

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 23, 2023, at Knoxville

FILED

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Clerk of the
Appellate Courts

STATE OF TENNESSEE v. ANDRE JUJUAN LEE GREEN

**Appeal from the Circuit Court for Montgomery County
No. CC20-CR-537 Robert T. Bateman, Judge**

No. M2022-00899-CCA-R3-CD

The State appeals the trial court's order granting the defendant's motion to suppress evidence recovered during the search of the car in which the defendant was a passenger. The State asserts that the trial court erred because the scent of marijuana provided probable cause for the search regardless of the possibility that legal hemp was the source of the odor. After review, we conclude the trial court erred in granting the defendant's motion to suppress. Therefore, we reverse the trial court's order granting the defendant's motion for suppression, reinstate the indictments against the defendant, and remand to the trial court for further proceedings.

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

J. ROSS DYER, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., P.J., and ROBERT H. MONTGOMERY, JR., J., joined.

Jonathan Skrmetti, Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Robert J. Nash, District Attorney General; and Crystal Morgan, Assistant District Attorney General, for the appellant, State of Tennessee.

Chason T. Smith, Clarksville, Tennessee, for the appellee, Andre JuJuan Lee Green.

OPINION

Facts and Procedural History

The defendant was indicted for possession of marijuana with intent to manufacture, sell or deliver, possession of a firearm with intent to go armed during the commission of a

dangerous felony, and possession of drug paraphernalia arising out of a search of his backpack during a traffic stop of a vehicle in which he was a passenger. The defendant filed a motion to suppress asserting that the search of his backpack was conducted without probable cause. More specifically, the defendant argued a canine sweep “is no longer valid” to provide probable cause for a search because a canine cannot distinguish between the smell of hemp, which is now legal, and marijuana, which is illegal.¹

The transcript of the suppression hearing is not included in the record before us; however, the trial court’s order on the motion indicates that the parties stipulated at the hearing that the factual summary provided in the defendant’s motion to suppress was correct. On February 16, 2020, Officer Andrew Trescott conducted a traffic stop of a vehicle driven by Julio Chavez for operating his vehicle on high beams on Crossland Avenue in Clarksville. The defendant was a passenger in the vehicle. When Officer Trescott approached the vehicle, he could smell a strong odor of a distinct fragrance coming from the vehicle. Mr. Chavez asserted that the odor was from the three fragrance pine trees he had hanging from his rearview mirror. Officer Trescott noticed a black backpack in between the defendant’s feet. When Officer Trescott inquired about the backpack, both occupants denied owning it. Mr. Chavez denied the officer consent to search his vehicle, and Officer Trescott ordered Mr. Chavez and the defendant out of the vehicle.

Once the men were out of the vehicle, Officer Trescott made the decision to conduct an open-air sniff of the vehicle with his police service dog, Arlo. Arlo indicated on the vehicle, and Officer Trescott asked both men if there was anything inside and both responded “no.” Officer Trescott informed Mr. Chavez that he could be charged with anything found in the vehicle, and Mr. Chavez looked at the defendant and encouraged him to talk. The defendant then stated that he had picked up the backpack from his brother but did not know what was in it. A search of the backpack revealed a little less than an ounce of marijuana, a loaded Smith & Wesson nine-millimeter handgun, Ziploc bags, and a working scale. Two cell phones were found on the defendant, and a charger for one of the phones was found in the backpack.

The trial court granted the motion to suppress and, as a result, judgments were entered dismissing the charges against the defendant. The State filed a timely appeal.²

¹ Since April 4, 2019, the possession of hemp has been legalized in Tennessee. Hemp is defined as *Cannabis sativa* containing not more than 0.3% Tetrahydrocannabinol (THC). Marijuana is defined as *Cannabis sativa* containing greater than 0.3% THC. *See* Tenn. Code Ann. §§ 39-17-14 (2019); 43-27-101 (Supp. 2020).

