IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
March 21, 2023 Session

STATE OF TENNESSEE v. JIMMY DEWAYNE RICHARDS

Appeal from the Criminal Court for Fentress County
No. 20-22 E. Shayne Sexton, Judge

No. M2022-00831-CCA-R3-CD

Defendant, Jimmy Dewayne Richards, was convicted by a Fentress County jury of burglary, theft of property, and vandalism. On appeal, the Defendant argues, among other things, that the trial court erred by denying the Defendant's pretrial motion to suppress. We cannot adequately review on the record before us whether the search was supported by probable cause or whether Defendant lacked standing to challenge the search. The trial court sua sponte raised the standing issue after all the proof was presented at the hearing and did not comply with its duties to judge the credibility of witnesses, to weigh the evidence, and to resolve factual issues in deciding the motion to suppress. We therefore remand this case for a new hearing on the motion to suppress in accordance with the instructions in this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed and Remanded

TIMOTHY L. EASTER, J., delivered the opinion of the court, in which JOHN W. CAMPBELL, SR., and TOM GREENHOLTZ, JJ., joined.

Evan M. Wright, Livingston, Tennessee (on appeal) and Tyler W. Lannom and Seth Crabtree, Cookeville, Tennessee, for the appellant, Jimmy Dewayne Richards.

Jonathan Skrmetti, Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; Jared Effler, District Attorney General; and Philip A. Kazee, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

Defendant was indicted by the Fentress County Grand Jury for one count of burglary, one count of theft of property valued at $1000 or less, and one count of vandalism of property of $1000 or less for events that took place on the night of February 12, 2020. Before trial, Defendant filed a motion to suppress evidence discovered during a warrantless search of his vehicle, asserting that the Fentress County Sheriff's Department lacked probable cause to believe that evidence of a crime was contained in his vehicle and that no exception to the warrant requirement permitted them to search the vehicle.

Testimony at the Suppression Hearing

At the hearing on the motion to suppress, the trial court heard testimony from Deputy Mike Potter of the Fentress County Sheriff's Department. He recalled that it was raining the night of February 12, 2020. Deputy Potter received information from sheriff's dispatch that "somebody had been on somebody's porch, out of their mind, out-of-their head talking, and concerned that they might be breaking into their home or another residence that they may own." Deputy Potter received similar information from 911 dispatch. Koy and Carolyn Flowers owned the residence but did not live there. Mrs. Flowers identified Defendant as the person on her porch. Mrs. Flowers knew Defendant personally and had to "run him off" after asking him "several times to leave." Deputy Potter was familiar with Defendant on "a personal level" and from "when he worked in the jail." When Deputy Potter and Sheriff Michael Reagan arrived at the unoccupied home, they "walked around the house to make sure that there was no forced entry, busted windows, nothing. . . ." The officers did not find anyone at the house. Sheriff Reagan and Deputy Potter left the residence in opposite directions in search of Defendant, though Deputy Potter admitted at that time there was no report of an active crime taking place.

Deputy Potter eventually located Defendant's vehicle, a red Dodge Neon, at a "shop or a garage" converted into a shop owned by Tim Thompson at around 9:30 p.m. on the same night. There was a gravel parking lot in the front of the building. Defendant's vehicle was not parked in the parking lot but was parked in the rear of the building immediately next to a back door. Deputy Potter notifed Sheriff Reagan that he found Defendant's vehicle and that he "didn't know [at] whose place it was [parked]." The sheriff arrived, recognized the building, and explained to Deputy Potter that he knew the owner. Sheriff Reagan left the shop to get Mr. Thompson. Deputy Potter explained that when they returned, Deputy Potter, Mr. Thompson, and Sheriff Reagan "went into the building to find out if [they] could find [Defendant]." They entered the building from the locked back door using a key provided by Mr. Thompson. The back window of the shop was "busted out" and there were "wet feet prints on the concrete." A wheelbarrow containing "sawdust or shavings" had been dumped out, and the wheelbarrow was "over right next to the door where the car was parked, full or – had tools, torches." Defendant was not in the building.

Deputy Potter "went back outside, and [] shined [his] flashlight through the windshield of [Defendant's] car and [] noticed a dash light on." He further explained that the "car was also warm from where obviously it had [not] been parked there long." Deputy Potter "shined" the flashlight in the window and "asked Mr. Thompson if he s[aw] anything in the car that belonged to him, because there was stuff laying all in the car. And under the driver's side front seat they was about three-quarters of a Napa impact gun sticking out from under his seat." Mr. Thompson identified it as belonging it to him. At that point, Deputy Potter searched the vehicle. He testified that the keys were in the ignition. Deputy Potter confirmed that Defendant was never seen at the shop "at all that night."

