IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MARCH 1996 SESSION

FILED

December 5, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE	) C.C.A. No.03C01-9510-CC-00311
	)
Appellee,	) Bradley County
V.	)
	) Hon. R. Steven Bebb, Judge
JAMES OLIVER GRAYLESS	)
	)(Certified Question of Law)
Appellant,	

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED

CHARLES LEE,
Special Judge

O P I N I O N

The defendant, James Oliver Grayless, entered a guilty plea in the Criminal Court of Bradley County for Driving Under the Influence Second Offense. He received a sentence of eleven months and twenty-nine days with forty five days to serve and was placed on probation for the balance of his sentence. In addition to this he was ordered to pay a five hundred dollar fine. The defendant appeals as of right upon a certified question of search and seizure law that is dispositive of his case. See T.R.A.P. 3(b); Tenn. R. Crim. P. 37(b).

The defendant contends that the officer's approach to his truck and subsequent request to exit his vehicle violated rights under the Fourth Amendment to the United States Constitution and Article I, § 7 of the Tennessee Constitution. He argues that because the initial approach and request were unconstitutional, the officer's subsequent observations of him as well as the results of any tests performed should have been suppressed. The state responds that the approach and request of the officer were predicated upon reasonable suspicions based upon specific and articulable facts which would justify an investigatory stop.

We find no violation of the defendant's constitutional rights and affirm the conviction.

PROCEDURAL HISTORY

The defendant moved to suppress certain evidence prior to entering his plea. The trial court overruled his motion. Unfortunately, no verbatim transcript of the suppression hearing exists. On June 8, 1995, the defendant entered his guilty plea reserving the right to appeal a certified question of law. A judgment of conviction was entered on June 8, 1995, and the defendant filed his notice of appeal on June 9, 1995. On October 9, 1995, the defendant filed a "Narrative Bill of Exceptions" which outlined his version of the proof adduced at the suppression hearing. This version was approved by the trial judge and the state and reads as follows:

> Deputy Jerry Johnson testified that on April 12, 1994, at 4:40am his dispatcher advised him to respond to a disturbance call at 1955 Woodlawn Street. While en-route he was further advised by communications that the person causing the disturbance was leaving the area in a blue Ford Ranger pickup truck. A short time later Officer Johnson observed a vehicle matching the description on Dalton Pike traveling away from the direction of Woodlawn Street. The vehicle pulled into the parking lot of Oakley's Video. Officer Johnson pulled into the parking lot, approached the vehicle and asked the driver to exit the vehicle. Officer Johnson had observed no traffic violation and approached the vehicle solely based on the report of a disturbance he had received over his radio. Officer Johnson did not know who had reported the disturbance. Upon questioning James Grayless, Officer Johnson noticed the odor an alcoholic beverage. He administered three field sobriety tests to Mr. Grayless. He then placed Mr. Grayless under arrest for driving Under the Influence and later administered a breathalyzer test.
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> James Grayless testified that he did not commit any traffic violation in Officer Johnson's presence. He pulled into the parking lot of Oakley's Video to use a pay telephone. Officer Johnson approached his vehicle and asked him to step out. Officer Johnson then asked him if he had been drinking and asked him to submit to some field sobriety tests.
>
> These were the only two witnesses who testified at the suppression motion. The Trial Court overruled the motions to suppress.

However, upon further review, the trial judge entered an order dated October 9, 1995, formally overruling the defendant's motion to suppress and supplementing the statement of the evidence filed by the defendant. In

pertinent part it reads as follows:

> While the Court finds no fault with the basic outline of facts by counsel in the Bill of Exceptions, the Court believes the officer had been dispatched to a felonious assault, received a second dispatch advising a description of the suspect vehicle; that a short time later near 5:00AM, the officer saw a vehicle matching the description of the suspect vehicle, pull quickly into the parking lot of a video store that was closed. The officer approached the vehicle to check out the report, noticed the defendant smelled of an intoxicant, administered field sobriety tests and arrested the defendant.
>
> The Court finds that the officer had an obligation to chekc [sic] out the dispatch of a felonious asault [sic] by stopping the suspect vehicle; however, there was no stop in this case. The officer had an obligation to make further investigation under the circumstances and finds no violation of the defendant's constitutional rights.

The state urges this court to dismiss the defendant's appeal for failure to comply with Rule 24(c) Tennessee Rules of Appellate Procedure.

When an appellant desires to include a statement of the evidence and proceedings in the appellate record, the narrative statement is required to be filed with the clerk of the trial court "within 90 days after filing the notice of appeal." Tenn. R. App. P. 24(c). If for some reason the statement of the evidence cannot be filed timely, it is the duty of the appellant to move this Court for the entry of an order permitting the appellant to file a delayed statement of the evidence. See State v. Blevins, 736 S.W.2d 120, 122 (Tenn. Crim. App. 1987). Absent such authorization this Court may dismiss the appellant's appeal or elect to disregard the transcript. Id. Tenn. R. App. P. 26(b).

