REL: 05/02/2014

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2013-2014

CR-12-2019

State of Alabama

v.

Teddy Lee Knox

Appeal from DeKalb Circuit Court
(CC-12-353)

PER CURIAM.

The State of Alabama appeals the circuit court's decision to suppress evidence of marijuana discovered during a search of Teddy Lee Knox's vehicle after Knox was stopped for a traffic violation. For the reasons that follow, this Court

reverses the circuit court's order and remands this cause for further proceedings.

On August 9, 2011, Officer Matt Wilson of the Fort Payne Police Department was patrolling Interstate 59 when he encountered a vehicle being driven by Knox. Knox was driving his vehicle at what Officer Wilson considered to be an unusually slow speed. As Officer Wilson was passing Knox's vehicle, he made eye contact with Knox. Knox appeared startled and maneuvered his vehicle into the emergency lane, where he stopped. Officer Wilson briefly continued down the interstate before stopping his patrol vehicle to wait on Knox to resume driving. After a few minutes, Knox's vehicle passed Officer Wilson's. Officer Wilson followed Knox until Knox crossed into another lane of traffic without signaling. Officer Wilson then initiated a traffic stop.

Officer Wilson approached the passenger side of Knox's vehicle. Officer Wilson did not see any contraband in the vehicle, but he did notice that there was a single key in the ignition -- Officer Wilson felt that a single key was suspicious because it suggested that the vehicle was not connected to Knox. Officer Wilson asked Knox for his driver's

license and proof of insurance, and Knox gave Officer Wilson several documents, one of which indicated that Knox was driving a rental vehicle that had not been rented in his name. Officer Wilson described Knox as being very nervous -- Knox's voice and hands were shaking. Knox was allowed out of the vehicle to retrieve his license, which had been issued in Texas, from the trunk of the vehicle. As Officer Wilson drafted a warning citation, he questioned Knox about his travel plans and the female passenger in his vehicle.

Knox told Officer Wilson that he was from Houston, Texas, which Officer Wilson found to be suspicious because, according to Officer Wilson, "most narcotics traffickers come from around the border or the southwestern states." (Supp. R. 7.) Officer Wilson also found it suspicious that Knox was traveling northbound on Interstate 59 because Officer Wilson considered that to be a known route of narcotics traffic to the east coast.

Knox told Officer Wilson that he and his female passenger were headed to Chattanooga, Tennessee, to attend a funeral. Officer Wilson gave his condolences and asked who had passed away. Knox initially told Officer Wilson that it was a family

member, but, when pressed for a name, Knox stated instead that he did not know the deceased's name and that it was actually a close friend who had passed away.

When asked about his female passenger, Knox explained that he was taking her to Chattanooga to visit with her father, who was suffering from cancer. Officer Wilson then spoke with Knox's female passenger, who stated that she was traveling to Chattanooga to see her father, who was suffering from Alzheimer's disease.

At this point, Officer Wilson believed that Knox was engaged in criminal activity. Lieutenant Randy Garrison had arrived on the scene, and Agent Tony Blackwell of the Drug Task Force, who had been summoned by Officer Wilson, was en route. Officer Wilson continued to probe Knox regarding his travel plans. Officer Wilson issued Knox his citation and then asked Knox if they could continue to speak in a consensual conversation. Knox consented to prolonging the conversation. Officer Wilson asked Knox if he possessed anything illegal or large sums of currency, which Knox denied. Officer Wilson then asked for consent to search Knox's vehicle, but Knox refused to give his consent. Upon hearing

Knox decline to give his consent, Agent Blackwell, who had recently arrived, allowed his canine to circle Knox's vehicle.

During the search, the canine indicated that it detected the presence of narcotics. In the trunk of the vehicle, the officers recovered a large package in Christmas wrapping paper. Knox stated that the package was a gift and that it contained toys. Knox would not state to whom the package was to be given, nor would he state with specificity what kind of toys were in the package. Officer Wilson placed the package on the ground along with various other bags and allowed the canine to smell the items. The canine indicated that it detected the presence of narcotics in the package. Upon opening the package, Officer Wilson smelled a strong odor of marijuana and saw a green, leafy substance wrapped in cellophane.