On cross-examination, however, Defendant's counsel confronted Deputy Potter with the deputy's testimony given in previous hearings, including the preliminary hearing in this case and a probation violation hearing. During the exchange, the deputy confirmed that he previously shared a different timeline of events. The deputy verified that he testified during a probation violation hearing that when Mr. Thompson and the sheriff arrived, they went immediately to the car parked next to the shop. The deputy opened the door, and only then did Mr. Thompson notice an air wrench that belonged to him in the car. After that discovery, the three men entered Mr. Thompson's shop building and saw the busted window and wheelbarrow full of tools. Deputy Potter agreed that this was his prior testimony, but explained that he "didn't search the vehicle first." He went on to state that he could see "the impact wrench through the front windshield of the car" when he "was making sure the[re] was nobody in the car." Defendant's counsel again asked the deputy if he testified at the preliminary hearing that he could not see the wrench before he opened the door. Counsel read from the transcript the following testimony from Deputy Potter: "you couldn't see the whole impact [wrench] from where it was at, and we opened the door."

Shortly after this exchange, the trial court stated, "I'm waiting for my turn to decide about suppression. This is impeachment stuff that a jury can . . . ferret through. What am I being asked to do here?" In response, Defendant's counsel responded that "this impeachment testimony goes directly to the credibility [of the witness]," and he noted that "[i]t's important for you as the deciding referee today to . . . to make a decision on [credibility.]" The trial court continued, however, saying that

> [if Deputy Potter] has misled a court in any way, then that is impeachment that a jury can weigh out. But, now, if there is an unconstitutional search, that's where I get involved, and I'm going to — I will suppress it.
>
> . . . .

> But I'm waiting. I'm not going to weigh the credibility of this witness on what he said before. . . . What he says . . . is largely irrelevant to whether or not the search is constitutional.

Defendant's counsel then asked Deputy Potter a single follow-up question and ended his examination of the deputy.

Mr. Thompson testified that the sheriff picked him up at his house and drove him to the shop to "unlock the door." There was a red car parked right outside the door. Once they entered the shop, he noticed a "wheelbarrow loaded with tools" and a "window broken out." Mr. Thompson did not give anyone permission to be in his shop. Mr. Thompson did not put the tools in the wheelbarrow but "had shavings, sawdust in there." The wheelbarrow was "[a]t the side – side door." Mr. Thompson did not see law enforcement "do anything to the car till we'd come back out" of the shop. At that point, they "saw the part – one of my tools in [the vehicle]."

On cross-examination, Mr. Thompson admitted that his preliminary hearing testimony indicated that the deputy had the door open and the impact wrench was laying on the floor of the vehicle. Mr. Thompson recalled that was after the deputy looked the car over.

Arguments and Trial Court's Findings

At the conclusion of the hearing, Defendant argued that there was "a clear lack of probable cause." Defendant argued that there was no criminal activity at the Flowers' home, and no probable cause or reasonable suspicion to "begin scouring the area." Defendant continued that there was no "indicia of a criminal act" until Defendant's car was discovered and Mr. Thompson came to the shop, opened it, and a broken window was discovered along with the wheelbarrow of tools. Defendant acknowledged that there is an automobile exception to the warrant requirement but argued that there were no exigent circumstances necessitating an immediate search of the vehicle and that "[t]here [was] some very conflicting testimony, which is why we believe that the impeachment was relevant now, not just [at] trial, as to when that shop was searched."

The State argued there was no proof that the search of the car occurred before the officers had inspected the shop building. It asserted that because the deputy saw evidence of a burglary in progress, the deputy had probable cause to believe that the Defendant's car likely held evidence of the burglary.

After the State's argument, the trial court denied the motion to suppress. The trial court seemed to reject the State's argument that the search was supported by probable cause by stating:

> What would the probable cause be on the search warrant? What would you put? I don't know.
>
> I mean, I got this car. I don't know that there is search warrant style probable cause. This is a developing scene that law enforcement is working with the aid of private citizens.
>
> The Defendant doesn't have standing about where the car was. I mean, you – you cited a case that dealt with a – a defendant's car on the defendant's property. This is almost abandoned – an abandoned vehicle with no – you know, no nexus of ownership with anyone.
>
> . . . .
>
> I – I find no deprivation at all of any constitutional issues. These are ripe trial issues. You can raise that with a jury. As far as impeachment, if there have been testimony differences, then yes, that's fair.
>
> But as far as, you know, dismissing the case and taking this on a constitutional standpoint, I don't think there's been any – anything here that law enforcement would lose the case on from a matter of law. They may lose it on facts, but they will not lose it on law.

Ultimately, the trial court found that because the Defendant abandoned his car, he lacked standing to challenge the search of the vehicle. More specifically, the trial court noted that "[t]he Defendant doesn't have standing about where the car was" because it was abandoned on the victim's property without a "nexus of ownership with anyone."

The trial court noted that Defendant could raise "impeachment" and "testimony differences" with the jury. But the trial court concluded that, insofar as "dismissing the case and taking this on a constitutional standpoint, there's been [nothing] here that law enforcement would lose the case on [as] a matter of law."

