

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs August 15, 2007

STATE OF TENNESSEE v. SHARI BRANDENBURG

**Direct Appeal from the Circuit Court for Maury County
No. 16178 Robert L. Holloway, Jr., Judge**

No. M2007-00667-CCA-R3-CD - Filed September 18, 2007

Following the stop of her vehicle, the defendant, Shari Brandenburg, was arrested for driving under the influence (DUI), a Class A misdemeanor. She pled guilty and was sentenced to eleven months and twenty-nine days, all suspended except for forty-eight hours, with the balance to be served on probation. As a condition of her guilty plea, she reserved a certified question of law: whether a private citizen may make an arrest for violation of Tennessee's speeding statute. The State argues on appeal that the certified question is not dispositive of the case, and we agree. Accordingly, we dismiss the appeal.

Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed

ALAN E. GLENN, J., delivered the opinion of the court, in which JERRY L. SMITH and JOHN EVERETT WILLIAMS, JJ., joined.

John S. Colley, III, Columbia, Tennessee, for the appellant, Shari Brandenburg.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel E. Willis, Assistant Attorney General; and Mike Bottoms, District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

This appeal comes in an unusual posture, for although a hearing was held on the defendant's motion to suppress, the record on appeal does not contain a transcript of that proceeding. Accordingly, our understanding of the facts comes solely from the trial court's order denying the motion.

In brief, it appears that Officer Tim Kennedy, of the Spring Hill Police Department, positioned within its city limits, utilized a radar gun which checked the speed of automobiles.

He was new to the department and believed that he was operating solely within the city limits of Spring Hill although, in fact, the device determined the speed of automobiles which had not yet entered Spring Hill. According to his radar gun, the defendant's vehicle, before entering the city limits, was going 72 miles per hour in an area where the posted speed limit was 55 miles per hour. The order does not state how far the defendant's vehicle was from the Spring Hill city limits when, according to the radar gun, she was speeding. Officer Kennedy made a U-turn in his vehicle to follow the defendant. Although it appears that she may not have been speeding while she was within the city limits of Spring Hill, the court's order does not specifically say that this was the case. According to the order, it appeared to Officer Kennedy that the defendant drove in a normal fashion as he observed her vehicle make a right turn and then proceed down a straight section of the two-lane road. Subsequently, as the road made a 90-degree turn, the defendant's vehicle swerved and nearly struck a railing. Officer Kennedy then stopped the vehicle and discovered that the defendant appeared to be intoxicated, whereupon she was arrested. Although the wording of the certified question implies that the defendant was stopped because she had been speeding prior to entering Spring Hill, we do not know what reasons Officer Kennedy gave for the traffic stop, since the record does not include a transcript of his testimony.

Subsequently, the defendant filed a motion to suppress, later amended, claiming that there was "no probable cause or other legal justification for the seizure of" the defendant. Following a hearing, the trial court overruled the motion.

The appellate record does contain copies of the exhibits introduced at the suppression hearing. We note that two photographs among the exhibits bear both exhibit numbers 5 and 6. The first photograph marked with these numbers depicts a straight, two-lane road with trees on one side and a wire fence on the other. Based upon the descriptions in the trial court's order, we presume that this is Exhibit 5, as relied upon by the trial court, and shows the straight stretch of road where Officer Kennedy followed the defendant's vehicle. Additionally, we presume that the second photograph, also marked as Exhibits 5 and 6 and depicting a two-lane road making a right turn with a white metal railing within the bend of the road, is Exhibit 6 as relied upon by the trial court.

ANALYSIS

The certified question presented by the defendant is whether Officer Kennedy "had probable cause and/or the authority to effect a citizen's arrest on the [d]efendant for speeding." The State responds that even if we conclude that the trial court erred and should have ruled in the defendant's favor on this point, our course then would be to remand the matter to the trial court to determine whether Officer Kennedy's stop of the defendant's vehicle was justified on another ground. As we will explain, we agree with the State's analysis that the certified question is not dispositive of this matter and that, therefore, this court is without jurisdiction to entertain the appeal.

