IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JUNE 1996 SESSION

FILED

July 3, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	No. 02C01-9580-CC-00231
	)	
	)	Henry County
v.	)	
	)	Honorable Julian P. Guinn, Judge
	)	
JAMES WESLY STARNES,	)	(Possession with the intent to deliver
	)	or sell marijuana and cocaine)
Appellant.	)	

For the Appellant:

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(AT TRIAL)

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OPINION FILED:_____

AFFIRMED

Joseph M. Tipton
Judge

O P I N I O N

The defendant, James Wesly Starnes, appeals as of right from his convictions by a jury in the Henry County Circuit Court for possession of cocaine with the intent to deliver or sell, a Class B felony, and for possession of marijuana with the intent to deliver or sell, a Class E felony. The trial court sentenced the defendant as a Range II, multiple offender to concurrent terms of fifteen and four years, respectively, in the custody of the Department of Correction. The trial court also imposed fines of twenty-five thousand dollars and five thousand dollars, respectively. On appeal, the defendant contends that:

(1) the evidence is insufficient to support his convictions;

(2) the trial court erred by overruling his motion to suppress; and

(3) the trial court erred in sentencing the defendant.

We hold that there is sufficient evidence to support the defendant's convictions and that the trial court did not err. We affirm the trial court's judgments of conviction.

Officer David Powell of the Henry County Sheriff's Department testified that on September 19, 1993, he received information from his superior officer regarding a Crime Stopper tip. He explained that Crime Stoppers is a program where people call the sheriff's department to report information regarding crimes that have been committed and the information is passed along to the officers. He stated that he was told that the defendant and Michelle Starnes[1] were traveling in a blue hatchback with the tag number "YRS 127," that the car was in violation of registration laws, and that they were transporting drugs. Officer Powell said that as he was near Highway 79 at approximately 10:30 p.m., he saw a car matching the description given to the Crime

[1] Michelle Starnes, the defendant's wife, was indicted for the same offenses. At a separate trial, she was found guilty by a jury of two counts of simple possession and was sentenced to concurrent terms of eleven months and twenty-nine days and fined two thousand five hundred dollars for each count.

Stoppers program. He testified that he called in the tag number for verification, and when the dispatcher confirmed that the car was the one suspected of carrying drugs, he turned on his blue lights to stop the car. Officer Powell stated that as he started to get out of his vehicle, Mrs. Starnes got out of the driver's side and walked to the rear of the car. He testified that he asked her about the registration of the vehicle and she told him that the registration belonged to a Camaro and that she and the defendant were in the process of buying the car from A1 Auto Sales. According to Officer Powell, he then explained the registration law and informed her that he had received a tip that drugs were in the car. He said that he told her that while he was investigating the registration violation, he was going to call for a drug unit. He testified that although Mrs. Starnes claimed that the car belonged to both her and the defendant, neither provided proof of ownership.

Officer Powell stated that during this time another officer arrived. Officer Powell recalled asking Mrs. Starnes whether there were any drugs in the car. He testified that when she replied that prescription drugs were in the car, he explained to her that the prescription drugs could be detected by the dog. He stated that she told him that she was not sure where the drugs were because they were in the process of moving and several boxes were inside the car. Officer Powell remembered that the prescription drugs were removed from the car but he did not see who removed them. He said that while waiting for the drug unit to arrive, he asked the defendant and Mrs. Starnes for permission to search the car. Officer Powell testified that both the defendant and Mrs. Starnes agreed, but he told them that he would wait for the arrival of the drug unit. He also said that he called for a wrecker at this time. Officer Powell stated that the defendant repeatedly requested to leave or to have someone to pick them up before the unit got there but he refused to let them leave. According to Officer Powell, the defendant acted very nervous and hyper and was very talkative.

Officer Powell testified that when the drug unit arrived, the dog indicated that drugs were in the rear of the car. He stated that a manual search of the car revealed marijuana contained in a makeup case behind the driver's seat in the floorboard. He said that he also found a spoon, a knife, a glass straw and a mirror in the makeup case and that the straw and the mirror appeared to have cocaine residue on them. He recalled that the dog was taken around the vehicle again and that the dog signaled that drugs were in the same area. He stated that Officer Crosser opened the flap covering the gas cap, and Mrs. Starnes began crying heavily. He said that the officers discovered an "eight ball" of cocaine inside. He testified that when he informed the defendant that he was under arrest, the defendant pointed to Mrs. Starnes and stated that the drugs were hers. Officer Powell also testified that he found one thousand six hundred dollars on the defendant when he was searched at the jail.