A written order denying the motion appears in the record. This order, unsigned by the trial judge, does not incorporate the oral findings from the hearing, and it does not mention Defendant's lack of standing to challenge the search. Instead, the unsigned order's

sole basis for denying Defendant's motion was that Deputy Potter possessed probable cause to search Defendant's car:

> Deputy Sheriff Mike Potter conducted a valid search of the defendant's automobile parked outside of the victim's garage because he had probable cause to believe that evidence of the crimes of [b]urglary and [t]heft were located inside the automobile searched and that the automobile was readily mobile. The [c]ourt does not find a deprivation of any constitutional rights of the defendant. Accordingly, the defendant's Motion is denied and dismissed.

Verdict, Sentence, and Appeal

After hearing the proof at trial, a jury convicted Defendant of burglary, theft of property, and vandalism as charged. The trial court later sentenced Defendant as a career offender to an effective term of twelve years to be served in the Tennessee Department of Correction.

The trial court denied Defendant's motion for new trial and Defendant filed a timely notice of appeal.

Analysis

After oral argument, when the panel began its foray into the resolution of the issues presented on appeal, a potential discrepancy was discovered in the record. As noted above, the order denying the motion to suppress that was filed in the technical record is not signed by the trial judge. Instead, the order, on pages 209-210 of the technical record, appears to have been prepared by counsel for the State and submitted to the trial court. There are several other orders related to motions that were filed that same day; all of these motions bear the signature of the trial court, a stamp file, signature of counsel for the State, and what appear to be the initials of a clerk.

Out of an abundance of caution, this Court ordered supplementation of the record in the event that there was a missing page from the order. In the event that the trial court clerk determined that the record contained within the technical record comprised the entire order, the trial court clerk was ordered to certify that the order accurately reflected the order as originally filed. The trial court clerk submitted a letter to this Court certifying that the order appearing in the technical record accurately reflects the order as entered, meaning that the order was unsigned by the trial court.

At that point, this Court ordered supplemental briefing. In our order, we acknowledged:

> the primary issue is whether the trial court properly denied the motion to suppress. The parties rely on arguments related to theories of probable cause. Our review of the record reveals that the unsigned order denying the motion to suppress relies on the existence of probable cause as the reason for the denial of the motion to suppress. However, our review of the ruling made by the trial court during the hearing on the motion to suppress appears to be in conflict with the unsigned order. As such, we find it would be helpful for the parties to be given the opportunity to submit supplemental briefing to the court, to address the following issues:
>
> (1) Whether the lack of a signature impacts the validity of the order denying the motion to suppress found on pages 209-210 of Volume 2 of the technical record?
>
> (2) Whether the unsigned order conflicts with the oral ruling of the trial court on the motion to suppress? If so, what is the impact of any such conflict?; and
>
> (3) Whether the issue of standing was raised in the trial court?

The parties were given ample time to submit supplemental briefing and presented this Court with argument on each of the issues above.

Central to our resolution of the issue is the trial court's ruling on the motion to suppress. In reviewing a trial court's ruling on a motion to suppress evidence, "we will uphold the trial court's findings of fact unless the evidence preponderates against those findings." *State v. Stanfield*, 554 S.W.3d 1, 8 (Tenn. 2018). The party prevailing in the trial court "is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence." *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996). "[I]n evaluating the correctness of a trial court's ruling on a pretrial motion to suppress, appellate courts may consider the proof adduced both at the suppression hearing and at trial." *State v. Henning*, 975 S.W.2d 290, 299 (Tenn. 1998).

Nevertheless, "[d]espite the deference given to [a] trial court's findings of fact, this [C]ourt reviews the trial court's application of the law to the facts de novo with no presumption of correctness." *State v. Henry*, 539 S.W.3d 223, 232 (Tenn. Crim. App. 2017) (citing *State v. Montgomery*, 462 S.W.3d 482, 486 (Tenn. 2015)). In addition,

"[d]etermining the existence of probable cause 'is a mixed question of law and fact that we review de novo.'" *State v. Reynolds*, 504 S.W.3d 283, 298 (Tenn. 2016) (citing *State v. Bell*, 429 S.W.3d 524, 529 (Tenn. 2014)).

As we have noted, Defendant asserts that the trial court erred in denying his motion to suppress. Specifically, he argues that Deputy Potter's search of his car violated the Fourth Amendment to the United States Constitution because the deputy did not have probable cause to believe that evidence of a crime would be found in the car. Defendant asserts that Deputy Potter's testimony at the hearing on the motion to suppress was not credible because he gave inconsistent testimony at previous hearings. Defendant argues that he was denied due process of law when the trial court refused to consider these inconsistencies in weighing Deputy Potter's credibility. Defendant also argues, in a supplemental brief in response to this Court's order, that the unsigned order has "no legal effect" and that the State waived any argument with regard to Defendant's standing by raising it for the first time on appeal.

For its part, the State argues that Defendant may not challenge the warrantless search of his car because he abandoned any reasonable expectation of privacy that he had in the vehicle; in other words, Defendant has no standing to challenge the search. The State also argues that the search was permissible because Defendant was a probationer with a diminished expectation of privacy and because the search was based upon probable cause to believe that contraband was contained in the car. In its supplemental brief, the State claims that the lack of a signature on the order denying the motion to suppress does "not necessarily render the order void," the unsigned order is not inconsistent with the oral ruling, and the matter of standing was raised sua sponte by the trial court making it a proper issue for appellate review.

