IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs February 26, 2002

STATE OF TENNESSEE v. DONALD RAY HICKEY

Direct Appeal from the Criminal Court for Knox County
No. 69342 Richard R. Baumgartner, Judge

No. E2001-00948-CCA-R3-CD
May 31, 2002

The Knox County Grand Jury indicted the Defendant for driving under the influence, fifth offense, driving on a revoked license, driving on a suspended license, driving on a cancelled license, and driving without a license. Claiming that the arresting officer stopped him illegally, the Defendant moved to suppress any evidence resulting from the stop. The trial court granted the motion, and the State appealed. We conclude that the trial court committed no error in its determination that the arresting officer lacked reasonable suspicion supported by specific and articulable facts to justify an investigatory stop of the Defendant's automobile. We further conclude that a "seizure" within the meaning of the Fourth Amendment to the United States Constitution and article I, § 7 of the Tennessee Constitution occurred when a police officer stopped her patrol car directly behind the Defendant's van and activated the blue lights and siren on her patrol car, but the Defendant drove away and did not submit to the officer's authority. Thus, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH, and JAMES CURWOOD WITT, JR., JJ., joined.

Paul G. Summers, Attorney General and Reporter; Thomas E. Williams, III, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Philip H. Morton, Assistant District Attorney General, for the Appellant, State of Tennessee.

Mark Stephens, Public Defender, Knoxville, Tennessee (on appeal); and Randall J. Kilby, Assistant Public Defender, Knoxville, Tennessee (on appeal and at trial), for the Appellee, Donald Ray Hickey.

OPINION

I. Facts

On the evening of April 28, 1998, Officer Sharon Terrell of the Knoxville Police Department was on routine patrol when she received a cell phone call from a resident of the Autumn Place Subdivision. Officer Terrell knew the caller because Terrell lived in that subdivision and was associated with the caller in a "Neighborhood Watch" program. The caller had spoken with Officer Terrell several times before about suspicious vehicles in the subdivision. At "Neighborhood Watch" meetings, various residents of the subdivision had reported two different vans that had regularly been seen driving slowly through the subdivision and residents were concerned about the occupants of the vans being potential burglars or pedophiles. On this occasion, the caller told Officer Terrell that a late model Dodge panel van had driven through the subdivision at a slow rate of speed. The van was one of the suspicious vehicles discussed by members of the "Neighborhood Watch." Officer Terrell had previously obtained the license tag number of a van that matched the caller's description at a "Neighborhood Watch"meeting. Officer Terrell was not aware of any burglaries in the subdivision or any incidents involving harm to the neighborhood children. When Officer Terrell first entered the subdivision to investigate, she did not see a van. However, as she was exiting the subdivision, Terrell saw a van that matched the van described by the caller and by other residents of the subdivision at the "Neighborhood Watch" meetings. The van was stopped on the side of the road at the exit to the subdivision.

Officer Terrell pulled in behind the van and verified that the tag number on the van matched the tag number on her memo pad. She activated her blue lights and then saw the driver of the van in the driver's side rear view mirror appear to lean over "into the floorboard of the seat beside him and either pick[] something up or put something down." Officer Terrell then activated her siren. Immediately prior to the activation of the siren, the person in the van began to drive away. The driver drove out of the subdivision and turned right onto Creek Head. Officer Terrell pursued the van at a "very low speed" for approximately a half mile, with the van passing by several driveways and proceeding along a "straightaway" where, according to Officer Terrell, it would have been "safe for him to stop." Officer Terrell testified that the Defendant traveled about "half a mile or maybe just a little less" without responding to the blue lights and siren. The driver of the van eventually turned left into his own driveway and stopped. By the time Officer Terrell got her vehicle stopped, the driver who was later identified as the Defendant was getting out of the van. She approached the Defendant quickly and the Defendant asked Terrell, "what was [her] problem" or "what did [she] want." She noticed indications of alcohol consumption and arrested the Defendant for DUI and violation of the driver's license law.

II. Analysis

At the hearing of the motion to suppress, the trial court determined that Officer Terrell lacked reasonable suspicion, based upon specific and articulable facts, that a criminal offense had been, was being, or was about to be committed. Thus, the trial court found that the stop of the Defendant's vehicle was constitutionally defective and suppressed the evidence. The State contends that the evidence should not have been suppressed because Officer Terrell had reasonable suspicion for an investigatory stop of the Defendant's vehicle. In the alternative, the State argues that even if Officer

Terrell lacked a constitutionally acceptable basis for initially attempting to stop the Defendant, the arrest was not "constitutionally infirm" because no "stop" occurred.

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 the trier of fact." State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). Findings of fact made by a trial court in ruling on a motion to suppress are binding upon this Court unless the evidence preponderates against the findings. See id. However, the application of the law to the facts found by the trial court is a question of law which this Court reviews de novo. See State v. Yeargan, 958 S.W.2d 626, 629 (Tenn. 1997).

The Fourth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Article I section 7 of the Tennessee Constitution provides that

> people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted.

Both of these constitutional provisions are intended to "safeguard the privacy and security of individuals against arbitrary invasions of government officials." Camara v. Municipal Court, 387 U.S. 523, 528, 87 S. Ct. 1727, 1730, 18 L. Ed. 2d 930 (1967); see also State v. Keith, 978 S.W.2d 861, 865 (Tenn. 1998).

