

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
May 15, 2007 Session

STATE OF TENNESSEE v. DREXSEL GREEN

**Appeal from the Criminal Court for Davidson County
No. 3537 Seth Norman, Judge**

No. M2006-01296-CCA-R3-CD - Filed August 22, 2007

The defendant, Drexsel Green, appeals his Davidson County Criminal Court conviction of first-offense driving under the influence (DUI), a Class A misdemeanor. *See* T.C.A. §§ 55-10-401(a)(1), -403(a)(1) (2004). After the trial court denied the defendant's motion to suppress evidence acquired after the police had detained him, the defendant pleaded guilty in the trial court but reserved, via certified questions of law, the search and seizure issue for appeal. The focus of the Fourth-Amendment problem in this case is the legitimacy of a police officer's approach and initial questioning of the defendant at the serving counter in a Waffle House restaurant. Although the certified questions are properly reserved, the record supports the trial court's denial of the defendant's motion to suppress evidence, and we affirm the criminal court's judgment.

Tenn. R. App. P. 3; Judgment of the Criminal Court is Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and D. KELLY THOMAS, JR., JJ., joined.

Robert L. Smith and Jeffrey W. Blackshear, Nashville, Tennessee, for the Appellant, Drexsel Green.

Robert E. Cooper, Jr., Attorney General & Reporter; Mark A. Fulks, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Michel Clair Bottom, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

At the suppression hearing, Metropolitan Nashville police officer Matthew Valiquette¹ testified that, while he was on duty as a patrol officer at approximately 3:00 a.m. on February 12, 2004, he saw a Honda Accord automobile pull into the parking lot of a Waffle House restaurant on West Trinity Lane. The defendant, the driver of the Honda, “appeared to have a hard time parking [] between the lines.” The officer “observed the [defendant] exit the vehicle, nearly fall over, had to catch himself against the vehicle,” and as the defendant “walked inside the [Waffle House] he appeared to stagger, have a hard time walking.” The officer testified that he thought the defendant was impaired, and he and his patrol partner entered the Waffle House and “contacted” the defendant, who was seated at the counter.

At his point, the officer noticed that the defendant had “[r]ed watery blood shot eyes, [the] smell of an alcoholic beverage coming from his person, that sort of thing.” The officer asked the defendant some questions, and the defendant’s verbal responses were “slurred.” The defendant agreed to engage in field sobriety tests inside the restaurant. The officer testified that the defendant “had to catch himself during the walk and turn [test] on a booth to keep himself from falling over.” The officer testified, “The [d]efendant appeared to be extremely intoxicated, [and] he was clearly the driver of that vehicle.” Accordingly, the officer arrested him for DUI.

The defendant refused to take a breath-alcohol test. The officer testified that the defendant admitted to drinking four beers and two mixed drinks at a bar.

On cross-examination, the officer testified that when he and his partner approached the defendant at the Waffle House counter, the officers stood between the defendant and the exit. The officer testified, however, that the defendant was not under arrest prior to his engaging in the field sobriety tests.

In its order overruling the motion to suppress, the criminal court thoroughly reviewed the facts that emerged from Officer Valiquette’s testimony and accredited that testimony as presented. The court concluded that the officer “had reasonable suspicion to approach the defendant initially based upon his observations outside the Waffle House.” The court further concluded that, once inside the restaurant, the officer lawfully discerned other facts which properly led to the field sobriety tests. The tests, then, revealed facts that formed a basis of probable cause for arrest.

In the plea agreement documents and in a separate document that was attached to and incorporated into the conviction judgment by specific reference, the defendant reserved the following certified questions of law pursuant to Tennessee Rule of Criminal Procedure 37(b)(2):

Whether the arresting officer had probable cause or a reasonable suspicion to stop the defendant who was seated at a restaurant based solely upon the officer’s observation of the [d]efendant parking his vehicle and walking into the restaurant; and, whether

¹ The officer’s surname spelling is derived from the trial court’s April 8, 2005 order overruling the motion to suppress. A different spelling of the surname was used in the suppression hearing transcript, but the transcriber noted that the spelling she used was “phonetic.”

the defendant's statements and field sobriety test should be suppressed as violations of the 4th, 5th, and 6th Amendments to the United States Constitution.