On appeal, the State argues, in part, that the circuit court abused its discretion by granting Knox's motion to suppress because Knox was not being detained at the time of the canine search.[1] This Court agrees.

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[1]Although the State did not raise this specific argument below, "we review the circuit court's application of the law to the facts in this case de novo." State v. Pollard, [Ms.

Initially, this Court notes:

> "'"When evidence is presented ore tenus to the trial court, the court's findings of fact based on that evidence are presumed to be correct," Ex parte Perkins, 646 So. 2d 46, 47 (Ala. 1994); "[w]e indulge a presumption that the trial court properly ruled on the weight and probative force of the evidence," Bradley v. State, 494 So. 2d 750, 761 (Ala. Crim. App. 1985), aff'd, 494 So. 2d 772 (Ala. 1986); and we make "'all the reasonable inferences and credibility choices supportive of the decision of the trial court.'" Kennedy v. State, 640 So. 2d 22, 26 (Ala. Crim. App. 1993), quoting Bradley, 494 So. 2d at 761. "[A]ny conflicts in the testimony or credibility of witnesses during a suppression hearing is a matter for resolution by the trial court .... Absent a gross abuse of discretion, a trial court's resolution of [such] conflict[s] should not be reversed on appeal." Sheely v. State, 629 So. 2d 23, 29 (Ala. Crim. App. 1993) (citations omitted). However, "'[w]here the evidence before the trial court was undisputed the ore tenus rule is inapplicable, and the [appellate] Court will sit in judgment on the evidence de novo, indulging no presumption in favor of the trial court's application of the law to those facts.'" State v. Hill, 690 So. 2d 1201, 1203 (Ala. 1996), quoting Stiles v. Brown, 380 So. 2d 792, 794 (Ala. 1980). "'"[W]hen the trial court improperly applies the law to the facts, no presumption of correctness exists as to the court's judgment."'" Ex parte Jackson, 886 So. 2d 155, 159 (Ala. 2004), quoting Hill, 690 So. 2d at 1203, quoting in turn Ex parte Agee, 669 So. 2d 102, 104 (Ala. 1995). A trial court's ultimate legal conclusion on a motion to suppress

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CR-10-1560, Aug. 30, 2013] ___ So. 3d ___, ___ n.3 (Ala. Crim. App. 2013). Because this argument is based on facts "squarely presented to the circuit court, the argument is properly before this Court for review." Id.

> based on a given set of facts is a question of law that is reviewed de novo on appeal. See State v. Smith, 785 So. 2d 1169 (Ala. Crim. App. 2000).'"

C.B.D. v. State, 90 So. 3d 227, 237 (Ala. Crim. App. 2011) (quoting State v. Hargett, 935 So. 2d 1200, 1203–04 (Ala. Crim. App. 2005)). "'"'"A judge abuses his discretion only when his decision is based on an erroneous conclusion of law or where the record contains no evidence on which he rationally could have based his decision."'"'" Byrd v. State, 78 So. 3d 445, 450-51 (Ala. Crim. App. 2009) (quoting Hodges v. State, 926 So. 2d 1060, 1072 (Ala. Crim. App. 2005), quoting in turn State v. Jude, 686 So. 2d 528, 530 (Ala. Crim. App. 1996), quoting in turn Dowdy v. Gilbert Eng'g Co., 372 So. 2d 11, 12 (Ala. 1979), quoting in turn Premium Serv. Corp. v. Sperry & Hutchinson, Co., 511 F.2d 225 (9th Cir. 1975)).

