IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

FEBRUARY 1999 SESSION

FILED

July 22, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	C.C.A. No. 02C01-9809-CC-00152
Appellant,	)	
	)	Henderson County
v.	)	
	)	Honorable Franklin Murchison, Judge
OLIVIA E. WASHBURN,	)	
	)	(Motion to Suppress - State Appeal)
Appellee.	)	

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED AND REMANDED

JAMES C. BEASLEY, SR., SPECIAL JUDGE

O P I N I O N

_____The Henderson County grand jury returned a two-count indictment against the defendant, Olivia E. Washburn, charging her with possession of marijuana and possession of drug paraphernalia. After a pretrial hearing on the defendant's motion to suppress evidence, the trial court entered an order suppressing the marijuana but denying the motion to suppress the drug paraphernalia.

The issue presented in this Rule 9 appeal is:

> Whether the trial court erred in granting the motion to suppress the marijuana seized from the defendant's person and in denying the motion to suppress the "rolling papers" and "bong" discovered during a warrantless search of the defendant's vehicle.

After reviewing the record and applicable authorities, we affirm both rulings of the trial court.

At the suppression hearing, Lexington Police Officer Jeff Middleton testified that he was working the 10 p.m. to 6 a.m. shift on June 28, 1997, when he received information from the police dispatcher regarding a narcotics transaction witnessed at the Major Market on West Church Street. A complainant had reported seeing a white female in a red Cavalier passing what was believed to be narcotics to several persons. The dispatcher described the vehicles involved and advised the officer that the Cavalier was registered to the defendant. After determining that the vehicles were no longer at the scene, Officer Middleton proceeded toward the defendant's home. En route he met the red Cavalier driven by the defendant traveling in the opposite direction. After making a U-turn, the officer followed the defendant and determined that she was driving forty-five miles per hour in a forty miles per hour speed zone. Other officers had been alerted, and a total of four police cars were following the defendant's vehicle at the time it was stopped. Officer Middleton advised the defendant that she had been stopped for speeding and asked for and received her driver's license. He also advised her of the complaint regarding her involvement in a narcotics transaction. The defendant denied any involvement and, when

asked if there was anything in the vehicle that the officer needed to know about, she replied "no." When asked if she had any objection to the officer "taking a look," the defendant responded "no." Middleton then asked the defendant to step out of the car, walk over to Officer Michael Harper, and empty her pockets. In the course of the search of the Cavalier, a package of "rolling papers" was removed from the defendant's purse which was sitting on the console or front seat, and a "bong" was found under the front seat.

The State next called Officer Michael Harper who testified that he was traveling behind Officer Middleton when the defendant was stopped. When asked by the assistant district attorney general to explain what happened after the stop, Officer Harper responded as follows:

> A. Okay. Officer Middleton walked up to the car. He talked with Ms. Washburn. He asked her to step out of the car. He asked her consent to search the vehicle, which she did agree to. I had her stand back with me and away from the vehicle as the officers, at that time -- Sergeant Tony Powers and Patrol Todd Bowman had arrived. I had her stand back with me while Officer Middleton searched the vehicle. At that time I did ask her if she had anything in her pockets. I patted the front pockets of her pants. I did see -- feel that there was something in [her] pocket. I did ask her if she wouldn't, would she empty her pockets on the hood of my car, which she did. At that time she put her left hand in her back pocket. I asked her again if she would remove her hand from her pocket. She pulled it about halfway in and stuck it back down. I asked her about three times to remove her hand, before she finally did. At the point that she removed her hand from her back left pocket, the -- the pants that she had on was denim blue jeans, and they was real, real baggy. They were real loose on her. At that point when she removed her hand, I could see that there was a plastic bag or something in the back of her pocket -- on the left side. At that time I opened the pocket up with my finger and seen that there was something in a baggie. I stuck my hand down in her pocket and pulled it up; then I notified Officer Middleton that I had some marijuana there.

On cross-examination, Officer Harper admitted that he did not ask the defendant for her consent to search her person. He explained that the pat down and search were for his own safety to determine if the defendant had a weapon.

The defendant testified that she consented to the search of her vehicle but not of her person. She stated that she was told to empty her pockets and, thinking this was standard police procedure, she removed her cigarette lighter and money. She disputed the officer's testimony that the marijuana could be seen before he removed it from her back pocket.

Based upon the proof summarized above, the trial court found that the defendant was lawfully stopped for speeding and that subsequent to the stop she knowingly consented to the search of her vehicle but did not consent to the search of her person. Accordingly, the court granted the motion to suppress the marijuana seized in the search of the defendant's person, but denied the motion to suppress the rolling papers and bong recovered from her vehicle.