In denying the defendant's motion to suppress, the trial court found that although Officer Kennedy could not, acting as a Spring Hill police officer, stop the defendant in Spring Hill for speeding within the city limits of Columbia, he could, while acting as a private citizen, do so

and, upon stopping the defendant's vehicle in Spring Hill and believing that she was intoxicated, could then act as a Spring Hill police officer, as the court explained:

Spring Hill City Police Officer, Tim Kennedy, was operating radar within the city limits of Spring Hill, Tennessee on the night of August 21, 2005. [The defendant] was driving north towards Spring Hill on U.S. Highway 31. Officer Kennedy clocked [the defendant] at 72 in a 55 m.p.h. zone. At the time Officer Kennedy clocked [the defendant], she was within the city limits of Columbia, Tennessee and had not entered the Spring Hill city limits. Officer Kennedy testified that he was new to the job and did not know where the city limits ended. Officer Kennedy proceeded south on U.S. Highway 31, cut through the median, and proceeded north. [The defendant] turned right on Denning Lane (Exhibit 2), where Officer Kennedy caught up with her. He proceeded to follow her around a 90 degree right hand turn (Exhibit 3), down a short strait [sic] stretch (Exhibit 5), and then around a 90 degree left hand turn (Exhibit 4). Officer Kennedy testified that [the defendant's] driving was fine on Denning Lane, until she veered off the road on the second turn almost striking a guardrail. The pictures (Exhibits 4 and 6) are clear that no guardrail exists on the second turn. The testimony confirmed that the pictures accurately depict the scene as it existed on August 21, 2005. [The defendant] testified that she was frightened because Officer Kennedy's car was close behind her, it was dark and she was on a rural road. She did not know that the vehicle was a law enforcement vehicle. After negotiating the left turn, she stopped and signaled for the car to go around. When the vehicle would not go around, she proceeded forward. Officer Kennedy activated his blue lights for the first time and stopped her for speeding in violation of a Spring Hill Ordinance, according to Officer Kennedy's testimony. Officer Kennedy's stop ultimately led to [the defendant] being charged with driving under the influence. [The defendant] was inside the city limits of Spring Hill when she allegedly veered off Denning Lane and when she was stopped.

ISSUES

1. Whether Officer Kennedy can charge [the defendant] for speeding outside the corporate limits of Spring Hill.

Tenn. Code Ann. § 6-54-301 provides: **Extension of police authority beyond limits.** – The police authority of all incorporated towns and cities shall extend to a distance of one (1) mile from the lawful corporate limits thereof . . . ; provided, that such jurisdiction for the incorporated town or city shall not be extended beyond the limits . . . so as to come within one (1) mile of any other incorporated town or city. Exhibit 7 shows that the corporate limits of the City of Columbia and the corporate limits of Spring Hill meet at approximately Denning Lane. Tenn. Code Ann. § 6-54-103 is not therefore applicable to these facts and does not authorize Officer Kennedy to charge [the defendant] with violating a Spring Hill ordinance.

Tenn. Code Ann. § 40-7-109 states “**Arrest by a private person – grounds.** – (a) a private person may arrest another: (1) for a public offense committed in the arresting person’s presence” The [d]efendant argues that a private citizen cannot stop someone for speeding. They rely on 61A C.J.S. Motor Vehicles § 1327 for the proposition that “in the absence of express statutory authorization, a traffic violation must be in such a nature that it constitutes an actual breach of the peace as defined at common law in order to authorize a citizen to arrest another citizen.” (Citing State ex rel. State v. Gustke, 205 W.Va. 72, 516 S.E.2d 283 (1999)). In State v. Durham, 1995 Tenn. Crim. App. LEXIS 911, the Court of Criminal Appeals pointed out that Tenn. Code Ann. § 40-7-109 says “any public offense” and found the argument that the offense in that case was a misdemeanor to not be “a meaningful distinction.” Based on State v. Durham, this Court finds Tenn. Code Ann. § 40-7-109 to encompass all misdemeanors if committed in public and in the presence of the private person making the arrest. Speeding is a violation of the law, and pursuant to Tenn. Code Ann. § 39-11-109 is a misdemeanor.