In its order granting Knox's motion to suppress, the circuit court enumerated nine facts on which Officer Wilson based his reasonable suspicion that Knox was engaged in criminal activity involving drugs:

> "1) Knox was from Houston, Texas, and Officer Wilson had been trained that most narcotics traffickers come from around the border of the southwestern states; 2) that I-59 northbound is known as a route for narcotic traffic to the east coast; 3) that Knox was driving a rental car rented in the name of

> another; 4) that the car had a single key in the ignition; 5) that Knox was very nervous; 6) that Knox said he was going to the funeral of a relative, then stated it was the funeral of a friend; 7) that Knox could not provide the name of the deceased; 8) that Knox said he was taking his female passenger to visit her father who had cancer, and the passenger said he was taking her to visit her father who had Alzheimer's disease, and 9) that Knox refused consent for the car to be searched."

(C. 11-12.) The circuit court then found that "neither the individual factors relied upon by Officer Wilson nor the totality of those factors provided the officer sufficient reasonable suspicion to detain Knox beyond the point in time when the officer gave Knox the warning citation and told him he was free to go." (C. 14-15.)

Here, the circuit court analyzed the traffic stop under the standard set forth by the Supreme Court of the United States in Terry v. Ohio, 392 U.S. 1 (1968). The reliance by the circuit court on Terry was misplaced, however, because Knox consented to prolonging his conversation with Officer Wilson, effectively removing the encounter from Fourth Amendment scrutiny. See Florida v. Bostick, 501 U.S. 429, 434 (1991). Under Bostick, the central question is "whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests

or otherwise terminate the encounter." Bostick, 501 U.S. at 439. "'The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness -- what would the typical reasonable person have understood by the exchange between the officer and the suspect?'" Miller v. State, 602 So. 2d 488, 491 (Ala. Crim. App. 1992 (quoting Florida v. Jimeno, 500 U.S. 248, 251 (1991)). "'[T]he question whether a consent ... was in fact "voluntary" or was a product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.'" Miller, 602 So. 2d at 491 (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973)). "'Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred.'" Bostick, 501 U.S. at 434 (quoting Terry, 392 U.S. at 19, n.16).

As noted by the circuit court, Knox was given his citation and then told by Officer Wilson that he was "free to go." (C. 15.) Officer Wilson's release of Knox was in accord with § 32-1-4(a), Ala. Code 1975. See State v. Washington,

623 SO. 2d 392, 395 (Ala. Crim. App. 1993) ("Once the traffic offender signs the UTTC, the arresting officer is to 'forthwith release him from custody.' § 32-1-4(a)."). After releasing Knox, Officer Wilson asked Knox if they could speak in "just a consensual conversation," to which Knox acquiesced. (Supp. R. 10.)

Officer Wilson's conduct -- handing Knox a citation and telling Knox that he was "free to go" -- "would have communicated to a reasonable person that the person was ... free to decline [Officer Wilson's] requests or otherwise terminate the encounter."[2] Bostick, 501 U.S. at 439. There was no testimony indicating that the officers had blocked Knox's vehicle or otherwise attempted to physically restrain Knox. Nor was there testimony that the officers had brandished their weapons or had subjected Knox to any threats of force or intimidation. See United States v. Lopez, 911 F.2d 1006, 1010 (5th Cir. 1990) (list of specific factors to be considered in the totality of circumstances). Additionally, although Knox's subjective thoughts are not

[2]The circuit court assumed for the purpose of its order, but did not explicitly find, that Knox's decision to remain after being told he was "free to go" was consensual. (C. 8.)

dispositive of the issue, this Court finds significant the fact that Knox declined consent to search his vehicle. Knox's declining consent indicates that he was aware that he could say "no" to the officers. Under the totality of the circumstances, this Court holds that Knox's consent was voluntary. See United States v. Meikle, 407 F.3d 670, 672-74 (4th Cir. 2005).

