

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs May 3, 2016

STATE OF TENNESSEE v. RHONDA SOWELL

**Appeal from the Circuit Court for Madison County
No. 14434 Kyle Atkins, Judge**

No. W2015-01093-CCA-R3- CD - Filed September 21, 2016

The defendant, Rhonda Sowell, pled guilty in the Circuit Court for Madison County to driving under the influence (“DUI”) (Count 1), driving under the influence with a with a blood alcohol concentration of .08% or more (“DUI per se”) (Count 2), second offense DUI (Count 3), and violation of the light law pursuant to Tenn. Code Ann. § 55-9-402 (Count 4). Prior to pleading guilty, the defendant filed two suppression motions challenging the basis for the initial stop and the evidence collected subsequent to the stop. After the trial court denied both motions, the defendant pled guilty to all charges reserving two certified questions of law concerning the constitutionality of the traffic stop and the evidence obtained as a result. Upon review of the record, we hold that the traffic stop of the defendant was constitutional, supported by both reasonable suspicion and probable cause. Accordingly, we affirm the trial court’s denial of the defendant’s suppression motions. However, we remand the case to the trial court for entry of separate judgment forms for each conviction, including those that were merged, in light of our Supreme Court’s order in *State v. Marquize Berry*, No. W2014-00785-SC-R11-CD, slip op. at 5 (Tenn. Nov. 16, 2015) (order granting Tenn. R. App. P. 11 application for appeal).

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed;
Remanded for Entry of Additional Judgment Forms**

J. ROSS DYER, J., delivered the opinion of the court, in which ALAN E. GLENN and CAMILLE R. MCMULLEN, JJ., joined.

David W. Camp, Jackson, Tennessee, for the appellant, Rhonda Sowell.

Herbert H. Slatery III, Attorney General and Reporter; Zachary T. Hinkle, Assistant Attorney General; Jerry Woodall, District Attorney General; and Matthew Floyd, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

This case arises from a traffic stop that led to the defendant's arrest for driving under the influence in Jackson, Tennessee. The defendant was charged with three counts of driving under the influence and violation of Tenn. Code Ann. § 55-9-402 – the light law. The defendant filed two motions to suppress the evidence obtained from the traffic stop, arguing that the officer initiated the traffic stop absent reasonable suspicion and/or probable cause. The defendant further argued that the officer lacked reasonable suspicion and/or probable cause to request she submit to a blood alcohol test. The trial court held two suppression hearings. The evidence presented at the hearings included testimony from the arresting officer, Paul Bozza, testimony from the defendant, photographs of the traffic stop and arrest scene, and video footage of the interactions between the defendant and Officer Bozza after the initial traffic stop, and including her subsequent arrest. From the suppression hearings, the following facts emerged:

At approximately 3:00 a.m. on October 19, 2013, the defendant pulled out of a parking lot and onto Heritage Square Road without turning on her headlights. Officer Bozza, who was patrolling Heritage Square Road, witnessed the defendant driving without headlights. According to Officer Bozza, the defendant pulled onto Heritage Square Road approximately fifty feet in front of his patrol car. Officer Bozza followed the defendant for another fifty feet before initiating a traffic stop. The defendant never turned on her headlights.

After Officer Bozza activated his blue lights, the defendant pulled into a nearby parking lot. As he approached the defendant's vehicle, Officer Bozza detected a strong odor of alcohol coming from the defendant's vehicle. The defendant then "fumbled" when presenting her proof of insurance to Officer Bozza. Upon questioning, the defendant admitted to having nine beers that evening.¹ Consequently, Officer Bozza asked the defendant to exit her vehicle and to perform several field sobriety tests. As a result of her performance on the field sobriety tests, Officer Bozza arrested the defendant

¹The defendant later testified that she was being sarcastic in her response, and she in fact had only consumed one to two beers on the night in question.

for DUI. He then asked the defendant if she would consent to a blood alcohol test, and she agreed.

