IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER 1998 SESSION

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	No. 03C01-9701-CC-00040
	)	
	)	Sevier County
v.	)	
	)	Honorable Ben W. Hooper, Judge
	)	
JERRY LYNN SEATON,	)	(Certified question of law)
	)	
Appellant.	)	

For the Appellant:

Steven E. Marshall
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For the Appellee:

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Alfred C. Schmutzer, Jr.
District Attorney General
and
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OPINION FILED:_____

AFFIRMED

Joseph M. Tipton
Judge

O P I N I O N

The defendant, Jerry Lynn Seaton[1], was convicted upon his plea of guilty in the Sevier County Criminal Court to possession of marijuana with the intent to sell, a Class E felony. He was sentenced as a Range II, multiple offender to two years confinement in the custody of the Department of Correction and was fined two thousand dollars. He appeals as of right upon a certified question of law that is dispositive of this case. See T.R.A.P. 3(b); Tenn. R. Crim. P. 37(b). He contends that the trial court erred by denying his motion to suppress the marijuana seized from his truck on the grounds that the warrantless search of his truck violated his rights under the Fourth Amendment to the United States Constitution. We conclude that the defendant's rights were not violated.

At the suppression hearing, Officer Jim Marshall of the Pigeon Forge Police Department testified that at about 8:30 p.m. on February 25, 1992, he was traveling west on Lower Middle Creek Road when he saw the defendant's truck traveling east. He testified that the defendant's truck was partially in the opposite lane, heading toward him. He said that as the defendant passed him, he noticed that the tail lights on the defendant's truck were inoperable. He said that he turned around and followed the defendant. He said the defendant was going fifty-eight miles per hour in a thirty-five mile per hour zone, and the defendant was weaving into the opposite lane.

Officer Marshall said that when he pulled over the defendant, the defendant left the truck with a brown paper bag in his hand. He said the defendant placed the bag behind the seat in the truck. He said that when he approached the truck, he told the defendant to step away, and the defendant complied. He said he

[1] We note that the indictment refers to the defendant as "Jerry," whereas both the state and the defendant's brief refer to the defendant as "Jere." We use Jerry because that is the defendant's name in the charging instrument.

asked the defendant for his license and registration, which the defendant provided. He said he smelled alcohol on the defendant, and he asked the defendant if he had been drinking. The defendant said that he drank three or four beers earlier that day. Officer Marshall testified that he asked the defendant if any open beers were in the defendant's truck. He said the defendant replied, "No, do you want to look?" He said he asked the defendant, "Yeah, can I?" and the defendant told him he could. He said that another officer radioed him and asked if he needed assistance. He said he replied that he did because he knew the defendant had a reputation for fighting.

Officer Marshall said that after he obtained consent from the defendant, he approached the truck and pulled back the seat. He said he saw an open paper bag, and inside the paper bag there was a plastic bag containing about one pound of marijuana. He said he stepped back to the defendant and talked to him while he waited for the other officer to arrive. He said he did not want to arrest the defendant by himself because of the defendant's reputation for fighting. When the other officer arrived, he said he told the defendant he was going to give him a field sobriety test, and he told the defendant he was under arrest.

Officer Marshall said the other officer asked the defendant to put his hands on the truck, which the defendant did. Marshall said the defendant kept taking his hands off the truck, and the other officer kept asking the defendant to put his hands back on the truck. Marshall said that when the other officer asked the defendant to put his hands back on the truck for the third time, the defendant shoved the officer to the ground. He said the defendant ran toward the truck, but Marshall caught him and arrested him.

On cross-examination, Officer Marshall said he could not remember whether the driver's side door of the truck was open or closed. He said he did not

return the defendant's license and registration. He said the defendant did not make any threatening moves and had no weapons. He said he did not notice any bulges in the defendant's pockets. He testified that he suspected the defendant was under the influence of alcohol and that once he stopped the defendant, the defendant was not free to leave. He said he did not tell the defendant that he could refuse to consent to the search of his truck. He said that before he looked in the truck and saw the marijuana, he could have arrested the defendant for having inoperable tail lights. He said he had no indication that the defendant had used marijuana. He admitted that at the preliminary hearing, he said he received consent to search the defendant's truck for the purpose of looking behind the seat because he was concerned with what the defendant had put there. He said he told the defendant that he was under arrest a few minutes after he saw the marijuana in the brown bag. He said he did not remember the exact words the defendant used when he gave him consent to search the truck.