Officer Kennedy testified that he was acting as a Spring Hill Police Officer (under the mistaken belief that [the defendant] was within the Spring Hill city limits when he clocked her), not as a private person, when he stopped [the defendant] for violating a Spring Hill speeding ordinance. Officer Kennedy had no authority as a Spring Hill Police Officer to stop [the defendant] for violating a Columbia ordinance, assuming she was doing so.

2. Whether Officer Kennedy, even though he was on duty and acting in his official capacity as a Spring Hill Police Officer enforcing a Spring Hill ordinance, was in reality acting as a private citizen under Tenn. Code Ann. § 40-7-109(a)(1) when he stopped [the defendant] for speeding in another municipality. In State v. Durham, the Cookeville police officer, who was outside his jurisdiction when he observed the defendant, testified he was on duty, in uniform, and made the arrest as a police officer, not as a private citizen. Again, the Court of Criminal Appeals found that fact not to be meaningful because “a police officer does not give up the right to act as a private citizen when he is off duty or out of his jurisdiction.” Based on State v. Durham, Officer Kennedy did not give up his right to act as a private citizen because he was a police officer on duty and in uniform, or because he was acting as a police officer when he made the stop. He was therefore permitted to stop [the defendant] for speeding as a private citizen.

3. Whether Officer Kennedy was acting as a private citizen when he advised [the defendant] of the implied consent law, and if so what are the ramifications. Officer Kennedy stopped [the defendant] as a private citizen. Tenn. Code Ann. § 55-10-406(a)(1) states that any person who drives any motor vehicle is deemed to have given consent to a blood test “provided, that such test is administered at the direction of a law enforcement officer” Tenn. Code Ann. § 55-10-406(a)(2) states “[A]ny [law enforcement officer] who request[s]” a person to submit to a blood test shall advise of the consequences of refusing to

submit. Tenn. Code Ann. § 55-10-406 does not on its face provide private citizens the power to request or direct [a] blood test. Tenn. Code Ann. § 55-10-406[(e)] states “[N]othing in this section shall [a]ffect the admissibility in evidence, in criminal prosecution[s] for aggravated assault or homicide by the use of a motor vehicle only, of any chemical analysis of the alcoholic or drug content of the defendant’s blood which has been obtained by any means lawful without regard to the provisions of this section.” This is a DUI case, not an aggravated assault or homicide, so compliance with the provisions of Tenn. Code Ann. § 55-10-406 seems mandatory. The issue the[n] becomes whether Officer Kennedy, after stopping [the defendant] as a private citizen, can switch back to a Spring Hill officer because he smells alcohol. Based on [the] logic of State v. Durham, Officer Kennedy did not give up his right to act as a police officer after stopping [the defendant] as a private citizen. Therefore the request was made by and administered at the direction of Officer Kennedy as a law enforcement officer.

The trial court’s ruling focused upon Officer Kennedy’s stop of the defendant’s vehicle as being based solely upon his radar gun showing that her vehicle was exceeding the speed limit before she had entered the city limits of Spring Hill. Although it might be inferred, because of this question, that Officer Kennedy did not observe the defendant speeding in her vehicle after she had entered the city limits of Spring Hill, the order does not say that this was the case. Additionally, the order does not reveal whether Officer Kennedy was asked if his observing the defendant attempting to negotiate a left turn, with her vehicle swerving, entering the opposing lane, and nearly striking a guardrail, was a factor in his stopping the defendant’s vehicle almost immediately after this had occurred.¹ As we will explain, it appears that the stop could have been based upon the defendant’s difficulty in negotiating this turn, which occurred just before her vehicle was stopped.²

