IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

MARCH 1996 SESSION

STATE OF TENNESSEE,	*	C.C.A. # 02C01-9508-CC-00239
Appellee,	*	McNAIRY COUNTY
VS.	*	Hon. Joe H. Walker, Judge
GRAPEL SIMPSON,	*	(Certified Question of Law)
Appellant.		

For Appellant:

Lloyd R. Tatum
Attorney
124 East Main Street
P.O. Box 293
Henderson, Tennessee 38340

For Appellee:

Charles W. Burson
Attorney General and Reporter

William David Bridgers
Assistant Attorney General
Criminal Justice Division
450 James Robertson Parkway
Nashville, TN 37243-0493

Elizabeth T. Rice
District Attorney General

Ed McDaniel
Asst. District Attorney General
Justice Complex
Selmer, Tennessee 38340

OPINION FILED:_____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The defendant, Grapel Simpson, pled guilty to possession of dilaudid, a Schedule II drug, with intent to deliver and sell. She reserved the right to appeal as a certified question of law the denial of both a motion to dismiss, based upon a double jeopardy claim, and a motion to suppress evidence. See Tenn. R. Crim. P. 11(e) and 37(b)(2). The trial court imposed a Range I sentence of five (5) years, to be served concurrently with any other sentences for drug-related charges[1] pending at the time of the defendant's plea, and assessed a fine of $2,000.00.

In this appeal of right, the defendant presents the following issues for our review:

> (1) whether criminal prosecution was barred by double jeopardy principles because a settlement agreement had been entered pursuant to civil forfeiture proceedings, and
>
> (2) whether the trial court erred by denying the defendant's motion to suppress evidence seized from the defendant's person.

At approximately 3:30 p.m. on December 30, 1994, Officer Rodney Weaver of the McNairy County Sheriff's Department and Drug Task Force received a call from a confidential informant that the defendant and Jimmy Brumley[2] were transporting 100 dilaudid pills from Memphis to McNairy County. Officer Weaver testified that the informant told him that the defendant and Brumley were traveling on Highway 64 in a two-door, cream- or beige-colored Oldsmobile and that they were "due [to arrive in Selmer] ... any minute." The informant, who had given

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[1] The defendant also pled guilty to a separate charge of possession with intent to deliver a controlled substance, a Class D felony, and received a Range I, five-year sentence. Two other drug-related charges were pending at the time of the defendant's plea.

[2] Brumley was a codefendant in this case but is not a party to this appeal.

information on previous occasions, did not state whether the defendant or Brumley was driving the vehicle.

He did not explain how he knew that the defendant was transporting drugs. Officer Weaver made no specific inquiries concerning the basis of the informant's knowledge.

Officer Weaver, McNairy County Sheriff Paul Ervin, and a third officer then drove to Highway 64, where they saw Brumley and the defendant in the vehicle described by the informant. The car was stopped and Officer Weaver questioned the defendant and Brumley separately about where they had been and for what purpose. Each claimed that they were returning from Memphis but gave conflicting responses as to the reasons for their trip. The defendant said that they had taken her niece back to Memphis; Brumley claimed that he and the defendant had gone to Memphis by themselves. Officer Weaver, who by then had informed the defendant that he had information that she was transporting dilaudid pills, sought her permission to search the car. The defendant reportedly replied, "Well, you can look. You can search. I don't have anything." Officer Weaver testified that Brumley, the driver of the car, also consented. The officers searched the car, including the trunk, but did not find any drugs.

After the car search, Officer Weaver asked the defendant whether she had any drugs on her person. According to the officer, the defendant responded, "No. You can look all you want." Ruth Travis, a female dispatcher, was then summoned to the scene to search the defendant. Officer Weaver claimed that the defendant was free to leave at any time after the search of the car, even while they waited for Ms. Travis to arrive. He did not, however, inform the defendant that she

could go.