² Under Tenn. R.App. P. 3(c)(1), the State has an appeal as of right only when the “substantive effect” of the order suppressing or excluding the evidence “results in dismissing an indictment, information, or complaint.” *State v. Meeks*, 262 S.W.3d 710, 719 (Tenn. 2008).

Analysis

On appeal, the State argues that the trial court erred in granting the defendant's motion to suppress because the scent of marijuana provided probable cause for the search regardless of the possibility that legal hemp could be the source of the odor. The defendant responds that the trial court properly granted the motion because a canine sweep of a vehicle is unreliable to provide probable cause for a search because a canine trained to react to the scent of marijuana cannot distinguish between the smell of hemp, which is now legal, and marijuana, which is illegal. As we will address below, we conclude the trial court erred in granting the defendant's motion to suppress.

Suppression issues on appeal are subject to a well-established standard of review. Appellate courts are bound by a trial court's findings of facts determined after a suppression hearing unless the evidence preponderates against them. *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996); *State v. Matthew T. McGee*, No. E2011-01756-CCA-R3-CD, 2012 WL 4017776, at *2 (Tenn. Crim. App. Sept. 13, 2012). "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 the trier of fact." *Odom*, 928 S.W.2d at 23. Appellate courts should consider the entire record, affording the prevailing party "the strongest legitimate view of the evidence and all reasonable inferences drawn from that evidence." *Matthew T. McGee*, 2012 WL 4017776, at *2 (citing *State v. Hicks*, 55 S.W.3d 515, 521 (Tenn. 2001)); see also *State v. Sanders*, 452 S.W.3d 300, 306 (Tenn. 2014). However, applying the law to the factual findings of the trial court is a question of law, which is reviewed *de novo* on appeal. *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997).

The Fourth Amendment to the United States Constitution and Article I, section 7 of the Tennessee Constitution guarantee freedom from unreasonable searches and seizures. These guarantees exist to "safeguard the privacy and security of individuals against arbitrary invasions of government officials." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967); see *State v. Downey*, 945 S.W.2d 102, 106 (Tenn. 1997). "[A] warrantless search or seizure is presumed unreasonable, and evidence discovered as a result thereof is subject to suppression unless the State demonstrates that the search or seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement." *Yeargan*, 958 S.W.2d at 630.

An automobile stop constitutes a "seizure" within the meaning of both the Fourth Amendment to the United States Constitution and article I, section 7 of the Tennessee Constitution. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *State v. Pulley*, 863 S.W.2d 29, 30 (Tenn. 1993). Therefore, police must have probable cause or an "articulable and reasonable suspicion" to believe that a traffic violation has occurred when they initiate a

traffic stop. *Whren v. U.S.*, 517 U.S. 806, 810 (1996). In this case, it has not been challenged whether Officer Trescott had probable cause or reasonable suspicion for the initial stop of Mr. Chavez's vehicle.

Furthermore, "a canine sweep around the perimeter of a vehicle which has been legally detained does not constitute a search, and thus, does not require probable cause or reasonable suspicion so long as the duration of the canine sweep does not exceed the time necessary for the traffic stop." *State v. England*, 19 S.W.3d 762, 764 (Tenn. 2000). A positive reaction to a vehicle by a trained drug detection dog provides probable cause to search inside the vehicle if the dog's reliability is established. *Id.* at 768. This includes consideration of the dog's training, the officer's training and experience with the dog, and the record of false negative and false positive alerts. *Id.* In this case, the defendant stipulated that the canine was properly certified, and there is no proof the duration of the sweep exceeded the time necessary for the traffic stop. The defendant's primary contention is that a trained canine alerting for the cannabis plant cannot determine if the odor is from illegal marijuana or legal hemp, making it unreliable.

In granting the defendant's motion to suppress, the trial court observed that "the State, the party who has the burden of proof, offered no proof regarding whether the drug detection canine can distinguish between hemp and marijuana" and concluded, based on the lack of proof and rulings from other *trial* courts, that "the reliability of the drug detection canine has not been established[.]"

