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FILED
Aug 12 2009, 9:33 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEYS FOR APPELLANT:

GREGORY F. ZOELLER
Attorney General of Indiana

SCOTT L. BARNHART
Deputy Attorney General
Indianapolis, Indiana

ATTORNEYS FOR APPELLEES:

Clay Crick
WILLIAM G. SMOCK
MICHAEL A. SLAGLE
Smock & Etling
Terre Haute, Indiana

Jeffrey K. Watts
BRYAN L. COOK
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

STATE OF INDIANA,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 84A05-0901-CR-24
	)	
CLAY CRICK and JEFFREY K. WATTS,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable Michael J. Lewis, Judge
Cause No. 84D06-0710-FC-3326
Cause No. 84D06-0710-FC-3327

August 12, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

The State appeals the trial court's grant of Clay Crick's and Jeffrey K. Watts' motions to suppress.[1] We affirm.

Issue

The State argues that the search of a pickup truck did not violate the defendants' rights under either the Fourth Amendment of the federal Constitution or Article 1, Section 11 of the Indiana Constitution. We address only the latter issue, as it is dispositive.

Facts and Procedural History

The U.S. Drug Enforcement Administration ("DEA") requested the Indiana State Police to assist in investigating a gray Nissan Titan pickup truck allegedly containing 100 to 150 pounds of marijuana. At 6:13 p.m. on October 18, 2007, Indiana State Police Trooper Timothy Denny ("Trooper Denny") was informed that a gray Nissan pickup truck was driving left of center and going nine miles per hour over the speed limit on Interstate I-70. Trooper Denny caught up to the pickup truck and activated his truck's emergency lights "to investigate as to whether or not the driver had possibly been drinking or might be fatigued." Exhibit A. The driver immediately pulled over.

As the trooper did not smell alcohol or see any alcohol containers, he asked the driver, Jeffrey K. Watts ("Watts"), whether he was fatigued. Watts responded that he was tired and had been driving for about five hours. Watts and the passenger, Clay Crick ("Crick"), appeared nervous. Their faces were flushed; they were fidgeting in their seats, and Watts'

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[1] Pursuant to the State's motion, this Court consolidated the appeals.

voice cracked when he spoke. Upon questioning, the men indicated that they were driving from Denver, Colorado which, according to the training and experience of Trooper Denny, was a secondary hub for narcotics trafficking. It appeared to Trooper Denny that Crick was attempting to answer the questions for Watts. Trooper Denny told them that he was going to issue a warning ticket; he then returned to his vehicle. This initial encounter with the defendants lasted thirty-five seconds.

While Trooper Denny was in his truck writing the warning, he asked Trooper Dennis Wade ("Trooper Wade") to assist. Trooper Wade and his canine arrived six minutes after the pickup truck was stopped.

After writing the ticket, Trooper Denny motioned for Watts to stand behind the truck. As the trooper was explaining the ticket, Watts was perspiring and would not make eye contact. Trooper Denny gave Watts his driver's license and the warning ticket; he then advised Watts that he was free to leave.

As Watts was walking away, the trooper asked if he could talk further with Watts; Watts agreed. Upon being questioned, Watts said that they had gone to Denver to retrieve the truck from Crick's girlfriend. Trooper Denny then asked Watts a series of at least five questions, including the following:

> Whether there were weapons in the truck; Watts looked him in the eye and said, "no."
>
> Whether there were drugs in the truck; Watts looked down, shifted his feet, and said, "no."
>
> Whether there was marijuana in the truck; Watts looked down and said, "no."

> Whether there was cocaine, methamphetamine, or heroin in the truck; Watts looked him in the eye and said, "no."
>
> Whether there were large sums of money in the truck; Watts looked away and said, "no."

Trooper Denny then asked for permission to search the pickup truck. Watts became very nervous and said that it was not his truck. After the trooper asserted that Watts, as the driver, could give consent to the search, Watts repeated that it was not his truck and that it belonged to Crick. Trooper Denny then approached Crick who was extremely nervous, fidgeting, and would not make eye contact. Crick's voice was cracking.

While Crick and Watts were separated, Trooper Denny asked them additional questions about their travels. Although Crick and Watts each stated that they had flown to Denver, neither was immediately able to name the airline. Watts stated that Crick had purchased the tickets; Crick identified American Trans Air. One stated that they arrived in Denver on Saturday; the other said Monday.