Ms. Travis, the director and dispatcher of E-911, testified that she had previously been employed by the Sheriff's Department and had conducted other searches. Upon her arrival, she escorted the defendant to an area behind a patrol car which had been parked on the opposite side of the highway. Before the defendant was searched, her coat was removed and placed in the seat of the patrol car. Claiming that she was cold, the defendant then reached for her coat. When Ms. Travis informed the defendant that the coat would also have to be searched, the defendant acknowledged that there were drugs in the pocket and that she would pay her to keep quiet. There were one hundred (100) dilaudid pills in the defendant's coat. No drugs were found in Brumley's possession.

At the suppression hearing, the defendant testified that the officers did not ask for her permission and that she did not volunteer her consent to a search of either the car or her person. She was uncertain as to whether Brumley had given permission to the car search and denied telling Ms. Travis that she would pay her not to tell anyone that drugs were in her coat pocket. The defendant claimed that she told Ms. Travis that drugs were in her pocket in order to avoid having to take her clothes off while standing alongside the highway on a cold day with four or five male police officers on the other side of the road.

At the conclusion of the suppression hearing, the trial court made several findings:

> Law enforcement officers received a telephone call indicating that the defendant would be in a certain vehicle, g[iving] a description of the vehicle, and [providing] that the defendant would be illegally transporting a controlled substance. The telephone call indicated the approximate location of the vehicle coming

> back from Memphis to Selmer on Highway 64, and [gave] a good description of the vehicle. Law enforcement went to Highway 64, spotted the vehicle and signaled for it to pull off.
>
> The officers requested that the defendant step out of the car, and [they] called a female officer, Ms. Travis, to come to the scene in order to conduct a search of the ... [defendant].
>
> When Ms. Travis arrived, she indicated that she was to search [the defendant], and they went across the street for privacy reasons. [The defendant] put her coat in the car, and Ms. Travis conducted the search of [the defendant's] person. After the search, [the defendant] requested her coat, and Ms. Travis said that she would have to pat the coat down before giving it to her. [The defendant] grabbed for her coat, and said that there were drugs in the pocket, but she would give Ms. Travis money if she would not tell anyone.
>
> Ms. Travis seized the pills from the [defendant's] coat.

The trial court ruled as follows:

> (1) that sufficient probable cause supported the initial stop of the vehicle in which the defendant was a passenger;
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> (2) that exigent circumstances existed for an immediate search of the vehicle and of the defendant;
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> (3) that the defendant, although in custody, was not subject to interrogation at the time she made the statement that she would pay Ms. Travis if she would not tell anyone that drugs were in her coat; and
>
> (4) that the statement made by the defendant was a contemporaneous statement.

Civil forfeiture proceedings were also initiated seeking the forfeiture of the 1985 Oldsmobile Cutlass driven by Brumley and cash in the amount of $1717.00 which was in the defendant's possession at the time of her arrest. The defendant testified that the vehicle driven by Brumley was owned by her but was titled in her deceased son's name. The defendant entered into a civil settlement agreement on

March 10, 1995, forfeiting both the car and the cash. The settlement agreement was entered before the entry of the guilty plea on May 31, 1995. At the suppression hearing, the defendant stated that she did “not really” think that the criminal proceeding had anything to do with the civil forfeiture proceeding.

I

The defendant’s initial argument is that settlement of the civil forfeiture proceeding qualified as punishment for the offense, and thus, any subsequent prosecution was precluded by double jeopardy principles. See U.S. Const. amend. V ("nor shall any person be subject to the same offense to be twice put in jeopardy of life and limb"); Tenn. Const. art. I, § 10 ("that no person shall, for the same offense, be twice put in jeopardy of life or limb"). The defendant relies primarily on United States v. Halper, 490 U.S. 435 (1989), and Austin v. United States, 509 U.S. 602 (1993).

The double jeopardy clauses of the United States and Tennessee Constitution, virtually identical in content, provide protection against (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711 (1969).

In State v. Conley, 639 S.W.2d 435 (Tenn. 1982), our supreme court held that prior convictions for driving under the influence of an intoxicant resulting in the suspension of a license did not preclude a subsequent conviction under the Motor Vehicle Habitual Offender's Act to further bar the defendant from driving. From our reading of the case, the ruling stands for the proposition that if the state action is remedial and not intended to inflict punishment as a means of vindicating

public justice, the double jeopardy clause serves as no protection. See State v. Coolidge, 915 S.W.2d 820 (Tenn. Crim. App. 1995).