The record reflects that the defendant, the State, and the trial court agreed that the questions certified were dispositive of the case. We conclude that the defendant effectively reserved questions of law for our review.

I. Burden of Proof

The United States Constitution protects against unreasonable searches and seizures. U.S. Const. amend IV.² A search or seizure conducted without a warrant is presumed unreasonable, thereby requiring the State to prove by a preponderance of the evidence that the search or seizure was conducted pursuant to an exception to the warrant requirement. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043 (1973); *State v. Simpson*, 968 S.W.2d 776, 780 (Tenn. 1998). 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.

II. Standard of Review

When a party appeals the trial court's ruling on a suppression motion, the standard of appellate review requires acceptance of the trial court's findings regarding "questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence," unless the evidence preponderates against the findings. *State v. Ross*, 49 S.W.3d 833, 839 (Tenn. 2001); *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996); *State v. Cothran*, 115 S.W.3d 513, 519 (Tenn. Crim. App. 2003). However, "when a trial court's findings of fact on a motion to suppress are based solely on evidence that does not involve issues of credibility, appellate courts are just as capable to review the evidence and draw their own conclusions." *State v. Binette*, 33 S.W.3d 215, 217 (Tenn. 2000). In that situation, "a reviewing court must examine the record de novo without a presumption of correctness." *Id.* Moreover, the application of the law to the facts found by the trial court is a question of law that is reviewed de novo. *State v. Daniel*, 12 S.W.3d 420, 423 (Tenn. 2000); *Odom*, 928 S.W.2d at 23.

III. Bases for Warrantless Police Interaction with the Defendant

Warrantless "[p]olice-citizen interactions are of three different types: 1) a full scale arrest which must be supported by probable cause; 2) a brief investigatory stop which must be supported by reasonable suspicion; and 3) a brief police-citizen encounter which requires no objective justification." *State v. Nicholson*, 188 S.W.3d 649, 656 (Tenn. 2006). "Consensual encounters" do not implicate constitutional protections. *Id.* "Only when [a police officer], by means of physical force or show of authority, has in some way restrained the liberty of a citizen

² The defendant's claims in his certified questions of law are based upon the Fourth, Fifth, and Sixth Amendments to the United States Constitution and not upon any provisions of the Tennessee Constitution. We limit our analysis accordingly.

may we conclude that a “seizure” has occurred.”” *Daniel*, 12 S.W.3d at 424 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 88 S. Ct. 1868, 1879, n.16 (1968)).

In the present case, the record shows neither that the officer had probable cause to arrest the defendant when the officer entered the restaurant *nor that the officer had arrested* the defendant until the field sobriety tests had been conducted, after which probable cause existed. Thus, the issues of a full arrest and a supporting basis of probable cause are not implicated by the facts in the present case. We turn, therefore, to the other two rubrics of police-citizen encounters mentioned in *State v. Nicholson*. We take them in inverse order, considering first the consensual, non-seizure encounter.

A. Alternative Basis: No Objective Justification Required

“[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions.” *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 2386 (1991).

[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.

Florida v. Royer, 460 U.S. 491, 497-98, 103 S. Ct. 1319, 1324 (1983) (citations omitted).

Although the trial court in the present case did not rely upon a benign citizen encounter as a basis for gleaning facts about the defendant’s DUI, our de novo review of the underlying federal constitutional issues indicates that Officer Valiquette’s approach of the defendant in the public environs of the Waffle House was initially “a brief police-citizen encounter which require[d] no objective justification.”³ See *Nicholson*, 188 S.W.3d at 656. Although the officers stood between the defendant and the exit, such a positioning would be natural under the circumstances, and the evidence is devoid of any indication that the officers’ positions in the restaurant were actually confining.⁴ The officers’ presence in the Waffle House could hardly be characterized as extraordinary; in fact, Officer Valiquette testified that he had

³ In his brief, the defendant acknowledged the validity of brief police-citizen encounters that require no objective justification.