Knox's voluntary acquiescence to Officer Wilson's request transformed the encounter into a consensual one, and it was during this consensual encounter when Agent Blackwell allowed his canine to circle Knox's vehicle. Because the encounter was consensual, Knox was not being detained at the time of the canine search. Additionally, reasonable suspicion was unnecessary to perform the canine search. See Illinois v. Caballes, 543 U.S. 405, 409 (2005); Seeley v. State, 669 So. 2d 209, 212 (Ala. Crim. App. 1995). Once the canine indicated on Knox's vehicle, the officers had probable cause to search Knox's vehicle. West v. State, 53 So. 3d 990, 994 (Ala. Crim. App. 2010) (holding that law enforcement had probable cause to search the vehicle based on the canine's indication that narcotics were present in the vehicle (citing State v.

Montgomery, 968 So. 2d 543, 552 (Ala. Crim. App. 2006))); State v. Black, 987 So. 2d 1177, 1180 (Ala. Crim. App. 2006) (recognizing the "automobile exception" to the warrant requirement, which allows law enforcement to search an automobile based on probable cause alone because of the mobility of an automobile (citing Maryland v. Dyson, 527 U.S. 465, 466-67 (1999))). Accordingly, the circuit court erred in finding that the search of Knox's vehicle was illegal and in granting Knox's motion to suppress.

Based on the foregoing, the circuit court's order is reversed, and this cause is remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Kellum and Burke, JJ., concur. Joiner, J., concurs specially, with opinion. Windom, P.J., dissents, with opinion. Welch, J., dissents.

JOINER, Judge, concurring specially.

I concur with this Court's decision to reverse the circuit court's order granting Teddy Lee Knox's motion to suppress. I write specially, however, to address this Court's citation of State v. Pollard, [Ms. CR-10-1560, Aug. 30, 2013] ___ So. 3d ___, ___ n.3 (Ala. Crim. App. 2013), as a basis for addressing the State's argument on appeal.

Here, Knox moved to suppress evidence obtained by law enforcement after a traffic stop had been completed and a canine search of the vehicle Knox was driving had been conducted. The State, at the hearing on Knox's motion to suppress, presented the testimony of three witnesses, which was undisputed. The circuit court, in its written order granting Knox's motion to suppress, framed the issue to be addressed at the suppression hearing as follows:

> "[Knox] maintains that the officer had no reasonable suspicion to detain him after the warning citation was issued and no right to instigate the canine sniff of his vehicle."

(C. 10.) In other words, the circuit court believed that the dispositive issue on the motion to suppress was whether Knox was properly detained after he had been issued a "warning citation." The circuit court, applying the standards set

forth in Terry v. Ohio, 392 U.S. 1 (1968), concluded that Officer Wilson failed to articulate reasonable suspicion "to detain Knox beyond the point in time when the officer gave Knox the warning citation and told him he was free to go." (C. 14-15.)

The State, in its brief on appeal, contends that "Knox was not being detained at the time of the canine search." ___ So. 3d at ___. This Court correctly recognizes that the State's argument on appeal was not specifically raised in the circuit court and also correctly recognizes that the State's failure to raise this specific argument in the circuit court does not preclude our review of the State's argument on appeal. ___ So. 3d at ___ n.1. This Court addressed this precise issue in State v. Pollard.

In Pollard, this Court held that, although the State's argument on appeal was not first raised in the circuit court, we review the grant of a motion to suppress--which is based on undisputed evidence--under a de novo standard of review and that the State's argument did not raise a "new question of law" but, instead, merely asserted a "new argument" as a basis for reversing the circuit court's decision. ___ So. 3d at ___

n.3. This Court in Pollard, in deciding whether the State's argument on appeal was properly before this Court, did not address an issue of first impression; instead, this Court based its decision on the Alabama Supreme Court's holding in Ex parte Jenkins, 26 So. 3d 464 (Ala. 2009).