On cross-examination, Officer Powell testified that he did not know who placed the call to Crime Stoppers regarding the defendant and Mrs. Starnes. He said that he did not know whether rewards were paid for tips to Crime Stoppers. Officer Powell also stated that the defendant told him that he was employed at a bar owned by his uncle and that the money he had with him came from the bar. He conceded that no tests were conducted on the drug paraphernalia found in the makeup case. He also admitted that he did not test the defendant or Mrs. Starnes for drug content in their bodies. Officer Powell denied that Mrs. Starnes told him that the tag came from another car and said that the car actually belonged to Eastside Enterprises.

On redirect examination, Officer Powell noted that September 19 was on a Sunday and that the bar where the defendant worked would not have been open. He also stated that giving drug tests is not routine when charging a person with drug possession. Officer Powell also testified that the defendant and Mrs. Starnes did not

tell him that they had an interest in a bar in Stewart County and that he did not know whether bars were open on Sundays in that county.

Jimmy Luffman, a park ranger with the Tennessee State Parks at Paris Landing, testified that he responded to a call to assist Officer Powell. He said that when he arrived, Officer Powell was questioning Mrs. Starnes about the car's registration and the defendant was inside the car. He stated that the defendant got out of the car to talk to Officer Powell. Luffman testified that the drug unit arrived and that a search of the car was conducted. He said that he saw Officer Powell carrying a small package as he walked away from the car and that he observed the officers' discovery of something behind the gas flap. He recalled that Mrs. Starnes was crying and was very tense, upset, and nervous. Luffman also testified that the defendant was nervous and restless.

Officer James Crosser of the drug task force for the Henry County Sheriff's Department testified that he responded to a call on September 19, 1993. He stated that when he arrived approximately fifteen to twenty minutes after receiving the call, the defendant and Mrs. Starnes were standing outside the car. Officer Crosser said that he took the dog around the car and that the dog alerted that drugs were possibly near the left rear bumper. He testified that he then informed Officer Powell, the defendant and Mrs. Starnes that the dog signaled that the car contained drugs and that he was going to check inside. According to Officer Crosser, the defendant and Crosser agreed to the search. He stated that he then allowed the dog to enter the car and the dog indicated that drugs were inside the glove box and near the backseat floorboard on the driver's side. He said that the dog also signaled that drugs were near the gas tank.

Officer Crosser testified that he and Officer Powell then searched the car and discovered a makeup box in the floorboard behind the driver's seat that contained marijuana. He stated that he found prescription drugs in a vial inside the glove box. He also stated that Mrs. Starnes burst into tears as he opened the flap on the gas cap and found a bag of cocaine inside. Officer Crosser expressed the opinion that the cocaine was a very sizeable amount and that the amount was greater than that normally found on persons using the drug for personal use. He testified that as he was arresting the defendant, the defendant appeared excited and nervous and he pointed to his wife and said, "It's hers." Officer Crosser stated that the defendant had one thousand six hundred dollars in cash with him when he was booked.

On cross-examination, Officer Crosser conceded that he was not aware of the Crime Stoppers tip on September 19, 1993. He said that occasionally rewards are paid for information given to the Crime Stoppers program. He also estimated that the cocaine was worth a lot of money. Officer Crosser said that he did not recall whether the defendant tried to explain where the money came from but that some of the money was later given back to the defendant.

Lisa Mays, a forensic chemist with the Tennessee Bureau of Investigation, testified that she analyzed substances found by Officers Powell and Crosser. She said that the plant material was marijuana weighing 25.6 grams and that the vial contained benzocaine, which is a local anesthetic often used as a cutting agent for cocaine. Agent Mays also said that her analysis revealed that another package contained 10.1 grams of cocaine. On cross-examination, she admitted that she did not conduct any tests to determine the amount of foreign material in the substances. Agent Mays testified that the cocaine was pure enough that such testing was not necessary because the tests that she used required a relatively pure substance for analysis. She estimated that the cocaine was eighty percent pure.

