

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
February 20, 2008 Session

**STATE OF TENNESSEE v. JONATHAN C. CARR**

**Appeal from the Circuit Court for Williamson County  
No. II-CR051802 Timothy L. Easter, Judge**

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**No. M2007-01759-CCA-R3-CD - Filed September 26, 2008**

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The Appellant, Jonathan C. Carr, appeals his felony conviction by a Williamson County jury for the crime of possession of a controlled substance in a penal institution.<sup>1</sup> T.C.A. § 39-16-201(a)(2) (2005). On appeal, the following issues are raised: (1) whether the custodial arrest of Carr for a misdemeanor offense violated this state’s “cite and release” statute, Tennessee Code Annotated section 40-7-118 (2005) and, thus, any evidence obtained as a result of the arrest was inadmissible; (2) whether Carr’s presence in a “booking area” of the jail while in possession of a controlled substance constituted a “voluntary” act; and (3) with regard to the sufficiency of the evidence: (a) whether the proof established that Carr was ever “located within an area where prisoners are quartered” and (b) whether the proof established that Carr’s possession was “without the express consent of the chief administrator” of the institution. After review, we conclude that issues (2) and (3) are without merit and that issue (1) is procedurally defaulted. Accordingly, Carr’s convictions for possession of a controlled substance in a penal institution and possession of drug paraphernalia are affirmed.

**Tenn. R. App. P. 3; Judgments of the Circuit Court Affirmed**

DAVID G. HAYES, SR.J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and NORMA MCGEE OGLE, JJ., joined.

Vincent P. Wyatt, Nashville, Tennessee, for the Appellant, Jonathan C. Carr.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant Attorney General;

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<sup>1</sup>In addition to his conviction for possession of a controlled substance in a penal institution, the Appellant was also convicted of misdemeanor possession of drug paraphernalia. In his brief, the Appellant makes reference to the appeal of his conviction for possession of drug paraphernalia; however, the issues raised on appeal address only his conviction for possession of drugs in a penal institution. Moreover, no legal authority is cited in support of the appeal of his conviction for possession of drug paraphernalia. *See* Tenn. R. App. P. 27(a)(7). Accordingly, any challenge to his conviction for possession of drug paraphernalia is waived. *Id.*

Kim Helper, District Attorney General; and Jennifer C. Moore, Assistant District Attorney General, for the Appellee, State of Tennessee.

## OPINION

### Factual Background

A Williamson County grand jury returned an indictment charging the Appellant with simple possession of a Schedule II controlled substance,<sup>2</sup> possession of a Schedule II controlled substance while present in a penal institution, and possession of drug paraphernalia. The offenses were alleged to have occurred on December 24, 2005.

A jury trial was held on February 16, 2007, at which the following underlying facts were established. At approximately 4:00 a.m. on December 24, 2005, Williamson County Sheriff's Officers Michael Terns and Troy Gifford arrived at a market located on Nolensville Road in order to investigate a reportedly suspicious vehicle. Upon their initial arrival at the scene, the officers observed a blue minivan parked next to the market with a male occupant sitting in the passenger seat with his eyes closed. Officer Terns knocked on the vehicle's window to initiate a conversation, and the male opened the passenger side door, at which time Officer Gifford observed another male, identified as the Appellant, moving in the rear compartment of the van. Officer Gifford asked the Appellant and the other male to step out of the vehicle. The Appellant informed the officers that he was the owner of the van and denied them permission to conduct a search of the van. Standing outside the van, the officers visually inspected the interior of the van and observed on the passenger's seat a metal pipe which they believed to be of the type commonly used for smoking cocaine. Based upon this discovery, the officers searched the interior of the van further and found two glass pipes and two spoons containing "residue" in the rear of the vehicle, as well as two syringes and a "metal scrapper" underneath the passenger seat.

