

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOSEPHINE LINKER HART, JUDGE

DIVISION I

CACR07-1158

PATRICIA AVERY

June 4, 2008

APPELLANT

V.

APPEAL FROM THE CRAWFORD
COUNTY CIRCUIT COURT
[NO. CR2005-55]

STATE OF ARKANSAS

HON. MICHAEL MEDLOCK,
JUDGE

APPELLEE

AFFIRMED

Patricia Avery was convicted in a Crawford County jury trial of possession of more than 100 pounds of marijuana with intent to deliver and possession of drug paraphernalia, and she was sentenced to imprisonment in the Arkansas Department of Correction for consecutive terms of thirty years and eight years, respectively. On appeal, Avery argues that the trial court erred by 1) failing to suppress evidence seized after a traffic stop where there was an illegal detention and arrest; and 2) not allowing her to introduce mitigation evidence during the sentencing phase of the trial. We affirm.

We first consider Avery's suppression argument. Most of the facts are uncontested; the stop and detention was captured on video tape. On the night of January 30, 2005, Avery was driving east on I-40 in a pick-up truck with a camper top. At approximately the two-

mile point, she was stopped by Trooper Oleg Craig. Avery does not dispute that she was driving 75 miles per hour in a 70 mile-per-hour zone. Upon the trooper's request, Avery presented an expired driver's license and could not find her registration or proof of insurance. Avery stated that she was en route to her home in Virginia Beach, Virginia. She claimed that she was helping her daughter and child to move back to Virginia and that the truck she was driving was loaded with her daughter's belongings. She denied having any illegal drugs or weapons in her vehicle. Avery admitted that she had been arrested previously for altering a prescription. She gave her verbal consent for Trooper Craig to search her truck after he made it clear that she had the right to refuse.

In the cab of the truck, Trooper Craig observed a receipt from a business in California that was dated six days earlier. He then went around to the back of the truck and used Avery's keys to unlock the camper top. In addition to a small piece of luggage inside the covered and locked back compartment of the pick-up truck were several large, sealed boxes. Trooper Craig gave a cursory look at the items in the truck bed, then called Corporal Mike Bowman of the Van Buren Police Department and asked him to bring his drug dog to the scene. When he was making his request to Corporal Bowman, he opined that there was a "bunch of dope" in the back of the truck. He told Corporal Bowman that he based his conclusion on his having found a California business receipt dated January 26, 2005, which he believed was not consistent with Avery's story that she was coming from Oklahoma City. He also noted that Avery had turned around and looked at the vehicle when he asked her

if she was carrying any illegal drugs. Trooper Craig stated that he intended to wait for the drug dog, and he would use the time to go over the consent form.

Before going over the consent form, Trooper Craig engaged Avery in conversation, at one point asking about whether she was a horse enthusiast. While going over the consent-to-search form, Trooper Craig emphasized to Avery that she had the right to refuse to let him search her vehicle. She then decided to withdraw her consent. By this time, more than sixteen minutes had elapsed since Trooper Craig stopped Avery's vehicle. At that point, Trooper Craig informed Avery that he intended to write a warning and citation. He also informed Avery that his "friend" was going to "run" a drug dog around Avery's truck. Less than a minute and a half later, the Van Buren drug dog Nero alerted on Avery's vehicle. While Trooper Craig fiddled, Nero roamed and ultimately burned Avery.

Avery argues that the trial court erred by failing to suppress the illegal narcotics in this case because Trooper Craig unreasonably detained her without reasonable suspicion in violation of Rule 3.1 of the Arkansas Rules of Criminal Procedure. While she does not contest the validity of the traffic stop, she asserts that the detention was unlawful because it exceeded the fifteen minutes specified by Rule 3.1, without a reasonable excuse. Avery contends that Trooper Craig lacked a reasonable articulable basis for the investigatory detention. She argues that Trooper Craig's reasons—she appeared nervous, he observed a receipt from a California business, which was dated six days earlier, and she looked at her vehicle when she denied having contraband in the vehicle—were not sufficient. Under the supreme court's holding in *Sims v. State*, 356 Ark. 507, 157 S.W.3d 530 (2004), and *Lilley*