I. SUFFICIENCY OF THE EVIDENCE

The defendant contends that the evidence is insufficient to support his convictions. Essentially, he asserts that there is not enough proof to establish beyond a reasonable doubt that he had knowledge or possession of the drugs. He argues that the proof shows that the drugs were Mrs. Starnes and not his. We hold that the evidence establishes the defendant's guilt beyond a reasonable doubt.

Our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). This means that we may not reweigh the evidence, but must presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

A conviction for cocaine or marijuana possession may be based upon either actual or constructive possession. State v. Cooper, 736 S.W.2d 125, 129 (Tenn. Crim. App. 1987). Constructive possession of a drug requires proof that the person has the power and intention at a given time to exercise dominion and control over the drugs either directly or through others. Id. Mere association with a person who possesses drugs or presence in a place where drugs are found are insufficient to establish constructive possession. Id.

When viewed in the light most favorable to the state, the proof in this case establishes more than the defendant's association with Mrs. Starnes or his presence in a car where drugs were found. The evidence shows that the car in which the defendant

was riding was in violation of registration laws. Mrs. Starnes admitted that the registration belonged to a Camaro but claimed that she and the defendant were in the process of buying the car from A1 Auto Sales. While waiting for the drug unit to arrive, the defendant repeatedly asked Officer Powell that they be allowed to leave or have someone pick them up. The officers described the defendant's conduct as very nervous, restless, hyper and talkative. As Officer Crosser arrested the defendant, the defendant pointed to Mrs. Starnes and said, "It's hers." The defendant also had one thousand six hundred dollars in his possession.

A rational trier of fact could have concluded beyond a reasonable doubt that the defendant possessed the marijuana and cocaine found in the car. Therefore, we hold that sufficient evidence was presented to support his convictions.

II. MOTION TO SUPPRESS

The defendant asserts that the trial court erroneously overruled his motion to suppress the drugs seized during the search of his car based upon the untimeliness of the motion. The defendant concedes that the motion was filed outside the time allowed by the trial court, and he acknowledges the need for scheduling orders to assist in an orderly judicial process. He argues, though, that the trial court erred by overruling his motion to suppress because pursuant to Rule 12, Tenn. R. Crim. P., he filed his motion twenty-six days before trial allowing enough time for the motion to be heard without undue burden on any of the parties. The state responds that the defendant's failure to file his motion within the time set by the trial court constituted waiver and that the defendant failed to show cause for granting relief from the waiver. See Tenn. R. Crim. P. 12(c) and (f). We agree.

Pursuant to Rule 12(b)(3), Tenn. R. Crim. P., motions to suppress evidence must be raised "prior to trial." See State v. Davidson, 606 S.W.2d 293, 295-

96 (Tenn. Crim. App. 1980); Feagins v. State, 596 S.W.2d 108, 109-10 (Tenn. Crim. App. 1979). The term "prior to trial" means sometime earlier than the day of the trial. State v. Hamilton, 628 S.W.2d 742, 744 (Tenn. Crim. App. 1981). Also, "the court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests and, if required, a later date of hearing." Tenn. R. Crim. P. 12(c). The failure to present a motion to suppress by the time set by the trial court constitutes waiver, but the trial court may grant relief from the waiver for "cause shown." Tenn. R. Crim. P. 12(f). Under this rule, defense counsel travels at peril with an untimely motion unless the record adequately reflects cause for the late filing, because he or she has the burden of overcoming the waiver. See State v. Randolph, 692 S.W.2d 37, 40 (Tenn. Crim. App. 1985). On the other hand, the consideration of an untimely motion should be left to the sound discretion of the trial court.

At the arraignment on March 14, 1994, the trial court entered an order setting March 24 as the date for filing pretrial motions and April 27 as the date for hearing the motions. The defendant filed a motion for an extension of time within which to file additional pretrial motions on March 24, asserting that defense counsel had been retained on March 22 as grounds for the extension. The trial court granted ten additional days. The defendant did not file the motion to suppress until August 17, 1994, twenty-six days before the defendant's trial began on September 12.