In Davis v. Sadler, 612 S.W.2d 160 (Tenn. 1981), the Tennessee Supreme Court ruled that the Court of Appeals and this Court should permit the late filing of a transcript or statement of the evidence when (a) it does not prejudice either party to the proceeding, and (b) a good-faith effort was made to timely file the transcript. Since the order overruling the defendant's motion to suppress was not formally entered until October 9, 1995, and the State of

Tennessee has not been prejudiced by any delay, we suspend the time constraints of Rule 24(c) and treat the statement of the evidence as having been timely filed.

I. STATEMENT OF THE EVIDENCE

The defendant urges this court to disregard the supplemental order filed by the trial court on October 9, 1995, as a part of the statement of the evidence. Ironically, he wishes us to disregard that which has saved him from a possible dismissal under our rules. See T.R.A.P. 24(c). We believe the trial court has acted properly.

Tennessee Rules of Appellant Procedure 24(e) reads in pertinent part:

> Correction or Modification of the Record. If any matter properly includable is omitted from the record, is improperly included, or is misstated therein, the record may be corrected or modified to conform to the truth. Any differences regarding whether the record accurately discloses what occurred in the trial court shall be submitted to and settled by the trial court regardless of whether the record has been transmitted to the appellate court. Absent extraordinary circumstances, the determination of the trial court is conclusive. If necessary, the appellate or trial court may direct that a supplemental record be certified and transmitted.(emphasis added)

The purpose for allowing correction or modification of the record is "to convey a fair, accurate and complete record of what transpired in the trial court." T.R.A.P. 24(g); State v. Causby, 706 S.W.2d 628 (Tenn. 1986). Who better can convey a fair, accurate and complete description of what transpired in the trial court than the trial judge? It is his responsibility to make finding of facts. When a trial court makes a finding of fact after a hearing on

the merits, the factual findings are binding on the appellate court unless there is evidence which preponderates against the trial court's finding. State v. Aucoin, 756 S.W.2d 705, 710 (Tenn. Crim. App. 1988); State v. Johnson, 717 S.W.2d 298, 304-05 (Tenn. Crim. App. 1986).

This issue is without merit. However, even if we exclude the trial judges's supplement to the record from our consideration, we reach the same result.

II. SUPPRESSION ISSUES

A review of the brief submitted by the defendant and the state demonstrates the confusion which arise in cases similar to this. Each uses catch words such as "stop," "arrest," "probable cause," "reasonable suspicion," and "seized"; then attempts are made to illustrate how factually this case falls or does not fall into the category and why the law relating to the category should or should not be applied to the situation.

The better approach is to determine whether the conduct of the police officer was reasonable considering the totality of the circumstances. The Fourth Amendment to the United States Constitution prohibits only unreasonable intrusions by the police into the lives of our citizens. If the conduct was reasonable, there is no violation of any constitutional rights.

The defendant's version of the facts are that a police officer had been advised of a disturbance at 1955 Woodlawn Street at 4:55 A.M. While enroute he was advised the person causing the disturbance was leaving the area in a blue Ford Ranger pick up truck. Shortly thereafter, the officer observed a vehicle matching the description traveling away from Woodlawn and pull into a parking lot. The officer approached the vehicle and asked the

occupant to exit. After the occupant stepped from the truck, the officer noticed the odor of alcoholic beverage, administered three field sobriety tests and then placed the occupant under arrest for driving under the influence of an intoxicant.

Under these circumstances, was it reasonable for the officer to approach the vehicle and ask the occupant to exit? The answer is yes.

The question of reasonableness in the context of this case has most recently been considered by our Supreme Court in State v. Pulley, 863 S.W.2d 29 (Tenn. 1993). Pulley examined the various degrees of police intrusion and what is necessary to establish whether police action would be reasonable. In conclusion the Court found "[T]he reasonableness of a stop turns on the facts and circumstances of each case." In particular, the Court emphasized (i) the public interest served by the seizure, (ii) the nature and scope of the intrusion, and (iii) the objective facts upon which the law enforcement officer relied in light of his knowledge and experience. Id. quoting United States v. Mendenhall, 446 U.S. 544, 561 (1980). We therefore examine the facts of this case in the context of the holding in State v. Pulley.

A. THE PUBLIC INTEREST SERVED BY THE SEIZURE

According to the defendant's version of the facts, the police officer who requested he exit his vehicle was investigating a disturbance call. The police have a duty to investigate such calls. The facts of this case are similar to those of High v. State, 217 S.W.2d 774 (Tenn. 1949). In High the police of the town of Gallatin received information from a passing motorist that there was a disturbance several blocks down the street. They went to the place of

disturbance and saw a vehicle matching the description provided them pulling away from the scene of the disturbance. They stopped him and found that he was drunk. The defendant was subsequently convicted of driving under the influence.