⁴ The defendant did not testify in the suppression hearing.

been inside the particular Waffle House on several occasions prior to February 12, 2004. From that legitimate location, the officer's asking the defendant a question required no justification, and of course, thereafter, the defendant's appearance, demeanor, and aroma – all suggesting alcoholic impairment – became discernible.

B. Alternative Basis: Detention upon Reasonable Suspicion

In any event, and alternatively, the facts in evidence support the trial court's conclusion that Office Valiquette was justified by reasonable suspicion in approaching the defendant in the Waffle House. As such, any "detention" that resulted from the officers' approach and their positioning themselves between the defendant and the exit was justified. Under this view of the facts, the investigative detention led to the discovery of facts that ultimately yielded probable cause for arrest.

Although a warrant is normally required when a police officer intrudes upon the privacy of a citizen, a recognized exception pertinent in the present case is the brief investigatory stop; though warrantless, such a stop is reasonable when the detaining officer has a reasonable suspicion supported by specific and articulable facts that a criminal offense has been – or is about to be – committed. *Terry v. Ohio*, 392 U.S. 1, 20-23, 88 S. Ct. 1868, 1879-81 (1968). Whether reasonable suspicion existed in a particular case is a fact-intensive, but objective analysis. *State v. Garcia*, 123 S.W.3d 335, 344 (Tenn. 2003). The likelihood of criminal activity required for reasonable suspicion is not as great as that required for probable cause and is "considerably less" than would be needed to satisfy a preponderance of the evidence standard. *United States v. Soklow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 1585 (1989). Furthermore, a court must consider the totality of the circumstances in evaluating whether a police officer's reasonable suspicion is supported by specific and articulable facts. *State v. Hord*, 106 S.W.3d 68, 71 (Tenn. Crim. App. 2002). The totality of the circumstances embraces considerations of the public interest served by the seizure, the nature and scope of the intrusion, and the objective facts on which the law enforcement officer relied in light of his experience. *See State v. Pulley*, 863 S.W.2d 29, 34 (Tenn. 1993). The objective facts on which an officer relies may include his or her own observations, information obtained from other officers or agencies, offenders' patterns of operation, and information from informants. *State v. Michael James Grubb*, No. E2005-01555-CCA-R3-CD, slip op. at 6 (Tenn. Crim. App., Knoxville, Apr. 18, 2006).

In the present case, the officer noticed that the defendant appeared to experience difficulty in parking his car in a lined space in the restaurant parking lot. After emerging from his car, the defendant nearly fell down and staggered into the restaurant. The defendant argues that the parking difficulty and the stumbling gait could have been innocent, indeed sober encounters with an awkwardly laid-out parking lot, a misplaced parking curb, or an uneven sidewalk. We do not disagree; however, the possibility of innocent explanations for a person's otherwise suspicious behavior does not necessarily degrade reasonable suspicion into mere speculation. Particularly in the present case, when multiple actions occur that evoke consistent inferences of unlawful conduct, the observing officer is justified in detaining and conducting a brief investigation.

IV. Conclusion

As stated above, the focus of this Fourth Amendment problem is the legitimacy of the officer's approach and initial questioning of the defendant at the serving counter in a Waffle House restaurant. We hold that the officer's approach and initial questioning was not a detention and fell within an allowable ambit of police presence in our society and needed no objective justification. Alternatively, even if the approach of the defendant is viewed as a detention, it was justified by a reasonable suspicion that the defendant had committed, was committing, or would imminently commit an offense. With the officer's approach and initial question legitimated by either theory, the facts he gleaned led properly and ultimately to probable cause that the defendant was guilty of DUI. The judgment of the trial court is affirmed.

JAMES CURWOOD WITT, JR., JUDGE