We remand the matter to the trial court for a new hearing on the motion to suppress for reasons we will explain below.

The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" *See also* Tenn. Const. art. I, § 7. "Few protections are as essential to individual liberty as the right to be free from unreasonable searches and seizures." *Byrd v. United States*, 138 S.Ct. 1518, 1526 (2018). And, "[t]he purpose of the prohibition against unreasonable searches and seizures under the Fourth Amendment is to safeguard the privacy and security of individuals against arbitrary invasions" by governmental officials." *Stanfield*, 554 S.W.3d at 8 (citation and internal quotation marks omitted). The United States Supreme Court has made clear that it "view[s] with disfavor practices that permit 'police officers [to have] unbridled discretion to rummage at will among a person's private effects.'" *Id.* (quoting *Arizona v. Gant*, 556 U.S. 332, 345 (2009)).

With Fourth Amendment protections, "[w]e are not dealing with formalities. The presence of a search warrant serves a high function." *McDonald v. United States*, 335 U.S. 451, 455 (1948). Thus, "a search is presumptively reasonable when conducted on the basis of probable cause and with a warrant[.]" *State v. Hamm*, 589 S.W.3d 765, 771 (Tenn. 2019). "Conversely, warrantless searches and seizures are presumptively unreasonable, and any evidence that is discovered as a result thereof is subject to suppression." *State v. McElrath*, 569 S.W.3d 565, 570 (Tenn. 2019). As with many areas of the law, however, there are exceptions to the warrant requirement. If the State "demonstrates that the search or seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement," then the evidence will not be suppressed. *State v. Williamson*, 368 S.W.3d 468, 474 (Tenn. 2012); *see also State v. Scott*, 619 S.W.3d 196, 206 (Tenn. 2021) ("A search without a warrant is presumed to be unreasonable unless one of the exceptions to the warrant requirement applies."). "The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.'" *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971) (*quoting Jones v. United States*, 357 U.S. 493, 499 (1958), and *McDonald v. United States*, 335 U.S. 451, 456 (1948)). "[A] search warrant serves a high function." *McDonald*, 335 U.S. at 455. The generally recognized exceptions to the Fourth Amendment warrant requirement include "search incident to arrest, plain view, stop and frisk, hot pursuit, search under exigent circumstances, and . . . consent to search." *State v. Cox*, 171 S.W.3d 174, 179 (Tenn. 2005) (citations omitted).

Fourth Amendment Standing

As a threshold matter, the State argues that Defendant lacks standing to challenge the search of his car because he abandoned the vehicle on the victim's property. "The United States Supreme Court has often held that the 'rights assured by the Fourth Amendment are personal rights, and that they may be enforced . . . only at the instance of one whose own protection was infringed by the search and seizure.'" *State v. Ross*, 49 S.W.3d 833, 840 (Tenn. 2001) (quoting *Simmons v. United States*, 390 U.S. 377, 389 (1968)). To this end, "[i]n order to challenge the reasonableness of a search or seizure, the defendant must have a legitimate expectation of privacy in the place or thing to be searched." *State v. Cothran*, 115 S.W.3d 513, 520-21 (Tenn. Crim. App. 2003). Failure to establish an expectation of privacy in the place to be searched results in a lack of "standing" to challenge the search. *State v. Patterson*, 966 S.W.2d 435, 441 n. 5 (Tenn. Crim. App. 1997). Notably, we have recognized that "[a] person does not maintain a reasonable expectation of privacy in abandoned property." *Gatewood v. State*, No. W2015-02480-CCA-R3-PC, 2017 WL 696850, at *5 (Tenn. Crim. App. Feb. 17, 2017), *perm. app. denied* (Tenn. June 7, 2017).

Because the Fourth Amendment protects people and privacy rather than places and property, a property interest does not determine standing to challenge a search and does not control the right of officials to search and seize. *See Oliver v. United States*, 466 U.S. 170 183 (1984); *Katz v. United States*, 389 U.S. 347, 351 (1967). The Supreme Court has explained, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz*, 389 U.S. at 351 (citations omitted). Even so, a "person can lose his reasonable expectation of privacy in his real property if he abandons it." *State v. Ledford*, 438 S.W.3d 543, 553 (Tenn. Crim. App. 2014) (quoting *United States v. Harrison*, 689 F.3d 301, 307 (3d Cir. 2012)). "Abandonment for purposes of the Fourth Amendment differs from [what legal scholars typically think of as] abandonment in property law" because "the analysis examines the individual's reasonable expectation of privacy, not his property interest in the item." *Id.* (quoting *United States v. Fulani*, 368 F.3d 351, 354 (3d Cir. 2004) (citing *United States v. Lewis*, 921 F.2d 1294, 1302 (D.C. Cir. 1990))). Our Court has explained that "'abandonment,' as understood in the constitutional context of unreasonable searches and seizures, 'is not meant in the strict property-right sense, but rests instead on whether the person so relinquished his interest in the property that he no longer retained a reasonable expectation of privacy in it at the time of the search.'" *Ledford*, 438 S.W.3d at 553 (quoting *United States v. Veatch*, 674 F.2d 1217, 1220-21 (9th Cir. 1981)).