Upon questioning of the Appellant by the officers as to the presence of drugs in the van or on his person, the Appellant stated "that there was none, that there wasn't any left, and he had already used it all." The officers testified that the Appellant appeared coherent and clear in his speech and that he did not seem "out of it." Officer Gifford testified that he advised the Appellant, while on the scene, "that if he had anything on him and he didn't tell [the officers] about it and he took it into the jail, that it would constitute further charges." The Appellant and passenger were read their *Miranda* rights and informed of their arrest for possession of drug paraphernalia, a Class A misdemeanor. The two were then taken into custody and were seated in the back of Officer Terns' patrol car. Officer Terns testified that, once they arrived at the jail, both were again warned about bringing drugs into the jail, informing them that such actions would constitute a felony, and advising that "if [the Appellant] had anything on him, to relinquish it to my custody." Neither the Appellant

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<sup>2</sup>Although the first count of the indictment originally charged the Appellant with possession of a Schedule II controlled substance with the intent to sell or deliver, this count was amended, upon motion of the State, to reflect a charge of misdemeanor possession of a Schedule II controlled substance.

nor the passenger offered a response. The men were brought into the booking and processing area of the Williamson County Jail, and Officer Terns returned to park his patrol car. While he sat in the car, Officer Terns listened to the audio portion of a videotape recording from the vehicle's surveillance camera, specifically to a conversation between the Appellant and his co-defendant. Afterwards, Officer Terns summoned Officer Gifford to listen to the tape as well. Officer Gifford testified that on the tape, he heard a voice, which he identified as that of the Appellant, stating, "I need to get comfortable so I can shove this shit up my ass."

Officer Charles Ferguson, who was serving as corporal of the jail at that time and was present in the booking area, testified that he received a call in which Officer Gifford informed him that the Appellant might have stashed "some type of drug paraphernalia or something on his person." At the time he received the call, the Appellant had completed his booking paperwork and was awaiting further processing in a holding cell at the Williamson County Criminal Justice Center. Officer Ferguson stated that pursuant to procedure, every person being "booked into the jail" went through a showering and delousing process, as well as a search by which the person is stripped naked, their mouth, hair, and ears are inspected, and they are asked to squat and cough "to make sure they're not hiding anything up inside their person." Officer Ferguson testified that he asked the Appellant to squat and cough and that the first time the Appellant complied "nothing happened." However, Officer Ferguson testified that he asked the Appellant to repeat the procedure once he stepped into the shower and that "[a]t that time a little baggy with a white rock-like substance" fell from inside the Appellant's rectum. The small bag was collected into evidence, and Donna Flowers of the Tennessee Bureau of Investigation subsequently tested its contents, which were determined to be 1.2 grams of a powder identified as cocaine.

Based upon the foregoing evidence, a Williamson County jury convicted the Appellant of simple possession of a Schedule II controlled substance, possession of a Schedule II substance while present in a penal institution, and possession of drug paraphernalia. The Appellant's conviction for simple possession was merged with his conviction for possession of a controlled substance while present in a penal institution. Following a hearing, the trial court sentenced the Appellant, as a Range I offender, to three years and six months in the Department of Correction for the Class C felony.

### **Analysis**

On appeal, the Appellant argues that the introduction at trial of the cocaine seized during the search of his person while being "booked" was error, as it was obtained as a result of an unlawful custodial arrest, and was thus, "fruit of the poisonous tree." In addition, the Appellant challenges the "voluntariness" of his act of possession and advances a two-prong attack upon the legal sufficiency of the convicting evidence.

#### **I. Initial Arrest**

The Appellant argues that his initial custodial arrest was unlawful, thus "barr[ing] the State

from presenting evidence that was garnered through such illegal arrest since such evidence violated the fruits of the poisonous tree” doctrine. Citing Tennessee Code Annotated section 40-7-118, commonly referred to as the “cite and release statute” providing for the use of citations in lieu of continued custody of an arrested person, the Appellant argues that the arresting police officer should have issued him a citation for the offense rather than place him in full custodial arrest, in the absence of evidence that one of the eight statutory exceptions was applicable.

Tennessee Code Annotated section 40-7-118 (2005) provides in relevant part:

(b)(1) A peace officer who has arrested a person for the commission of a misdemeanor committed in the peace officer’s presence . . . shall issue a citation to the arrested person to appear in court in lieu of the continued custody and the taking of the arrested person before a magistrate. . . .

. . . .