The defendant testified that he was hauling firewood in his truck on February 25, 1992. He said he might have driven a little in the opposite lane at a curve in the road. He said that when Officer Marshall pulled him over, he stopped and got out of the truck, and the door shut behind him. He said he did not have anything in his hands when he got out of the truck. He said the officer took his license and registration and asked him if he had been drinking. He said he told the officer that he had a couple of beers at about 10:00 a.m. He said the officer told him he smelled alcohol and was going to perform a field sobriety test. He said the officer then went to the front of the truck, opened the door, and began digging around in the truck. He said he never gave the officer permission to look in the truck, and the officer never asked for permission. He said the officer kept his license and registration. He said the officer arrested him after another officer arrived, but they never told him why he was arrested.

On cross-examination, the defendant said that he got out of his truck when the officer stopped him because that is what he always does when he is stopped. He said the brown bag was rolled up, and the officer would have had to open it to see what was inside the bag.

The trial court overruled the defendant's motion to suppress and made the following findings: (1) the stop was valid due to the defendant's driving behavior, (2) the defendant knowingly and voluntarily consented to the search of his truck, and (3) the search was incident to a lawful arrest of the defendant for driving under the influence. A trial court's factual findings on a motion to suppress are conclusive on appeal unless the evidence preponderates against them. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996); State v. Jones, 802 S.W.2d 221, 223 (Tenn. Crim. App. 1990). The application of the law to the facts as determined by 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 defendant contends that the trial court should have granted his motion to suppress because the state failed to prove that the defendant freely and voluntarily gave the officer consent to search his truck and because the search was not incident to a lawful arrest. First, we believe that the issue of whether the search was incident to a lawful arrest is not determinative, because the evidence does not preponderate against the trial court's finding that the defendant freely and voluntarily consented to the search.

Warrantless searches are presumed unreasonable under the Fourth Amendment unless they fall within carefully delineated exceptions. Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967). A warrantless search may be conducted when a suspect consents, and the reasonableness of a consensual search is determined by examining the totality of the circumstances. Schneckloth v.

Bustamonte, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043 (1973). The totality of the circumstances test is also used when a suspect gives consent for a search while he is in custody. United States v. Watson, 423 U.S. 411, 424, 96 S. Ct. 820, 828 (1976). The standard for measuring the scope of a suspect's consent is one of objective reasonableness, that is, what would a reasonable person have understood by the exchange between the suspect and the officer? Illinois v. Rodrigues, 497 U.S. 177, 183-89, 110 S. Ct. 2793, 2789-2802 (1990).

Viewed in this light, we conclude that the evidence does not preponderate against the trial court's finding that the defendant freely and voluntarily consented to the search of his truck. The evidence shows that the officer was justified in stopping the defendant because of his erratic driving and traffic violations. This conduct and the odor of alcohol also justified the officer's further inquiry. The officer asked the defendant if he had any open beers in his truck, and the defendant replied that he did not and asked the officer if he wanted to look in the truck. The defendant did not place any restrictions on the scope of the officer's search, and it is objectively reasonable to conclude that the officer would look inside the paper bag for beers, particularly in light of the fact that the defendant immediately left the truck and placed the paper bag behind his seat when he was stopped. See Florida v. Jimeno, 500 U.S. 248, 251, 111 S. Ct. 1801, 1804 (1991) (holding that it is reasonable to conclude that a suspect's general consent to the search of his car includes consent to search a paper bag lying on the floor of the car); State v. James E. Johnson, No. 01C01-9502-CC-00040, Robertson County (Tenn. Crim. App. Mar. 22, 1996), applic. denied (Tenn. Aug. 26, 1996) ("a reasonable person would assume that in conducting a search of an automobile, an officer will search under the seat where the driver has been sitting.").

The defendant also argues that the search was unconstitutional because the officer did not tell the defendant that he could refuse to consent to the search.

Although it is one factor in the totality of the circumstances, a suspect need not be apprised of his right to refuse consent to a search in order for that search to be voluntary. Schneckloth, 93 S. Ct. at 2059, 412 U.S. at 250. Also, the defendant summarily argues that the consent was not voluntary because he was in custody when the consent was given. However, we believe that the totality of the circumstances shows that he still freely and voluntarily consented to the search of his truck.

In consideration of the foregoing and the record as a whole, we affirm the judgment of the trial court.

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Joseph M. Tipton, Judge

CONCUR:

_____
John H. Peay, Judge

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David G. Hayes, Judge