A reviewing court should consider whether the individual has an ownership interest in the place searched, whether he has a possessory interest in the place searched, whether he has the right to exclude others from the place, and whether he undertook normal precautions to maintain the privacy of the place searched to determine whether an individual had a legitimate expectation of privacy in the place searched. *See State v. Oody*, 823 S.W.2d 554, 560 (Tenn. Crim. App. 1991).

Keeping all that in mind, we recognize that the State never argued at the hearing on the motion to suppress that Defendant lacked standing to challenge the search of his car because he had abandoned the vehicle. At every opportunity at the hearing, the State argued instead that the warrantless search was proper because the search was supported by probable cause. For the first time, in the response to the motion for new trial, the State argued that Defendant abandoned the vehicle.

The State's failure to raise the issue of standing based on abandonment at the suppression hearing risks waiver on the issue of standing. We have long recognized that "the State has a duty to notify the defendant that it opposes his motion on standing grounds, a result which reflects the traditional policies of notice and fair play." *State v. White*, 635 S.W.2d 396, 399 (Tenn. Crim. App. 1982). Indeed, "[i]f the State fails to raise the standing issue, but instead opposes the motion on the merits, the defendant is entitled to infer that

the State concedes his standing and need not offer any evidence relevant to his expectation of privacy." *Id.* at 399-400. As to the issue of Fourth Amendment standing in particular, "the State is estopped" to raise any standing issue in the appellate court that was not first raised and addressed in the trial court. *Id.* at 400.

While the trial court suggested at the hearing that Defendant did not have standing to challenge the search of the car, no such finding was included in the written order denying the motion to suppress appearing in the record. We note that a trial court is not required to enter a written order disposing of a motion to suppress. *See State v. Geyer*, No. W2005-02697-CCA-R3-CD, 2006 WL 3626324, at *5 (Tenn. Crim. App. Dec. 12, 2006), *perm. app. denied* (Tenn. Apr. 30, 2007). However, where the trial court later enters a written order, and that written order conflicts with the court's earlier oral announcement, the terms of the written order govern. *See State v. McCulloch*, No. E2021-00404-CCA-R3-CD, 2022 WL 2348568, at *12 (Tenn. Crim. App. June 29, 2022), *perm. app. denied* (Tenn. Dec. 14, 2022); *Williams v. City of Burns*, 465 S.W.3d 96, 119 (Tenn. 2015) ("It is well-settled that a trial court speaks through its written orders—not through oral statements contained in the transcripts—and that the appellate court reviews the trial court's written orders."). However, the resolution of this issue is complicated by the fact that the order denying the motion to suppress herein is unsigned. The State argues that the lack of a signature does not necessarily invalidate the order but fails to point to any direct authority to support its argument. Defendant argues that the unsigned order has "no legal effect," citing *State v. Applegate*, No. 01C01-9608-CR-00370, 1998 WL 188937, at *1 (Tenn. Crim. App. Apr. 16, 1998). Indeed, "'a [c]ourt speaks only through its written judgments, duly entered upon its minutes.'" *Green v. Moore*, 101 S.W.3d 415, 420 (Tenn. 2003) (quoting *Evans v. Perkey*, 647 S.W.2d 636, 641 (Tenn. Ct. App. 1981)). Moreover,

> [i]t is the primary duty of counsel to obtain the signature of the judge upon a proposed order or judgment before filing with the clerk. If an unsigned order is received by the clerk for presentation to the judge, this is a mere unofficial courtesy; and it has no official significance until the signed order reaches the hands of the clerk for filing.

Zeitlin v. Zeitlin, 544 S.W.2d 103, 107 (Tenn. Ct. App. 1976).

We conclude that the order denying the motion to suppress that appears in the technical record, unsigned by the trial judge in this case, is a nullity. We are left, therefore, with the transcript of the hearing and the accompanying oral ruling of the trial court on the motion to suppress in order to determine if the issue of standing is preserved for appeal. In our view, the trial court sua sponte raised the issue of standing, finding that Defendant did not have standing to challenge the search in part because he abandoned his vehicle. In fact, this seems to be the primary reason the trial court denied the motion, thus seemingly putting

the issue of standing squarely before the parties despite the State's failure to raise the issue at the hearing on the motion. Here though, the trial court interjected standing into the equation during its ruling on the motion, and Defendant either did not or was not permitted to introduce additional evidence to show he had standing to challenge the search.