Under both the federal and state constitutions, warrantless seizures are presumed unreasonable and evidence obtained from such a seizure should be suppressed unless the State demonstrates by a preponderance of the evidence that the search or seizure was conducted pursuant to an exception to the warrant requirement. See Coolidge v. New Hampshire, 403 U.S. 443, 454-455, 91 S. Ct. 2022, 2032, 29 L. Ed. 2d 564 (1971); State v. Watkins, 827 S.W.2d 293, 295 (Tenn. 1992). An investigatory stop of an automobile is such a seizure. See Colorado v. Bannister, 449 U.S. 1, 4 n.3, 101 S. Ct. 42, 44 n.3, 66 L. Ed. 2d 1 (1980); State v. Pulley, 863 S.W.2d 29, 30 (Tenn. 1993).

One exception to the warrant requirement was set forth by the United States Supreme Court in Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889 (1968). The Terry court held that a police officer may temporarily seize a citizen if the officer has a reasonable suspicion based upon specific and articulable facts that a criminal offense has been, is being, or is about to be

committed. See id. Likewise, an investigatory stop of an automobile is constitutional if the police officer has a reasonable suspicion, supported by specific and articulable facts, that the occupants of the vehicle have committed, are committing, or are about to commit a criminal offense. See United States v. Cortez, 449 U.S. 411, 417, 101 S. Ct. 690, 694, 66 L. Ed. 2d 621 (1981); Yeargan, 958, S.W.2d at 631; Watkins, 827 S.W.2d at 294.

In determining whether a police officer has a reasonable suspicion, supported by specific and articulable facts, a court must consider the totality of the circumstances including, but not limited to, the officer's personal objective observations, information obtained from other officers, information obtained from citizens, and the pattern of operation of certain criminals. See Cortez, 449 U.S. at 417, 101 S. Ct. at 695; Watkins, 827 S.W.2d at 294. The police officer "must be able to articulate something more than an inchoate and unparticularized suspicion or hunch." United States v. Sokolow, 490 U.S. 1, 7-8, 109 S. Ct. 1581, 1585, 104 L. Ed. 2d 1 (1989).

In this case, the testimony of Officer Sharon Terrell is undisputed. The trial court applied the law to the facts presented by Officer Terrell and concluded as a matter of law that Officer Terrell did not have a reasonable suspicion, based upon specific and articulable facts, that a criminal offense had been, was being, or was about to be committed by the Defendant at the time that Officer Terrell attempted the Terry stop. After a thorough de novo review, we have reached the same conclusion. Officer Terrell did not observe the Defendant commit any traffic violations. Various residents of the Autumn Place Subdivision had expressed concern at "Neighborhood Watch" meetings, attended by Officer Terrell, that certain vehicles were driving slowly past houses or parking in front of houses in the subdivision. The license tag of one such vehicle matched the license tag of the Defendant's vehicle, but Officer Terrell did not testify that any burglaries or problems with the neighborhood children had been reported. No complaints of any specific illegal activity by the "suspicious" vehicles had been reported. Therefore, Officer Terrell did not have reasonable suspicion, supported by specific and articulable facts, that the occupant of the van that she attempted to seize had committed, was committing, or was about to commit any criminal offense.

Citing this Court's opinion in State v. Perry Thomas Randolph, No. M2000-2293-CCA-R3-CD, 2001 Tenn. Crim. App. LEXIS 249 (Tenn. Crim. App., Nashville, Apr. 4, 2001), and the opinion of the United States Supreme Court in California v. Hodari D., 499 U.S. 621 (1991), the State argues that the Defendant was not "seized" when Officer Terrell activated the patrol car's blue lights and siren and pursued the Defendant, because the Defendant did not stop or yield to the officer's show of authority. The Tennessee Supreme Court recently reversed the judgment of this Court in the Randolph case, and rejected the Hodari D. standard on state constitutional grounds. State v. Perry Thomas Randolph, ____ S.W.3d ____, No. M2000-02293-SC-R11-CD, 2002 Tenn. LEXIS 195 (Tenn., Nashville, May 3, 2002). Our Tennessee Supreme Court has now ruled that a citizen has been "seized" for the purpose of Article I Section 7 of the Tennessee Constitution when, in view of the totality of the circumstances, a reasonable person would have believed he was not free to leave the scene. Id. at 17; see also State v. Binette, 33 S.W. 3d 215, 218 (Tenn. 2000); State v. Daniel, 12 S.W.3d 420, 425 (Tenn. 2000); State v. Pulley, 863 S.W.2d 29, 30 (Tenn. 1993); State v. Gonzalez, 52 S.W.3d 90, 95 (Tenn. Crim. App. 2000).

In our view, considering the totality of the circumstances surrounding the incident in this case, a reasonable person in the Defendant's place would not have believed he was free to leave. Therefore, Officer Terrell's actions in this case constituted a "seizure" implicating constitutional concerns. Having previously analyzed those concerns and concluded that the trial court was correct in suppressing the evidence, we affirm the judgment of the trial court.

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ROBERT W. WEDEMEYER, JUDGE