Under this statutory section, “when an officer observes the commission of certain misdemeanors, the officer is required to cite and release the misdemeanant in lieu of effecting a custodial arrest.” *State v. Walker*, 12 S.W.3d 460, 464 (Tenn. 2000); *see also State v. Chearis*, 995 S.W.2d 641, 644 (Tenn. Crim. App. 1999). The “cite and release” statute creates a presumptive right to be cited and released for the commission of a misdemeanor. *Walker*, 12 S.W.3d at 464. Notwithstanding, subsection (c) of the statute provides eight exceptions that require an officer to disregard the “cite and release” procedure and effect a custodial arrest. *Id.* On appeal, the Appellant argues that none of the eight statutory exceptions apply to his arrest.

At trial, arresting officer Troy Gifford testified that “[i]t was because the [Appellant] had admitted to me that he had used narcotics and that he had used them recently” and that he “did not feel comfortable releasing him . . . on his own.” Officer Gifford further recalled that it was very cold on that Christmas Eve morning, approximating that the temperature was below twenty degrees. Furthermore, Officer Michael Terns, who assisted Officer Gifford with the arrest, responded to direct examination at trial as follows:

- Q. Why did you arrest them rather than issue them a misdemeanor citation?  
A. When [the Appellant] said they had just got done [sic] using drugs, I feared for his safety. It was very cold outside. I feared if I released him that, you know, some harm might come to him. Also, the owner of the property didn’t want him on his property anymore. And being December, that early in the morning, there was nothing open and nowhere to take him to.  
Q. Did you give him the opportunity though to call somebody to come get him?  
A. Yes, ma’am.  
Q. And why did nobody arrive on the scene?  
A. He couldn’t give me any telephone numbers to call.

On appeal, the State argues that the Appellant's assertion that his custodial arrest was unlawful has been waived by virtue of the fact that this issue was never raised by pretrial motion nor objected to at trial.<sup>3</sup> We agree with the State that the record fails to demonstrate that this issue was ever litigated prior to or during the trial proceeding. Because no pretrial or contemporaneous motion was apparently made to suppress the alleged "fruits of the poisonous" custodial arrest, we are without any trial court findings on this issue.

Tennessee Rule of Criminal Procedure 12(b)(2)(C) provides that a motion to suppress evidence must be raised prior to trial. *See also State v. Goss*, 995 S.W.2d 617, 628 (Tenn. Crim. App. 1998). The failure to raise the suppression issue pretrial constitutes a waiver of such issue, absent good cause that merits relief from the waiver. Tenn. R. Crim. P. 12(f)(1). Clearly, in this case, a suppression motion was capable of being raised prior to trial. Moreover, the Appellant's failure to make a contemporaneous objection to the Appellant's alleged "unlawful arrest" at trial resulted in a waiver of that issue on appeal. Tenn. R. App. P. 36(a). Accordingly, the issue is waived.

## **II. "Voluntariness" of the Appellant's Act**

The Appellant contends that the proof at trial failed to establish that his presence in the Williamson County Jail, while in possession of a controlled substance, was voluntary. The Appellant argues that because he was transported to the jail under custodial arrest and physically escorted to the booking area of the jail by law enforcement personnel, his "[b]ringing drugs into the jail was not a result of his voluntary effort and determination." While acknowledging that "voluntariness" is not an element of the crime for which he was convicted, he, nonetheless, argues that "one of the very basis tenets of American jurisprudence" requires that before criminal liability may be found, the activity in question must be voluntary. (citing Wayne R. LaFare, *Substantive Criminal Law* §6.1(c) at 425 (2d ed. 2003) (citing MODEL PENAL CODE §2.01(1)). Moreover, the Appellant cites this court's decision in *State v. Turner*, 953 S.W.2d 213, 216 (Tenn. Crim. App. 1996), for the authority that "in general, a minimum requirement for criminal liability is the performance of a voluntary act" and that a voluntary act is defined as a "bodily movement performed consciously as a result of effort or determination." The Appellant also cites, as persuasive authority, the decisions of other state jurisdictions which have held that a defendant's introduction of drugs into a penal institution, while under custodial arrest, does not constitute a voluntary act, thereby precluding criminal liability. *See State v. Cole*, 164 P.3d 1024, 1027 (N.M. Ct. App. 2007); *State v. Sowry*, 803 N.E.2d 867, 870 (Ohio Ct. App. 2004); *State v. Tippetts*, 43 P.3d 455, 459-60 (Or. Ct. App. 2002). Finally, the Appellant argues that requiring him to divulge to law enforcement personnel that he was in possession of drugs would, in turn, require that he implicate himself in a criminal act (possession of cocaine), in violation of his Fifth Amendment right and Article I, Section

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<sup>3</sup>In the alternative, the State argues that the facts testified to at trial, with regard to the Appellant's arrest, permits a custodial arrest based upon the statutory exception that "the person is unable to care for the person's own safety[.]" *See T.C.A. § 40-7-118(c)(1)* (2005).

