

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs May 23, 2023, at Knoxville

STATE OF TENNESSEE v. MARK DAVID BOND

**Appeal from the Circuit Court for Montgomery County
No. CC20-CR-1268 William R. Goodman, III, Judge**

No. M2022-00469-CCA-R3-CD

The State appeals the trial court's order granting the motion of the defendant, Mark David Bond, to suppress evidence seized during the search of his vehicle after a drug detection canine indicated the presence of narcotics during a sweep around the perimeter of the vehicle. The State challenges the trial court's conclusion that the canine's reaction was unreliable due to the canine's inability to distinguish between the odor of illegal marijuana and the odor of legal hemp. After review, we reverse the trial court's order granting the defendant's motion to suppress, reinstate the indictment against the defendant, and remand to the trial court for further proceedings.

Tenn. R. App. P. 3; Judgment of the Circuit Court Reversed; Remanded

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which ROBERT H. MONTGOMERY, JR. and J. ROSS DYER, JJ., joined.

Jonathan Skrmetti, Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Robert J. Nash, District Attorney General; and Kayla McBride, Assistant District Attorney General, for the appellant, State of Tennessee.

Chason T. Smith, Clarksville, Tennessee, for the appellee, Mark David Bond.

OPINION

In December 2020, a Montgomery County Grand Jury returned an indictment charging the defendant with the improper use of a license plate or registration; possession of fentanyl with the intent to manufacture, sell, or deliver; possession of a firearm with the intent to go armed during the commission of or attempt to commit a dangerous felony; and

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possession of drug paraphernalia. The charges resulted from evidence seized by officers during a traffic stop and the subsequent search of the defendant's vehicle on July 9, 2020.

The defendant filed a motion to suppress, asserting that the warrantless search of his vehicle was conducted without probable cause. He maintained that the canine's reaction during a sweep of the vehicle, which led to the search, was unreliable because the canine could not distinguish between the odor of marijuana, an illegal substance, and the odor of hemp, a legal substance. The State filed a response, arguing that "the possibility that the smell detected could emanate from legal hemp does not change the longstanding precedent that the smell of marijuana provides probable cause to search."

The transcript of the suppression hearing is not included in the appellate record. However, the trial court's order entered on January 19, 2022, set forth the facts to which the parties stipulated. According to the trial court's order, agents with the Nineteenth Judicial Drug Task Force stopped a vehicle driven by the defendant on Highway 76 in Montgomery County for a traffic violation. The officers requested consent to search the vehicle, but the defendant declined. Officer Casey Stanton of the Clarksville Police Department ("CPD") used a trained canine of the CPD to conduct an "open air 'sniff' of the vehicle." The canine indicated the presence of "narcotics." Officers searched the vehicle, finding fentanyl and cocaine.

In granting the defendant's motion to suppress, the trial court noted that the determination of whether the plant *cannabis sativa* L. is hemp or marijuana is dependent upon the level of delta-9 tetrahydrocannabinol ("THC") in the plant. *See* Tenn. Code Ann. §§ 39-17-402(16)(C) (2019); 43-27-101 (Supp. 2020). The trial court cited to an article from the Tennessee Bar Journal and found that the compound that a canine is trained to detect is present in the plant regardless of the THC level. *See* Cynthia A. Sherwood, et al., "Even Dogs Can't Smell the Difference," 55 Tenn. B.J. 14, 18 (Dec. 2019). The trial court found that a canine, thus, cannot distinguish between hemp and marijuana. The trial court stated that the officers' finding fentanyl and cocaine rather than marijuana in the defendant's vehicle did not "change the fact that the canine would not be able to distinguish an illegal substance from one that is not illegal." The trial court ordered that all evidence seized during the search of the defendant's vehicle be suppressed.

As a result of the trial court's order, judgments were entered on March 17, 2022, dismissing the defendant's charges. The State filed a timely notice of appeal.

When reviewing a trial court's findings of fact and conclusions of law on a motion to suppress evidence, we are guided by the standard of review set forth in *State v. Odom*, 928 S.W.2d 18 (Tenn. 1996). Under this standard, "a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." *Id.*

at 23. As in all cases on appeal, “[t]he prevailing party in the trial court is afforded the ‘strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence.’” *State v. Carter*, 16 S.W.3d 762, 765 (Tenn. 2000) (quoting *State v. Keith*, 978 S.W.2d 861, 864 (Tenn. 1998)). We review the trial court’s conclusions of law under a de novo standard without according any presumption of correctness to those conclusions. See, e.g., *State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001); *State v. Crutcher*, 989 S.W.2d 295, 299 (Tenn. 1999).