In our view, this was error. The issue of standing in case in which a person challenges the reasonableness of a search or seizure is a threshold issue, to be sure. *See Oody*, 823 S.W.2d at 560 ("One who challenges the reasonableness of a search of seizure has the initial burden of establishing a legitimate expectation of privacy in the place where property is searched.") (citing *Rawlings v. Kentucky*, 448 U.S. 98 (1980); *State v. Roberge*, 642 S.W.2d 716, 718 (Tenn. 1982)). Any analysis as to whether standing has been shown by the facts is ordinarily used only after the State has raised the issue of standing and the defendant is given an opportunity to demonstrate an expectation of privacy in the place searched sufficient to trigger Fourth Amendment protection and his standing to challenge the search. That did not happen in this case. Moreover, the record is not entirely clear as to the trial court's reason for the denial of the motion to suppress. To be sure, the trial court relied in part on what it perceived as Defendant's lack of standing to challenge the search. The only resolution we see, therefore, is a remand to the trial court for a new hearing as we will explain more fully below.

Defendant's Status as a Probationer

As a variation on its standing argument, the State next asserts that the Defendant had a reduced expectation of privacy in his car because he was on probation for previous felony convictions. This Court has recognized that "[a] defendant released on probation has a diminished protection from warrantless searches." *See*, *e.g.*, *State v. Hogan*, No. E2020-01496-CCA-R3-CD, 2022 WL 842600, at *3 (Tenn. Crim. App. Mar. 22, 2022) (citing *State v. Turner*, 297 S.W.3d 155, 160, 161 (Tenn. 2009)), *perm. app. denied* (Tenn. July 14, 2022).

However, three things must also be true before a warrantless search of a probationer may be considered reasonable. First, the law enforcement officer conducting the search must actually be aware of the defendant's status as a probationer at the time of the search. *Hamm*, 589 S.W.3d at 778. Second, the search must be conducted for a legitimate law-enforcement purpose. *Id.* at 778-79. And third, the defendant must be subject to a warrantless-search condition of probation of which he or she is "unambiguously" aware. *Id.*

In this case, Deputy Potter testified that he was actually aware of Defendant's status as a probationer, and the deputy's search was indeed conducted for legitimate law enforcement purposes. However, we have previously recognized that a defendant's

probationer status cannot sustain a warrantless search unless the record also contains evidence showing the defendant's probation conditions. *State v. Patterson*, No. W2018-01799-CCA-R3-CD, 2020 WL 1082381, at *8 (Tenn. Crim. App. Mar. 5, 2020), *no perm. app. filed*. Such evidence is absent here. No witness testified about Defendant's conditions of probation, and the State did not introduce the original probation order. As such, we cannot affirm the trial court's denial of Defendant's motion on this basis.

Probable Cause

We turn then to the issue of whether the warrantless search was supported by probable cause. As an initial matter, we note that the trial court appeared unsure whether probable cause existed to support the search. In its oral announcement, the trial court doubted whether "search warrant style probable cause" existed. To be clear, though, there are not two different standards for evaluating probable cause. As the United States Supreme Court has recognized, "[t]he scope of a warrantless search based on probable cause is no narrower—and no broader—than the scope of a search authorized by a warrant supported by probable cause." *United States v. Ross*, 456 U.S. 798, 823 (1982); *see State v. Taylor*, No. W2001-00829-CCA-R3-CD, 2002 WL 1482683, at *2 n.1 (Tenn. Crim. App. Mar. 15, 2002), *no perm. app. filed*. Thus, if "search warrant style" probable cause does not exist, then *no* probable cause exists.

The written order in the record, which we have now determined to be a nullity, included a discussion on probable cause. However, because this order was a nullity, and the trial court failed to make a definitive finding with regard to probable cause on the record, the issue of probable cause is not properly before us. In considering a motion to suppress evidence where issues of fact are presented, the trial court has an affirmative duty to make findings of fact on the record. *See* Tenn. R. Crim. P. 12(e); *State v. Ledford*, No. E1999-00917-CCA-R3-CD, 2000 WL 1211312, at *6 (Tenn. Crim. App. Aug. 28, 2000) ("Where resolution of factual issues are central to the determinations made by the trial court, Tenn[essee] R[ule of] Crim[inal] P[rocedure] 12(e) requires the trial court to state its essential findings on the record."), *no perm. app. filed*. "As the trier of fact at a suppression hearing, the trial court *must determine the credibility of the witnesses*, the weight and value of the evidence, and the resolution of conflicts in the evidence." *State v. Kelly*, No. M2001-01054-CCA-R3-CD, 2002 WL 31730874, at *15 (Tenn. Crim. App. Dec. 5, 2002) (emphasis added) (citing *Odom*, 928 S.W.2d at 23), *no perm app. filed*. Indeed, we have recognized that "[a] trial court that fails to comply with this duty runs the risk of having the judgment vacated and the case remanded for factual findings." *State v. Young*, No. M1999-01166-CCA-R3-CD, 2000 WL 380103, at *2 (Tenn. Crim. App. Apr. 14, 2000), *no perm. app. filed*.