9, of the Tennessee Constitution.

The clear objective of our General Assembly in enacting Tennessee Code Annotated section 39-16-201 was that of maintaining the safety, security and non-disruptive operation of every municipal, county or state penal facility in this State by prohibiting the introduction or possession therein of any weapon, ammunition, explosive, intoxicant, legend drug or controlled substance. *See* T.C.A. § 39-11-101(1). For this reason, we respectfully reject the decisions of other jurisdictions which have held that a defendant may, with impunity, introduce into, or possess in, a penal institution, drugs, weapons, or other contraband, even in those situations where the unlawful introduction or possession is accompanied by the use of false information to a correctional or law enforcement officer. In sum, we conclude that these sister state holdings are contrary to sound policy and thwart the intent of our legislature in its enactment of this criminal offense. Moreover, we reject the Appellant's argument that divulgence to a law enforcement officer of his possession of a controlled substance would, in effect, require him to incriminate himself in criminal activity. In *People v. Ross*, 76 Cal. Rptr. 3d 477 (Cal. Ct. App. 2008), the Court of Appeal of California rejected the defendant's argument that she had a Fifth Amendment right not to disclose her possession of a knife prior to entering a jail facility because disclosures would have incriminated her. The court in *Ross* reasoned as follows:

[*Ross*] *Fifth Amendment* privilege permitted her to remain silent. It did not protect her from the consequences of lying to a law enforcement officer, who had properly inquired whether she possessed any weapons. Without *Miranda* warnings (*Miranda v. Arizona* (1966) 384 U.S. 436 [16 L. Ed. 2d 694, 86 S. Ct. 1602]) law enforcement officials may subject an arrestee to questioning “necessary to secure their own safety or the safety of the public” and not “designed solely to elicit testimonial evidence from a suspect.” (*New York v. Quarles* (1984) 467 U.S. 649, 659 [81 L. Ed. 2d 550, 104 S. Ct. 2626].) “While the *Fifth Amendment* provides [suspects] with a shield against compelled self-incrimination, it does not provide them with a sword upon which to thrust a lie.” (*State v. Reed* (2005) 280 Wis. 2d 68 [695 N.W.2d 315, 325]; see also *Brogan v. United States* (1998) 522 U.S. 398, 404 [139 L. Ed. 2d 830, 118 S. Ct. 805] [“[N]either the text nor the spirit of the *Fifth Amendment* confers a privilege to lie. ‘[P]roper invocation of the *Fifth Amendment* privilege against compulsory self-incrimination allows a witness to remain silent, but not to swear falsely.’”].)

*Id.* at 481-82.

We adhere to the holding of *Ross*. Furthermore, we conclude that the Appellant's possession of a controlled substance was voluntary in that, after being advised of the consequences of bringing drugs into the jail, the Appellant consciously chose to ignore the officers' warnings, choosing instead to enter the jail in possession of cocaine. Under these circumstances, the Appellant was the author of his own fate.

### III. Sufficiency of the Evidence

The Appellant argues that the evidence is insufficient to support his conviction for possession of a controlled substance while present in a penal institution.

Due process requires that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof, which is defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 2787 (1979). A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal, a convicted defendant has the burden of demonstrating that the evidence is insufficient. *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982).

In our review of the issue of sufficiency of the evidence, the relevant question is “whether, after viewing the evidence in the light most favorable to the [State], any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson*, 443 U.S. at 319, 99 S. Ct. at 2789 (emphasis in original); see also Tenn. R. App. P. 13(e). Moreover, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this court does not re-weigh or re-evaluate the evidence. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002). Nor may this court substitute its inferences drawn from circumstantial evidence for those drawn by the trier of fact. *Id.* (citing *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000); *Liakas v. State*, 199 Tenn. 298, 286 S.W.2d 856, 859 (1956)).