Both the state and federal constitutions offer protection from unreasonable searches and seizures; the general rule is that a warrantless search or seizure is presumed unreasonable and any evidence discovered is subject to suppression. See U.S. Const. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”); Tenn. Const. art. I, § 7 (“That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures”). “[T]he most basic constitutional rule in this area is that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.’” *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971) (alteration in original) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)); see also *State v. Bridges*, 963 S.W.2d 487, 490 (Tenn. 1997). “The exceptions are ‘jealously and carefully drawn,’ and there must be ‘a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.’” *Coolidge*, 403 U.S. at 455 (quoting *Jones v. United States*, 357 U.S. 493, 499 (1958), and *McDonald v. United States*, 335 U.S. 451, 456 (1948)). Thus, a trial court necessarily indulges the presumption that a warrantless search or seizure is unreasonable, and the burden is on the State to demonstrate that one of the exceptions to the warrant requirement applied at the time of the search or seizure. See, e.g., *Missouri v. McNeely*, 569 U.S. 141, 148 (2013) (“Our cases have held that a warrantless search of the person is reasonable only if it falls within a recognized exception.”).

An automobile stop is a “seizure” within the meaning of both the Fourth Amendment to the United States Constitution and article I, section 7 of the Tennessee Constitution. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *State v. Pulley*, 863 S.W.2d 29, 30 (Tenn. 1993). Law enforcement officers must have probable cause or an “articulable and reasonable suspicion” to believe that a traffic violation has occurred when they initiate a traffic stop. *Whren v. United States*, 517 U.S. 806, 810 (1996). The defendant acknowledged in his motion to suppress that the officers’ stop of the defendant’s vehicle was constitutional. The defendant challenges the canine sweep of his vehicle following the stop, arguing that the drug detection canine’s reaction was not reliable and failed to establish probable cause to search his vehicle.

The United States Supreme Court has recognized that the “automobile exception” to a search warrant applies “[i]f a car is readily mobile and probable cause exists to believe it contains contraband.” *Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (quoting *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996)). Probable cause is a “fair probability that contraband or evidence of a crime will be found.” *State v. Yeargan*, 958 S.W.2d 626, 632 (Tenn. 1997) (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)). “Probable cause has been defined as a reasonable ground for suspicion, supported by circumstances indicative of an illegal act.” *State v. Henning*, 975 S.W.2d 290, 294 (Tenn. 2014). It is more than mere suspicion, but it need not be absolute certainty. *State v. Bell*, 429 S.W.3d 524, 530 (Tenn. 2014).

Our supreme court has held that “a canine sweep around the perimeter of a vehicle which has been legally detained does not constitute a search, and thus, does not require probable cause or reasonable suspicion so long as the duration of the canine sweep does not exceed the time necessary for the traffic stop.” *State v. England*, 19 S.W.3d 762, 764 (Tenn. 2000). A positive reaction to a vehicle by a trained drug detection canine provides probable cause to search inside a vehicle. *Id.* at 768. The canine’s reliability must be established, and this determination includes consideration of the canine’s training, the officer’s training and experience with the canine, and the record of false negative and false positive reactions. *Id.*

The defendant did not raise any issues in the trial court regarding the certification of the canine that conducted the search of the defendant’s vehicle, the canine’s record of false positive or false negative reactions, or the officer’s training and experience with the canine. Rather, in the trial court, the defendant only challenged the canine’s reliability based on its inability to distinguish between marijuana and hemp. On appeal, the defendant raises additional issues, arguing that the use of the canine sweep extended the duration of the stop beyond what is constitutionally permissible, that the canine initially failed to react to anything in the defendant’s vehicle, which “justifies suppression of this search even before discussing legal hemp/CBD,” and that the testimony presented at the suppression hearing “does not meet constitutional Confrontation muster.” Nothing in the appellate record reflects that the defendant raised these issues in the trial court, and the defendant references evidence that was not included in the stipulated facts or the appellate record. Accordingly, these arguments are waived. *See* Tenn. R. App. P. 36(a).