One of the prior trial court rulings referred to by the trial court in this case was in *State v. Ariana E. Major*, No. 2019-CR-1374; Order Granting Motion to Suppress, July 28, 2020, in which that trial court addressed a similar situation and reached the conclusion that the reliability of the canine could not support a finding of probable cause. In making that determination, the *Ariana E. Major* trial court pointed to the legalization of hemp and evidence that the drug dog could not differentiate between legal hemp and illegal marijuana.

The trial court in this case also referred to *State v. Mark David Bond*, No. CC-2020-CR-1268; Order Granting Motion to Suppress, Jan. 19, 2022, in which that trial court discussed the levels of THC found in cannabis defining legal hemp and illegal marijuana. The court then discussed that the odor causing compounds found in cannabis, known as terpenes, were present regardless of the level of THC, and drug dogs were trained to detect the odor. Unlike the present case, the vehicle in the *Mark David Bond* case was found to contain fentanyl and cocaine and not marijuana, but the court pointed out that did not "change the fact that the canine would not be able to distinguish an illegal substance from one that is [legal]." The *Mark David Bond* trial court concluded "by virtue of the cannabis plant having an odor, which results in an alleged trained canine alerting for illegal drugs,

whether the cannabis plant is an illegal substance or not by virtue of its level of THC content, would cause the ‘sniff’ not to be ‘up to snuff[.]’”

While we acknowledge the rationale behind these trial court decisions, at this juncture the binding precedent from the Tennessee Supreme Court allows the smell of marijuana to provide probable cause for a search. *See State v. Hughes*, 544 S.W.2d 99, 101 (Tenn. 1976); *see also Hicks v. State*, 534 S.W.2d 872, 874 (Tenn. Crim. App. 1975); *State v. Frederic A. Crosby*, No. W2013-02610-CCA-R3-CD, 2014 WL 4415924, at *8 (Tenn. Crim. App. Sept. 9, 2014). In fact, another panel of this Court recently commented that “until our supreme court or our legislature determines otherwise, the smell of marijuana continues to establish probable cause for the warrantless search of an automobile.” *State v. Stephen Paul Hampton and Margaret Mary Hampton*, No. W2021-00938-CCA-R3-CD, 2022 WL 16919950, at *6 (Tenn. Crim. App. Nov. 14, 2022). Although these cases factually involve an officer, not a trained canine, smelling marijuana, we determine there is no practical difference for purposes of our analysis.

Additionally, while the alert of a trained drug detection canine is alone sufficient, a review of the totality of the circumstances surrounding the stop bolster a finding of probable cause. As noted *supra*, Officer Trescott noticed a strong odor of a distinct fragrance coming from the vehicle. Then, when he inquired about the backpack between the defendant’s feet, both the driver and the defendant denied ownership. Once the dog alerted on the vehicle and Officer Trescott informed the driver that he could be charged with anything found in the vehicle, the driver encouraged the defendant to talk. At that point, the defendant claimed that it was his brother’s backpack and that he was unaware of its contents. Clearly, the totality of the circumstances surrounding the stop in conjunction with the alert by a trained drug detection canine is sufficient to establish probable cause to search the vehicle and the defendant’s backpack. And, this conclusion is consistent with the approach outlined by the United States Supreme Court in *Florida v. Harris*: “whether all the facts surrounding a dogs alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime.” 568 U.S. 237, 248 (2013).

As such, upon a *de novo* review of the trial court’s legal conclusions, we conclude the trial court erred by granting the defendant’s motion to suppress and dismissing the indictments. Therefore, we reverse the trial court’s grant of the defendant’s motion to suppress, reinstate the indictments against the defendant, and remand the matter to the trial court for further proceedings.

Conclusion

Based upon the foregoing authorities and reasoning, we reverse the trial court's grant of the defendant's motion to suppress, reinstate the indictments against the defendant, and remand for further proceedings.

J. ROSS DYER, JUDGE