On August 18, 1994, a hearing was conducted regarding the motions[2] filed by the defendant. At the beginning of the hearing, defense counsel informed the court that he was not prepared for the motion to suppress and requested that the trial court continue the hearing until August 30. When the trial court inquired about the delay, defense counsel stated that there had been problems with obtaining discovery

[2] In addition to the motion to suppress, the defendant filed a motion to sever on August 17, 1994.

from the district attorney. He asserted that although the request for discovery was filed on March 24, he did not receive anything until a week ago. Defense counsel explained that he understood that the prosecution had an open file policy, but when he went to copy the file, it was not available. He said that the file was never sent to him nor did he go back to get the file. Defense counsel also told the trial court that the problems with discovery were complicated because the preliminary hearing tape had been lost. He stated that the defendant and Mrs. Starnes had been represented by other counsel at the preliminary hearing and that the other counsel claimed that the tape of the preliminary hearing had been given to the court reporter. Defense counsel informed the court that he and the other counsel had been asking for the tape since April.

Defense counsel asserted that evidence of the drugs seized from the defendant's car must be suppressed because the stop and search of the defendant's car were not proper. He argued that the Crime Stoppers tip did not satisfy probable cause requirements relative to the informant's reliability. Defense counsel claimed that the information in support of his motion to suppress was contained in the discovery that he had received the week before.

In response, the assistant district attorney general who prosecuted the case stated that she learned of the missing preliminary hearing tape within the last few weeks when questioned about it by the defendant's attorney who represented him at the preliminary hearing. She said that defense counsel had not asked her about the tape. She also said that she received the defendant's motion to suppress the day before the hearing.

Regarding the tip relied upon by Officer Powell for stopping the car, the prosecutor stated that someone telephoned Crime Stoppers with a description of a car registered to Mrs. Starnes, stating that the registration of the car was not proper and

that the car contained a large amount of drugs. She said that Officer Powell saw a car matching the description, and after he noted that the registration had expired, he stopped the car. According to the prosecutor, Officer Powell requested the assistance of the drug task force. She said that the dog signaled that drugs were in the car, and that a search of the car revealed 10.1 grams of cocaine and 25.6 grams of marijuana. The prosecutor also stated that the file had been available to the defendant since the arraignment on March 14, 1994. She said that her records reflected that the file was copied by someone in defense counsel's office on August 5, 1994. She also informed the court that she did not have an answer to the motion or law in support but argued that the motion to suppress was not timely filed.

The trial court overruled the motion to suppress because it was untimely, stating:

> It is not something that arises from a situation that is hoisted upon these defendants by the State or any of its agents, but is something of their own making. They had the full benefit of a preliminary hearing and retained counsel. What may or may not have happened as a result of that is a problem that they themselves have created and are going to have to resolve.

The trial court concluded that the defendant had the information within his control and could have filed an appropriate motion in a timely fashion. The court also stated that the statements made by counsel were insufficient to make a determination of whether the initial stops satisfied the prevailing tests.

Under these circumstances, the defendant's failure to file the motion to suppress at the time set by the trial court constituted waiver of the right to complain about introduction of evidence of the drugs seized from his car. See Tenn. R. Crim. P. 12(c). Obviously, defense counsel's claimed lack of the preliminary hearing transcript and lack of access to the prosecutor's file would not have prevented him from investigating the case, including interviewing the defendant, his former attorney, and the relevant witnesses about either the substance of the preliminary hearing or the

circumstances surrounding the defendant's arrest. Likewise, the defendant could have requested that the deadline for filing pretrial motions be extended.

We are mindful that sanctions for violation of a local or state court procedural rule should not work an undue hardship upon the litigants. In this respect, trial courts should look to the actual or potential prejudice flowing from the violation in considering the course of action to take. See, e.g., State v. Garland, 617 S.W.2d 176, 185 (Tenn. Crim. App. 1981) (failure to provide discovery under Rule 16 does not allow for exclusion of the evidence unless the lack of disclosure prejudiced the opponent and the prejudice cannot be eradicated except by exclusion). Primary purposes of the Rule 12(b)(3) requirement of filing prior to trial relate to avoiding interruption and inefficiency in jury trials and to providing the state an opportunity to appeal an adverse ruling while keeping its chance of a successful prosecution if the ruling is overturned. See Feagins, 596 S.W.2d at 110. In this sense, the record does not indicate how the state or the business of the trial court would be prejudiced by allowing the suppression motion in this case with a hearing to be held a few weeks before the trial.

On the other hand, the trial court is in the best position to determine when enforcement of its rules is best suited to preserve the integrity of the justice system. The same is true for its docket calendar. It is apparent that the trial court found no just cause for the untimely filing and no just cause to grant relief from the waiver. We believe that the record contains material evidence to support the trial court's discretionary action in denying the defendant relief from the waiver.

