizure requires a warrant. United States v. Place, 462 S.W.2d 696, 701 (1983). Any search and seizure conducted without a warrant is presumed unreasonable. State v. Bartram, 925 S.W.2d 229, 230-31 (Tenn. 1996). The State then has the burden of showing that the search and seizure was conducted within a recognized exception to the warrant requirement. State v. McClanahan, 806 S.W.2d 219, 220 (Tenn. Crim. App. 1991). One such exception is the doctrine of search

Swah, an investigatory stop may not have occurred. See State v. Moore, 776 S.W.2d 933, 935-36 (Tenn. 1989). Not all contact between the police and a citizen constitutes a seizure. Terry v. Ohio, 392 S.W.2d 1, 20 n.16 (1968). Nevertheless, we will assume for the purpose of review that an investigatory stop did occur.

incident to arrest. State v. Transou, 928 S.W.2d 949, 951 (Tenn. Crim. App. 1996) (citing Chimal v. California, 395 U.S. 752, 762 (1969)).

Under the doctrine of search incident to arrest, “a lawful custodial arrest creates a situation which justifies the contemporaneous search without a warrant of the person arrested and of the immediately surrounding area.” New York v. Butler, 453 U.S. 454, 457 (1981). In order to justify a search incident to arrest, the searching officers must have probable cause to arrest the individual in question. Id. Probable cause to arrest exists if the officers have “facts and circumstances within their knowledge and of which they had reasonably trustworthy information [that] [are] sufficient to warrant a prudent man in believing that the [individual in question] had committed or was committing an offense.” State v. Melton, 638 S.W.2d 342, 350-51 (Tenn. 1982) (quoting Beck v. Ohio, 379 U.S. 89, 91 (1964)).

Here, the officers confirmed the outstanding warrant against Herriman, creating probable cause for his arrest. The officers then informed Herriman that he would be transported to jail and discussed with him what he would like to do with his truck. When determining the custodial status of a suspect, the relevant inquiry is whether a reasonable person in the suspect’s position would have understood that he or she was not free to leave. Michigan v. Chesternut, 486 U.S. 567, 573 (1988); State v. Darnell, 905 S.W.2d 953, 957 (Tenn. Crim. App. 1995). Clearly, in light of the foregoing statements made by Officers Spangler and Hutchins, a reasonable person in Herriman’s position would have understood that he or she was not free to leave. The officers then

had a right to search Herriman's vehicle as an incident to his arrest. Thus, we conclude that the search of Herriman's vehicle was constitutional.

Given Herriman's initial access to Swah's vehicle, Officer Spangler was justified in requesting permission to search her vehicle. Swah consented to the search. Voluntary consent by the owner of a vehicle is a recognized exception to the warrant requirement. Schneckloth v. Bustamonte, 412 U.S. 218, 218 (1973). The record is devoid of any evidence that Swah's consent was anything but voluntary. Thus, we conclude that the search of Swah's vehicle was constitutional.

C. CONCLUSION

In sum, we conclude that the investigatory stop of Herriman was justified and that the subsequent search of both vehicles was legal.

Accordingly, the judgment of the trial court is affirmed.

JERRY L. SMITH, JUDGE

CONCUR:

DAVID H. WELLES, JUDGE

WILLIAM M. BARKER, JUDGE