As part of this duty, the trial court should seek to resolve "all of the factual and legal issues presented by the parties." *State v. Hannah*, 259 S.W.3d 716, 723 (Tenn. 2008). Consequently, where particular factual findings depend on the credibility of various witnesses, "[i]t is the right and the obligation of the trial court to again review all the evidence submitted at the suppression hearing and make a ruling based upon appropriate (and clear) findings of fact and credibility determinations." *State v. Walters*, No. W2019-00420-CCA-R3-CD, 2020 WL 2614671, at *4 (Tenn. Crim. App. May 22, 2020), *no perm. app. filed*; *see also State v. Velez*, No. 01C01-9611-CC-00488, 1998 WL 44924, at *6 (Tenn. Crim. App. Jan. 30, 1998) ("The trial court's duty was to assess the credibility of [witnesses] at the suppression hearing."), *perm. app. denied* (Tenn. Jan. 4, 1999); *State v. Norton*, No. M2009-01359-CCA-R3-CD, 2010 WL 4812852, at *5 (Tenn. Crim. App. Nov. 24, 2010) (remanding, in part, for the trial court to make a finding regarding the credibility of witnesses in a motion to suppress), *no perm. app. filed*.

In this case, Deputy Potter gave one timeline of the events at the hearing on Defendant's motion to suppress. He stated that he did not search Defendant's car until *after* he saw evidence consistent with a burglary inside Mr. Thompson's wood shop and *after* Mr. Thompson later saw his air wrench inside Defendant's car. However, Defendant alleges that Deputy Potter gave a different timeline during his testimony in earlier hearings. As Defendant alleges, the deputy testified previously that he discovered the air wrench *after* opening the car door but *before* discovering the burglary in the wood shop and *before* the victim first saw the tool in plain sight.

Depending on how these factual inconsistencies are resolved, the conclusion as to whether the search was valid will be affected. Importantly, the arguable inconsistencies do not mean the deputy's testimony has been dishonest or false in any way. *See Walters*, 2020 WL 2614671, at *4. But it does mean that the trial court, when confronted with material inconsistencies, had a duty "to judge the credibility of the witnesses, to weigh the evidence, and to resolve factual issues" in deciding the motion to suppress. *State v. Haney*, No. E2002-02189-CCA-R3-CD, 2003 WL 22046683, at *3 (Tenn. Crim. App. Sept. 2, 2003), *no perm. app. filed*.[1]

However, the trial court expressly refused to make any credibility determinations concerning Deputy Potter's testimony after material discrepancies arose, leaving it for the jury to determine the deputy's credibility at trial. This refusal was error. A trial court may not avoid its obligation to resolve factual inconsistencies in a pretrial motion to suppress by deferring to the jury's later consideration of the ultimate issue at trial.

[1] Importantly, we have recognized that "[i]n appropriate situations, clear and concise findings of fact can be made without stating that one witness is totally credible and the other witness is not credible. The finder of fact (which is the trial court here) can find a witness credible in some testimony and not credible in other testimony." *Walters*, 2020 WL 2614671, at *4 (citing *Odom*, 928 S.W.2d at 23).

To compensate for the lack of findings, the State urges us to affirm the denial of Defendant's motion on the theory that the trial court implicitly credited Deputy Potter's testimony given at the hearing. True, it will sometimes be apparent that a trial court implicitly credited the testimony of a key witness in resolving various issues in a motion to suppress. *See State v. Black*, 607 S.W.3d 832, 837 (Tenn. Crim. App. 2020) (recognizing that "an appellate court is permitted, under certain circumstances, to conclude the trial court implicitly accredited an officer's testimony by denying a motion to suppress"). At least in some cases, these implicit findings may appropriately aid appellate review when "we are hampered in our analysis by the lack of any specific findings by the trial court." *State v. Brown*, 294 S.W.3d 553, 565 (Tenn. 2009). However, the same cannot be true when the trial court expressly states that it is "not going to weigh the credibility" of a particular witness. Under those circumstances, we cannot conduct a proper review based on findings implied by the trial court's ultimate ruling.

Because the trial court failed to make findings of fact on the record, and because it affirmatively refused to make credibility findings when the need for such findings was apparent, we cannot adequately review whether the warrantless search of Defendant's car was supported by probable cause, because Defendant lacked standing to challenge the search, or for some other reason. Moreover, because we are not permitted to make findings of fact ourselves from the record, we cannot review the facts under a purely de novo standard and determine whether the trial court properly denied the motion. *See State v. Sherrill*, No. W2019-00150-CCA-R3-CD, 2020 WL 974195, at *6 (Tenn. Crim. App. Feb. 27, 2020) (holding that this Court may not conduct a de novo review when a trial court has failed to make credibility findings), *perm. app. denied* (Tenn. July 21, 2020). After all, "it is neither the duty nor the privilege of the appellate court to weigh conflicting evidence or pass upon the credibility of witnesses. Those issues are within the province of the trial court." *Meadows v. Story*, No. M2020-00886-COA-R3-CV, 2022 WL 4541193, at *8 (Tenn. Ct. App. Sept. 29, 2022) (citations and internal quotation marks omitted)), *no perm. app. filed*.