The defendant also testified. However, her testimony did not elicit any evidence regarding the constitutionality of the traffic stop. Rather, her testimony confirms that she was pulled over by Officer Bozza and that she had consumed alcohol and marijuana prior to the traffic stop. The bulk of her testimony concerns the area of the parking lot where she performed the field sobriety tests. The defendant did not dispute the fact that she drove on Heritage Square Road without turning on her headlights.

In addition to the testimony of Officer Bozza and the defendant, the trial court reviewed video footage of the defendant performing the field sobriety tests and her subsequent arrest. In ruling on the suppression motions, the trial court found Officer Bozza to be a credible witness. The trial court held that “based on the [d]efendant driving without her headlights on, Officer Bozza had reasonable suspicion to conduct a traffic stop of the [d]efendant.” Further, the trial court held that Officer Bozza had probable cause to ask the defendant to perform field sobriety tests and to submit to a blood alcohol test based upon a totality of the circumstances. As a result, the trial court denied both suppression motions.

On appeal, the defendant presents two certified questions of law pursuant to Rule 37 of the Tennessee Rules of Criminal Procedure:

1. Did the trial court err when it denied the Defendant’s Motion to Suppress the stop of her automobile when the stop was made without reasonable suspicion or probable cause as the Defendant was exiting a parking lot of a business onto a public road?
2. Did the trial court err when it denied the Defendant’s Motion to Suppress the blood test when the request to obtain the blood test from the Defendant was based on the totality of the circumstances, specifically on her failing a field sobriety test that was conducted in the dark, on uneven ground without clear and/or specific instructions and by a law enforcement officer who was prejudiced against the Defendant and stated he did this job because of concerns about his own family being on the same road with a driver under the influence?

However, as explained in depth later in this opinion, only the first question satisfies the requirements of Rule 37. Accordingly, we only have jurisdiction to address the constitutionality of the stop. Tenn. R. Crim. P. 37 (b) (2); *see State v. Preston*, 759 S.W.2d 647, 650 (Tenn. 1988).

ANALYSIS

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." *McGee*, No. E2011-01756-CCA-R3CD, 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).

On appeal, the defendant challenges the constitutionality of the traffic stop that led to her DUI arrest. Both the United States and Tennessee constitutions protect people against unreasonable searches and seizures. U.S. Const. amend. IV; Tenn. Const. art. I, § 7; see *Sneed v. State*, 423 S.W.2d 857, 860 (Tenn. 1968) (stating that Article I, § 7 of the Tennessee Constitution "is identical in intent and purpose with the Fourth Amendment"). These constitutional protections exist to "safeguard the privacy and security of individuals against arbitrary invasions of government officials." *State v. Yeargan*, 958 S.W.2d 626, 629 (Tenn. 1997) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967)). "Accordingly, '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 that the search or seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement.'" *State v. Smith*, 484 S.W.3d 393, 400 (quoting *Yeargan*, 958 S.W.2d at 629) (citations omitted)).

When a police officer initiates a traffic stop, effectively "seizing" an individual, the individual's constitutional rights against unreasonable searches and seizures are implicated. *Smith*, 484 S.W.3d at 400 (citing *State v. Pulley*, 863 S.W.2d 29, 30 (Tenn. 1993)). In Tennessee, a traffic stop is deemed constitutional if an officer has probable cause that a traffic violation has occurred. *State v. Andrew Quinn*, No. M2013-01683-CCA-R3-CD, 2014 WL 2000666, at *2 (Tenn. Crim. App. May 14, 2014). Though not technically defined, "probable cause exists when 'at the time of the [stop], the facts and circumstances within the knowledge of the officers, and of which they had reasonably

trustworthy information, are sufficient to warrant a prudent person in believing that the defendant had committed or was committing an offense.” *Smith*, 484 S.W.3d at 401 (quoting *State v. Dotson*, 450 S.W.3d 1, 50 (Tenn. 2014)). Further, “probable cause justifies a traffic stop under Article I, Section 7 of the Tennessee Constitution without regard to the subjective motivations of police officers.” *State v. Vineyard*, 958 S.W.2d 730, 736 (Tenn. 1997).