v. State, 362 Ark. 436, 208 S.W.3d 785 (2005), she contends that because Trooper Craig lacked “reasonably articulable suspicion for believing that criminal activity is afoot,” continuing the detention past the time required to write the warning was unreasonable. Avery asserts that it was not necessary for Trooper Craig to wait for the drug dog, and the delay extended the stop beyond the time allowed under Rule 3.1. Finally, she acknowledges that the U.S. Supreme Court, in *Illinois v. Caballes*, 543 U.S. 405 (2005), stated that use of a drug dog in a lawful traffic stop did not violate the Fourth Amendment, but emphasized that it further required that use of the dog did not permit extending the stop “beyond the time necessary to complete the criminal history check and issue the warning ticket.” Here, she argues, Trooper Craig “intentionally delayed” his activities to allow the canine unit to arrive. We find this argument unpersuasive.

In reviewing the denial of a motion to suppress evidence, we conduct a de novo review based on the totality of the circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court. *Simmons v. State*, 83 Ark. App. 87, 118 S.W.3d 136 (2003). In our review, we defer to the superior position of the trial judge to pass upon the credibility of witnesses. *Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003).

Rule 3.1 permits a detention without arrest under certain circumstances:

A law enforcement officer lawfully present in any place may, in the performance of his duties, stop and detain any person who he reasonably suspects is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of

appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct. An officer acting under this rule may require the person to remain in or near such place in the officer's presence for a period of not more than fifteen (15) minutes or for such time as is reasonable under the circumstances. At the end of such period the person detained shall be released without further restraint, or arrested and charged with an offense.

We note that there is some merit to Avery's argument. We agree that prior to the drug dog alerting on her vehicle, Trooper Craig did not have reasonable suspicion to continue the detention. "Reasonable suspicion" is defined as "a suspicion based on facts or circumstances which of themselves do not give rise to the probable cause requisite to justify a lawful arrest, but which give rise to more than a bare suspicion; that is, a suspicion that is reasonable as opposed to an imaginary or purely conjectural suspicion." *Dowty v. State*, 363 Ark. 1, 210 S.W.3d 850 (2005). Whether there is reasonable suspicion depends on whether, under the totality of the circumstances, the police have specific, particularized, and articulable reasons indicating the person may be involved in criminal activity. *Id.* The three reasons Trooper Craig was able to articulate, that she appeared nervous, that he observed a receipt from a California business dated six days earlier, and that she looked at her vehicle when she denied having contraband in it, were not sufficient, as they all could reasonably be interpreted as innocent behavior. *Lilley v. State, supra* (holding that "it is impossible for a combination of wholly innocent factors to combine into a suspicious conglomeration unless there are concrete reasons for such an interpretation"). However, the fact that Trooper Craig did not have reasonable suspicion prior to the time that the drug dog alerted on Avery's vehicle is not dispositive of this case.

Our holding rests on the fact that ten minutes into the stop, Avery gave Trooper Craig consent to search her vehicle. We know from the video that her consent was freely given. In fact, Trooper Craig did look into the rear compartment of Avery's vehicle. Rather than tearing into the large cartons that were found there, however, Trooper Craig requested a much less intrusive means of inspecting the cargo, when he requested Corporal Bowman to bring his drug dog. As our supreme court stated in *Yarbrough v. State*, 370 Ark. 31, ___ S.W.3d ___ (2007), the fifteen-minute time limit for detention specified in Rule 3.1 is qualified by the phrase "or for such time as is reasonable under the circumstances." The question then is whether the detention was reasonable. Given that Avery initially consented to the search, that she did not withdraw her consent until 85 seconds past the fifteen-minute limit, that the drug dog was already on the scene, and that the dog alerted only 90 seconds later, we cannot say that the delay was unreasonable. We note that Avery does not assert, nor can we conclude that after Avery withdrew her consent, Trooper Craig further delayed writing the warning ticket for driving on an expired driver's license.