Trooper Denny then asked Crick about drugs. Crick became extremely nervous and gave evasive answers. Crick denied consent to search the vehicle and indicated that they were in a hurry. Standing on the side of the interstate highway, Trooper Denny told Crick that he had a right to refuse a search of the vehicle and that the men were free to leave, but that the pickup truck was being detained until a canine unit was available to walk around the vehicle. The trooper added that they would be free to leave in the truck, if the canine gave no alert.

Trooper Wade deployed his canine, which alerted at the truck's tailgate. Six to eight

minutes after Trooper Denny gave Watts the warning ticket, he informed Crick and Watts that they were not free to go. The troopers searched the truck and found more than ten pounds of vacuum-packed marijuana, more than $2100, a drug ledger, a cash counter, and three vacuum-sealing machines.

The State charged both men with Dealing in Marijuana, Possession of Marijuana, and Possession of Paraphernalia. Each moved to suppress the seized evidence, arguing that the canine sniff of the truck was not a constitutional search.

During an evidentiary hearing on the motions to suppress, the State presented the testimony of Trooper Denny, Trooper Wade, and Detective Todd McComas ("Det. McComas"); also, it called DEA Agent Gerald Dooley ("Agent Dooley"). Trooper Denny testified that Trooper Wade had informed him that the DEA was investigating the gray Nissan pickup truck. Trooper Denny's understanding was that it allegedly contained 100 to 150 pounds of marijuana. Neither defendant objected to this testimony. On cross-examination, Trooper Denny acknowledged that neither his probable cause affidavit nor his police report referenced the fact that the DEA had provided information pertinent to the investigation. Apparently on the basis of a discovery violation, the trial court later excluded the testimony of the DEA agent.[2] The State made an offer of proof regarding his planned testimony.

Near the conclusion of the hearing, Watts objected when the State asked Det. McComas about DEA Agent Dooley. The trial court "sustain[ed] that objection with regard

[2] The trial court's discovery sanction is not challenged on appeal.

to what Dooley says." Transcript at 148. In its further questioning of Det. McComas, the State remarked, "I don't want you to get into, the Court's already ruled as far as the, we can't get into the DEA and their investigation." Id. at 152.

In two one-sentence orders, the trial court granted both motions to suppress. The State now appeals.

Discussion and Decision

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated . . . ." IND. CONST. art. 1, § 11. "The provision must receive a liberal construction in its application to guarantee the people against unreasonable search and seizure." State v. Quirk, 842 N.E.2d 334, 340 (Ind. 2006) (citing Brown v. State, 653 N.E.2d 77, 79 (Ind. 1995)). The State has the burden of proving that its intrusion was reasonable under the totality of the circumstances. Quirk, 842 N.E.2d at 340.

Our review of a trial court's ruling on a motion to suppress is similar to that used for other sufficiency issues. Id. We consider the evidence most favorable to the ruling, as well as substantial uncontradicted evidence to the contrary. Holder v. State, 847 N.E.2d 930, 935 (Ind. 2006). The record must disclose substantial evidence of probative value that supports the trial court's decision. Quirk, 842 N.E.2d at 340. We do not reweigh the evidence. State v. Washington, 898 N.E.2d 1200, 1203 (Ind. 2008), reh'g denied. As the State appeals from a negative judgment, it must show that the trial court's rulings on the motions to suppress were contrary to law. Id.

As an initial matter, we note that, while the trial court explicitly excluded the testimony of DEA Agent Dooley, it made no mention of Trooper Denny's testimony regarding what was communicated to him about the DEA investigation. Nonetheless, the trial court later excluded evidence as to "what Dooley says." Tr. at 148. Thus, while the record arguably contains minimal evidence regarding what the DEA told the State Police, the trial court's evidentiary rulings evidence its intent to exclude the content of the DEA's assertions. Indeed, the State itself acknowledged that "we can't get into the DEA and their investigation." Id. at 152. Therefore, to the degree that any evidence about the DEA investigation was admitted, we conclude that the trial court accorded it little, if any, consideration.

Trooper Denny knew that the gray pickup truck was driving left of center and that it was going nine miles per hour over the speed limit. Indeed, he testified that he stopped the truck to investigate whether the driver was fatigued or possibly had been drinking alcohol. During his brief, initial conversation with Crick and Watts, Trooper Denny observed no contraband or evidence of the driver's intoxication. As the trooper testified on cross-examination,

> Q: Did you talk to anybody while you were writing that warning ticket?
>
> A: I believe I talked to Trooper Wade on the radio and asked him if he would come to my location.
>
> Q: Now, do you normally, with somebody committing the offense of nine miles [per hour] over the speed limit, call in another officer to help you with the arrest?
>
> A: Normally, no.

Tr. at 41-42.