III. SENTENCING

Next, the defendant complains that the trial court erred in sentencing the defendant. Significantly, the defendant does not argue that the trial court improperly applied enhancing and mitigating factors. Rather, he essentially asserts that the

evidence does not warrant a three-year enhancement on the possession of cocaine conviction or a two-year enhancement on the possession of marijuana conviction. He argues that "[m]inimum confinement would serve the same purpose or at most a one year enhancement" is appropriate. However, the trial court is granted the discretion to determine the weight to be given to applicable factors, see T.C.A. § 40-35-210, Sentencing Commission Comments, and its decision will be upheld absent an abuse of that discretion. See State v. Moss, 727 S.W.2d 229, 237 (Tenn. 1986).

At the sentencing hearing, the defendant denied that the marijuana and cocaine found in the car was his. He asserted that a person with the last name "Hart" was working for his father and that Hart had driven the car to Nashville to pick up a load of cocaine. He said that he did not know that the drugs were in the car. The defendant also stated that the drugs could have been Mrs. Starnes'. He asserted that he had earlier obtained cocaine free from his father and he and Mrs. Starnes had used the drugs in another state. The defendant stated that his father would tell him that if he had to use the drugs, he wanted him to rent a room and use the drugs there so that he did not bother anyone. He claimed that he had been addicted to drugs for a long time.

The defendant also conceded having several prior convictions but asserted that they were all related to his drug addiction. The defendant admitted having convictions while living in Texas for theft by check, possession of a prohibited weapon, possession of methaqualone, possession of marijuana, theft of services, possession of cocaine, attempted capital murder of a police officer, possession of methamphetamine, and unlawful delivery of methamphetamine. He also admitted that his probation for the unlawful delivery of methamphetamine had been revoked because of his commission of the offense of attempted capital murder of a police officer. Regarding his attempts to overcome his addiction, the defendant stated that his father placed him in a drug rehabilitation program when he was living with his parents more

than fifteen years ago. He said that his life had changed because he had been married for the last two years, he and Mrs. Starnes had stopped using drugs, and they had a newborn child. The defendant also testified that he had been involved in the printing business off and on for the past fifteen years and that he had been employed for the last year by the same business.

The presentence report reflects that the defendant, a high school graduate, had been employed as a press operator for two printing companies since 1988 and that he had been employed by another printing company during 1994 for approximately six months. The defendant also worked for approximately six months in 1993 as the manager of a bar. The report also shows that the defendant admitted being addicted to drugs including cocaine, PCP, and methamphetamine since 1977. He described his drug use as being "heavy" for long periods of time. According to the defendant, he has voluntarily sought treatment four times since 1990. His prior record involves convictions in Texas dating back to 1978 for theft by check, possession of a prohibited weapon, possession of methaqualone, possession of marijuana, theft of services, second degree possession of cocaine, attempted capital murder of a peace officer, possession of methamphetamine, and unlawful delivery of methamphetamine. The presentence report reflects that the defendant's probation for his conviction of possession of methamphetamine was revoked because he committed the offense of attempted capital murder of a peace officer.

At the conclusion of the sentencing hearing, the trial court found the defendant to be a Range II, multiple offender and sentenced him to fifteen years for the possession of cocaine conviction, a Class B felony, and to four years for the possession of marijuana conviction, a Class E felony, to be served concurrently. As a Range II, multiple offender, the sentencing range for the Class B felony was twelve to twenty years and two to four years for the Class E felony. See T.C.A. § 40-35-112(b)(2) and

(5). The trial court stated that it found the defendant's testimony to be incredible. In sentencing the defendant, the trial court relied upon enhancement factors (1) and (8), a prior history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range and a previous history of unwillingness to comply with the conditions of a sentence involving release in the community. See T.C.A. § 40-35-114(1) and (8). The court stated that it had considered the circumstances of the offense and concluded that a lesser sentence would depreciate the seriousness of the offense and would not be in the best interest of the defendant, the public or justice. See T.C.A. § 40-35-103(1)(B).

The record fully supports the trial court assessing great weight to the existing enhancement factors. We conclude that the trial court did not abuse its discretion in sentencing the defendant to the terms it did.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

_____
_____Joseph M. Tipton, Judge

CONCUR:

_____
David H. Welles, Judge

_____
Jerry L. Smith, Judge