In commenting on the duty of a law enforcement officer to investigate disturbance calls the Court said:

> 'The policeman, above all officers, requires the protection of arms.... He is a watchman, both by day and night, in our cities, to seek for probable offenders and offenses, and to arrest parties guilty, as the guardian of the homes and business houses of our people living in cities, charged with watching for offenders, both by day and night, and especially at night. He is entitled to the utmost liberality in the construction of the statute in his favor.'
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> A policeman is the protector of the municipality which he serves, and common prudence demanded that these officers undertake to investigate this report given to them for the safety of the town.' (quoting Smith v. State, 155 Tenn. 40, 42, 290 S.W. 4, and State v. Rogers, 84 Tenn. 510, 515) (emphasis added).

After declaring the conduct of the police to be reasonable under the circumstance, the Court affirmed the defendant's conviction. Although decided almost fifty years ago and certainly not to the analytical depth as found in State v.Pulley, the principles are the same. See also State v. Blankenship, 757 S.W.2d 354 (Tenn. Crim. App. 1988) relying on High.

Of course the nature of the disturbance call has a direct bearing upon the public interest served. One would expect the response to a barking dog disturbance call to be different than the response to a fight or assault disturbance call. The record submitted by the defendant does not reveal if the officer was made aware of the nature of the disturbance. He did know, however, that the nature of the call involved human interaction and the perpetrator was departing the scene. Human interaction disturbance calls are fraught with the possibility of danger and/or bodily injury especially in the early morning hours. A reasonable officer could conclude that he was

enroute to a possible domestic violence or similar call. In such instances he certainly would be expected to ascertain at least the identity of any alleged perpetrator or participants in the disturbance. It would be reasonable for the officer to ask a person sitting in a parked vehicle which matched the description of one fleeing from the scene to exit in order to ascertain his or her identity or further very brief questioning.

Certainly if the call received by the officer involved the report of a felonious assault, as found by the trial judge, not only would he be expected to investigate more fully, but would also be expected to take measures necessary to protect himself. See Terry v. Ohio, 392 U.S. 1 (1968).

Under either circumstance the public interest was served by the investigating officer in this matter.

B. THE NATURE AND SCOPE OF THE INTRUSION

The nature and scope of this intrusion was slight. The defendant was required to take no action other than to depart an automobile which was parked on a public parking lot. A police officer may approach a car parked in a public place and ask for driver identification and proof of vehicle registration, without any reasonable suspicion of illegal activity. Pulley, supra, citing State v. Butler, 795 S.W.2d 680, 685 (Tenn. Crim. App. 1990). Although not entirely clear from the record, we may assume that the defendant had intended to exit his automobile even before the officer arrived on the scene since his stated purpose was to use a pay telephone. The inconvenience, if any at all, to the defendant was minimal.

C. THE OBJECTIVE FACTS UPON WHICH THE LAW ENFORCEMENT OFFICER RELIED IN LIGHT OF HIS KNOWLEDGE AND EXPERIENCE

The final area of analysis has led to some confusion in cases of this nature especially as it relates to anonymous reports of criminal activity. In "probable cause" analysis, to justify an arrest the law of this state is clear and requires a showing of both the informant's credibility and his or her basis of knowledge. See State v. Jacumin, 778 S.W.2d 430, 436 (Tenn. 1989). However, the law in those situations less intrusive than a full-scale arrest is not as clear. Prior to Pulley it appeared the Jacumin two prong test of reliability applied to investigatory stops. See State v. Coleman, 791 S.W.2d 504 (Tenn. Crim. App. 1989). However, in Pulley our Supreme Court found the Jacumin factors useful but not mandated in considering the reasonableness of police action.

Our Supreme Court rejected the "totality of circumstances test" adopted in Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), in favor of the two-pronged standard, originally set forth in Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), and Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969) as it relates to a full scale arrests. Jacumin, supra at 436. However, the "totality of circumstances test" remains the standard to be applied to investigatory stops such as the case under consideration. See generally State v. James E. Sanders, 1996 Tenn. Crim., No. 01C01-9502-CC-00037 (Tenn. Crim. App., Nashville, January 17, 1996); State v. David W. Crowder, 1996 Tenn. Crim., No. 03C01-9412-CR-00437 (Tenn. Crim. App., Knoxville, March 21, 1996); State v. Kenneth M. Seaton, 1995 Tenn. Crim., No. 03C01-9501-CR-00020 (Tenn. Crim. App., Knoxville, October 12, 1995); State v. Dennis Keith and Timothy Collins, 1995 Tenn. Crim., No. 03C01-9501-CR-00020 (Tenn. Crim. App., November 15, 1995).

As such we hold that the request of the officer to the defendant to do that which he was already about to do was reasonable considering the totality of the circumstance of this case.

Accordingly, we affirm the conviction.

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Charles Lee, Special Judge

CONCUR:

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Paul G. Summers, Judge

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Joseph M. Tipton, Judge