The statute defining the offense for which the Appellant was convicted provides: “It is unlawful for any person to . . . [k]nowingly possess any of the materials prohibited in subdivision (a)(1) [controlled substances] while present in any penal institution where prisoners are quartered or under custodial supervision without the express written consent of the chief administrator of the institution.” T.C.A. § 39-16-201(a)(2) (2005). A violation of this section is a Class C felony. *Id.* § 39-16-201(b).

First, the Appellant contends that the statutory provision under which he was convicted required him to have possessed a controlled substance “within an area where prisoners are quartered.” The Appellant’s position appears to be based upon a misreading of the applicable statute. We agree with the argument advanced by the State that the relevant statute, in its plain language, prohibits a person from possessing controlled substances “in any penal institution where prisoners are quartered or under custodial supervision,” not from possessing controlled substances in a specific area of the penal institution. See T.C.A. § 39-16-201(a)(2) (2005). In *State v. Kilpatrick*, this court observed:

While the term penal institution is not defined in Tenn. Code Ann. § 39-16-201, it is defined for obstruction of justice purposes as “any institution or facility used to house or detain a person . . . convicted of a crime[,] or adjudicated delinquent by a juvenile court[,] or who is in direct or indirect custody after a lawful arrest.” Tenn. Code Ann. § 39-16-601(4). . . . [T]he county jail in which the defendant was detained falls, in our view, within the definition of penal institution contained in Tenn. Code Ann. § 39-16-601(4) and constitutes a “penal institution where prisoners are quartered or under custodial supervision” within the meaning of Tenn. Code Ann. § 39-16-201.

52 S.W.3d 81, 86 (Tenn. Crim. App. 2000). Contrary to the Appellant’s argument on this issue, the evidence clearly established that the Appellant was being detained at the Williamson County Jail, a penal institution, when police officers discovered the concealed contraband.

Second, the Appellant contends that the evidence was insufficient to sustain his conviction because the State offered no proof that his possession of cocaine was without the “express written consent of the [c]hief [a]dministrator of the [penal] institution,]” as alleged in the indictment. In response, the State cites several decisions by this court in which we have affirmed a conviction for this offense despite the State’s failure to offer positive evidence that the penal institution’s chief administrator did not expressly consent to a defendant’s possession of contraband. In each of those cases, panels of this court concluded that circumstantial evidence surrounding the defendants’ conduct supported a jury’s finding a lack of consent for the defendants’ possession of contraband, despite a lack of testimony from a chief administrator. *See State v. Jeffrey W. Osborne*, No. 01C01-9807-CC-00292 (Tenn. Crim. App. at Nashville, Oct. 22, 1999); *State v. Jimmy Bowen*, No. 03C01-9612-CR-00460 (Tenn. Crim. App. at Knoxville, Dec. 23, 1997); and *State v. Jimmy Cullopp, Jr.*, No. 03C01-9607-CR-00281 (Tenn. Crim. App. at Knoxville, March 18, 1997). In the present case, the testimony established that the Appellant was heard on an audio recording stating to his confederate that he needed “to get comfortable so [he] can shove this shit up my ass.” The Appellant was later asked to “squat and cough” while showering, and a small bag containing cocaine was observed falling from his rectum. These circumstances clearly supported a finding that the Appellant attempted to conceal the contraband from the police, thus permitting a rational juror to conclude that such possession was without the express consent of the chief administrator of the penal institution.

We conclude that the evidence, when viewed in a light most favorable to the State, was more than sufficient to convince a rational juror beyond a reasonable doubt that the Appellant was guilty of the knowing possession of a controlled substance while present in a penal institution, as dictated by the plain language of the statute. Officers Gifford and Terns both testified that the Appellant was informed, prior to his entry in the Williamson County Jail, of the felonious consequences of entering the penal institution while in possession of a controlled substance, that they provided him an opportunity to relinquish any such contraband, and that he chose not to do so. The testimony further adduced at trial established that Officer Ferguson retrieved a small bag containing 1.2 grams of cocaine, which dropped from the anus of the Appellant while he was present in the booking area of

the Williamson County Jail. For these reasons, we conclude that the evidence was legally sufficient to convict the Appellant of possession of a controlled substance in a penal institution.

### **CONCLUSION**

Based upon the foregoing, the Appellant's convictions for possession of a controlled substance in a penal institution and possession of drug paraphernalia are affirmed.

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DAVID G. HAYES, SENIOR JUDGE