Absent probable cause, an officer “may legitimately initiate a brief, investigatory traffic stop if he possesses a ‘reasonable suspicion, supported by specific and articulable facts, that a criminal offense has been or is about to be committed.’” *Smith*, 484 S.W.3d at 401 (quoting *State v. Binnette*, 33S.W.3d 215, 218 (Tenn. 2000)). The purpose of a reasonable suspicion stop is to investigate the potential criminal activity of the subject motorist. *Smith*, 484 S.W.3d at 401. More is required than an officer’s “inchoate and unparticularized suspicion or hunch” to validate the stop. *Id.* (quoting *State v. Day*, 263 S.W.3d 891, 902 (Tenn. 2008) (internal citations omitted)).

Courts review the legality of a reasonable suspicion stop by looking at the totality of the circumstances from the perspective of a reasonable officer. *Id.* at 402 (citing *Day*, 263 S.W.3d at 903 (Tenn. 2008)). This requires a review of the record for “specific and articulable facts” demonstrating that the defendant engaged in criminal activity, or was about to engage in criminal activity. *Id.* As with a stop backed by probable cause, the subjective state of mind of the officer is not relevant to analyzing a reasonable suspicion stop. *Smith*, 484 S.W.3d at 402 (citing *Brigham City. Utah v. Stuart*, 547 U.S. 398, 404 (2006)). Further, “if the defendant attempts to suppress evidence collected during the challenged stop, the state is not limited in its opposing argument to the grounds ostensibly relied upon by the officer if the proof supports the stop on other grounds.” *Smith*, 484 S.W.3d at 402 (citing *State v. Tague*, 676 N.W.2d 197, 201 (Iowa 2004)).

In ruling on the suppression motions, the trial court found that Officer Bozza had reasonable suspicion to conduct the traffic stop of the defendant because she was driving without headlights prior to the stop. As argued by the State and found by the trial court, Tenn. Code Ann. § 55-9-406 requires motorists to display their headlights “during the period from one half (½) hour after sunset to one half (½) hour before sunrise.” Tenn. Code Ann. § 55-9-406. Officer Bozza witnessed the defendant driving on Heritage Square Road without headlights at approximately 3:00 a.m. This fact is undisputed in the record and it alone establishes probable cause.² See *Quinn*, No. M2013-01683-CCA-R3-

²The defendant also pled guilty to violating the light law found in Tenn. Code Ann. § 55-9-402 which requires “[e]very motor vehicle . . . be equipped with at least two (2) and not more than four (4) headlights, with at least one (1) on each side of the front of the motor vehicle.” Tenn. Code Ann. § 55-9-402.

CD, 2014 WL 2000666, at *2. Because he witnessed the defendant commit a traffic violation pursuant to Tenn. Code Ann. § 55-9-406, Officer Bozza had probable cause to initiate a traffic stop of the defendant. *Id.*; see *State v. Vineyard*, 958 S.W.2d at 736 (holding a traffic law violation creates probable cause to justify a traffic stop); see also *State v. Davis*, 484 S.W.3d 138 (Tenn. 2016) (holding that an officer had probable cause to stop a motorist after observing the motorist drive across a double yellow line, even if only once, on a two-lane road in violation of Tenn. Code Ann. § 55-8-115(a)). The record supports the trial court's determination that the stop was constitutional as Officer Bozza had probable cause to initiate the stop.

Furthermore, the record supports that Officer Bozza had reasonable suspicion to initiate the traffic stop. Officer Bozza testified that he saw the defendant driving without headlights on at 3:00 a.m., at a time when the bars in the area closed for the night. He then followed behind the defendant for about fifty feet, during which she still failed to turn on her headlights. As a result, Officer Bozza initiated a traffic stop because the defendant was driving, in the early morning hours, without headlights. Based upon a totality of the circumstances, it was reasonable that Officer Bozza initiated a traffic stop of the defendant in order to further investigate the defendant's activity. *Smith*, 484 S.W.3d at 402 (citing *Day*, 263 S.W.3d at 903 (Tenn. 2008)).