Recently, the United States Supreme Court considered the very issue presented by the defendant in this case. Holding that in rem forfeitures are neither "punishment" nor criminal for double jeopardy consideration, the court held in two separate actions that the forfeiture of property as a result of a civil complaint did not bar a subsequent criminal prosecution. United States v. Ursery and United States v. $405,089.23 in United States Currency, et al, 64 U.S.L.W. 4565 (U.S. June 24, 1996). The ruling was based in great measure upon the rationale of Various Items of Personal Property v. United States, 282 U.S. 577, 581 (1931):

> [This] forfeiture proceeding ... is in rem. It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient. In a criminal prosecution it is the wrongdoer in person who is forfeited against, convicted, and punished. The forfeiture is no part of the punishment for the criminal offense. The provision of the Fifth Amendment to the Constitution in respect to double jeopardy does not apply.

So long as the forfeiture proceeding is civil or remedial in nature, not intended as an additional punishment, there is no constitutional protection. United States v. One Assortment of 89 Firearms, 465 U.S. 354, 362 (1984). We find no distinction between the facts in this case and the ruling in Ursery. In our view, our state constitution provides no greater protection than that afforded by the double jeopardy clause in the United States Constitution. Thus, the forfeitures here did not qualify as punishment for criminal purposes; there is no bar to either the prosecution or the convictions.

II

Next, the defendant argues that the trial court erred by refusing to grant the motion to suppress. The defendant makes two claims: (1) the officers lacked probable cause or reasonable suspicion to stop the vehicle; and (2) the officers lacked probable cause to search the defendant. The state asserts that the evidence does not preponderate against the trial court's decision that probable cause existed for the initial stop of the vehicle and that the search of the defendant was a search incident to a lawful arrest or under exigent circumstances. The state further contends that even if probable cause did not exist for the initial stop, there was sufficient reasonable suspicion to support an investigatory stop and the defendant voluntarily consented to the subsequent search of the car and of the defendant's person. We agree that there was a valid investigatory stop. Because the defendant consented to the search of her person, the illegal drugs, in our view, were properly admitted into evidence.

Both the state and federal constitutions protect individuals from unreasonable searches and seizures. An automobile stop constitutes a "seizure" within the meaning of both the Fourth Amendment of the United States Constitution and Article I, Section 7 of the Tennessee Constitution. See Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 450 (1990); Delaware v. Prouse, 440 U.S. 648, 653 (1979); State v. Pulley, 863 S.W.2d 29, 30 (Tenn. 1993); State v. Binion, 900 S.W.2d 702, 705 (Tenn. Crim. App. 1994); State v. Westbrooks, 594 S.W.2d 741, 743 (Tenn. Crim. App. 1979). The fact that the detention may be brief and limited in scope does not alter that fact. Delaware v. Prouse, 440 U.S. at 653; State v. Pulley, 863 S.W.2d at 30; State v. Binion, 900 S.W.2d at 705; State v. Westbrooks, 594 S.W.2d at 743. The basic question, as indicated, is whether the seizure was "reasonable." State v. Binion, 900 S.W.2d at 705 (citing Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990)). The state always carries the burden of

establishing the reasonableness of any detention. See State v. Matthew Manuel, No. 87-96-III (Tenn. Crim. App., at Nashville, Nov. 23, 1988).

Our determination of the reasonableness of the stop of the vehicle turns on whether the officers had either probable cause or an "articulable and reasonable suspicion" that the vehicle or its occupants were subject to seizure for violation of the law. See Delaware v. Prouse, 440 U.S. at 663; State v. Coleman, 791 S.W.2d 504, 505 (Tenn. Crim. App. 1989). Probable cause has been generally defined as a reasonable ground for suspicion, supported by circumstances indicative of an illegal act. See State v. Lea, 181 Tenn. 378, 380-81, 181 S.W.2d 351, 352 (1944). While probable cause is not necessary for an investigative stop, it is a requirement that the officer's suspicion be supported by "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry v. Ohio, 392 U.S. 1, 21 (1968); State v. Pulley, 863 S.W.2d at 30; State v. Coleman, 792 S.W.2d at 505. Our courts have held that the Terry investigatory stop doctrine also applies to those persons riding in a vehicle. E.g., State v. Watkins, 827 S.W.2d 293, 294 (Tenn. 1992). In determining whether reasonable suspicion exists, an important factor in the analysis is that:

> [r]easonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.