Under both the federal and state constitutions, a warrantless search or seizure is presumed unreasonable, and evidence discovered as a result thereof is subject to suppression unless the State demonstrates by a preponderance of the evidence that the search or seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement. State v. Simpson, 968 S.W.2d 776, 780 (Tenn. 1998) (citing Coolidge v. New Hampshire, 403 U.S. 443, 454-55, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564, 576 (1971); State v. Watkins, 827 S.W.2d 293, 295 (Tenn. 1992). Exceptions to the warrant requirement include searches incident to a lawful arrest, those made by consent, in the "hot pursuit" of a fleeing criminal, "stop and frisk" searches, and those based on probable cause in the presence of exigent circumstances. State v. McMahan, 650 S.W.2d 383, 386 (Tenn. Crim. App.), per. app. denied (Tenn. 1983).

At the trial level, the prosecution relied exclusively on the "consent exception" in seeking justification for the warrantless search of the defendant's vehicle and her person. It is abundantly clear from the transcript of the oral ruling, and the order subsequently entered, that the trial court's decision dealt solely with the question of whether or not the State's proof established consent by the defendant to the search of her person and her

vehicle.

On appeal, the State continues to rely on the defendant's consent to the vehicle search, but has abandoned the consent exception as the basis for the search of the defendant's person and now argues that the marijuana is admissible under the probable cause and exigent circumstances exception. However, since this theory was not presented in the court below and no rulings were made thereon, we will consider that issue waived and accordingly limit our review to the consent issue as to both searches. See State v. Matthews, 805 S.W.2d 776, 781 (Tenn. Crim. App.), per. app. denied (Tenn. 1990).

In her brief, the defendant says the trial court correctly suppressed the evidence recovered in the search of her person but erred in upholding the search of her vehicle. Conceding the lawfulness of an initial stop for the violation of traffic laws, the defendant argues that the officer's conduct in this case exceeded the justification for the stop and was improperly intrusive and unreasonable under both the United States and Tennessee Constitutions.

When reviewing a trial court's ruling on a motion to suppress, questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as trier of fact. We afford to the party prevailing in the trial court the strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from the evidence. The findings of a trial court in a suppression hearing will be upheld unless the evidence preponderates against those findings. State v. Keith, 978 S.W.2d 861, 864 (Tenn. 1998).

As we have heretofore noted, consent voluntarily and understandingly given is an exception to the constitutional requirement of a search warrant. The sufficiency of consent depends largely upon the facts and circumstances in a particular case. The burden is on the prosecution to prove that consent was freely and voluntarily given. State v. Jackson, 889 S.W.2d 219, 221 (Tenn. Crim. App. 1993), per. app. denied (Tenn. 1994).

From our review of the record, we find that it contains ample evidence, when viewed in the light most favorable to the party prevailing in the trial court, to support that court's ruling as to each search. Although he suspected that the defendant had been involved in a narcotics transaction, the proof shows that Officer Middleton stopped her only after determining that she was speeding. Thus, the initial stop was valid under State v. Vineyard, 958 S.W.2d 730 (Tenn. 1997).

When assessing whether a detention is too long to be justified as an investigatory stop, the proper inquiry is whether during the detention the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicion quickly. State v. Simpson, 968 S.W.2d 776, 783 (Tenn. 1998) (citing United States v. Sharpe, 470 U.S. 675, 686, 105 S.Ct. 1568, 1575, 84 L.Ed.2d 605 (1985)). Applying that standard to the facts reflected in the record before us, it is clear the detention in this case was not excessive. Immediately after the stop, the defendant was told why she had been stopped and was asked about her involvement in the reported drug activity. At that point, she was asked for and gave consent to search her vehicle.

"To pass constitutional muster, consent to search must be unequivocal, specific, intelligently given, and uncontaminated by duress or coercion." State v. Brown, 836 S.W.2d 530, 547 (Tenn. 1992). Relative to the scope of the defendant's consent, Officer Middleton testified as follows:

> Q. All right. Now, when you asked her for consent was that just to search her vehicle?
>
> A. In my mind it was for herself and the vehicle. Now, that was my intention. When I asked her if there was anything inside the vehicle, she was inside the vehicle, and that was my intention.
>
> Q. Did she in any way object to that?
>
> A. No, she did not.
>
> Q. Did she consent to that, in your opinion?
>
> A. Yes. When I asked her to empty her pockets out, she began to do so. To me that was consensual.

The defendant testified at the suppression hearing that she was asked for and gave

permission to search her vehicle, but was not asked for and did not consent to the search of her person.

The proof in this record falls short of establishing that the defendant freely and voluntarily consented to the search of her person. Accordingly, we affirm the trial court's rulings suppressing the marijuana and denying the motion to suppress the "rolling papers" and "bong" and remand the cause to the trial court for further proceedings.

_____
JAMES C. BEASLEY, SR., SPECIAL JUDGE

CONCUR:

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JOHN H. PEAY, JUDGE

_____
JOE G. RILEY, JUDGE