The stipulated facts set out in the trial court’s order provided that the drug detection canine that conducted the sweep of the defendant’s vehicle reacted to the presence of “narcotics,” but the stipulated facts did not include any information regarding the specific drugs that the canine was trained to detect. However, in analyzing the issue, the trial court did not focus on the specific characteristics of the canine at issue but cited to

information relating to drug detection canines as a whole. The trial court found that the canine's reaction was unreliable due to the inability of a drug detection canine, in general, to differentiate between the odor of marijuana and the odor of hemp. The trial court concluded that a canine's inability to differentiate between the odor of an illegal substance from a substance that is not illegal rendered the canine's reaction unreliable. The State does not challenge the trial court's finding that drug detection canines cannot distinguish between the odor of marijuana and the odor of hemp but asserts that a canine's inability to distinguish between the odor of the two substances does not render the canine's reaction unreliable for purposes of establishing probable cause to conduct a search.

Binding precedent from our supreme court provides that the odor of marijuana constitutes probable cause for a search. *See State v. Hughes*, 544 S.W.2d 99, 101 (Tenn. 1976); *see also Hicks v. State*, 534 S.W.2d 872, 874 (Tenn. Crim. App. 1975). This court has recently stated that “until our supreme court or our legislature determines otherwise, the smell of marijuana continues to establish probable cause for the warrantless search of an automobile.” *State v. Stephen Paul Hampton and Margaret Mary Hampton*, No. W2021-00938-CCA-R3-CD, 2022 WL 16919950, at *6 (Tenn. Crim. App., Jackson, Nov. 14, 2022), *no perm. app. filed*. Although these cases involved an officer who smelled marijuana, this court recently applied the same analysis to the reaction of a trained drug detection canine during a canine sweep, concluding that “there is no practical difference for purposes of our analysis.” *State v. Andrew JuJuan Lee Green*, No. M2022-00899-CCA-R3-CD, 2023 WL 3944057, at *3 (Tenn. July 25, 2023). In that case, a drug detection canine reacted to a vehicle in which the defendant was a passenger, and officers searched the vehicle and found marijuana, a loaded handgun, and drug paraphernalia in a backpack. *Id.* at *1. The trial court granted the defendant's motion to suppress, finding that “the reliability of the drug detection canine has not been established” due to the lack of proof “regarding whether the drug detection canine can distinguish between hemp and marijuana.” *Id.* at *3. In reversing the trial court's decision, this court reviewed the above-cited cases and reaffirmed that “the alert of a trained drug detection canine is alone sufficient” to establish probable cause. *Id.* This court also reviewed the totality of the circumstances surrounding the stop and concluded that the circumstances “bolster a finding of probable cause.” *Id.*

Other jurisdictions also have rejected claims that a drug detection canine's inability to distinguish between the odor of marijuana and the odor of hemp rendered the dog's reaction unreliable for purposes of establishing probable cause to conduct a search. *See, e.g., United States v. Deluca*, No. 20-8075, 2022 WL 3451394, at *5 (10th Cir. Aug. 18, 2022) (concluding that probable cause to search the defendant's vehicle existed due to the drug detection canine's reaction “even if [the canine] was trained to alert on hemp in addition to other controlled substances”); *United States v. Hayes*, No. 3:19-CR-73-TAV-HBG, 2020 WL 4034309, at *20 (E.D. Tenn. Feb. 21, 2020) (rejecting the defendant's

argument that “the legalization of hemp eliminates any probable cause gained from a trained and certified drug detection dog’s alert” and concluding that “[a]n alert by a drug detection dog, trained to detect marijuana and other illegal narcotics, means there is a fair probability, not an absolute guarantee, that one of the illegal narcotics, which the dog is trained to detect, will be found in that location”).

Based on binding precedent from our supreme court, we conclude that the inability of a trained drug detection canine to distinguish between the odor of marijuana and the odor of hemp does not, in and of itself, render the canine’s reaction to narcotics unreliable for purposes of establishing probable cause to support a search. Thus, the trial court erred in granting the defendant’s motion to suppress and dismissing the indictments.

For the foregoing reasons, we reverse the trial court’s decision granting the defendant’s motion to suppress, reinstate the indictments against the defendant, and remand the matter to the trial court for further proceedings.

JAMES CURWOOD WITT, JR., JUDGE