State v. Pulley, 863 S.W.2d at 32 (quoting Alabama v. White, 496 U.S. 325, 330 (1990)).

In State v. Jacumin, 778 S.W.2d 430, 436 (Tenn. 1989), our supreme court adopted the two-prong test of Aguilar v. Texas, 378 U.S. 108 (1964), and

Spinelli v. United States, 393 U.S. 410 (1960), regarding the adequacy of information necessary to support the issuance of a search warrant. In Aguilar, the United States Supreme Court held that there must be a "basis of knowledge" when the officer relies on hearsay information from a confidential informant. The second part of the Aguilar-Spinelli test, the "veracity prong," requires a showing that the informant is credible or the information is reliable. The failure to establish the basis of knowledge or veracity of the confidential informant, however, is not necessarily fatal. In Jacumin, our supreme court held as follows:

> [W]hile independent police corroboration could make up deficiencies in either prong, each prong represents an independently important consideration "that must be separately considered and satisfied in some way."

In Coleman, our court found Jacumin, even though a search warrant case, to be helpful in analyzing the sufficiency of grounds for an investigatory stop. See also State v. Pulley, 863 S.W.2d at 32. "When a stop is based on the tip of an informant, however, the danger of false reports, through police fabrication or from vindictive or unreliable informants, becomes a concern." State v. Pulley, 863 S.W.2d at 31. Here, as in State v. Coleman, the stop was made, not upon the officer's observations, but solely upon the information supplied by a confidential informant. The tip provided by the confidential informant is quite similar to that given in State v. Coleman:

> [T]hat between 2:00 and 2:30 P.M. on August 10, a white female, between 25 and 35 years of age and whose first name was Carla, would be en route to Robertson County from Davidson County on Highway 431 South. The informant stated that she wold be driving an older model black Monte Carlo, would have in her possession several pounds of marijuana, and would ultimately drive to a location on Washington Road.

791 S.W.2d at 504 (holding that an investigatory stop, while not requiring probable cause, was nonetheless improper because the officer had been unable to corroborate either the veracity of the informant or the basis of knowledge for his tip).

Similar to the informant in Coleman, the confidential informant here did not explicitly state the basis of knowledge for the information given, and Officer Weaver made no inquiries. Also, the basis of the informant's knowledge was not "immediately verifiable at the scene." See Adams v. Williams, 407 U.S. 143, 146 (1972); see also State v. Coleman, 791 S.W.2d at 507.

On the other hand, in determining whether an officer had reasonable suspicion to make an investigatory stop, a court should also consider the rationale inferences and deductions that a trained officer may draw from the facts and circumstances known to him or her. See Terry v. Ohio, 392 U.S. at 21. Here, the confidential informant, a convicted felon, was known to Officer Weaver. Here, Officer Weaver testified that he had personally "interview[ed]" the informant on other occasions. Moreover, he knew the informant "through previous contacts as a confidential informant." The officer did not specifically testify that the information the informant had given on earlier occasions had been found reliable but did indicate his belief that he had acquired a credible tip. The corroboration of several facts supplied by the informant, such as the description of the car, the location and direction of travel, and the time of arrival, further supports the informant's credibility. See State v. Pulley, 863 S.W.2d at 32. These facts, we think, are distinguishable from those in Coleman where an anonymous informant called the police and claimed that a vehicle contained illegal drugs. While we doubt that the state had established probable cause to arrest, the "indicia of reliability" necessary to support an investigatory stop was present.