Trooper Denny summoned Watts, gave him his license and the warning ticket, and told him that he was free to leave. Thus, the trooper's investigation of the traffic infractions was concluded. As Watts was walking away, Trooper Denny asked to speak further with Watts. He did so based upon the nervous actions of the two men and his understanding that Denver was a secondary hub for narcotics trafficking. Watts agreed to talk. While Trooper Denny spoke individually with Watts and Crick, each continued to appear nervous, especially with respect to questions regarding drugs, marijuana, and cash. Also, the men responded ambivalently to questions regarding their airline; their accounts differed as to when they had arrived in Denver. On this basis, Trooper Denny informed the men that they were free to leave, but that he was keeping the pickup truck for a canine search. Trooper Denny testified,

> Q: [P]edestrians are pretty much prohibited from being out on Interstate 70, right?
>
> A: Yes sir.
>
> Q: You don't want people out there jogging, exercising, getting their daily walk out on the interstates, right?
>
> A: No, it's posted, it's a violation, it's a violation of state law, yes sir.
>
> Q: [S]o you basically gave these guys a choice, they could either wait there until [the] canine was done or they could violate state law by walking on the interstate, right?
>
> A: Or hop the fence and walk on private property.
>
> Q: Okay, so they could trespass on someone else's property?
>
> A: Well . . .

Q: Right?

A: Yes sir, then they would be.

Id. at 70.

In 2006, our supreme court considered a similar case in State v. Quirk, which also happened to involve Trooper Denny. Quirk was driving a semi tractor-trailer carrying lettuce from Arizona to West Virginia, when he was stopped for a traffic infraction. The investigating state trooper learned from his driving record that Quirk was known under three different aliases. The trooper therefore requested a State Police Post to check Quirk's criminal history. Still completing the paperwork for the warning ticket, the trooper gave his cell phone to Trooper Denny. Apparently while Trooper Denny was receiving the requested information, the other trooper gave the ticket to Quirk and advised that he was free to leave.

As Quirk was returning to his truck, Trooper Denny informed the other trooper that, between 1970 and 1988, Quirk had "four to six entries for possibly trafficking in narcotics." Quirk, 842 N.E.2d at 338. The trooper told Quirk that he wanted to ask him a few more questions. Quirk complied and ultimately allowed the troopers to search the trailer, but not the cab. They allowed Quirk to leave, but followed him to a rest stop and requested the assistance of a canine team. As Quirk exited the rest stop building, the troopers told him that he was free to leave, but that the truck would have to remain for a canine search. The canine search revealed cocaine in the cab.

Our supreme court affirmed the trial court's grant of Quirk's motion to suppress. Id.

at 343. The Quirk court initially noted that, in investigating a traffic infraction, an officer may "detain a motorist briefly only as necessary to complete the officer's work related to the illegality for which the motorist was stopped," including a request to search the vehicle and an inquiry whether the driver had a weapon. Id. at 340. The trooper testified that he detained Quirk beyond investigation of the traffic infraction based upon: (1) Quirk's nervous behavior; (2) a handwritten bill of lading; (3) his past use of aliases; (4) his criminal record which included possible drug trafficking; (5) his lying about his criminal record; and (6) the fact that he was traveling from Arizona with a California driver's license, states the officer believed to be sources for narcotics. In support, the trooper testified that "any state bordering Mexico" was a source state for drugs.

After considering cases suggesting that almost all border states from Washington to Florida were sources of illicit drugs, the Quirk court concluded that "the 'source state' designation is a non-factor to support reasonable suspicion of criminal activity." Id. at 343. It then held that the duration of Quirk's detention and subsequent search of his vehicle were unreasonable under Article 1, Section 11 of Indiana's Constitution.

Here, Trooper Denny asked to speak further with the defendants based only upon their nervous conduct and the fact that they were traveling from Denver. As compared with Quirk, there were even fewer facts offered to support the troopers' suspicion. There was no evidence that the defendants had criminal records, that they had aliases, or that they were lying about anything. Upon additional questioning, the men continued to appear nervous and gave conflicting accounts of when they flew to Denver. Trooper Denny detained the

defendants for more than fourteen minutes, including six to eight minutes after issuing the warning. The State effectively asks this Court to reweigh the evidence, which we do not do. There was substantial evidence of probative value to support the trial court's grant of the defendants' motions to suppress.

In considering the evidence most favorable to the trial court's grant of Crick's and Watts' motions to suppress, we conclude that the State failed to show that its intrusion was reasonable under the totality of the circumstances.

Affirmed.

DARDEN, J., and ROBB, J., concur.