Based upon our review of the record, we hold that Officer Bozza had both reasonable suspicion and probable cause to initiate the stop of the defendant after seeing her violate Tenn. Code Ann. § 55-9-406. Accordingly, Officer Bozza's stop passes constitutional muster, and the trial court properly ruled on the defendant's suppression motion.

The defendant presents a second certified question on appeal regarding the suppression of the defendant's blood alcohol test. However, this question does not meet the requirements of Rule 37 of the Tennessee Rules of Criminal Procedure. Tenn. R. Crim. P. 37; see also *State v. Gerald Anthony Humphrey*, No. M2013-01512-CCA-R3-CD, 2014 WL 1354936, at *2 (Tenn. Crim. App. Apr. 4, 2014), *appeal denied* (Sept. 5, 2014)(noting the defendant must explicitly comply with the requirements of Rule 37, substantial compliance is not enough). In order to garnish appellate review, a certified question must be dispositive of the case. Tenn. R. Crim. P. 37(b)(2)(A)(iv). Though the trial court and the State agreed that the second certified question presented a dispositive issue, we disagree.

In Tennessee, "the crime for driving under the influence can be established by circumstantial evidence." *State v. Corder*, 854 S.W.2d 653, 654 (Tenn. Crim. App. 1992)

(citing *State v. Harless*, 607 S.W.2d 492, 493 (Tenn. Crim. App. 1980)). Here, the record provides that, after initiating the traffic stop Officer Bozza smelled alcohol on the defendant, the defendant “fumbled” with her insurance card, the defendant admitted to drinking nine beers that evening, and the defendant failed several field sobriety tests. Thus, the State could properly bring a case against the defendant for driving under the influence absent the results of the defendant’s blood alcohol test. As a result, the second certified questions regarding the suppression of the defendant’s blood alcohol test is not dispositive of the case and, therefore, this Court lacks jurisdiction.³

Finally, we note that the record only contains judgments for Counts 3 and 4. The judgement for Count 3 includes a note in the “Special Conditions” box that “Counts 1, 2, and 3 merge.” However, the record does not contain judgements for Counts 1 and 2. Our Supreme Court has recently provided guidance as to the proper procedure for recording judgments of merged convictions. *See State v. Marquize Berry*, No. W2014-00785-SC-R11-CD, slip op. at 5 (Tenn. Nov. 16, 2015) (order granting Tenn. R. App. P. 11 application for appeal). On remand in this case, the trial court should enter judgments for each conviction in Counts 1 and 2. Then the trial court should note in the “Special Conditions” box on those counts that the convictions have merged with the conviction in Count 3. *Id.* Additionally, the merger should be noted in the “Special Conditions” box of Count 3. *Id.*

CONCLUSION

Based on the foregoing authorities and reasoning, we affirm the judgments of the trial court.

J. ROSS DYER, JUDGE

³ It should be noted that even if the defendant’s second certified question were properly before this Court that the defendant would not be entitled to relief. The same reasoning and analysis applied to the first certified question presented on appeal is applied to the second certified question. The constitutionality of the traffic stop and the totality of the circumstances surrounding the stop (including the defendant’s consent to the test) eliminate further scrutiny by this Court of Officer Bozza’s request for the defendant to submit to a blood alcohol test. Additionally, the second question presented on appeal requires this Court to make additional factual findings regarding the condition of the parking lot where the field sobriety tests took place, the administration of the field sobriety tests, and Officer Bozza’s subjective feelings towards the defendant. However, it is the trial court’s duty to resolve factual issues. Because the factual issues raised in the defendant’s second question on appeal were not addressed by the trial court, it exceeds the scope of our appellate review and is not properly before this Court.