In Ex parte Jenkins, as in this case and in Pollard, the Alabama Supreme Court addressed a circuit court's grant of a motion to suppress and the State argued in the Supreme Court an argument that was not first raised in the lower court. 26 So. 3d at 473 n.7. In his dissent, Justice Woodall "criticize[d]" the decision to address the State's argument based on the principle asserted "in Avis Rent A Car Systems, Inc. v. Heilman, 876 So. 2d 1111, 1124 n.8 (Ala. 2003), that '"[a]n argument not made on appeal is abandoned or waived."' 26 So. 3d at 485." Id. The Alabama Supreme Court, however, noted:

> "Properly viewed ... the rule upon which the dissent attempts to rely is one that generally prevents an appellant from raising on appeal a question or theory that has not been preserved for appellate review, not the provision to a higher court of an additional specific reason or authority for a theory or position asserted by the party in the lower court. The fundamental rule in this regard, as stated in Corpus Juris Secundum, is that a 'higher court normally will not consider a

question which the intermediate court could not consider.' 5 C.J.S. Appeal and Error § 977 (2007). However, '[a]lthough on appeal from an intermediate court the higher court may be limited to the questions of law raised or argued at the trial, it is not limited to the arguments there presented.' 5 C.J.S. Appeal and Error § 978 (2007) (emphasis added). In other words, '[n]ew arguments or authorities may be presented on appeal, although no new questions can be raised.' 4 C.J.S. Appeal and Error § 297 (emphasis added).

"In Kerbs v. California Eastern Airways, Inc., 33 Del. Ch. 69, 80, 90 A.2d 652, 659 (1952), for example, the court put it this way:

> "'It should be noted that the plaintiffs did not call Section 9 of the General Corporation Law to the [trial court's] attention, but argued solely that the presence of interested directors could not be ignored in determining whether the plan received a majority favorable vote at the Board's meeting. While the plaintiffs did not urge this precise reason for the illegality of the directors' act upon the Chancellor, they did, however, argue its illegality. We will not permit a litigant to raise in this court for the first time matters not argued below where to do so would be to raise an entirely new theory of his case, but when the argument is merely an additional reason in support of a proposition urged below, there is no acceptable reason why in the interest of a speedy end to litigation the argument should not be considered. We think the point falls within the class of additional reasons supporting the plaintiffs' theory.'

"(Emphasis added.) See also Board of Comm'rs of Orleans Levee Dist. v. Shushan, 197 La. 598, 611, 2

So. 2d 35, 39-40 (1941) ('The rule [that an appellate court will not consider, for the first time, matters not raised in the court of original jurisdiction] has reference only to controversies arising under the pleadings or the evidence and not to contentions urged in the argument of counsel. The Supreme Court decides a case on the issues presented by the pleadings or the evidence, and not on the argument of counsel in the court below, or even on the reasons assigned by the trial judge.').

"In the earlier case of Persky v. Bank of America National Ass'n, 261 N.Y. 212, 185 N.E. 77 (1933), the Court began by noting that

> "'"it is well settled that this court will not, for the purpose of reversing a judgment, entertain questions not raised or argued at the trial, or upon the intermediate appeal."'

"261 N.Y. at 217, 185 N.E. at 79 (quoting Martin v. Home Bank, 160 N.Y. 190, 199, 54 N.E. 717 (1899) (emphasis added)). The court thereafter explained that this rule was not applicable in the case before it:

> "'In our review we are confined to the questions raised or argued at the trial but not to the arguments there presented. "Nor is it material whether the case was well presented to the court below, in the arguments addressed to it. It was the duty of the judges to ascertain and declare the whole law upon the undisputed facts spread before them; and it is our duty now to give such judgment as they ought to have given." (Oneida Bank v. Ontario Bank, 21 N.Y. 490, 504 [(1860)].)'

"261 N.Y. at 218, 185 N.E. at 79 (all but first emphasis added).

"The foregoing principles have been recognized in Alabama cases. Although not dealing with the precise appellate review issue presented here, the case of Blue Cross & Blue Shield of Alabama v. Hodurski, 899 So. 2d 949, 960 (Ala. 2004), addressed the possibility of a litigant 'miscalculat[ing] the applicability of the appropriate rule of law.' The Court cited Williams-Guice v. Board of Education of Chicago, 45 F.3d 161, 164 (7th Cir. 1995), for the proposition that

> "'"litigants' failure to address the legal question from the right perspective does not render [the appellate court] powerless to work the problem out properly. A court of appeals may and often should do so unbidden rather than apply an incorrect rule of law to the parties" circumstances.'