Our supreme court has held that a report can often be presumed to be first-hand and reliable "[w]hen an informant reports an incident at or near the time of its occurrence ...." State v. Pulley, 863 S.W.2d at 32 (stating that timing is important

in determining the reliability of an informant because timing suggests first-hand knowledge). Here, the confidential informant told Officer Weaver that the car in which the defendant was a passenger was about to arrive in Selmer "any minute;" the police officers drove immediately to Highway 64, finding the vehicle described occupied by the defendant and her companion and thus confirming the content of the tip. Officer Weaver testified that following the stop, he questioned the defendant and Brumley as to their whereabouts "to try to figure out how much of the information [he] had was going to be true...." Thus, he made a legitimate attempt to corroborate the accuracy of the informant's tip. Different answers given to routine questions further aroused the level of suspicion. While not a strong showing, these facts permit an inference that the informant had some basis for his knowledge.

While the United States Supreme Court has adopted a de novo review of trial court's determination of reasonable suspicion and probable cause, Ornelas v. United States, ____ U.S. ____, 116 S.Ct. 1657, 1663 (1996), case law in Tennessee provides that a trial court's determination is conclusive on appeal unless the evidence preponderates against the decision. State v. Long, 694 S.W.2d 337, 339 (Tenn. Crim. App. 1985). While this is a close issue, some deference must be given the trial judge who heard and observed the witnesses firsthand, even though he erroneously concluded that the information available rose to the level of probable cause. Our supreme court stated that the "reasonableness of seizures less intrusive than a full-scale arrest is judged by weighing the gravity of public concern, the degree to which the seizure advances that concern, and the severity of the intrusion into individual privacy." State v. Pulley, 863 S.W.2d at 34. Here, the content of the tip, the corroborative observations of the officers, and the public concern for the illegal possession and distribution of a Schedule II drug establish the reasonableness of the investigatory stop.

That conclusion does not, however, end our inquiry. When an investigatory stop of a motor vehicle is based on "reasonable suspicion, supported by specific and articulable facts, that a criminal offense has been or is about to be committed," State v. Watkins, 827 S.W.2d 294, an officer may detain the occupants for questioning. See Terry v. Ohio, 392 U.S. at 30. Here, the defendant and Brumley gave conflicting stories about the reason for their trip to Memphis. While not elevating the degree of suspicion to probable cause, this contradiction elevated the degree of suspicion. Officer Weaver testified that he requested and obtained consent to search the car. While the defendant's claimed otherwise, the trial court implicitly held for the state by refusing to suppress the evidence ultimately obtained.[3] On appeal, our scope of review is limited. The trial judge's findings of fact on a motion to suppress are generally binding. State v. Odom, ___ S.W.2d ___, slip op. at 10 (Tenn. 1996); State v. Tate, 615 S.W.2d 161, 162 (Tenn. Crim. App. 1981). While there was contested evidence on the issue of consent, the trial court's ruling tends to support the validity of the car search. In our view, the greater weight of the evidence suggests consent, even though the officers ultimately found no contraband in the vehicle.

The state asserts that the defendant consented to the search of her person after the stop. The validity of the search depends on whether, based on the totality of the circumstances, the consent was "voluntarily given and not the result of duress or coercion." Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973); Liming v. State, 220 Tenn. 371, 375, 417 S.W.2d 769, 770 (1967). A determinative factor is whether the consent is an "act of necessity rather than of volition." Fox v. State,

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[3]The trial court specifically found that the defendant was in custody at the time Ms. Travis was called to the scene because "the reasonable expectation would be that when [a person] is stopped on the side of the road and ... notified that someone is on[] their way to search [him or her,] that [person is] not free to leave the officer's custody at that time."

214 Tenn. 694, 702, 383 S.W.2d 25, 28 (1964), cert. denied, 380 U.S. 933 (1965). The trial court accredited Officer Weaver's testimony that the defendant gave him permission to “look all [he] want[ed].” As indicated, our scope of review on appeal, however, is limited. Here, the trial court made no specific findings concerning whether the defendant consented to the search of her person. The implication of the ruling denying suppression, of course, is that the defendant did consent to the search of her person. In the words of Officer Weaver, the defendant "openly" consented. The search of her person was within five minutes of the stop. All of this supports the conclusion that the defendant consented to the search.

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Gary R. Wade, Judge

CONCUR:

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Joe B. Jones, Presiding Judge

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William M. Barker, Judge