To initiate a traffic stop, a police officer must have either probable cause to believe that a crime has occurred and that the defendant has committed it, or a reasonable suspicion, supported by specifically articulable facts, sufficient to justify a seizure. See Terry v. Ohio, 392 U.S. 1, 20-21, 88 S. Ct. 1868, 1879-80 (1968). Without probable cause or reasonable suspicion, a search or seizure is unreasonable under the Fourth Amendment of the United States Constitution and Article I, Section 7 of the Tennessee Constitution; the remedy for either constitutional violation is the suppression of evidence obtained as a result of the unlawful search or seizure. State v. Yeargan, 958 S.W.2d 626, 629 (Tenn. 1997). The direct observation of a traffic violation gives an officer probable cause to initiate a traffic stop. State v. Levitt, 73 S.W.3d 159, 173 (Tenn. Crim. App. 2001) (“As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.”) (quoting Whren v. United States, 517 U.S. 806, 810, 116 S. Ct. 1769, 1772 (1996)).

¹ Although the order states that “no guardrail exists on the second turn,” the photograph of what we believe to be the second turn shows what appears to be a white metal fence on the inside of the turn, its placement apparently intended to prevent drivers from going off the paved roadway to cut the corner “short.” A vehicle following this road to turn left would have to veer sharply to the left and cross most of the oncoming lane to nearly strike this fencing.

² The State argues on appeal that this action was a violation of the Code of Ordinances for Spring Hill 15-103, 15-401.

In reviewing this appeal, we first must determine whether the issue presented by the certified question is dispositive of this case. This question is jurisdictional; if we find that the certified question is not dispositive, we may not rule on the defendant's appeal. State v. Preston, 759 S.W.2d 647, 651 (Tenn. 1988). Rule 37(b)(2) of the Tennessee Rules of Criminal Procedure provides that an appeal lies from an adverse ruling which is the basis for a certified question if the question is dispositive of the matter:

the defendant – with the consent of the court – explicitly reserved the right to appeal a certified question of law that is dispositive of the case, and the requirements of Rule 37(b)(2) are met, except the judgment or document need not reflect the state's consent to the appeal or the state's opinion that the question is dispositive.

Tenn. R. Crim. P. 37(b)(2)(D).

As our supreme court explained in Preston, it is the responsibility of the defendant, in bringing a certified question to the appellate courts, to provide a sufficient record so the appellate courts can determine whether the certified question is dispositive of the matter:

[T]he burden is on defendant to see that these prerequisites are in the final order and that the record brought to the appellate courts contains all of the proceedings below that bear upon whether the certified question of law is dispositive and the merits of the question certified. No issue beyond the scope of the certified question will be considered.

759 S.W.2d at 650.

As we have set out, the question certified is “whether or not Officer Tim Kennedy had probable cause and/or the authority to effect a citizen’s arrest on the [d]efendant for speeding.” Even if we were to accept completely the defendant’s argument that she could not have been lawfully stopped in Spring Hill for speeding in Columbia, we would not dismiss this matter but would remand for the trial court to determine whether the defendant’s operation of her car within the city limits of Spring Hill gave Officer Kennedy probable cause to initiate the traffic stop. It appears he observed her vehicle veer sharply, cross an opposing lane of traffic, and nearly strike a barrier. Further, as we have stated, the court’s order is silent as to whether the defendant was speeding while in the Spring Hill city limits. Accordingly, even if we agree with the defendant that the trial court erred in its ruling on the certified question, we would then remand the matter for the trial court to determine whether other grounds existed for the stop of the defendant’s vehicle. Thus, we conclude that the certified question of law preserved by the defendant is not dispositive of the case, and this court has no jurisdiction to hear the appeal. State v. Wilkes, 684 S.W.2d 663, 667 (Tenn. Crim. App. 1984).

CONCLUSION

Based on the foregoing authorities and reasoning, we conclude that the certified question is not dispositive of this matter and dismiss the appeal.

ALAN E. GLENN, JUDGE