"Also in Hodurski, this Court quoted with approval from another federal decision:

> "'"'Appellate review does not consist of supine submission to erroneous legal concepts even though none of the parties declaimed the applicable law below. Our duty is to enunciate the law on the record facts. Neither the parties nor the trial judge, by agreement or passivity, can force us to abdicate our appellate responsibility.'"'

"Hodurski, 899 So. 2d at 960 (quoting Forshey v. Principi, 284 F.3d 1335, 1357 n.20 (Fed. Cir.), cert. denied, 537 U.S. 823, 123 S. Ct. 110, 154 L. Ed. 2d 33 (2002), quoting in turn Empire Life Ins. Co. of America v. Valdak Corp., 468 F.2d 330, 334 (5th Cir. 1972)).

"In Home Indemnity Co. v. Reed Equipment Co., 381 So. 2d 45, 50 (Ala. 1980), the Court explained

> that '[t]he rule requiring adherence to the theory relied on below ... does not mean the parties are limited in the appellate court to the same reasons or arguments advanced in the lower court upon the matter or question in issue. 5 Am. Jur. 2d, Appeal and Error, § 546 at 32.' (Emphasis added), relied upon in Associated Gen. Contractors Workers Compensation Self Ins. Fund v. Williams, 982 So. 2d 557 (Ala. Civ. App. 2007). See also Alabama Medicaid Agency v. Beverly Enters., 521 So. 2d 1329, 1333 (Ala. Civ. App. 1987) (apparently stating the general rule discussed above, albeit using different terminology, namely 'that an appellant may present new theories in support of its position for the first time on appeal' (emphasis added)).
>
> "In the present case, the question whether the language of the warrant describing the object of the search was specific enough to satisfy the 'thing-to-be-seized' requirement within the so-called 'particularity clause' of the Fourth Amendment to the United States Constitution has existed throughout. In response to a motion to suppress, the trial court decided this issue against the State and in favor of Jenkins. The trial court's order analyzed the issue in-depth and concluded that the language of the warrant did not satisfy the particularity clause of the Fourth Amendment. The State timely sought review of this order in the Court of Criminal Appeals pursuant to Rule 15.7(a), Ala. R. Crim. P., maintaining that the trial court had erred in its ruling against the State on this issue. The State, by its citation to this Court of the Montana and South Carolina Supreme Court cases quoted in the text, is simply giving this Court the benefit of an additional 'precise reason' and authority as to why, as a matter of law, the trial court wrongly decided this issue.

26 So. 3d at 473 n.7.

Here, although the issue raised by the State in its brief on appeal was not first presented to the circuit court, the State is not raising a "new question of law"; instead, the State is raising an "additional 'precise reason' and authority as to why, as a matter of law, the trial court wrongly decided this issue." Ex parte Jenkins, 26 So. 3d at 473 n.7.

The State's

> "failure to address the legal question from the right perspective does not render [this Court] powerless to work the problem out properly. A court of appeals may and often should do so unbidden rather than apply an incorrect rule of law to the parties circumstances."

Id. (internal quotations and citations omitted). The position taken in Jenkins, Pollard, and this case is especially prudent when this Court applies a de novo standard of review to a circuit court's grant of a motion to suppress. Ignoring the additional precise reason provided by the State for reversing the circuit court's order granting Knox's motion to suppress would require this Court to "overlook" an undisputed fact--that Knox consented to prolonging the "detention"--and would further require this Court to "overlook" the circuit court's incorrect application of the law to the undisputed facts in this case.

WINDOM, Presiding Judge, dissenting.

For the reasons stated in my special writing in State v. Pollard, [Ms. CR-10-1560, Aug. 30, 2013] ___ So. 3d ___, ___ (Ala. Crim. App. 2013), I respectfully dissent.