Remedy

The procedural posture of this case is important because a jury has already found Defendant guilty of various crimes beyond a reasonable doubt. Proof that the victim's air wrench was found in Defendant's car provided significant evidence upon which Defendant was convicted of theft, burglary, and vandalism. Not only did the tool's discovery provide actual evidence to support the elements of theft of property, but the evidence also served as valuable, if not essential, support for the jury's finding on the issue of identity, *i.e.*, that Defendant was the perpetrator in all three crimes.

Because the issue is not before us, we reach no opinion on whether the evidence would be legally sufficient to support each conviction without proof of the air wrench and its discovery in Defendant's car. Nevertheless, it is clear that this evidence impacted the jury's verdict and the parties' respective presentations of the case. *See* Tenn. R. App. P. 36(a).

In similar circumstances, we have remanded cases to reconsider a pretrial issue while leaving the underlying judgment intact during the resolution of that issue. For example, in *State v. Walters*, No. W2019-00420-CCA-R3-CD, 2020 WL 2614671 (Tenn. Crim. App. May 22, 2020), *no perm. app. filed*, a trial court granted a motion to suppress, and the State dismissed the indictment and sought an appeal. This Court concluded that the trial court did not make appropriate findings of fact to support its conclusion that the search was unconstitutional, and we "remanded [the case] to the trial court to make appropriate findings of fact in accordance with this opinion." *Id.* at *4. However, we left the judgment of dismissal intact, and we outlined the process to be followed depending upon how the trial court resolved the motion on remand:

> Based upon its findings of facts, the trial court must make a ruling either granting the motion to suppress, or denying the motion to suppress. If the trial court denies the motion, the indictment must be reinstated. After the trial court's ruling, the aggrieved party may seek any relief it may be entitled to seek.

Id.

We have followed a similar path involving jury verdicts as well. In *State v. Mobley*, No. E2020-00234-CCA-R3-CD, 2021 WL 3610905 (Tenn. Crim. App. Aug. 16, 2021), *perm. app. denied* (Tenn. Jan. 13, 2022), a trial court denied a *Batson* motion during jury selection,[2] and the jury ultimately found the defendant guilty of several offenses, including two counts of first degree premeditated murder. On appeal, this Court concluded that we could not adequately review the *Batson* issue because particular factual findings were not made. *Id.* at *18. As such, we ordered a limited remand to address only the *Batson* issue while leaving the jury's verdicts intact. As we did in *Walters*, we outlined the process on remand as follows:

> [W]e remand the case to the trial court for a hearing to address the three-part test under *Batson*. At the hearing, the Defendant should be given the opportunity to proceed with his efforts to establish a violation. The trial court

[2] A *Batson* motion is used to contest the use of a preemptory challenge to remove a juror because of that juror's race. *See Batson v. Kentucky*, 476 U.S. 79 (1986).

> shall make specific findings, applying the principles set forth in this opinion. If the trial court concludes that the Defendant has met his burden of establishing a *Batson* violation, the trial court shall grant the Defendant a new trial. If the trial court concludes that the State's exercise of the preemptory challenge did not violate *Batson*, the Defendant shall have the right to appeal the trial court's decision.

Id. (citations omitted).

In this case, if Defendant's motion to suppress is ultimately denied after a proper hearing, the evidence of the air wrench found in the Defendant's car would be admissible and the jury's verdicts would be unaffected. Conversely, if the motion to suppress is granted, then Defendant should be given a new trial without the evidence of the air wrench being placed before the jury. As such, consistent with both *Walters* and *Mobley*, we remand this case to the trial court with the following instructions:

- The trial court shall conduct a new hearing on Defendant's motion to suppress. In resolving Defendant's motion, the trial court shall make appropriate findings of fact and conclusions of law, applying the principles set forth in this opinion.

- If the State intends to maintain a position that Defendant lacks standing, it shall comply with its duty to notify Defendant that it opposes his motion on standing grounds, pursuant to *State v. White*, 635 S.W.2d 396, 399 (Tenn. Crim. App. 1982).

- If the trial court concludes that Defendant's motion to suppress should be granted, then the trial court shall grant Defendant a new trial on each count of the indictment.

- If the trial court concludes that Defendant's motion to suppress should be denied, then the judgments of conviction shall remain as originally entered. Defendant shall then have the right to appeal the trial court's decision by filing a notice of appeal within thirty (30) days of the trial court's order denying the motion to suppress.

CONCLUSION

In summary, we hold that the record here does not support the conclusion that Defendant possessed a reduced expectation of privacy in his car due to his status as a probationer. However, we cannot adequately review whether the search was supported by

probable cause or whether Defendant lacked standing to challenge the search because the trial court sua sponte raised the standing issue after all the proof was presented at the hearing and did not comply with its duties to judge the credibility of the witnesses, to weigh the evidence, and to resolve factual issues in deciding the motion to suppress. Accordingly, we remand this case for a new hearing on the motion to suppress in accordance with the instructions identified in this opinion.

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TIMOTHY L. EASTER, JUDGE