As far as the presence of the drug dog outside Avery's vehicle while Trooper Craig was writing the warning ticket, our supreme court has held that a canine sniff of the exterior of a vehicle is not a Fourth Amendment search. See *Dowty, supra* (citing *Sims v. State, supra*). Where there is no "search" within the meaning of the Fourth Amendment, no reasonable suspicion is necessary to justify having a dog smell appellant's vehicle. *Id.* Where Avery had expressly consented to the search of her vehicle, we cannot say that the brief delay caused by the wait for the drug dog, which was clearly the least-intrusive invasion into Avery's

belongings available to Trooper Craig, was unreasonable under the circumstances. Accordingly, we hold that the trial court did not err in refusing to suppress the physical evidence in this case.

For her second point, Avery argues that the trial court erred when it did not allow her to introduce mitigation evidence during the sentencing phase of the trial. The items excluded were 1) hand-written notes and cards from Avery's grandchildren; 2) information pertaining to her history of taking medication for depression; 3) testimony from family members concerning Avery's remorse over accepting \$20,000 to pick up and deliver the drugs and that she could not reveal to the trooper that someone was following her the night she was stopped because of the fear she or her family member would be killed. Avery acknowledges that the evidence she sought to admit was hearsay but cites *Adkins v. State*, 371 Ark. 159, ___ S.W.3d ___ (2007), for the proposition that it was proper to allow hearsay evidence in the sentencing phase where it was not offered for the truth of the matter asserted, but rather to demonstrate that she had a "close family relationship with her grandchildren and the consequence in their lives of incarcerating their grandmother for any length of time." Likewise, she asserts that evidence of her feelings of guilt and fear for her life and the life of her family members should not have been excluded as hearsay. She further argues that the trial court's conclusion that the evidence was not relevant because neither the courts nor the legislature have provided a definitive definition of "mitigating evidence." Finally, she asserts that the evidence of her taking medication should not have been excluded as irrelevant given the length of the sentence that she faced.

We review a trial court's decision to admit or exclude evidence in the penalty phase of a trial for an abuse of discretion. *Id.* The Arkansas Rules of Evidence governs the admission of evidence during this phase of the trial. *Id.*

We note first that the handwritten cards and notes were clearly hearsay, and without the messages contained on them being offered for the truth of the matter asserted, i.e., the grandchildren's affection for Avery, they could not prove the fact for which they were offered. We hold that the trial court did not err in excluding these materials as hearsay. *Perry v. State*, 371 Ark. 170, ___ S.W.3d ___ (2007). Likewise, we hold that the testimony concerning what Avery contends are feelings of guilt and fear for her life and the lives of family members is also hearsay. We note further that the trial court found not only that it was hearsay, but also not relevant. Avery did not challenge the latter ruling at the trial, and indeed, the argument on this point is markedly different from the argument that she made to the trial court. Accordingly, we hold that this argument is not preserved for appeal.¹ We do not consider arguments raised for the first time on appeal, and a party is bound on appeal by the nature and scope of the objections and arguments presented at trial. *Thomas v. State*, 92 Ark. App. 425, 214 S.W.3d 863 (2005).

Finally, concerning the evidence of her taking medication, we note that it was only objected to after the testimony was presented, and the State did not move to strike. Nothing further was proffered. In order to challenge a ruling excluding evidence, an appellant must

¹ We do not mean to suggest that, during the penalty phase of a trial, evidence of remorse would not be "relevant," particularly in light of the fact that lack of remorse is routinely acknowledged to be an aggravating factor.

proffer the excluded evidence so that we can review the decision, unless the substance of the evidence is apparent from the context. *Arnett v. State*, 353 Ark. 165, 122 S.W.3d 484 (2003). The substance of whatever else Avery was attempting to introduce on this subject is not apparent here. Accordingly, the failure to proffer specific evidence renders a relevancy determination impossible, *Turner v. State*, 355 Ark. 541, 141 S.W.3d 352 (2004), and without a proffer we cannot ascertain whether appellant was prejudiced by the trial court's ruling. *Rollins v. State*, 362 Ark. 279, 208 S.W.3d 215 (2005).

Affirmed.

MARSHALL, J., agrees;

GLADWIN, J., concurs.